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FOREWORD

The Constitutional Court of Bosnia and Herzegovina continues with its activity, initiated in 2006, of occasionally publishing a number of its decisions in a special edition of the Bulletin in the English language. This is the fifth issue of that special edition of the Bulletin. As a rule, every Bulletin published so far presents a selection of decisions taken in the previous three years. The same applies to this Bulletin.

The selected decisions the Constitutional Court took in the previous year are published in the national languages every year. The contents of the Bulletin in the national languages and English language are available on our website (www.ustavnisud.ba).

The constitutional law system of Bosnia and Herzegovina is very specific and quite complicated. The Court's jurisdiction is adapted to that system. For better understanding of our decisions, it would be useful to refer briefly to the provisions of the Constitution of Bosnia and Herzegovina that stipulate the structure and jurisdiction of the Constitutional Court.

Chapter VI of the Constitution is completely reserved for the Constitutional Court. The Constitutional Court is composed of nine judges. Out of that number, six are national judges. The House of Representatives of the Federation selects four of them and the Assembly of the Republika Srpska selects two. However, the Court has also an international character as it has also three international judges selected by the President of the European Court of Human Rights in Strasbourg after consultation with the Presidency of BiH. Indeed, the Constitution stipulates that for appointments made more than five years, after the initial appointment of judges under the Dayton Constitution, a law will be adopted to regulate a different method of selection of international judges. However, this has not been done so far.

As to the jurisdiction of the Constitutional Court, Article VI (3) of the Constitution provides for a general and most comprehensive provision stipulating that the Constitutional Court shall "uphold this Constitution". The jurisdiction of the Constitutional Court is further specified in the provisions of Article VI (3)(a), (b) and (c) and Article IV (3)(f) enabling unblocking of parliamentary procedure and protection of the "vital interest" of any of the constituent peoples in Bosnia and Herzegovina (Bosniac, Croat and Serb). Under Amendment I to the Constitution of Bosnia and Herzegovina, the only one so far, which was adopted in March 2009, a new Article VI(4) was added to the Constitution enabling the Brčko District to become a constitutional category. That Amendment stipulates that the Constitutional Court has jurisdiction to decide in any dispute relating

to protection of the determined status and powers of the Brčko District of Bosnia and Herzegovina that may arise between an Entity or more Entities and the Brčko District of Bosnia and Herzegovina. In addition, it stipulates any dispute that may arise also between Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina, under this Constitution and the awards of the Arbitral Tribunal. Any such dispute may also be referred by a majority of the councillors of the Assembly of the Brčko District of Bosnia and Herzegovina, including at least one-fifth of the elected councillors from among each of the constituent peoples.

Thus, the competencies of the Constitutional Court are as follows: (Article VI (3)):

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 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[1] 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 onefourth of either chamber of a legislature of an Entity[2].

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

1 Note: Although the review of constitutionality of laws or provisions of laws enacted by the Parliamentary Assembly of Bosnia and Herzegovina is not stipulated explicitly as a competence of the Constitutional Court of Bosnia and Herzegovina, that "gap in the Constitution" was removed by the Constitutional Court's case law. In particular, the Constitutional Court, through its judicial activism, declared itself competent to deal with such cases. It gave reasons that "substantial notion of the competencies determined in the Constitution of Bosnia and Herzegovina itself contains titulus of the Constitutional Court to exercise that competence, notably the Constitutional Court's role as an authority upholding the Constitution of Bosnia and Herzegovina.

2 The Constitutional Court, thus, has no jurisdiction to act *ex officio*.

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

It should be noted that, due to a reduced number of persons authorized to initiate a review of constitutionality of laws, or to refer constitutional disputes (which is mainly reserved for politics), over 99% of the cases that the Constitutional Court of Bosnia and Herzegovina receives per year, fall under the scope of the appellate jurisdiction (constitutional claim of citizens and legal persons). A very small number of received cases fall under the abstract jurisdiction.

The European Convention for the Protection of Human Rights and Fundamental Freedoms is incorporated in the Constitution of Bosnia and Herzegovina and has priority and supremacy over all other law. The Constitutional Court consistently applies the case law and standards of the European Court of Human Rights in its decisions.

As there is no supreme court at the level of Bosnia and Herzegovina, which would harmonize the case law, the only judicial institution the citizens may address, is the Constitutional Court. This is the reason why the Constitutional Court receives, compared to the number of population, a large number of constitutional claims (appeals). This is an average number ranging from 5500 to 6000 appeals per year.

There are 33 decisions presented in this Bulletin, with 19 falling under the abstract jurisdiction and 14 falling under the appellate jurisdiction. The decisions are presented in chronological order and in order of legal issues raised in them.

We hope that this Bulletin will provide the broad professional public, primarily in Europe, with valuable insights in a very complex constitutional system and social reality in Bosnia and Herzegovina, and the role of the Constitutional Court.

Finally, I would like to extend my deepest gratitude to the Government of the United Kingdom – The AIRE Centre – and their Western Balkan Programme Director, Ms. Biljana Braithwaite, for financially supporting regular publication of this Bulletin.

Sarajevo, May 2022

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

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FOREWORD FROM THE AIRE CENTRE

Dear readers,

This Bulletin is the result of a successful continued cooperation between the AIRE Centre and the Constitutional Court of Bosnia and Herzegovina. It is a way to additionally strengthen and continue the cooperation. In addition, it represents a part of broader activities that the AIRE Centre has implemented in Bosnia and Herzegovina. They are, among other things, focused on strengthening the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, harmonising the case law and strengthening the judicial capacities. The result of these activities is a series of different regular and periodical publications and reports, the development of the database of decisions of the highest courts under the auspices of the High Judicial and Prosecutorial Council, the organisation of the forum of the highest courts in Bosnia and Herzegovina and many others. The Constitutional Court of Bosnia and Herzegovina has been with us all this time, as one of the project partners. Therefore, it is our great pleasure to be in a position to provide support to the Constitutional Court by printing this publication too.

The case law is one of the sources of law that plays a very important role in the decision-making. It is, therefore, very important to present it to the public. The Constitutional Court of Bosnia and Herzegovina achieves the transparency of work at the national level by issuing the Bulletin in local languages once a year. This publication, which contains the most significant decisions translated into the English language, will contribute to the transparency of the work of the Constitutional Court at the international level as well. There is also a growing demand for studying and learning the case law of the Constitutional Court of Bosnia and Herzegovina outside the borders of Bosnia and Herzegovina and we are pleased that the AIRE Centre can contribute towards meeting that demand.

Biljana Braithwaite
Project Director of Western Balkans Programme
AIRE Centre

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić, and

Mr. Giovanni Grasso

Having deliberated on the request filed by **nineteen representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina**, in the case no. **U-5/18**, at its session held on 15 February 2018 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by nineteen representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina for review of the constitutionality of the Law on Amendments to the Law on Excise Duties in Bosnia and Herzegovina (*Official Gazette of BiH*, 91/17), the Law on Amendments to the Law on Payments into the Single Account and Distribution of Revenues (*Official Gazette of BiH*, 91/17) and the Law on Amendments to the Law on Indirect Taxation System in Bosnia and Herzegovina (*Official Gazette of BiH*, 91/17) is hereby dismissed.

It is hereby established that the Law on Amendments to the Law on Excise Duties in Bosnia and Herzegovina (*Official Gazette of BiH*, 91/17), the Law on Amendments to the Law on Payments into the Single Account and Distribution of Revenues (*Official Gazette of BiH*, 91/17) and the Law on Amendments to the Law on Indirect Taxation System in Bosnia and Herzegovina (*Official Gazette of BiH*, 91/17) are in conformity with Articles I(2), IV and V(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 17 January 2018, nineteen representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina ("the applicant") filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of constitutionality of the Law on Amendments to the Law on Excise Duties in Bosnia and Herzegovina (*Official Gazette of BiH*, 91/17), the Law on Amendments to the Law on Payments into the Single Account and Distribution of Revenues (*Official Gazette of BiH*, 91/17) and the Law on Amendments to the Law on Indirect Taxation System in Bosnia and Herzegovina (*Official Gazette of BiH*, 91/17) ("the challenged laws").

2. The applicant requested the adoption of an interim emasure repealing the challenged laws pending the final decision by the Constitutional Court.

II. Procedure before the Constitutional Court

3. Pursuant to Article 23 of the Rules of the Constitutional Court, the Parliamentary Assembly of Bosnia and Herzegovina, the House of Representatives and the House of Peoples respectively were requested on 24 January 2018 to submit their respective replies to the request.

4. The House of Representatives submitted its reply on 6 February 2018. The House of Peoples failed to submit its reply.

III. Request

a) Allegations stated in the request

5. The applicant claimed that the challenged laws are in contravention of Articles I(2), IV and V(4) of the Constitution of Bosnia and Herzegovina ("the Constitution of BiH").

6. The applicant indicated that at the session held on 7 December 2017, the House of Peoples adopted the Bills of the challenged laws in a summary procedure in the course of the first reading and then, by applying Article 103(4) of the Rules of Procedure of the House of Peoples, in the course of the second reading. The applicant claimed that Article

103(4) of the Rules of Procedure of the House of Peoples may be applied only in case of a law of lesser scope or degree of complexity, and the aforementioned does not apply to the Bills of the challenged laws.

7. Furthermore, the applicant indicated that after adopting the bills of the challenged laws in the second reading, the House of Peoples deliberated on and adopted, by referring to Article 153 and Article 175(1), (2) and (3) of the Rules of Procedure of the House of Peoples, the proposal for the conclusion by delegate Halid Genjac, which reads as follows: "After the Bill on Amendments to the Law on Excise Duties in Bosnia and Herzegovina no. 01-02-02-1-2808/17 of 5 December 2017 was adopted at the session of the House of Peoples of the Parliamentary Assembly of BiH, the House of Peoples of the Parliamentary Assembly of BiH put forward to the House of Representatives of the Parliamentary Assembly of BiH the mentioned Bill on Amendments to the Law on Excise Duties in Bosnia and Herzegovina, the Bill on Amendments to the Law on Payments into the Single Account and Distribution of Revenues and the Bill on Amendments to the Law on Indirect Taxation System in Bosnia and Herzegovina, as Bills of the House of Peoples with a request to deliberate on them in the course of an urgent legislative procedure, in accordance with Article 133 of the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of BiH".

8. The applicant indicated that Article 94(1) of the Rules of Procedure of the House of Peoples and Article 104 of the Rules of Procedure of the House of Representatives prescribe who may be proponents of a bill, that the Council of Ministers of BiH is a formal proponent of the bills of the challenged laws, and that not a single provision of the Rules of Procedure of both Houses provides for a possibility for some of the authorized proponents of laws to take over someone else's bill and to carry on with a legislative procedure as a new proponent of a law, as the House of Peoples did. By referring to Article IV(3)(b) of the Constitution of BiH, the applicant indicated that the adoption of the rules of procedure of both houses and their application have the greatest legal force, which they draw from the Constitution of BiH, which is binding on the representatives and the delegates of the Parliamentary Assembly of BiH to act in a uniform fashion, and that any interpretation of the provisions of rules of procedure without a valid *iustus titulus* constitutes a deliberate violation of the Constitution of BiH. The applicant deemed that Article 175(1), (2) and (3) of the Rules of Procedure of the House of Peoples was violated and that it could not have been applied given that it is indisputable that the Council of Ministers of BiH is a proponent of the bills of the challenged laws and that, accordingly, a legislative procedure, which is precise and clear, should have been conducted. In the opinion of the applicant, the cited provisions were applied in order to give a specious legitimacy to unlawful decisions and numerous violations of the provisions of rules of procedure relating to the conduct of a legislative procedure. The violation of Article 133 of the Rules of Procedure of the House of Representatives, in the opinion of the applicant, is reflected in the fact that only the law proponent may request

that a bill be considered in the course of an urgent procedure, which the Council of Ministers of BiH, as a formal proponent of the challenged laws, has not done. Due to the aforementioned, the applicant deemed that the House of Peoples violated Article 1 of the Rules of Procedure of the House of Peoples, which prescribes that the House of Peoples organizes itself and operates in accordance with the Constitution of BiH, law and these Rules of Procedure, including all the provisions of the Rules of Procedure regulating a legislative procedure.

9. Furthermore, the applicant indicated that the notification of the House of Peoples no. 02-50-6-16-34/17 of 8 December 2017 addressed to the House of Representatives reads that the House of Peoples adopted the bills of the challenged laws, which proponent was the Council of Ministers of BiH, and proposed that the bills of the challenged laws be considered in an urgent legislative procedure. The conclusions adopted by the House of Peoples were submitted, too. The applicant enumerated the specific documents that were submitted, wherefrom it clearly follows, as stated, that the complete correspondence related to the bills of the challenged laws was maintained with the Council of Ministers of BiH as the formal proponent thereof.

10. The applicant stated that on 13 December 2017, the chairwoman of the SDS Caucus Ms. Aleksandra Pandurević, the chairman of the DF Caucus Mr. Damir Bećirović, the chairman of the SDP Caucus Mr. Mirsad Mešić and the chairman of the "Independent Block" Caucus Mr. Salko Sokolović addressed a letter to the Collegium of the House of Representatives, no. 01-01-2879/17, informing the Collegium of the violations of the Constitution of BiH, the Rules of Procedure of both Houses and other laws and delegated legislation, in relation to the conduct on the part of the House of Peoples when it came to the bills of the challenged laws, i.e. that their inclusion in the agenda would mean the violation of the applicable regulations. On 13 December 2017, the Collegium in extended composition included the bills of the challenged laws in the agenda of 54th session of the House of Representatives, with the request by the House of Peoples to consider them in an urgent legislative procedure. During the break at the 54th session of the House of Representatives, the Finance and Budget Committee of the House of Representatives resumed the interrupted 57th session of the Committee and gave a negative opinion on the bills of the challenged laws, and submitted the opinion to the House of Representatives. However, although it had the obligation to do so, the House of Representatives failed to include them in the agenda of the 54th session while while arguing that it was about different laws. The applicant indicated that this amounted to the violation of Article 113 of the Rules of Procedure of the House of Representatives, for when one compares the registration numbers of laws considered at the session of the House of Representatives with the numbers from the headings of the submitted opinions of the Finance and Budget Committee, it clearly follows that they are the same laws. The applicant recalled that the bills of the challenged laws submitted by the House of Peoples

to the House of Representatives carry the same protocol numbers of the Registry Office of the Parliamentary Assembly of BiH assigned to the bills of the Council of Ministers of BiH submitted on 5 December 2017 to the Parliamentary Assembly of BiH. The House of Representatives adopted the challenged laws at the 54th session held on 14 and 15 December 2017.

11. The applicant further alleged that before the Speakers of both Houses signed the challenged laws, the Department for the Drafting and Publication of Legal Documents of the House of Peoples had observed essential errors in the adopted challenged laws, i.e. in their language versions, of which it notified the Secretaries of both Houses. The applicant enumerated concrete errors, which are, as they stated, essential errors, which make the challenged laws voidable and unenforceable. However, notwithstanding this, the challenged laws were signed and published in the *Official Gazette of BiH*, and they will enter into force upon the expiry of the time limit of eight days from the day of the publication.

12. The applicant deemed that the described and illegal conduct violated Article I(2) of the Constitution of BiH, which prescribes that Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections, and Article IV of the Constitution of BiH, which establishes the Parliamentary Assembly of BiH – as the legitimacy and legality of its work, that is to say the overall legislative function, was seriously violated, as well as Article V(4) of the Constitution (Council of Ministers), as the House of Peoples took over the prerogatives of the executive authority, which is inadmissible. By taking over the Bills of the challenged laws from their proponent - the Council of Ministers of BiH, in the opinion of the applicant, the House of Peoples violated the equality of the Houses in the exercise of their legislative function, that is to say one of the Houses appropriated for itself the function reserved for the executive authority of BiH, which violated the tripartite separation and independence of the authority in Bosnia and Herzegovina.

13. The applicant requested an interim measure, whereby the challenged laws pending the final decision by the Constitutional Court would be rendered ineffective, noting that it was required in order to prevent detrimental consequences, i.e. to stop illegal taxation and collection of funds from the citizens of BiH.

b) Reply to the request

14. In its reply, the House of Representatives – the Constitutional Commission stated that at its session held on 5 February 2018, with four votes „in favour“, one vote “against” and one “abstained”, it adopted the conclusion according to which the Constitutional Commission supports the request of the group of delegates/representatives of the House of Representatives for review of constitutionality of the challenged laws in full.

IV. Relevant Law

15. The **Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina** (*Official Gazette of BiH*, 58/14, 88/15, 96/15 and 53/16) reads in its relevant part as follows:

Article 1
(Organization and operation of the House)

The House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ("the House") shall be organized and shall work in accordance with the Constitution of Bosnia and Herzegovina ("the Constitution of BiH"), the law, and these Rules of Procedure.

Article 18
(Responsibilities of the Collegium of the House)

The Collegium of the House shall be responsible for:

(...)

j) deciding on interpretation of these Rules of Procedure, until this issue is regulated by the House;

(...)

l) any other issue which might affect the work of the House and carrying out any other duty assigned by the House and these Rules of Procedure.

Article 23
(Duties of the Speaker of the House)

(1) The Speaker of the House shall:

(...)

h) ensure consistent application of these Rules of Procedures;

(...)

Article 94
(Authorized proponent)

(1) A bill may be presented by a representative, a House Committee, a joint committee, the House of Representatives, as well as the Presidency of BiH and the Council of Ministers of BiH, within their respective responsibilities.

(...)

Article 95
(Content of a bill)

(1) A bill shall be submitted in the form of a text, in accordance with the Uniform Rules for Drafting Legal Regulations in the Institutions of BiH. The proponent shall present the bill simultaneously in a hard copy and electronically, in the languages in

the official use in Bosnia and Herzegovina. Exceptionally, when a representative is the proponent, he or she may submit a bill in a hard copy and electronically in one of the languages and scripts in the official use in Bosnia and Herzegovina.

(...)

Article 103
(General debate, principles, necessity of enactment and compliance with the Constitution of BiH)

(1) The general debate in the House shall begin with the first reading which concerns the principles on which the proposed law is based and the necessity to enact the proposed law, in the opinion of the Constitutional and Legal Committee and the responsible committee in the first phase.

(2) The debate in the first reading shall end with the adoption or rejection of the proposed law in the first reading.

(3) The deadlines for submission of amendments begin on the day of the passage of the proposed law into law.

(4) If the House estimates that the proposed law is of minor extent or complexity, the House may decide that it should consider the proposed law also in the second reading, without the prior consideration of the proposed law within the responsible committee - the second phase.

(5) The House may adopt a conclusion by which it has concluded that the competent committee should conduct a public debate over the proposed law within 30 days.

Article 118
(Enactment of a law)

A bill shall be considered as passed once it has been adopted by both Houses of the Parliamentary Assembly of BiH in an identical text.

Article 121
(Adoption of an identical text)

If the House has adopted a bill or other act in the text which is identical to the text adopted by the House of Representatives, the bill or other act shall be considered as enacted. The Speaker shall undertake the actions necessary for the publication thereof.

Article 122
(Original text of laws and other acts)

(1) The Secretary of the House shall be responsible, in cooperation with the Secretary of the House of Representatives, for the drafting of an original text of laws and other acts passed by both Houses, affixing a stamp and shall take care of other actions, in accordance with the law.

(...)

Article 134
(Corrigenda)

(1) The proposal to correct typing errors in the published text of a law or another piece of legislation, or general act passed by the House shall be made to the House by a body responsible for the implementation of the law or the general act.

(2) The corrections of typing errors, after comparing texts with the original, shall be edited by the secretaries of both Houses of the Parliamentary Assembly of BiH.

Article 153
(Other documents)

(1) The House may pass declarations, decisions, recommendations, conclusions and other documents.

(2) The documents referred to in paragraph (1) of this Article are defined as follows:

a) The declaration shall be understood to mean a document which contains a principled opinion on some important issues considered by the House;

b) The decision shall be understood to mean the document which regulates the issue from within the scope of responsibility of PABiH;

c) The recommendation shall be understood to mean the document which indicates the importance of some issues pertaining to the implementation of laws;

d) The conclusion shall be understood to mean the document which shall be passed on the issues in individual matters regarding the procedure.

3) The vote on the documents referred to in paragraph (1) of this Article shall be taken in accordance with the established manner of decision-making in the House, unless otherwise defined in the Constitution of BiH, these Rules of Procedure or the law.

Article 175
(Regulating issues by conclusions)

(1) The House may regulate by its Conclusion a certain issue which has not been regulated at all or has not been regulated in precise terms by these Rules of Procedure.

(2) The Conclusion shall be binding only in terms of a specific issue referred to in paragraph (1) of this Article.

(3) A conclusion shall be binding, until the issue is regulated differently by the Rules of Procedure. Conclusions shall be applied from the day of adoption, unless provided otherwise.

16. The **Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina** (*Official Gazette of BiH*, 79/14, 81/15 and 97/15) reads in its relevant part as follows:

Article 1
(Organization and operation of the House)

The House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina ("the House") shall be organized and shall work in accordance with the Constitution of Bosnia and Herzegovina ("the Constitution of BiH"), the law, and these Rules of Procedure.

Article 20
(Responsibilities of the Collegium of the House)

The Collegium of the House shall be responsible for:

(...)

j) deciding on interpretation of these Rules of Procedure, until this issue is regulated by the House;

(...)

Article 22
(Extended Collegium of the House)

(...)

(2) The Extended Collegium of the House shall:

(...)

e) Consider any other issues that could affect the functioning of the House.

(...)

Article 27
(Duties of the Speaker of the House)

(1) The Speaker of the House shall:

(...)

h) ensure consistent application of these Rules of Procedures;

(...)

Article 104
(Authorized proponent)

(1) A bill may be presented by a representative, a House Committee, a joint committee, the House of Peoples, as well as the Presidency of BiH and the Council of Ministers of BiH, within their respective responsibilities.

Article 105
(Content of a bill)

(1) A bill shall be submitted in the form of a text, in accordance with the Uniform Rules for Drafting Legal Regulations in the Institutions of Bosnia and Herzegovina.

The proponent shall present the bill simultaneously in a hard copy and electronically, in the languages in the official use in BiH. Exceptionally, when a representative is the proponent, he or she may submit a bill in a hard copy and electronically in one of the languages and scripts in the official use in BiH.

Article 127
(Enactment of a law)

A bill shall be considered as passed once it has been adopted by both Houses of the Parliamentary Assembly of BiH in an identical text.

Article 130
(Adoption of an identical text)

If the House has adopted a bill or other act in the text which is identical to the text adopted by the House of Peoples, the bill or other act shall be considered as enacted. The Speaker shall undertake the actions necessary for the publication thereof.

Article 131
(Original text of laws and other acts)

(1) The Secretary of the House shall be responsible, in cooperation with the Secretary of the House of Peoples, for the drafting of an original text of laws and other acts passed by both Houses, affixing a stamp and shall take care of other actions, in accordance with the law.

(2) The Secretary of the House shall be responsible for the drafting of an original text of the acts adopted by the House, affixing a stamp and shall take care of other actions in accordance with the law.

Article 133
(Emergency procedure)

1) When presenting the proposed law of high urgency or the bill written in such a simple way that it may be adopted or rejected as a whole, the proponent may request in writing that the House consider the bill in one reading debate.

2) The motion referred to in paragraph (1) of this Article shall be considered at the next session of the House. The House shall make a decision on the motion following the debate.

3) Once the debate has taken place on the motion, the motion shall be put to vote. If adopted, the House shall proceed with the debate and shall vote on the proposed law. 4 The amendments to the proposed law may be submitted in written by completion of the debate on the proposed law only if they pertain to correction of obvious normative and technical and printing errors in the text of the proposed law.

4) If the House does not adopt the proponent's motion to consider the proposed law in an emergency procedure, the House shall decide on whether the proposed law shall be debated pursuant to provisions regulating the summary or regular procedure.

Article 144
(Corrigenda)

(1) The proposal to correct typing errors in the published text of a law or another piece of legislation, or general act passed by the House, shall be made to the House by a body responsible for the implementation of the law or the general act.

(2) The corrections of typing errors, after comparing texts with the original, shall be edited by the secretaries of both Houses of the Parliamentary Assembly of BiH.

VI. Admissibility

17. 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 19 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 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.

18. The request for review of constitutionality was submitted by nineteen representatives in the House of Representatives of the Parliamentary Assembly of BiH, which means that the request was filed by an authorized person under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

VII. Merits

19. The applicant claims that the challenged laws are inconsistent with Articles I(2), IV and V(4) of the Constitution of BiH.

20. The Constitution of BiH reads as follows:

Article I, as relevant, 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 IV as relevant reads:

The Parliamentary Assembly shall have two chambers: the House of Peoples and the House of Representatives.

(...)

3. Procedures

a) Each chamber shall be convened in Sarajevo not more than 30 days after its selection or election.

b) Each chamber shall by majority vote adopt its internal rules (...)

c) All legislation shall require the approval of both chambers.

d) All decisions in both chambers shall be by majority of those present and voting. The Delegates and Members shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates or Members from the territory of each Entity. 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.

(...)

h) Decisions of the Parliamentary Assembly shall not take effect before publication. i) Both chambers shall publish a complete record of their deliberations and shall, save in exceptional circumstances in accordance with their rules, deliberate publicly.

(...)

4. Powers

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.

(...)

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

4. Council of Ministers

(...)

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).

(...)

21. On the basis of the applicants' allegations, it appears that they hold that the challenged laws were passed by way of violation of the legislative procedure stipulated under the Rules of Procedure of the House of Peoples and the House of Representatives. In view of Article IV(3)(b) of the Constitution of Bosnia and Herzegovina, the applicants consider that the adoption of the Houses' Rules of Procedure and their application have the highest legal force drawn from the Constitution of Bosnia and Herzegovina, which is binding on delegates and representatives of the Parliamentary Assembly of Bosnia and Herzegovina to act in an uniform fashion. Therefore, any subjective interpretation of provisions of the Rules of Procedure without a valid *iustus titulus* constitutes a deliberate violation of the Constitution of Bosnia and Herzegovina. Furthermore, they claim that by taking over three bills from their proponent - the Council of Ministers, the House of Peoples violated the equality of the Houses in the exercise of their legislative function, that is to say that one of the Houses appropriated for itself the function reserved for the executive authority of Bosnia and Herzegovina, and in this way the principle of tripartite separation and independence of authority in Bosnia and Herzegovina were violated. Finally, they claim that the challenged laws are inapplicable as in the final versions in three languages there are discrepancies and deviations, which are of essential nature.

22. First of all, the applicants claim that the principle referred to in Article I(2) of the Constitution of Bosnia and Herzegovina has been violated. The Constitutional Court recalls that cited Article regulates that Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections. In democratic states, which are based on the rule of law principle contained in the cited provision of the Constitution of Bosnia and Herzegovina, the law represents a mechanism by which the public authorities, in accordance with powers they have been invested with, regulate particular issues affecting and relating to the widest community both in the field of public and private life. In addition, consideration of issues regulated by legislation is entrusted to the democratically elected representatives, for whom the free expression of will and opinion in the law adoption procedure has been secured.

23. Therefore, the first issue the Constitutional Court should deal with is whether any kind of failure to comply with the legislative procedure, and in the particular case the procedure prescribed by the Rules of Procedure of both Houses in the Parliamentary Assembly of Bosnia and Herzegovina, may result, by default, in violation of principles set out in Article I(2) of the Constitution of Bosnia and Herzegovina as well, as claimed by the applicants? In response to this question, the Constitutional Court shall primarily avail itself of the provisions of Article IV of the Constitution of Bosnia and Herzegovina, given that the said Article contains (also) particular legislative procedures by the Parliamentary Assembly of Bosnia and Herzegovina.

24. Article IV of the Constitution of Bosnia and Herzegovina establishes the Parliamentary Assembly of Bosnia and Herzegovina which has two chambers: the House of Peoples and the House of Representatives. Further, paragraph 3 of this Article provides for the procedures under which, *inter alia*, each House shall by majority vote adopt its internal rules and select from its members its Chair and Deputy Chairs. All legislation shall require the approval of both chambers. All decisions in both chambers shall be made by majority of those present and voting, and the majority required for adoption of decisions is prescribed. The decisions of the Parliamentary Assembly shall not take effect before publication. Both chambers shall publish a complete record of their deliberations and shall, save in exceptional circumstances in accordance with their rules, deliberate publicly.

25. However, the Constitutional Court observes that the relevant request does not raise an issue of compliance with procedures in terms of Article IV(3) of the Constitution of Bosnia and Herzegovina which would, if such violation of that Article would be established, undeniably, bring to doubt (as well) the compliance with the rule of law principle under Article I(2) of the Constitution of Bosnia and Herzegovina. Namely, based on the allegations of the applicants, it follows that the challenged laws were approved by both Houses of the Parliamentary Assembly of Bosnia and Herzegovina; that they were adopted by the majority of those present and voting, respecting the necessary majority for the adoption thereof; that they did not take effect before publication in the Official Gazette; that the transcripts of deliberations were published and that the public aspect of their sessions was secured.

26. As stated above, it follows from the allegations of the applicants that the challenged laws are in contradiction with the Constitution of Bosnia and Herzegovina as the legislative procedure stipulated by the Rules of Procedure of both Houses has been violated. The applicants primarily indicate that the House of Peoples adopted the challenged laws in the course of a summary procedure, which, in their opinion, could not have been applied as those are the laws of lesser scope and degree of complexity, and that the House of Peoples took over the role of the proponent of the challenged laws instead of the Council of Ministers and put forward an unauthorized request before the

House of Representatives to decide on the challenged laws in the course of an expedited procedure. In addition, the applicants point out that the House of Representatives granted the request and failed to amend the Agenda by including negative opinions of the Finance and Budget Committee, as it was concluded, without any grounds, that it was about different laws.

27. However, the Constitutional Court notes that the identical objections (as regards the violation of procedures set out in the Rules of Procedure) were presented in the legislative procedure, firstly before the Collegium of the House of Representatives, then before the Extended Collegium of the House of Representatives, and subsequently in the discussion conducted in the House of Peoples prior to the adoption of the challenged laws, but those objections have not been granted. In that connection, the Constitutional Court observes that both Rules of Procedure contain the provisions prescribing that the Collegiums of the Houses shall, *inter alia*, be responsible for interpretation of the Rules of Procedure (Article 18 of the Rules of Procedure of the House of Peoples, Article 20 of the Rules of Procedure of the House of Representatives), that the Collegium of the House of Peoples shall be responsible for any other issue that might affect the work of the House of Peoples (Article 18 of the Rules of Procedure of the House of Peoples), that the Extended Collegium of the House of Representatives shall consider any other issues that could affect the functioning of the House of Representatives (Article 22 of the Rules of Procedure of the House of Representatives) and, finally, that the Speakers of the Houses shall ensure consistent application of the Rules of Procedure of the Houses (Article 23 of the Rules of Procedure of the House of Peoples, Article 27 of the Rules of Procedure of the House of Representatives).

28. As already stated, the particular request does not raise the issue of compliance with the procedure prescribed by Article IV(3) of the Constitution of Bosnia and Herzegovina. The remaining procedures necessary for the adoption of legislation as well as the review of regularity of that procedure is stipulated by the Rules of Procedure of the Houses of the Parliamentary Assembly of Bosnia and Herzegovina. The issue of regularity of the Rules of Procedure procedures in the particular case have already been considered by the competent bodies of the Parliamentary Assembly (the Collegium of the House of Representatives and the Extended Collegium of the House of Representatives), who are entrusted with interpretation of the Rules of Procedure. Those bodies concluded that the objections (presented also in the instant request) do not bring into question the regularity of the procedure prescribed by the Rules of Procedure and that delegates/representatives, in the course of consideration before the House of Representatives were given the possibility to express their opinion as regards the compliance with the procedures set out in the Rules. In view of the aforesaid, the Constitutional Court is of the opinion that, in the present case, it is not necessary to enter into more detailed consideration of the regularity of the procedures set out in the Rules that preceded the adoption of the challenged laws. Therefore, the Constitutional Court holds that, in the particular case,

the applicants' claim cannot be accepted as well-founded that the challenged laws, due to the alleged failure to comply with the procedures prescribed by the Rules of Procedure of both Houses, are in contravention with Articles I(2) and IV of the Constitution of Bosnia and Herzegovina.

29. Furthermore, the applicant claims that while referring to the provisions of Articles 175(1), (2) and (3) of the Rules of Procedure of the House of Peoples, and by adopting the conclusion whereby the bills of the challenged laws were put forward to the House of Representatives, as the Bills of the House of Peoples, with request to conduct a deliberation in the course of an urgent legislative procedure in accordance with Article 133 of the Rules of Procedure of the House of Representatives, the House of Peoples took over the role of the proponent of the challenged laws from the Council of Ministers and thus violated the principle of separation of powers, and that is also undertook the prerogatives of the executive authority and violated the equality of houses in exercising the legislative function.

30. In regards to these claims, the Constitutional Court first notes that Article VI(4)of the Constitution of BiH provides for powers of the Parliamentary Assembly, *inter alia*, to enact legislation as well as other issues necessary to carry out responsibilities of the Parliamentary Assembly. For that purpose, under the Rules of Procedures of both Houses, both House of Representatives and House of Peoples have the role of the proponent of a law, in addition to others, (Article 94 of the Rules of Procedure of the House of Peoples, Article 104 of the Rules of Procedure of the House of Representatives) and Council of Ministers. Therefore, the claim of the applicant that the principle of separation of powers is violated as, allegedly, the House of Peoples undertook the prerogatives of the executive power – the Council of Ministers, putting forward the challenged laws, which were previously adopted, as the bills of the House of Peoples, to the House of Representatives, cannot be accepted as well-founded. Indeed, it is undisputed that the House of Peoples may be proponent which is in the instant case, sufficient to the Constitutional Court to conclude that there was no violation of the principle of separation of powers, as well as that there was no violation of the appropriate provisions of the Constitution of BiH in regards to compliance with the principle of the separation of powers.

31. Finally, in regards to the claim of the appellant that the challenged laws contain substantial differences in three languages' versions that prevent them from being implemented and, therefore, inconsistent with the Constitution, the Constitutional Court observes that both rules of procedures contain separate provisions regulating that the Secretaries of both Houses are responsible for creation of the original text of the law (Article 131 of the Rules of Procedure of the House of Representatives, Article 122 of the House of Peoples), as well as the provision on the correction of the law (Article 144 of the Rules of Procedure of the House of Representatives, Article 134 of the Rules of Procedure of the House of Peoples). Considering that there are the mechanisms

through which, even after publication in the official gazettes, it is possible to remove inconsistencies in the different languages versions of the challenged laws, it cannot be accepted that the claim of the applicant is well-founded that in this manner Article I(2) and Article IV of the Constitution of BiH were violated.

32. The Constitutional Curt concludes that the challenged laws are in line with Articles I(2), IV and V(4) of the Constitution of BiH.

VIII. Conclusion

33. The Constitutional Court concludes that the Law on Amendments to the Law on Excise Tax in Bosnia and Herzegovina (*Official Gazette of BiH*, 91/17), Law on Amendments and Supplement to the Law on Payments into the Single Account and Distribution of Revenues (*Official Gazette of BiH*, 91/17) and Law on Amendments to the Law on Indirect Taxation System in Bosnia and Herzegovina (*Official Gazette of BiH*, 91/17) are in conformity with Article I(2), IV and V(4) of the Constitution of Bosnia and Herzegovina.

34. Pursuant to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

35. Considering the decision of the Constitutional Court in this case, it is not necessary to separately examine the proposal of the applicant for adoption of an interim measures.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

CONTENTS

Case No. U-15/18

DECISION ON ADMISSIBILITY AND MERITS

Request of Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, at the time of filing the request, for the review of constitutionality of the provision of Article 20(g) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 12/09, 16/09, 93/09 and 72/13), in the part reading as follows: "Expert associates as well as investigators working for the Prosecutor's Office of Bosnia and Herzegovina under the authorization of the Prosecutor shall also be considered as authorized official."

Decision of 29 November 2018

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) and Article 60 of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić, and

Mr. Giovanni Grasso

Having deliberated on the request filed by **Ms. Borjana Krišto**, Second Deputy Chair of the House of Representatives at the time of filing the request, in the case no. **U-15/18**, at its session held on 29 November 2018 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding the request filed by Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives, at the time of filing the request, for review of constitutionality of the provision of Article 20(g) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 12/09, 16/09, 93/09 and 72/13),

it is hereby established that the provision of Article 20(g) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 12/09, 16/09, 93/09 and 72/13), in the challenged part reading as follows: "Expert associates as well as investigators working for the Prosecutor's Office of Bosnia and Herzegovina under the authorization of the Prosecutor shall also be considered as authorized officials", is compatible with Article (I)(2) 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 26 July 2018, Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, at the time of filing the request ("the applicant"), filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for the review of constitutionality of the provision of Article 20(g) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 12/09, 16/09, 93/09 and 72/13; "the BiH Code"), in the part reading as follows: "Expert associates as well as investigators working for the Prosecutor's Office of Bosnia and Herzegovina under the authorization of the Prosecutor shall also be considered as authorized official."

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the Parliamentary Assembly of Bosnia and Herzegovina, the House of Representatives and the House of Peoples were requested on 3 August 2018 to submit their respective responses to the request.

3. The House of Representatives and the House of Peoples received the request on 6 August 2018. However, they failed to submit a response within the given time limit of 30 days.

III. Request

a) Allegations stated in the request

4. The applicant claims that the provision of Article 20(g) of the BiH Code is not compatible with Article I(2) of the Constitution of Bosnia and Herzegovina. The part of the provision that is not compatible reads: "Expert associates as well as investigators working for the Prosecutor's Office of Bosnia and Herzegovina under the authorization of the Prosecutor shall also be considered as authorized official."

5. The applicant alleges that Article 20(g) of the BiH Code prescribes that the authorized persons within the meaning of the BiH Code are the persons having an appropriate

authorization within the police authorities in Bosnia and Herzegovina, including the State Investigation and Protection Agency, the State Border Service, the Judicial Police, the Financial Police, as well as within the customs authorities, tax authorities and military police authorities in Bosnia and Herzegovina. The challenged second sentence extends the scope of authorized official persons by including expert associates and investigators of the Prosecutor's Office of BiH, who work under the authorization of the Prosecutor.

6. When referring to the relevant provisions of the BiH Code, which regulate the rights and duties of the authorized officials in the criminal proceedings, the applicant observes that their role is of decisive importance in taking actions aimed at identifying suspected persons and gathering statements, in taking actions aimed at gathering evidence and in taking investigative actions and other actions prescribed by the BiH Code.

7. In her opinion, giving the mentioned powers to the circle of persons and bodies referred to in Article 20(g) of the BiH Code, primarily to the police officers, is quite logical. In support of the aforementioned, the applicant claims that there is no doubt that the police officers have the required professional knowledge and skills, technical means and extensive experience in exercising authorizations prescribed not only by the BiH Code but also by the Law on Police Officials of BiH (*Official Gazette of BiH*, 27/04, 63/04, 5/06, 33/06, 58/06, 15/08, 63/08, 35/09 and 7/12) as well as the authorized officials of other State bodies in carrying out various forms of inspection control in accordance with special laws regulating their organization and the scope of their rights and duties in the case that a criminal act has been committed in violation of the law. Given the aforementioned, in the applicant's opinion, the authorizations of the persons and bodies referred to in the first sentence of item g) of Article 20 of the BiH Code are closely related to their authorizations referred to in special laws.

8. However, the applicant is of the opinion that Article 20(g) of the BiH Code, in the contested part extending the scope of authorized officials to the expert associates and investigators of the Prosecutor's Office of BiH, who work under the authorization of the Prosecutor "is unclear and unprecise and does not meet the requirements under the rule of law referred to in Article I(2) of the Constitution of Bosnia and Herzegovina."

9. In support of the aforementioned, the applicant observes that from the aspect of organization and implementation in practice, the challenged part of Article 20(g) of the BiH Code should be seen in the context of the Law on the Prosecutor's Office of BiH (*Official Gazette of BiH*, 49/09 and 97/09). In particular, Article 3(1) of the Law on the Prosecutor's Office of BiH stipulates that the duties of the Prosecutor's Office shall be carried out pursuant to the Constitution of BiH and the laws of BiH. They shall be performed by the Chief Prosecutor of BiH, four Deputy Chief Prosecutors of BiH and a certain number of Prosecutors of BiH. Furthermore, Article 5(3) of that Law stipulates that the Deputy Chief Prosecutors and Prosecutors may perform any action in the proceedings instituted before the Court of BiH, for which the Chief Prosecutor

is authorized in accordance with a BiH law. Finally, Article 16 of that Law prescribes that there shall be a Registrar of the Prosecutor's Office and Article 14(1) of that Law prescribes that the Rulebook of the Prosecutor's Office shall regulate *inter alia*, the organization of the Prosecutor's Office, of BiH the number of administrative-technical staff and conditions for performance of such duties.

10. The applicant claims that the Law on the Prosecutor's Office of BiH provides in no way the possibility of employing authorized official persons, i.e. expert associates and investigators to whom the authorizations of the prosecutor could be transferred. Furthermore, their authorizations are neither precise nor determined, but the Law stipulates that they work under the authorization of the prosecutor. This creates legal uncertainty and imprecision of legal regulations because the transfer of the prosecutor's authorizations to expert associates and investigators is possible. This is not prescribed as a possibility either by the Constitution of BiH or the Law on the Prosecutor's Office of BiH.

11. According to the applicant, it is particularly illogical and unfounded that Article 49(1)(d) and Article 51(1)(b) through (d) of the Rulebook of the Prosecutor's Office of BiH (*Official Gazette of BiH*, 29/14 and 56/15) provide that they are authorized to coordinate the activities of the law-enforcement agencies and other authorities during the investigation (which is an authorization of the prosecutor), that an expert associate-investigator prepares the guidelines for the work in the field of investigation of criminal offences and that such persons are in charge of planning, organizing and providing professional assistance in investigation of organized crimes and other forms of crimes, defining resources necessary for the conduct of investigation. Furthermore, it is notably unacceptable, in her opinion, that Article 31(a), paragraph 2(a) and (b) of the mentioned Rulebook stipulates that the expert associate – investigator even takes special investigating actions upon order of the chief prosecutor, given the fact that the police bodies are entrusted with such duties according to Article 118(6) of the BiH Code. Finally, with regard to the employment requirements, the applicant alleges that the investigator is approximately required to have capacity to perform tasks of intelligence and investigative nature, whereas the expert associate is not even required to fulfil this condition.

12. The applicant further observes that the legislator is obliged to determine the authorizations of expert associates in the Law on the Prosecutor's Office of BiH, as it was prescribed, for example, in Article 49 of the Law on the Prosecutor's Office of the Brčko District or Article 46 of the Public Prosecutor's Offices of the Republika Srpska. Given the fact that this was not done, the applicant is of the opinion that given the rights and duties of the authorized officials referred to in the BiH Code, the expert associates and investigators of the Prosecutor's Office of BiH may take, under the prosecutor's authorization, all actions for which they have no authorization under the special law (the Law on the Prosecutor's Office of BiH. In fact, they exercise authorizations, which were

previously given only to the persons who have the relevant powers (as prescribed by the special law) within the police bodies of BiH, judicial and financial police and within the customs bodies, taxation bodies and bodies of the military police of BiH.

13. In the applicant's opinion, given the fact that the Law on the Prosecutor's Office of BiH does not prescribe the possibility of employing authorized officials, the Rulebook itself cannot give authorizations to officials without prior precisions defined in the law. In her opinion, the aforementioned results in the fact that authorizations given to the prosecutors are conferred without legal basis to the persons that do not have sufficient knowledge or training.

14. The applicant further observes that neither the Constitution of BiH nor the Law on the Prosecutors Office of BiH prescribe that certain actions in the criminal procedure, including the conduct of investigative actions, may be taken by expert associates or investigators of the Prosecutor's Office of BiH. She observes that according to Article 14(1) of the Law on the Prosecutor's Office of BiH, these categories of persons may perform only the tasks of administrative-technical nature, and cannot take actions the prosecutors are responsible for in the criminal procedure. Therefore, in her opinion, direct supervision of a prosecutor over the actions taken by the expert associates or investigators cannot compensate the lack of authorizations, which a prosecutor has. As the legislator does not prescribe the specific actions an expert associate or investigative officer could take under the authorization and supervision of the prosecutor, the applicant is of the opinion that such a norm leaves it to the prosecutor to determine the actions he/she will assign to an expert associate or investigator. In the applicant's opinion, all employees within the Prosecutor's Office of BiH, who are not the holders of prosecutorial powers, may only perform the tasks not interfering with the criminal procedure, including the investigation. They may only do the tasks of assisting in the professional duties.

15. While referring to the decisions of the Federal Constitutional Court of Germany (judgment no. 1 BvR 370/07 of 27 February 2008, paragraph 209, and Conclusion no. 1 BvF 3/92 of 3 March 2004, paragraph 107) and decision of the Constitutional Court in the case no. *U-6/06*, the applicant alleges that the requirement of clarity and determinedness of legal norm "constitutes one of the basic elements of the rule of law". In addition, the applicant alleges that procedural regulation of criminal proceedings must be regulated always in the manner to ensure the achievement of legitimate aims of criminal procedure, legal certainty of objective legal order, prevision, availability, foreseeability and procedural certainty of criminal norm. The applicant finally concludes that Article 20(g) of the BiH Code, in the part reading: "Expert associates as well as investigators working for the Prosecutor's Office of Bosnia and Herzegovina under the authorization of the Prosecutor shall also be considered as authorized officials", does not fulfil the requirement of clarity and determinedness. In addition, it notably does not ensure adequate protection against possible abuses in practice.

IV. Relevant Law

16. The **Law on the Prosecutor's Office of Bosnia and Herzegovina – Revised Text** (*Official Gazette of BiH,* 49/09) in the relevant part, it reads as follows:

Article 1
(Establishment)

1. In order to ensure the effective exercise of competence of the State of Bosnia and Herzegovina and the respect for human rights and the rule of law in the territory of this State, the Prosecutor's Office of Bosnia and Herzegovina (hereinafter: the 'Prosecutor's Office') is hereby established.

(...)

Article 2
(Independence)

The Prosecutor shall act independently as a separate organ of Bosnia and Herzegovina.

Article 3
(Organization of the Prosecutor's Office)

(1) The duties of the Prosecutor's Office shall be carried out pursuant to the Constitution of Bosnia and Herzegovina and the laws of Bosnia and Herzegovina and shall be held by the Chief Prosecutor of Bosnia and Herzegovina (hereinafter: the Chief Prosecutor), four Deputy Chief Prosecutors of Bosnia and Herzegovina (hereinafter: the Deputy Chief Prosecutors) and a number of Prosecutors of Bosnia and Herzegovina (hereinafter: the Prosecutors).

(...)

Article 5
(Chief Prosecutor, Deputy Chief Prosecutors and Prosecutors)

(1) The Prosecutor's Office shall be represented and chaired by the Chief Prosecutor.

(...)

(3) The Deputy Chief Prosecutors and Prosecutors may perform any action in the proceedings instituted before the Court of Bosnia and Herzegovina for the Chief Prosecutor has been authorized which as provided by State Law.

Article 12
(Criminal Jurisdiction)

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

(...)

Article 14
(Rulebook)

(1) The Rulebook of the Prosecutor's Office shall regulate, inter alia, the organization of the Prosecutor's Office, the number of administrative-technical staff and conditions for performance of such duties.

(2) The Rulebook of the Prosecutor's Office shall be issued by the Chief Prosecutor, upon approval of the Collegium of Prosecutors and the High Judicial and Prosecutorial Council of Bosnia and Herzegovina.

(3) Head of each of the Special Departments shall regulate the internal organization of the Special Department by the Internal Rules of the Special Department.

Article 15
(Administration of the Prosecutor's Office)

(1) The Chief Prosecutor directs the Office administration. He/she shall issue general instructions to the prosecutorial and administrative branches of the Office in accordance to the Rulebook.

(...)

Article 16
(Registrar of the Prosecutor's Office)

(1) The Prosecutor's Office shall have a registrar. The Prosecutor's Office shall have other staff in charge of expert, administrative and technical duties.

(...).

Article 20
(International Registrar)

During the transitional period, an international Registrar shall be appointed as Head of the Registry for the Special Departments, responsible for the provision of support services to the Special Departments.

17. The **High Representative Decision Enacting the Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06 and 29/07), published in the *Official Gazette of BiH*, 53/07. In its relevant part, reads as follows:

(...)

***Bearing in mind** the reinvigorated strategy for judicial reform to strengthen the Rule of Law efforts in Bosnia and Herzegovina in 2002/03 that was endorsed by the Steering Board of the Peace Implementation Council on 28 February 2002.*

(...)

Bearing in mind *that the ability of the prosecutors' offices to conduct large-scale investigations has been undermined by the fact that experts cannot take investigative acts in the official capacity;*

(...)

Deploring*, however, that the changes to legislation necessary to facilitate the investigation and eventual prosecution of the most serious crimes such as genocide, crimes against humanity and war crimes, have not been given the required attention by the authorities in Bosnia and Herzegovina*

Being seized *of the urgency to amend such legislation.*

(...)

LAW ON AMENDMENTS TO THE CRIMINAL PROCEDURE CODE OF BOSNIA AND HERZEGOVINA

Article 1
(Amendment to Article 20)

In the Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06 and 29/07; hereinafter: the Code), Article 20 (Basic Terms), sub-paragraph g), at the end of the text a full-stop shall be inserted instead of a semicolon and a new sentence shall be added to read:

Expert associates as well as investigators working for the Prosecutor's Office of Bosnia and Herzegovina under the authorization of the Prosecutor shall also be considered as authorized officials.

18. **The Criminal Procedure Code of Bosnia and Herzegovina** (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13[1]), in its relevant part reads:

Article 16
Accusatory Principle

Criminal proceedings may only be initiated and conducted upon the request of the Prosecutor.

Article 17
Principle of Legality of Prosecution

The Prosecutor is obligated to initiate a prosecution if there is evidence that a criminal offense has been committed unless otherwise prescribed by this Code.

1 The Law on Amendments to the Criminal Procedure Code of BiH (Official Gazette of BiH, 65/18), which do not relate to Article 20(g) of the BiH Code, in the part challenged by the request, was adopted after the request in question had been filed.

Article 20
Basic Terms

Unless otherwise provided under this Code, the particular terms used for purposes of this Code shall have the following meanings:

(...)

g) "An authorized official person" is a person having an appropriate authorization within the police authorities in Bosnia and Herzegovina, including the State Investigation and Protection Agency, the State Border Service, the Judicial Police, the Financial Police, as well as within the customs authorities, tax authorities and military police authorities in Bosnia and Herzegovina. Expert associates as well as investigators working for the Prosecutor's Office of Bosnia and Herzegovina under the authorization of the Prosecutor shall also be considered as authorized officials.

j) The term "investigation" refers to all activities undertaken by the Prosecutor or by authorized officials in accordance with this Code, including the collection and preservation of information and evidence.

(...)

Article 35
Rights and Duties

(1) The basic right and the basic duty of the Prosecutor shall be the detection and prosecution of perpetrators of criminal offenses falling within the jurisdiction of the Court.

(2) The Prosecutor shall have the following rights and duties:

a) as soon as he becomes aware that there are grounds for suspicion that a criminal offense has been committed, to take necessary steps to discover it and investigate it, to identify the suspect(s), guide and supervise the investigation, as well as direct the activities of authorized officials pertaining to the identification of suspect(s) and the gathering of information and evidence;

(...)

f) to order authorized officials to execute an order issued by the Court as provided by this Code;

Article 36
Taking Actions

The Prosecutor shall take all actions in the proceedings for which he is himself authorized by law or through the persons who are authorized pursuant to the law to act on his request in criminal proceedings.

Article 218
Prosecutor Supervising the Work of the Authorized Officials

(1) If there are grounds for suspicion that a criminal offense has been committed that carries a prison sentence of more than five (5) years, an authorized official shall immediately inform the Prosecutor and shall under the Prosecutor's direction take the steps necessary to locate the perpetrator, to prevent the suspect or accomplice from hiding or fleeing, to detect and secure the clues to the criminal offense and objects which might serve as evidence, and to gather all information that might be of use for the criminal proceedings.

(2) If there are grounds for suspicion that the criminal offense referred to in Paragraph 1 of this Article has been committed, and the delay would pose a risk, an authorized official is obligated to carry out necessary actions in order to fulfil the tasks referred to in Paragraph 1 of this Article. When carrying out these actions, the authorized official is obligated to act in accordance with this Code. The authorized official shall be bound to inform the Prosecutor on all taken actions immediately and deliver the collected items that may serve as evidence.

(3) If there are grounds for suspicion that a criminal offense has been committed that carries a prison sentence of up to five (5) years, an authorized official shall inform the Prosecutor of all available information, actions and measures performed no later than seven (7) days after forming the grounds for suspicion that a criminal offense has been committed.

19. The **Rulebook on Internal Organization of the Prosecutor's Office of Bosnia and Herzegovina** (the *Official Gazette of BiH*, 29/14 and 56/15), as relevant, reads:

Article 1
(Application of the Rulebook)

This Rulebook shall regulate the organization of the Prosecutor's Office ("the Prosecutor's Office"), professional and administrative-technical staff required, conditions for performance of professional and administrative-technical duties and the number of employees performing such duties.

(...)

Article 5
(Principles)

The Prosecutor's Office shall be an independent authority acting in accordance with the Law and operating on the following principles:

a) Independence in relation to all participants in the criminal proceedings as well as state and other public authorities and international organizations;

b) Uniformity of operation so that every action by any component of the Prosecutor's Office in exercising rights and duties established by law represents an action taken by the Prosecutor's Office;

c) Hierarchical relationship that implies accountability of all employees to the Chief Prosecutor and their superiors in the system of accountability that arises under this Rulebook and internal rules.

Article 31(a)
(Section for Terrorism)

Section for Terrorism of the Prosecutor's Office of BiH shall prosecute criminal offences of terrorism and other similar criminal offences referred to in Chapter XVII of the Criminal Code of Bosnia and Herzegovina. The Section for Terrorism shall include the following categories of the employees:

a) Expert associate – BA in Law

Duties description:

- in accordance with the instructions from the Prosecutor assists the Prosecutor in preparation of legal submissions;

- prepares drafts of legal submissions (indictments, appeals, motions, orders and other documents);

- in accordance with the instructions from the Prosecutor assists the Prosecutor in work by carrying out legal duties such as: finding regulations necessary for work, analysis of regulations and case-law of national and international courts, notes on case summary;

- in accordance with the instructions from the Prosecutor carries out preparation for the main hearing and attends the main hearing with the Prosecutor;

- in accordance with the instructions from the Prosecutor coordinates activities for the law enforcement agencies and other authorities during the investigation;

- undertakes other necessary actions during the investigation and participates in on-field activities upon the Prosecutor's order;

- as necessary, attends working meetings and sessions of the collegium;

- in addition to working on criminal cases also carries out other duties upon the Prosecutor's order or the Prosecutor of the Department and Head of the Section.

Minimum qualifications: University degree, prior to university degree reform acquired BA in Law on a four year program at the Law Faculty or under education system following the Bologna process, a four year program at the Law Faculty and acquired at least 240 ECTS, passed Bar exam, a minimum of two years of professional experience in legal posts, ability to write legal documents, computer proficiency, experience in international criminal law area and active command of English an asset.

b) Expert associate - investigator

Duties description:

- participates in activities of the Prosecutor's Office of BiH in the part relating to uncovering and prosecuting criminal offences;

- prepares documents, reports and work guidelines in terms of uncovering criminal offences under the jurisdiction of the Prosecutor's Office of BiH;

- prepares and suggests concepts and methods of investigation for the specific criminal offences under the jurisdiction of the Prosecutor's Office of BiH;

- plans, organises and offers other professional assistance in investigations;

- in cooperation with the Prosecutor in charge, defines resources necessary for the investigation;

- proposes use of investigative action and manner of proving and gathering evidence and provides them upon the order of the Prosecutor;

- analyses facts and gathered evidence;

- prepares reports and other necessary acts;

- coordinates activities of the law enforcement agencies during investigation;

- undertakes other necessary actions during investigation upon request and order of the Prosecutor;

- undertakes and executes special investigative action upon order of the Chief Prosecutor;

Minimum qualifications: University degree, Law Faculty, Criminal Law Faculty, Faculty of Security Studies, Law Enforcement Academy – Criminal Law study or other similar Faculty, professional qualifications exam passed, a minimum of three years of professional experience after acquiring qualifications, ability to carry out intelligence and investigative tasks, computer proficiency, active command of English an asset, driver's license B category.

V. Admissibility

20. 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 19 of the Rules of the Constitutional Court.

21. 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.

22. The request for review of constitutionality was filed by the Second Deputy Chair of the House of Representatives of the Parliamentary Assembly of BiH. Thus, the request was filed by an authorized entity within the meaning of the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

VI. Merits

23. The applicant asserts that Article 20(g) of the BiH Code is not in conformity with Article I(2) of the Constitution of Bosnia and Herzegovina. It reads as follows: "Expert associates as well as investigators working for the Prosecutor's Office of Bosnia and Herzegovina under the authorization of the Prosecutor shall also be considered as authorized officials."

24. Article I(2) of the Constitution of Bosnia and Herzegovina reads:

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

25. The Constitutional Court first notes that the applicant corroborated her allegations by making reference, *inter alia*, to the Decision of the Constitutional Court no. *U-6/16*.

26. The Constitutional Court recalls that in the Decision on Admissibility and Merits no. *U-6/16* of 6 July 2017 (available at www.ustavnisud.ba), while interpreting Article I(2) of the Constitution of Bosnia and Herzegovina, the Constitutional Court pointed out the following:

> "20. (…) the Constitutional Court recalls that Article I(2) of the Constitution of Bosnia and Herzegovina defines that Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law. The Constitutional Court has jurisdiction and is obligated always to uphold the Constitution (Article VI(3)), including one of its fundamental principles – the rule of law under the aforementioned constitutional provision. The rule of law principle means a political system that is based on the adherence to the constitution, laws and other regulations by all citizens and government.

In addition, the concept of the rule of law is not confined only to the formal adherence to the principle of constitutionality and lawfulness but it requires that constitution and laws must have a certain quality that is appropriate to a democratic system, so that they protect human rights and freedoms as regards a relationship between citizens and governmental bodies within a democratic political system.

21. The Constitutional Court also recalls that the requirements of legal certainty and the rule of law entail that a legal norm must be adequately accessible for persons to whom it will be applied and it must be foreseeable, meaning that it must be formulated with sufficient precision, so that the persons can know actually and specifically their rights and obligations, to a degree that is reasonable in the circumstances, to regulate their conduct accordingly. If this requirement is not met, vague and imprecise norms make room for arbitrary decision-making by competent authorities. Laws, in a legal system that is based on the rule of law, should be of a general nature and should be applied to all people equally and legal consequences should be foreseeable for those to whom the law will be applied. In this connection, the Constitutional Court recalls the position of the European Court related to the determination of "autonomous term of law", clarifying the expression "law". Under the case-law of the European Court, the expression "law" does not relate to the mere existence of law, but also relates to the quality of law, requiring that a law is in compliance with the rule of law and that its norms are sufficiently precise, clear and foreseeable (see, European Court of Human Rights, case *Silver and Others v. Great Britain*, judgment of 25 March 1983, paragraphs 85-88; *Sunday Times v. Great Britain*, judgment of 26 April 1979, paragraphs 48-49; *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000, paragraph 84). Law must give the sufficiently clear scope of any discretionary right given to public authorities as well as the manner in which it is executed (see, European Court of Human Rights, *Rotaru v. Romania*, judgment of 4 May 200, paragraphs 52-56; *Rekvenyi v. Hungary*, judgment of 20 May 1999, paragraph 34)."

27. The Constitutional Court takes into account the essence of the applicant's assertions related to a violation of Article I(2) of the Constitution of Bosnia and Herzegovina, where the applicant claims that the challenged provision is vague and imprecise. This, in the applicant's opinion, resulted in the delegation of parts of the powers of the legislator to the Chief Prosecutor for his/her subjective decision-making. In addition, the challenged provision does not meet the "quality of law" requirement in terms of its precision and clarity and no arbitrary decision-making. In this connection, the Constitutional Court holds that, in examining the present request, the Constitutional Court may be guided by the positions taken in its case law quoted above.

28. The Constitutional Court notes that the BiH Code promotes the accusatory principle (Article 16 of the BiH Code), which prescribes that criminal proceeding may only be initiated and conducted upon the request of the Prosecutor. It also promotes the principle

of legality of prosecution (Article 17 of the BiH Code), according to which the Prosecutor is obligated to initiate a prosecution if there is evidence that a criminal offense has been committed, unless otherwise prescribed by this Code. Pursuant to Article 35 of the BiH Code, the basic right and the basic duty of the Prosecutor will be the detection and prosecution of perpetrators of criminal offenses falling within the jurisdiction of the Court. By the same Article it is determined that the Prosecutor will have, *inter alia*, the following rights and duties: to take necessary steps, as soon as he/she becomes aware that there are grounds for suspicion that a criminal offense has been committed, to discover it and investigate it, identify the suspect(s), guide and supervise the investigation, as well as direct the activities of authorized officials pertaining to the identification of suspect(s) and the gathering of information and evidence and to perform an investigation in accordance with this Code and to issue and defend indictment before the Court. Pursuant to Article 36 of the BiH Code, the Prosecutor will take all actions in the proceedings for which he/she is himself/herself authorized by law or through the persons who are authorized pursuant to the law to act on his/her request in criminal proceedings.

29. In addition, the Constitutional Court notes that Article 20 of the BiH Code, subparagraph (j), defines the term "investigation", which refers to all activities undertaken by the Prosecutor or by authorized officials in accordance with this Code, including the collection and preservation of information and evidence.

30. A number of the provisions of the BiH Code entrusted authorised officials with certain activities in the course of investigation, primarily carrying out specific investigative actions (crime scene investigation, hearing of witnesses, searches, *etc*.) and collection of evidence. However, irrespective of the authorization granted to them by a special law within the specific authorities (such as the customs authorities, tax authorities and police authorities and the like), and in that connection, the rights and duties in detecting a criminal offence, when acting in an investigation, as an authorised official person within the meaning of the BiH Code, they can do so only upon a prior notification and supervision of the Prosecutor or under his/her direct management. In that connection, they can take measures and actions determined by the BiH Code.

31. In view of the above, it follows that the relation between the Prosecutor and authorised official persons is hierarchical, where the Prosecutor is superior to authorised official persons and he/she is in charge of an investigation in accordance with the BiH Code, while authorised official persons act in accordance with Prosecutor's order. Therefore, although Article 20(g) of the BiH Code defines that authorised official persons are the persons entrusted with certain powers under a special law within the different police authorities as well as within the customs authorities and tax authorities, the BiH Code does not assign taking of an investigative action only to one or some of the specified categories. It, however, consistently uses the term "an authorised official person". In that sense, the fact that the challenged part of Article 20(g) of the BiH Code

also defines expert associates and investigators, working under the authorization of the Prosecutor, as authorised official persons in terms of the BiH Code does not *per se* make the mentioned provision vague and imprecise, as claimed by the applicant. Specifically, all the categories of persons who have been granted the status of an authorised official person in terms of the BiH Code, irrespective of whether they are granted an appropriate authorisation (including the status of an authorised official person in terms of a special law), do have the status of an authorised official person in criminal proceedings based on the BiH Code. It relates only to the actions and measures determined by the BiH Code, which they can take upon a prior notification and supervision of the Prosecutor or under his/her direct management.

32. Bearing in mind that the Prosecutor, by himself or through other persons obligated by law to act upon his/her order, takes all actions for which he/she is authorised by law, it cannot be concluded, contrary to the applicant's assertions, that the challenged part of Article 20(g) of the BiH Code gives the possibility to the Prosecutor to interpret it in an arbitrary fashion. More specifically, in the manner that he/she transfers the authorization granted to him/her by law to expert associates and investigators, working under the authorization of the Prosecutor, as authorized officials in terms of the BiH Code.

33. Furthermore, the Constitutional Court recalls that the Prosecutor's Office of BiH was established by the Law on Prosecutor's Office of BiH as an independent body to ensure the effective exercise of competence of the State of Bosnia and Herzegovina and the respect of human rights and the rule of law in the territory of this State. The duties of the Prosecutor's Office are carried out pursuant to the Constitution of Bosnia and Herzegovina and the laws of Bosnia and Herzegovina by the Chief Prosecutor of Bosnia and Herzegovina, three Deputy Chief Prosecutors and a number of Prosecutors. The Chief Prosecutor represents and runs the operation of the Prosecutor's Office of BiH. The Rulebook of the Prosecutor's Office of BiH, as expressly stated in Article 14(1) of the Law on Prosecutor's Office of BiH, regulates, *inter alia*, the organization of the Prosecutor's Office, the number of administrative-technical staff and conditions for performance of such duties. The Chief Prosecutor, upon approval of the Collegium of Prosecutors and the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, issues the Rulebook of the Prosecutor's Office. Finally, the Prosecutor's Office has a Secretary and other staff in charge of expert administrative and technical duties, and a Registrar.

34. It follows from the above-cited provisions that the Law on Prosecutor's Office of BiH, in the first place, protects the institutional independence of the Prosecutor's Office of BiH. In addition, the cited Law promotes the hierarchical structure within the Prosecutor's Office of BiH headed by the Chief Prosecutor, which ensures the organisational control and management of the Prosecutor's Office. In that sense, the Law stipulates that the Rulebook, which is issued by the Chief Prosecutor (including all necessary approvals),

regulates, *inter alia*, the organization of the Prosecutor's Office and the number of administrative-technical staff. This implies that the legislator, with due regard to the institutional independence and hierarchical structure, did not opt for an exhaustive list of issues to be regulated by the Rulebook. In view of the above, the applicant's claim cannot be accepted as well-founded where it is stated that the challenged part of Article 20(g) of the BiH Code resulted in the delegation of parts of the powers of the legislator to the Chief Prosecutor for his/her subjective decision-making.

35. Furthermore, the Constitutional Court recalls that the Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System[2], as regards measures to assist public prosecutors in carrying out their functions, states (paragraph 8), *inter alia:* "In order to respond better to developing forms of criminality, in particular organized crime, specialisation should be seen as a priority, in terms of the organisation of public prosecutors, as well as in terms of training and in terms of careers. Recourse to teams of specialists, including multi-disciplinary teams, designed to assist public prosecutors in carrying out their functions should also be developed." The Explanatory Memorandum, which is an integral part of the Recommendation, clarifies in that part (paragraph 8) that all public prosecutors must be thoroughly familiar with most areas of the law. In fact, they must be "generalists" rather than "specialists", but for reasons of effectiveness, specialisation is essential in fields that are highly technical (business-related and financial crime, for example), or fall into the category of large-scale organised crime. Accordingly, one of the types of specialisation that should be encouraged and that is recommended is the formation, under the direction of prosecutors who are themselves specialists, of truly multi-disciplinary teams whose members are drawn from a variety of backgrounds. Finally, it is indicated that the pooling of expertise in a single unit is a vital factor in the operational effectiveness of the system.

36. The Constitutional Court notes that the BiH Code, *i.e.* Article 20(g) in the part challenged by the applicant, where it is stated that expert associates and investigators working for the Prosecutor's Office of BiH under the authorization of the Prosecutor will also be considered as authorized officials, was amended by the Decision of the High Representative of 9 July 2007. It ensues from the mentioned Decision that the High Representative opted for such a solution bearing in mind, *inter alia*, "(…) the reinvigorated strategy for judicial reform to strengthen the Rule of Law efforts in Bosnia and Herzegovina and its entities (…)", and "the ability of the prosecutors' offices to conduct large-scale investigations has been undermined by the fact that experts cannot take investigative acts in the official capacity".

37. The Constitutional Court also notes that one of the indicators of institutional independence of the Prosecutor's Office includes the powers granted to the Chief

2 Adopted by the Committee of Ministers at the 724th session held on 6 October 2000.

Prosecutor in managing human resources, *i.e.* the staff of the Prosecutor's Office of BiH not including prosecutors (appointments, organisation and the scope of duties). In accordance with the legal authorisation granted to the Chief Prosecutor, having obtained the necessary approvals of the Collegium of Prosecutors and the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, the Chief Prosecutor issued the Rulebook on Internal Organization of the Prosecutor's Office of Bosnia and Herzegovina *(the Official Gazette of BiH,* 29/14 and 56/15). The mentioned Rulebook governs, *inter alia*, the duties description and conditions for performance of such duties by expert associates and investigators, as authorised officials in charge of professional duties, and whom, according to the Law on the Prosecutor's Office, the Prosecutor's Office may hire. Therefore, the applicant's allegation cannot be accepted where it is stated that there is no possibility of hiring expert associates and investigators, given the fact that the Law on the Prosecutor's Office of BiH does not explicitly mention expert associates and investigators as authorised officials in charge of professional duties. All the more so because the Law on the Prosecutor's Office of BiH, as regards the staff of the Prosecutor's Office of BiH not including prosecutors, only determines that the Prosecutor's Office has a Secretary and a Registrar. Finally, according to the aforementioned and contrary to the applicant's allegations, the Chief Prosecutor, by issuing the Rulebook that contains the description of duties of expert associates and investigators, did not grant them the status of authorised official persons. This implies that those categories have that status only in terms of the BiH Code. They have that status as well with respect to the actions and procedures determined by the BiH Code. They, as well as other categories of authorised official persons referred to in Article 20(g) of the BiH Code, can take those actions upon a prior notification and supervision of the Prosecutor or under his/her direct management.

38. In view of the above, the Constitutional Court holds that the challenged part of Article 20(g) of the BiH Code meets the "quality of law" requirement in terms of its precision and clarity and foreseeability. It is thereby not leaving room for arbitrary decision-making and possible abuses. The challenged part reads: "Expert associates as well as investigators working for the Prosecutor's Office of Bosnia and Herzegovina under the authorization of the Prosecutor shall also be considered as authorized officials."

39. The Constitutional Court concludes that Article 20(g) of the BiH Code is compatible with the rule of law principle under Article (I)(2) of the Constitution of Bosnia and Herzegovina. The challenged part reads: "Expert associates as well as investigators working for the Prosecutor's Office of Bosnia and Herzegovina under the authorization of the Prosecutor shall also be considered as authorized officials."

VII. Conclusion

40. The Constitutional Court concludes that the challenged part of Article 20(g) of the BiH Code is compatible with the rule of law principle arising under Article (I)(2) of the

Constitution of Bosnia and Herzegovina. The challenged part reads: "Expert associates as well as investigators working for the Prosecutor's Office of Bosnia and Herzegovina under the authorization of the Prosecutor shall also be considered as authorized officials."

41. Pursuant to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

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Case No. U-24/18

DECISION ON ADMISSIBILITY

Request of 27 representatives in the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina for the review of constitutionality of the Instruction Amending the Instruction on the Procedure for Administering Indirect Elections for the Bodies of Authority in Bosnia and Herzegovina under the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 91/18)

Decision of 31 January 2019

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 19(1)(a) and Article 57(2)(a) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges: Mr. Zlatko M. Knežević, as President, Mr. Mato Tadić, Mr. Mirsad Ćeman and Ms. Margarita Tsatsa-Nikolovska as Vice-Presidents, and Mr. Tudor Pantiru, Ms. Valerija Galić, Mr. Miodrag Simović, Ms. Seada Palavrić and Mr. Giovanni Grasso, having deliberated on a request filed by **27 representatives in the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina**, in case no. **U-24/18**, at its session held on 31 January 2019, adopted the following

DECISION ON ADMISSIBILITY

The request filed by 27 representatives in the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina for the review of constitutionality of the Instruction Amending the Instruction on the Procedure for Administering Indirect Elections for the Bodies of Authority in Bosnia and Herzegovina under the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 91/18), is hereby rejected as inadmissible, since 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 December 2018, 27 representatives in the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina ("the applicant") filed the request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for the review of constitutionality of the Instruction Amending the Instruction on the Procedure for Administering Indirect Elections for the Bodies of Authority in Bosnia and Herzegovina under the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 91/18)("the Instruction on Amendments").

2. At the same time, pursuant to Article 64 of the Rules of the Constitutional Court, the applicants requested that the Constitutional Court issue an interim measure, prohibiting the application of the Instruction pending a final decision on the request by the Constitutional Court.

Procedure before the Constitutional Court

3. Pursuant to Article 23(2) of the Rules of the Constitutional Court, on 28 December 2018 the Central Election Commission of Bosnia and Herzegovina ("the CEC") was requested to submit a response to the request.

4. On 18 January 2019, the CEC submitted its reply to the request.

Request

Allegations from the request

5. The applicants consider that the Instruction on Amendments is in contravention of Articles I(2) and II(2) of the Constitution of Bosnia and Herzegovina and Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"). The applicants state, *inter alia*, that the general elections in Bosnia and Herzegovina were held in October 2018 in accordance with the Election Law of Bosnia and Herzegovina ("the Election Law"), while its unconstitutional provisions on the election of delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina ("the House of Peoples") were not in effect. In that context, the applicants point to the Decision of the Constitutional Court of Bosnia and Herzegovina *U-23/14* of 1 December 2016, establishing that the provision of Sub-chapter B, Article 10.12(2), in the part stating that *each of the constituent peoples shall be allocated one seat in every canton,* and the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A(2), items a-j of the Election Law, were declared unconstitutional. They were declared unconstitutional as the Constitutional Court established that they were not in conformity with Article I(2) of the Constitution of Bosnia and Herzegovina. Given that the Parliamentary Assembly of Bosnia and Herzegovina had failed to enforce the aforementioned decision, the CEC passed the impugned Instruction on Amendments. The Instruction on Amendments regulated the structure and manner of election of delegates to the House of Peoples, although the responsibility of the CEC relates only to the determination of the number of delegates, after each census, elected from each constituent people and from the group of Others that are to be elected from the legislative body of each canton (Article 10.12 of the Election Law).

6. In this connection, the applicants, referring to the content of the impugned Instruction on Amendments, hold that the Constitutional Court of Bosnia and Herzegovina has jurisdiction, since the impugned Instruction on Amendments regulates the issues arising

from the Constitution of Bosnia and Herzegovina and International documents for the protection of human rights and fundamental freedoms.

7. The applicants consider that it is a well-known fact, which was also publically emphasised on a number of occasions by the President of the CEC, that the CEC used the 2013 Census as a basis for adopting the impugned Instruction on Amendments and determining the number of delegates from among the cantonal assemblies. This is in contravention with the Constitution of the Federation of Bosnia and Herzegovina and the Election Law. The applicants claim that the CEC, by passing the impugned Instruction on Amendments instead of the legislator, failed to comply with the Decision of the Constitutional Court of Bosnia and Herzegovina *U-23/14*. In this decision, the Constitutional Court declared the absolute determinant of the Election Law to be unconstitutional, which stipulated that one delegate would be elected to the House of Peoples from each constituent people regardless of whether he/she was elected to the cantonal assembly. At the same time, the provision of Article 3 of the impugned Instruction on Amendments, contrary to the Constitution of the Federation of Bosnia and Herzegovina, envisages, as an exception, the possibility of filling in the missing number of delegates from among the constituent peoples by applying the principle of "parity in the representation of the constituent peoples". Therefore, the applicants claim that according to the impugned provision, filling the seats in the House of Peoples would be from among those candidates who were not elected to cantonal assemblies, although the Constitution of the Federation of Bosnia and Herzegovina explicitly requires the election of cantonal delegates to the House of Peoples. According to the applicants' assertions, the CEC acted contrary to Article IX.7, being modified by Amendment LI to the Constitution of the Federation of Bosnia and Herzegovina to read: *Published results of the 1991 census shall be appropriately used for all calculations requiring demographic data until Annex VII is fully implemented*. In this connection, the applicants make reference to Article 20.16A(1) of the Election Law, which unambiguously refers to the necessity of applying the 1991 census in determining the number of delegates to the House of Peoples until Annex VII has been fully implemented. In this context, it is emphasised that neither the High Representative for Bosnia and Herzegovina nor the Parliamentary Assembly of Bosnia and Herzegovina have proclaimed that Annex VII of the General Framework Agreement for Peace in Bosnia and Herzegovina has been fully implemented.

8. In addition, the applicants point out that even the 2013 census is unacceptable as a basis for passing the impugned Instruction on Amendments, given the opinion of 4 November 2018 issued by the Federal Institute of Statistics. It states, *inter alia*, that the 1991 census was conducted in accordance with the "permanent population" methodology and the 2013 Census was conducted in accordance with "usual population" methodology. Furthermore, as underlined by the applicants, the final results of the 1991 and 2013 census are not comparable because the 1991 census includes also the citizens who were temporarily employed or stayed abroad irrespective of the length of their temporary residence outside the country. At the same time, under the 2013 census, the citizens of

Bosnia and Herzegovina, living abroad and having residence in Bosnia and Herzegovina and being absent for period longer than 12 months, are registered in a separate database and they do not make the total number of citizens of Bosnia and Herzegovina. In addition, the applicants indicate that the Law on Census of Population, Households and Dwellings in Bosnia and Herzegovina stipulates that census data may be used only for statistical purposes. Moreover, as highlighted by the applicants, the 2013 census did not include refugees who, according to the Election Law, have the active electoral right. This implies that the 2013 census, even without the constitutional principle contained in Article IX.7 of the Constitution of the Federation of Bosnia and Herzegovina, would not be legally relevant to the electoral process that recognizes that category of population and gives it the possibility to participate in the electoral process of Bosnia and Herzegovina.

9. Therefore, given that in the impugned Instruction on Amendments the CEC, while substituting for the legislator and while regulating the relevant legal matter, determined the number of delegates and the manner in which they are elected from each canton without respect for the constitutional principle established under the Constitution of the Federation of Bosnia and Herzegovina on the application of 1991 census results, the applicants consider that the adopted Instruction is not in conformity with the Constitution of Bosnia and Herzegovina. Specifically, it is not in conformity with Articles I(2) and II(2) of the Constitution of Bosnia and Herzegovina and Article 3 of Protocol No. 1 to the European Convention. The applicants suggested that the request be granted and that it be established that the Instruction on Amendments did not comply with Articles I(2) and II(2) and Article 3 of Protocol No. 1 to the European Convention. In addition, they suggested that the CEC be ordered to harmonise the provisions of the Instruction on Amendments with the aforementioned Articles of the Constitution of Bosnia and Herzegovina and Article 3 of Protocol No. 1 to the European Convention. Specifically, they suggested that the CEC be ordered to determine, by applying the 1991 census, the number of delegates to be elected from each constituent people and from among the Others that are elected by the legislature of each canton.

10. As to the applicant's request for an interim measure, no specific reasoning has been offered.

Reply to the request

11. In a rather extensive reply to the request, CEC, *inter alia*, stated that the CEC violated neither the rights of the applicant nor the rights of any participant in the electoral process. In fact, it rather passed the Instruction on Amendments with the aim of protecting the election process in order to ensure free and democratic direct election in accordance with Article I(2) of the Constitution of Bosnia and Herzegovina. The CEC is responsible and competent for implementation of the elections in accordance with Article 5 of Annex 3 of the Agreement on Elections of the General Framework Agreement for Peace in Bosnia and Herzegovina. It stressed that, by passing the disputed Instruction on Amendments,

no voters with a right to vote in elections in Bosnia and Herzegovina are denied the right to participate in elections (the right to elect and the right to be elected), nor are there any restrictions imposed on the expression of the will of voters. It is suggested that the request be rejected or dismissed as ill-founded as there is no violation of the Constitution of Bosnia and Herzegovina.

Relevant Law

12. The provisions of the **Constitution of Bosnia and Herzegovina,** as relevant, read:

Article I
Bosnia and Herzegovina

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
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 VI(3)(a)

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 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 VI(5)

Decisions of the Constitutional Court shall be final and binding.

13. The provisions of the **Constitution of the Federation of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 1/94,13/97, 16/02, 22/02, 52/02, 18/03, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05 and 88/08), as relevant, read:

IX. APPROVAL AND ENTRY INTO FORCE OF THE CONSTITUTION AND TRANSITIONAL ARRANGEMENTS

Article 7

The published results of the 1991 census shall be used as appropriate in making any calculations requiring population data.

Article 11a

1. Proportionate representation in all public authorities including courts

Constituent peoples and members of the group of the Others shall be proportionately represented in public institutions in the Federation of Bosnia and Herzegovina.

As a constitutional principle, such proportionate representation shall follow the 1991 census until Annex 7 is fully implemented, in line with the Civil Service Law of Bosnia and Herzegovina. Further and concrete specification of this general principle shall be implemented by Entity legislation. Such legislation shall include concrete time lines and shall develop the aforementioned principle in line with the regional ethnic structure in the Entities and the Cantons.

Public institutions as mentioned above are the ministries of the Government of the Federation of BiH and of Cantonal Governments, municipal governments, Cantonal and Municipal Courts in the Federation of Bosnia and Herzegovina.

14. The provisions of the **Election Law of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16 – in the present decision we used an unofficial revised version available at www.elections.ba), as relevant, read:

Article 2.9

The Central Election Commission of Bosnia and Herzegovina is an independent body, which derives its authority from and reports directly to, the Parliamentary Assembly of Bosnia and Herzegovina. The Central Election Commission of Bosnia and Herzegovina shall:

1. coordinate, oversee and regulate the lawful operation of all election commissions and

Polling Station Committees in accordance with this law;

2. issue administrative Regulations for the implementation of this law;

2.a issue a decision to hold the direct elections in Bosnia and Herzegovina, as provided by this Law;

3. propose a budget for the Central Election Commission of Bosnia and Herzegovina and report on its spending;

4. be responsible for accuracy, update and overall integrity of the Central Voters Register 1for the territory of Bosnia and Herzegovina;

4.a ensure the statistical records classified by gender, age, classified by polling stations for each part of the election process;

5. certify the participation of political parties, coalitions, lists of independent candidates and independent candidates for all levels of direct elections in Bosnia and Herzegovina;

6. verify and certify the lists of candidates and the candidates for all levels of direct and indirect elections in Bosnia and Herzegovina covered by this law;

7. be responsible for the timely printing, distribution and security of ballots and forms for all levels of direct elections in Bosnia and Herzegovina;

8. define the contents and the form of the ballot for all levels of direct elections in Bosnia and Herzegovina;

9. determine and verify election results for all direct and indirect elections covered by this Law, certify that elections were conducted in accordance with this Law and publish results of all direct and indirect elections covered by this Law;

10. issue certificates to persons who receive mandates at all levels of direct and indirect elections in Bosnia and Herzegovina covered by this Law;

11. notify an election commission or Polling Station Committee or any other competent authority responsible for the conduct of elections that it does not comply with or violates a provision of this law and order the remedial action required to be taken by the competent body;

12. publicize all Rules of Procedure, Regulations and election results of the direct and indirect elections in Bosnia and Herzegovina covered by this Law, voter information and all other information necessary for the implementation of this law and all electoral laws, in the Official Gazettes and the media, both inside and outside Bosnia and Herzegovina as appropriate;

13. conduct all election activities for the elections for the members of the Presidency of Bosnia and Herzegovina and the members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina;

14. take the decision to terminate the mandate f an elected official at all levels of direct and indirect elections in Bosnia and Herzegovina covered by this Law, but also where necessary conduct the preliminary fact - finding procedure (in the case where a member resigns, that it is done of his or her own volition);

15. review the decision taken by the competent authority to terminate the mandate of an elected official by recall, in order to ensure that the elected official's mandate was terminated in accordance with this Law;

16. report annually to the Parliamentary Assembly of Bosnia and Herzegovina on the electoral administration in Bosnia and Herzegovina, the implementation of this law and initiates amendments to this law; and

17. perform all other duties as authorised by law.

Article 10.12

The number of delegates from each constituent people and group of Others to be elected to the House of Peoples of the BiH Federation Parliament from the legislature of each canton shall be proportionate to the population of the canton as reflected in the last census. The Election Commission will determine, after each new census, the number of delegates elected from each constituent people and from the group of Others that will be elected from each canton legislature.

For each canton, the population figures for each constituent people and for the group of Others shall be divided by the numbers 1,3,5,7 etc. as long as necessary for the allocation. The numbers resulting from these divisions shall represent the quotient of each constituent people and of the group of Others in each canton. All the constituent peoples' quotients shall be ordered by size separately, the largest quotient of each constituent people and of the Others being placed first in order. Each constituent people shall be allocated one seat in every canton. The highest quotient for each constituent people in each canton shall be deleted from the list of quotients of that constituent people. The remaining seats shall be allocated to constituent peoples and to the Others one by one in descending order according to the remaining quotients on their respective list.

Article 20.16.A

Until Annex 7 of the GFAP has been fully implemented, the allocation of seats by constituent people normally regulated by Chapter 10, "Subchapter B" of this law shall be done in accordance with this Article.

Until a new census is organized, the 1991 census shall serve as a basis so that each Canton will elect the following number of delegates:

15. The provisions of the **Instruction on the Procedure for Administering Indirect Elections for the Bodies of Authority in Bosnia and Herzegovina under the Election Law of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 38/14, 98/16 and 8/17), as relevant, read:

Article 1
(Subject matter)

(1) This Instruction regulates the method and procedure of nomination, candidates vetting, verification of candidates' lists, election, establishment of the voting results,

confirmation of the voting results and the issuance of certificates to persons who won mandates:

a) in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ("the House of Peoples of the Parliamentary Assembly of BiH");

b) in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina ("the House of Peoples of the Parliament of the Federation of BiH");

c) in the Council of Peoples of the Republika Srpska ("the RS Council of Peoples");

d) in the City Council of the City of Sarajevo and the Assembly of the City of Istočno Sarajevo.

(2) This Instruction regulates the method and procedure of candidates vetting, verification of candidates' lists and the issuance of certificates to persons who won mandates of President and Vice-Presidents of the Federation of Bosnia and Herzegovina ("President and Vice-Presidents of the Federation of BiH") and the City Mayor of the City of Sarajevo, City of Istočno Sarajevo, City of Mostar ("City Mayor") and of the Brčko District of Bosnia and Herzegovina.

Chapter III. House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina

Section A. Nomination of candidates and election of delegates

Article 21(3)

(3) The number of delegates elected from cantonal assemblies is prescribed by Article 20.16A of the BiH Election Law.

16. The relevant provisions of the **Instruction Amending the Instruction on the Procedure for Administering Indirect Elections for the Bodies of Authority in Bosnia and Herzegovina under the Election Law of Bosnia and Herzegovin**a (*Official Gazette of Bosnia and Herzegovina*, 91/18) read:

Article 1

The Instruction on the procedure for administering indirect elections for the bodies of authority in Bosnia and Herzegovina under the Bosnia and Herzegovina Election Law (Official Gazette of Bosnia and Herzegovina, 38/14, 90/16 and 8/17), Article 21(3) shall be amended to read as follows:

"(3) Preliminary number of delegates elected from cantonal assemblies is established as follows:

a) from the legislative body of the Canton no. 1, Una-Sana Canton, six delegates shall be elected, including two from among the Bosniac, one from among the Croat, two from among the Serb people and one from among Others;

b) from the legislative body of the Canton no. 2, Posavina Canton, three delegates shall be elected, including one from among the Bosniac, one from among the Croat and one from among the Serb people;

c) from the legislative body of the Canton no. 3, Tuzla Canton, eight delegates shall be elected, including three from among the Bosniac, one from among the Croat, two from among the Serb people and two from among Others;

d) from the legislative body of the Canton no. 4, Zenica-Doboj Canton, six delegates shall be elected, including three from among the Bosniac, one from among the Croat, one from among the Serb people and one from among Others;

e) from the legislative body of the Canton no. 5, Bosnian-Podrinje Canton Gorazde, three delegates shall be elected, including one from among the Bosniac, one from among the Croat and one from among the Serb people;

f) from the legislative body of the Canton no. 6, Central Bosnia Canton, six delegates shall be elected, including one from among the Bosniac, three from among the Croat, one from among the Serb people and one from among Others;

g) from the legislative body of the Canton no. 7, Herzegovina-Neretva Canton, six delegates shall be elected, including one from among the Bosniac, three from among the Croat and two from among the Serb people;

h) from the legislative body of the Canton no. 8, West Herzegovina Canton, five delegates shall be elected, including one from among the Bosniac, three from among the Croat and one from among the Serb people;

i) from the legislative body of the Canton no. 9, Sarajevo Canton, nine delegates shall be elected, including three from among the Bosniac, one from among the Croat, three from among the Serb people and two from among Others, and

j) from the legislative body of the Canton no. 10, Canton 10, six delegates shall be elected, including one from among the Bosniac, two from among the Croat and three from among the Serb people.

Article 3

A new paragraph (3) shall be added after paragraph (2) in Article 37 and it shall read as follows:

"(3) Exceptionally, if, following the procedure laid down in paragraphs (1) and (2) of this Article, a certain number of delegates is missing from among one of the constituent peoples or from among Others (Article 10.10 of the Law), by applying the constitutional principle of parity in the representation of the constituent peoples and the appropriate representation of Others (Amendment XXXIII, paragraph 1, item 1, to the Constitution of the Federation of BiH), the Bosnia and Herzegovina Central Election Commission shall prescribe by a special act the manner of filling and shall fill in the missing number of delegates from among the constituent peoples or from among Others, by applying Article 10.16 of the Bosnia and Herzegovina Election Law."

17. 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 19(a) 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 19(a) of the Rules of the Constitutional Court reads as follows:

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

(a) the Constitutional Court is not competent to take a decision; (...)

18. The request for review of constitutionality was filed by 27 representatives in the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina out of 98 representatives in total, which means that the request was filed by an authorized person in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

19. In the present case, the applicants hold that the impugned Instruction on Amendments, passed by the CEC, is in contravention of the Constitution of the Federation of Bosnia and Herzegovina and the Election Law, *i.e.* the Constitution of Bosnia and Herzegovina, Articles I(2) and II(2) and Article 3 of Protocol No. 1 to the European Convention. The Constitutional Court notes that, although the applicants did not explicitly state it, they essentially raise an issue as to the provisions of Article 1 of the Instruction on Amendments. By those provisions, the CEC amended Article 21(3) of the original text of the Instruction and established the preliminary number of delegates to the House of Peoples to be elected from cantonal assemblies.

20. In this connection, the Constitutional Court points out that Article VI(3)(a) of the Constitution of Bosnia and Herzegovina does not provide for an express competence of the Constitutional Court to review the constitutionality of an act of lower legal rank than the law.

21. In view of the above and taking into account that the subject matter of dispute is an act of lower legal rank than the law, it follows that in the present case it is necessary first to establish whether the Constitutional Court is competent to take a decision within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

22. As to the impugned act, the Constitutional Court notes that according to its previous case law, in the situations where the issue of compatibility of a general act not expressly referred to in the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina has been raised, the Constitutional Court has assessed the circumstances of the relevant case on a case-by-case basis commensurate with the competences which are conferred upon it by the mentioned Article. Accordingly, it has expressed its positions as to whether or not the requests for review of such acts have been admissible. In addition, the Constitutional Court points out 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 parties to the proceedings (see, Constitutional Court, Decision on Admissibility and Merits *U-6/06* of 29 March 2006, paragraph 21, published in the *Official Gazette of Bosnia and Herzegovina*, 40/08), and that the Constitutional Court is the ultimate judicial authority on the interpretation and application of the Constitution of Bosnia and Herzegovina (see, Constitutional Court, Decision on Admissibility and Merits *U-9/09* of 26 November 2010, paragraph 70, published in the *Official Gazette of Bosnia and Herzegovina*, 48/11).

23. In view of the above, the Constitutional Court will present its previous case law in the cases related to the review of constitutionality of acts of lower legal rank than laws.

24. Therefore, in case *U-7/16* the subject matter of dispute were the acts of lower rank than the law. The subject matter was the Decision on the Adoption of Unified Data Processing Programme for the Census of the Population, Households and Dwellings in Bosnia and Herzegovina in 2013 and the Data Processing Unified Programme for the Census of the Population, Households and Dwellings in Bosnia and Herzegovina in 2013, passed by the Director of the Agency for Statistics. The applicant claimed that the impugned acts were in violation of the Constitution of Bosnia and Herzegovina for they were in contravention of the Law on Census of Population, Households and Dwellings in Bosnia and Herzegovina and the Law on Statistics of Bosnia and Herzegovina, which were passed by the Parliamentary Assembly of Bosnia and Herzegovina (see, Constitutional Court, Decision on Admissibility *U-7/16* of 19 January 2017, available at www.ustavnisud.ba). The Constitutional Court concluded that it had no jurisdiction to decide within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, as the challenged acts did not raise an issue of violation of human rights and fundamental freedoms. Finally, the Constitutional Court pointed out that it had no jurisdiction to review the lawfulness of acts in general, but it followed from the arguments of the applicant that, in essence, the issue had been raised with regards to the conformity of the challenged acts with the Law on Census and the Statistics Law (see paragraphs 33 and 34).

25. The Constitutional Court recalls that the subject matter of review of constitutionality in case *U-28/14* was the provision of a by-law, namely, the Rulebook Amending the Rulebook on Criteria, Procedure and Method of Allocation of International Permits for Cargo Transport to Domestic Carriers, which was issued by the Minister of Communications and Transport. As the request for review of the constitutionality related to the issues arising out of the Constitution of Bosnia and Herzegovina and International Agreements that guarantee the protection and exercise of human rights and constitutional principles, such as the principle of market economy, the right to property and non-discrimination, the Constitutional Court concluded that it had jurisdiction to review the constitutionality of the act of lower rank in that case (see, Constitutional Court, Decision on Admissibility and Merits, *U-28/14* of 26 November 2015, paragraph 15, available at www.ustavnisud.ba).

26. In addition, the Constitutional Court indicates that according to the established case law it created a standpoint that the issue related to a conflict of responsibilities between different levels of government in Bosnia and Herzegovina, as regards the constitutional responsibility to pass (also) by-laws, may give rise to the constitutional dispute within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. Given the provisions of Article VI(3) under which *the Constitutional Court shall uphold this Constitution* as well as the provision of the same Article reading, as relevant, … *including but not limited to…*, in respect of which the Constitutional Court considers also the provisions on division of responsibilities under Article III of the Constitution of Bosnia and Herzegovina, and in view of the constitutional principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina, the Constitutional Court finds that it may establish its jurisdiction to decide the constitutional dispute in which it is claimed that the by-law was passed by the body which had no jurisdiction under the Constitution of Bosnia and Herzegovina (see, the Constitutional Court, Decision *U-10/14* of 4 July 2014, paragraph 79). In addition, the Constitutional Court gave the interpretation in its case-law that a "dispute" could arise from ordinary and positive legal regulations but it must relate to certain issues regulated by the Constitution of Bosnia and Herzegovina itself (see, the Constitutional Court, Decision on Admissibility no. *U-12/08* of 30 January 2009, paragraph 7, published in the *Official Gazette of Bosnia and Herzegovina*, 62/09).

27. Furthermore, in case *U-1/09*, the applicant claimed that three by-laws and a decision, which the Government of the Federation of Bosnia and Herzegovina passed as implementing regulations enabling the enforcement of the Law on Settlement of Debts Arising from Old Foreign Currency Savings, based on which the State of Bosnia and Herzegovina had taken over liabilities and responsibility for payment of old foreign currency savings, were violated as well as the constitutional right to property and the principle of non-discrimination (see, Constitutional Court, Decision on Admissibility and Merits *U-1/09* of 20 May 2009, available on the website of the Constitutional Court

www.ustavnisud.ba). The Constitutional Court concluded that it was not competent to review the constitutionality within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina as the challenged acts did not represent general acts the constitutionality of which could by reviewed by the Constitutional Court within the meaning of the mentioned provision. In addition, the Constitutional Court did not see any reason for which the challenged acts could raise the issue of violation of human rights and fundamental freedoms.

28. In addition, in cases *U-4/05* and *U-7/07*, taking into account the wording of Article VI(3)(a) of the Constitution including but not limited to, the Constitutional Court concluded that it had jurisdiction to review the constitutionality of the acts of lower rank than laws where such acts raised an issue of violation of human rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina and European Convention (see, Constitutional Court, Decision on Admissibility and Merits *U-4/05* of 22 April 2005, published in the *Official Gazette of Bosnia and Herzegovina*, 32/05; Decision on Admissibility and Merits *U-7/05* of 2 December 2005, published in the *Official Gazette of Bosnia and Herzegovina,* 45/05). As regards the aforementioned decisions, the subject matter of the dispute related to the statutes of local self-management units (the City of Sarajevo, the Town of Istočno Sarajevo and the Town of Banja Luka). In both cases, the Constitutional Court concluded that the requests for review of the constitutionality related to the issues arising out of the Constitution of Bosnia and Herzegovina and International Agreements that guarantee the protection and exercise of human rights and constitutional principles, such as the principle of constituent status of peoples and the right to non-discrimination. It found that the Constitutional Court was competent to take decisions in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

29. The Constitutional Court further recalls that the applicant in case *U-3/04* requested, *inter alia*, a review of constitutionality of individual rulings on change of names of streets, bridges and parks on the territory of certain municipalities of the City of Sarajevo, which were issued by the municipal authorities, by referring to the principle of prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina (see, Constitutional Court, Decision on Admissibility and Merits *U-3/04* of 27 May 2005, published in the *Official Gazette of Bosnia and Herzegovina,* 58/05). Having dealt with that part of the request, the Constitutional Court concluded that it did not have jurisdiction to take a decision given the nature of the challenged acts, namely the rulings, as those acts, as the acts of executive power, did not represent general-normative acts. In fact, it does not represent regulations which could be subject to review of the constitutionality by the Constitutional Court under its jurisdiction referred to in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

30. In view of the above, it follows that the very fact that the challenged provisions are contained in the legal acts which are not explicitly enumerated in Article VI(3)(a) of the

Constitution of Bosnia and Herzegovina, is not an obstacle for the Constitutional Court to take a decision on the specific case. However, at the same time, it does not mean that every legal act, which is lower in rank than the law or the constitutions of the Entities, may be subject to review within the meaning of the responsibilities under the quoted constitutional provision. It also does not mean that any referral to the principles contained in the Constitution of Bosnia and Herzegovina necessarily results in the dispute over which only the Constitutional Court of Bosnia and Herzegovina is competent to take a decision (see, *mutatis mutandis*, amongst others the Decision *U-28/13*, paragraph 17).

31. As to the present case, the Constitutional Court first recalls that in its previous case law it has not reviewed the constitutionality of legal acts passed by the CEC, in accordance with the authority referred to in Article 2.9 of the Election Law. According to Article 2.9 of the Election Law, the CEC is an independent body that derives its authority and reports directly to the Parliamentary Assembly of Bosnia and Herzegovina, and paragraphs 1 to 17 of Article 2.9 of the Election Law prescribe the authority of the CEC (see relevant regulations). Thus, *inter alia*, paragraph 1, item 2 of Article 2.9 of the Election Law stipulates that the CEC is competent to pass administrative regulations for the implementation of the Election Law. Consequently, the Constitutional Court considers that the impugned Instruction on Amendments, by its nature, is in fact an administrative regulation passed by the CEC in order to implement the Election Law and to administer indirect elections for the bodies of authority in Bosnia and Herzegovina. In this regard, the Constitutional Court notes that Article 1 of the original text of the Instruction (*Official Gazette of Bosnia and Herzegovina*, 38/14) prescribes the subject matter of that legal act. Thus, paragraph 1 of Article 1 of the Instruction prescribes that the mentioned legal act governs the method and procedure of nomination, candidates vetting, verification of candidates' lists, election, establishment of the voting results, confirmation of the voting results and the issuance of certificates to persons who won mandates at the House of Peoples of the Parliamentary Assembly Bosnia and Herzegovina, the House of Peoples (the Parliament of the Federation of Bosnia and Herzegovina), the Council of Peoples of the Republika Srpska and the City Council of the City of Sarajevo and the Assembly of the City of East Sarajevo. Paragraph 2 of the same Article stipulates that the Instruction will govern the method and procedure of candidates vetting, verification of candidates' lists and the issuance of certificates to persons who won mandates of President and Vice-Presidents of the Federation of Bosnia and Herzegovina and the City Mayor of the City of Sarajevo, City of Istočno Sarajevo, City of Mostar and of the Brčko District of Bosnia and Herzegovina. Other provisions of the Instruction in fact elaborate in more detail the subject matter of the Instruction. The Constitutional Court also observes that the CEC, in Article 1 of the disputed Instruction on Amendments, determined the number of delegates to be elected from cantonal assemblies (see relevant regulations), as stated in sub-paragraphs from (a) to (j), by determining the preliminary number of delegates from the constituent peoples and from among the Others to the House of Peoples to be elected from the legislative bodies of the ten cantons of the Federation of Bosnia and

Herzegovina. In that context, the Constitutional Court especially emphasizes that the CEC has established a preliminary number of delegates, which points to the conclusion that this is a temporary provision, which should certainly be taken into account when considering the jurisdiction of the Constitutional Court.

32. The Constitutional Court notes that the applicants, in their request, refer to the provisions of Article I(2) and II(2) of the Constitution of Bosnia and Herzegovina, *i.e.* Article 3 of Protocol No. 1 to the European Convention. However, they failed to explain what constituted non-compliance with the mentioned provisions of the Constitution of Bosnia and Herzegovina and the European Convention in terms of the impugned Instruction on Amendments. Specifically, the Constitutional Court notes that the applicants essentially claimed that the disputed Instruction on Amendments was not passed in accordance with the principles of the Constitution of the Federation of Bosnia and Herzegovina and the Election Law. They requested that the Constitutional Court establish that the Instruction on Amendments is not in accordance with the aforementioned provisions of the Constitution of Bosnia and Herzegovina and Protocol no. 1 to the European Convention. In addition, they requested that the Constitutional Court order the CEC to determine the number of delegates to be elected from cantonal assemblies according to the 1991 census, referring to the Constitution of the Federation of Bosnia and Herzegovina (Article IX.7).

33. In view of the above, it follows that the applicants do not actually call into question the legitimacy of the CEC. Thus, taking into account the provision of Article 31 of the Rules of the Constitutional Court, the Constitutional Court is obliged to examine the existence of only those violations that are stated in the request. On the other hand, the Constitutional Court notes that the impugned Instruction does not explicitly indicate the population census that was used by the CEC in determining the preliminary number of delegates. This indicates the conclusion that the Constitutional Court should deal with the demographic structure of the population in Bosnia and Herzegovina in order to possibly examine this objection. This issue does not directly arise from the Constitution of Bosnia and Herzegovina.

34. As to the applicants' objection that the CEC, by passing the impugned Instruction on Amendments, failed to comply with the Decision of the Constitutional Court of Bosnia and Herzegovina *U-23/14* of 1 December 2016, the Constitutional Court recalls that it was established in the cited Decision, *inter alia*, that the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A (2), items a-j of the Election Law of Bosnia and Herzegovina were in contravention of Article I(2) of the Constitution of Bosnia and Herzegovina. For that reason the Constitutional Court ordered the Parliamentary Assembly of Bosnia and Herzegovina to harmonise, not later than six months from the day of delivery of the decision concerned, the cited provision with Article I(2) of the Constitution of Bosnia and Herzegovina. In addition, the Constitutional Court recalls

that the mentioned decision was transmitted to the Parliamentary Assembly of Bosnia and Herzegovina on 1 December 2016 and that the time limit for enforcement of that decision expired on 30 June 2017. In this regard, the Constitutional Court recalls the provisions of Article VI(5) of the Constitution of Bosnia and Herzegovina, stipulating that the decisions of the Constitutional Court are final and binding. The failure to enforce the final and binding decision of the Constitutional Court was precisely the reason for the Constitutional Court to pass a Ruling on 6 July 2017, establishing that the Parliamentary Assembly of Bosnia and Herzegovina failed to enforce the Constitutional Court's Decision *U-23/14* within the given time limit. Consequently, the Ruling was transmitted to the Prosecutor's Office of Bosnia and Herzegovina within the meaning of Article 72(6) of the Rules of the Constitutional Court.

35. In view of the above, it clearly follows that the Constitutional Court gave the order to the competent legislative authority of Bosnia and Herzegovina, and not to CEC, to harmonise the unconstitutional provisions of the Election Law. Thus, in such circumstances one cannot speak about a failure to enforce the decision of the Constitutional Court by the CEC, given that in the present case the CEC is not authorized to enforce the cited decision of the Constitutional Court.

36. Taking into account the aforementioned, the Constitutional Court holds that the impugned Instruction on Amendments is an implementing regulation, passed by the CEC in order to implement the Election Law in the process of administering indirect elections for the bodies of authority in Bosnia and Herzegovina. The impugned Instruction on Amendments determined the preliminary number of delegates to the House of Peoples to be elected from cantonal assemblies. Accordingly, and taking into account the fact that it concerns a temporary provision, the Constitutional Court concludes that in the present case it is not about a general act which, being the subject of review of constitutionality, falls under the jurisdiction of the Constitutional Court within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. Moreover, taking into account the content of the request in the case at hand and Article 31 of the Rules of the Constitutional Court, the Constitutional Court does not find any reason why the impugned implementing act of the CEC would raise an issue of violation of human rights and fundamental freedoms. Therefore, taking into account the mentioned circumstances and in particular the jurisprudence related to interpretation of its jurisdiction, the Constitutional Court concludes that it is not competent to decide on the review of constitutionality of the impugned act of the CEC within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

37. In view of the provision of Article 19(1)(a) of the Rules of the Constitutional Court, according to which a request shall be rejected as inadmissible if established that the Constitutional Court is not competent to take a decision, the Constitutional Court decided as set out in the enacting clause of this decision.

38. Given the decision of the Constitutional Court in the case at hand, it is not necessary to consider separately the applicants' request for an interim measure.

39. In terms of Article 43 of the Rules of the Constitutional Court, the Separate Dissenting Opinion of Vice-President Mirsad Ćeman is annexed to the present Decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of Vice-President Mirsad Ćeman

Although authorised applicant set out a motion for the issuance of the *Decision on Admissibility and Merits* by filing the request for the review of constitutionality of the Instruction on the Procedure for Administering Indirect Elections for the Bodies of Authority in Bosnia and Herzegovina under the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 91/18), the Constitutional Court dealt (only) with the admissibility of the case. It dealt *exclusively with the procedural aspect* of the case.

In fact, the Constitutional Court *rejected* the request lodged by 27 representatives in the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina *as inadmissible, since the Constitutional Court of Bosnia and Herzegovina is not competent to take a decision*.

The vital arguments for such decision the Court mainly found (by the majority of votes) in the following:

- the impugned Instruction of the Central Election Commission ("the CEC") is by-law serving as "implementation act";
- no reason why the impugned implementing act of the CEC would raise an issue of violation of human rights and fundamental freedoms has been observed;
- in its previous case-law, the Constitutional Court has not reviewed the constitutionality of legal acts passed by the CEC, in accordance with the authority referred to in Article 2.9 of the Election Law and in the present case it is not about a general act the constitutionality of which could by reviewed by the Constitutional Court within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina;
- it concerns a *temporary provision*, as the Constitutional Court concludes, given that the Instruction established only the *preliminary number of delegates* to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina to be elected from cantonal assemblies.

I could not agree with the position of the majority that the request is inadmissible for the following reasons:

- The Constitutional Court has already taken a categorical position that, whenever possible, it must interpret its jurisdiction in a manner that would allow the *widest possibility of recourse* regarding the consequences of violation of the rights safeguarded by the Constitution. Since the impugned provisions *essentially* relate to

the possibility and scope of individual and collective representation in the legislative body, in my opinion, the standard of *widest possibility* not only allows but also requires the *widest possible interpretation* of the provisions of the Constitution and the Rules of the Constitutional Court when the establishment of jurisdiction is concerned. To be precise, contrary to the position of majority that the Constitutional Court does not perceive a single reason for the impugned *implementing act* of the CEC to raise an issue of violation of human rights and fundamental freedoms. In my opinion, the impugned provisions are significantly affecting the realisation of human rights, fundamental freedoms and principles set out in the Constitution of Bosnia and Herzegovina, European Convention and International Agreements listed in Annex I to the Constitution of Bosnia and Herzegovina (the constituency of the peoples principle, prohibition of discrimination, etc.) in the election process.

- On the basis of referential jurisprudence of the Constitutional Court of Bosnia and Herzegovina (see for example paragraphs 24 to 30 of the reasoning of the Decision) it is visible that the Constitutional Court *in a number of similar cases* where the subject matter of review were *by-laws* based its competence evaluating the circumstances of the relevant case on a case-by-case basis (Statutes of local self-management units: the City of Sarajevo, the Town of Istočno Sarajevo, the Town of Banja Luka, the City of Mostar and the Rulebook on CEMT Permits; Decision on Validation of Correctness and Truthfulness of Data when Registering Residence on the Territory of RS, etc.) In this context, the issue inevitably arises as to what is the difference between the case *U-24/18* and those in which the Constitutional Court accepted its competence and entered into consideration of the merits. In my opinion, as the issue of competence is concerned, there is *no essential difference*.
- It is of importance to recall that the Constitutional Court (for example in the Decision *U-19/14*) gave its definition of laws and by-laws under which "the laws are general legal acts of the state passed by its legislative body in the predetermined legal procedure while by-laws are acts of lesser legal force and serve for elaboration of certain legal issues". However, it is obvious that in the particular case the impugned norm in the Instruction does not "serve for elaboration of certain legal issues" but the particular norm which has already been contained in the law it was allowed that as a *"legal matter" it is from time to time made concrete* by the CEC in an important segment thereof, i.e. to calculate and determine a number of mandates/delegates *on the basis of variable statistics*. However, that does not deteriorate the nature of the given norm in the standard hierarchy of regulations. *Ratio legis* of such approach, thus, is apparently that the legislator pragmatically opted not to commit itself to deal with it as (allegedly) "technical issue" in otherwise very formal and complex legislative procedure.
- As the Parliamentary Assembly of Bosnia and Herzegovina as legislator authorised the CEC to "determine, after each new census, (only – my remark) the number of

delegates elected from each constituent people and from the group of Others…" by its act (not specifying the nature of that act), in my opinion, that matter was and remains the "legal matter". Nevertheless, in the Decision *U-10/14*, where it accepted its competence to decide, the Constitutional Court notes that "the impugned decision does not elaborate on the existing State law but rather supplement it by regulating additional requirements for…". Consequently, the Instruction issued by the CEC, although by its form the implementing act ("administrative regulation for implementation of the Election Law", as qualified by the Constitutional Court) in this context, *in its essence, is the "law" at least in the part relating to the impugned provisions*. Therefore, the Constitutional Court, as the institution upholding the Constitution, is competent to review the constitutionality of all acts, and this Instruction as well, irrespective of its author, if the issue is raised in accordance with any of the responsibilities of the Constitutional Court under Article VI(3) of the Constitution of Bosnia and Herzegovina.

And finally, the fact that (if that is so) the particular case concerns the provisions of "temporary nature" cannot be of any influence whatsoever to the admissibility as laws or their individual provisions, as generally known in theory and practice, may have and often have the "temporary nature". This, with other prerequisites, in itself does not represent an obstacle for the review of their compatibility with the Constitution.

At the end, I hold it *necessary to especially underline* that, in principle, I am not against the *caution and restraint*, which the Constitutional Court has evidently shown in such, or similar cases to this moment (by accepting or not accepting its jurisdiction on the case-by-case basis). However, I am always for this institution to face boldly the challenges of its role, jurisdiction and mission. That is so, amongst other issues, because, notwithstanding the occasional denials, the Constitutional Court of Bosnia and Herzegovina, as the upholder of the Constitution, is the only "address" which, *in due course*, has to secure the constitutional protection and functioning of the constitutional order and system in whole.

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Case No. U-16/18

DECISION ON ADMISSIBILITY AND MERITS

Request of twelve representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina for review of the constitutionality of Article 395 (1) of the Civil Procedure Code of the Republika Srpska (*Official Gazette of the Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13) in the part relating to "the Public Attorney's Office"

Decision of 28 March 2019

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić, and

Mr. Giovanni Grasso

Having deliberated on the request filed by **twelve representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina**, in the Case no. **U-16/18**, at its session held on 28 March 2019 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

Deciding on the request filed by twelve representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina for review of the constitutionality of Article 395 (1) of the Civil Procedure Code of the Republika Srpska (*Official Gazette of the Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13) in the part relating to "the Public Attorney's Office", as well as Article 395 of the Civil Procedure Code of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina*, 58/03, 73/05, 19/06 and 98/15),

it is hereby established that Article 395 (1) of the Civil Procedure Code of the Republika Srpska (*Official Gazette of the Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13) in the part relating to "the Public Attorney's Office" and Article 395 of the Civil Procedure Code of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina*, 58/03, 73/05, 19/06 and 98/15) are in conformity with Articles I(2) and I(4) of the Constitution of Bosnia and Herzegovina,

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.

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 26 July 2018, twelve representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina ("the applicants"), represented by Mr. Nedim Ademović, a lawyer practicing in Sarajevo, filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the constitutionality of Article 395 (1) of the Civil Procedure Code of the Republika Srpska (*Official Gazette of the Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13) in the part relating to "the Public Attorney's Office" ("the challenged provision"). The Constitutional Court has registered this request under no. *U-16/18*.

2. Also on 26 July 2018, the applicants filed a request with the Constitutional Court for review of the constitutionality of Article 395 of the Civil Procedure Code of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina*, 53/03, 73/05, 19/06, 22/06 and 98/15; hereinafter: the challenged provision and/or the challenged provisions). The Constitutional Court has registered the mentioned request under no. *U-17/18*.

II. Procedure before the Constitutional Court

3. Pursuant to Article 32(1) of the Rules of the Constitutional Court, the Constitutional Court adopted a decision to merge the mentioned requests, concerning which a single procedure would be conducted and a single decision would be made under no. *U-16/18*.

4. Pursuant to Article 23 of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska ("the National Assembly") was requested on 20 July 2018 to submit its reply to the request.

5. Pursuant to Article 23 of the Rules of the Constitutional Court, the House of Representatives and the House of Peoples of the Parliament of the Federation of Bosnia

and Herzegovina were requested on 13 August 2018 to submit their respective replies to the request.

6. The House of Representatives and the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina submitted their replies on 13 and 17 September 2018 respectively.

7. The National Assembly failed to submit the reply within the given deadline.

III. Request

a) Allegations stated in the request

As to the request made in Case no. U-16/18

8. The applicants allege that the challenged provision (its part relating to "the body of the Public Attorney's Office of the Republika Srpska") of the Civil Procedure Code of the Republika Srpska constitutes a legal basis in all proceedings conducted under the provisions of a civil procedure concerning the collection of the payment of the costs of proceedings by the relevant public attorney's office representing public legal entities. Therefore, this legal basis is applied in all procedures conducted under the rules of civil procedure in which the public attorney's office represents the Republika Srpska, local self-government units, their bodies and organizations, and other bodies and organizations not having capacity of a legal person and not registered in the court register, which are funded from the budget of the Republika Srpska.

9. The applicants allege that the challenged provision constitutes a general norm (*lex generalis*) on the basis of which the relevant courts may award the costs of proceedings payable to the public attorney's office by an opposing litigant under the official Tariff on Fees for Lawyers' Services (*Official Gazette of the Republika Srpska*, 68/05; "the Lawyers' Tariff"), which is currently in effect in the Republika Srpska. Whether the costs will be awarded or not, and if yes, to what extent, depends on every specific situation in a civil procedure, whereby the applicants refer to the provisions of Article 383 *et seq.* of the Civil Procedure Code of the Republika Srpska. Accordingly, for example, "the general principle is prescribed in Article 386 paragraph 1 of the Civil Procedure Code of the Republika Srpska, which orders a party who loses the dispute in entirety to reimburse the costs of proceedings to the competent public attorney's office". The following provisions prescribe the principle that a party who has explicitly generated certain costs, which were not necessary for the proceedings, covers on its own such costs irrespective of the success in the litigation (Article 387 paragraph 1 and/or Article 388 of the Civil Procedure Code of the Republika Srpska). Also, the courts rely on the principle of fairness and justification of the costs on a case-by-case basis. Article 387 paragraph 2 of the Civil Procedure Code of the Republika Srpska prescribes that the costs of the

proceedings will be determined according to the official lawyers' tariff if applied to the persons participating in the proceedings.

10. However, the applicants find that "the challenged part" (relating to the Public Attorney's Office) of the provision of Article 395 of the Civil Procedure Code is unconstitutional, and indicate that the request for review of the constitutionality aims at proving that "the institutions of public attorney's office cannot, as a matter of principle, charge the costs of proceedings under the Lawyers' Tariff". The applicants assert that it is absolutely unconstitutional and inadmissible for courts to award to institutions of public attorney's office the costs of civil proceedings under the Lawyers' Tariff. According to the opinion of the applicants, the challenged provision (in the part relating to the Public Attorney's Office) is, in general, as a concept, contrary to the principle of "the legal state" referred to in Article I(2) and the principle of a single market under Article I(4) of the Constitution of Bosnia and Herzegovina, and Articles II(3)(e) and II(3)(k) of the Constitution of Bosnia and Herzegovina, *i.e.* Article 6 of the European Convention and Article 1 of Protocol No. 1 to the European Convention. In support of their assertions the applicants refer to the case-law of the European Court of Human Rights ("the European Court"), which established that a party's right to charge or the obligation to pay the costs of the proceedings falls within the scope of Article 6 of the European Convention and Article 1 of Protocol No. 1 to the European Convention.

11. Furthermore, the applicants reason why the compensation and fees to lawyers for representation may not be systemically interpreted as a compensation and fees to public attorneys for representation. The applicants point to the basic features of an autonomous, professional lawyers' business and, in that respect, to the term of the provision of "lawyers' services", which the official Lawyers' Tariff is connected to. To be "a lawyer" means to be registered with the competent body (competent bar) as a physical or legal person (entrepreneur) providing (legal) services in legal transactions. Article 2 paragraph 1 of the Law on Attorney Profession of the Republika Srpska (*Official Gazette of the Republika Srpska*, no. 80/15) prescribes the law practice as "an independent and autonomous service of providing legal assistance to physical and legal persons", while Article 3 explains what the service of providing legal assistance entails. Concerning the legal services in legal transaction, a lawyer receives "a fee and compensation" as prescribed under the Lawyers' Tariff. Further, the applicants point to all the costs/expenditures that a lawyer may incur (salary with paid contributions, the tax on the profit, the tax for the firm, membership in the Bar, as well as other costs).

12. Furthermore, the applicants point to the important elements of the functioning of the public attorney's office body, representing the Republika Srpska, local self-government units, their bodies and organizations, as well as other bodies and organizations not having capacity of a legal person and not registered in a court register, which are funded from the budget of the Republika Srpska, before courts and other bodies in Bosnia and Herzegovina and abroad, under the conditions prescribed by the Law on Public Attorney's Office of

the Republika Srpska and other relevant decisions. The applicants cite the provisions of the Law on Public Attorney's Office of the Republika Srpska (Article 1, Article 21 paragraph 3, Article 22 paragraphs 1, 2, 3 and 4, and Article 37 paragraphs 1 and 3) and conclude that it is a "public body" as part of the overall public authority. Based on the regulations governing the institution of the Public Attorney's Office in the Republika Srpska, it follows that the public attorney's office is a body funded from the budget. Public attorneys accomplish their objective for which they are appointed within their employment relationship. Namely, the rights of employees arising from employment relationship derive from the rights that civil servants have. They receive compensation for their work, *i.e.* gross salary, which is financed from the public funds of the competent public legal entity, *i.e.* from the budget. In other words, public attorneys carry out work as part of their employment relationship, for which they are elected to such positions, and they are financed by the state, *i.e.* finally by the taxpayers via indirect or direct taxes. Therefore, public attorneys, formally speaking and *per definitionem*, do not provide legal services. In doing so, since they do not provide legal services, public attorneys may not charge fees and compensations for such services within the meaning of lawyers' fees and compensations, accordingly, they may not generate profit for the state. According to the position of the applicants, the absurdity of this concept is in the fact that fees and compensations that public attorneys receive go into the state budget.

13. The applicants point that the objective of fees and compensations for attorney's services is not to compensate for effective costs of a court procedure, but to remunerate adequately attorney's services, irrespective of the fact that these costs may be understood to be part of the overall costs of a procedure. In addition, they point out that the institution of a public attorney's office do not pay anything out of the fee and compensation awarded to them in the way that attorneys do. Therefore, the purpose of Lawyers' Tariff and the collection of fees and compensations for the work in the form of the costs of a civil procedure is completely lost if applied to public attorney's offices. The state is forbidden to engage in "the provision of services", as the state may engage in the provision of services exclusively and solely as part of a private legal administration. Accordingly, a fee and compensation for the work of lawyers is a fee and compensation for "legal services" and they may not be identified with the compensation for the costs of proceedings that the state may incur. The applicants allege that the provision of services is exclusively a matter of a free market within the meaning of Article I(4) of the Constitution of Bosnia and Herzegovina. Therefore, a fee and compensation for the work of lawyers, which is a fee and compensation for legal services, may not be identified with the compensation for the costs of proceedings that the state may incur.

14. On the contrary, as further stated, if the position is accepted that public attorneys may provide the services of representation for which they would generate revenues for the state as lawyers do, then the state must not monopolize the market of these services, rather it has to offer the representation of the state, in addition to public attorney's offices

bodies, also to other potential services providers who meet the necessary qualifications via the mechanism of public procurement of services. Lawyers in all such proceedings concerning which the relevant laws prescribe public attorneys as legal representatives cannot represent the state. Therefore, according to the applicants, the state has monopolized the position of a public attorney. If the state, alongside regular salaries paid to public attorneys, which are originally based on the collection of civil taxes, collects the revenue from the representation of the state from the opponent party in a civil procedure, then such a legal representation services market has to be opened to other potential services providers. However, in the opinion of the applicants, that is contrary to the idea and the concept of public attorney's offices and the overall role of the state in the procedures against private, physical and legal persons. Such an idea completely derogates the basic principles of a democratic and legal state organization within the meaning of Article I(2) of the Constitution of Bosnia and Herzegovina. If the opponent party in a civil procedure must pay for the services of representation of the state by the public attorneys in civil procedures, who receive the compensation for the work from the public revenues, then the monopolization of the transaction of legal representation services in the hands of public attorney's offices constitutes unconstitutional monopolization of the market, which is contrary to the idea of the liberalization of markets and the free flow of services within the meaning of Article I(4) of the Constitution of Bosnia and Herzegovina. Moreover, such a function of public attorney's offices would not be "public and legal" any longer, but it would interfere with the sphere of operation of "private legal administration", and the monopolization of the private legal administration is contrary to the idea of a democratic and legal position of the state in the capacity of a public authority ("service for citizens").

15. This conclusion, in the opinion of the applicants, is compatible with the European method of regulation of this area. Namely, such states that allow the state to charge the costs of the representation from the opponent party must open the market to other legal representation services providers. Such states that restrict by law the representation of the state to the bodies of public attorney's offices or similar bodies may not charge the services of representation under the law, as the state, *i.e.* the tax payers in the end already pay those persons for their work.

16. In summarizing their request, the applicants allege that the challenged portion of Article 395 of the Civil Procedure Code is conceptually contrary to the democratic and legal position of the state in the capacity of a public authority for at least three relevant reasons. First and foremost, the tariff concept of "fees/compensations – lawyer" is not applicable to the concept of "fees/compensations – public attorney", due to the nature of "fees and compensations" in the system of practicing lawyers' profession and providing lawyer's services. Next, the charging of fees/compensations for legal services by persons who are employed is contrary to the relevant provisions of work-related and tax-related legislation. Finally, if the idea persists that public attorneys may provide legal services in exchange for fees and compensations, then the portion of the challenged provision,

in connection with the provisions of the relevant Law on Public Attorney's Office of the Republika Srpska, which monopolize this service in the Republika Srpska via the mechanism of "legal representatives" exclusively to public attorneys, is contrary to the idea of the liberal market and the prohibition of monopoly. The state, in that case, would have to open the market via the mechanism of the public procurement of services to which other services providers who meet the requirements may apply. However, that would be an exception to the continental legal system and the central European legal and state organization that Bosnia and Herzegovina belongs to.

17. In addition, the applicants pointed to the case-law of the European Court of Human Rights in the case of *Cindrić and Bešlić v. Croatia*, indicating that in the mentioned decision the European Court of Human Rights "objected [...] to the calculation of the costs of representation under the lawyer' tariff" because the opponent party, the Republic of Croatia, was represented by the State Attorney's Office. Considering the conclusion of the European Court of Human Rights in the mentioned decision, the applicants emphasize also that the connection of the lawyers' tariff with public attorneys makes it impossible for the judicial authority to adjudicate fairly in connection with the costs of proceedings. It was emphasized that the challenged provision relating to public attorney's office makes it impossible for the courts to use their margin of appreciation when reaching a decision on the costs of procedure, for when compared to the basic principle of the compensation for the costs under Article 386(1) (the loser pays the costs), it "ties the hands of the competent court to apply the test of fairness". In this part, the applicants point to the Decision of the Constitutional Court in the Case no. *AP-1101/17*, and believe that citizens, facing the high costs of court proceedings, which include unconstitutional collection of fees and compensations for public attorneys, are directly discouraged even to try to pursue their legal interest. That "*de facto* transforms the costs of proceedings, particularly "fees and compensations" for public attorneys, into civil law monetary sanctions and unconstitutional enrichment of the state".

18. The applicants proposed that, following the procedure of assessment of the request, the Constitutional Court of Bosnia and Herzegovina grant the request for review of the constitutionality of the challenged provision of Article 395(1) of the Civil Procedure Code in the part concerning the Public Attorney's Office and that it be established that the challenged portion of the mentioned Article is contrary to Article I(2) and Article I(4) of the Constitution of Bosnia and Herzegovina, 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.

As to the request made in Case no. U-17/18

19. The applicants claim that the provision of Article 395 of the Civil Procedure Code of the Federation of Bosnia and Herzegovina is not in conformity with Article I(2) and Article I(4) of the Constitution of Bosnia and Herzegovina, Article II(3)(e) and Article

II(3)(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. The applicants emphasize that, in relation to the provision of Article 395 of the Civil Procedure Code of the Federation of Bosnia and Herzegovina, they remain supportive of the same reasons they pointed out in their request no. U-16/18.

20. In addition, as to the Civil Procedure Code of the Federation of Bosnia and Herzegovina, it is stated that Article 387(2) of the mentioned law prescribes that the costs of proceedings will be determined in accordance with the official Lawyers' Tariff if it is applicable to persons participating in the proceedings. In the Federation of Bosnia and Herzegovina, the Tariff on Fees for Lawyers' Services or ("the Lawyers' Tariff") from 2004 is presently in force, with Article 31(5) of the Law on the Attorney Profession of the Federation of Bosnia and Herzegovina being also relevant, which prescribes a restriction on the possibility of charging a fee up to the level of the net average salary in the Federation of BiH for each legal action, if that fee under the official Lawyers' Tariff would be higher than an average salary in the Federation of Bosnia and Herzegovina. Thus, the costs before "courts or other authorities" are limited to the amount of the average salary in the Federation of Bosnia and Herzegovina. Further it was stated that the same system of charging a fee and reimbursement for the work of lawyers, which is described in the preceding paragraph, also applies to the institutions of a public attorney's office by the force of the challenged provision (of Article 395 of the Civil Procedure Code of the Federation of Bosnia and Herzegovina).

21. The Institution of the Public Attorney's Office, as further mentioned, provides legal counselling and legal representation of public legal entities, namely, the Federation of Bosnia and Herzegovina, cantons, municipalities and other public legal entities before courts and other authorities in Bosnia and Herzegovina and abroad, under the conditions prescribed by relevant decisions and laws on public attorney's offices. The challenged provision relates to the bodies of all public attorney's offices in civil proceedings in the Federation of Bosnia and Herzegovina. The applicants indicate that the concept of normative frameworks of all regulations for all bodies of public attorney's offices is identical or similar. Accordingly, they cite as example the provisions of Articles 1, 4, 21, 40, 41 and 42 of the Law on Public Attorney's Office of the Federation of Bosnia and Herzegovina. According to the regulations governing the umbrella Institution of the Public Attorney's Office in the Federation of Bosnia and Herzegovina, the Public Attorney's Office is a body financed from the budget. The applicants indicate that public attorneys achieve their goal for which they are appointed to their positions through their employment relations, to receive compensation for their work, *i.e.* gross salary, financed from the budget of the competent public legal entity, *i.e.* from the budget. In other words, as further indicated, public attorneys carry out their work within the scope of their employment relations for which they are appointed to their positions and they are financed by the State, *i.e.* ultimately by taxpayers through indirect or direct taxes. Since

public attorneys do not provide "legal services", which lawyers do, in the opinion of the applicants, public attorneys cannot charge fees and compensations for those services in terms of "lawyers' fees and compensations" and, consequently, they cannot generate "profit" to the State.

22. Finally, the Constitutional Court recalls that the Constitutional Court of the Republika Srpska adopted Ruling no. *U-3/13*, of 23 December 2013, refusing the initiative for review of the constitutionality of Article 395 of the Civil Procedure Code of the Republika Srpska. In the mentioned decision, the Constitutional Court of the Republika Srpska stated that, by considering the constitutional provisions, it established that they contain the power of the National Assembly of the Republika Srpska to govern the organization, competence and work of state authorities, and to regulate by law the rules of procedure of ordinary courts making decisions in civil law matters. The mentioned powers imply the power of the legislator to govern, within the scope of regulating the rules of civil procedure, the area relating to the costs incurred by the conduct thereof.

b) Reply to the request

Reply to the request no. U-17/18

23. The Constitutional Committee of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina states in its reply that the reply to the request of the applicants is undergoing coordination before the House of Peoples and the House of Representatives, and that the specific reply will be provided by the authorized representatives of the Parliament of the Federation of Bosnia and Herzegovina once a public hearing has been scheduled before the Constitutional Court.

24. The reply of the Chairwoman of the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina reads that in accordance with the provisions of the Rulebook on the Work of the House of Peoples the respective request was forwarded to the competent bodies of the House of Peoples, namely to the Legislative-Legal Committee and the Committee on Constitutional Affairs, and to the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina as well as to the Government of the Federation of Bosnia and Herzegovina to prepare the reply. Next, it is stated that only the Government of the Federation of Bosnia and Herzegovina submitted its reply within the given deadline on the respective request of 13 September 2018. The mentioned opinion of the Government of the Federation of Bosnia and Herzegovina was delivered to the Constitutional Court.

25. In the opinion of the Government of the Federation of Bosnia and Herzegovina it was indicated that the responsibility of the Public Attorney's Office of the Federation of Bosnia and Herzegovina was laid down in the Law on Public Attorney's Office of the Federation of Bosnia and Herzegovina, which clearly stipulated that the Public

Attorney's Office of the Federation of Bosnia and Herzegovina was a special autonomous body undertaking measures and legal instruments for the purpose of legal protection of property and property-related interests of the Federation of Bosnia and Herzegovina in accordance with the mentioned law (Article 1 of the Law). Also, it is mentioned that the Public Attorney's Office of the Federation of Bosnia and Herzegovina undertakes legal actions and legal instruments for the purpose of the protection of the ownership of the Federation of Bosnia and Herzegovina before the courts and other competent authorities, when authorized to do so by the FBiH law. In undertaking legal actions and legal instruments referred to in paragraph 1 of Article 1 of the mentioned law, as well as in other cases when authorized to do so by the FBiH law, the Public Attorney's Office of the Federation of Bosnia and Herzegovina has a position and rights of a party to the proceedings. Further, it is mentioned that Article 42 of the Law on Public Attorney's Office of the Federation of Bosnia and Herzegovina prescribes that actions undertaken in the representation before the courts and other bodies, the Public Attorney's Office of the Federation of Bosnia and Herzegovina is entitled to compensation of the costs under the Lawyers' Tariff. The funds earned during the representation by the Public Attorney's Office of the Federation of Bosnia and Herzegovina are the revenue of the budget of the Federation of Bosnia and Herzegovina. Article 395 of the Civil Procedure Code of the Federation of Bosnia and Herzegovina, which the applicants deem to be unconstitutional, prescribes that the provisions on the costs are applied to the parties represented by the public attorney's office. In that case, the costs of proceedings cover the amount that a party would be awarded in respect of the fee for a lawyer. This is to say that the respective norm is fully in compliance with the provision of Article 42 of the Law on the Public Attorney's Office of the Federation of Bosnia and Herzegovina, which gives the legal basis for the compensation of the costs to the public attorney in a court procedure. Also, the mentioned provision should be viewed in the context of the provision of Article 383 of the Civil Procedure Code, which reads that the litigation costs are made up of the expenditures incurred in the course or in respect of the proceedings and that the litigation costs include also the fee for the work of a lawyer and other persons whom the law recognises the right to receive compensation. This is to say that when conducting court procedures the existence of certain expenditures is inevitable, which the court establishes in every separate proceeding, irrespective of the parties to the proceedings. The Public Attorney's Office is an autonomous body set up under the law, which basic function is to protect the property and property-related interests of the Federation of Bosnia and Herzegovina, which implies participation in court procedures. The Public Attorney's Office, as a party to the proceedings, exercises equal rights as other parties to the proceedings, including the right to compensation of costs. It is evident that this is the right established on the basis of the law, which prescribes the core responsibility of the Public Attorney's Office of the Federation of Bosnia and Herzegovina, and the basic right of every party to the proceedings, including the state itself, is to decide who will look after the protection of its rights and interests, which is

the reason why the allegations made by the applicants are uncorroborated in so far as they suggest that the provision of Article 395 of the Civil Procedure Code, in connection with the compensation of the costs to public attorneys, monopolizes the services in the Federation of Bosnia and Herzegovina contrary to the idea of a liberal market and the prohibition of monopoly, as alleged by the applicants. Also, as further alleged, it should be mentioned that the said provision in the Federation of Bosnia and Herzegovina was identical in the original text of the law passed in 2003, then it was rectified in 2006 and amended again in 2015, when the Law on Amendments to the Civil Procedure Code was passed in the text harmonized with the legal text at the state level and the legal text in the Republika Srpska. It is proposed that the respective request be dismissed.

IV. Relevant Laws

26. The **Civil Procedure Code of Republika Srpska** (*Official Gazette of the Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 105/08-O.U.S., 45/09-O.U.S., 49/09 and 61/13).

For the purposes of the present Decision, the text of the relevant regulations published in official gazettes is used, as it has not been published in all official languages and alphabets.

For the purposes of the present Decision, an unofficial consolidated text of the relevant provisions of the Civil Procedure Code of Republika Srpska (*Official Gazette of Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 105/08-O.U.S., 45/09-O.U.S., 49/09 and 61/13), made in the Constitutional Court, is used and, as relevant, reads:

Chapter XXIV

COSTS OF PROCEEDINGS

1. Litigation costs

Article 383

Litigation costs shall include expenses incurred during the proceedings or in connection therewith.

Litigation costs shall also include the remuneration for work of attorneys and other persons whose right to remuneration is envisaged.

Article 386

The party that has lost the litigation in its entirety shall cover the winning party's costs.

If the party was partially successful, the court may, depending on the success in the proceedings, order each party to cover its own costs, or one party to cover a proportionate part of other party's costs.

The court may decide that a party covers all the costs of the adverse party, if the adverse party failed to succeed in a small part of his/her claim only and no separate costs were incurred in connection to that part of the claim.

On the basis of the outcome of the presentation of evidence, the court shall decide if the costs referred to in Article 385 paragraph 4 of this Law shall be covered by one or both parties or the court.

Article 387

When deciding on the costs that are to be compensated to the party, the court shall take into account only the costs necessary for conducting the litigation. When deciding which costs have been necessary and the amount thereof, the court shall evaluate all circumstances.

If there is a prescribed tariff for remuneration for the work of attorneys or for other costs, the costs shall be measured up according to the tariff.

Article 394

If an ombudsman participates in a dispute as a party, s/he shall be granted right to reimbursement of costs in accordance with provisions of this Law, but not the right to remuneration.

Article 395

Provisions on expenses shall apply to the parties represented by the Public Attorney's Office and Free Legal Aide Centre.

Expenses referred to in paragraph 1 of this Article shall include expenses in accordance with the Tariff on Fees for Lawyers Services in Republika Srpska.

Article 396

At the specific request of the party, the court shall decide on the reimbursement of costs, without holding the hearing.

The party shall be obliged to specify the costs in the request for the reimbursement. The request shall be filed not later than upon the completion of the hearing, which precedes the ruling on costs. If the ruling is to be reached without a hearing, the party shall be obliged to include the claim for reimbursement of costs in the motion to be decided by the court.

The court shall decide on the reimbursement of costs in the judgment or decision, which concludes the proceedings before that court.

In the course of proceedings, the court shall decide on the reimbursement of costs by the separate decision only when the right to the reimbursement of costs does not depend on the ruling on the main matter.

In the case referred to in Article 390 of this Law, if the withdrawal of the complaint or the express waiver of a legal remedy has not been conducted at the hearing, the

request for reimbursement of costs may be filed within fifteen (15) days upon the receipt of the notification on the waiver or the withdrawal of claim.

3. Exception from payment of costs

Article 400

The court shall exempt a party from paying the costs of the proceedings if, according to his/her general financial situation, the party cannot compensate the costs without jeopardizing the necessary support of him/herself and his/her family.

Exemption from paying the costs of the proceedings shall include exemption from paying court taxes and depositing advance payment for the costs of witnesses, experts, on-the-spot investigation, translation and interpretation and court advertisements. The court may exempt a party from paying all or a part of costs of the proceedings.

27. The **Law on the Public Attorney's Office of the Republika Srpska** (*Official Gazette of the Republika Srpska*, 7/18), in the relevant part reads:

Subject-matter of the Law

Article 1

This Law shall regulate the organization, jurisdiction, scope and manner of work of the Attorney's Office of Republika Srpska ("the Attorney's Office"), manner of representing property rights and interests of the Republika Srpska, local self-government units and other entities represented by the Attorney's Office, the manner of appointment, rights, obligations and responsibility of the Attorney of the Republika Srpska, Deputy Attorney of the Republika Srpska and position of other employees of the Attorney's Office and other issues relevant for the work of the Attorney's Office.

Jurisdiction of the Attorney's Office

Article 13

(1) The Attorney's Office is an autonomous and independent body authorized to undertake legal actions for the protection and exercising of the property rights and interests of the represented entities in the proceedings before courts and other authorised bodies and undertakes other tasks as provided for by law.

(2) The Attorney's Office shall assume representation in judicial, administrative and other proceedings.

(3) The Attorney's Office shall have the right and obligation to initiate or lodge a motion for the initiation of proceedings or shall involve in the proceedings before the court or other authorised body for the protection of property rights and interests of the represented entities in the cases as provided for by the law, when requested in writing by the entities it represents or when it finds, in some other way, that it is necessary.

(4) The Attorney's Office shall follow and scrutinise occurrences, legal issues and problems relevant to the performance of its competences, property of represented

entities, amendments to the laws and other regulations, and shall inform the Government and other authorised bodies thereof and shall propose measures for the protection of represented entities' property and prevention of socially harmful occurrences.

(5) The Attorney's Office shall have the obligation to institute the proceedings for review of constitutionality of laws and legality of other regulations and general acts before the Constitutional Court subject to the evaluation that the property rights and interests of represented entities have been violated.

(6) The Attorney's Office shall be obligated to request the annulment or repeal of decisions and other acts which are in violation of property rights of represented subjects.

(7) In the procedures of establishing criminal liability for the criminal offences, subject to the existence of reasonable suspicion that a substantive damage for the represented subject's property occurred, the Attorney's Office shall participate in the role of representative of the damaged upon a motion of the competent body or in other cases where it finds it is necessary.

Funds for work and expenses for the representation by the Attorney's Office

Article 37

(1) Funds for the work of the Attorney's Office shall be secured in the budget of the Republika Srpska and shall be separately presented in the budget and the system of the Republika Srpska Treasury.

(2) The funds shall be secured in such manner that the amount and time of transmission shall allow the Attorney's Office to meet its financial obligations to the amount planed in the budget and in accordance with the available funds.

(3) The costs of the Attorney's Office representation shall be calculated according to the Tariff on Fees for Lawyer Services and shall represent the revenues of the Republika Srpska budget.

(4) As an exception from paragraph 3 of this Article, if the local self-government unit paid out from its fund for a part of costs of proceedings that are included in the costs of representation, such assets shall be the revenues of the budget of that local self-government unit.

28. The **Law on Attorney Profession of the Republika Srpska** (*Official Gazette of the Republika Srpska*, 80/15), as relevant, reads:

CHAPTER I
BASIC PROVISIONS

Article 1

This Law regulates the attorney's profession, conditions for practice of law, forms of attorneys practice, rights, obligations and responsibilities of attorneys, judicial

associates and interns and the organisation and work of the Bar Association of Republika Srpska (hereinafter: Bar Association).

Article 2

The practice of law shall be an independent practice of providing legal assistance to natural and legal persons.

[...]

Article 3

Providing legal assistance referred to in Article 2 paragraph 1 of this Law shall include:

1) Provision of oral and written legal counsel and opinions;

2) Preparation of lawsuits, motions and other initial submissions, requests, appeals, legal remedies, applications and other submissions,

3) Preparation of contracts, wills, settlements, statements, general and individual acts and other documents.

4) Representation and defence of natural and legal persons,

5) Mediation for the conclusion of legal transaction or peaceful settlement of dispute and disputable relations and

6) Provision of other activities of legal assistance on behalf and for the local or foreign natural or legal person, based on which the rights are exercised, freedoms and other interests protected.

29. The **Tariff on Fees for Lawyer Services** (*Official Gazette of the Republika Srpska*, 68/05), as relevant, reads:

Article 1

Tariff on Fees for Lawyer Services (hereinafter: Tariff) shall determine the amount of fee the attorney is entitled to in rendering the attorney services and amount of compensation of expenses pertaining to that work, unless determined otherwise by a written contract between the attorney and his/her client.

30. The **Civil Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 53/03, 73/05, 19/06 and 98/15).

For the purposes of the present Decision, an unofficial consolidated text of the relevant provisions of the Civil Procedure Code of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina*, 53/03, 73/05, 19/06 and 98/15), made in the Constitutional Court, is used and, as relevant, reads:

Article 383

(1) Litigation costs shall include expenses incurred during the proceedings or in connection therewith.

(2) Litigation costs shall also include the remuneration for work of attorneys and other persons whose right to remuneration is envisaged.

Article 386 paragraph 1

(1) The party that has lost the litigation in its entirety shall cover the winning party's costs.

(...)

Article 387

(1) When deciding on the costs which are to be compensated to the party, the court shall take into account only the costs necessary for conducting the litigation. When deciding which costs have been necessary and the amount thereof, the court shall evaluate all circumstances.

(2) If there is a prescribed tariff for remuneration for the work of attorneys or for other costs, the costs shall be measured up according to the tariff.

Article 394

If an ombudsman participates in a dispute as a party, s/he shall be granted right to reimbursement of costs in accordance with provisions of this Law, but not the right to remuneration.

Article 395

Provisions on expenses shall apply to the parties represented by the Public Attorney's Office.

In such cases, the costs of the litigation shall include the amount that could be granted to the party as the remuneration for attorney.

Article 400

(1) The court shall exempt a party from paying the costs of the proceedings if, according to his/her general financial situation, the party cannot compensate the costs without jeopardizing the necessary support of him/herself and his/her family.

(2) Exemption from paying the costs of the proceedings shall include exemption from paying court taxes and depositing advance payment for the costs of witnesses, experts, on-the-spot investigation, translation and interpretation and court advertisements. The court may exempt a party from paying all or a part of costs of the proceedings.

31. The **Law on Federal Public Attorney's Office** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 2/95, 12/98, 18/00 and 61/06).

For the purposes of the present Decision, an unofficial consolidated text of the relevant provisions of the Law on Federal Public Attorney's Office (*Official Gazette of the Federation of Bosnia and Herzegovina*, 2/95, 12/98, 18/00 and 61/06), made in the Constitutional Court, is used and, as relevant, reads:

Article 1

The Federal Attorney's Office is an autonomous body undertaking measures and legal instruments for the purpose of legal protection of property and property-related interests of the Federation of Bosnia and Herzegovina (hereinafter: Federation) in accordance with this Law.

The Federal Attorney's Office (hereinafter: Federal Attorney's Office) carries out other duties as specified by the federal law in addition to property and property interests of the Federal Ministry of Defence (hereinafter: Ministry of Defence) and Army of the Federation, wherein legal protection, in accordance with this law, is offered by the Ministry of Defence, through applicable organisational unit.

Article 8

The Federal Attorney's Office shall carry out duties of legal protection of property and property interests of the Federation and its bodies not having capacity of legal person funded from the Budget of the Federation of Bosnia and Herzegovina (hereinafter: Federation Budget).

The Federal Attorney's Office may represent legal persons founded by the Federation and financed from the Federation Budget if so provided by the act on founding the legal person.

The Federal Attorney's Office shall not represent authorities of the Federation in employment disputes. This shall be done by a person employed in the bodies of the Federation as so specified by the Federation bodies' supervisor except for the employment disputes of the Federal Ministry of Defence.

Article 40

The Funds for the work of the Attorney's Office shall be secured in the budget of the Federation.

Article 41

The financial and material operations of the Federal Attorney's Office shall be carried out in the manner valid for the federal authorities of the state administration.

The Government of the Federation shall establish the salaries quotient of the Federal Attorney and his/her Deputies by a decision while for compensations not categorised as salary, the regulations valid for civil servants shall apply.

Article 42

For actions undertaken in the representation before the courts and other authorities, the Federal Public Attorney's Office shall be entitled to compensation of the costs under the Tariff on fees for lawyer services.

The funds earned during representations by the Federal Public Attorney's Office represent the revenue of the Federation Budget.

32. The **Law on Attorney Profession of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 25/02, 40/02, 29/03, 18/05, 68/05 and 42/11).

For the purposes of the present Decision, an unofficial consolidated text of the relevant provisions of the Law on Attorney Profession of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina*, 25/02, 40/02, 29/03, 18/05, 68/05 and 42/11), made in the Constitutional Court, is used and, as relevant, reads:

Article 1

This Law regulates the organisation and status of attorneys who provide legal assistance to natural and legal persons in matters protecting their rights, obligations or legal interests.

Article 31

The Tariff on Fees for Lawyer Services (hereinafter: Tariff) shall define the fees for work and expenses in practising law and the application and coming into effect of the Tariff.

The Assembly of the Bar Association shall propose the Tariff, which must be approved by the Federation Ministry of Justice after consultation with other pertinent ministries, and published in the Official Gazette of the Federation of Bosnia and Herzegovina.

Tariff is published in the Official Gazette of the Federation of BiH.

An attorney shall have the right to request and receive a fee for his/her work and compensation of expenses pertaining to the work in accordance with the Tariff

The fee for attorneys for the legal assistance provided to a party before a court or other authorities in the course of single hearing or single legal action (writs) in litigious and non-litigious procedure, criminal procedure, bankruptcy and liquidation procedure, land registry procedure, administrative procedure, administrative dispute, executive procedure, procedure for the registry with the register of the company, procedure before the Constitutional Court of the Federation of Bosnia and Herzegovina and the Constitutional Court of Bosnia and Herzegovina, i.e. all other actions taken by an attorney in providing legal assistance to a party, cannot exceed the average monthly net salary in the Federation of Bosnia and Herzegovina.

Courts and other state authorities, in decision on the fee amount for the attorney for providing legal assistance to a party, shall determine the fee for the attorneys pursuant to the provisions of the paragraph 5 of this Article if the fee for attorney under the Tariff exceeds the amount referred to in paragraph 5, unless the attorney had agreed with his/her client the fee amount in written pursuant to the current regulations, which cannot encumber the respondent party.

The Bar Association Assembly of the Federation of Bosnia and Herzegovina shall harmonize the Tariff with the provisions of paragraph 5 of this Article.

33. The **Tariff on Fees for Lawyer Services** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 22/04 and 24/04), as relevant, reads:

Article 1

Unless otherwise determined by a written contract between the attorney and his/her client, attorney shall be entitled to the compensation of expenses pertaining to the work in accordance with this Tariff.

V. Admissibility

34. 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 19 of the Rules of the Constitutional Court.

35. 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.

36. The request for review of constitutionality was submitted by twelve representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina. Thus, the request was filed by an authorized person within the meaning of Article VI(3)(a) of the Constitution of BiH.

VI. Merits

37. The challenged provisions read as follows:

Article 395(1) of the Civil Procedure Code of the Republika Srpska, in the part related to the "Public Attorney's Office", reads:

The provisions on expenses shall apply to the parties represented by the Public Attorney's Office and Centre for Free Legal Assistance.

Article 395(1) of the Civil Procedure Code of the Federation of BiH reads as follows:

Provisions on expenses shall apply to the parties represented by the Public Attorney's Office. In such cases, the costs of the litigation shall include the amount that could be granted to the party as the remuneration for attorney.

38. The applicants claim that a part of the challenged provision of Article 395(1) of the Civil Procedure Code of the Republika Srpska (the part related to the Public Attorney's Office) and the challenged provision of Article 395 of the Civil Procedure Code of the Federation of Bosnia and Herzegovina are contrary to Article I(2) and I(4) of the Constitution of Bosnia and Herzegovina, Article II(3)(e) and II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention and Protocol No. 1 to the European Convention. Although the linguistic content of challenged provisions of the Laws of the Entities is not identical, the Constitutional Court observes that the requests raise identical issues. The Court will therefore give one reasoning for the requests submitted. Next, although the case relates to two challenged provisions (of two Laws), the term "the challenged provision" will be used in the reasoning as the reasoning is the same one. Furthermore, given the fact (which was alleged by the applicants) that the challenged provision in the Federation of Bosnia and Herzegovina relates to all attorney's offices (given the fact that there are Cantonal Attorney's Office and Municipal Attorney's Offices in the Federation of Bosnia and Herzegovina, which are regulated in special law), in this decision, the Constitutional Court will use, if need be, the provisions of the Law on the Public Attorney's Office of the Federation of Bosnia and Herzegovina, whereas the same conclusion will apply to other attorney's offices in the Federation of Bosna and Herzegovina, to which the challenged provision relates.

As to the constitutionality of the challenged provision with regard to Article I(2) of the Constitution of Bosnia and Herzegovina

39. 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.

40. The applicants are of the opinion that the challenged provision is in contravention of the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina. In this connection, the Constitutional Court recalls that it has interpreted the mentioned Article in its previous case law as being enshrined in the principle of the rule of law. The principle of the rule of law signifies the system of political power based on how the Constitution, laws and other regulations are complied with both by citizens and holders of political power. All laws, regulations and conducts of the holders of power must be based on the law or regulations based on laws. In addition, that principle requires that

all constitutions, laws and other regulations that are passed be harmonized with the constitutional principles, which means that the legal system is based on the hierarchy of legal acts, starting from the Constitution as the higher legal act to by-laws (see, *inter alia*, Constitutional Court, Decision on Admissibility and Merits no. *U-21/16* of 1 June 2017, paragraph 19, and no. *U-6/06* of 29 March 2008, paragraph 22).

41. Next, the principle of the rule of law is not limited only to formal compliance with the principle of constitutionality and lawfulness, but it requires that all legal acts (laws, regulations *etc.*) have a specific content, *i.e.* quality appropriate in a democratic society, so that it serves the principle of protection of human rights and freedoms with regards to the relations between citizens and bodies of public authority within the frame of democratic and political system. The Constitutional Court also recalls that the requirements of legal certainty and the rule of law entail that a legal norm must be adequately accessible to persons to whom it will be applied and it must be foreseeable, meaning that it must be formulated with sufficient precision, so that the persons can know actually and specifically their rights and obligations to a degree that is reasonable in the circumstances, to regulate their conduct accordingly (see Decision on Admissibility and Merits, no. *U-15/18* of 29 November 2018, paragraph 26).

42. The Constitutional Court recalls the position of the European Court according to which the expression "law" does not relate to the mere existence of law, but also relates to the quality of law, requiring that a law be in compliance with the rule of law and that its norms are sufficiently precise, clear and foreseeable. Law must give the sufficiently clear scope of any discretionary right given to public authorities as well as the manner in which it is executed (*ibid. U-15/18*, paragraph 26).

43. The Constitutional Court holds that allegations in the request indicate that the applicants (do not) raise an issue as to the mechanism of attorney's office and collection of the costs for representation by the attorney's office in accordance with the Lawyers' Tariff in the sense that it is not regulated by law or that the professional activity of that body and collection of the costs are not based on the law, which entail a violation the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina. The applicants (do not) claim that the legal system, insofar as this segment is concerned, is (not) based on the hierarchy of legal acts as required by the principle of the rule of law under the mentioned constitutional provision.

44. The allegations from the request actually indicate that the content of the challenged provisions does not have the necessary "quality" which would meet the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina. Essentially, the applicants are against the current legal solutions provided for in the law, according to which the fees and compensations for the professional activities of representation of the parties by the public attorneys are equal to the fees and compensations for the professional activities of the lawyers.

45. Therefore, the applicants' allegations will be examined in accordance with the criteria necessary to meet the standard of the "quality of law", more specifically: preciseness, clarity and foreseeability of the challenged provision and scope of the margin of appreciation afforded to the public authorities by the challenged provision, and the manner in which it is exercised. In this connection, we would like to note as follows.

46. The challenged provision forms part of the law prescribing the rules of procedure in civil litigations. The Civil Procedure Code (both Laws of the Entities) determines the rules of the procedure based on which the ordinary courts conduct proceedings to decide civil litigations. Thus, certain principles related to that procedure are prescribed. The challenged provision is a part of the chapter of the law, which relates to the costs of the procedure. The challenged provision prescribes in almost identical manner in both Entities' Laws that the provisions on expenses will apply to the parties represented by the Public Attorney's Office, and stipulates that the costs of the litigation will include the amount that could be granted to the party as the remuneration for attorney.

47. The courts take decisions on the costs of the proceedings upon explicit request of the party, not *ex officio*. The costs of the proceedings are defined as expenses incurred during the proceedings or in connection therewith. The legislator has clearly prescribed that the costs of litigation include the remuneration for the professional activity of the lawyer and other persons that have such a right recognized under the law, which is regulated by Article 383 of both Laws of the Entities. As the Tariff on Fees for Lawyers Services is prescribed, such costs will be determined in accordance with the Tariff. In addition to other provisions regulating the issue of the costs of proceedings, the challenged provision stipulates that the provisions on expenses will apply to the parties represented by the Public Attorney's Office. Next, the legislator opted for the a *causal* principle as the basic principle applied to the compensation for the costs, which implies that the party that was fully unsuccessful in the litigation is obliged to pay the opposite party compensation for the costs of the proceedings, and then it elaborated further on the costs depending on the success in the litigation. Generally speaking, the provisions related to the compensation for the costs of the proceedings constitute a kind of obstacle set by the legislator against vexatious litigations, manifestly ill-founded litigations. However, the legislator also prescribed the *culpae* principle, which implies that irrespective of the outcome of the litigation, the party is obliged to pay the opposite party the compensation for the costs, which he/she/it incurred through his/her fault.

48. The activities of representation before the courts, which are carried out by a public attorney's office (on behalf of the parties who are to be represented by the public attorney's office in accordance with the law) are identical to the professional activities of representation before the courts, which are carried out by lawyers on behalf of the parties who give them a power of attorney to do so.

49. The costs of the proceedings which are awarded to the party represented by the pubic attorney's office constitute the benefit of the Entities (Republika Srpska and Federation

of Bosnia and Herzegovina), *i.e.* they form part of the revenues thereof (Republika Srpska and Federation of Bosnia and Herzegovina). The source of the funds for the professional activities of the public attorney's office is the budget, which means that the representation by the public attorney's office is not free of charge, but the Entities, *i.e.* certain level of authorities (depending on the particular organisation of public attorney's office) pay it by providing budgetary funds from the revenues assigned to them in accordance with the law. Thus, if a party is represented by a public attorney's office, that party is entitled to compensation for the costs of the proceedings and compensation for the professional activities of the public attorney's office, just like lawyers who have the same entitlements. All costs of the proceedings and remunerations for professional activities of lawyers or public attorneys constitute the costs of the represented party, as the party is the one that bears the costs incurred during the proceedings or in connection therewith. Thus, it is quite logical that the costs of the proceedings, which are awarded to a public attorney's office, are paid into the budget.

50. It appears that the applicants identify the position of public attorney (as an individual) with attorney's office as an institution. A public attorney is a person employed with an attorney's office as institution, who has necessary professional qualifications and powers to represent the parties prescribed by the law before the court on behalf of the public attorney's office. A public attorney as an employee who receives a pay by the public attorney's office actually would not be entitled to receive compensation for the costs of the proceedings, and the challenged provisions do not prescribe so. The challenged provisions, as already said, stipulate compensation for the costs of the attorney's office as an institution representing the parties prescribed by the law, and the representation of such parties is not free of charge, given the fact that professional persons must be employed (public attorneys), who must have certain means of work and work conditions and who must be paid for services rendered so that it is necessary to ensure financial means in the budget for that.

51. The Constitutional Court holds that it obviously follows from the reasons given above that the challenged provisions satisfy the standard of the "quality of law" within the meaning of the relevant criteria: precision, clarity and foreseeability, and the scope of discretionary right that the challenged provision affords to the public authorities, including the manner in which it is enforced.

52. Although the Constitutional Court examined whether the challenged provisions satisfy the standard of the "quality of law", it will not be confined to the reasons given so far, since the applicants, in the Constitutional Court's opinion, actually contest the choice of a specific solution provided for in the relevant Laws on Civil Procedure, which equalize the costs of the proceedings to which both lawyers and public attorney's offices are entitled. The applicants are of the opinion that such a legal solution is not good as it is (un)fair to the detriment of the lawyers.

53. In this connection, the Constitutional Court notes that according to the Constitution of Bosnia and Herzegovina, the relevant legislator has the exclusive responsibility to determine the rules and principles of the civil procedures, including the costs of the proceedings. From the constitutional-legal aspect, the legislator has the obligation to respect demands imposed by the Constitution of Bosnia and Herzegovina when determining the rules and principles of the civil procedure. In the present case, those principles that derive from the principle of the rule of law.

54. In this case, the legislator chose the approach according to which the Civil Procedure Codes complied with the principle which, insofar as the compensation for the costs of the proceedings is concerned, equalized the parties represented by the public attorney's offices in civil proceedings and the parties represented by lawyers. Not only is the legislator's decision, meaning that the costs of representation by the public attorney's office are calculated in accordance with the Lawyers' Tariff, defined in the Entities' Laws (which is challenged by the applicants) but it is (also) consistently implemented at all levels of power in Bosnia and Herzegovina, namely, in the Law on Public Attorney's Office of BiH (and) Law on Public Attorney's Office of Brčko District, and Civil Procedure Code before the Court of BiH (and) Civil Procedure Code of Brčko District of BiH.

55. Finally, the Constitutional Court notes that the entitlement to the costs of the proceedings, which the Public Attorney's Office, *i.e.* the party which it represents has in accordance with the Lawyers' Tariff is not a "novelty" (even not in the Federation of Bosnia and Herzegovina, as alleged by the applicants), since such a provision existed at an earlier point (more specifically, in the Federation before the amendments to the 2006 Civil Procedure Code, with the same wording as well as in the former SFRY). In addition, the Constitutional Court notes that the issue of compensation for the costs of the civil procedure is regulated in the same manner in the countries of the region (Croatia, Serbia, Montenegro).

56. The mentioned principle cannot be challenged in the procedure for abstract review of constitutionality in terms of whether it is the best possible legal solution or whether a different solution would be more fair and better. Such issues could be addressed only to the relevant legislator in a procedure for amending laws as prescribed by the law. The Constitutional Court has emphasized in several decisions that it does not have jurisdiction to examine the constitutionality of laws under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina in terms of whether a legal solution is good or bad, whether it could be better or whether it could be regulated in a different manner, *etc*. According to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court has exclusive jurisdiction to establish whether a law provision is in accordance with "this Constitution".

57. Thus, the Constitutional Court holds that the challenged provision is compatible with Article I(2) of the Constitution of Bosnia and Herzegovina.

As to the constitutionality of the challenged provision with regard to Article I(4) of the Constitution of Bosnia and Herzegovina

58. Article I(4) of the Constitution of Bosnia and Herzegovina reads:

4. Movement of Goods, Services, Capital 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.

59. The applicants allege that the State, *i.e.* the public authorities may not be engaged in rendering services, and that fees and compensations for the lawyers' work are fees and compensations for "legal services". Otherwise, "if the position is accepted that public attorneys may provide the services of representation for which they would generate revenues for the state as lawyers, then the state must not monopolize the market of these services. The applicants are of the opinion that if the opposing party to a civil procedure must pay the services of the representation of the State by the public attorneys in civil procedures, who receive compensation for work from the public revenues, then the monopolization of the transaction of legal representation services in the hands of public attorney's offices (…) constitutes unconstitutional monopolization of the market, which is contrary to the idea of the liberalization of the market and the free flow of services within the meaning of Article I(4) of the Constitution of Bosnia and Herzegovina.

60. The Constitutional Court notes that Article I(4) prescribes freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina without controls at the boundaries between the Entities, meaning first of all non-existence of boundaries or any control at the internal boundaries of the Entities. The Constitutional Court observes that in its decision no. *AP-2560/16* (see Decision on Admissibility and Merits, no. *AP-2560/16* of 12 May 2016, available at www.ustavnisud.ba), it noted as follows: "Besides, the Constitutional Court observes that Article I(4) of the Constitution of Bosnia and Herzegovina guarantees freedom of movement of persons, goods, services and capital, but that the mentioned freedom is neither absolute nor unconditional. In particular, the rights guaranteed under the Constitution, such as the right to which the second appellant refers, take a particular form through further specification in matters they relate to."

61. Turning to the present case, the Constitutional Court notes that the applicants first indicate that a State, *i.e.* the public authorities could not provide services. Such a stance of the applicants is unacceptable as citizens must pay a number of "services provided by the State", which constitute the revenue of the State. For instance, citizens pay the issuance of various documents, permits and a number of other services provided by the State and the authorities thereof. Next, it is noted in the paragraphs above that the public attorneys

perform the same professional activities as lawyers in the court proceedings, and that the costs they are entitled to are calculated in accordance with the Lawyers' Tariff. Thus, this does not constitute the monopolization of the legal services of representation of the State by the public attorneys as the challenged provision is not a basis to determine that the public attorneys are legal representatives of the Entities *i.e.* State or other levels of power. The laws on public attorney's office constitute the mentioned basis, which is not challenged by the applicants in the present case. The Constitutional Court holds at the case at hand that a broad margin of appreciation is given to the State (which the State has in such matters) to determine who will represent it and how. Next, the fact that the public attorney's offices are not allowed always and in all proceedings to represent the parties whose legal representatives they are can be mentioned in support of the conclusion that the case does not relate to monopolization. In particular, the law clearly prescribes the ban on representation in labour disputes (Law on the Public Attorney's Office of the Federation of BiH). Unlike the public attorneys, lawyers are afforded considerably larger scope of professional "legal" activities, *i.e.* providing legal services. Finally, just as any person has the right to freely choose a lawyer who will represent him/her in a litigation, so the State decided, through laws, to be represented by public attorneys.

62. Therefore, the Constitutional Court holds that the challenged provision is not in contravention of Article I(4) of the Constitution of Bosnia and Herzegovina.

As to the constitutionality of the provisions with regard to the right to a fair trial

63. The applicants are of the opinion that the challenged provision is in contravention of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, as the parties represented by the public attorney's office are entitled to compensation for the costs in accordance with the Lawyer's Tariff. In this connection, in the applicants' opinion, normative connection of the Lawyers' Tariff with public attorneys makes it impossible for the judicial authority to adjudicate fairly in connection with the costs of proceedings. In the applicants' opinion, such an approach, and the costs being the result of court proceedings, lead "to indirect threat to effective enjoyment of the right of access to a court", as the opposing party to the proceedings, due to fear of the costs to which he/she/it will be exposed, will be discouraged to initiate proceedings which include fees and compensations for services of public attorneys, which transforms the costs of proceedings, "into civil law monetary sanctions and unconstitutional enrichment of the State".

64. Taking as a starting point the applicants' allegations that the challenged provision is in violation of the right of access to a court under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, the Constitutional Court reminds of the principles safeguarded by the mentioned Article and notes that it will deal here only with the civil limb of the right to a fair trial. These principles guarantee

the procedural rights of the parties to the proceedings, *i.e.* the right to an independent and impartial tribunal established by law, public hearing and trial within a reasonable time. In order for the rights guaranteed under Article 6 of the European Convention not to be illusory and theoretical, the elements of the right to a fair trial were developed, first of all through the case law of the European Court, which clearly determine the right of every individual to have a decision by the tribunal in adversarial proceedings, which includes a reasoned decision. It should be noted in this regard that although not explicitly stipulated by Article 6 of the European Convention, "the right to a court having full jurisdiction" has been established.

65. The Constitutional Court recalls that within the scope of abstract review under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, it examines the challenged law provision from the aspect of its content expressed in the law. In its previous case law, the Constitutional Court emphasized on several occasions that the Constitutional Court, within the scope of abstract review of constitutionality, would not examine how a challenged law provision could apply in practice and what consequences the application thereof could entail in practice. Thus, when deciding the cases falling within the abstract review and when the examination is confined to the text of the challenged provision, it is hard to examine whether the right to a fair trial has been violated, as the compliance or failure to comply with Article 6 of the European Convention, which prescribes in detail a number of procedural guarantees, may be effectively examined only upon the conduct of the proceedings as a whole. Within the scope of abstract review, the Constitutional Court may only examine whether the challenged provision explicitly excludes any of the principles under Article 6 of the European Convention, which are enumerated in the reasons given above.

66. The applicants complain of the violation of the right to a fair trial only in respect of the principle that guarantees the right of access to a court. Therefore, the Constitutional Court will examine the challenged provision only with regard to that aspect. The Constitutional Court notes that the applicants claim that the challenged provision will indirectly affect the right of the parties of access to a court, as it will discourage the parties to bring lawsuits due to a fear of paying the costs if they do not succeed in litigation.

67. Thus, the applicants do not claim that the challenged provision explicitly excludes the right of the parties of access to a court but they rather claim that this could occur indirectly, through the application of the challenged provision in practice. In this connection, the Constitutional Court refers to the reasons given above, where it has noted that when it comes to the abstract review of constitutionality, notably when it comes to the right to a fair trial, it is not possible to examine how a law provision would apply in practice or what consequences the application of such a norm could be.

68. Thus, the Constitutional Court notes that it is not up to the Constitutional Court to examine what psychological effects the challenged provision could have on the persons who wish to initiate civil proceedings, even when such persons have an arguable claim. The Constitutional Court holds that the challenged provision does not restrict the right of access to a court in any way whatsoever. Every initiated proceedings bear the risk of outcome, including the costs incurred in connection with the proceedings. *Argumentum a contrario* - if the challenged provisions did not exist, this would incite the initiation of proceedings against the Entities for the sole reason that they are not represented by lawyers but by the public attorney's office, even when the parties do not have an arguable claim. The European Court recognized this as a precise reason for which the State is (also) entitled to costs.

69. In this connection, the European Court has noted that that the obligation to pay the costs (see ECtHR, *Cindrić and Bešlić v. Croatia*, judgment of 6 September 2016, Application no. 72152/13) is not *per se* contrary to the guarantees which the right to a fair trial affords and it notes that the State also enjoys protection from ill-founded litigation (within the meaning of initiation of ill-founded litigations with excessive claims), as the State should not be considered to have limitless resources. In this connection, the European Court has noted that the "loser pays" rule pursues a legitimate aim of ensuring the proper administration of justice and protecting the rights of others by discouraging ill-founded litigations and excessive costs.

70. For the aforementioned reasons, the Constitutional Court finds that the challenged provision is not in violation of the guarantees 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.

Other allegations

71. As to the applicants' allegations that the challenged provision is unconstitutional, *i.e.* in contravention 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 notes that the mentioned provision stipulates that the costs of the proceedings apply also to the parties represented by the public attorney's office and that the legal basis used in this regard is the Lawyers' Tariff. Thus, the Constitutional Court holds that the challenged provision does not raise the issue of the right to property. The mentioned challenged provision only entitles the public attorney's office, *i.e.* the parties it represents, to request and calculate the costs of representation in accordance with the Lawyers' Tariff. However, when it will happen, who will be requested to pay it and in which amount are possible future questions that could raise the issue of the right to property through individual and concrete cases.

72. Thus, the Constitutional Court holds that the challenged provision does not raise the issue 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, which is the reason why this part of the request is ill-founded.

VII. Conclusion

73. The Constitutional Court concludes that the provision of Article 395(1) of the Civil Procedure Code of the Republika Srpska, in the part related to the Attorney's Office, and the provision of Article 395 of the Civil Procedure Code of the Federation of Bosnia and Herzegovina are compatible with Article I(2) and I(4) of the Constitution of Bosnia and Herzegovina, and with 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 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.

74. Having regard to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this Decision.

75. Pursuant to Article 43 of the Rules of the Constitutional Court, a Separate Concurring Opinion of the Vice-President Mato Tadić is annexed to the present Decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Separate Concurring Opinion of Vice-President Mato Tadić

When considering and deciding on the request for review of the constitutionality of the challenged provisions of the Civil Procedure Code of the Federation of Bosnia and Herzegovina and Civil Procedure Code of the Republika Srpska, with regard to the costs afforded to the Public Attorney's Office where it is a party to the proceedings before the courts, I voted in favour of the majority decision, according to which the challenged provisions are not unconstitutional *per se*. In particular, the public authorities, *i.e.* the Entities in the present case, have a margin of appreciation to regulate this matter, and they did so.

However, every law should be as clear and precise as possible in order not to leave room for arbitrary interpretation when it is applied and it should have the same criteria for all participants in the proceedings that act on behalf of the authorities of the State/ Entities.

For instance, Article 394 of the Civil Procedure Code of the Federation of BiH stipulates as follows: *If an ombudsman participates in a dispute as a party, s/he shall be granted right to reimbursement of costs in accordance with provisions of this Law, but not the right to remuneration,* which is a clear norm and does not raise a dilemma about what the ombudsman is entitled to as party to the proceedings. On the other hand, that is not clearly indicated in the challenged provision of Article 395 of the Civil Procedure Code of the Federation of Bosnia and Herzegovina, which relates to the Attorney's Office, since it only refers to the act regulating costs and fees according to the Lawyers' Tariff.

Having analysed legal solutions prescribed in the same codes in regional countries, it follows that all of them have the norms regulating that issue (the issue of the costs of the public attorneys and, generally, State authorities when they act before the courts), which are considerably more precise than the norms existing in the challenged Codes in BiH. For example, the Civil Procedure Code of the Republic of Slovenia stipulates that *where a State authority participates in the proceedings as a party, it shall be entitled to the reimbursement of costs under the provisions of this Code, but not to the payment of a fee.*

Therefore, I hold that it would be useful to note this in the reasons for our decision in order to make it possible for the legislator, in case of potential amendments to that Code, to take this into account and specify the challenged norm.

Case No. U-7/19

DECISION ON ADMISSIBILITY AND MERITS

Request of Bosniac Caucus in the Republika Srpska Council of Peoples for review of constitutionality of Article 11(2) of the Constitution of the Republika Srpska

Decision of 4 October 2019

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2) (b), Article 59 (1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in plenary and composed of the following judges:

Zlatko M. Knežević, President

Mato Tadić, Vice-President

Mirsad Ćeman, Vice-President

Margarita Tsatsa-Nikolovska, Vice-President

Tudor Pantiru,

Valerija Galić,

Miodrag Simović,

Seada Palavrić, and

Giovanni Grasso

Having deliberated on the request of the **Bosniac People Caucus in the Council of Peoples of the Republika Srpska** in case no. **U-7/19**, at its session held on 4 October 2019, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding the request of the Bosniac People Caucus in the Council of Peoples of the Republika Srpska for review of the constitutionality of Article 11(2) of the Constitution of Republika Srpska (*Official Gazette of the Republika Srpska*, 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02 - correction, 30/02 - correction, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05 and 48/11),

it is hereby established that Article 11(2) of the Constitution of Republika Srpska (*Official Gazette of the Republika Srpska*, 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02 - correction, 30/02 - correction, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05 and 48/11) is not in conformity with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 13 to the European Convention for Protection of Human Rights and Fundamental Freedoms relating to abolition of the death penalty under all circumstances (*Official Gazette of Bosnia and Herzegovina* - International Treaties, 8/03).

Pursuant to Article 61(2) of the Constitution of Bosnia and Herzegovina, Article 11(2) of the Constitution of Republika Srpska (*Official Gazette of the Republika Srpska*, 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02 - correction, 30/02 - correction, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05 and 48/11) reading as follows: "The death penalty may be pronounced exclusively for capital crimes," shall be quashed.

Article 11(2) of the Constitution of Republika Srpska (*Official Gazette of the Republika Srpska*, 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02 - correction, 30/02 - correction, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05 and 48/11), which has been quashed in accordance with Article 61(3) of the Rules of the Constitutional Court, shall be rendered ineffective the day following the date of the publication of the decision of the Constitutional Court in the *Official Gazette 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 June 2019, the Bosniac Caucus in the Republika Srpska Council of Peoples ("the applicant") filed with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") a request for review of constitutionality of Article 11(2) of the Constitution of the Republika Srpska ("the Constitution of RS).

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska ("the National Assembly") was requested on 2 July 2019 to submit its reply to the request.

3. The National Assembly submitted its reply on 25 July 2019.

III. Request

a) Allegations from the Request

4. The applicant alleges that the Article 11(2) of the RS Constitution is not in conformity with the Constitution of Bosnia and Herzegovina and the European Convention for the

Protection of Human Rights and Fundamental Freedoms ("the European Convention") and its Protocols. In this respect, the applicant refers to the provisions of Articles II(1), II(2) and II (3)(a) of the Constitution of Bosnia and Herzegovina, and to the provisions of Articles 1 and 2 of Protocol No. 13 to the European Convention, Article 1 of Protocol No. 6 to the European Convention, and Article 1 of the Second Optional Protocol to the International Covenant on Civil and Political Rights ("the International Covenant").

5. In the exhaustive request, the applicant states, *inter alia*, that even 16 years after the entry into force of Protocol No. 13 to the European Convention, the RS National Assembly did not harmonize the RS Constitution with the Constitution of Bosnia and Herzegovina and the said Protocol. The applicant recalled that since the beginning of 1980 the Council of Europe have made efforts to abolish the death penalty across Europe, and as a result of these efforts is the fact that there has been no execution of death penalty in the member states of the Council of Europe since 1997. The first concrete steps in this direction include the adoption of Protocol No. 6 to the European Convention, which became the first legally binding instrument to abolish the death penalty in peace, and since 1989 the abolition of the death penalty has been a condition for all new members to access the European Union. In 2002, the Council of Europe took an important step in prohibiting the death penalty in all circumstances by adopting Protocol 13 to the European Convention, which requires the abolition of the death penalty even with regards to the acts committed during the war.

6. The applicant points out that all levels of government in Bosnia and Herzegovina, with the exception of the Republika Srpska Entity, have fully complied with the international obligation and the provisions of the Constitution of Bosnia and Herzegovina and abolished the death penalty. Unfortunately, as the applicant states, despite the fact that the provisions of Article 5 of the RS Constitution require that the constitutional organization of that Entity be based on the guarantee and protection of human rights and freedoms in accordance with international standards, the death penalty is still part of the RS Constitution. It was also pointed out that under criminal codes of Bosnia and Herzegovina the death penalty is not stipulated, but that the disputed Article 11(2) of the RS Constitution also stipulates that the death penalty can exceptionally be pronounced for the most serious forms of criminal acts.

7. The applicant then points out that the representatives of all peoples in the Republika Srpska agreed that the disputed provision of the RS Constitution should be deleted. However, that did not happen. To this end, the applicant explains why this has not happened yet, although in 2009 an initiative was launched and the RS National Assembly adopted an Act that included 29 Amendments to the RS Constitution, including an amendment that prescribed deletion of the disputed Article 11(2) of the Constitution of RS. In order for such arrangement to be fully adopted and put into effect, according to Article 135 of the RS Constitution, a majority of the members of the Council of Peoples

from each constituent people and the Others should have voted for it, which did not happen because the amendments were adopted as a "package" along with other largely disputed amendments that could not be supported by the applicants. It is for this reason that the amendment relating to the deletion of Article 11(2) of the RS Constitution, which is not in dispute, could not be adopted because it was not made possible for individual amendments to the RS Constitution to be adopted.

8. The applicant points out that the reports to the European Commission indicated that the provisions on the death penalty in the RS Constitution should be abolished, since such a provision constitutes a major obstacle to the harmonization of legal provisions with the EU *acquis* and, consequently, to the membership in the European Union. Protocol No. 13 to the European Convention was adopted on 3 May 2002, ratified by Bosnia and Herzegovina on 29 July 2003, and entered into force on 1 November 2003, and at that moment the obligation of Bosnia and Herzegovina was created to adhere to it and apply it in domestic law. Article 1 of the said Protocol abolished the death penalty in all circumstances, and Article 2 of the same Protocol provided that Article 15 of the European Convention could not derogate from the provisions of the Protocol. The applicant points out that Protocol No. 13 entered into force to strengthen the protection of the right to life guaranteed by Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention, and the right to life is one of the fundamental human rights, which constitutes a legal and a political precondition for exercise of all other rights and freedoms. The right to life is the highest value in the international hierarchy of rights and is protected by binding standards at the universal and regional level.

9. The applicant considers that the disputed provision of the RS Constitution stipulating the possibility of imposing the death penalty for the most serious crimes is unconstitutional because such provision violates the above provisions of the Constitution of Bosnia and Herzegovina and the European Convention and its Protocols.

b) Response to the Request

10. In response to the request, the RS National Assembly primarily challenged the applicant's authority to file the request, within the meaning of Article VI(3) (a) of the Constitution of Bosnia and Herzegovina, since the RS Council of Peoples does not represent a separate house of the RS National Assembly, which arises from Article 69(2) of the RS Constitution. Therefore, it is clear that the Council of Peoples, which has restrictive jurisdiction, is one special body for protection of the vital national interest of any of the constituent peoples, and it is not another house of the RS National Assembly.

11. With respect to the applicant's allegations that Article 11(2) of the RS Constitution is not consistent with the provisions of the Constitution of Bosnia and Herzegovina, the RS National Assembly very extensively explained what activities it had undertaken in the

period 2007-2009 with a view to erasing the disputed Article 11(2) of the RS Constitution. However, if the Bosniac People Caucus in the RS Council had not been against the Amendments to the RS Constitution, including the amendment to delete the disputed provision on the death penalty, the Amendments would have been adopted, thereby the Republika Srpska would have fully harmonized its Constitution with the European Convention and its Protocols, and, consequently, with the Constitution of Bosnia and Herzegovina. In this regard, they point out that the Bosniac delegates to the Council of Peoples are the only ones to be blamed for the fact that the RS Constitution has not been yet brought in line with the European Convention. It has been emphasized in the response that in a situation in which the same body, which is in charge of adopting an amendment, refused to adopt the relevant amendment that would make it possible for the disputed Article 11(2) of the RS Constitution to be rendered ineffective, now, after more than seven years, has decided to submit a request for review of the compatibility of the disputed provision with the Constitution of Bosnia and Herzegovina, and that constitutes a legal nonsense, direct abuse of their competencies and unsustainable legal situation.

12. Finally, it was pointed out in the response that the RS National Assembly adopted Amendment CXXV as a part of the proposal for Amendment CXXII-CL to the Constitution of the RS by a two-thirds majority, in accordance with Article 135(2) of the Constitution of the RS. At the public hearing the whole public, including the formally presented views of the representatives of the European Union and the Council of Europe, supported the proposed amendments to the RS Constitution, which gave them full legitimacy. On the other hand, without any support from the public and citizens, with almost no legitimacy, the delegates of the Bosniac People Caucus made it impossible for the amendments to the RS Constitution to be adopted at its session held on 26 April 2012.

13. Given the fact that, because of all of the above, the RS National Assembly is unable to give other response to the request than the one stated above, it is proposed that the Constitutional Court seek a response from the applicant, in order to gain insight into the real reasons why this request was filed and because of which the mentioned provision of the RS Constitution is still in force, which is contrary to the Constitution of Bosnia and Herzegovina.

IV. Relevant Law

14. The **Constitution of the Republika Srpska** (*Official Gazette of the Republika Srpska*, 21/92, 28/94, 8/96, 13/96, 15/96,16/96, 21/96, 21/02, 26/02 - correction, 30/02 - correction, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05 and 48/11) as relevant reads:

Article 11 (2)

(2) The death penalty may be pronounced exclusively for capital crimes.

15. The **Constitution of Bosnia and Herzegovina** as relevant reads:

Article II
Human Rights and Fundamental Freedoms

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.

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:

a) The right to life.

16. The **Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty** (*Official Gazette of BiH*, 6/99) as relevant reads:

Article 1
Abolition of the death penalty

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

Article 2
Death penalty in time of war

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.

17. The **Second Optional Protocol to the International Covenant on Civil and Political Rights** (*Official Gazette of Bosnia and Herzegovina*, 31/00) as relevant reads:

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.

3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.

18. The **Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the Death Penalty in all Circumstances** (*Official Gazette of Bosnia and Herzegovina* - International Treaties, 8/03)

Article 1
Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2
Prohibitions of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 5
Relationship to the Convention

As between the states Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

V. Admissibility

19. 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.

20. 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 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.

21. The request for constitutional review was submitted by seven delegates of the Republika Srpska Council of Peoples, totalling 28 delegates, making ¼ members of any legislative body of the Entity, which means that, contrary to the allegations of the RS National Assembly, the request was submitted by an authorized person within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina (see, the Constitutional Court, Decision on Admissibility, *U-7/10* of 26 November 2010, paragraph 21 available on the website of the Constitutional Court: www.ustavnisud.ba).

VI. Merits

22. The applicant considers that the provision of Article 11(2) of the RS Constitution is not in conformity with the provisions of the Constitution of Bosnia and Herzegovina, namely Articles II(1), II(2) and II(3)(a) and international protocols which limit or completely abolish the death penalty, and it is about Protocols Nos. 6 and 13 to the European Convention and the Second Optional Protocol to the International Covenant (see relevant regulations).

23. On the other hand, the RS National Assembly does not refute that Article 11(2) of the RS Constitution is incompatible with the Constitution of Bosnia and Herzegovina and international protocols abolishing the death penalty in all circumstances. However, as regards the fact that the disputed provision still exists in the RS Constitution, the RS National Assembly places the burden of responsibility on the applicant for that and, according to the RS National Assembly, that makes the filed request contradictory.

24. Taking the allegations stated in the request as a starting point, the Constitution of Bosnia and Herzegovina, in its Article II(1), obliges Bosnia and Herzegovina and its Entities to ensure the highest level of internationally recognized human rights and fundamental freedoms, while in Article II(2), it states that the rights and freedoms provided for in the European Convention and its Protocols are directly applicable in Bosnia and Herzegovina.

25. The right to life under Article II(3)(a) of the Constitution of Bosnia and Herzegovina, as a fundamental human right, constitutes a fundamental value in a democratic society. Considering the importance of the right to life, the Constitutional Court recalls that while wishing to strengthen the protection of that right, the member states of the Council of Europe have made efforts to secure the right to abolish the death penalty through international instruments. In this regard, the Constitutional Court recalls that in 2003, in the *Öcalan v. Turkey* case, the European Court of Human Rights stated that the areas covered by the member states of the Council of Europe became a "zone without death penalty" and that capital punishment in peacetime had come to be regarded as an unacceptable, if not inhuman, form of punishment which was no longer permissible under Article 2 of the European Convention (see, the European Court of Human Rights, Judgment (First Section), 12 March 2003, no. 46221/99) .

26. Taking into account the changes that have taken place in several member states of the Council of Europe, which have expressed a general tendency to abolish the death penalty, on 28 April 1983 the member states of the Council of Europe adopted the Protocol in Strasbourg on the abolition of the death penalty (see relevant regulations). The Constitutional Court recalls that the prohibition of death penalty laid down in Protocol No. 6 created a non-derogatory Convention right, but did not provide absolute protection for that right. The prohibition of the imposition of the death penalty under this Protocol shall not apply to acts committed in time of war or imminent threat of war, if so provided by the law of the relevant State.

27. The Constitutional Court recalls that a step further on the abolition of the death penalty was taken by adoption of the Second Optional Protocol to the International Covenant, which also prohibits the execution of the death penalty in peace, but during the war the death penalty is allowed only if executed on the basis of a judgment because of a particularly grave offense of a military nature committed during the war and if such an exception was made by an international legal declaration on reserve at the time of ratification or accession to the covenant.

28. With the aim of complete abolition of the death penalty, on 3 May 2002, the members of the Council of Europe adopted in Vilnius Protocol No. 13 on the abolition of the death penalty in all circumstances (see relevant regulations), which entered into force on 1 July 2003. The immediate consequence of its entry into force was the indirect repeal of Article 2 of Protocol No. 6, which provided that the prohibition of the imposition of the death penalty does not apply to acts committed during the war or imminent threat of war if so provided by the law of the relevant State. The foregoing indicates that Article 2 of Protocol No. 6 and Protocol No. 13 are mutually exclusive by the fact that Protocol No. 13 indirectly derogates from Article 2 of Protocol No. 6, while it also derogates from the second sentence of Article 2(1) of the European Convention. Although it is not apparent from the very text of the European Convention, these Protocols amended,

for the first time and thus far it was the only time, a substantive Convention provision governing a protected human right. It is about the second sentence of Article 2(1) of the European Convention, which reads as follows: "…. 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".

29. Thus, with the entry into force of Protocol No. 13 to the European Convention, the death penalty was abolished in all circumstances. Therefore, since its entry into force, the Protocol No. 13 to the European Convention, which abolishes the death penalty, constitutes a legally binding act for all levels of government in Bosnia and Herzegovina, including its Entities, it is obvious, consequently, that the unconstitutional provision of Article 11(2) which exceptionally allows for pronouncing of the death penalty for the most serious criminal offences, should not have place in the RS Constitution.

30. Therefore, in view of the above, the Constitutional Court concludes without any dilemma that the provision of Article 11(2) of the RS Constitution is not compatible with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 13 to the European Convention, which prohibits the death penalty in all circumstances.

VII. Conclusion

31. The Constitutional Court concludes that the challenged provision of Article 11(2) of the RS Constitution, which exceptionally prescribes pronouncing of the death penalty for the most serious crimes is not in compliance with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 13 to the European Convention relating to the prohibition of the death penalty in all circumstances, which was ratified by Bosnia and Herzegovina and which is a legally binding act for all levels of government in Bosnia and Herzegovina, including the Entity of Republika Srpska.

32. Pursuant to Article 59(1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Case No. U-8/19

DECISION ON ADMISSIBILITY AND MERITS

Request of Seven Delegates of the Council of Peoples of Republika Srpska for review of constitutionality of Article 53 of the Law on Agricultural Land of Republika Srpska (*Official Gazette of the Republika Srpska*, 93/06, 86/07, 14/10, 5/12 and 58/19)

Decision of 6 February 2020

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President,

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić, and

Mr. Giovanni Grasso

Having deliberated on the request filed by **Seven Delegates of the Council of Peoples of the Republika Srpska**, in the Case no. **U-8/19**, at its session held on 6 February 2020, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding on the request of Seven Delegates of the Council of Peoples of Republika Srpska for review of constitutionality of Article 53 of the Law on Agricultural Land of the Republika Srpska (*Official Gazette of the Republika Srpska*, 93/06, 86/07, 14/10, 5/12 and 58/19),

it is hereby established that Article 53 of the Law on Agricultural Land of the Republika Srpska (*Official Gazette of the Republika Srpska*, 93/06, 86/07, 14/10, 5/12 and 58/19) is not compatible with Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina.

Pursuant to Article 61(2) of the Constitution of Bosnia and Herzegovina, Article 53 of the Law on Agricultural Land of the Republika Srpska (*Official Gazette of the Republika Srpska*, 93/06, 86/07, 14/10, 5/12 and 58/19) is quashed.

Pursuant to Article 61(2) of the Rules of the Constitutional Court, the Law on Agricultural Land of the Republika Srpska (*Official Gazette of the Republika Srpska*, 93/06, 86/07, 14/10, 5/12 and 58/19), the quashed Article 53 of the Law on Agricultural Land of the Republika Srpska (*Official Gazette of the Republika Srpska*, 93/06, 86/07, 14/10, 5/12 and 58/19) shall be rendered ineffective on the next day following the date of the publication of the decision of the Constitutional Court in the *Official Gazette 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 2019, Seven Delegates of the Council of Peoples of the Republika Srpska ("the applicants") filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of constitutionality of Article 53 of the Law on Agricultural Land of the Republika Srpska (*Official Gazette of the Republika Srpska*, 93/06, 86/07, 14/10, 5/12 and 58/19). In addition, the applicants requested the Constitutional Court to take a decision on interim measure to forbid the application of the challenged provision pending a decision by the Constitutional Court.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska ("the National Assembly") was requested on 29 October 2019 to submit a response to the request.

3. The National Assembly submitted its response on 2 December 2019.

III. Request

a) Allegations from the request

4. The applicants claim that the challenged provision is contrary to Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina. They alleged that despite a series of prohibitions to deal with the issue of State-owned property unilaterally, and a clear position of the Constitutional Court of BiH in case No. *U-1/11* that the said issue is within the exclusive responsibility of BiH, the RS National

Assembly passed the challenged provisions in the latest Amendments to the Law on Agricultural Land (*Official Gazette of the RS*, 58/19), thus unilaterally tackling the issue of a portion of the state-owned property of BiH.

5. According to the challenged provision, as further alleged, agricultural land in the territory of the Republika Srpska registered in public records as people's property, without the registered right of use, management or disposal, or as socially-owned or state-owned property with the right of use, management or disposal in favor of enterprises which were the subject of privatization or were registered as the possession of the said enterprises, or as possession of former social-legal entities with the seat outside the territory of the Republika Srpska, upon the entry into force of those Amendments, by force of law, shall become the property and possession of the Republika Srpska.

6. The applicants further note that the Law on the Transformation of Socially-Owned Property, which was enacted by the Republic of Bosnia and Herzegovina, determines that the Republic of Bosnia and Herzegovina shall become the right holder of socially-owned property as prescribed in Article 1 of that Law. Furthermore, the applicants allege that the Agreement on Succession Issues was signed among Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the Federal Republic of Yugoslavia (concluded in Vienna on 29 June 2001 and ratified in a decision of the Presidency on 28 November 2001). According to Article 2 of Annex A of the Agreement on Succession, *Immovable State property of the SFRY, which was located within the territory of the SFRY, shall pass to the Successor State on whose territory that property is situated.* The applicants are of the opinion that the Agreement on Succession undisputedly indicates that the state of BiH is the titleholder of ownership of immovable property of the former SFRY, which was situated in the territory of BiH, following the dissolution of the former SFRY. As the subject of international law, BiH is the signatory to this multilateral agreement (Agreement on Succession), which was ratified by its competent authorities and bodies and has the responsibility to comply with it.

7. The applicants also refer to the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina and two Entities' laws prohibiting the disposal of state property on the territory of the Federation of BiH, and the RS, which were enacted by the decision of the High Representative in BiH. The mentioned laws, as alleged, are still in effect given the fact that no law on state property has been enacted at the level of BiH. Article 1, paragraphs 1 and 2 of the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina determines the property considered as State property of BiH. In its Decision *No. U-1/11*, the Constitutional Court of BiH deems that "the High Representative passed the relevant laws on the temporary prohibition of the disposal of state property..." in order to help the process enactment of laws at the state and lower levels on the rights of ownership, management and other issues related to state property".

8. Furthermore, the applicants allege that the BiH authorities have not passed a law to regulate the issue of state property, but, this time around partially, this issue was attempted to be regulated by the legislator in the Entity of the RS, by enacting the challenged amendments to the Law on Agricultural Land of the Republika Srpska. They allege that the continuity of the State of BiH, as prescribed by Article I(1) of the Constitution of BiH, implies in the present case the continuation of the right of the State of BiH to regulate the issue of state property, which belonged to it on the basis of the right of disposal, management or use. That property, as considered by the applicants, by all means, may include agricultural land, which the challenged Law on Agricultural Land of the Republika Srpska declares as public good owned by and in possession of the RS. This property constitutes a part of the property, which was, under the Agreement on Succession, conferred upon the State of BiH, which the Constitutional Court, in its Decision *No. U-1/11*, found to be capable of being a subject matter of disposal, primarily, under the laws at the level of BiH.

9. The applicants further allege that the Agreement on Succession (Article 1 and Article 2) shows beyond any doubt that the State of BiH is the titleholder of ownership over the state property. The Constitutional Court of BiH defined in its Decision *No. U-1/11* the notion of "state property", and established that, by its nature, it primarily serves all people in the country, and reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina. In the applicants' opinion, despite the fact that it is obvious that the agricultural land referred to in the challenged Article constitutes a portion of state property, which became the property of the State of BiH under the Agreement on Succession, the challenged provision prescribes that it shall become, by the force of law, a public good owned by and in the possession of the Republika Srpska. In this way, the State of BiH is deprived of the right to exercise its international obligations prescribed under Article III(3)(b) of the Constitution of BiH, which makes the challenged provision unsustainable. The issue of agricultural land should, first and foremost, be regulated by a law at the level of BiH, which would clearly position the responsibility of the Entities, thereby observing the Constitution of BiH and "the decisions of the institutions of BiH" and harmonize the operation of the competent bodies within BiH.

10. The applicants allege that the challenged provision also violates Article IV(4)(e) of the Constitution of BiH, which bestows the responsibility on the Parliamentary Assembly concerning such other matters as are necessary to carry out the duties of the State. They allege that the state-owned property is an issue in the exclusive jurisdiction of the State of BiH and its authorities, which may be observed based on a number of laws proclaimed by the decision of the High Representative in BiH: the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina, and the two Entities' laws prohibiting the disposal of state property in the territory of the Federation of BiH, and the RS.

11. The applicants propose that the Constitutional Court should grant the request for review of constitutionality and establish that the challenged provision is not in conformity with Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina and, pursuant to Article 61(2) and (3) of the Rules of the Constitutional Court, that the challenged provision should be rendered ineffective on the next day after the day of the publication of this Decision in the *Official Gazette of Bosnia and Herzegovina.*

b) Reply to the request

12. In its response to the request, the National Assembly first contests the standing of the applicants to initiate proceedings for the purposes of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina as the Council of Peoples of the Republika Srpska does not constitute a special House of the National Assembly, which follows from Article 69(2) of the Constitution of the Constitution of the Republika Srpska. Thus, it is clear that the Council of Peoples, which has a restrictive responsibility, constitutes a special body for the protection of vital national interest of any of the constituent peoples, and not the second house of the National Assembly.

13. According to the opinion of the National Assembly, the request in this case is not founded and the Constitutional Court should therefore dismiss it, including the request for interim measure. In support of the aforementioned, they alleged that Amendment XXXII to Article 68(6) of the Constitution of the Republika Srpska stipulates that Republic shall regulate and ensure, *inter alia*, property and obligation relations and protection of all forms of property, and item 8 of the mentioned Article stipulates that Republic shall regulate the main objectives and directions of economic, scientific, technological, demographic and social development, the development of agriculture and the village, etc. The National Assembly further alleges that it follows from a number of the provisions of the Constitution of the Republika Srpska, which are the constitutional basis for adoption the law in question, that the Republika Srpska has the responsibility to enact the Law on Agricultural Land, i.e. has the responsibility to regulate all those issues which are relevant to agricultural land, a good of general interest, including the issue of ownership over agricultural land.

14. In the opinion of the National Assembly, the applicants' allegations that the challenged provision is in violation of Articles I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of BiH are unfounded. As to Article I(1) of the Constitution, the National Assembly alleges that the mentioned Article strictly stipulates the continuation of legal existence of Bosnia and Herzegovina under international law, the consequence of which is not legal continuation of property or ownership of the agricultural land. The part of that legal provision reading "with its internal structure modified as provided in this Constitution" actually means that the legal continuation does not exclude internal structure as modified and defined by the Constitution of Bosnia and Herzegovina.

15. As to Article III(3)(b) of the Constitution of Bosnia and Herzegovina, which stipulates that the Entities and any of their subdivisions shall comply fully with this Constitution, which renders ineffective all inconsistent law provisions of Bosnia and Herzegovina and constitutional and law provisions of the Entities, including the decisions of the institutions of Bosnia and Herzegovina, the National Assembly, unlike the applicants' opinion according to which the contested provision is in violation of the mentioned provisions of the Constitution of BiH, holds that the challenged provision was passed based on the responsibilities provided for in the Constitution of the Republika Srpska, which is compatible with the Constitution of BiH. It was noted that Amendment XXXII to Article 68(6) of the Constitution of the Republika Srpska provides the responsibility for the Republic to regulate and ensure property relations and to protect all forms of property. According to the National Assembly, the challenged provision is deriving from the Constitution of BiH, which, in its Article III(1), enumerates the matters being the responsibility of the institutions of BiH and prescribes, at the same time, in Article III(3)(a,) 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.

16. Also, the National Assembly considers as unfounded the applicants' allegations that the contested provisions is also in violation of Article IV(4)(e) of the Constitution of Bosnia and Herzegovina, which stipulates that the Parliamentary Assembly shall have responsibility for such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities. Unlike the allegations of the applicants, the National Assembly is of the opinion that the mentioned provision, when interpreted, must be brought in conjunction with Article III(1) which enumerates the matters being the responsibility of the institutions of BiH, including the matter of ownership of agricultural land.

17. The response also states that in 2010, the Office of the High Representative for BiH adopted a Decision on the State Property Inventory in and Outside Bosnia and Herzegovina with the aim of providing assistance to the authorities of Bosnia and Herzegovina to make an inventory of State Property by gathering data on immovable property, which makes part of the property determined in a Decision to Form a Working Group for Inventory of Property of the Council of Ministers of BiH, dated 9 April 2009. In accordance with the aforementioned, in 2010, the Office of the High Representative for Bosnia and Herzegovina made a "Final Report on the State Property Inventory - Annex A", which provided for a State property inventory in BiH, which did not determine that agricultural land was the State property of BiH and which was the subject of regulation in the challenged provision. It is further stated that the contested provision relates to agricultural land, which had been used by former State-owned enterprises, which were the subject of privatization conducted by the Republika Srpska in accordance with the Law on Privatization of State capital in the companies. Given the fact that Article 8 of the mentioned Law stipulates that natural resources, public goods, cultural monuments of

general importance given to the enterprise for use cannot be the subject of privatization of the State-owned capital in enterprises, it is clear that agricultural land, which is the subject of regulation of the challenged provision and which had been used for agricultural production could not be the subject of privatization, and which, at the same time, was not on the High Representative's list of State property of BiH.

18. Other allegations of the applicants, which refer to the Agreement on Succession Issues between former Yugoslav Republics, are pointless in the opinion of the National Assembly and may in no way be relevant to the determination of constitutionality of the contested provision.

19. The National Assembly referred to the case-law of the Constitutional Court in the Cases Nos. *AP-2108/14* of 7 March 2017, *AP-4731/14* of 19 April 2017 and *AP-2187/16* of 11 October 2018. According to the opinion of the National Assembly, in the mentioned cases the Constitutional Court upheld the decisions of the County Court and Supreme Court, wherein it was determined that agricultural land, which was registered as State property in land registers and other public registers, was governed by and was at the disposal of the Republika Srpska.

20. Taking into account the aforesaid, in the opinion of the National Assembly, the challenged provision is not in violation of the provisions of Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina. Therefore, the National Assembly proposes that the Constitutional Court should dismiss the request and establish that there has been no violation for the purposes of the Constitutional Court's jurisdiction under Article VI(3)(a) of the Constitution, i.e. the challenged provision is compatible with the Constitution of Bosna and Herzegovina according to the National Assembly.

IV. Relevant Law

21. The **Constitution of Bosnia and Herzegovina**, in its relevant part, reads as follows:

Article I(1)
Continuation

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 III(3)(b)

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 IV(4)(e)

The Parliamentary Assembly shall have responsibility for:

e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.

22. The **Law on Agricultural Land** (*Official Gazette of the Republika Srpska*, 93/09, 86/07, 14/10, 5/12 and 58/19). For the purpose of the present Decision, an unofficial consolidated text of the Law on Agricultural Land made in the Constitutional Court of BiH is used and, as relevant, reads:

Article 1

(1) This Law regulates planning, protection, development, use and disposal of land and other issues relevant to the agricultural land as a common good.

(2) Agricultural land as a natural resource and common good shall be used for agricultural production and cannot be used for other purpose except as provided in this Law.

VI- DISPOSAL OF AGRICULTURAL LAND

Article 53

(1) Agricultural Land in the territory of the Republic registered in public records as national property, without the registered right of use, management or disposal, socially-owned or state-owned property with the right of use, management or disposal in favor of enterprises, which were the subject of privatization or were registered as the possession of the said enterprises, upon the entry into force of this law, by force of law, shall become the property and possession of the Republic.

(2) Agricultural Land in the territory of the Republic registered in public records as national property, without the registered right of use, management or disposal, socially-owned or state-owned property with the right of use, management or disposal, or as the possession of former social-legal entities with the seat outside the territory of the Republic, upon the entry into force of this law, by force of law, shall become the property and possession of the Republic.

(3) An administration authority in charge of keeping public records on real properties shall register the right of ownership and possession on real properties referred to in paragraphs 1 and 2 of this Article on the request of the Public Attorney's Office of the Republika Srpska.

(4) The right of ownership and possession in favor of the Republic shall be established on the real properties referred to in paragraphs 1 and 2 of this Article, concerning which

no ownership records exist and which were registered as the possession of former social-legal entities, or were registered in the cadaster as the possession of natural or legal persons without a valid legal ground.

(5) On the request of the Public Attorney's Office of the Republika Srpska, an administration authority in charge of property-legal affairs shall conduct a procedure and render an administrative decision establishing the rights referred to in paragraph 4 of this Article.

23. The **Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina** (*Official Gazette of BiH*, 18/05 and 29/06, 85/06, 32/07, 41/07, 74/07, 99/07, 58/08), in its relevant part, reads as follows:

Article 1

This Law prohibits the disposal of State Property.

For the purpose of this Law, State Property is considered to be:

1. Immovable property, which belongs to the State of Bosnia and Herzegovina (as an internationally recognized state) pursuant to the international Agreement on Succession Issues signed on 29 June 2001 by the states of Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Slovenia and the Federal Republic of Yugoslavia which, on the day of adoption of this Law, is considered to be owned or possessed by Bosnia and Herzegovina or other public organizations of Bosnia and Herzegovina; and

2. Immovable property for which the right of disposal and management belonged to the former Socialist Republic of Bosnia and Herzegovina before 31 December 1991, which on the day of adoption of this Law is considered to be owned or possessed by Bosnia and Herzegovina, or public organization or body of Bosnia and Herzegovina and any of its subdivisions.

For the purpose of this Law, disposal of the aforementioned property shall mean the direct or indirect transfer of ownership.

Article 4

The temporary prohibition on the disposal of State Property in accordance with this Law shall be in force until entry into force of the law regulating implementation of criteria to be used for identification of property owned by Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District of Bosnia and Herzegovina, and specifying the rights of ownership and management of State Property, which shall be enacted upon the recommendations of the Commission but not later than one year from the day of the entry into force of this Law, i.e. or until an "acceptable and sustainable" apportionment of property is endorsed between the State and other levels of authority by the Steering Board of the Peace Implementation Council, or until the High Representative decides otherwise.

24. The **Framework Law on Privatisation of Enterprises and Banks in Bosnia and Herzegovina** (*Official Gazette of BiH*, 12/99, 14/00 and 16/02), in its relevant part, reads as follows:

Article 2

In accordance with the GFAP, this Law expressly recognises the right of the Entities to privatise non-privately owned enterprises and banks located on their territories.

25. The **Law on Privatization of State-Owned Capital in Enterprises** (*Official Gazette of the Republika Srpska*, 51/06, 1/07, 53/07, 41/08, 58/09, 79/112 and 28/13), in its relevant part, reads as follows:

Article 1

This Law regulates the requirements and procedure for sale and transfer of the State-owned capital in enterprises, which was owned by Republika Srpska ("the State-owned capital), owned by national and foreign natural and legal persons […].

Article 4

The subject of privatization are shares and equities and the State-owned capital in enterprises which have not been established in accordance with the Law on Enterprises or the Law on Public Enterprises until the day of entry of this Law.

Article 8

(1) Natural resources, common goods of general use, monuments of general cultural and historic importance, which are given to the enterprise for use cannot be the subject of privatization on the basis of this Law

(2) The status of construction and agricultural land shall be determined in a special law.

Article 8a, paragraph 1

(1) Based on the records of the privatization of the State-owned capital, which was carried out in enterprises in accordance with the provisions of the Law on Privatization of the State-Owned Capital in Enterprises (Official Gazette of Republika Srpska, 24/98, 62/02, 38/03 and 109/05) and provisions of the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 14/98), Investiciono-razvojana banka Republike Srpske a.d. Banja Luka, upon request of enterprise, issues a certificate to mark immovable property as it is marked in the initial balance sheet (the privatization program) and specified in assets of the enterprise which has been the subject of privatization. (…)

V. Admissibility

26. 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.

27. 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.

28. The request for review of constitutionality was filed by seven delegates of the Council of Peoples of the Republika Srpska, which consists of a total number of 28 delegates, which means one-fourth of either chamber of a legislature of an Entity, Thus, unlike the allegations of the National Assembly, the request was filed by an authorized person for the purposes of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina (see, the Constitutional Court, Decision on Admissibility *No. U-7/10* of 26 November 2010, paragraph 21, available at www.ustavnisud.ba).

VI. Merits

29. The applicants claim that the challenged provisions of the Entity law regulating the legal status of agricultural land is in violation of Articles I(1), III(3)(b) and IV(4) (e) of the Constitution od Bosnia and Herzegovina as there is no constitutional ground for the National Assembly to regulate the issue relating to a part of the State-owned property, the regulation of which is the exclusive responsibility of the State of Bosnia and Herzegovina and its authorities according to the provisions of the Constitution of Bosnia and Herzegovina.

30. The Constitutional Court notes that it dealt with the issue of the State-owned property and constitutional responsibility to regulate that matter in its Decision *No. U-1/11* (see Constitutional Court, Decision on Admissibility and Merits *No. U-1/11* of 13 July 2012, available at www.ustavnisud.ba). In that case, the Constitutional Court reviewed the constitutionality of the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban concluded that the Republika Srpska had enacted the challenged Law on Status of State Property located in the territory of the Republika Srpska and is under the Disposal Ban and it concluded that

the Republika Srpska had enacted that Law contrary to Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of BiH as Bosnia and Herzegovina had the exclusive responsibility to regulate the matter of property referred to in disputable Article 2 of the challenged Law. For these reasons, the challenged Law was unconstitutional and the law as a whole could not remain in effect (*op. cit. U-1/11*, paragraph 86).

31. The Constitutional Court notes that the applicants' request gives rise to the issue of whether the agricultural land in question constitutes the State-owned property, the title holder of which is Bosnia and Herzegovina and, in this respect, whether the Republika Srpska had the constitutional responsibility to regulate the right of ownership of that land in its favour by enacting that provision. Also, given the response of the National Assembly, which states that the challenged provision exclusively relates to the agricultural land which had been used by the former State enterprises and which could not be the subject of the privatization carried out by the Republika Srpska in accordance with the Law on Privatization of State-Owned Capital because the agricultural land was regarded as natural resources and common good, and that Article 8 of the Law gives it the responsibility to pass the challenged provision, the Constitutional Court notes that the present case gives rise to the issue whether the Republika Srpska had the responsibility to enact the challenged provision according to the Law on Privatization of State-Owned Capital in Enterprises.

32. With regard to the National Assembly's allegation that the present case relates to the privatization of the property of the former State enterprises, which was carried out by the Republika Srpska, the Constitutional Court notes that the Framework Law on Privatisation of Enterprises and Banks in Bosnia and Herzegovina expressly recognises the right of the Entities to privatise non-privately owned enterprises located on their territories. However, the Constitutional Court also notes that the agricultural land in question was not recorded in any public register as the property of the enterprises (agricultural cooperatives, combines etc.) in order to be the subject of privatization. The mentioned land was registered as people's property, socially-owned property, i.e. the State-owned property with a right to use or manage, and as such it constituted the property of the former State (Socialist Republic of Bosnia and Herzegovina). The provisions of the Law on the Initial Balance Sheet in the Procedure for Privatization of the State-Owned Capital in Enterprises (*Official Gazette of the Republika Srpska*, 24/98), which stipulate that the value of assets, claims and liabilities and capital of the enterprise being the subject of privatization is stated in the initial balance according to book value and in convertible marks (Article 2 and 4). Thus, the Constitutional Court holds that the National Assembly cannot base its responsibility to regulate the status of the land in question on the Law on Privatization of the State-Owned Capital in Enterprises as it is undisputable that the land in question was not the property of the enterprises (according to the books), the privatization of which was carried out by the Republika Srpska. Also, taking into account the fact that agricultural land is considered

a natural resource and public good according to Article 8 of the same Law and cannot be the subject of privatization according to the mentioned law and that the status of agricultural land shall be determined in a special law, the Constitutional Court considers as unfounded the National Assembly's allegations that the National Assembly was given the responsibility under the Law on the Privatization of the State-Owned Capital in Enterprises to privatize the agricultural land and establish it as its ownership. Next, as to the allegations of the National Assembly that the land in question was not included in the High Representative's Final Report on the State Property Inventory, of December 2009, the Constitutional Court observes that the fact as to whether agricultural land was recorded as State-owned land or not (referring to the inventory of December 2009) is not relevant to the decision as it is indisputable that the case related to the land recorded as people's property, socially-owned property or State-owned property with the rights arising out of such an ownership.

33. As regards the National Assembly's reference to the case-law of the Constitutional Court in cases no. *AP-2108/14*, *AP-4731/14* and *AP-2184/16* (wherein "Ratar" a.d. Prnjavor was the appellant), the Constitutional Court notes that in those cases, which fell under the scope of the appellate jurisdiction of the Constitutional Court, it dealt with the alleged violations of the constitutional rights of appellant "Ratar" a.d. Prnjavor (the right to a fair trial, right to property, right to prohibition of discrimination) in the proceedings before the ordinary courts and that "it did not find in those cases that agricultural land was subject to privatization process and that it was owned by the Republika Srpska".

34. Starting from the allegations of the applicants, the next issue the Constitutional Court should examine is whether the agricultural land in question constitutes the State-owned property of BiH and, in that respect, whether the Republika Srpska had constitutional responsibility to regulate the right of ownership over that land in the challenged provision.

35. When determining the notion of the State-owned property, the Constitutional Court found in the mentioned decision that "it includes, first of all, movable and immovable objects in the hands of public authorities and can include furthermore a "public good" (sea water and sea bed, river water and river beds, lakes, mountains and other natural resources, public transport networks, traffic infrastructure, etc.). It, by its nature, primarily serves all people in the country" (*op. cit. U-1/11*, paragraph 62).

36. The Constitutional Court observes that the Law on Agricultural Land determines that agricultural land constitutes natural resource and public good used for agricultural production and cannot be used for other purpose, except as provided in that Law.

37. Next, the Constitutional Court observes that the legal status of agricultural land was similar in former legal systems of Bosnia and Herzegovina, i.e. it was a public good subject to decision-making by the State. The Constitution of the Socialist Republic of

Bosnia and Herzegovina (Article 92) stipulated that the good of general interest, such as, *inter alia*, land, forests, water and other natural resources enjoyed special protection and were used under the terms and in the manner as prescribed by the law. However, in addition to the fact that it was defined as public good of general interest, agricultural land is also used as means of work in the agricultural production being of general interest. In this connection, the Constitutional Court notes that agricultural land had the status of people's property in the legal system of the Socialist Republic of Bosnia and Herzegovina and socially-owned property at a later point, which encompassed the right to manage, use it and have it at their disposal. For example, the first time that the means of work, such as the agricultural land, were encompassed by the right of use was in the 1953 Law on (SFRY) on Agricultural Land Fund of People's Property and Allocation of Land to Agricultural Organisations. Taking into account the legal continuation of the State of Bosnia and Herzegovina under Article I(1) of the Constitution of Bosnia and Herzegovina, the Constitutional Court observes that it follows from the foregoing that the land, including agricultural land, constituted public or State-owned property.

38. In response to the question whether agricultural land constitutes a part of the State property, the title holder of which is Bosnia and Herzegovina, the Constitutional Court, taking as a starting point Article I(1) of the Constitution of Bosnia and Herzegovina (State continuation) and conclusion referred to in its Decision No. *U-1/11* (*op. cit. U-1/11*, paragraphs 71 and 72), concludes that Bosnia and Herzegovina is the titleholder of the property of its legal predecessors, i.e. the agricultural land constitutes a part of the State property, the titleholder of which is Bosnia and Herzegovina.

39. It follows from the challenged provision that the Republika Srpska established that the agricultural land in question, upon the entry into force of the Law on Amendments to the Law on Agricultural Land, by force of law, would become the property and possession of the Republika Srpska, and that paragraphs 3, 4 and 5 prescribe the procedure for the registration of ownership. The Constitutional Court observes that the Republika Srpska regulated in the challenged provision the procedure for registration of ownership in its favour over the property, which the Constitutional Court found to be the State property. According to the challenged provision, the agricultural land in question becomes "the ownership" of the Republika Srpska.

40. The next question to be answered by the Constitutional Court is whether the Republika Srpska had the responsibility to regulate the legal status of the agricultural land in question as its ownership. In the mentioned case No. *U-1/11*, the Constitutional Court concluded that "pursuant to Article I(1) of the Constitution of BiH, BiH is entitled to continue to regulate 'the state property' of which it is the title holder, meaning all the issues related to the notion of 'the state property', both in terms of civil law and public law. This conclusion is the sole possible logical and substantive content of the notion of "identity and continuity" under the quoted provision. In addition, the Constitutional

Court reiterates that though every level of government enjoys constitutional autonomy, the Entities' constitutional competencies subordinated to the obligation to comply with the Constitution and "the decisions of the Institutions of BiH". This clearly arises from the provisions of Article III(3)(b) of the Constitution of BiH. Furthermore, the right of the State of BiH to regulate the issue of state property also stems from the provisions of Article IV(4)(e) of the Constitution of Bosnia and Herzegovina. Therefore, taking into account all the conclusions reached above, primarily that the State of BiH is entitled to continue to regulate the state property, i.e. that the State of BiH is the title holder of the state property, and that the provisions of Article IV(4)(e) of the Constitution of Bosnia and Herzegovina prescribe that the Parliamentary Assembly will be responsible for regulating such other matters as necessary to carry out its duties and that the state property reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina, it is undisputed that the aforementioned provision gives the State of BiH, i.e. the Parliamentary Assembly, competence to regulate the issue of state property. Therefore, this concerns the exclusive responsibility of BiH derived from Article I(1), Article III (3) (b) and Article IV(4)(e) of the Constitution of BiH" (*op.cit.* U-1/11, paragraph 80).

41. As to the findings and legal views which were expressed in the mentioned decision *U-1/11*, which are binding upon the Constitutional Court, the Constitutional Court notes that it has established in its case-law that the compliance with the final and binding decisions of the Constitutional Court relates not only to the enacting clause of the relevant decision but also to the legal opinion and the legal assessment as to what constitutional right has been violated and in what manner (see rulings of the Constitutional Court, No. *AP-289/03* and *AP-854/04* of 1 June 2006, paragraph 8 and, *mutatis mutandis,* Decisions on Admissibility and Merits, No. *2578/15* of 12 January 2016, paragraph 84, and *AP-699/15* of 9 July 2015, paragraph 61). Although the mentioned case-law is based on Article 62(4) of the Rules of the Constitutional Court, which relates to the effects of the decisions on appeals, the Constitutional Court holds that the same case-law relates to the decisions taken under Article VI(3)(a) and (c) of the Constitution of Bosnia and Herzegovina (see Constitutional Court, Ruling *No. U-3/13* of 30 September 2016, paragraph 11).

42. The Constitutional Court observes that the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina, which was enacted by the High Representative for Bosnia and Herzegovina, is in effect, and that Article 4 of that Law stipulates that the temporary prohibition on the disposal of State property in accordance with this Law shall be in force until the entry into force of the law regulating implementation of criteria to be used for identification of property owned by Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District of Bosnia and Herzegovina, and specifying the rights of ownership and management of State property, or until otherwise decided by the High Representative. The Constitutional Court observes that it concluded in Decision No. *U-1/11* that there was a true necessity and positive obligation of BiH to resolve this issue as soon as possible

(*op. cit. U-1/11*, paragraph 84). The Constitutional Court holds that the fact that a Law on the State Property has not been enacted yet does not mean that the Entities may regulate, by their own laws, the issue of ownership over the State property, which has not been defined yet at the level of Bosnia and Herzegovina. In addition, the Constitutional Court reiterates that the decision in this case does not prejudge the issue of legal regulation of the State property in the future, including the agricultural land, by BiH, Republika Srpska, Federation BiH and Brčko District.

43. Taking into account the provisions of Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina, which stipulate the legal continuation of the State of Bosnia and Herzegovina, and the fact that the State of Bosnia and Herzegovina is therefore the title holder of the property of its legal predecessors, that Bosnia and Herzegovina has the exclusive right to regulate the State property, as its title holder, the Constitutional Court concludes that the challenged provision, which stipulates that the agricultural land in question shall become, by force of law, the property and possession of the Republika Srpska is not compatible with Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina,

VII. Conclusion

44. The Constitutional Court concludes that the challenged provision, which stipulates that the agricultural land in question, which is a public good, i.e. the state property, shall become, by force of law, the property and possession of the Republika Srpska is incompatible with Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina, as Bosnia and Herzegovina has the exclusive responsibility to regulate the issue of state property.

45. Pursuant to Article 59(1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

46. Given the decision of the Constitutional Court in this case, the Constitutional Court does not need to consider the applicants' request for interim measure.

47. Within the meaning of Article 43 of the Rules of the Constitutional Court, President of the Constitutional Court Zlatko M. Knežević and Judge Miodrag Simović gave a statement of dissent from the decision of the majority of judges.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Case No. U-9/19

DECISION ON ADMISSIBILITY AND MERITS

Request of seven delegates of the Council of Peoples of Republika Srpska for review of constitutionality of Article 53 of the Law on Agricultural Land of the Republika Srpska (*Official Gazette of the Republika Srpska*, 93/06, 86/07, 14/10, 5/12 and 58/19)

Decision of 6 February 2020

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić, and

Mr. Giovanni Grasso

Having deliberated on the request filed by the **seven delegates of the Council of Peoples of the Republika Srpska,** in the Case no. **U-9/19**, at its session held on 6 February 2020, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding on the request of the Seven Delegates of the Council of Peoples of the Republika Srpska for review of the constitutionality of Article 2, items 11, 12, 20 and 21, Article 4, Article 6 paragraph 2, Article 8 paragraph 1 lines 1 and 2, Article 10, Article 15 paragraph 2, Article 24, Article 25 paragraph 4, Article 28 paragraph 3, Article 30 paragraph 1, Article 94 paragraph 4 and Article 95 paragraphs 1 and 2 of the Law on Inland Waterways Navigation of the Republika Srpska (*Official Gazette of the Republika Srpska*, 54/19)

It is hereby established that the provisions of Article 2, items 11, 12, 20 and 21, Article 4, Article 6 paragraph 2, Article 8 paragraph 1 lines 1 and 2, Article 10, Article 15 paragraph 2, Article 24, Article 25 paragraph 4, Article 28 paragraph 3, Article 30 paragraph 1, Article 94 paragraph 4 and Article 95 paragraphs 1 and 2 of the Law on Inland Waterways Navigation of the Republika Srpska (*Official Gazette of the Republika Srpska*, 54/19)

are not in conformity with Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina.

In accordance with Article 61(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the provisions of Article 2, items 11, 12, 20 and 21, Article 4, Article 6 paragraph 2, Article 8 paragraph 1 lines 1 and 2, Article 10, Article 15 paragraph 2, Article 24, Article 25 paragraph 4, Article 28 paragraph 3, Article 30 paragraph 1, Article 94 paragraph 4 and Article 95 paragraphs 1 and 2 of the Law on Inland Waterways Navigation of the Republika Srpska (*Official Gazette of the Republika Srpska*, 54/19) shall be quashed.

The quashed provisions of Article 2, items 11, 12, 20 and 21, Article 4, Article 6 paragraph 2, Article 8 paragraph 1 lines 1 and 2, Article 10, Article 15 paragraph 2, Article 24, Article 25 paragraph 4, Article 28 paragraph 3, Article 30 paragraph 1, Article 94 paragraph 4 and Article 95 paragraphs 1 and 2 of the Law on Inland Waterways Navigation of the Republika Srpska (*Official Gazette of the Republika Srpska*, 54/19), shall be rendered ineffective on the first day following the publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*, in accordance with Article 61(3) 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 24 October 2019, Dževad Mahmutović, Mihnet Okić, Džemaludin Šabanović, Fakur Đozić, Muris Čirkić, Ahmet Čirkić and Alija Tabaković, seven delegates of the Council of Peoples of the Republika Srpska ("the applicants") filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the constitutionality of Article 2, items 11, 12, 20 and 21, Article 4, Article 6 paragraph 2, Article 8 paragraph 1 lines 1 and 2, Article 10, Article 15 paragraph 2, Article 24, Article 25 paragraph 4, Article 28 paragraph 3, Article 30 paragraph 1, Article 94 paragraph 4 and Article 95 paragraphs 1 and 2 of the Law on Inland Waterways Navigation of the Republika Srpska (*Official Gazette of the Republika Srpska*, 54/19, "the Law") with Article I(1) of the Constitution of Bosnia and Herzegovina, Article

III(3)(b) of the Constitution of Bosnia and Herzegovina and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina**.**

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska ("the National Assembly") was requested to submit its reply to the request.

3. The National Assembly submitted its reply on 2 December 2019.

III. Request

a) Allegations stated in the request

4. The applicants primarily pointed to two things. They claimed that the National Assembly does not have the following: (1) legal basis for legal regulation of the issue of state-owned property and (2) of the issue of international and interstate traffic and infrastructure on water surfaces in the Republika Srpska. In the opinion of the applicants, the competence to resolve the mentioned issues lies exclusively with the State of Bosnia and Herzegovina ("BiH" or "the State of BiH") and its authorities. Despite that, the National Assembly regulated the mentioned issues in the Law. The applicants indicated that the challenged provisions were in violation of the provisions of Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina ("the Constitution of BiH" or "the Constitution").

5. As to the state property, the applicants pointed to the following: 1994 Law on the Transformation of Socially-Owned Property into State-Owned Property, Decision of the Constitutional Court no. *U-1/11* of 13 July 2012 and positions taken in that decision on the continuity of the State of BiH and the state property, the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina, and two Entities' laws prohibiting the disposal of state property in the territory of the Entities. The applicants stated that despite the fact that the issue of state property was an issue that was primarily within the jurisdiction of the State of BiH, the Entity of the Republika Srpska tried to resolve the same issue unilaterally and contrary to the Constitution of BiH, by enacting the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban, stipulating that it was about the property owned by the Republika Srpska (in respect of which the Constitutional Court passed its Decision no. *U-1/11*). The applicant stated that it was a similar situation as regards the challenged provisions of the Law.

6. The applicants (as to international and interstate traffic and infrastructure) have indicated that the responsibilities of the Institutions of BiH are set forth in Article III(1) of the Constitution of BiH. Accordingly, the exclusive responsibilities of the Institutions

of BiH include, *inter alia*, the foreign policy (item a), and the establishment and operation of common and international communications facilities (item h). The applicants pointed to the relevant stances specified in the Decision of the Constitutional Court no. U-9/00 of 3 November 2000 (the subject of decision-making was the constitutionality of the Law on State Border Service of BiH), as well as to the laws passed by the Parliamentary Assembly of BiH pursuant to Article IV(4)(e) of the Constitution of BiH, concerning the issues of international and interstate traffic and infrastructure, pointing to the Law on Ministries and other Administration Authorities of BiH (Article 10), the Law on Border Control (Articles 22-26) and the Law on Border Police of BiH in respect of which the challenged provisions of the Law were not harmonized.

7. According to the applicants, it follows from the aforementioned regulations that there is a special ministry at the state level responsible for the issues of international and interstate traffic and infrastructure (the Ministry of Communications and Transport of BiH). The Ministry of Communications and Transport of BiH is responsible, among other things, (also) for the international and inter-Entity traffic and infrastructure. In that connection, it is mentioned that water surfaces in the territory of any Entity, bordering with neighboring states, on which the international traffic regimes have been established, pursuant to the powers set forth in the Constitution of BiH, should be the subject of special regulations at the level of BiH. In this connection, the applicants pointed to the Framework Transport Strategy of BiH for the period 2016-2030, as well as the Framework Agreement on the Sava River Basin and Protocol on the Navigation Regime (*e.g.* Article 2 paragraph 1 and Article 4 paragraph 3), with the emphasis that the Framework Agreement had already resolved the issue of navigation on the Sava River. According to the Framework Transport Strategy of BiH for the period 2016-2030, the Sava River is a border waterway, and an international navigation regime is established on it. Accordingly, this document prescribes a divided jurisdiction over the traffic on this river, according to which the Ministry of Communications and Transport of BiH is in charge of international traffic. In view of the above, it may be concluded that delegating the responsibility for these issues to the Entities' ministries, as determined by the challenged provisions of the Law, constitutes a violation of Articles III(3)(b) and IV(4)(e) of the Constitution of Bosnia and Herzegovina.

8. The applicants stated that the provision of Article III(3)(b) of the Constitution of BiH stipulates the general principles of international law as an integral part of law of Bosnia and Herzegovina, which implies that the State of BiH has to comply with the international treaties signed and ratified. In the present case, as already stated, Bosnia and Herzegovina ratified the Agreement on Succession and the Framework Agreement on the Sava River Basin and its Protocol on the Navigation Regime, thereby accepting to work, together with other signatory states, on the establishment of an international regime of navigation on the Sava River and its navigable tributaries. As part of this Agreement, BiH assumed the obligation specified in the Protocol on the Navigation Regime,

according to which navigation on the rivers of the Sava River Basin shall be carried out in accordance with the Rules of Navigation to be determined by the International Sava River Basin Commission and the competent authorities of the Parties, and that the customs and border formal procedures shall be conducted at the sites designated by the competent authorities of the Parties, that is to say by the competent bodies of the State of BiH (considering the fact that the State is a signatory to the mentioned Agreement). It is possible to infer that the issues related to the international traffic and infrastructure (international waterways and ports, harbors, winter ports, border and customs control on these waterways, international and interstate regime of navigation and all issues related to them and such like) are an international obligation of the State of BiH. Tackling these issues in the manner provided for by the challenged provisions of the Law on Inland Waterways Navigation of the Republika Srpska constitutes an interference with the international obligations of the State of BiH, which it took over upon ratifying the Framework Agreement on the Sava River Basin and, in this way, it constitutes an activity on the part of the Entity's legislator, which is contrary to the provisions of Article III(3)(b) of the Constitution of BiH and may not remain in force. In view of the above, the applicants deem that the issue of inland navigation should be, first and foremost, regulated by a law at the level of BiH, which would clearly position the responsibility of the State and the Entities, thereby observing the Constitution of BiH and the decisions of the Institutions of BiH, and harmonize the operation of the competent bodies within BiH.

9. The applicants state that the Constitution of BiH (Article I(1)) clearly determines that BiH shall continue its legal existence under international law as a state with its internal structure modified based on the principles of democracy, equality and respect for human rights. The applicants point out that in BiH there are still groups, and one could say they are even getting stronger, which are not inclined to the common state. The applicants underline the operation of these groups, giving as examples the blockages of the decision-making processes at the state level, and the intensification of legislative activities at lower levels by those groups, outside the constitutional framework of BiH. By such activities, attempts are made to establish "states" in lieu of the Entities with their own legislature and institutions, which may function without the Institutions of the State. A series of laws have been enacted, while many are in the pipeline and attempting to define differently the issues already considered by the Constitutional Court of BiH and found to be the responsibility of the State of BiH. Thus, attempts are being made to provide for the powers of the Entities that the Constitution of BiH does not confer on them, *i.e.* to usurp the powers of the State of Bosnia and Herzegovina. A blatant example of the aforementioned is the Law on Inland Waterways Navigation of BiH, which has been in the pipeline as a preliminary draft since 2005, which has not gone through the parliamentary procedure to this day. The applicants indicate that the Preliminary Draft Law at the state level regulates the issues pertaining to vessels, operation and regime of navigation, control and safety of transport, and defines priority directions for advancement of cooperation related to revitalization of the waterway, harmonization of the system

and unification of the rules of navigation. However, even after almost fifteen years, the law has not been adopted in a parliamentary procedure at the level of BiH. However, its matter was taken over and regulated by the legislator in the Republika Srpska, by enacting the challenged Law on Inland Waterways Navigation of the Republika Srpska.

10. The applicants state that the continuity of the State of BiH, as prescribed by Article I(1) of the Constitution of BiH, implies in the present case the continuity of the right of the State of BiH to regulate the issue of state property, which belongs to it. Rivers, channels, lakes and other waterways may certainly be regarded as the state property, which the challenged Law declares as a public good owned by and in possession of the Republika Srpska. This property constitutes a portion of the property, which the Constitutional Court found to be capable of being a subject matter of regulation, primarily, under the laws at the level of BiH. Unilateral solution, as established by the provision of Article 4 of challenged Law, constitutes a violation of Article I(1) of the Constitution of BiH. The applicants indicate that the Constitutional Court specified in its Decision no. *U-1/11* the notion of state property, and established that it includes, *inter alia*, sea water and seabed, river water and river beds, *etc.*, and that, by its nature, it primarily serves all people in the country, and reflects the statehood, sovereignty and territorial integrity of BiH (see paragraph 62). Despite the fact that it is obvious that rivers, channels, lakes and other water surfaces referred to in Article 3, paragraph 1 of the Law constitute a portion of state property, the Law, under the challenged provision of Article 4, prescribed that it is a public good owned by and in the possession of the Republika Srpska.

11. The applicants indicate that the Constitution of BiH contains numerous provisions on the division of responsibilities between the State of BiH and the Entities. Although Article III(1) of the Constitution of BiH enumerates the responsibilities of the Institutions of BiH, this constitutional norm cannot be construed separately from other constitutional provisions. The Constitutional Court of BiH dealt with the responsibilities of the State and Entities' institutions in numerous cases before and established that the responsibility thereof has to be viewed in the context of the overall text of the Constitution of BiH. In that connection, and on the basis of the decisions of the Constitutional Court of BiH in the cases nos. *U-5/98-II*, *U-25/00* and *U-1/11*, one may infer that the division of responsibilities between the Institutions of BiH and those of the Entities may be found also in the provisions of Articles III, IV(4), V(3), as well as in other numerous provisions of the Constitution of BiH, such as Articles I(4) and I(7). In connection with the responsibility of the State and the division of responsibilities between the State of BiH and its Entities (in the present case in connection with the disputing of the provisions of the Law), the applicants pointed out the international obligations of the State of BiH and the obligation of the Entities to comply with the Constitution of BiH and the decisions of the Institutions of Bosnia and Herzegovina, contained in Article III(3)(b) of the Constitution of BiH.

12. The applicants requested that the Constitutional Court adopt the decision granting the request for review of the constitutionality of Article 2, items 11, 12, 20 and 21, Article 4, Article 6, paragraph 2, Article 8 paragraph 1 lines 1 and 2, Article 10, Article 15, paragraph 2, Article 24, Article 25, paragraph 4, Article 28, paragraph 3, Article 30, paragraph 1, Article 94, paragraph 4 and Article 95, paragraphs 1 and 2 of the Law on Inland Waterways Navigation of the Republika Srpska and establishing that the challenged articles of the Law are not in conformity with Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina and shall cease to be in force.

13. In order to prevent detrimental consequences that the challenged provisions might generate, the applicants proposed that the Constitutional Court adopt the interim measure prohibiting the application of the challenged articles of the mentioned Law.

b) Reply to the request

14. In the reply to the appeal, the National Assembly indicate that Article III(3)(a) of the Constitution of Bosnia and Herzegovina prescribes 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. Bearing in mind this provision, as well as Article III(1) of the Constitution of Bosnia and Herzegovina - the Law on Inland Waterways Navigation was passed in accordance with the Constitution of the Republika Srpska. Furthermore, the National Assembly indicate that Article 1 of the Law on Inland Waterways Navigation of the Republika Srpska prescribes that it regulates the conditions and manner of use of inland waters and the coastline of inland waters of the Republika Srpska for navigation, the safety of navigation on inland waters of the Republika Srpska, navigation safety objects, vessels, ship's papers, a procedure of entry into a register and deletion from the register of a vessel, vessel's capability to sail, shippers, goods and passengers transport, marine incidents, river information system, technical maintenance of waterways. This is to say that the Law regulates the inland navigation on inland waters of the Republika Srpska, which can, in no way, be in contravention of Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina.

15. Furthermore, it is indicated that Article 2 of the Law regulates the use of certain notions that have no normative character, where item 11 prescribes that an international navigational route is a waterway, where an international regime of navigation is applied and where vessels are allowed to sail under all flags, while item 12 stipulates that an international waterway is a waterway where an interstate regime of navigation is applied and where vessels are allowed to sail under the flags of the bordering states on that waterway. Both definitions only carry the clarification of the notions relating to the navigation regime, or the rules of navigation on inland navigable waterways, which constitute a traffic infrastructure owned by the Entity, and not an international or state navigable waterway.

16. The National Assembly further indicated that an international regime of navigation was declared on the Sava River and its navigable tributaries by the Framework Agreement on the Sava River Basin and the Protocol on the Regime of Navigation to the Framework Agreement, and referred to Article 2 of the Protocol on the Regime of Navigation to the Framework Agreement on the Sava River Basin. Also, references were made to Article 2 of the Framework Agreement on the Sava River Basin, which, as stated in the reply, "defined the position of the Republika Srpska and its competent institutions", while the list attached to the Framework Agreement on the Sava River Basin and the Protocol on the Regime of Navigation mentioned, as the bodies responsible for the implementation of the Framework Agreement on the Sava River Basin in BiH, the Ministry of Transport and Communications of the Republika Srpska, the Ministry of Spatial Planning, Construction and Ecology of the Republika Srpska and the Ministry of Agriculture, Forestry and Water Management. Therefore, it is clear that the Law in no way regulates the issue of international navigation, but the manner and conditions of the use of inland waters of the Republika Srpska, which was the reason why it was necessary to mention in Article 2, items 20 and 21 what the notions of a foreign vessel and a foreign public vessel implied, as well as to prescribe in Article 10 the manner and conditions under which a foreign vessel may use the navigable waterways of the Republika Srpska.

17. Further, the reply reads that Article 3 of the Law governs the issue of inland waters of the Republika Srpska, which include rivers, channels, lakes and other water surfaces of the Republika Srpska where navigation is carried out on certain waterways, while Article 4 prescribes that inland waters are a public good owned by and in the possession of the Republika Srpska. This provision, as stated in the reply, in no way attempts to solve the issue of state property, as it was clearly stated that those are inland waters where navigation is carried out, which is not the responsibility of Bosnia and Herzegovina under the Constitution of Bosnia and Herzegovina. The objective of this legal solution is to protect and to prevent from any detrimental treatment of inland waters of the Republika Srpska, and to establish the manner and conditions for safe use of inland waterways, as well as the maintenance and management of navigable waterways of the Republika Srpska.

18. Furthermore, Article 8 governs the issue of the regime of navigation on inland waters of the Republika Srpska, which, *inter alia*, may be the international navigation regime or interstate navigation regime. The objective of such formulation concerning this specific provision is to establish the conditions and manner of the use of inland waters of the Republika Srpska for navigation, as well as safety of navigation in these waters. Under the same analogy, Article 24, paragraph 1 prescribes that ports, or harbors may be open to public traffic (international and inland) or docks for own needs of carriers as part of their business activities (docks for gravel and sand, construction material and such like), if conditions for the safety of navigation have been met as set forth in the Law. Bearing in mind the definition of ports, or harbors, as prescribed in Article 23, paragraph 1 of the Law, as well as the definition of the navigation safety facilities referred to in

Article 20, paragraph 1 of the Law, and the fact that the international navigation regime was established on the Sava River and its tributaries, it is clear, as stated in the reply, that there was no violation of Article III(3)(b) of the Constitution of Bosnia and Herzegovina.

19. The National Assembly states that the challenged provision of Article 28, paragraph 3 of the Law prescribes that the Government shall pass a decision determining winter ports on inland navigation routes of the Republika Srpska to which international or interstate navigation regime is applied and prescribing the conditions that winter ports have to meet. Given that Article 27, paragraph 2 prescribes the definition of winter ports (built or natural water surfaces on a waterway, which is planned and equipped so as to be a safe shelter for vessels from ice damage, high water levels or other bad weather conditions) and the fact that a winter port is one of the navigation safety facilities situated on the coastline of inland waters, which construction and use require the consent of an authority in charge of spatial development and construction, it is the obligation of the owner of traffic infrastructure (namely the Republika Srpska in this case) to regulate this matter.

20. Article 30, paragraph 1 prescribes that the River Information System (RIS) shall be established on the navigational route on which the international navigation regime has been established, for the purpose of providing information services in planning and managing navigation, which will be available to all system users under equal conditions. The navigation on the navigational route on which the international navigation regime has been established shall be carried out in accordance with the rules of the International Sava River Basin Commission and the obligations arising from EU Directives. Bearing in mind the aforementioned, the Law has been aligned with the Directive 2005/44 EC of the European Parliament and the Council dated 7 September 2005, on aligned River Information Systems (RIS) on inland waterways.

21. The challenged Article 94, paragraph 4 prescribes that international transport is transport by vessels from any domestic port or harbor to a foreign port or harbor, or *vice versa*. This provision only defines what an international traffic implies. Article 95, paragraphs 1 and 2 regulates conditions a boatman has the obligation to meet in order to perform public transport of passengers and goods in inland and international traffic, as well as conditions for the transport for own needs in inland and international traffic.

22. In view of all the aforementioned, as stated in the reply, it is clearly visible that the assertions made by the applicants are ill-founded that all issues related to the international traffic and infrastructure - international waterways and ports, harbors, winter ports, international regime of navigation and interstate regime of navigation – are an international obligation of Bosnia and Herzegovina, and that the Law on Inland Waterways Navigation of the Republika Srpska constitutes the interference with the international obligations of Bosnia and Herzegovina. Bearing in mind the aforementioned, the National Assembly proposed that the respective request be dismissed, that is to say to establish that there is no violation in terms of the competence

of the Constitutional Court of Bosnia and Herzegovina referred to in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, *i.e.* that the challenged legal provision is in conformity with the Constitution of Bosnia and Herzegovina.

IV. Relevant Law

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

Article I
Bosnia and Herzegovina

1. Continuity

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. [...]

Article III

3. Law and Responsibilities of the Entities and the Institutions

All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.

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 IV
Parliamentary Assembly

4. Powers

The Parliamentary Assembly shall have responsibility for:

e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.

24. The **Law on Inland Waterways Navigation of the Republika Srpska** (*Official Gazette of the Republika Srpska*, 54/19), so far as relevant, reads:

CHAPTER I
BASIC PROVISIONS

Article 1

This Law regulates the conditions and manner of use of inland waters and the coastline of inland waters of the Republika Srpska for navigation, the safety of navigation

on inland waters of the Republika Srpska, navigation safety facilities, vessels, ship's papers, a procedure of entry into a register and deletion from the register of a vessel, vessel's capability to sail, boatmen, transport of goods and passengers, marine incidents, river information system, technical maintenance of waterways.

Article 2

Certain notions used in this Law shall have the following meaning:

[...]

11) international navigational route is a waterway, where an international regime of navigation is applied and where vessels are allowed to sail under all flags,

12) international waterway is a waterway where an interstate regime of navigation is applied and where vessels are allowed to sail under the flags of the bordering states on that waterway,

[...]

18) the River Information System (hereinafter: RIS) are aligned information services intended as a support to the management of navigation on waterways, including, if so justified, a connection with other forms of traffic,

[...]

20) a foreign vessel is a vessel of foreign affiliation entered in a foreign register of vessels,

21) a foreign public vessel is a vessel used by a public authority of other states, other than warships, used exclusively for non-economic purposes,

[...]

Article 3

(1) The inland waters of the Republika Srpska (hereinafter: the inland waters) are rivers, channels, lakes and other water areas of the Republika Srpska, which specific navigational routes are sailed on, in accordance with this Law.

(2) A decision determining navigational routes on the inland waters of the Republika Srpska shall be issued by the Government of the Republika Srpska (hereinafter: the Government).

Article 4

The inland waters referred to in Article 3, paragraph 1 of this Law are public goods owned by and in the possession of the Republika Srpska.

CHAPTER II
SAFETY OF NAVIGATION

1. Common Provisions

Article 6

(1) The safety of navigation includes the conditions, rules, technical rules and measures to be fulfilled as mandatory by vessels, vessels crew, waterways and safety facilities, in order to ensure safe navigation.

(2) The Minister of Traffic and Communications (hereinafter: the Minister) shall pass rulebooks prescribing a manner of exercising the protection of people, goods and the environment, as well as procedures for investigating the causes of accidents of domestic and foreign civilian vessels on inland waters of the Republika Srpska.

2. Regimes of navigation and navigation

Article 8

(1) The following navigation regimes may be prescribed on inland waterways navigational routes:

1) International navigation regime,

2) Interstate navigation regime,

[...]

(2) The Government shall issue a decision on the navigation regimes on inland waterways navigational routes of the Republika Srpska.

Article 10

1) Foreign vessels may navigate inland waterways navigational routes on which the prescribed navigation regime applies.

2) Foreign vessels may navigate other inland waterways navigational routes for the purpose of entry into a port, or harbor open to international traffic.

3) Foreign vessels shall have the obligation to display the national ensign when navigating or operating in inland waters of the Republika Srpska.

4) The Minister shall issue a rulebook determining the conditions for navigation and stay of foreign vessels in inland waters of the Republika Srpska

Article 15

[...]

(2) Categorization of waterways is carried out on the basis of technical and exploitation features established under an international agreement.

[...]

Article 24

1) Ports, or harbors may be open to public traffic (international and inland) or docks for own needs of carriers as part of their business activities (docks for gravel and sand, construction materials and such like), if conditions for the safety of navigation have been met as set forth in Article 6, paragraph 1 of this Law.

2) The Government shall issue a decision determining ports, or harbors designated for international traffic, as well as conditions that are mandatory for the ports, or harbors designated for international traffic to meet.

Article 25 paragraph 4

4) When it comes to using a port, or a harbor open to international public traffic and paying port or harbor fees, on a condition of reciprocity, foreign vessels enjoy the same status as domestic vessels.

Article 28 paragraph 3

(3) The Government shall pass a decision determining winter ports on inland navigational routes of the Republika Srpska on which international or interstate navigation regime is applied and prescribing the conditions that winter ports have to meet.

Article 30

(1) The River Information System (RIS) shall be established on the navigational route on which the international navigation regime has been established, for the purpose of providing information services in planning and managing navigation, which will be available to all system users under equal conditions.

[...]

Article 94 paragraph 4

(4) International transport is transport by vessels from any domestic port or harbor to a foreign port or harbor, or vice versa.

Article 95

(1) A boatman may perform public transport of passengers and goods in inland and international traffic if registered to perform such activity.

(2) Transport for own needs in inland and international traffic may be performed by a legal or natural person if registered to perform such activity.

[...]

25. The **Law on Ministries and other Administration Authorities of Bosnia and Herzegovina** (*Official Gazette of BiH*, 5/03, 42/03, 26/04, 42/04, 45/06, 88/07, 35/09, 59/09, 103/09, 87/12, 6/13, 19/16 and 83/17). For the purpose of this decision, unofficial

revised text compiled at the Constitutional Court of Bosnia and Herzegovina will be used, which reads as follows:

Article 10

The Ministry of Communications and Transport shall be responsible for:

- *policy and regulation of common and international communication facilities;*
- *international and inter-Entity transportation and infrastructure;*
- *preparation of treaties, agreements and other acts in the field of international and inter-Entity communications and transport;*
- *relations with international organizations in the field of international and inter-Entity communications and transport;*
- *preparation and drafting of strategic and plan documents in the field of international and inter-Entity communications, transport, infrastructure and information technologies;*
- *tasks of control of smooth transport in international transportation;*
- *civil aviation and air traffic control.*

The Ministry shall comprise administrative organizations: the Directorate of Civil Aviation of Bosnia and Herzegovina and the Regulatory Board of Railways of Bosnia and Herzegovina, the rights and duties of which shall be set forth by a special law.

26. The **Law on Border Control** (*Official Gazette of BiH*, 53/09, 54/10 and 47/14), so far as relevant, reads as follows:

Article 22
(Permit for foreign vessels' cruise and stopping)

(1) Foreign vessels for entertainment or sports may cruise and stop in the coastal seas of BiH, and on rivers designated for international navigation, if they obtain a permit.

(2) The permit referred to in paragraph 1 of this Article may be issued to a foreign vessel for entertainment or sports if the crew of such vessels meets general conditions for the entry into BiH, prescribed by Article 8, paragraph 2 of this Law, and the vessel possesses appropriate documents.

(3) The permit is issued by the nearest port authority, with the consent of the competent units of the BPBiH and ITA, after the foreign vessel referred to in paragraph 1 of this Article has entered the inland waters.

(4) The permit for foreign vessels referred to in paragraph 1 of this Article, shipped to BiH by land, is issued by the nearest port authority.

(5) The permit referred to in paragraph 1 of this Article shall contain the features of a foreign vessel designated for entertainment or sports, the details on the crew and passengers of the vessel concerned, as well as the expiry date of the permit.

Article 23
(Temporary ban or restriction of navigation)

BPBiH may temporarily ban or restrict the navigation in a certain area of a river designated for international navigation or coastal seas, if so suggested for the reasons of border safety.

Article 24
(Obligation to report persons without documents)

(1) A vessel commander or leader shall have the obligation, after docking at a port, to report to the competent unit of the BPBiH or other police unit any person aboard the vessel without documents required to cross the state border, as well as a person who boarded the vessel without the permission of the captain or leader.

(2) The vessel commander or leader will not allow for a person referred to in paragraph 1 of this Article, or a person prohibited to enter BiH, to disembark the vessel without the permission of the BPBiH.

(3) In the event that a person referred to in paragraphs 1 and 2 of this Article disembarks the vessel without the permission of the BPBiH, the commander, leader or owner of the vessel shall have the obligation to cover the costs of the stay and removal of that person from BiH.

Article 25
(A person boarding the vessel outside a border crossing)

(1) The vessel commander or leader in international traffic shall not allow persons to board or disembark a vessel outside a border crossing, unless in the event of rescuing persons.

(2) The vessel commander or leader in international traffic shall have the obligation to report immediately the case referred to in paragraph 1 of this Article to the nearest unit of BPBiH or to other police unit.

Article 26
(Permit issued to a crewmember to move in the place of the detention of a ship)

(1) A crewmember of a foreign ship, who does not have the required visa to enter BiH, for the duration of the detention of the ship in the area of a border crossing or a port, may be issued a permit to move in the area where the port is situated.

(2) The permit referred to in paragraph 1 of this Article, upon the request of the commander of a foreign ship, shall be issued by the competent unit of the BPBiH for the duration of the detention of the ship, up to a maximum of 30 days.

(3) The BPBiH will issue an enforcement regulation on the layout, content and the method of issuance, and on the form of the permit for movement in the place of detention of a ship, within one year from the day of entry into force of this Law.

27. The **Protocol on the Regime of Navigation to the Framework Agreement on the Sava River Basin (FASRB) – Decision on ratification of the Framework Agreement on the Sava River Basin and the Protocol on the Regime of Navigation** (*Official Gazette of BiH – International Treaties*, 8/03 and 10/04), so far as relevant, reads:

Pursuant to the provisions referred to in Article 10, paragraph 6 of the Framework Agreement on the Sava River Basin (hereinafter: The Agreement), Bosnia and Herzegovina, the Republic of Croatia, Republic of Slovenia and the Federal Republic of Yugoslavia (hereinafter: The Parties) have agreed as follows:

Article 1

Navigation on the Sava River from the river kilometer 0.00 to the river kilometer 586.00, on the Kolubara River from the river kilometer 0.00 to the river kilometer 5.00, on the Drina River from the river kilometer 0.00 to the river kilometer 15.00, on the Bosna River from the river kilometer 0.00 to the river kilometer 5.00, on the Vrbas River from the river kilometer 0.00 to the river kilometer 3.00, on the Una River from the river kilometer 0.00 to the river kilometer 15.00 and on the Kupa River from the river kilometer 0.00 to the river kilometer 5.00, shall be carried out in accordance with the provisions of Article 10 of the Framework Agreement on the Sava River Basin.

Article 2

1) Navigation on the rivers referred to in Article 1 of this Protocol shall be carried out in accordance with the Rules of Navigation to be determined by the International Sava River Basin Commission (hereinafter: Sava Commission) and the competent authorities of the Parties.

2) The Rules determined by the competent authorities of the

Parties shall be in accordance with the decisions of the Sava Commission.

Article 3

The Parties acknowledge equal status of all vessels in:

a) payment of navigation and port fees, services and taxes;

b) use of pilotage services;

c) use of port equipment, anchorage sites, navigation locks and other vessel equipment for general use;

d) loading and unloading vessels, embarking and disembarking persons;

e) conducting all types of controls and issuing documents by the competent authorities;

f) furnishing vessels with fuel, lubricants, water and other supplies; and

g) discharging waste, wastewater and used mineral oils generated onboard vessels.

Article 4

1) The competent authorities of the Parties shall be in charge of customs, police and sanitary procedures and shall communicate the rules on these procedures to the Sava Commission which shall assist in their harmonization.

2) The customs, police and sanitary rules pertaining to navigation on the rivers referred to in Article 1 of this Protocol shall be applied to vessels without discrimination in terms of nationality. These rules shall be of such nature so as not to hinder navigation.

3) Customs and border formal procedures shall be conducted at the sites designated by the competent authorities of the Parties. The Parties shall inform the Sava Commission on the location of these sites.

Article 5

The competent authorities of the Parties shall supervise navigation in a uniform manner in accordance with the decisions of the Sava Commission and national regulations of the Parties.

28. The website of the Sava Commission https://www.savacommission.org) carries a column titled "Basic documents", which contains a document "List of the bodies of the Parties' responsible for implementation of the Framework Agreement on the Sava River Basin". The mentioned document lists the following bodies for Bosnia and Herzegovina:

- *Ministry of Communications and Transport of BiH*
- *Ministry of Foreign Trade and Economic Relations of BiH*
- *Ministry of Agriculture, Forestry and Water Management of the Republika Srpska*
- *Federal Ministry of Agriculture, Water Management and Forestry*
- *Ministry of Transport and Communications of the Republika Srpska*
- *Federal Ministry of Transport and Communications*
- *Ministry of Spatial Planning, Civil Engineering and Ecology of the Republika Srpska*

29. The **Decision adopting the Framework Transport Strategy of Bosnia and Herzegovina for the period 2016-2030 (***Official Gazette of BiH*, 71/16), so far as relevant, reads (the Decision published in the *Official Gazette* – Bosnian language, page 142 onwards was used):

2.4 Inland Waterways

Taking into account the morphological and hydrological characteristics of the watercourses in BiH as well as possibilities and needs for development of transport on the rivers, it is necessary to observe separately the Sava River from other rivers, the

Sava's tributaries: the rivers Una with Sana, Vrbas, Bosna and Drina. Both the Drina and Una rivers are navigable with a length of about 15 km from theirs confluences in the Sava River.

The Sava River, as a border waterway, deserves a special attention because it is a valuable economic potential, particularly in terms of navigation and providing conditions for economic transport of goods.

On the Sava River, an international regime of navigation is established and jurisdiction over traffic is divided on three levels:

- *Ministry of Communications and Transport of BiH, in charge of international traffic;*
- *Ministry of Transport and Communications of FBiH, responsible for infrastructure;*
- *Ministry of Transport and Communications of the RS, responsible for infrastructure;*
- *Traffic Department in the Brcko District, responsible for infrastructure.*

V. Admissibility

30. 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.

31. 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 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.

32. The request for review of constitutionality was filed by seven delegates of the Council of Peoples of the Republika Srpska, which has a total of 28 delegates, which makes up ¼ of members of either chamber of a legislature of an Entity, which means,

contrary to the assertions made by the National Assembly of the Republika Srpska, that the request was filed by an authorized subject, within the meaning of Article VI(3)(a) of the Constitution of BiH, (see, the Constitutional Court, Decision on Admissibility no. *U-7/10* of 26 November 2010, paragraph 21, available at the website of the Constitutional Court www.ustavnisud.ba).

33. Having regard to 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 found that the request is admissible, as it was filed by an authorized subject, therefore, there is no single formal reason under Article 17(1) of the Rules of the Constitutional Court rendering the request inadmissible.

VI. Merits

34. The applicants state that the Law on Inland Waterways Navigation of the Republika Srpska ("the Law") is not in conformity with Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of BiH.

35. The Constitutional Court will divide the reasoning of the decision into two parts, as follows:

a) The first part of the reasoning will relate to Article 4 of the Law, which is challenged so as to claim that the Entity of the Republika Srpska has no legal basis for legal regulation of the issue of state-owned property, which, in the opinion of the applicants, certainly includes inland waters, which the mentioned article prescribed to be owned by the Republika Srpska.

b) The second part of the reasoning will relate to articles of the Law, as follows: Article 2, items 11, 12, 20 and 21, Article 4, Article 6 paragraph 2, Article 8 paragraph 1 lines 1 and 2, Article 10, Article 15 paragraph 2, Article 24, Article 25 paragraph 4, Article 28 paragraph 3, Article 30 paragraph 1, Article 94 paragraph 4 and Article 95 paragraphs 1 and 2. The mentioned articles are disputed because they regulate the issues of international and interstate traffic and infrastructure on water surfaces, which issues, in the opinion of the applicants, fall exclusively within the jurisdiction of the State of BiH and its authorities.

36. The National Assembly, as the enactor of the Law, challenged the allegations made by the applicants. The essence of the allegations is that the Law pertains to the inland waters of the Republika Srpska, over which the State of BiH has no jurisdiction under the Constitution of BiH. Article 3 of the Law prescribes what inland waters are and the Republika Srpska has the jurisdiction over those.

37. The challenged Article 4 of the Law prescribes as follows: "The inland waters referred to in Article 3 paragraph 1 of this Law are public goods owned by and in the possession of the Republika Srpska". Article 3 paragraph 1 of the Law prescribes as

follows: "The inland waters of the Republika Srpska (hereinafter: the inland waters) are rivers, channels, lakes and other water areas of the Republika Srpska, which specific navigational routes are sailed on, in accordance with this Law". Synonyms for the word property referred to in the challenged Article 4 are possession and ownership.

38. In the Decision no. *U-1/11* of 13 July 2012, the Constitutional Court examined whether the Republika Srpska had the constitutional responsibility to pass the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban. However, in that decision the Constitutional Court explained what the notion state property meant. Accordingly, paragraph 62 reads as follows: "State property, although similar in its structure to civil law private property, is a specific legal concept enjoying a special status for this reason. State property is characterized by the public law nature of the relationship between the subjects and the use of that property as well as its title holder. It includes, on the one hand, movable and immovable assets in the hands of public authorities which it uses to exercise that authority, on the other hand, it may include a "public good" (sea water and seabed, river water and river beds, lakes, mountains and other natural resources, public transport networks, traffic infrastructure, *etc*.). It, by its nature, primarily serves all people in the country. As such, the "public good" may be exempted from legal transaction (*res extra commercium*) due to its importance, as it is the only way to preserve and protect it."

39. In addition, in paragraph 77 of the Decision no. *U-1/11* the Constitutional Court emphasized that the subject-matter of regulation by the challenged Law under examination is "the immovable property which Bosnia and Herzegovina got on the basis of the International Agreement on Succession Issues", and "the immovable property over which the former SRBiH had the right to manage and to dispose of". However, in the continuation of the reasoning (see paragraph 82), the Constitutional Court additionally clarified that the notion of state property may not mean solely real properties such as buildings and such like, and emphasized as follows: "The Constitutional Court reiterates that the state property has a special status. It encompasses, on the one hand, movable and immovable assets in the hands of public authorities used to exercise that authority. On the other hand, the state property can include a public good, which, by its nature, primarily serves all people in the country (running water, protection of climate-related living conditions and protection of other natural resources such as forests, necessary state infrastructural networks within the meaning of Annex 9 to the General Framework Agreement for Peace in BiH, *etc*.). Such property reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina. Furthermore, the interest of BiH should not be disregarded when it comes to preserving its "public good", as a part of the state property serving all citizens of BiH and as a part which is not essential in order for specific competence of certain administrative-territorial level of government to be effectively exercised in the state. In addition, this property may serve as "another means for financing the expenses necessary for executing the responsibilities of the Institutions

of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina", within the meaning of Article IV(4)(b) in conjunction with Article VIII(3) of the Constitution of Bosnia and Herzegovina."

40. It follows from the cited case-law of the Constitutional Court that waters, as public goods, are considered state property. When the challenged Article 4 is read together with the provisions of Article 3 paragraph 1 of the Law, it follows that inland waters are "... water areas... where navigation is carried out on certain waterways…" However, it is obvious that "inland waters" or "water areas", as referred to in the mentioned articles of the Law, are considered public goods, concerning which the Constitutional Court had taken a position earlier to be part of state property (river water and river beds, lakes, running water, as stated in the cited paragraphs 62 and 82 of the Decision no. *U-1/11*). The Constitutional Court held (also) in the present case that "inland waters", referred to in the challenged Article 4, were included in the notion of state property. The Constitutional Court does not take it as a justification that the legislator indicated that these were "inland waters in the territory of the Republika Srpska", for all of that is situated in the territory of the State of BiH. In terms of the title-holder of state property, there are no abstract "external waters", in order for the legislator to make a difference in comparison to the "inland waters" in the territory of the Republika Srpska that are its property.

41. As the challenged Article 4 of the Law prescribes that inland waters are "ownership of the Republika Srpska", in that way they were registered legally as the property of the Republika Srpska and were assigned to the Republika Srpska. It has been reasoned above that the state property (the property of the State of BiH) includes (also) inland waters. Therefore, the Constitutional Court has to conclude that the disputed provision is contrary to Articles I(1), III(3)(b) and IV(4)(e) of the Constitution of BiH, for the state property should be decided at the level of the State of BiH, as it follows from the Decision *U-1/11,* which the Constitutional Court supports in this case too, as the decision on the status of the state property falls exclusively within the jurisdiction of the State of BiH in terms of the cited constitutional provisions.

42. However, unlike the case in which the decision *U-1/11* was rendered, in this case the constitutionality of the entire law was not challenged. The Entity of the Republika Srpska undoubtedly has the responsibility to regulate the navigation on "certain" inland waters, which will be elaborated on in the continuing part of the reasoning.

43. This part of the reasoning will carry the examination of the constitutionality of the provisions of the Law, as follows: Article 2, items 11, 12, 20 and 21, Article 4, Article 6 paragraph 2, Article 8 paragraph 1 lines 1 and 2, Article 10, Article 15 paragraph 2, Article 24, Article 25 paragraph 4, Article 28 paragraph 3, Article 30 paragraph 1, Article 94 paragraph 4 and Article 95 paragraphs 1 and 2.

44. The mentioned articles of the Law will be examined together, for the reason that the Constitutional Court deems that the same reasoning applies to all the challenged provisions.

45. As indicated in the part of the reasoning above, the Constitutional Court holds that the Republika Srpska has responsibility to regulate the issue of inland navigation, exclusively on inland waters though. In terms of the constitutional division of responsibility, the Constitutional Court regards as "exclusively inland waters" the waters of the Republika Srpska that are not at the same time the state borders and international navigable rivers.

46. Under Article 3(1) of the Law, it is obvious that various issues of inland navigation, which are regulated by the challenged articles, pertain to all inland waters that are situated in the Republika Srpska. That is where the Constitutional Court sees the main problem. It is undisputed that the rivers Sava and Drina flow through the Republika Srpska. However, it is undisputed that the rivers Sava and Drina make up a part of the state border to the Republic of Croatia and to the Republic of Serbia, while being at the same time the international navigable rivers. The Law, which is obvious from the provisions of the law and the reply of the National Assembly of the Republika Srpska, established the exclusive responsibility of the Republika Srpska over the issues of inland navigation on all water courses in the Republika Srpska, including the Sava River and the Drina River, irrespective of the fact that those rivers are part of the state border and are international navigable rivers at the same time. The Constitutional Court does not see a single reason why the part of the river border should be treated differently from the land, sea or air border, over which certain responsibilities are undisputedly held by state authorities (for instance, customs service, border police, *etc.*). According to the existing state laws, particularly under the provisions of the Law on Border Control (*Official Gazette of BiH*, 53/09, 54/10 and 47/14), state authorities have responsibilities over navigable rivers on which international navigation takes place. For instance, the Border Police of BiH has powers to issue permits for sailing and stopping of foreign vessels (Article 22), to temporarily ban or restrict navigation (Article 23), to regulate the obligation to report persons without documents (Article 24) as well as embankment of vessels outside a border crossing (Article 25), and the issuance of permits to a crew member for movement at the location of the ship detention (Article 26).

47. In addition, the issues of navigation on the international navigable rivers are regulated under the Framework Agreement on the Sava River Basin as well as the Protocol on the Regime of Navigation (Decision on ratification of the Framework Agreement on the Sava River Basin and the Protocol on the Regime of Navigation, *Official Gazette of BiH – International Treaties*, 8/03 and 10/04), where, for instance, Article 4 (Protocol on the Regime of Navigation) prescribes that the competent authorities of the Parties shall be in charge of customs, police and sanitary procedures. However, as there are no guarantees that the responsibilities of state authorities referred to in the cited provisions of the

Law on Border Control will be observed, nor is it possible to see from the challenged provisions of the Law that the responsibilities of state authorities, which the mentioned Article 4 of the Protocol on the Regime of Navigation pertains to, will be observed. It is indisputable that according to the state laws the state authorities have powers concerning "customs and police service", as stipulated in Article 4 of the Protocol on the Regime of Navigation. The website of the Sava Commission carries a list of the national bodies responsible for implementation of the Framework Agreement on the Sava River Basin, as follows: the Ministry of Communications and Transport of BiH and the Ministry of Foreign Trade and Economic Relations of BiH (on behalf of the State of BiH), on behalf of the Entity of the Republika Srpska the responsible bodies are the following: the Ministry of Agriculture, Forestry and Water Management of the Republika Srpska, the Ministry of Transport and Communications of the Republika Srpska and the Ministry of Spatial Planning, Civil Engineering and Ecology of the Republika Srpska. According to the Decision adopting the Framework Transport Strategy of Bosnia and Herzegovina for the period 2016-2030 (*Official Gazette of BiH*, 71/16), an international regime of navigation was established on the Sava River, while the responsibility over traffic was divided between: the Ministry of Communications and Transport of BiH – responsible for international traffic and the Ministry of Transport and Communications of the Republika Srpska – responsible for infrastructure. Despite that, in the reply of the National Assembly of the Republika Srpska, when referring to the aforementioned acts, there is no mention of the state authorities and specific responsibilities of the state authorities, instead the reply mentions solely the responsibilities of the Entity of the Republika Srpska in such a way that it is possible to conclude that all the issues relating to the inland navigation on interstate and international navigable rivers (Sava and Drina) are the exclusive responsibility of the Republika Srpska.

48. The National Assembly may not base its exclusive responsibility over the regulation of the issues of inland waters navigation on the rivers Sava and Drina, just because they flow partially through the Republika Srpska. The Constitutional Court reached a similar conclusion concerning the regulation of the issue of property (ownership) over the waterways in the Republika Srpska.

49. Therefore, the issues pertaining to the navigation on interstate and international rivers, as well as the related responsibility between the State and Entity authorities, should be regulated by a law to be passed at the state level, as those issues are the exclusive responsibility of the State of BiH under Articles I(1), III(3)(b) and IV(4)(e) of the Constitution of BiH.

50. In view of the fact that the aforementioned has not been done and the challenged provisions of the Law may be applied (also) to the rivers Sava and Drina, which make up part of the border of BiH, while being the international navigable rivers, the Constitutional Court concludes that articles of the Law, as follows: Article 2, items 11,

12, 20 and 21, Article 4, Article 6 paragraph 2, Article 8 paragraph 1 lines 1 and 2, Article 10, Article 15 paragraph 2, Article 24, Article 25 paragraph 4, Article 28 paragraph 3, Article 30 paragraph 1, Article 94 paragraph 4 and Article 95 paragraphs 1 and 2, are not in conformity with Articles I(1), III(3)(b) and IV(4)(e) of the Constitution of BiH.

VII. Conclusion

51. The Constitutional Court concludes that the provisions of Article 2, items 11, 12, 20 and 21, Article 4, Article 6 paragraph 2, Article 8 paragraph 1 lines 1 and 2, Article 10, Article 15 paragraph 2, Article 24, Article 25 paragraph 4, Article 28 paragraph 3, Article 30 paragraph 1, Article 94 paragraph 4 and Article 95 paragraphs 1 and 2 of the Law on Inland Waterways Navigation of the Republika Srpska (*Official Gazette of the Republika Srpska*, 54/19) are not in conformity with Articles I(1), III(3)(b) and IV(4)(e) of the Constitution of Bosnia and Herzegovina, for the reason that the issues pertaining to the navigation on interstate and international rivers, as well as the related responsibility between the State and Entity authorities, should be regulated by a law to be passed at the state level, as those issues are the exclusive responsibility of the State of BiH according to the mentioned provisions of the Constitution of BiH.

52. Pursuant to Article 59(1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

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

54. Pursuant to Article 43 of the Rules of the Constitutional Court, President Zlatko M. Knežević and Judge Miodrag Simović gave a statement dissenting from the majority decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Case No. U-2/20

DECISION ON ADMISSIBILITY AND MERITS

Request of 11 Members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina for review of constitutionality of Article 2 of the Law on Amendments to the Animal Welfare Law (*Official Gazette of Bosnia and Herzegovina*, 9/18), with the Constitution of Bosnia and Herzegovina

Decision of 26 November 2020

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President,

Mr. Mato Tadić, Vice-President,

Mr. Mirsad Ćeman, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić, and

Ms. Angelika Nussberger

Having deliberated on the request filed by **11 Members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina**, in case no. **U-2/20**, at its session held on 26 November 2020, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding the request filed by 11 Members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina for review of constitutionality of Article 2 of the Law on Amendments to the Animal Welfare Law (*Official Gazette of Bosnia and Herzegovina*, 9/18)

it is hereby established that Article 2 of the Law on Amendments to the Animal Welfare Law (*Official Gazette of Bosnia and Herzegovina*, 9/18) is compatible with Article I(2) 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 26 February 2020, 11 Members of the House of Representatives of the Parliamentary Assembly 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 Article 2 of the Law on Amendments to the Animal Welfare Law (*Official Gazette of Bosnia and Herzegovina*, 9/18), ("the contested Law") with the Constitution of Bosnia and Herzegovina.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, the House of Peoples and House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina were requested on 3 March 2020 to submit their responses to the request.

3. The Constitutional-Legal Commission of the House of Peoples of the Parliamentary Assembly of BiH submitted its response on 28 May 2020 and Constitutional-Legal Commission of the House of Representatives of the Parliamentary Assembly of BiH submitted its response on 14 May 2020.

III. Request

a) Allegations stated in the request

4. In short reasons given in support of their request, the applicants allege that the Proposal for Contested Law was adopted on 31 January 2018, 31 days after the relevant prohibition had come into force that it came into force on 6 February 2018 by being published in the *Official Gazette of Bosnia and Herzegovina*, 9/18.; that the contested Law was adopted in contravention of the Law in force, i.e. positive legal provision which was in force at that point of time; that the prohibition had effect for full 37 days; that the decision on the extension of time-limits is incompatible with the previously adopted law whereby the prohibition started to run as of 1 January 2018. The applicants are of the opinion that the contested Law "is contrary to the principle of lawfulness and that it permits general legal uncertainty and instability and supports previous legal uncertainty raised because of inadequate application of the same law due to the fact that the register of fur farmers does not exist at any of the levels of Bosnia and Herzegovina".

5. The applicants proposed that their request should be granted and that it should be established that the contested Law was not compatible with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and, finally, that the contested Law should be annulled as a whole.

b) Response to the request

6. In its response, the President of the Constitutional-Legal Commission of the House of Peoples of the Parliamentary Assembly of BiH alleged that that Commission had decided unanimously to leave the request up to the decision of the Constitutional Court.

7. The President of the Constitutional-Legal Commission of the House of Representatives of the Parliamentary Assembly of BiH alleged that the request for review of constitutionality had been considered at the session held on 14 May 2020 and that it had been unanimously concluded that the Parliamentary Assembly of BiH had enacted the contested Law in accordance with its powers under Article IV(4) of the Constitution of Bosnia and Herzegovina.

IV. Relevant Law

8. The **Constitution of Bosnia and Herzegovina**, in its relevant part, reads as follows:

(...)

Article I
Bosnia and Herzegovina

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 IV
Parliamentary Assembly

4. Powers:

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.

Constitutional Court

Article VI(3)(a)

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 neighbouring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision fan 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.

9. The **Animal Welfare Law** (*Official Gazette of Bosnia and Herzegovina*, 25/00), in its relevant part reads:

SECTION II – PROTECTION OF ANIMALS DURING THE KEEPING AND BREEDING

Article 4
(Protection of animals during the keeping)

It is notably prohibited:

(...)

Article 4 bb) - to breed animals for fur production purposes.

Article 43(5)
(Time limit for enactment of by-laws)

(5) The provision of Article 4 of this Law relating to the prohibition on breeding animals for fur production purposes shall enter into force in 2018.

10. The **Law on Amendments to the Animal Welfare Law** (*Official Gazette of Bosnia and Herzegovina*, 9/18), in its relevant part, reads as follows:

Article 2

In Article 43 paragraph 5, number "2018" shall be replaced with number "2028".

Article 3

This Law shall come into force on the eighth day following its publication in the Official Gazette of Bosnia and Herzegovina.

V. Admissibility

11. 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.

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.

12. The request for review of constitutionality was filed by 11 Members of the House of Representatives of the Parliamentary Assembly of BiH, out of a total number of 42 members, which means that the request was filed by an authorized person (by one-fourth of the members/delegates of either chamber of the Parliamentary Assembly) for the purposes of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

13. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court established that the request at hand was admissible as it was filed by an authorized person and there was no other formal reason under Article 19 of the Rules of the Constitutional Court that would render the request inadmissible.

VI. Merits

14. The Constitutional Court reminds that the applicants claim that Article 2 of the contested Law is incompatible with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. The Constitutional Court observes that Article VI(3)(a) of the Constitution

of Bosnia and Herzegovina prescribes one of the jurisdictions of the Constitutional Court. It is therefore obvious that there is no ground for examining the constitutionality of the contested Law with regard to that constitutional provision.

15. Furthermore, the Constitutional Court reiterates notes that Article 31 of the Rules of the Constitutional Court stipulates that *as a rule, during the decision-making procedure, the Constitutional Court shall examine the existence of only those violations that are stated in the request/appeal.* Thus, as a rule, the Constitutional Court decides only on allegations, reasons, arguments, facts, etc., and violations stated in the request. However, the Constitutional Court has already concluded in its case law that in certain cases, although it is strictly bound by content expressed in the part related to the facts, it is not strictly bound by legal classification expressed in the request, and so in the case that it clearly follows from the part related to the facts of the request that it relates to another issue under the Constitution according to the rule *iura novit curia* (the court knows the law) (see Constitutional Court, Decision on Admissibility and Merits, *No. U-23/18* of 5 July 2019, paragraph 19, available at: www.ustavnisud.ba).

16. Thus, although the facts presented in the request are poor, the Constitutional Court shall examine the request with regard to the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina.

17. Thus, the Constitutional Court first refers to its case-law wherein it gave an interpretation of the principle of the rule laid down in Article I(2) of the Constitution Bosnia and Herzegovina. In case no. *U-6/16* of 6 July 2017 (see Decision on Admissibility and Merits, *No. U-6/16* of 6 July 2017, paragraph 21, available at: www.ustavnisud.ba), the Constitutional Court, in interpreting Article I(2) of the Constitution of Bosnia and Herzegovina, noted as follows:

> "… the requirements of legal certainty and the rule of law entail that a legal norm must be adequately accessible for persons to whom it will be applied and it must be foreseeable, meaning that it must be formulated with sufficient precision, so that the persons can know actually and specifically their rights and obligations, to a degree that is reasonable in the circumstances, to regulate their conduct accordingly. If this requirement is not met, vague and imprecise norms make room for arbitrary decision-making by competent authorities. Laws, in a legal system that is based on the rule of law, should be of a general nature and should be applied to all people equally and legal consequences should be foreseeable for those to whom the law will be applied ..."

18. As to the applicants' allegations that the provision of Article 2 of the contested Law is unconstitutional as it allows "general legal uncertainty and instability" and was adopted contrary to the provision which was in force (at that point of time), the

Constitutional Court observes that on 26 February 2009 the Parliamentary Assembly of BiH adopted the Animal Welfare Law which, in Section II – Protection of Animals during the Keeping and Breeding – Article 4 (Protection of Animals during the Keeping), stipulates that breeding animals for fur production purposes is notably prohibited (Article 4.bb). However, the legal effect, i.e. the entry into force of that provision was postponed in accordance with the law so that it came into force in 2018 in accordance with Article 43(5) of the Law. The Parliamentary Assembly of BiH, pursuant to Article IV(4)(a), at the 5th urgent session of the House of Peoples held on 22 December 2018 and at the 56th session of the House of Representatives held on 31 January 2019, adopted the contested Law, wherein its legal effect, i.e. entry into force, was postponed.

19. The Constitutional Court holds on the one hand that it is beyond any doubt that such a manner of regulating the matter related to the protection and welfare of animals falls within the scope of discretionary right and obligations of the legislator, which has been afforded under the Constitution of Bosnia and Herzegovina. On the other hand, the Constitutional Court holds that the provision of Article 2 of the contested Law is foreseeable and precise to a sufficient extent, given the fact that the entry into force of one of the legal consequences prescribed by the 2009 Animal Welfare Law was postponed for a certain period of time (the prohibition shall enter into force in 2028 instead of 2018). Thus, it cannot be concluded that the provision of Article 2 of the contested Law is imprecise, unclear or that it enables the possibility of different interpretation and application, which could otherwise bring into question the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina.

20. As to the applicants' allegations that Article 2 of the contested Law allows legal uncertainty and instability for the lack of records, i.e. the lack of a "register of fur farmers", the Constitutional Court holds that this does not allow the possibility of arbitrary interpretation. In particular, it is quite clear that the 2009 Animal Welfare Law stipulates the prohibition on breeding animals for the fur production purposes, but the effect thereof, i.e. its entry into force was postponed until 2018, and the entry into force of this prohibition was postponed anew until 2028 in accordance with the contested Law. It follows that Article 2 of the contested Law does not undermine the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

21. The Constitutional Court concludes that Article 2 of the contested Law, whereby the legal effect, i.e. the entry into force of the prohibition on breeding the animals for the fur production purposes was postponed again, "is adequately accessible for all those to whom it applies, that it is foreseeable, i.e. it is formulated with sufficient precision so that the persons can know actually and specifically their rights and obligations to a degree that is reasonable in the given circumstances to regulate their conduct accordingly".

Thus, the provision at issue is compatible with the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina.

22. Having regard to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this Decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Case No. U-5/16

DECISION ON ADMISSIBILITY AND MERITS

Request of Borjana Krišto, Second Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, at the time of filing the request, for the review of constitutionality of the provisions of Article 84(2), (3), (4) and (5), Article 109(1) and (2), Article 117(d), Article 118(3), Article 119(1), Article 216(2), Article 225(2) and Article 226(1) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 12/09, 16/09, 93/09 and 72/13) with the provisions of Article I(2), II(3)(b), (e) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3, 6, 8 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

Decision of 26 March 2021

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2) (b) and Article 59(1), (2) and (3) and Article 60 and Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Mato Tadić, Vice-President,

Mr. Zlatko M. Knežević, Vice-President,

Ms. Margarita Tsatsa-Nikolovska, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović, and

Mr. Giovanni Grasso

Having deliberated on the request filed by **Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives at the time of filing the request**, in the case no. **U-5/16**, at its session held on 1 June 2017 adopted the following

PARTIAL DECISION ON ADMISSIBILITY AND MERITS

The request filed by Ms. Borjana Krišto, the Second Deputy Chair of the House of Representatives at the time of filing the request, is partly granted.

It is hereby established that the provisions of Article 84 (2), (3) and (4) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 117 (d) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) in connection with Article II(3) (f) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 118 (3) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) in connection with Article II(3)(f) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 225 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) in connection with Article II(3) (f) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 226 (1) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina.

The Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered, in accordance with Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, not later than six months from the date of communicating the present decision, to harmonize the provisions of:

Article 84 (2), (3) and (4) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina,

Article 117 (d) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the provisions of Article I(2) in connection with Article II(3) (f) of the Constitution of Bosnia and Herzegovina,

Article 118 (3) and Article 225 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the provisions of Article I(2)

in connection with Article II(3)(f) of the Constitution of Bosnia and Herzegovina,

Article 225 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the provisions of Article I(2) in connection with Article II(3)(f) of the Constitution of Bosnia and Herzegovina,

and Article 226 (1) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina.

The Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered, in accordance with Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina to inform the Constitutional Court, within six months from the date of communicating this decision, on the measures taken to enforce the present decision.

The request filed by Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives at the time of filing the request, for the review of constitutionality of the provisions of Article 84 (5), Article 119 (1) and Article 216 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) is hereby dismissed as ill-founded.

It is hereby established that the provisions of 84 (5) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are in conformity with the provisions of Articles I(2) and II(3) (e) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 119 (1) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are in conformity with the provisions of Article I(2) and 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.

It is hereby established that the provisions of Article 216 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are in conformity with the provisions of 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 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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 June 2016, Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives at the time of filing the request ("the applicant") filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for the review of constitutionality of the provisions of Article 84 (2), (3), (4) and (5), Article 109 (1) and (2), Article 117(d), Article 118 (3), Article 119 (1), Article 216 (2), Article 225 (2) and Article 226 (1) of 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, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13; "the Code") with the provisions of Article I(2), II(3) (b), (e) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3, 6, 8 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention").

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, the Parliamentary Assembly of Bosnia and Herzegovina, the House of Representatives and the House of Peoples respectively were requested on 1 July 2016 to submit their respective replies to the request.

3. The House of Representatives and the House of Peoples submitted their replies to the request on 1 August and 28 July 2016 respectively.

4. In accordance with Article 90(1) (b) of the Rules of the Constitutional Court, at the session held on 30 and 31 March 2017 the Constitutional Court adopted a decision disqualifying the President of the Constitutional Court Mr. Mirsad Ćeman and the Judge Ms. Seada Palavrić from working and deciding on the respective request, as they had taken part, as members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, in the enactment of the Law, which provisions were challenged.

5. Pursuant to Article 60 of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court reached a conclusion to adopt a partial decision and to postpone the adoption of the decision regarding the part relating to the establishment of the conformity of Article 109 (1) and (2) of the Code with the provisions of Article II(3) (b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3 and 8 of the European Convention.

III. Request

a) Allegations stated in the request

1. Right of the Witness to Refuse to Respond, Article 84 (2), (3), (4) and (5) of the Code

6. The applicant indicated that the provisions of Article 84 (2), (3), (4) and (5) of the Code are contrary to Article II(3)(e) in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention.

7. In reasoning these allegations, the applicant has stated that the mentioned provisions are unspecified and imprecise, because they do not prescribe the limits, or the manner in which the Chief Prosecutor treats a witness who is being granted immunity, *i.e.* the Chief Prosecutor may decide not to undertake criminal prosecution for even the most serious criminal offenses, so that the victim and the damaged person lose the right to satisfaction in a criminal procedure. The legislator failed to set a clear and precise limit considering the nature and gravity of criminal offenses, which may justify the failure to undertake criminal prosecution on account of protecting the public interest in a democratic society, which is based on the rule of law and the respect for human rights.

8. In addition, a "prosecutor's pardon" entirely excludes the court and its role in a criminal procedure, and the witness becomes an evidentiary instrument in the hands of the prosecution, which leads to the violation of the principle of the equality of citizens before the law and the principle of legality, thus it becomes questionable as to what happens with the property gain effected through the criminal offense. Prosecutor's pardon entirely excludes the court and its role in a criminal procedure, and the witness becomes an evidentiary instrument in the hands of the prosecution.

2. Physical Examination and Other Procedures, Article 109 (1) and (2) of the Code

9. The applicant indicated that the provisions of Article 109 (1) and (2) of the Code are in contravention of Article II(3)(b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3 and 8 of the European Convention.

10. In reasoning these allegations, the applicant indicated that the mentioned provisions prescribe the taking of blood samples and other medical procedures, essentially speak about medical treatments and criteria according to which, against the will and without the consent of the accused and other persons, they may be subjected to such medical treatments, which may raise the issue of inhuman and degrading treatment under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention. The applicant pointed to the case-law of the European Court of Human Rights according to which the right to private life was narrowly connected to the term of personal integrity, and any interference with the physical integrity must be prescribed by law and must be proportionate to the legitimate purpose for which it is exercised and for which the consent of the given person is required. Within the meaning of the case-law of the European Court of Human Rights (the applicant specified the judgments of the European Court of Human Rights) any performance of coercive medical procedure with the aim of collecting evidence must be convincingly justified by the facts of the present case, whereby it is necessary to be mindful of the gravity of the criminal offense concerned, and it must also be shown that the alternative methods of extracting evidence were considered. Besides, the procedure must not be followed by any risk of permanent damage to the suspect's health. The provisions of Article 109 (1) and (2), from the aspect of Article 3 of the European Convention, do not specify the degree to which coercive medical procedure was necessary for obtaining evidence, the risk to the suspect's health, the manner in which the procedure was performed and the physical pain and mental suffering the procedure inflicted, the degree of physician's (medical) supervision made available and the effects on the suspect's health.

3. Criminal Offenses as to Which Special Investigative Measures May Be Ordered, Article 117 point d) of the Code

11. The applicant indicated that the provisions of Article 117 point d) of the Code are contrary to Article II(3)(f) of the Constitution of Bosnia and Herzegovina in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina.

12. In reasoning these allegations, the applicant indicated that the prescribing in this manner made it possible for the exception to be turned into a rule, that is to say that elements of disproportion, excessiveness and covert arbitrariness are introduced into the criminal legislation. Irrespective of the legitimate goal, the said provision opens up a

possibility to undertake investigative actions for almost all criminal offenses enumerated in the Criminal Code.

4. Competence to Order the Measures and the Duration of the Measures, Article 118 paragraph (3) of the Code

13. The applicant indicated that the provisions of Article 118 paragraph (3) of the Code are contrary to Article II(3)(f) of the Constitution of Bosnia and Herzegovina in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina.

14. In reasoning these allegations, the applicant indicated that, according to these provisions, investigative actions may last up to one month at the longest, and may, for particularly important reasons, and upon the reasoned motion of the Prosecutor, be prolonged for a term of another month, with measures referred to in points a) and c) of Article 116 of the Code lasting up to six months in total at the longest. Such a long period of the duration of measures can in no way be considered a proportionate time limit in relation to the nature and need to restrict constitutional rights. The portion of the provision reading "particularly important reasons" violates the principle of the rule of law and of the right to a fair trial, because the law is not clear and transparent and leaves a possibility for arbitrary interpretation and procedures on the part of a body before which a procedure is conducted. Besides, that part of the provision is at the same time a presumption and a standard, on which a preliminary proceeding judge relies when applying this provision. Namely, it is an undisputed fact that a prolonged duration of special investigative actions will be necessary when it comes to criminal offenses of terrorism, severe forms of corruption, *i.e.* organized crime, trafficking in persons, in narcotic drugs and in arms. However, the disputed provision did not make a necessary distinction between such offenses and those that do not have such elements, and to which the extension of time limits should not apply. Due to the aforementioned, the disputed provision causes legal unforeseeability and legal uncertainty. The applicant indicated that the restrictions on citizens' constitutional rights to privacy are within the judicial discretion of a Prosecutor and a preliminary proceeding judge, based on unspecified presumptions for the extension of the enforcement of special investigative actions.

5. Materials Received through the Measures and Notification of the Measures Undertaken, Article 119 paragraph (1) of the Code

15. The applicant indicated that the provisions of Article 119 paragraph (1) of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

16. In reasoning these allegations, the applicant indicated that the regulation of special investigative actions is not in conformity with the Constitution of Bosnia and Herzegovina

for the reason that there is no mechanism securing a judicial control. Namely, the Court decides on the commencement of the undertaking of special investigative actions, however the mentioned provision prescribes that upon the completion of actions a police body prepares a report for the Prosecutor's Office, and a Prosecutor does so for a preliminary proceeding judge and only then a preliminary proceeding judge obtains a complete information on the results of the special investigative actions. A preliminary proceeding judge, after determining the commencement of the application is unable to oversee whether there still exists a need for the conduct of such actions, since the Code does not impose on a preliminary proceeding judge an obligation to demand daily or periodical reports from the police, neither does it impose an obligation on the police to submit such reports of its own initiative to a preliminary proceeding judge, or to a Prosecutor for that matter. The applicant indicated that the European Court of Human Rights holds that the control over the secret oversight measures should be, desirably, entrusted to a court, as the judicial control affords the best guarantees for independence, impartiality and compliance with procedures. In the case of *Rotaru v. Romania* the European Court of Human Rights indicated that although intelligence services may exist legitimately in a democratic society, the powers of secret oversight of citizens may be tolerated solely to an extent that is strictly necessary for the protection of democratic institutions. Within the meaning of Article 8 of the European Convention, oversight procedures must follow the values of a democratic society, particularly the rule of law, which implies that the interference of executive authorities with the rights of individuals must be subjected to effective oversight, which should be carried out by a court. The disputed provision did not envisage such a possibility, instead it prescribed the submission of the relevant data, which makes it possible to reach a conclusion on whether the reasons for which actions were ordered had ceased and whether actions must be stopped. It is certain that the obligations of the police stipulating that "upon the completion of the application of the measures referred to in Article 116 of this Code, all information, data and objects obtained through the application of the measures, as well as a report, must be submitted by police authorities to the Prosecutor" are not sufficient for the realization of that goal. A preliminary proceeding judge must have a legal power at all times throughout the conduct of special investigative actions and request from a Prosecutor to submit a report on the justification of their further continuation, or when he/she finds so necessary, for the purpose of evaluating the justification of further continuation of actions, request from the police to submit daily reports and documentation to the extent and measure he/she is authorized to determine on one's own.

6. Order for Conducting an Investigation, Article 216 paragraph (2) of the Code

17. The applicant indicated that the provisions of Article 216 paragraph (2) of the Code are contrary to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention in connection with Article 13 of the European Convention.

18. In reasoning these allegations, the applicant indicated that the order to conduct an investigation is the first act placing a certain person under a criminal procedure, which, in its essence, constitutes a sort of restriction on fundamental rights and freedoms, as it does not secure the right to appeal or other legal protection against the initiation of criminal prosecution. The order to conduct an investigation contains the data on a perpetrator of the criminal offense if known, the description of the act pointing out the legal elements which make it a crime, the legal name of the criminal offense, *etc*. The legislator is, therefore, obliged to prescribe an obligation that a person must be informed immediately *ex officio* that he/she is a suspect and to constitute at the same time an effective legal instrument of protection against unlawful prosecution. The right to an appeal may be exceptionally ruled out in cases stipulated by law, if other legal protection is ensured. The right to a legal remedy is a universal constitutional and legal right of a human and a citizen. The order to conduct an investigation does not contain the instruction on the legal remedy, and citizens do not have the secured right to appeal against. Not a single law provides for other legal protection against the mentioned order to conduct an investigation. A Prosecutor has issued an order to conduct an investigation, and the person against whom the investigation is conducted has no knowledge whatsoever about it and has not been informed of his/her rights. That could be justified for the most serious criminal offenses, if found in a particular case that there is a risk to life or body or property of greater extent, which the legislator should specify precisely in the law.

7. Completion of Investigation, Article 225 paragraph (2) of the Code

19. The applicant indicated that the provisions of Article 225 paragraph (2) of the Code are contrary to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention in connection with Article 13 of the European Convention.

20. In reasoning these allegations, the applicant indicated that the mentioned provisions regulate the situation where the investigation is not completed within six months, that the Collegium of the Prosecutor's Office shall undertake necessary measures, without prescribing the final time limit. That is contrary to the right to a trial within a reasonable time, and a suspect and damaged person are not afforded the right to complain over the delay of a procedure and other irregularities in the course of investigation, so a possibility is left for investigation to be conducted for several years. The case-law of the European Court of Human Rights shows that non-effectiveness of investigative procedures, if established that it existed, always leads to a violation of the rights referred to in the Convention. Criminal prosecution must be independent and impartial and investigation must be effective (comprehensive, thorough, quick, diligent, attentive and meaningful).

8. Issuance of the Indictment, Article 226 paragraph (1) of the Code

21. The applicant indicated that the provisions of Article 226 of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina and Article 13 of the European Convention.

22. In reasoning these allegations, the applicant indicated that the mentioned provision is incomprehensive from the aspect of a trial within a reasonable time, which stipulates that "If during the course of an investigation, the Prosecutor finds that there is enough evidence for grounded suspicion that the suspect has committed a criminal offense". Upon the completion of an investigation a Prosecutor has at his/her disposal the information, on which basis he/she could either suspend a procedure or issue an indictment. The legislator is obliged to prescribe a time limit for the issuance of an indictment, as well as the extension thereof when it comes to the complex or particularly complex cases. In addition, the mentioned provisions do not envisage a legal instrument against the delay of the proceedings and other irregularities in the investigation procedure, which is contrary to the principle of the rule of law, legal certainty and legal consistency.

b) Reply to the request

23. The House of Representatives, Constitutional-Legal Committee, indicated that it considered the respective request, and that it adopted a conclusion with six votes in favor, one against and one abstention as follows: "The Constitutional-Legal Committee of the House of Representatives of the Parliamentary Assembly of BiH considered the request of the Constitutional Court of BiH[…] and adopted a conclusion that the Parliamentary Assembly of BiH adopted the Criminal Procedure Code of Bosnia and Herzegovina".

24. The House of Peoples, Constitutional-Legal Committee, indicated that it considered the respective request, and that the Constitutional Court, in accordance with its competence, should decide on the consistency between the Code with the Constitution of Bosnia and Herzegovina.

IV. Relevant Law

25. The **Criminal Procedure Code of Bosnia and Herzegovina** (*Official Gazette of BiH,* 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13), as relevant, reads:

Article 84
Right of the Witness to Refuse to Respond

(1) The witness shall be entitled to refuse to answer such questions with respect to which a truthful reply would result in the danger of bringing prosecution upon himself.

(2) The witnesses exercising the right referred to in to Paragraph 1 of this Article shall answer the same questions provided that immunity is granted to such witnesses.

(3) Immunity shall be granted by the decision of the Chief Prosecutor of BiH.

(4) The witness who has been granted immunity and who has testified shall not be prosecuted except in case of false testimony.

(5) A lawyer as the advisor may be assigned by the Court's decision to the witness during the hearing if it is obvious that the witness himself is not able to exercise his rights during the hearing and if his interests cannot be protected in some other manner.

Article 116 paras 1 and 2
Types of Special Investigative Actions and Conditions of Their Application

(1) If evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties, special investigative measures may be ordered against a person against whom there are grounds for suspicion that he has committed or has along with other persons taken part in committing or is participating in the commission of an offense referred to in Article 117 of this Code.

(2) Measures referred to in Paragraph 1 of this Article are as follows:

a) surveillance and technical recording of telecommunications;

b) access to the computer systems and computerized data processing;

c) surveillance and technical recording of premises;

d) covert following and technical recording of individuals, means of transport and objects related to them;

e) undercover investigators and informants;

f) simulated and controlled purchase of certain objects and simulated bribery;

g) supervised transport and delivery of objects of criminal offense.

Article 117
Criminal Offenses as to Which Special Investigative Measures May Be Ordered

Measures referred to in Article 116(2) of this Code may be ordered for following criminal offenses:

a) criminal offenses against the integrity of Bosnia and Herzegovina;

b) criminal offenses against humanity and values protected under international law;

c) criminal offenses of terrorism;

d) criminal offenses for which, pursuant to the law, a prison sentence of three (3) years or more may be pronounced.

Article 118 paras 1, 3, 5 and 6
Competence to Order the Measures and the Duration of the Measures

(1) Measures referred to in Article 116(2) of this Code shall be ordered by the preliminary proceedings judge in an order upon the properly reasoned motion of the Prosecutor containing: the data on the person against which the measure is to be applied, the grounds for suspicion referred to in Article 116(1) and (3) of this Code, the reasons for its undertaking and other important circumstances necessitating the application of the measures, the reference to the type of required measure and the method of its implementation and the extent and duration of the measure. The order shall contain the same data as those featured in the Prosecutor's motion as well as ascertainment of the duration of the ordered measure.

(3) Measures referred to in Subparagraphs a) through d) and g) Article 116(2) of this Code may last up to one (1) month, while on account of particularly important reasons the duration of such measures may upon the properly reasoned motion of the Prosecutor be prolonged for a term of another month, provided that the measures referred to in Subparagraphs a), b) and c) last up to six (6) months in total, while the measures referred to in Subparagraphs d) and g) last up to three (3) months in total. The motion as to the measure referred to in Article 116(2)(f) may refer only to a single act, whereas the motion as to each subsequent measure against the same person must contain a statement of reasons justifying its application.

(5) By way of a written order the preliminary proceedings judge must suspend forthwith the execution of the undertaken measures if the reasons for previously ordering the measures have ceased to exist.

(6) The orders referred to in Paragraph 1 of this Article shall be executed by the police authorities. The companies performing the transmission of information shall be bound to enable the Prosecutor and police authorities to enforce the measures referred to in Article 116(2)(a) of this Code.

Article 119 paras 1 and 3
Materials Received through the Measures and Notification of the Measures Undertaken

(1) Upon the completion of the application of the measures referred to in Article 116 of this Code, all information, data and objects obtained through the application of the measures as well as a report must be submitted by police authorities to the Prosecutor. The Prosecutor shall be bound to provide the preliminary proceedings judge with a written report on the measures undertaken. On the basis of the submitted report the preliminary proceedings judge shall evaluate the compliance with his order.

(3) The preliminary proceedings judge shall forthwith and following the undertaking of the measures referred to under Article 116 of this Code inform the person against whom the measures were undertaken. That person may request from the Court a review of legality of the order and of the method by which the order was enforced.

Article 216 paras 1 and 2
Order for Conducting an Investigation

(1) The Prosecutor shall order the conduct of an investigation if grounds for suspicion that a criminal offense has been committed exist.

(2) The order to conduct the investigation shall contain: data on perpetrator if known, descriptions of the act pointing out the legal elements which make it a crime, legal name of the criminal offense, circumstances that confirm the grounds for suspicion for conducting an investigation and existing evidence. The Prosecutor shall list in the order which circumstances need to be investigated and which investigative measures need to be undertaken.

Article 225 paras 1 and 2
Completion of Investigation

(1) The Prosecutor shall order a completion of investigation after he concludes that the status is sufficiently clarified to allow for the bringing of charges. Completion of the investigation shall be noted in the file.

(2) If the investigation has not been completed within six (6) months after the order on its conducting has been issued, the Collegium of the Prosecutor's Office shall undertake necessary measures in order to complete the investigation.

Article 226 paragraph 1
Issuance of the indictment

(1) If during the course of an investigation, the Prosecutor finds that there is enough evidence for grounded suspicion that the suspect has committed a criminal offense, the Prosecutor shall prepare and refer the indictment to the preliminary hearing judge.

V. Admissibility

26. 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.

27. 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 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.

28. The remainder of the respective request was filed by the Second Deputy Chair of the House of Representatives of the Parliamentary Assembly. Bearing in mind the aforementioned, within the meaning of the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court has established that the remainder of the respective request is admissible, because it was filed by an authorized entity, and that there is not a single formal reason under Article 19 of the Rules of the Constitutional Court rendering the request inadmissible.

VI. Merits

29. The applicant claims that the provisions of Article 84 (2), (3), (4) and (5), Article 117(d), Article 118 (3), Article 119 (1), Article 216 (2), Article 225 (2) and Article 226 (1) of the Code are not in conformity with the provisions of Article I(2), II(3) (e) and (f) of the Constitution of Bosnia and Herzegovina and the provisions of Articles 6, 8 and 13 of the European Convention.

VI. 1. Right of the Witness to Refuse to Respond, Article 84 (2), (3), (4) and (5) of the Code

30. The applicant indicated that the provisions of Article 84 (2), (3), (4) and (5) of the Code are contrary to Article II(3)(e) in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention. The applicant claims that the mentioned provisions are not in conformity with the Constitution of Bosnia and Herzegovina, because they are unspecified and imprecise, since they do not have a clear limit considering the nature and gravity of criminal offenses, which may justify the failure to undertake criminal prosecution on account of protecting the public interest in a democratic society, which is based on the rule of law and the respect for human rights. The Chief Prosecutor may decide not to undertake criminal prosecution for even the most serious criminal offenses.

31. The Constitutional Court finds, first and foremost, that the provisions of Article 84 paragraph 1 of the Code prescribe that "the witness shall be entitled to refuse to answer such questions with respect to which a truthful reply would result in the danger of bringing prosecution upon himself". In that respect the Constitutional Court recalls that the European Court of Human Rights in the case of *Saunders v. The United Kingdom* (see, the European Court of Human Rights, judgment of 17 December 1996) noted that "although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognized international standards

which lie at the heart of the notion of a fair procedure under Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention". The Constitutional Court finds that the mentioned provision "incorporated" into the Code the mechanism of privileges against self-incrimination as one of the fundamental rights, which makes a part of the principle of a fair procedure and is narrowly linked to the presumption of innocence.

32. The Constitutional Court finds that the challenged provisions of Article 84 of the Code prescribe that *the witnesses exercising the right referred to in to Paragraph 1 of this Article shall answer the same questions provided that immunity is granted to such witnesses. Immunity shall be granted by the decision of the Chief Prosecutor of BiH. The witness who has been granted immunity and who has testified shall not be prosecuted except in case of false testimony. A lawyer as the advisor may be assigned by the Court's decision to the witness during the hearing if it is obvious that the witness himself is not able to exercise his rights during the hearing and if his interests cannot be protected in some other manner.*

33. Thus, the challenged provisions, as a form of protection against self-incrimination, the legislator prescribed that a witness may answer those questions provided that he/she has been granted immunity against criminal prosecution, the competence for granting immunity, failure to undertake criminal prosecution against a witness being granted immunity, and an obligation to appoint a counsel under certain conditions to a witness who has been granted immunity. The Constitutional Court observes, first and foremost, that the present case is about a witness, *i.e.* a person for whom no evidence exist that he/she had committed a criminal offense, *i.e.* who will incriminate oneself by answering the questions as a witness in a procedure against another person, and those will be the first evidence against him/her. In terms of the mentioned provisions the prosecutor may abandon criminal prosecution of such a witness for the purpose of obtaining his/her answers in a procedure against another person. Such answers become evidence for the prosecution against that other person. It follows that this is an agreement between a prosecutor and a witness. The Chief Prosecutor shall decide on the granting of immunity.

34. The Constitutional Court recalls that the entry into force of the Code (2003) in Bosnia and Herzegovina brought about essential changes to the rules of a criminal procedure. First and foremost, a criminal procedure was regulated as a sort of a criminal litigation with strong emphasis on the adversariness of each stage of a criminal procedure, where a prosecutor is one of the parties to the proceedings, with the powers and obligation to prosecute the perpetrators of criminal offenses. The Code gives the competence and responsibility to a prosecutor for the entire procedure of uncovering and resolving criminal offenses, by entrusting an investigative procedure in its entirety

to a prosecutor. Thus, within the meaning of the Code, a prosecutor has the obligation to undertake criminal prosecution if there is evidence that a criminal offence was committed, unless prescribed differently by this code. The principle of legality follows from the aforementioned, suggesting that everyone for whom evidence exist that he/she had committed a criminal offense should be prosecuted and punished in accordance with law. On the other hand, the Constitutional Court recalls that one of the ways used by contemporary states and the international community for a more successful fight against the perpetrators of severe criminal offenses is the creation of legal mechanisms that allow for a prosecutor to depart, under certain conditions, from the principle of legality of criminal prosecution, and they are special cases, when a greater public interest requires so. The Constitutional Court finds that the mechanism of granting immunity is "incorporated" in the Code with a view to opposing serious threats to the security of citizens, which appear in the form of terrorist organizations and affiliated criminal associations, *i.e.* with a view to bringing the perpetrators of such offenses to justice, as well as the organizers thereof in particular. It is indisputable that the aforesaid constitutes a justified exception to the principle of legality.

35. According to the applicant's allegations the mentioned provisions do not meet the requirements of being specified and precise, because they do not have a clear boundary *vis-à-vis* the nature and seriousness of criminal offenses that might justify the failure to undertake criminal prosecution on account of the protection of the public interest in a democratic society.

36. The Constitutional Court recalls the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina, according to which Bosnia and Herzegovina has been determined as "a democratic state, which shall operate under the rule of law and with free and democratic elections". The mentioned provision gives rise to the principle of the rule of law, which represents the system of political authority based on the respect for the Constitution, laws and other regulations, by citizens and the holders of public offices alike. All laws, other regulations, as well as conduct on the part of public office holders must be based on law, or on a regulation based on law. Further, the concept of the rule of law is not limited solely to the formal respect for the principle of constitutionality and legality, but it requires that the constitution and laws have certain content, appropriate for a democratic system, so that they may serve the protection of human rights and freedoms in relations between citizens and public authority bodies, as part of a democratic political system. Also, the European Convention particularly proclaims the rule of law, and its special significance is reflected in the area of procedural law.

37. The Constitutional Court further recalls that the Code determines rules ensuring that no innocent person is convicted in a legally conducted procedure before a competent court, and that a perpetrator of a criminal offense is sentenced or another measure ordered against him/her under conditions envisaged by Criminal Code. Within

the meaning of the Constitution of Bosnia and Herzegovina the regulation of criminal legislation lies within the exclusive competence of a legislator. From a constitutional and legal point of view, it is a sole obligation of a legislator to consider, while regulating certain mechanisms of that procedure, the requirements set before it by the Constitution of Bosnia and Herzegovina, particularly those arising from the principle of the rule of law. More precisely, the regulation thereof must be, at all times such, so as to ensure the accomplishment of legitimate goals of a criminal procedure, legal certainty, clarity, accessibility, predictability of legal norms, and a procedural equality of the parties. It is the task of the Constitutional Court to ensure that such requirements are complied with.

38. The Constitutional Court recalls that the requirements of the legal certainty and the rule of law imply that a legal norm is accessible to persons it applies to and is foreseeable for them, that is to say that it is sufficiently precise so that they can actually and specifically know their rights and obligations, up to a degree that is reasonable in given circumstances, so that they can conduct themselves in keeping with such legal norms. When such a requirement is not complied with, undefined and imprecise legal norms leave room for arbitrary decision-making by competent bodies.

39. The Constitutional Court recalls primarily that different forms of immunity were developed in the international criminal law practice, so that a prosecutor may, depending on the circumstances of the specific case, opt for one of the two basic types of procedural immunity: the total (blanket) immunity granting a witness the full protection from criminal prosecution for any previously committed criminal offenses, to be uncovered during his/her testimony and the limited (use) immunity, guaranteeing a witness that his/her testimony, or other evidence stemming from his/her testimony, will not be used against him/her. However, if a prosecutor collects other evidence, separately and independently from a witness's testimony, a prosecutor may, based on such evidence, prosecute/accuse a witness for a specific criminal offense. Therefore, granting immunity during a criminal procedure aims at ensuring internationally recognized standards of a fair procedure, and they are the right to remain silent, *i.e.* a privilege against self-incrimination. By linking the aforementioned to the provision prescribing that "The witness who has been granted immunity and who has testified shall not be prosecuted except in case of false testimony", the Constitutional Court primarily holds that the challenged provisions are not precise regarding the scope of immunity that may be granted to a certain witness. Namely, based on the cited provision it does not follow whether a decision on immunity relates to the actions the witness mentioned in his/her testimony, or it relates to the actions from the overall criminal event in connection with which the witness deposits a testimony, that is to say whether it relates to the actions that might be uncovered during his/her testimony. Thus, it follows from the cited provision that a legislator failed to make a clear distinction between the right of a witness to remain silent and not to respond to certain questions if a truthful answer would expose him/her to criminal prosecution in relation to the obligation of a witness to answer the questions asked, which is particularly

relevant from the aspect of equality of parties to the proceedings. In addition, there is no prescribed mechanism that will ensure for a witness who has been granted immunity, and who has not testified, to be prosecuted for a criminal offense concerning which he/she has been granted immunity. Such a witness may be prosecuted solely if he/she deposited a false testimony. When interpreting the portion of the provision "The witness who has been granted immunity and who has testified shall not be prosecuted..." it could be deduced that criminal prosecution of such a witness is permissible when he/she did not testify. However, the aforementioned indicates that this is an imprecise provision, *i.e.* that the legislator failed to prescribe precisely when, under what circumstances and in what manner such prosecution might be undertaken, for instance what to do in a situation where a witness has not refused to testify, but has changed the testimony. It follows from the aforementioned that witnesses who would offer testimonies in exchange for abandonment of criminal prosecution do not know specifically and actually to which extent and under which conditions they may realize that, that is to say they do not know when and whether they will be prosecuted. In that respect, the Constitutional Court finds that the legislator did not satisfy the standards of precision and clarity. In view of the aforementioned, the challenged provisions themselves leave room for arbitrary decision-making by a prosecutor, *i.e.* the Chief Prosecutor when granting the immunity.

40. The Constitutional Court further recalls that legal certainty does not mean that decision-makers shall not be entrusted with discretionary powers or a certain freedom to act, provided that there are legal means and legal procedures to prevent the abuse thereof. Laws must always set the framework of discretionary powers and regulate the manner of the implementation thereof with sufficient clarity, which ensures to an individual an adequate protection against arbitrariness. Arbitrary exercise of powers enables unfair or unreasonable decisions contrary to the principle of the rule of law. The Constitutional Court observes that the protection of the rights of the damaged person in a criminal procedure is ensured under the Law (notifying the damaged person of the following: that during a criminal procedure he/she may file a property claim, on the failure to conduct an investigation, on the suspension of the investigation as well as on the reasons for the suspension of the investigation, on the withdrawal of the indictment, on the adoption of a decision acquitting the accused of charges or dismissing the charges or suspending a criminal procedure by a decision, on the results of negotiating the guilt with the accused). Further, the Constitutional Court recalls that the principle of legality is a guarantee to citizens that the prosecutor would institute a criminal procedure whenever statutory conditions have been met (if there is evidence that a criminal offense was committed) and that he/she would treat everyone equally. The person damaged by a criminal offense will then be able to exercise such rights as guaranteed under the Law. On the other hand, the Constitutional Court reiterates that a legislator "incorporated" in the Law the possibility not to undertake criminal prosecution with a view to countering serious threats to the security of citizens appearing in the form of terrorist organizations or other organized and associated criminal associations, that is to say with a view for perpetrators of such

offenses, particularly the organizers thereof, to be brought to justice. In that case, the person damaged by a criminal offence in the perpetration of which a person who was granted the immunity from criminal prosecution for such crime had taken part in the perpetration, will not be able to exercise such rights as guaranteed under the Law, which he/she would possibly be able to exercise in a criminal procedure if no immunity was granted. The Constitutional Court previously noted that a grant of immunity constitutes indisputably a justified exception from the principle of legality. However, the Constitutional Court finds that it follows from the mentioned provisions that the legislator failed to set any statutory conditions or limitations regarding the granting of immunity to a witness, thus it follows that the immunity may be granted to a witness for whom the information exist that he had just participated in the perpetration of criminal offenses as part of a criminal or terrorist organization, with a view to proving criminal offenses, for example the forgery of an official identification card. Thus, the legislator failed to set a limitation for the immunity to be granted to a witness concerning whom there is information to have just participated in the perpetration of these offences, that is to say the challenged provisions do not contain any determinant or indication of the criminal offences being investigated, in order for a prosecutor to suspend the criminal prosecution of a witness with a view to proving those offences. Therefore, the Constitutional Court holds that due to the existence of different interests *i.e.* the endangerment of the rights of an individual to equality before the law and the rights of the persons damaged by a grave criminal offense committed by a person being granted immunity, prescribing the immunity without any limitations rules out the absolutely discretionary nature of the power conferred by the legislator on a prosecutor, or Chief Prosecutor for that matter. The manner in which the legislator will regulate the mechanism of granting immunity is not within the jurisdiction of the Constitutional Court, however the legislator must prescribe the offences for which immunity may be granted to the witness and the criminal offences to be investigated, in order for a prosecutor to suspend criminal prosecution of a witness with a view to proving those offences. For the sake of comparison, the Constitutional Court observes that the legislator foresaw in the Law a possibility to enter into a Guilty Plea Agreement. That gave a possibility to the prosecutor to negotiate with a suspect or accused on the conditions of confessing to the criminal offense he/she was charged with, in exchange for a certain sanction, which, by its type and severity, may be below the minimum punishment of imprisonment determined by law for that criminal offense. However, the Constitutional Court observes that the legislator in that case engaged in a detailed regulation of that mechanism, by prescribing exactly the conditions under which a guilty plea agreement may be accepted, and concerning the verification of meeting those conditions the legislator prescribed a judicial control during decision-making on accepting the agreement. Bearing in mind that a prosecutor, or a Chief Prosecutor in the legal system of Bosnia and Herzegovina has a role of a party to the proceedings, which fact does not offer sufficient guarantees regarding his/her independence and impartiality, in addition to prescribing conditions, or limitations (concerning which offences a witness may be granted immunity, and which

offences are to be investigated in order for a prosecutor to suspend criminal prosecution of a witness with a view to proving those offences), the legislator is obliged to prescribe judicial control of the fulfillment of these conditions; it is also necessary that the legislator rules out the absolutely discretionary nature of the power conferred by the legislator on a prosecutor or Chief Prosecutor for that matter.

41. Therefore, the Constitutional Court holds that because of imprecision and vagueness of the challenged provisions, these provisions are contrary to the principle of the rule of law. In particular, it is necessary to determine: a) for which crimes the immunity could be granted; b) in which proceedings this kind of immunity could be used. Furthermore, it is necessary to underline that the respect of the conditions foreseen should be verified by an independent and impartial tribunal.

42. The Constitutional Court concludes that the provisions of Article 84 paras 2, 3 and 4 of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina.

43. In view of the mentioned conclusion, the Constitutional Court will not consider whether the provisions of Article 84 paras 2, 3 and 4 of the Code are contrary to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention.

44. The applicant indicated that the provisions of Article 84 (5) of the Code are contrary to Articles I(2) and II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention. The Constitutional Court finds that the mentioned provisions read as follows "A lawyer as the advisor shall be assigned by the Court's decision to the witness during the hearing if it is obvious that the witness himself is not able to exercise his rights during the hearing and if his interests cannot be protected in some other manner". The Constitutional Court observes that the applicant failed to provide a single allegation reasoning why she held that these challenged provisions are contrary to the mentioned articles of the Constitution of Bosnia and Herzegovina and the European Convention.

45. In view of the aforementioned the Constitutional Court finds these allegations stated in the request ill-founded, *i.e.* it concludes that the provisions of Article 84(5) of the Code are in conformity with Articles I(2) and II(3)(e) of the Constitution of Bosnia and Herzegovina.

VI. 2. Criminal Offenses as to Which Special Investigative Measures May Be Ordered, Article 117 (d) of the Code

46. The applicant indicated that the provisions of Article 117 (d) of the Code are contrary to Article II(3)(f) of the Constitution of Bosnia and Herzegovina in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina. The applicant indicated that the mentioned provisions made it possible to turn an exception into a rule, that is to say

that elements of disproportion, excessiveness and covert arbitrariness were introduced into the criminal law legislation. Irrespective of the legitimate goal, the mentioned provision opens up a possibility to undertake special investigative actions for almost all criminal offenses enumerated in the Criminal Code.

47. The Constitutional Court recalls that it is indisputable that by ordering or applying special investigative measures the state interferes with the exercise of the rights of an individual referred to in Article 8 of the European Convention. Such interference is justified within the meaning of Article 8(2) only if "in accordance with the law", and pursuing one or more legitimate goals adduced in paragraph 2, and is "necessary in a democratic society" in order to achieve that goal or goals (see, *Kvasnica v. Slovakia*, no. 72094/01, paragraph 77, 9 June 2009). Furthermore, "in accordance with the law" pursuant to Article 8(2) requires in principle, firstly, for the disputable measure to have a certain foundation in the domestic regulation; it also applies to the quality of the respective regulation, which should be in accordance with the rule of law and available to the person concerned who must, additionally, be able to anticipate the circumstances for oneself, and that the measure must be in accordance with the rule of law (see, e.g., *Kruslin v. France*, 24 April 1990, paragraph 27, Series A no. 176-A). The Constitutional Court also indicates that according to the case-law of the European Court of Human Rights (see also *Kruslin v. France*) wiretapping and other forms of surveillance of telephone conversations constitute serious interference with private life and correspondence and, therefore, must be based on "law" that is particularly precise. The most fundamental thing is to have clear and detailed rules, first and foremost the law must define the categories of persons who can be subject to measures of wiretapping on the basis of a court order and the nature of criminal offenses rendering reasons for such an order. Further, the Constitutional Court recalls that the interference will be considered necessary in a democratic society for a legitimate goal if it responds to an urgent social need and, particularly, if proportionate to a legitimate goal sought to be achieved (see *Coster v. The United Kingdom* no. 24876/94, paragraph 104, 18 January 2001).

48. The Constitutional Court recalls that the provisions of the Code prescribe that if evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties, special investigative measures may be ordered against a person against whom there are grounds for suspicion that he/she has committed or has along with other persons taken part in committing or is participating in the commission of a criminal offense referred to in Article 117 of this Code: a) against the integrity of Bosnia and Herzegovina; b) against humanity and values protected under international law; c) terrorism; and d) for which, pursuant to the law, a prison sentence of three (3) years or more may be pronounced. It follows that the Code specified the categories of persons against whom special investigative measures may be imposed and the nature of criminal offenses.

49. Furthermore, the Constitutional Court finds that the challenged provision of Article 117 (d) of the Code prescribes as follows: "Measures referred to in Article 116(2) of this Code may be ordered for following criminal offenses: criminal offenses for which, pursuant to the law, a prison sentence of three years or more may be pronounced." The applicant claims that the mentioned provision made it possible for an exception to be turned into a rule, that is to say that elements of disproportion, excessiveness and coveted arbitrariness are introduced into a criminal legislation.

50. First and foremost, the Constitutional Court recalls that the criminal legislation in Bosnia and Herzegovina is made up of the Criminal Code of BH, Criminal Code of the Federation of BiH, Criminal Code of the Republika Srpska and Criminal Code of the Brčko District. The Constitutional Court further recalls that the reason for enacting the Criminal Code at the state level was the need to introduce the criminal law standards of the international law into the criminal legislation of BiH and thus to secure legal certainty and the protection of human rights throughout BiH, and the advancement of the fight against crime. When inspecting the Criminal Code of BiH, the Constitutional Court observes that for a great majority of criminal offenses (*i.e.* a qualified form) the legislator prescribed a possibility to impose an imprisonment in duration of three years, so that it follows that special investigative measures may be imposed for all those offenses. Furthermore, as part of those criminal offenses the Constitutional Court finds that the Criminal Code of BiH, among other things, prescribed the following as criminal offenses: Attack on the Constitutional Order, Endangering Territorial Integrity, Genocide, Inciting National, Racial and Religious Hatred, Discord or Hostility, Money Laundering, Organized Crime. It follows from the aforementioned that these are extremely important objects of criminal law protection, *i.e.* that these are serious criminal offenses manifested through violence and attack on the fundamental values of a human and the society as a whole. However, as part of those criminal offenses the Criminal Code of BiH, among other things, prescribed as criminal offenses the following: Violating the Free Decision-Making of Voters, Misuse of International Emblems, Counterfeiting of Instruments of Value, False Information about Criminal Offence, Illegal Use of Radio Broadcasting Rights. It follows from the aforementioned that the Criminal Code of BiH also provided criminal offenses that have no elements of serious criminal offenses. The Constitutional Court finds that the legislator prescribed by the Code that special investigative measures would be employed exclusively if there was no other way to achieve the goal, so that the legislator undoubtedly had in mind the restriction on the rights of an individual referred to in Article 8 of the European Convention. However, the Constitutional Court reiterates that the Criminal Code of BiH stipulates that special investigative measures may be ordered for a great majority of criminal offenses (basic or qualified form), including serious criminal offenses and criminal offenses not carrying such elements. The Constitutional Court finds that the legitimate goal of the application of special investigative measures is to counter the severest forms of crime. By prescribing that special investigative measures

may be ordered for a great majority of criminal offenses prescribed by the Criminal Code, including offenses not carrying elements of serious criminal offenses, the legislator failed to ensure that the interference with the right referred to in Article 8 would be to such an extent that is necessary for the preservation of democratic institutions, *i.e.* it failed to secure the proportion between the severity of the interference with the right to privacy and the legitimate goal sought to be achieved through the application of that special measure. It is not within the competence of the Constitutional Court how the legislator will regulate this issue, whether it will raise the general limit of the punishment for which special investigative measures may be determined in combination with certain criminal offenses, or groups of criminal offenses, which, due to their specificity, irrespective of the prescribed punishment, require to be covered by a legal provision of criminal offenses for which special investigative measures may be ordered. However, when determining criminal offenses for which special investigative measures may be ordered, the legislator must restrict itself solely to that which is necessary in a democratic society, *i.e.* make possible the proportion between the right to privacy and the legitimate goal sought to be achieved through the application of that special investigative measure.

51. The Constitutional Court concludes that the provision of Article 117(d) of the Code is contrary to Article I(2) in connection with Article II(3)(f) of the Constitution of Bosnia and Herzegovina.

VI. 3. Competence to Order the Measures and the Duration of the Investigative Measures, Article 118(3) of the Code

52. The applicant indicated that the provisions of Article 118(3) of the Code are contrary to Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article I(2) of the Constitution of Bosnia and Herzegovina. The applicant indicated in the reasons for the said allegations that under these provisions investigative measure may last up to one month at the longest, and may, for particularly important reasons, and upon the reasoned motion of the Prosecutor, be prolonged for a term of another month, provided that the measures referred to in Article 116 (a) and (c) of the Code may last no longer than six months in total. Such a lengthy period may not be considered a proportionate time limit in relation to the nature and need to restrict constitutional rights. The part of the provision reading "particularly important reasons" violates the principle of the rule of law and of the right to a fair trial, because the law is not clear and transparent and leaves a possibility for arbitrary interpretation and procedures on the part of a body before which a procedure is conducted. In addition, the challenged provision did not make a necessary distinction between those bodies and the ones which do not have such features and to which the extension of time limits need not apply.

53. The Constitutional Court reiterates that it is indisputable that by applying special investigative measures the state interferes with the exercise of the rights of an individual

referred to in Article 8 of the European Convention. The Constitutional Court recalls the decision of the European Court of Human Rights in the case of *Dragojević v. Croatia* (Application no. 68955/11, judgment of 15 January 2015, paras 79-82) wherein the European Court of Human Rights indicated, such interference is justified within the meaning of Article 8(2) only if "in accordance with the law", and it pursues one or more legitimate goals adduced in paragraph 2, and is "necessary in a democratic society" in order to achieve that goal or goals (see, in a series of judgments *Kvasnica v. Slovakia*, no. 72094/01, paragraph 77, 9 June 2009). The term "in accordance with the law" pursuant to Article 8(2) requires in principle, firstly, for the disputable measure to have a certain foundation in the domestic regulation; it also applies to the quality of the respective regulation, which should be in accordance with the rule of law and available to a person concerned who must, additionally, be able to anticipate the circumstances for oneself, and that the measure must be in accordance with the rule of law (see, *e.g.*, *Kruslin v. France*, 24 April 1990, paragraph 27, Series A no. 176-A). Particularly in the context of secret measures of surveillance, such as the interception of communications, the requirement of legal "foreseeability" cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, where a power of the executive is exercised in secret, the risks of arbitrariness are evident. Therefore, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see, for instance, *Malone*, cited above, § 67; *Huvig v. France*, judgment of 24 April 1990, Series A no.176-B, § 29; *Valenzuela Contreras v. Spain*, judgment of 30 July 1998, § 46, Reports on Judgments and Decisions1998-V; *Weber and Saravia v. Germany* (Decision), no. 54934/00, § 93, ECHR 2006 XI; and *Bykov v. Russia* [GC], no. 4378/02, § 76, 10 March 2009). In that respect the Court also reiterated the need for safeguards (see, *Kvasnica*, cited above, § 79). Specifically, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive – or to a judge – to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see *Bykov*, cited above, § 78, and *Blaj*, cited above, § 128).

54. Also, in its case-law the European Court of Human Rights developed the following minimum safeguards that should be set out in the statute in order to avoid abuses of power: the nature of the offences which may give rise to such an order; the categories of people liable to have their telephones tapped by judicial order; a limit on the duration of telephone tapping, the procedure for questioning, use and storage of the data obtained; the precautions to be taken when communicating data to other parties and the circumstances in which recordings may or must be erased or the tapes destroyed (see, European Court

of Human Rights, *Huvig*, cited above, § 34; *Valenzuela Contreras*, cited above, § 46; and *Prado Bugallo* v. Spain, no. 58496/00, § 30, 18 February 2003).

55. Thus, according to the standards of the European Court of Human Rights, the domestic law must be sufficiently clear and particularly precise in order to point to an individual the circumstances in which and conditions under which the public authorities may order special investigative measures. Since these are secret measures not subject to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive – or to a judge – to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference.

56. The Constitutional Court finds that the provision of Article 118(3) of the Code reads: *Investigative measures referred to in Article 116(2) Subparagraphs a) through d) and g) of this Code may last up to one month at the longest, while on account of particularly important reasons the duration of such measures may upon the properly reasoned motion of the Prosecutor be prolonged for a term of another month, provided that the measures referred to in Subparagraphs a), b) and c) last up to six months in total, while the measures referred to in Subparagraphs d) and g) last up to three months in total. The motion as to the measure referred to in Article 116(2)(f) of this Code may refer only to a single act, whereas the motion as to each subsequent measure against the same person must contain a statement of reasons justifying its application.* Based on the mentioned provisions it follows that the total period during which special investigative measures may last is six months, or three months respectively. During this period the duration of these measures was restricted to one month and each new extension requires the statement of reasons by a prosecutor. Thus, the legislator opted for graduality in the establishment and extension thereof. The Constitutional Court finds that any extension of special investigative measures must be approved by a preliminary proceeding judge, who has a possibility not to approve the extension of investigative measures, if the prosecutor's motion contains no reason to continue with the enforcement thereof, *i.e.* that the extension is necessary to serve the purpose for which they were approved. The Constitutional Court finds that the legislator prescribed by the Code that special investigative measures are applied exclusively if there is no other way to achieve the same goal, and that there must be the grounds for suspicion that a person alone has committed or has along with other persons taken part in committing or is participating in the commission of a criminal offense. The legislator prescribed precisely in the provision of Article 118(3) the duration, or the longest duration of special investigative measures (up to one month, the total of three or six months respectively). Furthermore, the Constitutional Court observes that the legislator opted for graduality in the extension of special investigative measures (for additional term of one month). Also, the legislator

prescribed that the extension of special investigative measures may be approved for particularly important reasons.

57. The applicant's allegations are based on the claim that the legislator, in the part of the provision reading "particularly important reasons" left a possibility for arbitrary interpretation and procedures on the part of a body before which a procedure is conducted. In addition, the challenged provision did not make a necessary distinction between those bodies and the ones which do not have such features in relation to the offenses to which the extension of time limits need not apply. Therefore, the Constitutional Court ought to examine in the present case whether the challenged provisions, regarding the extension of special investigative measures, sufficiently clearly allege the scope and manner of exercising discretion conferred upon the public authorities, and whether the period of the extension of special investigative measures was proportionate to the nature of criminal offenses concerning which special investigative measures may be extended.

58. By linking the previously presented case-law of the European Court of Human Rights to the relevant provisions of the Code, the Constitutional Court finds that by prescribing for special investigative measures to last no longer than one month the legislator indisputably took into account the restrictions of the rights of an individual under Article 8 of the European Convention, *i.e.* that the duration of special investigative measures must be brought down to the shortest possible time. However, the challenged provisions prescribe that special investigative measures may be extended two more times, or five more times in duration of one month each for particularly important reasons. In that respect, the Constitutional Court primarily observes that the legislator, as a requirement for the extension of special investigative measures, used a syntagm "particularly important reasons", which constitutes an undetermined term not used in any other provision of the Code. Namely, it does not follow from the cited provision what particularly important reasons refer to, *i.e.* whether they refer to impossibility to obtain evidence due to the failure of special investigative measures to generate expected results, or they refer to the very nature and circumstances of the perpetration of a criminal offense, and whether and to what extent the results of the information collected up to that moment, through the employment of special investigative measures, must be known to the preliminary proceedings judge. Thus, it follows that the preliminary proceedings judge does not have precise benchmarks in the law according to which he/she could consider the motion of the prosecutor for the extension of special investigative measures and, accordingly, dismiss the motion, or grant it and order the extension thereof. Therefore, whether the reasons of the prosecutor proposing the extension of special investigative measures will be sufficient in terms of "particularly important reasons" depends exclusively on the margin of appreciation of the preliminary proceedings judge. In that respect, the Constitutional Court reiterates that under the standards of the European Court of Human Rights, since these are secret measures not subject to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of

law for the legal discretion granted to the executive – or to a judge – to be expressed in terms of an unfettered power. Consequently, the law must indicate sufficiently clearly the scope of any such discretion conferred on the competent authorities and the manner of its exercise to give the individual adequate protection against arbitrary interference. In this part the Constitutional Court recalls that inappropriate implementation of certain statutory solutions is not a matter of constitutionality, if such solutions are in themselves in accordance with the constitution. In such situations, in the event of abuse in the implementation of legal provisions there are other appropriate safeguard mechanisms. However, the present case is not about such a situation, but a situation where the challenged provisions are themselves, in the implementation, contrary to the Constitution of Bosnia and Herzegovina, as the challenged provisions did not sufficiently clearly prescribe the scope of discretion conferred upon the preliminary proceedings judge, since his/her discretion is manifested in the form of unlimited powers when interpreting those undetermined legal notions *i.e.* a presumption "for particularly important reasons" so that they do not guarantee to an individual an adequate protection against arbitrary interference. Therefore, the Constitutional Court finds that the legislator, by prescribing that, for particularly important reasons, which is an undetermined presumption, special investigative measures may be extended, did not appreciate that the law must sufficiently clearly prescribe the scope of discretion conferred upon the competent bodies.

59. Also, the Constitutional Court reiterates that according to the case-law of the European Court of Human Rights, the minimum guarantees that should be prescribed in the law in order to avoid the abuse of the conferred powers are, *inter alia*, the nature of the offenses concerning which a measure of eavesdropping may be ordered and the limitation time-wise of the duration of the eavesdropping measure. The Constitutional Court observes that the legislator prescribed in the provisions of Article 116 of the Code that special investigative measures may be ordered for the following criminal offenses: a) against the integrity of Bosnia and Herzegovina, b) against humanity and values protected under international law, c) terrorism, and d) criminal offenses for which, pursuant to the law, a prison sentence of three (3) years or more may be pronounced. Although it did prescribe the types of criminal offenses for which it is possible to order special investigative measures, the Constitutional Court observes that the legislator prescribed in the same manner and within the same time limits the extension of special investigative measures irrespective of criminal offenses concerned. In that respect, the Constitutional Court reiterates that the interference with human rights and fundamental freedoms, in the present case the right to private life, is justified if in conformity with law and pursuing one or more legitimate goals referred to in Article 8(2) of the European Convention, and is "necessary in a democratic society" in order to achieve a specific goal. The Constitutional Court also recalls that the legitimate goal of special investigative measures constitutes the opposition to the gravest forms of crime. In that sense, it is indisputable that lengthier duration of special investigative measures is necessary if concerning the proving of criminal offenses of terrorism, corruption, organized crime,

trafficking in humans and arms since the perpetration of these offenses may last over a prolonged period of time. However, considering the legitimate goal of implementing special investigative measures, the Constitutional Court holds that, although ordering special investigative measures in duration of one month may be justified for all criminal offenses for which a prison sentence of three years or more may be pronounced, it is unclear why the nature and seriousness of criminal offenses for which, for instance, a maximum prison sentence of up to three years or up to five years is prescribed, objectively justifies the possibility of ordering such measures in the longest duration as equally as criminal offenses with a prescribed prison sentence of up to twenty years or a long-term prison sentence. Therefore, the Constitutional Court finds that the legislator, when prescribing the length of special investigative measures failed to take into account the proportion between the restriction on human rights and the seriousness of criminal offenses, that is to say it failed to harmonize the issue of duration of special investigative measures with the nature of certain criminal offenses, which the extension should not apply to objectively.

60. Bearing in mind that the legislator failed to make any distinction whatsoever between criminal offenses, which the extensions of special investigative measures should not apply to, and that the presumption "for particularly important reasons" was determined imprecisely and may not serve as a benchmark for that distinction, the Constitutional Court finds that the challenged provisions of Article 118(3) of the Code, in the part relating to the extension of special investigative measures, are not in conformity with Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article I(2) of the Constitution of Bosnia and Herzegovina.

VI.4. Materials Received through the Measures and Notification of the Measures Undertaken, Article 119(1) of the Code

61. The applicant indicated that the provisions of Article 119(1) of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, as there is no mechanism securing a judicial control. The applicant stated that a preliminary proceeding judge must have a legal power at all times during the conduct of special investigative actions and request that a prosecutor submits a report on the justification for their further continuation, or when he/she finds so necessary, for the purpose of evaluating the justification for further continuation of measures, request from the police to submit daily reports and documentation to the extent and measure he/she is authorized to determine on one's own.

62. In connection with those allegations, the Constitutional Court recalls the case-law of the European Court of Human Rights that the control over the secret oversight measures should be, desirably, entrusted to a court, as the judicial control affords the best guarantees for independence, impartiality and compliance with procedures. The

Constitutional Court recalls the case of *Rotaru v. Romania* (Judgment, Grand Chamber, of 4 May 2000, Application no. 28341/95), which reads: "In order for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain safeguards established by law which apply to the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, *inter alia*, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure… In the instant case the Court notes that the Romanian system for gathering and archiving information does not provide such safeguards, no supervision procedure being provided by Law no. 14/1992, whether while the measure ordered is in force or afterwards. That being so, the Court considers that domestic law does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities… There has consequently been a violation of Article 8."

63. The Constitutional Court finds that the challenged provision stipulates as follows: "Upon the completion of the application of the measures referred to in Article 116 of this Code, all information, data and objects obtained through the application of the measures as well as a report must be submitted by police authorities to the Prosecutor. The Prosecutor shall be bound to provide the preliminary proceedings judge with a written report on the measures undertaken. On the basis of the submitted report the preliminary proceedings judge shall evaluate the compliance with his order." It follows that police authorities, upon the completion of special investigative actions, are obliged to submit to the Prosecutor all materials resulting from the conduct of special investigative actions and a report on the measures taken, while the Prosecutor is bound to provide a preliminary proceedings judge with a written report on the measures taken, so that the preliminary proceedings judge becomes acquainted with the conduct of actions, *i.e.* so that he/she can check whether his/her order has been complied with. The Constitutional Court notes that this is a form of supervision, *i.e.* the protection of persons against unlawful interference with their rights and freedoms.

64. The Constitutional Court recalls that, according to the Law, the authority to order special investigative actions is expressly conferred on a preliminary proceeding judge and such actions may last up to one month and be extended for a term of another month, and they may last up to six months in total, *i.e.* three months in total. In addition, the provisions of the Law stipulate that a preliminary proceeding judge is bound to issue, without delay, a written order ceasing the enforcement of the actions taken, if the reasons for which actions are ordered have ceased. Furthermore, a prolonged duration of special investigative actions must be approved by a preliminary proceeding judge. Therefore, a preliminary proceeding judge has the possibility not to approve the extension of special

investigative actions in the event that he/she considers that other circumstances have been created, allowing the application of other methods of obtaining evidence without interference or with a lesser degree of interference with fundamental human rights. The Constitutional Court finds that the aforementioned is a form of supervision *i.e.* the protection of persons against unlawful interference with their rights and freedoms.

65. Furthermore, the provisions of the Law prescribe a preliminary proceeding judge's obligation to notify, without delay, a person against whom an action has been taken and that person can ask the court to examine the legality of the order and the manner in which the action has been enforced. The Constitutional Court finds that the legislator has thus secured that the person, who considers that his/her rights and freedoms were violated by the application of special investigative actions, can ask the court to examine the legality thereof, the manner in which they were applied as well as the judicial order constituting the basis of the application thereof. The Constitutional Court finds that the aforementioned is a form of supervision *i.e.* the protection of persons against unlawful interference with their rights and freedoms.

66. In view of the above, the Constitutional Court holds that the legislator has secured that interference with an individual's right is subject to effective supervision.

67. The Constitutional Court concludes that the provisions of Article 199(1) of the Law are consistent with Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

VI. 5. Order for Conducting an Investigation, Article 216(2) of the Code

68. According to the applicant, the provisions of Article 216(2) of the Law are not in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 in conjunction with Article 13 of the European Convention. The applicant points out in the reasons for the aforementioned allegations that the order to conduct an investigation does not contain an instruction on legal remedy and that the citizens' right to appeal is not secured.

69. The Constitutional Court notes that according to the case-law of the European Court of Human Rights, the specific rights guaranteed by Article 6 may be relevant before a case is sent for trial, *e.g.* the right to pre-trial proceedings within a reasonable time or the right to defend oneself, as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the provisions of Article 6 (the case of *Kuralić v. Croatia*, Judgment of 15 October 2009, Application no. 50700/07).

70. Moreover, as to the application of the guarantees of Article 6 of the European Convention on pre-trial proceedings or the stages thereof, the European Court of Human

Rights first determines whether there is a "criminal charge" for the purposes of Article 6 of the European Convention. The Constitutional Court recalls the case of *Foti and Others v. Italy* (Judgment of 10 December 1982, Applications nos. 7604/76, 7719/76, 7781/77 and 7913/77), according to which *...one must begin by ascertaining from which moment the person was "charged"; this may have occurred on a date prior to the case coming before the trial court... such as the date of the arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened ... Whilst "charge", for the purposes of Article 6(1), may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", it 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.*

71. In the present case the Constitutional Court recalls that the provision of Article 216(1) of the Law stipulates that the Prosecutor will order the conduct of an investigation if grounds for suspicion that a criminal offense has been committed exist. In addition, the Constitutional Court finds that the challenged provision reads: "The order on conducting the investigation shall contain: data on perpetrator if known, descriptions of the act pointing out the legal elements which make it a crime, legal name of the criminal offense, circumstances that confirm the grounds for suspicion for conducting an investigation and existing evidence. The Prosecutor shall list in the order which circumstances need to be investigated and which investigative measures need to be undertaken." In view of the above, it follows that the legislator "gives" a Prosecutor express authority to conduct an investigation and that an order on conducting the investigation is a Prosecutor's decision on the existence of grounds for suspicion that a specific perpetrator (if known) has committed a criminal offense and that it is a plan for conducting the investigation and that it includes the description of investigative actions. In addition, the Constitutional Court notes that the Law does not stipulate an obligation to submit an order on conducting the investigation nor does it stipulate sanctions for a Prosecutor's failure to issue an order on conducting the investigation. It follows from the above analysis that an order on conducting the investigation is an internal and preparatory act by a Prosecutor. Furthermore, the Law determines that when it is stipulated that the institution of criminal proceedings entails restrictions on the exercise of certain rights, such restrictions, unless otherwise specified, commence upon confirmation of an indictment and, as regards the criminal offenses for which the principal penalty prescribed is a fine or imprisonment up to five years, those consequences commence as of the day the verdict of guilty is rendered, regardless of whether or not the verdict has become legally binding. The Constitutional Court notes that the issuance of an order on conducting the investigation, *per se*, has no consequence that entails restrictions on the exercise of certain rights by a suspect. The Constitutional Court reiterates that the guarantees under Article 6 of the European Convention apply upon the official notification given to an individual by the competent authority of an

allegation that he has committed a criminal offence, *i.e.* upon other measures or actions which carry the implication that he has committed a criminal offence and which likewise substantially affect the situation of the suspect. The Constitutional Court also recalls that, in the course of an investigation, certain rights of a suspect may be subject to restrictions (measures securing the presence of the suspect, special investigative actions), however, in such a case, a basis for restrictions on the exercise of rights is a judicial decision and not an order on conducting the investigation, as an internal and preparatory act. Taking into account the preceding position that an order on conducting the investigation is an internal and preparatory act by a Prosecutor and that the legislator has not stipulated an obligation that an order on conducting the investigation has to be submitted to a suspect and that an order on conducting the investigation, *per se*, has no consequence, in terms of the Law, that entails restrictions on the exercise of certain rights by a suspect, the Constitutional Court assesses that the applicant's allegations are ill-founded that the challenged provisions are not in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 in conjunction with Article 13 of the European Convention.

72. The Constitutional Court concludes that the provisions of Article 216(2) are not in contravention of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 and Article 13 of the European Convention.

VI. 6. Completion of Investigation, Article 225(2) of the Code

73. The applicant pointed out that the provisions of Article 225(2) of the Law are contrary to the standards of a trial within a reasonable time guaranteed by Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention in conjunction with Article 13 of the European Convention. In the reasons for those allegations, the applicant stated that this provision regulates the situation where the investigation is not completed within six months, *i.e.* it stipulates that the Collegium of the Prosecutor's Office shall undertake necessary measures in order to complete the investigation, without prescribing the final time limit for the completion of investigation. That is contrary to the right to a trial within a reasonable time, and a suspect and damaged person are not afforded the right to complain over the delay of a procedure or other irregularities in the course of investigation, thus the possibility is left for investigation to be conducted for several years.

74. The Constitutional Court finds that the applicant's allegations are essentially based on the allegation that the challenged provision does not foresee the lodging of a complaint, thus leaving a possibility for an investigation to be conducted for a number of years. In that respect, the Constitutional Court observes that the applicant held that the challenged provisions do not meet the principles of the rule of law, *i.e.* that they do not guarantee a fair investigative procedure.

75. The Constitutional Court recalls that the principles of the rule of law require that a law must be clear and precise in accordance with the special nature of the matter it regulates normatively, thereby preventing any arbitrariness in the interpretation and application of laws, *i.e.* the removal of uncertainty concerning the addressee of the legal norm regarding the ultimate effect of the legal provisions directly applicable to them.

76. The Constitutional Court further recalls that the goal of a criminal procedure is to establish the truth, *i.e.* to establish whether a suspect or an accused had committed a criminal offense or not. The Constitutional Court previously noted that an order to carry out an investigation is an internal and preparatory act on the part of a prosecutor, that the legislator failed to prescribe an obligation to communicate the order to the suspect, and that it follows that the suspect needs not have any knowledge that an investigation is being conducted against him/her. In this connection, the Constitutional Court finds that the suspect in that case is not in a state of uncertainty nor does he/she have an interest in the conclusion of the investigative procedure. However, as of the day on which he/she learns about the investigation against him/her, that is to say when his/her rights are restricted during the investigation, the interest and right of the suspect to conclude the investigation are undeniable. Further, the Constitutional Court finds that a criminal procedure is conducted with a view to protect fundamental rights and freedoms of a human and citizen, who, in the event of the enforcement of a punishment, get the status of the damaged persons if any of those rights and freedoms were violated or threatened. Therefore, it is necessary to bear in mind during the investigative procedure the damaged persons as a person whose rights and freedoms were violated or threatened by a criminal offense. In that respect, the damaged person is a person who has exceptional interest in the conclusion of an investigative or criminal procedure. It follows from the aforementioned that the provisions of the rules of procedure must meet the principles of the rule of law, which will guarantee the respect for the rights of a suspect and a due care for the protection of the rights of the damaged persons, that is to say the fairness of an investigative procedure.

77. The Constitutional Court observes that the challenged provision of Article 225(2) of the Code reads: "If the investigation has not been completed within six (6) months after the order on its conducting has been issued, the Collegium of the Prosecutor's Office shall undertake necessary measures in order to complete the investigation". Thus, it follows that the mentioned legal provision does not state explicitly that the investigation must be completed within six months, neither does it state the lengthiest time limit within which the investigation must be completed. Thus, undertaking necessary measures for the purpose of completing the investigation exclusively depends on the margin of appreciation of the Collegium of the Prosecutor's Office. This is to say that bearing in mind the role of a prosecutor in the Code, who is also a party to the criminal proceedings, the Constitutional Court finds that prescribing the obligation on the Collegium of the Prosecutor's Office to undertake necessary measures in order to conclude the investigation, the legislator failed

to provide an appropriate insurance that the investigation would be completed indeed. Also, it follows that no possibility was prescribed for a suspect to lodge a complaint for the excessively lengthy duration of the investigative procedure, so that the challenged provisions make it possible for an individual charged with a criminal offense to be in a state of uncertainty and lack of information about own destiny for unlimited duration of time. Besides, it follows that the legislator failed to prescribe a possibility for a person damaged by the criminal offense to lodge a complaint over the excessive length of the investigative procedure, so that the person damaged by the criminal offense is in a state of uncertainty as to whether the suspect had committed or not that criminal offense for unlimited duration of time. The Constitutional Court observes that the legislator, in certain cases, prescribed in the Code a possibility to oversee the legality of actions taken during the investigation. For instance that was done in the event of a temporary seizure of objects and documentation, in the event of issuing the order to a bank or other legal person to temporarily suspend the execution of a financial transaction, against an administrative ruling ordering the measures of prohibition, against an administrative ruling ordering the detention and such like. In view of the aforementioned, the Constitutional Court concludes the legislator was not consistent in terms of law when it regulated a possibility for unlimited duration of investigation, in essence, without prescribing a mechanism for the protection of the rights of suspects and damaged persons. Therefore, the Constitutional Court holds that if the legislator opted for a possibility of unlimited duration of investigation, it had to ensure in the Code simultaneously a direct protection of the rights of those whose rights might be violated.

78. In view of the aforementioned, the Constitutional Court finds that the challenged provision does not meet the principles of the rule of law, that is to say the legislator failed to be mindful of the rights of suspects and the protection of the rights of the damaged persons, thereby jeopardizing fairness in an investigative procedure from the aspect of the reasonable time-limit.

79. In view of the aforementioned, the Constitutional Court concludes that the provisions of Article 225(2) of the Code are contrary to Article I(2) in connection with Article II(3) (e) of the Constitution of Bosnia and Herzegovina.

VI. 7. Issuance of indictment, Article 226 paragraph 1 of the Code

80. The applicant emphasized that the provisions of Article 226 of the Law are inconsistent with Article I(2) of the Constitution of Bosnia and Herzegovina and Article 13 of the European Convention. In the reasoning of these allegations the applicant emphasized that this provisions is incomprehensible from the aspect of a trial within a reasonable time, since when the investigation is completed the prosecutor disposes with the information based on which he could either suspend the proceedings or issue an indictment. The legislator is obliged to stipulate a general time limit for the issuance of an indictment, as well as extension of that limit when it comes to the complex or

particularly complex cases. In addition, these provisions do not provide for legal remedy against protraction or irregularities in the investigation proceedings, which is inconsistent with the principle of the rule of law, legal security and legal consistency.

81. The Constitutional Court finds that the challenged provision provides as follows: "If during the course of an investigation, the Prosecutor finds that there is enough evidence for grounded suspicion that the suspect has committed a criminal offense, the Prosecutor shall prepare and refer the indictment to the preliminary hearing judge." The Constitutional Court finds, first and foremost, that the Code prescribes that a criminal procedure may be instituted and conducted only upon the request of a Prosecutor. It follows from the mentioned provision that the institution and conduct of a criminal procedure require a prosecutor's request. A criminal proceeding may be conducted solely against such a person and for such an offense that the prosecutor has specified in his/her request. In accordance with the aforementioned, following the completion of an investigation a criminal procedure may be conducted solely following an indictment issued by a competent prosecutor and solely against a person specified in the indictment and solely for an offense which is the subject-matter of the indictment. The Constitutional Court further finds that, according to the Code, the Prosecutor shall complete investigation when it finds that the state of affairs is sufficiently clarified in order to file an indictment, and completion of the investigation will be recorded in the case-file. Thus, the legislator obliged the Prosecutor to complete investigation when the state of affairs is sufficiently clarified so that an indictment may be issued, which means that the legislator obliged the prosecutor to prepare and refer the indictment to the preliminary hearing judge if during the course of an investigation the prosecutor finds that there is enough evidence for a grounded suspicion that the suspect has committed a criminal offense. So, the challenged provision does not provide for a time-limit within which the prosecutor is obliged to prepare an indictment, neither is that time-limit prescribed under the provision regulating the matter of completion of an investigation.

82. The applicant challenges the ruling of the legislator who failed to prescribe the time-limit for issuing an indictment. In this connection, the Constitutional Court reiterates that according to the principle of the rule of law, the law must be clear and precise and in conformity with specific nature of the matter subject to normative regulation, thereby preventing any arbitrariness in interpretation and application of law, *i.e.* removal of uncertainty of the addresses of the legal norm with regards to the final effect of law provisions that are directly applied to them. In the legal system which was founded on the rule of law, laws must be general and equal for all and legal consequences should be certain for those to whom the laws will apply. In the case at hand, the legislator determined that the prosecutor shall prepare the indictment if during the course of an investigation he/she finds that there is sufficient evidence to do so. The legislator decided not to specify the time-limit within which a prosecutor is obligated to issue an indictment, while at the same time it failed to ensure in the Code a direct protection of the

rights of those whose rights might be violated. The establishment of unconstitutionality of the provision of Article 225(2) of the Code due to the lack of a mechanism protecting the rights of suspects and damaged persons during the investigation would not lead to genuine protection of their rights, if such protection would not apply at the same time to the stage from the completion of investigation to the issuance of indictment. From the aspect of the rule of law, it is not relevant which stages in the conduct of investigation were prescribed as necessary by the legislator, but the final result is relevant, for only the adoption of a decision by a Prosecutor's Office removes the uncertainty of persons in question. Therefore, it is necessary to ensure in the present case the continuity of the protection of the rights of suspects and damaged persons.

83. In view of the aforementioned, the Constitutional Court concludes that the provisions of Article 226(1) of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina.

84. In view of the aforementioned conclusion, the Constitutional Court will not consider whether the challenged provisions of Article 225(2) of the Code are contrary to Article 13 of the European Convention.

VII. Conclusion

85. The Constitutional Court concludes that the provisions of Article 84, paragraphs 2, 3 and 4 of the Code are in contravention of Article I(2) of the Constitution of Bosnia and Herzegovina, due to the lack of clear distinction between granting immunity and absolute discretionary power to grant immunity, namely, because of imprecision and vagueness the challenged provisions themselves are contrary to the principle of the rule of law.

86. The Constitutional Court concludes that the provision of Article 117(d) of the Code is contrary to Article I(2) of the Constitution of Bosnia and Herzegovina because the legislator failed to ensure that the interference with this right would take place to such an extent that is strictly necessary for the preservation of democratic institutions, *i.e.* it failed to ensure the proportion between the severity of interference with the right to privacy and the legitimate goal sought to be achieved through the application of that special measure.

87. Bearing in mind that the legislator failed to make any distinction whatsoever between criminal offenses to which the extension of special investigative measures should not apply, and that the presumption for particularly important reasons is imprecisely set and may not serve as a benchmark for that distinction, the Constitutional Court finds that the challenged provisions of Article 118(3) of the Code in the part relating to the extension of special investigative measures are not in conformity with Article of the Constitution of Bosnia and Herzegovina in connection with Article II(3)(f) of the Constitution of Bosnia and Herzegovina.

88. The Constitutional Court concludes that the provisions of Article 225(2) of the Code are in contravention of Articles I(2) and II(3)(e) of the Constitution of Bosnia and Herzegovina, because they do not meet the principles of the rule of law, *i.e.* the legislator failed to be mindful of the rights of suspects and the protection of the rights of damaged persons, thereby jeopardizing the fairness in an investigative procedure.

89. The Constitutional Court concludes that the provisions of Article 226(1) of the Code are in contravention of Article I(2) of the Constitution, as the establishment of unconstitutionality of the provision of Article 225(2) of the Code due to the lack of a mechanism protecting the rights of suspects and damaged persons during the investigation would not lead to genuine protection of their rights, if such protection would not apply at the same time to the stage from the completion of investigation to the issuance of indictment.

90. The Constitutional Court concludes that the provisions of Article 84(5) of the Code are not contrary to Articles I(2) and II(3)(e) of the Constitution of Bosnia and Herzegovina, where the applicant fails to provide a single allegation to reason why she held that these challenged provisions are unconstitutional.

91. The Constitutional Court concludes that the provisions of Article 119(1) of the Code are consistent with Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, as the legislator ensured that the interference with an individual's right would be subjected to an effective supervision.

92. The Constitutional Court concludes that the provisions of Article 216(2) of the Code are not in contravention of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 and Article 13 of the European Convention, as the legislator "described" the order on conduct of an investigation as an internal and preparatory act of the prosecutor and the very order on conduct of an investigation, within the meaning of the Code, has no effects on a suspect when it comes to making restrictions on some of his/her rights.

93. Pursuant to Article 59(1), (2) and (3), Article 60 and Article 61(4) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

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

Mato Tadić
Vice-President
Constitutional Court of Bosnia and Herzegovina

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Case No. U-4/20

DECISION ON ADMISSIBILITY AND MERITS

Request of seven delegates of the Council of Peoples of the Republika Srpska for review of the constitutionality of the provisions of Articles 324, 325, 325a, 326 and 329 of the Law on Real Rights of the Republika Srpska (*Official Gazette of the Republika Srpska*, 124/08, 3/09 – correction, 58/09, 95/11, 60/15, 18/06 – Decision of the Constitutional Court and 107/19)

Decision of 26 March 2021

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Ms. Angelika Nussberger, and

Ms. Helen Keller

Having deliberated on the request lodged by **seven delegates of the Council of Peoples of the Republika Srpska,** in Case no. **U-4/20**, at its session held on 26 March 2021, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding on the request lodged by seven delegates of the Council of Peoples of the Republika Srpska for review of the constitutionality of the provisions of Articles 324, 325, 325a, 326 and 329 of the Law on Real Rights of the Republika Srpska (*Official Gazette of the Republika Srpska*, 124/08, 3/09 – correction, 58/09, 95/11, 60/15, 18/06 – *Decision of the Constitutional Court* and 107/19),

it is hereby established that the provisions of Articles 324, 325, 325a, 326 and 329 of the Law on Real Rights of the Republika Srpska (*Official Gazette of the Republika Srpska*, 124/08, 3/09 – correction, 58/09, 95/11, 60/15, 18/06 – *Decision of the Constitutional Court* and 107/19) are consistent with Article I(1), Article III(3)(b) and Article IV(4)(e) 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 18 May 2020, seven delegates of the Council of Peoples of the Republika Srpska ("the applicants") filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the constitutionality of the provisions of Articles 324, 325, 325a, 326 and 329 of the Law on Real Rights of the Republika Srpska (*Official Gazette of the Republika Srpska*, 124/08, 3/09 – correction, 58/09, 95/11, 60/15, 18/06 – Decisions of the Constitutional Court and 107/19; "the challenged provisions"). In addition, the applicants requested that the Constitutional Court issue a decision on an interim measure prohibiting the application of the challenged provisions pending a final decision of the Constitutional Court on the request.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 19 May 2020 the National Assembly of the Republika Srpska ("the National Assembly") was requested to submit its reply to the request.

3. The National Assembly submitted its reply on 21 July 2020.

III. Request

a) Allegations stated in the request

4. The applicants hold that the challenged provisions are in contravention of Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina. They point out that, despite clear prohibitions to resolve the issue of state property unilaterally and a clear position taken by the Constitutional Court in Case No. *U-1/11*, according to which the issue falls within the exclusive competence of Bosnia and Herzegovina, the National Assembly passed the challenged provisions of the Law on Real Rights, which, according to the applicants, unilaterally resolved the issue of part of the state property of BiH. It is pointed out that the issue of state property, according to several provisions of the Constitution of BiH, falls within the exclusive competence of the State of BiH and its institutions.

5. The request states that the provisions of Articles 324 and 325 of the Law on Real Rights stipulate that things, real estate and urban construction land under social or state ownership, which did not become the property of another person before the entry into

force of that Law, will be transformed into the right of ownership of its previous holder or legal successor, and that they can be the Republika, units of local self-government, public enterprises, public institutions and other public services formed by the Republika or units of local self-government. In addition, the provisions of the challenged Article 325a prescribe a procedure for transforming the registration of social *i.e.* state property and public property into the ownership right of the Republika Srpska as regards things, real estate and urban construction land. The challenged provisions of Article 326 prescribe the procedure for transforming and registering the rights referred to in Articles 324 and 325 of the Law, and the challenged provisions of Article 329 stipulate the deletion of a mortgage entered into public records before the transformation of the encumbered real property into state property.

6. Furthermore, it is pointed out that state property is an issue that falls within the exclusive competence of the State of BiH and its institutions, which can be seen from a number of laws promulgated by the High Representative in BiH, such as the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina, and two Entity laws prohibiting the disposal of state property in the territory of the Federation of BiH, *i.e.* in the territory of the Republika Srpska. The above assertion is supported also by a number of decisions of the Constitutional Court of BiH (see Decision on Admissibility and Merits, No. *U-1/11* of 13 July 2012, Decision on Admissibility and Merits No. *U-8/19* of 6 February 2020 and Decision on Admissibility and Merits No. *U-9/19* of 6 February 2020, available at www.ustavnisud.ba).

7. The applicants point out that the 1994 Law on the Transformation of Socially-Owned Property, adopted by the R BiH, stipulates that the R BiH shall become a holder of the right to socially-owned property, as prescribed by Article 1 of the Law. In addition, the applicants highlight that Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the Federal Republic of Yugoslavia entered into the Agreement on Succession Issues in Vienna on 29 June 2001. The aforementioned Agreement was ratified on 28 November 2001 by the Decision of the Presidency of BiH. Pursuant to Article 2 of Annex A to the Agreement on Succession Issues, *Immovable State property of the SFRY which was located within the territory of the SFRY shall pass to the Successor State on whose territory that property is situated*. According to the applicants, the Agreement on Succession Issues undoubtedly shows that the State of BiH is a legal owner of the immovable property of the former SFRY, which, following the dissolution of the former SFRY, was in the territory of BiH. In addition, BiH, as a subject of international law and a signatory to the mentioned multilateral treaty (Agreement on Succession Issues), which was ratified by its competent authorities and bodies, is obligated to comply with the aforementioned Agreement.

8. The applicants also refer to the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina ("the Law on the Prohibition of Disposal")

and two Entity laws prohibiting the disposal of state property in the territory of the Federation of BiH, *i.e.* in the territory of the Republika Srpska, which were promulgated by the High Representative in BiH. The aforementioned laws, as pointed out by the applicants, are still in force, as no law on state property has been passed at the level of BiH. It is also stated that Article 1, paragraphs 1 and 2 of the Law on the Prohibition of Disposal specify what immovable property is considered state property. Moreover, the applicants point out that the Constitutional Court of BiH, in its Decision No. *U-1/11*, held that *the High Representative passed the relevant laws on the temporary prohibition of the disposal of state property…* to help the process leading to the legislation at the state level and the legislation at the lower administrative-territorial level regarding the rights of ownership, management and other issues related to state property.

9. Furthermore, the applicants underline that the BiH authorities did not enact a law to regulate the issue of state property, but that the legislator in the RS entity tried to regulate the issue in part by enacting the challenged provisions of the Law on Real Rights. They also state that in the present case the continuation of the State of BiH, as stipulated by Article I(1) of the Constitution of BiH, implies the continuity of rights of the State of BiH to regulate the issue of state property, which belongs to it based on the right to dispose, manage or use. That property certainly includes things, real property and urban construction land referred to in Articles 324, 325, 325a, 326 and 329 of the Law on Real Rights. That property represents part of social, *i.e.* state property in respect of which the Constitutional Court of BiH has already established that it may be the subject-matter of the right of disposal primarily by laws at the level of BiH (Decisions of the Constitutional Court nos. *U-1/11*, *U-8/19*, *U-9/19*). According to the applicants, the unilateral solution established by the challenged provisions of the Law on Real Rights constitutes a violation of Article I(1) of the Constitution of BiH.

10. The applicants also underline that although it is evident that things, real property and urban construction land specified in the challenged provisions of the Law on Real Rights represent part of state property, which, by the Agreement on Succession Issues, became the property of the State of BiH, the challenged provisions prescribe that the right to dispose, manage and use, which did not become the property of another person before the entry into force of this Law, shall become the property of its former holder or of his legal successor (the Republika, units of local self-government, public enterprises, and public institutions and other public services formed by the Republika or units of local self-government), *i.e.* the property of the units of local self-government on whose territory the real property is located. In this way, as concluded by the applicants, the State of BiH is deprived of the right to fulfil its international obligations under Article III(3) (b) of the Constitution of BiH, which makes these provisions of the Law on Real Rights inadmissible.

11. In addition, the applicants allege that the challenged provisions are in violation of the provisions of Article IV(4)(e) of the Constitution of BiH, which provides that the

Parliamentary Assembly of BiH has responsibility for other matters as are necessary to carry out the duties of the State.

12. Moreover, the applicants highlight that the issue of state property ought to be regulated primarily by a law at the level of BiH, which would clearly position the competences of the Entities, by adhering to the Constitution of BiH and "decisions of the institutions of BiH, and it would harmonize the actions of competent bodies within BiH.

13. The applicants proposed that the Constitutional Court grant the request for review of constitutionality, find that the challenged provisions are not consistent with Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of Bosnia and Herzegovina, and that the challenged provisions, pursuant to Article 61(2) and (3) of the Rules of the Constitutional Court, cease to be valid on the day following the day of publication of the decision in the "Official Gazette of BiH".

b) Reply to the request

14. In response to the appeal, the National Assembly primarily challenges the applicants' standing to initiate proceedings for the purposes of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, for the RS Council of Peoples does not represent a separate house of the RS National Assembly, as provided in Article 69(2) of the RS Constitution. Therefore, it is clear that the Council of Peoples is a special body for the protection of vital national interest of any of the constituent peoples, and it is not another house of the National Assembly of RS.

15. In the opinion of the National Assembly, the request in question is unfounded and, consequently, the Constitutional Court should dismiss it, as well as the request for interim measure. In support of the aforementioned the following is highlighted: Amendment XXXII to Article 68(6) of the Constitution of the Republika Srpska stipulates that the Republika, *inter alia*, regulates and ensures ownership and obligation relations and the protection of all forms of ownership, and paragraph 8 of the same Article prescribes that the Republika Srpska regulates main objectives and directions of economic, scientific, technological, demographic and social development, the development of agriculture and the village, *etc*. In addition, Article 58 (1) of the Constitution of the Republika Srpska stipulates that property rights and obligations relating to socially-owned resources and the conditions of transforming the resources into other forms of ownership are regulated by law.

16. Furthermore, it is pointed out that in all property legislation in BiH, and that is also the generally accepted principle in the comparative European national legislation, the ownership right is equal for everyone – for every holder of the right, for every proprietor. Thus, the legal regulation of ownership relations is performed by law, and the legal solutions concerning the ownership right are equally applicable to any subject of law,

notwithstanding its private or public nature. The fact that the owner of a thing is a town or municipality, a public company or natural person, does not have an effect on the scope and content of the ownership right. Accordingly, whoever has the competence to regulate property relations may not be declared incompetent just for the reason that a public legal subject may appear as the holder of ownership right to some things. On the other hand, in the Constitution of Bosnia and Herzegovina there is no state property as a category, since any property that is not owned by natural or legal persons belongs to the Entities. The final validation of this claim is in the fact that the privatisation process had been performed by the Entities themselves – they sold the state capital in the enterprises that were located in their respective territories thereby recognising and implementing the territorial principle.

17. The National Assembly concludes that it clearly follows from the above provisions of the Constitution of the Republika Srpska, which represent the grounds for the adoption of the relevant Law, that the Republika Srpska has the competence for the adoption of the Law on Real Rights, *i.e.* is responsible for regulation of all matters which are of importance for the transformation of the right to dispose, manage or use the socially or state owned real property into the ownership of the Republika Srpska or units of local self-management.

18. It is also pointed out that the applicants' allegations that the relevant provisions of the Law are in violation of Articles I(1), III(3)(b) and IV(4)(e) of the Constitution of Bosnia and Herzegovina are completely ill-founded. Namely, as to Article I(1) of the Constitution of Bosnia and Herzegovina, the National Assembly underlines that the mentioned Article provides for the continuation of the international personality of Bosnia and Herzegovina, which does not have as its consequence the legal continuity of property nor could be brought into connection with the right of Bosnia and Herzegovina in internal law in general. It is further underlined that the relevant provision regulates the existence of Bosnia and Herzegovina as a subject in the international public law and it does not regulate in any way the internal organisation or anything else that could involve the real rights. As to Article III(3)(b) of the Constitution of BiH, which provides that 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 National Assembly holds that, contrary to the applicants' allegations that the challenged provision is in violation of the mentioned provision of the Constitution of BiH, the challenged provision of the Law was adopted on the basis of authority contained in the Constitution of the Republika Srpska, which is in compliance with the Constitution of Bosnia and Herzegovina. In the opinion of the National Assembly, the allegations are also ill-founded that the challenged provision is in violation of Article IV(4)(e) of the Constitution of Bosnia and Herzegovina under which the Parliamentary Assembly has the responsibility for such other matters as are necessary to carry out

its duties or as are assigned to it by mutual agreement of the Entities. Contrary to the applicants' allegations, the National Assembly holds that in interpreting the mentioned provision, it must be brought into connection with Article III(1), which enumerates the matters that are the responsibility of the Institutions of Bosnia and Herzegovina, and not for any other matter.

19. It is also pointed out that, as to the adoption of the relevant Laws, in the Republika Srpska in accordance with the Constitution of the Republika Srpska and in the Federation of Bosnia and Herzegovina in accordance with the Constitution of the Federation of Bosnia and Herzegovina, and all in accordance with Article III(3)(a) of the Constitution of Bosnia and Herzegovina, the concluding provisions of the mentioned Laws stipulate the manner of transformation of social and/or state property, and its derived rights to dispose, manage and use, into the ownership of natural and legal persons or the ownership of the holders of public right, as determined by the relevant laws (the Republika Srpska and the Federation of Bosnia and Herzegovina, cantons of the Federation of Bosnia and Herzegovina, public institutions of the Republika Srpska and the Federation of Bosnia and Herzegovina, units of self-management of the Republika Srpska and the Federation of Bosnia and Herzegovina, *etc*.).

20. Besides, the concluding provisions of the Law on Real Rights of the Federation of BiH (*Official Gazette*, 66/13 and 100/13) regulate the obligation of registration of real rights, and Article 361(2) stipulates that the relevant Public Attorney's Office is obliged to initiate the proceedings for the registration of real rights to the real property the holders of which are the Federation, cantons or units of self-management as well as the registration of public and common goods within three years as of the date of entry into force of the Law. The mentioned Law prescribes and defines the procedure for registration of real rights.

21. It is also highlighted that the challenged provisions of the Law on Real Rights regulate who are the holders of public property right. The comparative analysis of the Law on Amendments to the Law of Real Rights of the Republika Srpska and the Law on Real Rights of the Federation of Bosnia and Herzegovina shows that the issues of the holders of public property rights are regulated in the same manner, whereas the differences appear in the registration procedure and terminology used for the holders of public rights. It is also underlined that transitional and concluding provisions that regulate the manner of transformation of the social/state property and its derived rights to ownership have been in force for ten years already, as of the date of adoption of the Law on Real Rights. Therefore, it follows from the above that the challenged provisions of the Law on Real Rights only specify the provisions that are already in force.

22. In the opinion of the National Assembly, the legislation and practice in BiH after the Dayton Agreement and all political bodies in BiH recognize that state property belongs to the Entities, and not to the level of BiH. It is pointed out that the laws adopted by the

Parliamentary Assembly of BiH confirm the position that state property belongs to the Entities. Thus, in 1998, the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina was adopted by the Decision of the High Representative, and on 19 July 1999, the Parliamentary Assembly of BiH adopted the same Framework Law. In addition, it is pointed out that already in 2005, the Council of Ministers passed the Decision on establishing the State Property Commission to determine the criteria for division of the state property between different levels of government, but that Commission has never reached an agreement on these issues. The unresolved status of state property conditioned the prescribing of a ban on disposing of that property. The decisions on the prohibition of disposing of state property, as pointed out, do not claim that the level of BiH is in itself the legal owner of state property located in the territory of the Entities, nor do they determine the legal owner.

23. In view of the above, the National Assembly claims that the challenged provisions are not in violation of Articles I(1), III(3)(b) and IV(4)(e) of the Constitution of BiH and, therefore, it suggests the Constitutional Court to dismiss the request in question, *i.e.* to establish that there is no violation in terms of jurisdiction of the Constitutional Court under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, *i.e.* to establish that the challenged provisions are consistent with the Constitution of BiH.

IV. Relevant Law

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

Article I(1)
Continuity

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. [...]

Article III(3)(b)

3. Law and Responsibilities of the Entities and the Institutions

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 IV(4)(e)

The Parliamentary Assembly shall have responsibility for:

[...]

e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.

25. The **Law on Real Rights of Republika Srpska** (*Official Gazette of Republika Srpska*, 124/08, 3/09 - correction, 58/09, 95/11, 60/15, 18/16 - Decisions of the Constitutional Court and 107/19).

For the purpose of this decision, an unofficial revised text compiled at the Constitutional Court of Bosnia and Herzegovina will be used, which reads as follows:

Article 1
Ownership and other real rights

(1) This Law regulates the acquisition, use, disposal, protection and termination of property rights, other real rights and possession.

(2) Real rights are: the right of ownership, the right to construction, the right to pledge, the right to real and personal servitude and the right of real encumbrance.

(3) The provisions of this Law relating to the right of ownership shall accordingly apply to all other real rights, unless otherwise prescribed by a special law or it arises from their legal nature.

I. Transitional Provisions

Article 324

1. Transformation of social ownership

Transformation of the right to dispose, manage and use

(1) Unless otherwise prescribed by a particular piece of legislation, the right to dispose, manage and use as a basic right to things under social or state ownership, which did not become the property of another person before the entry into force of this Law, shall become the property of its former holder or of his legal successor, provided that the thing has the capacity to be the subject matter of the right of ownership.

(2) (deleted)

(3) The holder of the right to dispose, manage and use of socially or state-owned real property referred to in paragraph 1 of this Article shall be the Republika, units of local self-government, public enterprises, and public institutions and other public services formed by the Republika or units of local self-government, as holders of public property rights.

(4) The right to dispose, manage and use of socially or state-owned real property, which did not become the property of another person before the entry into force of this Law, shall be transformed into the right of ownership of the unit of local self-government on whose territory the real property is located, if the holder of that right has ceased to exist or has no legal successor.

Article 325
Transformation of the right to urban construction land into the right of ownership

The temporary right of use until taking over, the right of use for construction and the permanent right of use of a urban construction land under social or state ownership, which did not become the property of another person until the entry into force of this Law, shall be transformed into the right of ownership of its former holder or legal successor.

Article 325a
Transformation into the ownership right of the Republika Srpska

The registration of the holder of right to real property registered in public records as social or state property referred to in Article 324, paragraphs 1 and 4 and Article 325 of the Law, whose request for transformation of these rights into property rights has been rejected by a final decision of the competent administrative body, shall be deleted, and the registration of social, i.e. state property and public property shall be transformed into the property right of the Republika Srpska.

Article 326
Decision on the Transformation into Ownership Right

(1) The administrative body responsible for property and legal affairs, at the request of a party or ex officio, shall conduct the procedure and issue a decision on the transformation of the right referred to in Article 324, paragraphs 1 and 4 and Article 325 of this Law.

(2) (deleted)

(3) The registration shall be carried out in accordance with the legal regulations governing the entry of rights in public records on real property and rights to them.

Article 329
Deletion of Old Mortgages

Courts shall ex officio delete mortgages entered into public records before the transformation of the encumbered real property into state property.

Article 349(1)
Sale and disposal of real property owned by the Republika

(1) The sale and disposal of real property owned by the Republika pending the adoption of special regulations shall be carried out by applying the provisions of this Law, the Law on Temporary Prohibition of Disposal of State Property of the Republika Srpska (Official Gazette of the Republika Srpska, nos. 32/05, 32/06, 100/06, 44/07

and 86/07), the Law on Land Registry of the Republika Srpska (Official Gazette of the Republika Srpska, 74/02), the Agreement on Succession Issues (Official Gazette of BiH/ Annex - International Agreements/ 10/01 and 41/01), the Decision on Implementation of Annex "G" of the Agreement on Succession Issues on the Territory of BiH (Official Gazette of BiH, 2/04), the Decision on Obligation to Protect State Property, Financial Claims and Debts of Legal Entities from BiH in other States of the former SFRY (Official Gazette of BiH, 2/04), Interstate Treaty on Resolving Property-Legal Relations among the States that Emerged from the Dissolution of the former SFRY, and other regulations.

26. The **Law on Real Rights of the Federation of BiH** (*Official Gazette of the Federation of BiH*, 66/13, 100/13 and 32/19 - Decisions of the Constitutional Court FBiH), as relevant, reads:

Article 338
Transformation of the right to dispose, manage and use

(1) Unless otherwise prescribed by a particular piece of legislation, the right to dispose, manage and use as a basic right to things under social or state ownership, which did not become the property of another person before the entry into force of this Law, shall become the property of its former holder or of his legal successor, provided that the thing has the capacity to be the subject matter of the right of ownership.

(2) Entries of the right to dispose, manage and use of socially or state-owned things in the land register performed by the date of entry into force of this Law shall be deemed to be entries of the right of ownership, if the social ownership has not been transformed into the property of another person entitled to register his right.

(3) The right to dispose, manage and use of a thing under social or state ownership shall be transformed into the right of ownership of the legal successor of the former holder of the right to dispose, manage and use of the thing, provided that the thing has the capacity to be the subject matter of the right of ownership, unless it became the property of another person on some legal basis, and unless provided otherwise by a special law.

(4) The provisions of this Law, related to the transformation of disposal, management and use of a thing under social or state ownership shall also apply to the legal successors of the holder of those rights.

Article 339
Transformation of the right to use undeveloped construction land

The right to use undeveloped construction land under social, now state ownership that has not terminate by the adoption of this Law shall be transformed into the right of ownership of the former holder of the right or his legal successor, by the entry into force of this Law, and entries of that right shall be deemed to be entries of the right of ownership, unless provided otherwise by a special law.

Article 364(1)
Sale and disposal of real property owned by the Federation, cantons and units of local self-government

(1) The sale and disposal of real property owned by the Federation, cantons and local self-government units, in the transitional period, shall be carried out in the manner and under the conditions prescribed by this Law, the Law on the Temporary Prohibition of Disposal of State Property of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH, 20/05), the Law on Land Registry (Official Gazette of the Federation of BiH, 19/03 and 54/04), Agreement on Succession Issues (Official Gazette of BiH/Annex - International Agreements, 10/2001 and 41/2001), the Decision on Implementation of Annex "G" of the Agreement on Succession Issues on the Territory of BiH (Official Gazette of BiH, 2/04), the Decision on Obligation to Protect State Property, Financial Claims and Debts of Legal Entities from BiH in other States of the former SFRY (Official Gazette of BiH, 2/04), Interstate Treaty on Resolving Property-Legal Relations among the States that Emerged from the Dissolution of the former SFRY, and other regulations.

27. The **Law on Temporary Prohibition of Disposal of State Property of BiH** (*Official Gazette of Bosnia and Herzegovina*, 18/05 and 29/06, 85/06, 32/07, 41/07, 74/07, 99/07 and 58/08), as relevant, reads:

Article 1

This Law prohibits the disposal of State Property.

For the purpose of this Law, State Property is considered to be:

1. Immovable property, which belongs to the state of Bosnia and Herzegovina (as an internationally recognized state) pursuant to the international Agreement on Succession Issues signed on 29 June 2001 by the states of Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Slovenia and the Federal Republic of Yugoslavia which, on the day of adoption of this Law, is considered to be owned or possessed by Bosnia and Herzegovina or other public organizations of Bosnia and Herzegovina; and

2. Immovable property for which the right of disposal and management belonged to the former Socialist Republic of Bosnia and Herzegovina before 31 December 1991, which on the day of adoption of this Law is considered to be owned or possessed by Bosnia and Herzegovina, or public organization or body of Bosnia and Herzegovina and any of its subdivisions.

For the purpose of this Law, disposal of the aforementioned property shall mean the direct or indirect transfer of ownership.

Article 2

Notwithstanding the provisions of any other law or regulation, State Property may be disposed of only in accordance with the provisions of this Law.

Any decision, act, contract, or other legal instrument, disposing of property referred to in Article 1 of this Law concluded contrary to provisions of this Law, after its entry into force, shall be null and void.

Article 3

Assets and rights of enterprises, registered as such, which are subject to privatization pursuant to the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina no. 14/98 and 14/00), and applicable regulations thereunder, shall be exempt from the prohibition under this Law.

The portion of State Property that will continue to serve defence purposes, pursuant to and in accordance with Articles 71-74 of the Law on Defence of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, no. 88/05) shall also be exempt from the temporary prohibition imposed by this Law (remark by the Constitutional Court: this paragraph was added after the amendments had been published in the "Official Gazette of BiH", 85/06).

Additionally, the State Property Commission established by the Decision of the Council of Ministers of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", 10/05, hereinafter: "the Commission") may, upon the proposal of an interested party, decide to exempt certain State Property from the prohibition imposed by this Law.

Article 4

The temporary prohibition on the disposal of State Property in accordance with this Law shall be in force until entry into force of the law regulating implementation of criteria to be used for identification of property owned by Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District of Bosnia and Herzegovina, and specifying the rights of ownership and management of State Property, which shall be enacted upon the recommendations of the Commission but not later than one year from the day of the entry into force of this Law.

28. The **Law on Temporary Prohibition of Disposal of State Property of the Federation of Bosnia and Herzegovina** (*Official Gazette of FBiH*, 20/05, 17/06, 62/06, 40/07, 70/07, 94/07 and 41/08), as relevant, reads:

Article 1

This Law prohibits the disposal of State Property.

For the purpose of this Law, State Property is considered to be:

1. Immovable property which belongs to the state of Bosnia and Herzegovina (as an internationally recognized state) pursuant to the international Agreement on Succession Issues signed on 29 June 2001 by the states of Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Slovenia and the Federal Republic of Yugoslavia which, on the day of adoption of this Law, is considered to be owned or

possessed by any level of government or public organization in Federation of Bosnia and Herzegovina, and

2. Immovable property properties for which the right of disposal and management belonged to the former Socialist Republic of Bosnia and Herzegovina (hereinafter: SRBIH) before 31 December 1991, which on the day of adoption of this Law is considered to be owned or possessed by any level of government or public organization or body in Federation of Bosnia and Herzegovina.

For the purpose of this Law, disposal of the aforementioned property shall mean the direct or indirect transfer of ownership.

Article 2

Notwithstanding the provisions of any other law or regulation, State Property may be disposed of only in accordance with the provisions of this Law.

Any decision, act, contract, or other legal instrument, disposing of property referred to in Article 1 of this Law concluded contrary to provisions of this Law after its entry into force, shall be null and void.

Article 3

The following assets shall be exempt from the prohibition specified in Article 1 of this law and include:

1. Assets and rights of enterprises, registered as such, which are subject to privatization as defined in Article 1 of the Law on Privatization of Enterprises (Official Gazette of Federation of BiH, 27/97, 8/99, 45/00, 61/01, 27/02, 33/02, 28/04 and 44/04); and which are currently determined or will be determined as constituting the approved active balance sheet of enterprises as stipulated in the Law on Opening Balance Sheet of Enterprises and Banks (Official Gazette of FBiH, 12/98 and 40/99) and the Decree on Methodology for Preparation of Program of Privatization and Opening Balance Sheet (Official Gazette of FBiH, 10/98, 26/98, 49/99 and 40/00); as well as the assets and rights that are the subject of small privatization. The competent body, in accordance with the aforementioned laws shall be entitled to determine the amended active balance sheet, but shall communicate to the Commission, ex officio, any addition thereto of property specified by Article 1 of this Law; and

2. Assets subject to sale pursuant to the Law on Sale of Apartments with Occupancy Rights (Official Gazette of FBiH, 27/97, 11/98, 22/99, 27/99, 7/00, 32/01, 56/01, 61/01, 15/02, 54/04).

Additionally, the State Property Commission established by the Decision of the Council of Ministers of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", 10/05, hereinafter: "the Commission") may, upon the proposal of an interested party, decide to exempt certain State Property from the prohibition imposed by this Law.

The portion of State Property that will continue to serve defence purposes, pursuant to and in accordance with Articles 71-74 of the Law on Defence of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 88/05) shall also be exempt from the temporary prohibition imposed by this Law.

29. The **Law on the Temporary Prohibition of Disposal of State Property of the Republika Srpska** (*Official Gazette of the RS*, 32/05, 32/06, 100/06, 44/07, 86/07, 113/07 and 64/08), as relevant, reads:

Article 1

This Law prohibits the disposal of State Property.

For the purpose of this Law, State Property is considered to be:

1. Immovable property which belongs to the state of Bosnia and Herzegovina (as an internationally recognized state) pursuant to the international Agreement on Succession Issues signed on 29 June 2001 by the states of Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Slovenia and the Federal Republic of Yugoslavia which, on the day of adoption of this Law, is considered to be owned or possessed by any level of government or public organization in Republika Srpska, and

2. Immovable property for which the right of disposal and management belonged to the former Socialist Republic of Bosnia and Herzegovina (hereinafter: SRBIH) before 31 December 1991, which on the day of adoption of this Law is considered to be owned or possessed by any level of government or public organization or body in Republika Srpska.

For the purpose of this Law, disposal of the aforementioned property shall mean the direct or indirect transfer of ownership.

Article 2

Notwithstanding the provisions of any other law or regulation, State Property may be disposed of only in accordance with the provisions of this Law.

Any decision, act, contract, or other legal instrument, disposing of property referred to in Article 1 of this Law concluded contrary to provisions of this Law after its entry into force, shall be null and void.

Article 3

The following assets shall be exempt from the prohibition specified in Article 1 of this law and shall include:

1. Assets and rights of enterprises, registered as such, which are subject to privatization as defined in Article 1 of the Law on Privatization of State Capital in Enterprises in Republika Srpska (Official Gazette of RS, 24/98, 62/02, 38/03 and 65/03); and which are currently determined or will be determined as constituting the approved active balance sheet of enterprises as stipulated in the Law on Opening Balance Sheet in Privatization Procedure of State Capital in Enterprises (Official Gazette of RS, 24/98)

The competent body, in accordance with the aforementioned laws shall be entitled to determine the amended active balance sheet, but shall communicate to the Commission, ex officio, any addition thereto of property specified by Article 1 of this Law; and

2. Assets subject to sale pursuant to the Law on Privatization of State Owned Apartments (Official Gazette of RS, 11/00, 20/00, 18/01, 35/01, 65/01, 47/02, 65/03, 03/04, 70/04 and 2/05).

Additionally, the State Property Commission established by the Decision of the Council of Ministers of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 10/05, hereinafter: "the Commission") may, upon the proposal of an interested party, decide to exempt certain State Property from the prohibition imposed by this Law.

The portion of State Property that will continue to serve defence purposes, pursuant to and in accordance with Articles 71-74 of the Law on Defence of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 88/05) shall also be exempt from the temporary prohibition imposed by this Law.

30. The **Law on the Transformation of Socially-Owned Property** (*Official Gazette of the Republic of BiH*, 33/94 of 25 November 1994). For the purpose of this Decision, the text as published in the Official Gazettes will be used as it was not published in all languages and scripts, and, as relevant, reads as follows:

Article 1

On the date of the entry into force of this Law, the Republic of Bosnia and Herzegovina (hereinafter: the Republic) shall become the holder of the right to ownership over socially-owned property over which the Federation of Bosnia and Herzegovina has no right to disposal, and that is:

1. Natural resources and goods in general use;

2. Social capital expressed in balance sheets of legal persons on 31 December 1991; 3. Resources over which the right to use and the right to disposal have: local communities, social organisation, associations of citizens and political organisations, except such resources which those communities and organisations obtained from other sources but the budget, resources for financing of common needs, donations of social legal persons and voluntary taxes of citizens;

4. Real estates which were built or gained on other basis from the budgetary resources, resources for financing of common needs and resources of voluntary taxes of citizens and donations notwithstanding whether business books of social legal person, as user, are kept or not, i.e. whether they were registered in the Land Books.

Article 3

The third parties' real rights to the real property referred to in Article 1 of this Law, which have been acquired in accordance with the law, shall not be changed.

Article 4

Authorizations and obligations based on the property referred to in Article 1 of this Law for the bodies of the Republic, districts-cantons and municipalities shall be regulated by a special law.

Pending the enactment of the law referred to in Article 1 of this Article, the authorizations and obligations based on the property referred to in Article 1 of this Law shall be exercised by the competent authorities in accordance with the applicable regulations.

Article 9

The right of ownership over the property on which the Republic of Bosnia and Herzegovina has the right to disposal and the division of that property between the Republic of Bosnia and Herzegovina and the Federation shall be regulated by a special law.

Article 10

On the date of the entry into force of this Law, the following Laws shall cease to apply:

1. Law on Social Capital (Official Gazette of the Republic of BiH, 2/92);

2. Article 5 of the Law on Public Enterprises (Official Gazette of the Republic of BiH, 4/92, 21/92 and 13/94);

3. Law on Transformation of Social into Other Forms of Ownership in Enterprises Producing Weapons and Military Equipment (Official Gazette of RBiH - Special Gazette, 7/93).

31. The **Law on Transfer of Assets from Social to State Ownership** (*Official Gazette of RS*, 4/93, 29/94, 31/94, 9/95, Decisions of the Constitutional Court of the RS 8/96 and 20/98 and DoCC of the RS 74/07 and 83/07). For the purpose of this Decision, the text as published in the Official Gazettes will be used as it was not published in all languages and scripts, and, as relevant, reads:

Article 1

Due to an imminent danger of war and the potential of it turning into a war, all users are obliged to pay special attention to the protection of social property.

Article 2

At the end of extraordinary circumstances and the situation referred to in the previous Article:

- an audit of ownership transformation performed shall be carried out;

- the possibilities shall be considered and the way of transforming state property into private shall be formulated on the basis of realistic estimates of economic values created;

- the contributions to the acquisition (of both society and the individual) and the necessity for the state to take care of the soldiers and their families shall be taken into account.

32. The **Framework Law on Privatization of Enterprises and Banks in BiH** (*Official Gazette of Bosnia and Herzegovina*, 14/98, 12/99, 14/00, 16/02 and 88/05 - Correction), as relevant, reads:

Article 2

In accordance with the GFAP, this Law expressly recognises the right of the Entities to privatise non-privately owned enterprises and banks located on their territories.

V. Admissibility

33. 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.

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.

34. The request for review of constitutionality was filed by seven delegates of the Council of Peoples of the Republika Srpska, which has a total of 28 delegates, which makes up ¼ of members of either chamber of a legislature of an Entity, which means, contrary to the assertions made by the National Assembly of the Republika Srpska, that the request was filed by an authorized subject, within the meaning of Article VI(3)(a) of the Constitution of BiH, (see the Constitutional Court, Decision on Admissibility, No. *U-7/10* of 26 November 2010, paragraph 21, available at www.ustavnisud.ba).

VI. Merits

35. The applicants claim that the challenged provisions of the Entity Law on Real Rights are not consistent with Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of BiH, given that the National Assembly has no constitutional basis to regulate the issue of the relevant part of state property which, according to the provisions of the Constitution of BiH, is within the exclusive competence of the State of BiH and its Institutions.

36. It is pointed out in the request that the challenged provisions (Articles 324 and 325) stipulate that things, real property and urban construction land under social or state ownership, which did not become the property of another person before the entry into force of that law, will be transformed into the right of ownership of its previous holder or legal successor (and that they may be the Republika Srpska, units of local self-government, public enterprises, public institutions and other public services formed by the Republika Srpska or units of local self-government). In addition, it is stated that the challenged provisions (Articles 325a, 326 and 329) prescribe the procedure for transforming and registering social, *i.e.* state property and public property into the ownership right, and the deletion of a mortgage entered into public records before the transformation of the encumbered real property into state property. In the opinion of the applicants, the property in question falls within the framework of the Law on Prohibition of Disposal, which determines which immovable property is considered state property of BiH. According to the applicants, such property certainly includes things, real property and construction land specified in the challenged provisions. In addition, the applicants refer to the consistent case-law of the Constitutional Court in cases Nos. *U-1/11, U-8/19* and *U-9/19,* according to which the property in question, in the applicants' opinion, constitutes part of social or state property having the capacity to be the subject matter of the right to dispose of primarily by laws at the level of BiH. The applicants claim that the unilateral solution of transferring social property into the property of the previous holder or his successor established by the challenged provisions of the Entity Law amounts to a violation of Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of BiH, according to which BiH has the exclusive right to continue to regulate state property of which it is the legal owner.

37. The response of the National Assembly states that the challenged provisions are not in violation of Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of BiH. The National Assembly considers that the Entities, so the Republika Srpska, have the constitutional competence to regulate the issue of state property, *i.e.* it has the competence to enact the Law on Real Rights and to regulate property relations. In the opinion of the National Assembly, whoever has competence to regulate property relations may not be declared not competent simply for the reason that a public legal subject may appear as the holder of ownership right in respect of some things. It is

pointed out that the legal regulation of ownership relations is performed by law and that legal solutions concerning the ownership right are equally applicable to any legal subject, notwithstanding its private or public nature, and that the fact that the owner of a thing is a town or municipality, a public company or natural person, does not have an effect on the scope and content of the ownership right.

38. The challenged provisions read:

Article 324

1. Transformation of socially-owned property

Transformation of the right to dispose, manage and use

(1) Unless otherwise prescribed by a particular piece of legislation, the right to dispose, manage and use as a basic right to things under social or state ownership, which did not become the property of another person before the entry into force of this Law, shall become the property of its former holder or of his legal successor, provided that the thing has the capacity to be the subject matter of the right of ownership.

(2) (deleted)

(3) The holder of the right to dispose, manage and use of socially or state-owned real property referred to in paragraph 1 of this Article shall be the Republika, units of local self-government, public enterprises, and public institutions and other public services formed by the Republika or units of local self-government, as holders of public property rights.

(4) The right to dispose, manage and use of socially or state-owned real property, which did not become the property of another person before the entry into force of this Law, shall be transformed into the right of ownership of the unit of local self-government on whose territory the real property is located, if the holder of that right has ceased to exist or has no legal successor.

Article 325
Transformation of the right to urban construction land into the right of ownership

The temporary right of use until taking over, the right of use for construction and the permanent right of use of a urban construction land under social or state ownership, which did not become the property of another person until the entry into force of this Law, shall be transformed into the right of ownership of its former holder or legal successor.

Article 325a
Transformation into the ownership right of the Republika Srpska

The registration of the holder of right to real property registered in public records as social or state property referred to in Article 324, paragraphs 1 and 4 and Article 325 of

the Law, whose request for transformation of these rights into property rights has been rejected by a final decision of the competent administrative body, shall be deleted, and the registration of social, i.e. state property and public property shall be transformed into the property right of the Republika Srpska.

Article 326
Decision on the Transformation into Ownership Right

(1) The administrative body responsible for property and legal affairs, at the request of a party or ex officio, shall conduct the procedure and issue a decision on the transformation of the right referred to in Article 324, paragraphs 1 and 4 and Article 325 of this Law.

(2) (deleted)

(3) The registration shall be carried out in accordance with the legal regulations governing the entry of rights in public records on real property and rights to them.

Article 329
Deletion of Old Mortgages

Courts shall ex officio delete mortgages entered into public records before the transformation of the encumbered real property into state property.

39. The Constitutional Court points out that in its decision no. *U-1/11* it dealt with the issues of state property and constitutional jurisdiction to regulate them (see Constitutional Court, Decision on Admissibility and Merits *No. U-1/11* of 13 July 2012, available at www.ustavnisud.ba). In the mentioned case, the Constitutional Court reviewed the constitutionality of the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban and concluded that the Republika Srpska passed the challenged Law in contravention of Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of BiH, as the matter falls under the exclusive responsibility of BiH to regulate the issue of property referred to in the contested Article 2 of the challenged Law and that for these reasons, the challenged Law is unconstitutional and that it, as a whole, cannot remain in effect (*op.cit. U-1/11*, paragraph 86).

40. In Decision No. *U-1/11* of 13 July 2012, the Constitutional Court examined whether the Republika Srpska had the constitutional responsibility to pass the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban. In this connection, in that decision the Constitutional Court explained what the notion state property meant. Accordingly, paragraph 62 reads as follows: "State property, although similar in its structure to civil law private property, is a specific legal concept enjoying a special status for this reason. State property is characterized by the public law nature of the relationship between the subjects and the use of that property as well as its legal owner. It includes, on the one hand, movable and immovable assets in the hands of public authorities which it uses to exercise that authority, on the other hand,

it may include a 'public good' (sea water and seabed, river water and river beds, lakes, mountains and other natural resources, public transport networks, traffic infrastructure, *etc*.). It, by its nature, primarily serves all people in the country. As such, the 'public good' may be exempted from legal transactions (*res extra commercium*) due to its importance, as it is the only way to preserve and protect it."

41. In addition, in paragraph 77 of the Decision No. *U-1/11*, the Constitutional Court emphasized that the subject-matter of regulation by the challenged Law under examination was "the immovable property which Bosnia and Herzegovina got on the basis of the International Agreement on Succession Issues", and "the immovable property over which the former SRBiH had the right to manage and the right to dispose of". However, in the remainder of the reasoning (see paragraph 82), the Constitutional Court additionally clarified that the notion of state property could not mean solely real property such as buildings and such like, and emphasized the following: "The Constitutional Court reiterates that the state property has a special status. It encompasses, on the one hand, movable and immovable assets in the hands of public authorities used to exercise that authority. On the other hand, state property can include a public good, which, by its nature, primarily serves all people in the country (running water, protection of climate-related living conditions and protection of other natural resources such as forests, necessary state infrastructural networks within the meaning of Annex 9 to the General Framework Agreement for Peace in BiH, *etc*.). Such property reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina. Furthermore, the interest of BiH should not be disregarded when it comes to preserving its 'public good', as a part of the state property serving all citizens of BiH and as a part which is not essential in order for specific competence of certain administrative-territorial level of government to be effectively exercised in the State. In addition, this property may serve as 'another means for financing the expenses necessary for executing the responsibilities of the Institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina', within the meaning of Article IV(4)(b) in conjunction with Article VIII(3) of the Constitution of Bosnia and Herzegovina."

42. Starting from the definition of "state property" given by the Constitutional Court in its decision No. *U-1/11*, the Constitutional Court notes that the challenged provisions in the present case do not regulate the issue of "public goods" exclusively owned by the State of BiH, nor property acquired either by succession or based on the right to dispose of and manage the property by SR BiH "until 31 December 1991, which, on the day of enactment of the Law, is considered the property or possession of any level of government or public organization or body in the Republika Srpska." Nevertheless, the challenged provisions do not relate only to the construction land, but also to other social/state property, as can be seen from the content of Article 324, which prescribes the "transformation of social property" in general, and Article 325 which regulates the transformation of the right to construction land.

43. Therefore, the question that arises before the Constitutional Court in the present case is whether the challenged provisions, and in particular the provision of Article 324 of the Law on Real Rights, relate to state property defined by the Law on Prohibition of Disposal.

44. In decision No. *U-1/11*, the Constitutional Court reviewed the constitutionality of the Law which prescribed that precisely the property covered by the Law on Prohibition of Disposal became the property of RS, "meaning that the law regulates the change of the legal owner from BiH and the former SRBiH to the RS" (*op. cit. U-1/11*, paragraph 76). The Constitutional Court recalls that it pointed out*, inter alia*, that "the subject-matter regulated by the challenged Law is 'the immovable property which Bosnia and Herzegovina got on the basis of the International Agreement on Succession Issues', and 'the immovable property over which the former SR BiH had the right to manage and to dispose of', meaning that the state property of which 'Bosnia and Herzegovina' and 'the former SR BiH' are legal owners is regulated and transferred to the RS. In addition, the Constitutional Court recalled "the characteristics of state property, as a means of exercising public authority that is closely linked to the territorial and substantial competences of the public authorities, namely, the territorial integrity and sovereignty of the State", and that, according to the relevant provisions, the state property reflects the statehood, sovereignty and territorial integrity of BiH. Therefore, it forms an integral part of the constitutional attributes and powers of the State." Thus, in decision No. *U-1/11*, the Constitutional Court noted in respect of which state property the Republika Srpska did not have the competence to regulate the disposal of such property until the State passed an appropriate regulation in respect of that property.

45. Turning to the present case, the question arises whether there is a prohibition against the disposal of social/state property, including construction land on which other subjects, municipalities and towns, as units of local self-government, had the right to use, manage and dispose of at the relevant time. Namely, social/state property to which the challenged provisions of the Law on Real Rights relate is not property under a prohibition against the disposal or property that the Constitutional Court had in mind in its decision no. *U-1/11*, *i.e.* it is not property on which the SR BiH had the right to use, manage and dispose of at the relevant time. Only property (defined by the laws on the prohibition of disposal of state property) on which the former SR BiH had the right to use, manage and dispose of at the relevant time is under the disposal ban, and it is evident that the challenged provisions of the Law on Real Rights do not apply to it. However, in the present case, it is about social/state property that can be disposed of with a view to transferring social/state property into the right of ownership. Namely, the goal is to transform former social/state property on which there was a right to use, manage or dispose of, but not by the former SR BiH, to a modern right of ownership, which can still be state property (entities, towns or municipalities), or, after proceedings conducted under the Law on Real Rights, such property may become, in certain cases, the property of natural or legal persons.

Therefore, the essence of the goal to be achieved by the challenged provisions is the elimination of the former socialist legal mechanisms (right to dispose, right to manage and right to use), based on which property issues were resolved at the time when BiH was a socialist country.

46. Therefore, in the opinion of the Constitutional Court, the challenged provisions of the Law on Real Rights concern primarily the transformation of the right to use, manage and dispose of socially or state-owned property, including construction land, into the right of ownership in accordance with the terms of the aforementioned Law. It also ensues from their name and content (Articles 324, 325 and 326). The challenged provisions actually regulate the completion of the transition process, which began with the adoption of the law on transfer of social property into state property and other laws that abolished social ownership on which the social and economic system of SR BiH was based.

47. In view of the above, the Constitutional Court finds it useful to point out the relevant laws related to the issue of the transformation of social property. Before the signing of the General Framework Agreement for Peace in BiH, *i.e.* before the entry into force of the present Constitution of Bosnia and Herzegovina, two laws were adopted, which will be discussed in more detail below. On 25 November 1994, the Republic of Bosnia and Herzegovina passed the Law on the Transformation of Socially-Owned Property. The mentioned law abolished the form of socially-owned property. Article 1 of the Law on the Transformation of Socially-Owned Property prescribes what constitutes socially-owned property on which, according to that law, the right of ownership is acquired by the Republic of Bosnia and Herzegovina. It is interesting to note that the aforementioned Law does not mention apartments on which there is an occupancy right, which, at that time, made up a large share in the total volume of socially-owned property. It is even more important to note that the mentioned Law does not refer to urban construction land, which was also socially owned and made up a large share of the total socially-owned property. In addition, the Law takes into account the existence of different levels of government and the need to divide state property between the State (then the Republic of BiH), then the Federation, cantons and municipalities. On 28 April 1993, the Republika Srpska adopted the Law on Transfer of Assets from Social to State Ownership. Apart from the title, which refers to the subject-matter of regulation, the mentioned law does not contain clear provisions as to what constitutes social property, who becomes the legal owner of social property, *etc*.

48. After the entry into force of the Constitution of Bosnia and Herzegovina, on 2 August 1999, the State Parliament adopted the Framework Law on Privatization of Enterprises and Banks in BiH. The aforementioned law entitled the Entities to enact their own laws on the privatization of enterprises and banks, as Article 2 of that Law expressly recognised the right of the Entities to privatise non-privately owned enterprises and

banks located in their territories. According to the laws on the prohibition of disposal of state property (three laws, one at the state level, the other two at the Entity level), property to be privatized on the basis of entity laws on privatization of enterprises and banks, which were adopted in accordance with the Framework Law on Privatization of Enterprises and Banks in BiH, was exempted from the prohibition of disposal. It is also important to note that, although there was no law at the state level related to the privatization of apartments on which there is an occupancy right, *i.e.* of socially-owned apartments, the Entities (especially the Federation of BiH, which passed the Law on the Sale of Apartments with Occupancy Right on 28 November 1997), initiated the process of privatising apartments with occupancy right immediately after the entry into force of the Constitution of Bosnia and Herzegovina. However, apartments on which there is an occupancy right are exempted from the prohibition of disposal of state property by the Law on Prohibition of Disposal of State Property of the Federation of BiH and the Law on Prohibition of Disposal of State Property of the Republika Srpska, while the Law on Prohibition of Disposal of State Property of Bosnia and Herzegovina does not mention apartments with an occupancy right.

49. With a view to protecting state property, the following laws were adopted: the Law on the Temporary Prohibition of Disposal of State Property of BiH, the Law on the Temporary Prohibition of Disposal of State Property of the Federation of BiH and the Law on the Temporary Prohibition of Disposal of State Property of the Republika Srpska. Although the mentioned laws are identical in structure and have the same subject of regulation, there are still certain differences. So, in the provisions of Article 1, paragraph 2, subparagraph 2, all three laws identically state that the Law prohibits the disposal of: "Immovable property for which the right of disposal and management belonged to the former Socialist Republic of Bosnia and Herzegovina before 31 December 1991". However, the remainder of the said provision is formulated differently. Thus, the relevant part of the aforementioned provision in the Law on the Temporary Prohibition of Disposal of State Property of BiH reads: "which on the day of adoption of this Law is considered to be owned or possessed by Bosnia and Herzegovina, or public organization or body of Bosnia and Herzegovina and any of its subdivisions." Unlike the aforementioned Law, in the Entity Laws on the Temporary Prohibition of Disposal of State Property, the relevant part of the provision of Article 1, paragraph 2, subparagraph 2, read: "which on the day of adoption of this Law is considered to be owned or possessed by any level of government or public organization or body in Federation of Bosnia and Herzegovina", *i.e.* "which on the day of adoption of this Law is considered to be owned or possessed by any level of government or public organization or body in the Republika Srpska."

50. After recalling the relevant legal framework and turning to the present case, the Constitutional Court notes that the basic intention of the challenged provisions of the Law on Real Rights is to create a transitional civil law system for the period of transition from the socialist to modern continental European civil law system. The challenged

provisions of the Law establish the rules aimed at proclaiming new legal principles through the transformation of social property, *i.e.* the transformation of the right to use, manage and dispose. Socially-owned property is a form of property characteristic of socialist systems, as a specific form of appropriation of social goods by socially-owned legal entities, and it was the basic form of property in the previous system. In fact, social property was a negation of property for it did not have a legal owner in the proper sense of the word. The challenged provisions of the Law on Real Rights aim at the abolition of the previous socialist forms of ownership and the intention of the legislator is that all rights arising from social ownership and which are registered as such in public records are considered property rights with a specific legal owner. In that way, the domestic legal system is harmonized with the traditional principles of the system of real law and its harmonization with the law of the European Union Member States is achieved. Establishment of an appropriate legal framework in that area, following the conclusion of the Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part (signed in Luxembourg on 16 June 2008 and entered into force on 1 June 2015), is certainly a necessity on the path towards European integration.

51. In addition, taking into account the challenged provisions, the Constitutional Court notes that a certain part of state property to which the challenged provisions of the Law on Real Rights apply will remain state-owned (Republika Srpska, units of local self-government, public companies, *etc*.), except for property on which real rights will be acquired by natural or legal persons. However, it will not be a problem in terms of the constitutionality of the challenged provisions, as the Law provides the transformation of that property, under certain conditions, in respect of natural and legal persons who may become owners after proceedings conducted in accordance with the Law on Real Rights. In addition, the property to be transformed is not state property for the purposes of the Law on the Prohibition of Disposal, or the property referred to in the decision of the Constitutional Court No. *U-1/11*.

52. In addition to the above, the Constitutional Court notes that the relevant legal framework indicates (contrary to the applicants' view) that it was not always necessary to enact laws at the state level as regards the transformation of all forms of socially or state-owned property. The obvious example is the privatization of apartments on which there is an occupancy right, in respect of which the Entities passed their laws already in 1997 (the Federation of BiH) and in 2000 (the Republika Srpska). The Entity Laws on the Temporary Prohibition of Disposal of State Property, enacted in March 2005, exempted apartments on which there is an occupancy right from the disposal ban, and which are privatized based on the Entity laws on privatization, although *e.g.* "framework law on privatization of apartments with occupancy right" was not passed at the state level.

53. In view of the above, the Constitutional Court considers that based on the Law on Prohibition of Disposal, or the positions of the Constitutional Court presented in Decision No. *U-1/11*, or the overall situation that exists, it cannot be asserted that all "state property" is necessarily property of the State of BiH, *i.e.* former SFRY or SR BiH within the meaning of the Law on Prohibition of Disposal.

54. Therefore, as to the answer to the question (whether the challenged provisions of the Law on Real Rights relate to state property which is the subject of the Law on the Temporary Prohibition of Disposal of State Property of BiH, as well as whether they relate to state property referred to in the Constitutional Court's Decision No. *U-1/11*), the Constitutional Court considers that the challenged provisions do not regulate the issue of property to which the prohibition of disposal applies and that in that sense they are not in contravention of the provisions of the Constitution of BiH referred to by the applicants, *i.e.* the Constitutional Court considers that the Republika Srpska has the competence to regulate the issue of transformation of socially or state-owned property not covered by the Law on Prohibition, by the challenged law.

55. The question could be raised as to the possible abuse of the right referred to in the relevant law, *i.e.* an attempt of the Republika Srpska to register property that is under the prohibition of disposal on itself, basing that right on the Law on Real Rights. The Constitutional Court has no such information, but in its previous case-law it has reviewed the constitutionality of other laws - the Law on Inland Waterways Navigation of the Republika Srpska and the Law on Agricultural Land of the Republika Srpska by which the Republika Srpska declared the public property in question as a public good owned by and in possession of the Republika Srpska. The Constitutional Court found the aforementioned laws unconstitutional, *i.e.* it established that the challenged provisions were in contravention of Articles I(1), III(3)(b) and IV(4)(e) of the Constitution of BiH, for Bosnia and Herzegovina had the exclusive competence to regulate the issues of state property (see Constitutional Court, Decisions on Admissibility and Merits No. *U-9/19* of 6 February 2020 and No. *U-8/19* of 6 February 2020, available at www.ustavnisud.ba).

56. In addition, the Constitutional Court notes that the provision of Article 349 of the Law on Real Rights explicitly prescribes: "The sale and disposal of real property owned by the Republika pending the adoption of special regulations shall be carried out by applying the provisions of this Law, the Law on Temporary Prohibition of Disposal of State Property of the Republika Srpska…" Furthermore, the Constitutional Court notes that in any case, an attempt to make an entry and register state property under disposal ban based on the provisions of the Law on Real Rights would be an issue to be resolved first by ordinary courts and, ultimately, by the Constitutional Court, as the court of last resort. In this regard, the Constitutional Court, within the appellate jurisdiction, considered Case No. *AP-1080/18* (see Constitutional Court, Decision on Admissibility and Merits No. *AP-1080/18* of 28 January 2020, available at www.

ustavnisud.ba), wherein it concluded that there had been a violation of the constitutional right of Bosnia and Herzegovina, *i.e.* the appellant, to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina, for the ordinary court had failed to examine the important issue as to whether that case related to the state property for the purposes of the Law on the Temporary Prohibition of Disposal and that it had arbitrarily applied the substantive law, holding that the Law on Real Rights (of the Federation of BiH), as *lex posterior*, derogated the Law on the Temporary Prohibition of Disposal (*op. cit. AP-1080/18*, paragraph 36).

57. In view of the above, the Constitutional Court concludes that the challenged provisions regulate the issues of transformation of socially or state-owned property which is not under the disposal ban and that they, in that sense, are not in contravention of the provisions of Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of BiH (establishing the legal continuity of the State of BiH, and that, accordingly, the State of Bosnia and Herzegovina is the legal owner of property of legal predecessors, and that BiH has the exclusive right to continue to regulate the state property of which it is the legal owner), referred to by the applicants and according to which BiH has the exclusive competence to regulate the issues of state property under disposal ban, pending the adoption of appropriate regulations on the final distribution. Also, the Constitutional Court concludes that the Republika Srpska has the competence to regulate the transformation of socially or state-owned property that is not covered by the Law on the Prohibition of Disposal in accordance with the transitional provisions of the Law on Real Rights (taking into account the mentioned Article 349 of the Law).

VII. Conclusion

58. The Constitutional Court concludes that the challenged provisions of the Law on Real Rights regulate the issues of the transformation of socially or state-owned property which is not under the disposal ban and that they, in that sense, are not in contravention of the provisions of Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of BiH, referred to by the applicants and according to which BiH has the exclusive competence to regulate the issues of state property under disposal ban, *i.e.* the issues of property which, based on the Agreement on Succession Issues, became property of the State of BiH, and property on which the former SR BiH had the right to dispose and manage, pending the adoption of appropriate regulations on the final distribution, and that the Republika Srpska has the competence to regulate the transformation of socially or state-owned property that is not covered by the Law on the Prohibition of Disposal in accordance with the transitional provisions of the Law on Real Rights.

59. Pursuant to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

60. Given the decision of the Constitutional Court in the present case, it is not necessary to consider separately the applicants' proposal for an interim measure.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

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Case No. U-14/20

DECISION ON ADMISSIBILITY AND MERITS

Request of seven delegates of the Council of Peoples of the Republika Srpska for review of the constitutionality of the provisions of 15 subparagraph 16 and Article 31 of the Law on Republic Administration (*Official Gazette of Republika Srpska*, 115/18)

Decision of 26 March 2021

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Ms. Angelika Nussberger, and

Ms. Helen Keller

Having deliberated on the request filed by the seven delegates of the Council of Peoples of the Republika Srpska**,** in the Case no. **U-14/20**, at its session held on 26 March 2021, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding the request filed by seven delegates of the Council of Peoples of the Republika Srpska for review of the constitutionality of the provisions of Article 15 subparagraph 16 and Article 31 of the Law on Republic Administration (*Official Gazette of the Republika Srpska*, 115/18),

it is hereby established that the provisions of Article 15 subparagraph 16 and Article 31 of the Law on Republic Administration (*Official Gazette of the Republika Srpska*, 115/18) are in conformity with Articles I(1), I(2), I(7)(e), III(1)(a), III(2)(b), III(3)(b) and V(3)(a), (c) and (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 11 December 2020, seven delegates of the Council of Peoples of the Republika Srpska ("the applicants") filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the constitutionality of the provisions of 15 subparagraph 16 and Article 31 of the Law on Republic Administration (*Official Gazette of the Republika Srpska*, 115/18; "the challenged provisions").

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 (2) of the Rules of the Constitutional Court, on 22 December 2020 the National Assembly of Republika Srpska ("the National Assembly") was requested to submit its response to the request.

3. In its submission of 18 January 2021, the National Assembly requested to be given additional time to submit a response to the request, and it submitted the response on 17 February 2021.

III. Request

a) Allegations stated in the request

4. The applicants hold that the challenged provisions of the Law on Republic Administration are not in conformity with Articles I(1), I(2), I(7)(e), III(1)(a), III(2)(b), III(3)(b) and V(3)(a), (c) and (d) of the Constitution of Bosnia and Herzegovina, which prescribe the responsibilities of the Institutions of Bosnia and Herzegovina, given that in that way the entity law regulates the issue that falls within the responsibility of the Institutions of Bosnia and Herzegovina. The essence of the extensive allegations in the submitted request shows that the applicants consider that the constitutional and substantive responsibilities of the Institutions of Bosnia and Herzegovina in relation to foreign policy, especially in relation to the name of the Ministry of European Integration and International Cooperation ("the Ministry") have been blatantly taken away by the challenged provisions of the Law on Republic Administration, as well as in relation to the responsibilities assigned to it, especially in relation to emigration and *coordination of cooperation with other bodies in BiH, as well as institutions, bodies and authorities of the EU, its member states, candidate states and potential candidates in the process of association and accession to the EU*. The applicants hold that the challenged provisions, in addition to depriving the Institutions of BiH of their responsibilities, also aim at *introducing legal uncertainty into the entire legal system of BiH, thereby undermining the international legal personality and sovereignty of BiH*.

5. The applicants assert that the provisions of the Constitution of Bosnia and Herzegovina confer on the State of BiH and its Institutions the exclusive responsibility to regulate the issue of conducting foreign policy. Therefore, only the state institutions, in cooperation and coordination with the Entities and their assistance as necessary in that context, can lead the State of BiH to equal membership in international bodies and organizations, and above all to membership in the European Union ("the EU").

6. As to the name of the Ministry, as defined by the challenged provisions, the applicants point out that the name is *essentially contrary to the provisions of the Constitution of BiH*, for it implies that the Entity Ministry is responsible for European integration and international cooperation, which is the exclusive responsibility of the State of BiH. The applicants consider that *the legislator is obviously intent on showing through the name of the mentioned Ministry that the Republika Srpska is independent of BiH in the process of European integration*, which is absolutely in contravention of the Constitution of BiH and decisions of the BiH Institutions.

7. As to the responsibilities of the Ministry, the applicants first point out that foreign policy is one of the essential elements of the international legal personality and sovereignty of Bosnia and Herzegovina, which is reflected in: a) membership in the United Nations; b) membership in the Council of Europe and c) the intention of Bosnia and Herzegovina to become part of the EU, as a separate community of states. In that context, the applicants cite a number of laws and strategic documents adopted at the level of BiH which operationalize the field of foreign policy of Bosnia and Herzegovina. The applicants state that according to these laws and strategic documents, it is indisputable that the Presidency of Bosnia and Herzegovina has exclusive responsibility for conducting foreign policy and representing Bosnia and Herzegovina in international and European organizations and institutions. Therefore, the lower levels of government, specifically the Entities, can in no way deal with foreign policy issues in the way defined by the challenged provisions. In support of their claims, the applicants refer to the Decisions of the Constitutional Court nos. *U-5/98* and *U-68/02*, pointing out that the Constitutional Court concluded therein that foreign policy and foreign trade policy under Article III(1) (a) and (b) of the Constitution of BiH *are essentially a prerogative of the Institutions of Bosnia and Herzegovina*, and that the Entities are subordinate to the sovereignty of Bosnia and Herzegovina, *i.e.* that *the autonomous status of the Entities is conditioned by hierarchically superior responsibilities of the State*.

8. As to the strategic goals of BiH to become a full member of the EU, the applicants point out that Bosnia and Herzegovina has signed a Stabilization and Association Agreement with the EU Member States ("the SAA"), and that joint bodies of Bosnia and Herzegovina and the EU have been established to supervise the application and implementation of the SAA. In addition, they point to the Decision on the System of Coordination in the Process of European Integration in BiH (*Official Gazette of BiH,* 72/16; "the Decision

on Coordination"), which defines *the institutional and operational system and method of achieving the coordination of BiH Institutions on the implementation of activities related to the process of BiH's accession into the European Union, as well as joint bodies within the coordination system, their structure, responsibilities and relationships*. According to Article 2 of the Decision, *The system of coordination shall also regulate the manner of communication between the Institutions in Bosnia and Herzegovina, with the aim of ensuring and presenting a harmonized position, on behalf of Bosnia and Herzegovina, in communication with the Institutions of the European Union*. In this connection, the applicants point to the decisions of the Constitutional Court nos. *U-9/07* and *U-17/09* according to which the process of BiH's accession to European integration is *an integral part of foreign policy of Bosnia and Herzegovina, which falls within the exclusive responsibility of the state institutions*, *i.e.* that the issue of *Bosnia and Herzegovina's membership in the European Union is certainly a matter related to the foreign policy of our country and that we have already committed ourselves to certain obligations in this respect by signing the SAA.*

9. In the remainder of the request, the applicants describe the chronology of the activities of the RS National Assembly, which practically deprive the Institutions of BiH of their responsibilities in the field of foreign policy in the process of accession to European integration. These activities, as further stated, have been going on since 2008. Until that time, the Law on Ministries, which prescribed the coordinating role of the Ministry of Economic Relations and Coordination, with respect for the Constitution and laws of BiH and the necessary cooperation with BiH Institutions in the field of international cooperation and European integration, was in effect. In this connection, the applicants state that the Law on Ministries contained provisions stipulating that relations between higher and lower level civil service bodies and RS administration bodies were arranged by the Constitution of Bosnia and Herzegovina; that the Ministries of the Republika Srpska would cooperate with the same or similar Ministries of Bosnia and Herzegovina and international institutions in accordance with the Constitution of Bosnia and Herzegovina, and would provide notifications, information and data from the scope of their activities to the competent authorities of Bosnia and Herzegovina. They underline that the aforementioned Law took into account the fact of vertical subordination between *higher and lower level state and republic administration bodies*, as well as that any kind of cooperation of Entity administration bodies with BiH administrative bodies and international institutions took place in accordance with the Constitution of BiH.

10. The applicants also assert that that after rendering effective the Law on Republic Administration (*Official Gazette of the Republika Srpska,* 118/08. 11/09, 74/10, 86/10, 24/12, 121/12, 15/16, 57/16 and 31/18) in 2008, the Ministry of Economic Relations and Coordination ceased operations and its activities were taken over by the Ministry of Economic Relations and Regional Cooperation. The aforementioned Law already did not contain provisions governing the relations and cooperation of the administrative bodies

of the Republika Srpska with the institutions and administrative bodies of Bosnia and Herzegovina. The applicants mention a number of examples which, in their opinion, in the period between the expiration of the previous Law and the formation of the Ministry of Economic Relations and Regional Cooperation, implied the Entity as a contracting party to the SAA, and a subject in the process of negotiations with the EU. Namely, the applicants contend that the responsibility of that Ministry, *inter alia*, was *...to monitor the implementation of the SAA [...], coordination of activities related to the fulfilment of the Ministry's obligations arising from the Stabilization and Association Process [...], coordination of the activities of the representatives of the Republic in the BiH-EU joint bodies, which are established based on the SAA, and monitoring of their work [...], coordination of cooperation with other bodies in BiH, as well as institutions, bodies and authorities of the EU, its member states, candidate states and potential candidates in the process of association and accession to the EU [...].*

11. In addition, the applicants state that in 2018, the challenged Law on Republic Administration was rendered effective, which entrusted the tasks of the former Ministry of Economic Relations and Regional Cooperation to the new Ministry, assigning it *the responsibility in foreign policy and international relations*. Furthermore, the applicants contend that the challenged Law, as well as the previous one, does not contain provisions governing the cooperation of the administrative bodies of the Entity with the Institutions of BiH. This fact, in the applicants' opinion, indicates *the intention of the legislator to create conditions through the name of the Entity institutions, which not only deprive the State of BiH of its responsibilities in the field of foreign policy, but also tries to establish the international legal personality of the Entity, primarily in the field of foreign policy*. According to the applicants, the challenged provisions imply that *the Entity cooperates on an equal footing with other bodies in BiH, but also with institutions and bodies outside BiH*.

12. Furthermore, the applicants elaborate in detail on the constitutional provisions, which prescribe the responsibilities of the Institutions of Bosnia and Herzegovina in foreign policy, and the reasons why they consider that the challenged provisions are contrary to those constitutional provisions. As to the right referred to in Article I(1) of the Constitution of BiH, the applicants contend that the challenged provisions *seek to give the right to continuity and international legal personality of BiH to the Republika Srpska entity, since the Ministry is trying to impose itself as a subject of law*. In that context, the applicants indicate only some of the responsibilities assigned to the Ministry by the challenged provisions, such as *coordination of Republic administrative bodies regarding the development and monitoring of the implementation of measures envisaged by the UN Development Assistance Framework, through participation in the work of joint working bodies; cooperation with the UN specialized agencies; giving an opinion on UN acts; giving an opinion on the participation and coordination of the participation of Republic administrative bodies in UN projects in BiH; coordination of Republic administrative*

bodies in the field of implementation of post-accession obligations of BiH arising from membership in the Council of Europe and cooperation with the bodies of the Council of Europe; and giving an opinion on acts of the Council of Europe.

13. In addition, the applicants hold that the challenged provisions are in violation of the principle of the rule of law under Article I(2) of the Constitution of BiH, *which is a system of political power based on respect for the constitution, laws and other regulations and the requirement that all constitutions, laws and other regulations enacted must be harmonized with constitutional principles.* The applicants emphasize that the RS National Assembly, by adopting the challenged provisions of the Law on Republic Administration, *disregarded its obligation to comply with the Constitution and other laws of BiH*, since, as already mentioned, the issue of foreign policy falls within the exclusive responsibility of Bosnia and Herzegovina, *i.e.* the Presidency of Bosnia and Herzegovina.

14. The applicants also point to a violation of the provision of Article I(7)(e) of the Constitution of BiH, the essence of which is the protection of the citizens of BiH abroad. Namely, according to the applicants, *the protection of BiH citizens who are abroad, is achieved with the support of BiH Institutions*, and Bosnia and Herzegovina has regulated the implementation of the constitutional obligation by laws adopted by the Parliamentary Assembly of Bosnia and Herzegovina. In addition, there are two ministries at the level of BiH Institutions, namely the Ministry of Human Rights and Refugees and the Ministry of Foreign Affairs, dealing with the issue of emigration. In this connection, the applicants point to the decision of the Constitutional Court no. *U-9/11*, where it is highlighted *that it is the interest of Bosnia and Herzegovina to keep the bond with its citizens to whom it is the state of the so-called "parent or original" citizenship*.

15. As to the constitutional provisions of Articles III(1)(a), III(2)(b), III(3)(b) and V(3)(a), (c) and (d) of the Constitution of BiH, the applicants particularly point out that accession negotiations and treaties with international organizations, even at the accession phase, can be conducted only by BiH as a state, but not by lower levels of government. In addition, the applicants assert that the Entities have a 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 Bosnia and Herzegovina, but not to act independently, and that the Entities, as well as other levels of government in Bosnia and Herzegovina, enjoy their constitutional autonomy, but their autonomy is subject to their obligation to comply fully with the Constitution and the decisions of the Institutions of Bosnia and Herzegovina. Membership in international organizations, reporting to international organizations, concluding international agreements as well as protection and assistance to BiH citizens abroad are the exclusive responsibility of the Institutions of Bosnia and Herzegovina. According to the applicants, the challenged provisions *disregarded these constitutional principles and deprived the Institutions of Bosnia and Herzegovina of their responsibility in the field of European integration as a part of foreign policy.*

16. Based on all the above, the applicants proposed that the request for review of the constitutionality be granted and that the challenged provisions of the Law on Republic Administration be found not in conformity with Articles I(1), I(2), I(7)(e), III(1)(a), III(2)(b), III(3)(b) and V(3)(a), (c) and (d) of the Constitution of BiH.

b) Reply to the request

17. In response to the request, the RS National Assembly first disputes the applicants' standing to sue, pointing out that part of the Bosniak Caucus in the Council of Peoples of the RS National Assembly does not have a procedural possibility provided for by the Constitution of Bosnia and Herzegovina to submit a request for review of constitutionality under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. The aforementioned is explained by the fact that the Council of Peoples of the RS National Assembly is not a "house" within the RS National Assembly, which is a unicameral body, nor is it a "legislative body", but a "special body for the protection of vital national interest".

18. In addition, as to the applicants' allegations that the authorities of the Republika Srpska *do not perceive the protection of constitutionality as a positive obligation*, the RS National Assembly states that the situation is exactly the opposite, and that the applicants *have a continuous tendency to abolish the responsibilities of the Entities provided by the Constitution of BiH, namely by Article III(1), in order to change the division of responsibilities within BiH, which amounts to a direct violation of constitutionality.* Such ways of changing the division of responsibilities within Bosnia and Herzegovina, *especially through practice or judicial interpretation, create a real danger of disrupting the balance established by the Constitution*. Furthermore, the RS National Assembly points out that the applicants' allegations about the unconstitutionality of the challenged provisions are completely unfounded. Namely, the RS National Assembly first states that it is indisputable that foreign policy falls within the responsibility of state institutions, *i.e.* the Presidency of Bosnia and Herzegovina. However, at the same time the RS National Assembly points out that *the applicants lose sight of the fact that Article III(2) of the Constitution of BiH defines the responsibility of the Entities to enter into agreements with states and international organizations and Article 68 subparagraph 15 of the Constitution of Republika Srpska [...] which defines that the Republika Srpska regulates and ensures international cooperation, except for that which has been transferred to the Institutions of Bosnia and Herzegovina.*

19. The RS National Assembly also considers *that in the present case it is very important to give a precise definition of terms, for, as they point out, foreign policy and international cooperation are not only dissimilar concepts, but also, both doctrinally and in practice, fall into two completely different categories.* As the RS National Assembly states, *foreign affairs include relations between states as subjects of international public law, and those affairs are within the responsibility of the State of Bosnia and Herzegovina*, *i.e.* the Presidency of Bosnia and Herzegovina and the Ministry of Foreign Affairs of Bosnia

and Herzegovina. On the other hand, international cooperation ought to be understood *outside the context of foreign policy, as it represents cooperation without interfering in foreign affairs, which is confirmed by the provisions of the Constitution of BiH and the Constitution of the Republika Srpska*. Therefore, as the RS National Assembly points out, international cooperation can be developed by non-governmental organizations, economic entities, local self-government units, administrative and autonomous administrative levels of a state as well as of the state itself. Therefore, according to both the Constitution of Bosnia and Herzegovina and *all contemporary understandings of a democratic state and the principles of constitutionality and legality, and especially in accordance with the European Charter of Local Self-Government*, the Republika Srpska has the right to develop international cooperation.

20. In addition, as to the allegations about the unconstitutionality of the challenged provisions in relation to Article I(1) of the Constitution of Bosnia and Herzegovina, the RS National Assembly considers that the applicants' assertions are completely wrong, as the challenged provisions in no way violate the continuity and identity of the State of Bosnia and Herzegovina. Namely, it is incorrect that the Republika Srpska wants to acquire *certain legal capacities* by the challenged provisions, as emphasized by the applicants. Actually, *based on all provisions of the Constitution of BiH (as a whole), but also in accordance with international documents that are relevant to these legal issues, it has a basis for achieving international cooperation*. In this connection, the RS National Assembly underlines that the Republika Srpska has the right to enter into international relations at the regional level and to maintain international cooperation, not only because the Constitution of Bosnia and Herzegovina does not prohibit it, but also because it has a constitutional basis in Articles III(1) and III(3)(a) of the Constitution of Bosnia and Herzegovina. Furthermore, the RS National Assembly states that the Republika Srpska has *an international legal personality of a special nature* based on Article III(2)(a), according to which the Entities have the right to establish special parallel relationships with neighbouring countries and based on Article III(2)(d), according to which each Entity may enter into agreements with states and international organizations. In addition, the RS National Assembly reasons that there is the Congress of Local and Regional Authorities of the Council of Europe, which is *an example par excellence of international cooperation at the regional level, and of an institutional nature*. In view of the above, the RS National Assembly holds that the challenged provisions and actions of the Ministry are in accordance with the above constitutional provisions and the international system established at the level of the Council of Europe, and *especially with the obligations assumed by BiH when concluding [SAA]*.

21. The RS National Assembly also considers that the applicants erroneously hold that the challenged provisions are unconstitutional, viewing it in the context of legal regulations that preceded the Law on Republic Administration, as well as that the challenged provisions aim at depriving Bosnia and Herzegovina of its responsibilities

in the field of European integration. First, the RS National Assembly points out that the responsibilities have remained the same as before (as to coordination, *etc*.), and that the competent ministry was given a new name because it was reorganized, *i.e.* the department that is currently part of another ministry was singled out. The change of name *is not motivated by the tendency to take away responsibilities, but by completely different, practical reasons*. In addition, the RS National Assembly states that the challenged provision of Article 31 of the Law on Republic Administration prescribes the responsibility in performing coordination tasks in the work of republic institutions and fulfilling the obligations arising from the process of European integration. Therefore, as the RS National Assembly states, the prescribed responsibilities of the Ministry do not encroach on the responsibility of the Directorate for European Integration ("the Directorate"), nor are they it in conflict with it. On the contrary, the RS National Assembly points out that, in order to achieve a unified position of all levels of government in the field of European integration and international cooperation, the system of coordination of the European integration process was harmonized in 2016, respecting the constitutional structure and responsibilities of all levels of government in Bosnia and Herzegovina. In addition, the RS National Assembly states that the Decision on Coordination, referred to by the applicants, obligates the Republika Srpska *to work in the process in that way*. Accordingly, representatives of the Republika Srpska take part in delegations within committees, subcommittees and other bodies established under the SAA. Therefore, the RS National Assembly holds that the applicants' allegation that *the challenged provisions call into question the joint bodies of the Institutions of BiH [...], which were formed in order for BiH to meet all the conditions and join the [EU]*, is not clear. *On the contrary, the joint bodies formed to coordinate the activities related to meeting the conditions for EU accession 'have successfully implemented the activity of drafting answers to the European Commission Questionnaire and are currently actively working on the development of the Program for the Integration of BiH into the EU', and the [Ministry] directly cooperates with the Directorate and coordinates the members [of joint bodies] from the Republika Srpska.*

22. Therefore, according to the RS National Assembly, the Republika Srpska assists the Institutions at the level of Bosnia and Herzegovina, *for the obligations arising from European integration, in terms of percentage, mostly obligate the Entities*. In addition, RS National Assembly states that similar bodies exist in the Federation of BiH (Office of the Government of the Federation of BiH for European Integration) and in the Brčko District of BiH (Department for European Integration and International Cooperation). In view of the above, the RS National Assembly holds that neither the name of the Ministry nor its responsibilities violate the sovereignty of the constitutional responsibilities of Bosnia and Herzegovina, but, on the contrary, confirm them. Consequently, the RS National Assembly proposed that the Constitutional Court dismiss the request as a whole.

IV. Relevant Law

23. The Constitution of Bosnia and Herzegovina

Article I
Bosnia and Herzegovina

1. Continuation

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.

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.

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:

[...]

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. [...].

Article III
Responsibilities of and Relations between the Institutions of
Bosnia and Herzegovina and the Entities

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.

[...]

2. Responsibilities of the Entities

[...]

b) 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 […]

d) Each Entity may also enter into agreements with states and international organizations with the consent of the Parliamentary Assembly. The Parliamentary Assembly may provide by law that certain types of agreements do not require such consent.

3. Law and Responsibilities of the Entities and the Institutions

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.

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 V
Presidency

[…]

3. Powers

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.

4. Powers

The Parliamentary Assembly shall have responsibility for:

e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.

24. The **Law on Republic Administration (***Official Gazette of the Republika Srpska,* 115/18), in the relevant part, reads:

Article 15

Ministries are:

...

16) Ministry of European Integration and International Cooperation

Article 31

The Ministry of European Integration and International Cooperation shall perform administrative and other professional activities related to the monitoring of fulfilment and the fulfilment of obligations under the Stabilization and Association Agreement ("the SAA") and reporting on it; implementation and coordination of activities related to the fulfilment of obligations in the process of association and accession to the EU within the framework of chapters 1, 3 and 22 of the EU acquis and the Political Criteria; coordination of Republic administrative bodies in the implementation of activities in the field of European integration in accordance with Republic regulations; coordination of the activities of the Republic representatives in the joint bodies of the EU and BiH, which are established on the basis of the SAA, and analytical monitoring of their work; interministerial preparation of Republic institutions and coordination of the participation of Republic representatives in all phases of the pre-accession process and the process of negotiations with the EU; preparation and revision of strategic documents and action plans related to the fulfilment of obligations in the process of European integration; realization and coordination of cooperation with other bodies in BiH, as well as institutions, bodies and authorities of the EU, its member states, candidate states and potential candidates in the process of association and accession to the EU; coordination of harmonization of Republic legislation with the regulations of the European Union and the practice and standards of the Council of Europe; participation in the drafting of normative acts with the aim of their harmonization with the regulations of the European Union and the practice and standards of the Council of Europe; coordination of drafting and monitoring of Republic plans and programs for harmonization of republic legislation with the EU acquis and the practice and standards of the Council of Europe; professional support to Republic administrative bodies and other Republic institutions and coordination of their participation in the process of harmonization of legislation; cooperation with the working bodies of the National Assembly in the field of harmonization of the Republic legislation with the EU acquis and the practice and standards of the Council of Europe; translation and translation coordination for the needs of the European integration process; organization and operational coordination of activities of Republic administrative bodies and other Republic institutions with the aim of ensuring adequate participation of the Republic in the programming of European Union funds and resources made available to BiH by other donors; coordination of activities of Republic administrative bodies and other Republic institutions in the implementation of projects within the programmes to use EU funding and resources of other donors; cooperation with BiH and EU institutions in BiH with the aim of the Republic's participation in using funds from the EU pre-accession and accession programmes; proposing measures to improve the absorption capacity of BiH/Republic within the framework of available support programmes; encouraging the development and promotion of cross-border cooperation; planning and organization of trainings in the field of European integration; preparation and implementation of the General Professional Development Program in the field of European integration; development and issuance of publications in the field of European integration; monitoring the work of joint committees of BiH for

cooperation with countries abroad and coordinating the participation of representatives of the Republic in their work; improving regional and institutional cooperation with the regions of Europe and the world, as well as cooperation with domestic institutions; initiating, preparing and proposing agreements and protocols for the establishment and development of interregional cooperation and monitoring their implementation; keeping a register of agreements, protocols and memoranda of cooperation with entities abroad; participation in the drafting of international cooperation agreements; coordination of representation of the Republic abroad; normative regulation of the organization and work of economic offices representing the Republic abroad; monitoring the implementation of programs and work plans of economic representative offices, and taking measures and activities related to their coordinated and better work; activities in the field of relations between the Republic and diaspora; coordination of activities of Republic administrative bodies in the field of cooperation with diaspora; coordination of activities within the Republic's membership in the Assembly of European Regions; cooperation with domestic, regional and international organizations and institutions; cooperation with international organizations to coordinate donor contributions; keeping a register of donations in the public sector; coordination of activities associated with the preparation of reports and other documents related to the fulfilment of obligations of the institutions of the Republic regarding the membership of BiH in international organizations; coordination of Republic administrative bodies regarding the development and monitoring of the implementation of measures envisaged by the UN Development Assistance Framework, through participation in the work of joint working bodies; cooperation with the UN specialized agencies; giving an opinion on UN acts; giving an opinion on the participation and coordination of the participation of Republic administrative bodies in UN projects in BiH; coordination of Republic administrative bodies in the field of implementation of post-accession obligations of BiH arising from membership in the Council of Europe and cooperation with the bodies of the Council of Europe; giving an opinion on acts of the Council of Europe; drafting laws and bylaws falling within the scope of jurisdiction of the Ministry and other activities in accordance with the law.

25. The **Law on Council of Ministers of Bosnia and Herzegovina** (*Official Gazette of BiH*, 38/02, 30/03, 42/03, 81/06, 76/07, 81/07, 94/07 and 24/08), in the relevant part, reads:

Directorate for EU Integration

Article 23

The Directorate for EU Integration shall perform in particular the tasks and duties relating to the coordination of activities of the authorities in Bosnia and Herzegovina, supervision of the implementation of decisions taken by responsible institutions of Bosnia and Herzegovina concerning all relevant activities required for European integration.

The Directorate shall participate in the preparation of drafts, policy proposals, laws, other regulations and guidelines relating to the carrying out of tasks that Bosnia

and Herzegovina is obliged to undertake in order to join the process of European integration. […]

26. The **Decision on the System of Coordination in the Process of European Integration in Bosnia and Herzegovina** (*Official Gazette of BiH*, 72/16 and 35/18), in the relevant part, reads:

Article 1
(Subject-matter)

The Decision on Coordination System in the Process of European Integration in Bosnia and Herzegovina (hereinafter: the Decision) shall provide for the institutional and operational system and the manner of coordination of institutions in Bosnia and Herzegovina in terms of implementation of activities relating to the process of integration of Bosnia and Herzegovina into the European Union, joint bodies within the coordination system, their composition, responsibilities and mutual relations.

Article 2
(Coordination of the process of European integration)

(1) Coordination of the process of European integration in Bosnia and Herzegovina shall involve activities implemented with a view to ensuring the highest level of approximation and coherence of institutions across all levels of government in Bosnia and Herzegovina relating to fulfilling contractual obligations under the Stabilisation and Association Agreement between the European Communities and their Member States and Bosnia and Herzegovina … as well as any other obligations stemming from the process of European integration. The system of coordination shall also govern the manner of exercising communication between institutions in Bosnia and Herzegovina, aimed at ensuring and expressing an agreed view on behalf of Bosnia and Herzegovina in communicating with the European Union institutions.

(2) Coordination of the process of European integration in Bosnia and Herzegovina shall be based on the principles of compliance with the existing internal legal and political structure in Bosnia and Herzegovina, safeguarding of responsibilities of all levels of government and their institutions, as prescribed by constitutions, in specific areas covered by the process of European integration, as well as ensuring visibility and accountability of all levels of government for timely and effectively fulfilling of commitments in the European integration process within their responsibility.

(3) The coordination of the European integration process shall be realised at horizontal (coordination within one level of organisation of authority) and vertical levels (coordination between different levels of authority). In accordance with paragraph (2) of this Article, the structures and modalities of realisation of horizontal coordination shall be arranged independently by each level of authority, in line with its constitutional order and administrative-legal specificities, capacities and needs, and hence shall not be the subject of this Decision.

(4) For the purpose of effective implementation of vertical and horizontal coordination of the European integration process, the following joint bodies shall be established:

a) Collegium for EU Integration,

b) Ministerial Conferences,

c) Commission for European Integration,

d) Working Groups for European Integration.

(5) For the purpose of monitoring the implementation of the Stabilisation and Association Agreement, and ensuring functional link between the bodies of the internal system of coordination of the European integration process in BiH and actions and advocacy of an agreed "one voice" on behalf of Bosnia and Herzegovina, the composition of the joint bodies with the European Union on behalf of Bosnia and Herzegovina shall have the engagement of the following:

a) Standing delegation of Bosnia and Herzegovina with the Stabilisation and Association Council;

b) Standing delegation of Bosnia and Herzegovina with the Stabilisation and Association Committee;

c) Standing delegation of Bosnia and Herzegovina with the Stabilisation and Association Subcommittees;

d) Standing delegations of Bosnia and Herzegovina with other joint bodies between Bosnia and Herzegovina and the European Union established in accordance with the Stabilisation and Association Agreement.

[...]

Article 4
(Ministerial Conferences)

(1) Ministerial Conferences shall be bodies in the system of coordination of the European integration process in Bosnia and Herzegovina whose actions ensure comprehensive and aligned approach of competent institutions at all levels of government in each of the sectors covered by the European integration process.

(2) Ministerial Conferences shall comprise relevant line ministers with the Council of Ministers of Bosnia and Herzegovina, entity governments, cantonal governments and representatives of the Government of the Brčko District of BiH, in accordance with their respective constitutional responsibility for the matter under consideration or the area for which the Ministerial Conference was formed.

(3) Ministerial Conferences shall contribute to overcoming any possible stalemates in meeting the commitments of Bosnia and Herzegovina in the European integration process as well as the process of programming European Union assistance that could not be resolved by technical and operational bodies in the system of coordination. The

assignments of Ministerial Conferences shall refer to identifying joint guidelines and agendas for actions by operational and technical bodies in the system of coordination in each of the sectors covered by the European Union accession process, so as to meet the commitments under the Stabilisation and Association Agreement.

[...]

V. Admissibility

27. 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.

28. 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.

29. In its response, the RS National Assembly first points out that the request is *ratione personae* inadmissible, for the Council of Peoples of the Republika Srpska does not have standing to sue under the Constitution of Bosnia and Herzegovina to submit a request for review of constitutionality. The Constitutional Court highlights that it has already examined this issue, and in connection with such allegations it has stated, *inter alia*, 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 the jurisdiction of the RS National Assembly and the RS Council of Peoples. [...] 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 responsibility for filing a request. It is rather on the contrary, it vests such responsibility 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) (see, Constitutional Court, Decision on Admissibility and Merits no. *U-15/07* of 4 October 2008, published in the *Official Gazette of BiH*, 99/08, paragraphs 15 through 17). The Constitutional Court sees no reason to depart from this position.

30. In view of the aforementioned, the Constitutional Court points out that in the present case, the request for review of constitutionality was filed by seven delegates of the Council of Peoples of the Republika Srpska, which has a total of 28 delegates, which makes up ¼ of members of either chamber of a legislature of an Entity, meaning that the request was filed by an authorized subject within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

31. Having regard to 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 the request is admissible, as it was filed by an authorized subject, therefore, there is no single formal reason under Article 17(1) of the Rules of the Constitutional Court rendering the request inadmissible.

VI. Merits

32. The applicants consider that the RS National Assembly, by the challenged provisions of the Law on Republic Administration, autonomously regulated the segment of foreign policy relating to European integration, in respect of which it has no constitutional responsibility, since the Institutions of the State of Bosnia and Herzegovina have the exclusive responsibility in the areas of foreign policy, cooperation with international bodies and organizations and protection and assistance to BiH citizens abroad, *i.e.* the issue of cooperation with diaspora. They also state that the process of BiH's accession to European integration is *an integral part of foreign policy,* which falls within the exclusive responsibility of the state institutions. Therefore, the applicants hold that the challenged provisions violate the constitutional division of responsibilities between the Institutions of Bosnia and Herzegovina and the Entities and that for that reason those provisions are not in conformity with Articles I(1), I(2), I(7)(e), III(1)(a), III(2)(b), III(3)(b) and V(3)(a), (c) and (d) of the Constitution of Bosnia and Herzegovina.

The issue of division of responsibilities in the case law of the Constitutional Court

33. The Constitutional Court points out that the issue of division of responsibilities between Bosnia and Herzegovina and its Entities is a complex one, which the Constitutional Court encountered on a number of occasions when deciding on the basis of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In its Decision

U-16/11, the Constitutional Court points out that the text of the Constitution of Bosnia and Herzegovina itself entails a significant number of issues relating to the division of responsibilities between Bosnia and Herzegovina and the Entities, referring to relevant decisions on the matter (see, Constitutional Court, Decision on Admissibility and Merits no. *U-16/11* of 13 July 2012; *Official Gazette of BiH,* 105/13 of 31 December 2012, paragraph 30 and other references).

34. The case-law of the Constitutional Court shows that it is not possible to take a general position on the issue of division of responsibilities between the State and the Entities, but the issue, where there is a dilemma regarding the division of responsibilities, should be considered in each specific case as the decision on that, depends on a number of factors. For example, in the case challenging the constitutionality of the Law on Statistics of Bosnia and Herzegovina, the applicant considered that *the field of statistics did not fall within the scope of responsibilities specified in Article III(1) of the Constitution of BiH, [and that] the Parliamentary Assembly had no mandate to regulate this field through law*, *i.e.* that it was the exclusive responsibility of the Entities. The Constitutional Court stated in the decision that it considered the request *in the context of the obligations and requirements 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 sole responsibility of the state institutions within the meaning of Articles III(1)(a) and V(3)(a) of the Constitution of BiH*. After a detailed analysis of the issue in the light of the constitutional provisions on the division of responsibilities as well as the requirements to be met by Bosnia and Herzegovina for its inclusion into the European integration process, the Constitutional Court concluded *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* (see, Constitutional Court, Decision on Admissibility and Merits no. *U-9/07* of 4 October 2008, published in the *Official Gazette of BiH*, 20/09, paragraphs 16 through 18).

35. In another case, the Constitutional Court decided on the constitutionality of the acts concluded by the Republika Srpska in connection with its activities at international level, and on the constitutionality of the budget of Republika Srpska, which allocated the funds for the Republika Srpska's representation abroad. In that decision, the Constitutional Court stated 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 also highlighted 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.* Having considered the activities undertaken by the Republika Srpska in the case in question, the Constitutional Court assessed 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*. Therefore, the Constitutional Court assessed that the activities undertaken by the Republika Srpska were aimed at lobbying abroad for the purpose of advancing the interests of the Republika Srpska as an Entity, and that the acts passed by the Republika Srpska as the basis for any such activities contained nothing that related to the sole responsibility of Bosnia and Herzegovina in the field of foreign affairs or foreign trade. It was therefore 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* (see, Constitutional Court, Decision on Admissibility and Merits no. *U-15/08* of 3 July 2009, published in the *Official Gazette of BiH,* 73/09, paragraphs 35 through 36). The Constitutional Court came to the same conclusion in a case wherein it considered whether the preparation and submission of the Report of the Republika Srpska officials to the United Nations Security Council on the Situation in Bosnia and Herzegovina constituted an interference with and assumption of the sole responsibility of Bosnia and Herzegovina for conducting foreign policy. Namely, taking into account the content of the challenged report, the Constitutional Court concluded that neither the report nor the activities related to the submission thereof constituted a report of the State of Bosnia and Herzegovina, nor did they represent the State of Bosnia and Herzegovina before the UN Security Council. It was therefore concluded that *no legally relevant activity based on the challenged Report was taken to the detriment of the constitutional position of the State of Bosnia and Herzegovina*, *i.e.* that in the relevant case, the acts and activities of the Republika Srpska did not take over the constitutional responsibilities of Bosnia and Herzegovina in the field of foreign policy (see, Constitutional Court, Decision on Admissibility and Merits no. *U-15/09* of 27 March 2010, published in the *Official Gazette of BiH*, 84/10, paragraphs 43 through 45).

Application of the relevant positions of the Constitutional Court in the present case

36. In the present case, the applicants do not challenge any specific activities of the Republika Srpska in relation to the process of accession to the EU, but they contest the challenged provisions of the Law on Republic Administration *in abstracto*. Actually, the applicants raised the issue of the constitutionality of the name of the Ministry referred to in Article 15, subparagraph 16 and its responsibilities under Article 31 of the Law on Republic Administration, and reasoned that the responsibilities of Bosnia and Herzegovina in the field of foreign policy, including the process of European integration, and in the field of protection of BiH citizens abroad were taken over by the name of the Ministry itself and the prescribed responsibilities thereof.

37. The Constitutional Court holds that the issue of the name of the Ministry and its responsibilities can be examined only in relation to each other and not separately.

38. The Constitutional Court notes that the applicants and the RS National Assembly do not dispute that, pursuant to Article III(1) of the Constitution of BiH, foreign affairs are the sole responsibility of the State, not the Entities. As highlighted by the applicants, the Constitutional Court has already concluded that the obligations and requirements to be fulfilled by Bosnia and Herzegovina for its inclusion into the European integration process is an integral part of foreign policy of Bosnia and Herzegovina, and that it falls within its sole responsibility, and that the Entities have a constitutional obligation to assist the Institutions of Bosnia and Herzegovina to comply with these obligations, which is not disputed by the RS National Assembly. In order to examine whether the challenged provisions themselves take over the sole responsibility of BiH in the process of European integration as a part of foreign policy, the Constitutional Court highlights what has already been stated by both the applicants and the RS National Assembly, namely that a number of decisions have been made at the level of Bosnia and Herzegovina and a number of activities have been undertaken to meet the obligations and requirements related to the integration of Bosnia and Herzegovina into the EU. So, the Directorate for European Integration was established, which, according to the Law on the Council of Ministers, is responsible, *inter alia*, for matters relating to *the coordination of activities of the authorities in BiH, supervision of the implementation of decisions taken by responsible institutions of BiH concerning all relevant activities required for European integration*.

39. In addition, the Decision on Coordination of the Council of Ministers prescribes the system and manner of coordination of institutions in Bosnia and Herzegovina in the implementation of activities relating to the process of integration of Bosnia and Herzegovina into the EU, as well as joint bodies within the coordination system *with the aim of ensuring and presenting a harmonized position, on behalf of Bosnia and Herzegovina, in communication with the Institutions of the European Union*. The Constitutional Court notes that the aforementioned Decision prescribes vertical

coordination (between different levels of government, and joint bodies established by the Decision on Coordination are in charge of the implementation thereof), as well as horizontal coordination (within one level of government, for which lower levels of government are in charge). In addition, it is explicitly prescribed that the structures and modalities of realisation of horizontal coordination *shall be arranged independently by each level of authority, in line with its constitutional order and administrative-legal specificities, capacities and needs*, and for that reason this is not the subject of regulation in the Decision on Coordination. Therefore, taking into account *the existing internal legal and political structure in Bosnia and Herzegovina, safeguarding of responsibilities of all levels of government and their institutions, as prescribed by constitutions, in specific areas covered by the process of European integration*, the system of coordination at the state level stipulates that the Entities can and ought to coordinate the activities they have to carry out in order for Bosnia and Herzegovina to satisfy the criteria for accession to European integration. Furthermore, as correctly pointed out by the RS National Assembly, major obligations and requirements that Bosnia and Herzegovina must meet towards that goal, such as harmonization of a number of laws and other regulations governing the areas of responsibilities of lower levels of government, adoption and revision of strategic documents in these areas, *etc.*, can be met only by the active engagement of these levels of government. In this way, the lower levels of government meet their constitutional obligation to assist Bosnia and Herzegovina in fulfilling its international obligations.

40. In this connection, the Constitutional Court notes that the responsibilities referred to in the challenged Article 31 of the Law on Republic Administration include a number of the activities relating to coordination and similar activities between the republic administration bodies in the implementation of the mentioned activities. The applicants particularly dispute the activities related to the coordination of cooperation with institutions, bodies and authorities of the EU, its member states, candidate states and potential candidates in the process of association and accession to the EU and other activities that include international cooperation with entities abroad, participation in drafting international agreements on cooperation, coordination of the representation of the Republika Srpska abroad, *etc*. In this connection, the Constitutional Court holds that such a list of activities includes nothing that could be assessed as taking away the rights and possibilities to carry out these activities outside the framework of the Constitution of Bosnia and Herzegovina. Namely, although the applicants especially highlight that the definition of these responsibilities in the challenged provisions of the Law on Republic Administration does not include the wording *in accordance with the Constitution and laws of Bosnia and Herzegovina*, as it was in the previous laws, it does not mean that the Republika Srpska, acting according to the responsibilities referred to in Article 31 of the Law on Republic Administration, has the right to go beyond the framework of the Constitution of Bosnia and Herzegovina. On the contrary, according to Article III(3)(b) of the Constitution of Bosnia and Herzegovina, the Entities and any administrative units

thereof shall comply fully with the Constitution and the decisions of the Institutions of Bosnia and Herzegovina, and the Constitutional Court has jurisdiction to examine whether the Entities, by their activities, go beyond the constitutional framework. However, the Constitutional Court also emphasizes that the Entities have the right to establish special parallel relationships with neighbouring countries in accordance with the sovereignty and territorial integrity of Bosnia and Herzegovina (Article III(2)(a) of the Constitution of Bosnia and Herzegovina).

41. Also, given the areas in which the Entities have the responsibility for passing laws, policies, strategies, and the like, there is no doubt that they have the right to develop international cooperation with other relevant subjects of international law, international organizations, *etc*. The Constitutional Court has already stated in its previous decisions that it will not give a definition of foreign policy and, therefore, it will not give a definition of international relations and, in that context, international cooperation. However, the Constitutional Court emphasizes that these terms are certainly broader than the term foreign policy, and that international cooperation is not established exclusively by states or its administrative units, but also by other entities, such as non-governmental organizations, universities, companies, corporations, *etc*. In addition, Article III(2)(d) of the Constitution of Bosnia and Herzegovina prescribes that *each Entity may also enter into agreements with states and international organizations with the consent of the Parliamentary Assembly*. Therefore, regulation that the Republika Srpska may have and coordinate cooperation with other bodies in BiH, as well as institutions, bodies and authorities of the EU, its member states, candidate states and potential candidates in the process of association and accession to the EU, improve regional and institutional cooperation with the regions of Europe and the world, initiate, prepare and propose agreements and protocols for the establishment and development of interregional cooperation and the like, *per se*, does not constitute an assumption of the Bosnia and Herzegovina's responsibilities in the field of foreign policy. Such an issue could be raised, as the Constitutional Court has previously concluded, *only in the event that the activities taken by Entity officials constitute an interference with or assumption of some of the responsibilities of Bosnia and Herzegovina* (*op. cit. U-15/09*, paragraph 40). However, as already stated, the applicants do not dispute any specific activities of the Republika Srpska or the Ministry that should be examined as regards compliance with constitutional obligations, but they consider that the challenged provisions *are imprecise and, as such, leave open the possibility of different interpretations when applying the regulations in practice*; however, the applicants do not give specific examples of such an interpretation or activity that the Constitutional Court ought to examine.

42. In this connection, the applicants' allegations cannot be accepted that the name of the Ministry itself shows that *this is not about a body in charge of horizontal coordination*, and that the challenged provisions, contrary to the Constitution of Bosnia and Herzegovina, do not prescribe its vertical coordination with state institutions in the

process of European integration. Namely, the Constitutional Court highlights that joint bodies are prescribed and established for the implementation of vertical coordination in that process, in accordance with Article 2, paragraph 4 of the Decision on Coordination, which actively work on the matters related to the fulfilment of the obligations and criteria for Bosnia and Herzegovina's accession to the EU, and representatives of the institutions of the Republika Srpska also participate in those joint bodies. In addition, the presentation of harmonized positions on behalf of Bosnia and Herzegovina takes place through communication between the Institutions of Bosnia and Herzegovina and the EU Institutions, which the applicants did not even call into question.

43. The Constitutional Court also holds that the same can be concluded with regard to the issue of cooperation with BiH citizens abroad. Namely, Article I(7)(e) of the Constitution of Bosnia and Herzegovina regulates that BiH citizens abroad enjoy the protection of the State of Bosnia and Herzegovina. However, regardless of the fact that the issue of protection of citizens of Bosnia and Herzegovina at the state level falls within the responsibilities of the Ministry of Foreign Affairs and the Ministry of Human Rights, there are a number of issues that BiH citizens abroad regulate exclusively through the bodies and institutions of the Entities, such as the issuance of personal documents, regulation of issues related to property rights, cultural and other cooperation, *etc*. In this connection, the Constitutional Court points out that, in examining the constitutionality of the provisions of the Law on Citizenship which prescribed the loss of citizenship of Bosnia and Herzegovina in cases where there was no bilateral agreement on dual citizenship with the country whose citizenship had been acquired (referred to also by the applicants), it concluded that those provisions were unconstitutional, and that *it is the undisputable interest of Bosnia and Herzegovina to keep a certain bond with its citizens to whom it is the state of the so-called 'parent or original' citizenship* (see, Constitutional Court, Decision on Admissibility and Merits no. *U-9/11* of 28 September 2012, published in the *Official Gazette of BiH*, 85/12, paragraph 37). However, the Constitutional Court holds that vesting the Ministry with the responsibility for *affairs in the field of relations between the Republic and diaspora and coordination of activities of Republic administrative bodies in the field of cooperation with diaspora*, does not in any way encroach on the state's responsibility to protect its citizens abroad in terms of the provision of Article I(7)(e) of the Constitution of Bosnia and Herzegovina.

44. In view of the above, the Constitutional Court holds that the constitutional responsibilities of Bosnia and Herzegovina for conducting foreign policy or protecting its citizens abroad have in no way been assumed or called into question by the name of the Ministry or its responsibilities as prescribed by the challenged provisions of the Law on Republic Administration. Therefore, the Constitutional Court concludes that the applicants' allegations are ill-founded that the challenged provisions of the Law on Republic Administration are in violation of Articles I(1), I(2), I(7)(e), III(1)(a), III(2)(b), III(3)(b) and V(3)(a), (c) and (d) of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

45. The Constitutional Court concludes that the provisions of Article 15, subparagraph 16 and Article 31 of the Law on Republic Administration (*Official Gazette of the Republika Srpska*, 15/18) are not in contravention of Articles I(1), I(2), I(7)(e), III(1)(a), III(2)(b), III(3)(b) and V(3)(a), (c) and (d) of the Constitution of Bosnia and Herzegovina, for the reason that it cannot be concluded that the responsibility of Bosnia and Herzegovina for conducting foreign policy, in respect of the process of European integration as a segment of foreign policy which is within the responsibilities of the Institutions of Bosnia and Herzegovina, or the responsibility for protecting the citizens of Bosnia and Herzegovina abroad, have been taken over by those provisions.

46. Pursuant to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of the present decision.

47. Pursuant to Article 43 of the Rules of the Constitutional Court, the annex to this decision contains a Separate Concurring Opinion of Vice-President Mirsad Ćeman.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

SEPARATE CONCURRING OPINION OF VICE-PRESIDENT MIRSAD ĆEMAN

Pursuant to Article 43, paragraph 1 of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), I hereby give a separate opinion concurring in the decision in the Case No. *U-14/20*.

In the present case, the applicants challenge certain provisions of the applicable Law on Republic Administration of the Republika Srpska entity (*Official Gazette of the Republika Srpska,* 115/18) *in abstracto*. Namely, the applicants before the Constitutional Court raised the issue of the constitutionality of the name of the entity Ministry of European Integration and International Cooperation referred to in Article 15, subparagraph 16 and of its responsibilities under Article 31 of the Law on Republic Administration. According to the applicants, the name of the Ministry, as well as its prescribed responsibilities, constitute the assumption of the responsibilities of the State of Bosnia and Herzegovina in the field of foreign policy, which includes the process of European integration, as well as in the field of protection of citizens of Bosnia and Herzegovina abroad.

The Constitutional Court *concluded* that the challenged provisions were not in contravention of Articles I(1), I(2), I(7)(e), III(1)(a), III(2)(b), III(3)(b) and V(3)(a), (c) and (d) of the Constitution of Bosnia and Herzegovina, for the reason that it cannot be concluded that the responsibility of Bosnia and Herzegovina for conducting foreign policy, in respect of the process of European integration as a *segment of foreign policy* that is within the responsibilities of the Institutions of Bosnia and Herzegovina, or the responsibility for protecting the citizens of Bosnia and Herzegovina abroad, have been taken over by those provisions.

According to the Constitutional Court, the issue of the name of the Ministry and its responsibilities can be examined only in relation to each other, and not separately. I agreed with such an approach and supported the decision.

However, taking into account similar cases where the Constitutional Court reviewed the constitutionality of the provisions of certain state or entity laws and, in so doing, remained, tentatively speaking, only at a "declarative level", *i.e.* without a more complete definition of the meaning, sense and content of certain *constitutional categories, mechanisms and standards*, which later in the implementation of the decision proved to be *a serious shortcoming and 'unfinished job'* (in such cases I also wrote separate opinions), I am positive that the Court could and should have been more explicit in defining certain constitutional categories in this case as well, *e.g.* as to *foreign policy*.

Namely, in the case when the Court decides that a legal provision (of a state or entity law) is consistent or inconsistent with, or that it is in contravention of the Constitution,

the Constitutional Court is obligated *effectively to contribute* to the implementation of the standards contained in and guaranteed by the Constitution, without the possibility of circumventing or denying their constitutional force and meaning. Experience teaches us that whenever the Constitutional Court was not sufficiently explicit (true, not for that reason only), its decisions became only a *nudum ius* (naked law).

The need to define the content and to give the meaning to a constitutional norm stems from the very *nature of constitutional norms*, which are not (at least one part) always quite concrete, (but they encompass, *i.e.*, they take on meanings stemming from their own practice and the development of constitutionalism in general) and therefore require interpretation. Thus, at a global level, a number of constitutional mechanisms and standards have emerged that have universal meanings and application independently of other characteristics of the constitutional and political system of different states. This, however, at the same time gives the constitutional norms the necessary vitality, as well as the persistence by which the system, *i.e.* the constitutional order is established (was established) and defended.

For example, has not the European Court of Human Rights given meaning to the *general norms and standards* of the European Convention on Human Rights and Fundamental Freedoms (*e.g.* the right to a fair trial, the right to an effective remedy, the right to respect for private and family life, freedom of expression, freedom of thought, conscience and religion, *etc*.)? They have made the system of human rights and freedoms not only clearer and more specific than declarations and proclamations (as they seem according to the text itself), but also a very powerful means of affirming and defending democracy and human rights and freedoms.

However, although in our case the content, *i.e.* meaning (not only possible but also generally accepted), of certain constitutional norms, categories, mechanisms and standards is not sufficiently determined, the Constitutional Court avoids defining and determining them in more detail in specific examples and cases (even in this case), and it should do so. Thus, *e.g.* in paragraph 41 of the present decision, the Constitutional Court recalls that in its earlier decisions that *it has already stated that it will not give a definition of foreign policy and, therefore, it will not give a definition of international relations and, in that context, of international cooperation*. This consequently creates or maintains a state of constitutional confusion that not only fails to contribute to the establishment and consolidation of the order, but also makes it further confusing and complicated. As a result, new constitutional disputes and ambiguities survive or occur, most often on the issue of the distribution of responsibilities between the State and Entities, and the like.

As difficult as it may seem, in my opinion, it is a wrong approach. The Constitutional Court must be not only braver but also more responsible in this regard. Namely, where and if the Constitutional Court would define more bravely and responsibly certain

constitutional categories, it would, I am positive (provided, of course, that court decisions are accepted and enforced), contribute to more efficient functioning of the system, *i.e.* of the State at all levels within the existing constitutional solutions and internal structure of the State and Entities.

Finally, one gets the impression that the Constitutional Court additionally bases a major part of the reasoning for its decision on the Decision on the System of Coordination in the Process of European Integration in Bosnia and Herzegovina (*Official Gazette of BiH*, 72/16 and 35/18), instead of solely on the constitutional norm itself. However, although it is more an illustration, I hold it is wrong, especially since this bylaw (as the decision is actually a bylaw) at the time of adoption and application caused and has been causing the same controversy and dilemmas in the context of the *ever-present issue of responsibilities* among the State, Entities and other ("lower") administrative-territorial units that exist within the structure of government in Bosnia and Herzegovina.

Overall, as correctly stated in the decision and as the Constitutional Court emphasizes, it does not help that the specified terms (international relations, international cooperation, *etc*.) are certainly broader than the term *foreign policy*, and that international cooperation is not established exclusively by states or its administrative units, but also by other entities, such as non-governmental organizations, universities, companies, corporations, *etc*. Namely, by persistently avoiding to determine the meaning of certain constitutional categories, terms and standards more precisely by its decisions and interpretation of the constitutional text, *i.e.* in a situation where the seemingly resolved constitutional dilemma is not actually resolved (with obviously present different political aspirations and actions), the unproductive struggle of the State and the Entities for responsibilities (where they are not or should not be disputable) consumes the strength of both instead of being used productively in a pure "constitutional legal field". The Constitutional Court can contribute more in this regard. Therefore, as regards such circumvention or unfounded or excessive caution, I can recognise the defensive position of the Constitutional Court to do so.

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Case No. U-1/21

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina, for review of the compatibility of Article 8, paragraphs 2, 3, 4, 5 and 6, Article 8a and Article 32, paragraph 3, subparagraph d) of the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*Official Gazette of BiH*, 32/01, 56/08 and 58/15) with Articles I (2) , II (2), II (3) (m), II (4), II (5) of the Constitution of Bosnia and Herzegovina, lines 5 and 8 of the Preamble to the Constitution of Bosnia and Herzegovina, Annex I to the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 2, paragraphs 1, 3 and 4 of Protocol No. 4 to the European Convention, Article 1 of Protocol 12 to the European Convention, Article 2, paragraph 2, Article 5, paragraph 1, Article 12 and Article 16 of the International Covenant on Civil and Political Rights; Article 2, paragraph 1, Article 4 and Article 5, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights, Articles 6 and 13 of the UN Universal Declaration of Human Rights; Article 4, paragraphs 2 and 3 of the Framework Convention for the Protection of National Minorities; Annex 7 to the General Framework Agreement for Peace in BiH

Decision of 26 May 2021

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3) (a) of the Constitution of Bosnia and Herzegovina, Article 57(2) (b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Ms. Angelika Nussberger and

Ms. Helen Keller

Having deliberated on the request filed by **Mr. Željko Komšić, Member of the Presidency of Bosnia and Herzegovina**, in case no. **U-1/21**, at its session held on 26 May 2021, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

Deciding on the request of Mr. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina, for review of the compatibility of Article 8, paragraphs 2, 3, 4, 5 and 6, Article 8a and Article 32, paragraph 3, subparagraph d) of the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*Official Gazette of BiH*, 32/01, 56/08 and 58/15) with Article I(2), II(3)(m) and II(4) of the Constitution of Bosnia and Herzegovina regarding the right to freedom of movement and residence,

it is hereby established that Article 8, paragraphs 2, 3, 4, 5 and 6, and Article 8a and Article 32, paragraph 3, subparagraph d) of the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*Official Gazette of BiH*, 32/01, 56/08 and 58/15) are in accordance with Articles I(2), II(3) (m), and II (4) of the Constitution of Bosnia and Herzegovina regarding the right to freedom of movement and residence.

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 January 2021, Mr. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina, submitted a request to the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the compatibility of Article 8, paragraphs 2, 3, 4, 5 and 6, Article 8a and Article 32, paragraph 3, subparagraph d) of the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*Official Gazette of BiH*, 32/01, 56/08 and 58/15, hereinafter: the disputed provisions) with Articles I (2) , II (2), II (3) (m), II (4), II (5) of the Constitution of Bosnia and Herzegovina, lines 5 and 8 of the Preamble to the Constitution of Bosnia and Herzegovina, Annex I to the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), Article 2, paragraphs 1, 3 and 4 of Protocol No. 4 to the European Convention, Article 1 of Protocol 12 to the European Convention, Article 2, paragraph 2, Article 5, paragraph 1, Article 12 and Article 16 of the International Covenant on Civil and Political Rights; Article 2, paragraph 1, Article 4 and Article 5, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights, Articles 6 and 13 of the UN Universal Declaration of Human Rights; Article 4, paragraphs 2 and 3 of the Framework Convention for the Protection of National Minorities; Annex 7 to the General Framework Agreement for Peace in BiH.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, on 2 February 2021, the Parliamentary Assembly of Bosnia and Herzegovina, the House of Peoples and House of Representatives were requested to submit their responses to the request.

3. The House of Peoples and House of Representatives submitted their respective responses.

III. Request

a) Allegations stated in the request

4. The Constitutional Court notes that the applicant stated that part of the provisions challenged by the specific request was the subject of review before the Constitutional

Court (Decision *U-5/15* of 26 November 2015), but that the Constitutional Court did not take into account the factual and legal arguments set out in the specific request.

5. The applicant states that the provisions of Article 8, paragraphs 2, 3 and 4, part of the provision of paragraph 5, namely the words "who in the procedure of registration of residence cannot provide the evidence referred to in paragraph 2 of this Article" and the words "for registration of residence to prove a valid basis"; part of the provision of paragraph 6, namely the words "and cannot provide the evidence referred to in paragraph 2 of this Article" and the words "in obtaining evidence of a valid basis", Article 8a and part of the provision of Article 32, paragraph 3, subparagraph d) Article 8, Articles 2, 3 and 4 of the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*Official Gazette of BiH*, 32/01, 56/08 and 58/15, hereinafter: the disputed provisions) are contrary to Articles I(2), II(2), II(3)(m), II(4), II(5) of the Constitution of Bosnia and Herzegovina, lines 5 and 8 of the Preamble to the Constitution of Bosnia and Herzegovina, Annex I to the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), Article 2, paragraphs 1, 3 and 4 of Protocol No. 4 to the European Convention, Article 1 of Protocol 12 to the European Convention, Article 2, paragraph 2, Article 5, paragraph 1, Article 12 and Article 16 of the International Covenant on Civil and Political Rights; Article 2, paragraph 1, Article 4 and Article 5, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights, Articles 6 and 13 of the UN Universal Declaration of Human Rights; Article 4, paragraphs 2 and 3 of the Framework Convention for the Protection of National Minorities; and Annex 7 of the General Framework Agreement for Peace in BiH.

6. The applicant states that "already at first glance, bearing in mind the character of the right of residence, and the legal and factual consequences related to the fact of registration of residence, it is clear that this type of explicit "re-standardization" and introduction of conditions of imperative, conditional and exclusive nature can produce (and it produces!) numerous problems in everyday life from the point of view of the rights and fundamental freedoms of citizens guaranteed by norms of a constitutional character. Namely, it is a right and a subject of regulation that does not accept explicit enactment of regulations in an imperative - conditional and exclusive way, where the possibility opens - according to the disputed provisions of the Law, for a significant circle of persons who can be found in various life situations that do not meet the restrictive criteria, to be deprived of their right to residence, *i.e.* to prevent them from registering their permanent residence according to the criteria of truthfulness, accuracy and intention of permanent residence, which, as to be seen from the following text, already causes catastrophic consequences for many rights and fundamental freedoms of citizens of Bosnia and Herzegovina, *i.e.*, the legal personality of the persons in question. Moreover, the disputed provisions of the Law introduce the category of the so-called "valid grounds" and "valid evidence" for registering and acquiring the right to residence, which is a precedent in standardizing this type of right and which in

itself speaks of the restrictive, conditional and exclusive nature of the disputed regulation with regard to this right, which, by its nature and the consequences it produces for the overall legal personality of the citizen, does not accept this kind of conditioning that can lead (and leads!) to the complete negation of the legal personality of the citizen, and thus to its liquidation - in legal terms - as the subject of law and legal relations, and to reducing it to a mere object that exists in a purely physical sense within society".

7. The applicant considers that there are justifiable reasons why the impugned provisions may be considered unconstitutional given three essential facts:

- The first important fact concerns the character of the right to residence and the possibility of its establishment in legal terms, by registering that right, *i.e.*, the impact of that fact on the possibility of enjoying numerous other rights and fundamental freedoms of citizens.

- The second fact concerns the extremely restrictive conditions for advancement of this right, in an imperative, conditional and exclusive way, which is a completely inappropriate type of regulation from the point of view of the very character of this right, where a significant number of citizens including particularly vulnerable groups, displaced persons and returnees and members of the Roma national minority (but also other citizens!) were put in a hopeless situation, given the impossibility of exercising the right to register residence according to the criteria of truthfulness, accuracy and intention of permanent residence (real situation). The applicant also states that in this case, the legislator completely ignored the specific circumstances concerning the status of the mentioned categories and other categories of persons, as well as the character of the right to residence and its registration, which does not put up with a restrictive, conditional and exclusive character of the relevant regulation.

- The applicant states that the third fact is that "by the enactment of the Law in question in 2015", the previously acquired rights were denied to the greatest extent, which were valid in accordance with the law that was in force before the enactment of the Law in question, *i.e.* that within the frame of the annulment or revocation of previously acquired rights, a new legal situation is created in which previously revoked acquired rights cannot be confirmed or returned to the part of the citizens of Bosnia and Herzegovina to whom the new system of establishment of residence refer, which even leads to revocation or annulment of other rights and fundamental freedoms arising from the status of registration of residence.

8. The applicant states that "in terms of the disputed provisions of the Law in question, the imperative condition for registration of residence is the existence of the right of ownership or possession of residential real estate, whether it is the right of ownership of the person who registers residence already established by registration book, his/her parents, spouse or common-law partner, adoptee or adoptive parent with registered residence (with each other), or the lessor of residential real estate or it is an arising right

of ownership – to be created by legalization and registration of a residential building in respect of which ownership dispute is under way. Simply speaking, without the right of ownership that is in the procedure to arise through the process of legalization or registration of real estate that is uncertain, the real estate in connection with which there is an ownership dispute going on initiated by the person who registers the residence, or his/her parents, marital or extramarital partner, lessor, adoptive parent and adoptee (with each other), it is not possible to register residence in Bosnia and Herzegovina. At first glance, it is clear that such restrictive regulations in the field of the right to residence and registration of residence, and the right to freedom of movement exclude a significant number of citizens of Bosnia and Herzegovina *de iure* and *de facto*, including particularly vulnerable categories such as citizens who do not meet restrictively set conditions, given all the real social, property, historical, traditional, economic-social and other circumstances that the legislator simply ignored, including displaced persons and returnees, as well as members of the Roma national minority, and also a significant number of other citizens of this country".

9. The applicant emphasizes the nature of the right to residence and the right to register residence, whose unhindered and consistent exercise directly affects the freedom of movement, the right to personal documents, and exercising of numerous other rights. The applicant states: In this connection, the freedom of movement does not only include the possibility of permanent or temporary residence, that is, the change of location in a purely physical sense within a certain space/state or outside, but it also implies the possibility of continuity of unhindered enjoyment of all rights and fundamental freedoms of citizens guaranteed by the Constitution, including the meeting obligations regardless of any circumstance, and thus the circumstance of changing the place of residence within the same legal system. The registration of residence, in that regard, appears as a right and an objective fact which must not be called into question by prescribing conditions of a conditional, exclusive and imperative nature, as the legislator did by adopting the disputed provisions of the Law in question in this case, because this does not only challenge the right to residence and freedom of movement, but also disqualifies the legal and business capacity of the citizen, *i.e.*, abolishes his/her legal personality. In this regard, the public authority is obliged to create prerequisites - both for freedom of movement and residence in the physical sense, and for the unhindered enjoyment of constitutionally guaranteed rights and fundamental freedoms, and the continuity of the objective possibility to be the subject of rights and obligations, (which is not their object!), that is, that legal actions establish relations of a legal character for the purpose of exercising family, professional, economic, social, cultural, political and other rights, freedoms and interests.

10. Bearing in mind the importance of the right to register residence, the applicant considers that imposing conditions of an exclusive nature may constitute an insurmountable obstacle to the exercise of this right, which is not acceptable in a democratic society and from the point of view of constitutional norms. The applicant states that prescribing

certain conditions such as the right of ownership of residential real estate, the existence of a lease agreement, marital or extramarital status with the owner of residential real estate, *etc*. are not disputable as long as they are aimed at specifying and facilitating the registration of residence and as long as "exempli causa" are given, and where the normative possibility exists to register and establish residence on other grounds, complying with the criteria of truthfulness, accuracy and intention of permanent residence. However, when these or any other conditions are prescribed as "prerequisites" of an imperative, conditional and exclusive nature, if not meet, automatically lead to the impossibility of exercising the right to residence and its registration, without the normative possibility to register residence on another basis according to the criteria of truthfulness, accuracy and intention of permanent residence, then such regulations can lead to the impossibility of registering residence, the impossibility of exercising the right to personal documents and numerous other rights, which, in the end, essentially abolishes the legal and business capacity, *i.e.* the legal personality of the person in question. This implies the obligation of public authorities in a democratic society to provide all citizens with the possibility to register their residence according to the real situation, in accordance with the criteria of truthfulness, accuracy and intention of permanent residence without insurmountable obstacles. Therein, the possible prescribing of additional conditions may appear only as a mitigating and referring circumstance, and not as a decisive circumstance to be fulfilled beforehand, as a condition of ultimate nature and on which the exercise of the right to residence and formal registration of residence crucially depends.

11. The applicant cites the Law on Permanent and Temporary Residence of the Republic of Serbia as an example of a "good" legal arrangement. Contrary to the stated legal regulation, the disputed provisions are set as imperative conditions of an exclusive nature "through the criteria of ownership or possession of real estate/residential space, marital or extramarital status with a partner who is the owner or possessor of real estate/residential space (the legalization pending!), union of life with parents or an extramarital partner who are owners or possessors of real estate (the legalization pending!), the existence of a lease agreement and other previously mentioned conditions such as only formal individual participation in the procedure of legalization of an illegal facility or facility not registered in the land registry books. If not met, these conditions automatically lead to the impossibility to formally register the residence."

12. According to the applicant, the disputed provisions introduce criteria that are an insurmountable obstacle to the registration of residence of a large number of citizens, and "there seems to be an even more flagrant violation of this right, given the circumstances that the legislator completely ignored."

13. The applicant points out the persons affected by this legal arrangement, *i.e.* emphasizes that the legislator has ignored the factual situation on the ground, especially when it comes to Roma returnees, as persons without property.

14. This category of persons (the Roma returnees and other persons without property), as presented by the applicant, would include persons whose property was destroyed during the war, and is devastated as a result of the war ("due to ethnic cleansing"), and they have no means to restore it. The applicant alleges a bad situation with regard to the reconstruction of destroyed housing used to prevent the registration of residence at pre-war residential addresses of displaced persons and returnees in such a way that in these cases the conditions of restrictive, conditional and exclusive nature prescribed by the applicable disputed provisions apply. Furthermore, the provisions of the said Chapter IV of this Law are hereby suspended from application in practice - for the reason that the provisions of this Chapter are applied and interpreted in direct connection with the disputed provisions. The applicant points out that it concerns persons who, for objective reasons, failed to rebuild their housing units destroyed during the war (they were not allocated funds for reconstruction, and are not able to rebuild their housing units themselves) – which, according to Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina, should not have been an obstacle to registration at pre-war addresses of residence. By applying the disputed provisions, insurmountable obstacles were imposed on this category of persons when it comes to the formal registration of residence in the municipalities of their pre-war place of residence.

15. In this part, the applicant pointed out numerous examples of annulment of residence and identity cards (evidence submitted along with the request) from Srebrenica, but similar procedures are also followed in other places. The applicant alleges that the application and interpretation of the impugned provisions simply annulled the provisions of Chapter IV, so that registration of residence and establishment of the right of residence for the returnee population are not allowed at all after the entry into force of the disputed provisions.

16. Also, the applicant states: "In addition to the above, the esteemed Constitutional Court, dealing with this case, should in no way neglect the factual situation on the ground which, *inter alia*, indicates that the disputed provisions of the Law affect the particularly vulnerable population - the Roma national minority and this was completely ignored by the legislator. Namely, it is well-known that the citizens of Bosnia and Herzegovina of the Roma national minority in many cases do not have personal identification documents (ID card in the first place), and in a significant number of cases they are not even registered, so they are not able to enjoy numerous rights that often concern bare survival, such as the right to health insurance, *etc*. Due to the impossibility of registering residence and exercising the right to personal documents, especially in the context of application of the disputed provisions of the said Law, which imperatively insists on the right of ownership or possession of residential real estate in which he/she resides or which is the subject to lease agreements as a precondition for registration of residence, there are particularly vulnerable groups within this population - mothers and pregnant women that bear the most serious consequences."

17. The applicant points to the failure of the legislator to remove obstacles of a formal-procedural nature that continue to affect the process of registering residence according to the actual place of residence or issuing personal identification documents, or enjoying all other rights and freedoms by all citizens - including Roma population as a particularly vulnerable group. Moreover, these conditions have even been tightened by the disputed provisions of the Law in question.

18. The applicant also points to a number of other persons who own real estate (unlike returnees and Roma who, according to the allegations in the application, do not have real estate), but do not have the necessary permits (use or construction permits), or persons whose real estate is not legalized, persons who possess real estates that are not registered in the land register or the issue of ownership over the real estate has not been resolved yet.

19. In this part the applicant points out the historical, traditional and other circumstances that the legislator (in the opinion of the applicant) disregarded - the factual situation regarding the disorder of land registers, unresolved inheritance legal relations, traditional circumstances of "community life", housing facilities are registered on deceased relatives, and other cases in which tens of thousands of citizens, if not hundreds, are brought into a state of despair and complete hopelessness due to the imposition of insurmountable obstacles in terms of registration of residence and violation of their right to residence, "caused by five years of application of the disputed provisions of the Law in question".

20. In this part the applicant points to construction without a permit (due to the devastation of the housing units during the war in pre-war places of residence and due to the situation in which the expelled population remained living in buildings constructed during or immediately after the war). The applicant points to a huge number of such (illegally built) facilities. He also states that initiating the legalization procedure raises the issue of numerous costs that are extremely high for most citizens, and provides data on the number of submitted requests for legalization of buildings (Municipality of Novo Sarajevo), but also on the number of rejected requests for legalization, i.e. those that failed in the legalization process. The applicant points out that citizens in such a situation are, in fact, additionally sanctioned by "depersonalization".

21. Also, in this part the applicant points to the significant fact that "there is a considerable number of citizens, who, in accordance with the law that was applicable before the enactment of the Law in question, had the opportunity to exercise their right of residence and register it with the competent authority, which might have been done. However, those citizens would have lost such a previously acquired right, because they were not and are not now able, for formal-technical or substantive reasons, successfully to complete the process of legalization of the building in which they live to gain the right to register residence. That would mean that a large number of people, numbering tens of thousands of citizens of this country, would lose the previously acquired right to register their residence."

22. The applicant further explains the unconstitutionality by pointing to the relevant parts of the Constitution of Bosnia and Herzegovina, the European Convention and the Protocols to the European Convention, and other documents (listed in paragraph 5 of the present Decision).

23. With regard to the right to freedom of movement, the applicant states that the provisions of Protocol No. 4 to the European Convention guarantee the right of residence, and it is explicitly stipulated that no restrictions may be placed on the exercise of this rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *public order*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The applicant states that from the point of view of the rule of law principle, constitutional rule, and the principle of constitutionality, it is assumed that all regulations at the level of legal acts, above all, must be in accordance with the constitution and other norms of constitutional character. The applicant states "In this case, *in concreto,* it is quite clear that the establishment of ownership rights over the real estate/residential building in which he/she resides, or the conclusion of a marriage, or the establishment of an extramarital union with a person who owns the real estate in which he/she resides, or lifelong residence with parents who are owners or possessors of real estate, or adoptive or adoption status, *etc*. - the conditions for exercising the right to residence and freedom of movement prescribed by the disputed provisions of the Law in question may in no way have any significance or impact on state and public security, preservation of public order, prevention of crime and protection of morals. Also, it is clear that the prescribed conditions for exercising the right to residence and its registration according to the actual situation cannot affect the rights of other citizens in qualitative and quantitative terms, nor can prescribing the conditions be justified by preserving the public interest in a democratic society in certain parts of Bosnia and Herzegovina. It is just the opposite, so the reasons of normative, value-related and legal nature for which the legislator resorted to this type of restriction are not clear!? In fact, the legitimate aim of such a restriction is not clear, with all the direct and indirect violations of the Constitution of Bosnia and Herzegovina and international agreements for the protection of human rights and fundamental freedoms, if any legitimate aim can exist in this case. In fact, the restriction established by the disputed provisions of the said Law did not have a legitimate aim, nor can any legitimate aim be justified by violation of the right to registration of residence and freedom of movement, and consequently, by violation of legal personality and numerous other rights and freedoms of citizens - directly and indirectly, *i.e.* by imposing the requirements of an exclusive, conditional and imperative nature in this case. In addition, the legislator did not establish a special public interest in the procedure of enacting the disputed provisions of the Law in question, so that such conditioning and restriction of an imperative and exclusive nature could be considered reasonable, *i.e.* proportional to the legitimate aim sought to be achieved *in concreto*. It should also be borne in mind that the legislator is not absolutely unrestricted in its own assessment of the proportionality, and in any particular case, for

any restriction of human rights and fundamental freedoms, prescribed by the European Convention and its Protocols, it should provide valid arguments and evidence to support the need for such a restriction. This is an argument that is regularly insisted on in the case-law of the European Court of Human Rights in cases of reviewing the legitimacy of restrictions on human rights and fundamental freedoms guaranteed by the European Convention and its Protocols."

24. The applicant points out that the provisions of Article 12 of the International Covenant on Civil and Political Rights, which also guarantees the right to residence and freedom of movement, and the provisions of Article 13 of the UN Universal Declaration of Human Rights have been violated in an identical manner, including the lines 5 and 8 of the Preamble to the Constitution of Bosnia and Herzegovina referring to the obligation to apply these international instruments, as well as Annex I to the Constitution of Bosnia and Herzegovina, which lists all international documents on human rights, and which are directly applied in Bosnia and Herzegovina.

25. The applicant points out: "It is, therefore, a matter of imposing completely inappropriate requirements of an imperative, conditional and exclusive nature for this type of right, *i.e.*, conditioning with regard to the property and property status of citizens, with regard to marital, extramarital or adoption related status, community of life with parents who own or possess residential property, *etc*. Thus, in our opinion, the provision of Article II (4) of the Constitution of Bosnia and Herzegovina is directly violated which explicitly stipulates that the enjoyment of rights and freedoms, including the right to residence and its formal registration and freedom of movement, is guaranteed to all persons in Bosnia and Herzegovina without discrimination and disadvantage on any grounds, including, *inter alia*, property or property status, the existence or non-existence of the right of ownership or possession of residential real estate in this particular case. In addition, the said provision of Article II (4) of the Constitution of Bosnia and Herzegovina also prohibits any discrimination with regard to guaranteed rights and fundamental freedoms in relation to any other status, which, in this particular case, implies marital, extramarital, kinship or adoption status. In view of the above, the disputed provisions of this Law undoubtedly put the citizens of Bosnia and Herzegovina in a less favourable - discriminatory position with regard to property, *i.e.* property status, and with regard to marital, extramarital, kinship and adoption status in terms of enjoying the right of residence registration, and freedom of movement and, consequently, many other rights and freedoms, where the possibility of realization of these rights crucially determines the content of the legal personality of each citizen, his/her personality, dignity and personality within society and in legal transactions. In this way, in our opinion, Article II (4) of the Constitution of Bosnia and Herzegovina has been directly violated."

26. The applicant alleges that a state of complete legal uncertainty is introduced by the impugned provisions, and the principle of legal certainty is directly violated. This is the constitutional principle of the highest importance. Legal principles, including this

principle, are special rules that are principled in nature, and these are the constitution related rules of a higher order and they are a kind of source of law in themselves, and can be considered "the law for the legislator". The coherence of that system, and in this particular case the legal security of the participants in social relations, as a special value *per se*, depend on compliance with these principles and on their consistent implementation in the legal system of the country. The principle of legal certainty is part of every democratic legal order, including the legal order of Bosnia and Herzegovina, especially with regard to the provision of Article I (2) of the Constitution of Bosnia and Herzegovina, which has been also violated. The applicant again points out that the law must be in accordance with the Constitution, and the Constitutional Court in the specific case "should recognize all values of a constitutional nature that have been violated by the illegitimate intervention of the legislator."

27. Finally, the applicant states that it is important to "emphasize the fact, in which the primary reasons for the adoption of this type of regulation of a restrictive, negative and exclusive nature should be sought, although there is no place for such regulation (given the nature of the rights in question!). This fact concerns the consequences of application of the disputed provisions of the Law in question regarding the vulnerable groups of returnees and displaced persons, where this regulation appears as an insurmountable obstacle to registering the pre-war residence - and thus an obstacle for the returnees to return to their pre-war places of residence. In this way, a special attempt is made to legalize the situation created by ethnic cleansing in the territory of the BiH Entity Republika Srpska. Bearing in mind the provisions of the General Framework Agreement for Peace in Bosnia and Herzegovina, in particular its Annex 7 and the Constitution of Bosnia and Herzegovina, and the fact that based on the disputed provisions of this Law the returnee population is placed at a significant disadvantage, and in view of all the specifics of their position, the circumstances arising from the application of the disputed provisions of the Law in question should be particularly taken into account by the esteemed Constitutional Court.

b) Response to the request

28. In response to the request, the House of Peoples, the Constitutional Commission of the House of Peoples submitted an Opinion leaving the decision on the submitted request up to the Constitutional Court.

29. In response to the request, the House of Representatives stated that the request of the Constitutional Court to submit the answer had been submitted to the Constitutional Commission of the House of Representatives. After that, the Constitutional Commission of the House of Representatives submitted an Opinion stating that the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina was adopted by the Parliamentary Assembly of Bosnia and Herzegovina in accordance with competence arising under Article IV(4) of the Constitution of Bosnia and Herzegovina.

IV. Relevant Law

30. The **Constitution of Bosnia and Herzegovina**, in its relevant part, reads:

(...)

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 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.

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:

(...)

m) the right to liberty of movement and residence.

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

31. In the **Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina**[1] (*Official Gazette of Bosnia and Herzegovina,* 32/01 and 56/08), the relevant provisions provided as follows**:**

Article 8

When registering and cancelling permanent or temporary residence, citizens are obliged to provide accurate and true information.

1 The Constitutional Court notes that these are provisions with the stated content that were in force until the adoption of amendments to the said law in 2015, when they received the content that the appellant disputes in the request.

Within 60 days from the establishment of residence or 60 days after the entry into force of this

Law, whichever period is longer, the citizen submits a request for registration of residence to the competent authority in the place of his/her permanent or temporary residence stating his/her home address. Together with the request, he/she submits an ID card or other proof of identity.

When registering the residence of a minor due to a change of residence, the persons/bodies referred to in Article 7, paragraph 2, shall act in accordance with the procedure referred to in paragraph 2 of this Article by submitting the birth certificate of the minor.

When registering residence after the birth of a child, the persons/bodies referred to in Article 7, paragraph 2 shall register the child with the competent authority within 60 days after the birth of the child, acting in accordance with paragraph 2 of this Article, by submitting the child's birth certificate.

Cancellation of residence can be done directly with the competent authority or ex officio. Upon receipt of the request for registration of residence, in accordance with the procedure established in the previous paragraphs of this Article, the competent authority shall register the residence of the citizen after the previous cancellation of residence.

The competent authority to which the request for registration of residence has been submitted ex officio shall notify the competent authority in the place of previous residence of the citizen, for the purpose of cancellation of residence. The competent authority to which the request for registration of residence has been submitted shall be notified of the cancellation of residence.

The procedure from the submission of the request for registration of residence to the cancellation of the previous residence and from the registration of the new residence shall not be longer than 15 days.

The competent authority is obliged to immediately issue a certified copy of the registration request form to the citizen, which will serve as proof that the person has registered the residence as provided by this law. The certified form also serves as proof that the competent authority has enabled the cancellation of the citizen's previous residence.

Article 8a

If the competent authority in a procedure conducted ex officio or at the request of a party with a legal interest determines that a BiH citizen has registered a permanent or temporary residence contrary to the provisions of Article 8, paragraph 1 of this Law, it shall annul the permanent residence.

Article 32

Supervision over the implementation of this law is performed by the MCAC, as follows:

1. controls the legality of administrative acts and actions of competent bodies;

2. proposes, i.e., initiates the procedure of assessing the legality of administrative acts of the competent authorities;

3. orders the competent authority to fulfil certain obligations imposed on them by this Law;

4. adopts guidelines and instructions for the unified action of the competent authorities.

Within 90 days from the date of publication of this law, the MCAC shall issue bylaws on:

a) uniform forms for registration and cancellation according to the provisions of this Law;

b) rulebook on exercising supervision over the implementation of this Law;

c) all other issues necessary for the implementation of this Law.

Within 90 days from the day this law enters into force, the body that keeps central records, in accordance with the Law regulating the area of central records and data exchange in BiH, shall issue regulations on:

a) data protection in the central records in accordance with the Law regulating data protection in BiH;

b) the manner of submitting data;

c) the manner of data exchange between the central record keeping body and the competent authorities.

32. In th**e Law on Amendments to the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina**[2] *(Official Gazette of Bosnia and Herzegovina,* 58/15), the relevant provisions read:

Article 2

Article 8 is amended to read as follows:

"Article 8

When registering and cancelling residence, citizens are obliged to provide accurate and true information.

In the procedure of registration of residence and residential address, citizens are obliged to enclose proof that they have a valid basis for residence at the address where they register. One of the following pieces of evidence shall be considered as proof that the citizen has a valid basis for residence at the address where he / she is registering:

2 By Amendments to the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina, which was published in the Official Gazette, Articles 8, 8a and 32, paragraph 3, line d) have been amended, and those provisions have received the content that is still in force and which the applicant disputes

a) Proof of ownership or co-ownership or possession of an apartment, house or other residential building;

b) A certified lease agreement or a certified tenancy agreement with certified proof of ownership or co-ownership or possession of the landlord;

c) Confirmation that a dispute over ownership is being conducted before the competent authority, i.e. that a procedure for legalization or registration of the building, apartment or house has been initiated at the address where the residence is registered.

A certified statement of the landlord from which it is evident that the landlord meets the conditions prescribed in lines a), b) and c) from the previous paragraph of this article and that the landlord gives consent for a certain person to be registered at his residential address shall be considered valid proof of residence.

Married or extramarital partners and first-degree relatives in the direct line (parents and children), adoptive parents and adopted children, in the procedure of registration of residence, may submit a request for registration of residence at the address of already registered marital or extramarital partner or first-degree relatives in the direct line, or adoptive parent or an adoptee only with proof of marital or extramarital status, kinship or adoption, without obtaining the evidence referred to in paragraph 2 of this Article, with records of the existence of such a relationship.

Competent social protection bodies, nursing homes, geriatric and other specialized health care institutions shall submit relevant data on the residential addresses of protégés and users of their services, citizens of Bosnia and Herzegovina, who in the procedure of registration of residence cannot provide the evidence referred to in paragraph 2 of this Article, to the competent authority for registration of residence in order to prove a valid basis for registration of residence at the address where they are registered.

Citizens of Bosnia and Herzegovina who are in a state of social need and cannot provide the evidence referred to in paragraph 2 of this Article, and are not registered with the competent social security authorities as beneficiaries, may request assistance from the competent social security authority in obtaining evidence of a valid basis for registration of residence at the address where they are registered.

[...]"

Article 3

Article 8a is amended to read as follows:

"Article 8a

The competent authorities shall, within five years from the date of entry into force of this Law, for each citizen with registered residence, verify the fulfilment of the conditions referred to in Article 8, paragraphs 2, 3 and 4. Evidence may be collected electronically using digitally signed data from the bodies responsible for keeping records where the relevant data are located.

In the process of verifying the fulfilment of conditions, the competent authorities are obliged to evaluate with special care and understanding the evidence for vulnerable and socially endangered categories of BiH citizens referred to in Article 8, para. 4, 5 and 6.

In the process of checking the fulfilment of conditions, the following can be used as relevant: registries, real estate records, records of employment bureaus, health care, pension and disability insurance, records of users of utilities and other services, etc., about which a special instruction by the Director of the Agency will be issued."

Article 9

In Article 32, paragraph 3, after subparagraph c) a new subparagraph d) is added, which reads:

"d) implementation of Article 7a, paragraph 1 and Article 8, paragraphs 2, 3 and 4 of this Law".

33. **The Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (***Official Gazette of BiH*, 32/01, 56/08 and 58/15). For the purposes of this Decision, an unofficial consolidated text prepared in the Constitutional Court of BiH shall be used, which reads:

Article 8

When registering and cancelling residence, citizens are obliged to provide accurate and true information.

In the procedure of registration of residence and residential address, citizens are obliged to enclose proof that they have a valid basis for residence at the address where they register. One of the following pieces of evidence shall be considered as proof that the citizen has a valid basis for residence at the address where he/she is registering:

a) Proof of ownership or co-ownership or possession of an apartment, house or other residential building;

b) A certified lease agreement or a certified tenancy agreement with certified proof of ownership or co-ownership or possession of the landlord;

c) Confirmation that a dispute over ownership is being conducted before the competent authority, i.e. that a procedure for legalization or registration of the building, apartment or house has been initiated at the address where the residence is registered.

A certified statement of the landlord from which it is evident that the landlord meets the conditions prescribed in subparagraphs a), b) and c) from the previous paragraph of this article and that the landlord gives consent for a certain person to be registered at his residential address shall be considered valid proof of residence.

Married or extramarital partners and first-degree relatives in the direct line (parents and children), adoptive parents and adopted children, in the procedure of registration of

residence, may submit a request for registration of residence at the address of already registered marital or extramarital partner or first-degree relatives in the direct line, or adoptive parent or an adoptee only with proof of marital or extramarital status, kinship or adoption, without obtaining the evidence referred to in paragraph 2 of this Article, with records of the existence of such a relationship.

Competent social protection bodies, nursing homes, geriatric and other specialized health care institutions shall submit relevant data on the residential addresses of protégés and users of their services, citizens of Bosnia and Herzegovina, who in the procedure of registration of residence cannot provide the evidence referred to in paragraph 2 of this Article, to the competent authority for registration of residence in order to prove a valid basis for registration of residence at the address where they are registered.

Citizens of Bosnia and Herzegovina who are in a state of social need and cannot provide the evidence referred to in paragraph 2 of this Article, and are not registered with the competent social security authorities as beneficiaries, may request assistance from the competent social security authority in obtaining evidence of a valid basis for registration of residence at the address where they are registered.

A person who does not have a place and address of residence, or funds with which he/she could pay for housing (hereinafter: the homeless) may be allowed by the competent social welfare body to register residence at the address of the social welfare institution, in which case the homeless person shall submit to the competent authority and social welfare institution contact address, which may be with a natural or legal person, with their consent.

The citizen is obliged to register his/her residence with the competent authority within 15 days from the day of the beginning of residence at the address where he/she registers his/her residence.

When registering the residence of a minor, the body or person referred to in Article 7, paragraph 2 of the Law shall enclose the birth certificate of the minor.

Article 8a

The competent authorities shall, within five years from the date of entry into force of this Law, for each citizen with registered residence, verify the fulfilment of the conditions referred to in Article 8, paragraphs 2, 3 and 4. Evidence may be collected electronically using digitally signed data from the bodies responsible for keeping records where the relevant data are located.

In the process of verifying the fulfilment of conditions, the competent authorities are obliged to evaluate with special care and understanding the evidence for vulnerable and socially endangered categories of BiH citizens referred to in Article 8, para. 4, 5 and 6.

In the process of checking the fulfilment of conditions, the following can be used as relevant: registries, real estate records, records of employment bureaus, health care, pension and disability insurance, records of users of utilities and other services, etc., about which a special instruction by the Director of the Agency will be issued.

Chapter VI - TRANSITIONAL AND FINAL PROVISIONS

Article 32

Supervision over the implementation of this law shall be performed by the MCAC, as follows:

1. controls the legality of administrative acts and actions of competent bodies;

2. proposes, i.e., initiates the procedure of assessing the legality of administrative acts of the competent authorities;

3. orders the competent authority to fulfil certain obligations imposed on them by this Law;

4. adopts guidelines and instructions for the unified action of the competent authorities.

Within 90 days from the date of publication of this law, the MCAC shall issue bylaws on:

a) uniform forms for registration and cancellation according to the provisions of this Law;

b) rulebook on exercising supervision over the implementation of this Law;

c) all other issues necessary for the implementation of this Law.

Within 90 days from the day this law enters into force, the body that keeps central records, in accordance with the Law regulating the area of central records and data exchange in BiH, shall issue regulations on:

a) data protection in the central records in accordance with the Law regulating data protection in BiH;

b) the manner of submitting data;

c) the manner of data exchange between the central record keeping body and the competent authorities.

d) the implementation of Article 7a, paragraph 1 and Article 8 para. 2, 3 and 4 of this Law.

V. Admissibility

34. 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.

35. 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.

36. In the present case the applicant is Mr. Željko Komšić, a member of the Presidency of Bosnia and Herzegovina, which means that the request was submitted by an authorized person under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

VI. Merits

37. In the present case, the applicant considers that the impugned provisions are not in accordance with Articles I (2), II (2), II (3) (m), II (4) and II (5) of the Constitution of Bosnia and Herzegovina, lines 5 and 8 of the Preamble to the Constitution of Bosnia and Herzegovina, Annex I to the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention, Article 2, paragraphs 1, 3 and 4 of Protocol No. 4 to the European Convention, Article 1 of Protocol No. 12 to the European Convention, Article 2, paragraph 2, Article 5, paragraph 1, Articles 12 and 16 of the International Covenant on Civil and Political Rights; Article 2, paragraph 1, Articles 4 and 5, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights, Articles 6 and 13 of the UN Universal Declaration of Human Rights; Article 4, paragraphs 2 and 3 of the Framework Convention for the Protection of National Minorities, and Annex 7 to the General Framework Agreement for Peace in BiH.

38. The Constitutional Court first points to the provisions disputed by the applicant in the present case:

Article 8, paragraph 2

In the procedure of registration of residence and residential address, citizens are obliged to enclose proof that they have a valid basis for residence at the address where they register. One of the following pieces of evidence shall be considered as proof that the citizen has a valid basis for residence at the address where he / she is registering:

a) Proof of ownership or co-ownership or possession of an apartment, house or other residential building;

b) A certified lease agreement or a certified tenancy agreement with certified proof of ownership or co-ownership or possession of the landlord;

c) Confirmation that a dispute over ownership is being conducted before the competent authority, i.e., that a procedure for legalization or registration of the building, apartment or house has been initiated at the address where the residence is registered.

Article 8, paragraph 3

A certified statement of the landlord from which it is evident that the landlord meets the conditions prescribed in subparagraphs a), b) and c) from the previous paragraph of this article and that the landlord gives consent for a certain person to be registered at his residential address shall be considered valid proof of residence.

Article 8, paragraph 4

Married or extramarital partners and first-degree relatives in the direct line (parents and children), adoptive parents and adopted children, in the procedure of registration of residence, may submit a request for registration of residence at the address of already registered marital or extramarital partner or first-degree relatives in the direct line, or adoptive parent or an adoptee only with proof of marital or extramarital status, kinship or adoption, without obtaining the evidence referred to in paragraph 2 of this Article, with records of the existence of such a relationship.

Article 8, paragraph 5

[...] who in the procedure of registration of residence cannot provide the evidence referred to in paragraph 2 of this Article, [...] for registration of residence in order to prove a valid basis [...].

Article 8, paragraph 6

[...] and cannot provide the evidence referred to in paragraph 2 of this Article, [...] in obtaining evidence of a valid basis for registration of residence at the address at which they are registered.

Article 8a

The competent authorities shall, within five years from the date of entry into force of this Law, for each citizen with registered residence, verify the fulfilment of the conditions referred to in Article 8, paragraphs 2, 3 and 4. Evidence may be collected electronically using digitally signed data from the bodies responsible for keeping records where the relevant data are located.

In the process of verifying the fulfilment of conditions, the competent authorities are obliged to evaluate with special care and understanding the evidence for vulnerable and socially endangered categories of BiH citizens referred to in Article 8, para. 4, 5 and 6.

In the process of checking the fulfilment of conditions, the following can be used as relevant: registries, real estate records, records of employment bureaus, health care,

pension and disability insurance, records of users of utilities and other services, etc., about which a special instruction by the Director of the Agency will be issued.

Article 32, paragraph 3, subparagraph d)

[...] and Article 8, paragraphs 2, 3 and 4 of this Law.

39. The Constitutional Court recalls that in its Decision No. *U-5/15* it ruled on the constitutionality of the provisions of the same Law, which were again challenged by the present request, and decided that the challenged provisions were in accordance with Article II (3) (m) of the Constitution of Bosnia and Herzegovina and Articles II (4) and II (5) of the Constitution of Bosnia and Herzegovina. The provisions re-challenged by the present request are Article 8, paragraphs 2, 3, 4, 5 and 6, Article 8a and Article 32, paragraph 3, subparagraph d) of the Law on Permanent and Temporary Residence of BiH Citizens (see paragraph 33 above).

40. When comparing the provisions of the Law on Permanent and Temporary Residence of BiH Citizens decided by the Constitutional Court in its Decision No. *U-5/15*, as well as the provisions of that Law challenged in the present case, it follows that the Constitutional Court in its Decision No. *U-5/15* has not decided on the provisions of Article 8a, paragraphs 2 and 3 and Article 32, paragraph 3, subparagraph d) of the Law on Permanent and Temporary Residence of BiH Citizens (see paragraph 33 above).

41. Bearing in mind that the constitutionality of most provisions of the Law on Permanent and Temporary Residence of Citizens of BiH disputed in the present case has already been decided in the Decision No. *U-5/15*, the Constitutional Court notes that, pursuant to its earlier case-law (see, the Decision on Admissibility and Merits No. *U-23/18* of 5 July 2019), it may examine the same provisions which have been challenged again, given that these are similar but not the same allegations from the request for constitutional review.

42. The Constitutional Court will examine the applicant's allegations in relation to all disputed provisions, without making a special distinction between provisions whose constitutionality has already been decided and provisions whose constitutionality has not been decided, since most of the allegations relate to provisions whose constitutionality has already been decided in the Decision No. *U-5/15*, and these allegations cannot be separated. The Constitutional Court will examine the constitutionality of the impugned provisions in relation to Article I (2) of the Constitution of Bosnia and Herzegovina, Article II (3) (m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention, as well as Article II (4) of the Constitution of Bosnia and Herzegovina. Reasons will be given first in relation to the right to freedom of movement and residence.

43. Article II (3) (m) 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:

m) The right to liberty of movement and residence.

44. Article 2 of Protocol No. 4 to the European Convention reads in relevant part:

Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

(...)

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

45. In the Decision No. *U-5/15*, in paragraph 21, it is pointed out that the evidence is defined that is required in order to have a valid legal basis for permanent residence at the address at which the BiH citizen registers and further it is pointed to evidence arising from the text of the provision itself (amended Article 8, paragraphs 2, 3 and 4 and the provisions of paragraphs 5 and 6). The provision of Article 8a is further pointed out, which prescribes the verification of all registered residences within five years from the entry into force of the Law on Amendments (entered into force on 29 July 2015). Also, the Constitutional Court stated that the legislator, in prescribing evidence that can be a valid legal basis for registration of residence, also prescribed a wide range of evidence that the Constitutional Court considers to be reasonable and objective.

46. In view of the above, referring to the allegations in the specific request, the Constitutional Court emphasizes that it supports its position that the legislator has prescribed a wide range of evidence. For the registration of residence (meaning the disputed Article 8, paragraphs 2-6), proof of ownership or co-ownership or possession of the apartment or the house or other residential building is required. At the same time, the legislator left the possibility for persons who are conducting a dispute over ownership or who have initiated the legalization or registration procedure (certificates of initiated procedure) to use it as evidence for registration of residence.

47. In addition, the Constitutional Court notes that the impugned Article 8, paragraphs 2-6, also prescribe proof of possession of an apartment, house or other residential

building, without further specifying. The Constitutional Court notes that possession (according to the Law on Real Rights) is the *de facto* authority over things, *i.e.*, the factual state of things is protected by law. Persons claiming possession of real estate should prove this, but the same conditions required to prove ownership and registration in the land register are not required.

48. It clearly follows from the impugned provisions of Article 8, paragraphs 2-6, that registration may take place even when the person being registered does not have ownership or co-ownership or possession - but on the basis of a real estate lease agreement, or on the basis of a tenancy agreement (with certified proof of co-ownership or possession of the landlord) or with a certified statement of the landlord (which shows that the landlord meets the prescribed conditions under Article 8, paragraph 2, subparagraphs a), b) and c)), who gives consent for a particular person to be registered at his/her residential address. Therefore, in that case, the person registering does not need proof of ownership/co-ownership or possession, *i.e.*, this condition is not imperative for the person registering.

49. Also, it is clear from the disputed provisions of Article 8, paragraphs 2-6, that a certain status (marital, extramarital, kinship, adoption) allows registration of residence at the address of already registered spouse, relative, *etc*., with proof of marital or extramarital status, kinship, adoption, without obtaining the evidence referred to in paragraph 2. Therefore, requests for registration based on kinship, marriage, *etc*. in no case require the property of the person wishing to register as alleged in the Request for review of constitutionality. On the contrary, only a completely new basis for the registration of residence is added.

50. As regards the allegations that the legislator has tightened the criteria by challenged provisions of Article 8, paragraphs 2-6, compared to the provisions previously in force, the Constitutional Court emphasizes that in the Decision No. *U-5/15*, in paragraph 23, it is stated that the Council of Ministers of BiH, together with the Proposal of the Law on Amendments to the Law on Permanent and Temporary Residence, submitted an explanation for the proposed changes. The reasons for these changes are the real needs arising from the practical application of regulations related to electronic signatures, and the need to improve the legal text by specifying the conditions for registration and cancellation of permanent and temporary residence to prevent abuse of this mechanism. The explanation also stated that "the strategy for the development of the document system was crucial for BiH to obtain a visa-free regime. The strategy envisages the improvement of the personal document system. The starting point for the system of personal documents are reliable records of permanent and temporary residence. No matter how good they are in terms of security, personal documents will be a 'dead letter' if they do not contain accurate records of permanent and temporary residence where the relevant persons can be located. International cooperation in the field of execution of

sanctions is a European standard, and that cooperation is inconceivable without reliable records of permanent and temporary residence. BiH is one of the few countries that in diplomatic and consular missions does not have records of its citizens residing in the area covered by those missions.

51. The Constitutional Court therefore finds that the law clearly prescribed the conditions for the registration, stating evidence that may be a valid legal basis. The Constitutional Court finds that there is a legitimate aim for the above, *i.e.*, the public interest stated in the Decision no. *U-5/15*, which is reflected in ensuring accurate and true records on registered residences and in the need to improve the system of personal documents. Namely, the "abuse of rights" can be far greater if there is a possibility for residence registration without any proof that the relevant person will actually live at the registered address, than when compared to the situation where certain evidence is required for the above. In addition, the Constitutional Court, again pointing to the range of prescribed evidence for registration of residence and simplified procedure when it comes to verifying the fulfilment of conditions for registered citizens, cannot find in the mentioned provisions a disproportion alleged by the applicant, nor in relation to returnees (the issue already decided in the Decision no. *U-5/15*), nor in relation to any other person.

52. The Constitutional Court refers again to the view expressed in the Decision no. *U-5/15* (the applicant alleged that there was the possibility of arbitrary and tendentious interpretation of the law by the police authorities applying the impugned provisions), wherein it clearly concluded that the work of the police authorities was regulated by the law and that there existed judicial protection even in the event of possible unlawful actions on the part of the mentioned authorities. As for the submitted information about the offence proceedings against citizens of Srebrenica, an appeal could be lodged with the Constitutional Court if they were actually unlawful. Besides, the Constitutional Court notes that the documentation submitted by complainant is related to the period before the entry into force of the challenged provisions (information about the offence proceedings in 2013-2014). It is therefore clear that the aforementioned could not relate to the challenged provisions, which entered into force.

53. Given the conclusion expressed in the Decision no. *U-5/15* and all the aforementioned in the case at hand, the Constitutional Court finds that the challenged provisions are compatible with Article II (3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention.

54. Article I (2) of the Constitution of Bosnia and Herzegovina, so far as relevant, reads:

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

55. The Constitutional Court notes that the applicant alleges that the challenged provisions have been in violation of Article I (2) of the Constitution of Bosnia and Herzegovina and that the law must primarily be compatible with the Constitution. The Constitutional Court notes that in its previous case law it interpreted the mentioned Article as encompassing the principle of the rule of law. The rule of law principle means a political system that is based on the adherence to the Constitution, laws and other regulations both by citizens and public office holders. All laws and regulations, as well as the actions by the public office holders must be in compliance with the Constitution. In addition, the mentioned principle requires that all constitutions, laws and other regulations that are passed should be harmonized with the constitutional principles, meaning that the legal system is based on the hierarchy of legal acts, starting from the Constitution, as the highest law, to bylaws (see, *inter alia*, Constitutional Court, Decision on Admissibility and Merits No. *U-21/16* of 1 June 2017, paragraph 19 and *U-6/06* of 29 March 2008, paragraph 22).

56. Furthermore, the rule of law principle is not confined to formal adherence to the principle of constitutionality and lawfulness but it requires that all legal acts (laws, regulations, *etc*.) have a certain content, *i.e.* quality that is appropriate to a democratic system so as to protect human rights and freedoms in relationships between citizens and public authorities in a democratic political system. In this connection, the Constitutional Court recalls that the standard of the quality of the law requires that a legal norm must be adequately accessible to the individuals to whom it apply, and it must be foreseeable, meaning that it must be formulated with sufficient precision that individuals could actually and specifically know their rights and obligations to a degree that is reasonable in the circumstances, to regulate their conduct accordingly (see Decision on Admissibility and Merits No. *U-15/18* of 29 November 2018, paragraph 26).

57. Thus, in the applicant's opinion, the content of the challenged provisions does not satisfy the principle of the rule of law under Article I (2) of the Constitution of Bosnia and Herzegovina. The applicant essentially disagrees with the current law solution by seeing it as "imperative, exclusive and conditional". While pointing to the importance of the right to residence, from which numerous other rights derive, the applicant emphasizes that the exercise of the right to registration of residence should be made possible also on other grounds according to "the criteria of truthfulness, accuracy and intention of permanent residence".

58. The Constitutional Court refers to its previously expressed view that the law does not have to be perfect to be compatible with the Constitution. In the proceedings related to the abstract control of constitutionality, the mentioned principle cannot be challenged in terms of whether it is the best possible solution or whether a different solution would be more fair or better. It is obvious in the present case that the applicant is of the opinion that the criteria to register residence referred to in Article 8, paragraphs 2-6, should

not be read as they read now, and that they should rather be replaced by other criteria, namely by the criteria of "truthfulness, accuracy and intention of permanent residence". However, such a question can be addressed only to the relevant legislator in a procedure for amending the law. The Constitutional Court noted in several decisions that it was not competent to examine the constitutionality of laws under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina in terms of whether a law solution is good or bad, whether it could be better or whether it could be regulated differently. According to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall have exclusive jurisdiction to decide whether any provision of an Entity's constitution or law is "consistent with this Constitution". Thus, given the conclusion expressed in the Decision No. *U-5/15* and all the aforementioned in the present case, the Constitutional Court finds that the challenged provisions are compatible with Article I (2) of the Constitution of Bosnia and Herzegovina.

59. The applicant further complains of the violation of the right to non-discrimination in relation to the right to residence.

Article II (4) of the Constitution reads as follows:

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

60. The Constitutional Court reiterates that in its Decision No. *U-5/15* it examined the applicant's allegations of discrimination against returnees (Bosniacs and Croats who intended to return to the territory of Republika Srpska). However, it did not conclude that the challenged provisions raised the issue of discrimination prohibited by Article II (4) of the Constitution of Bosnia and Herzegovina in relation to the right to liberty of movement and free choice of residence and the right of refugees and displaced persons to return to their homes. By regulating the right to residence and verification of registered place of residence in such a way, the legislator in no way called into question the right of any citizen of Bosnia and Herzegovina to freely choose a place of residence, nor did it restrict his/her freedom of movement in terms of Article II (3) (m) and II (5) of the Constitution of Bosnia and Herzegovina.

61. As to the applicant's allegations that "the disputed provisions of this Law undoubtedly put the citizens of Bosnia and Herzegovina in a less favourable - discriminatory position with regard to property, *i.e.* property status, and with regard to marital, extramarital, kinship and adoption status in terms of enjoying the right to residence", the Constitutional

Court refers to its conclusions in this Decision. The legislator prescribed several grounds for registration of residence, and, as one of the proofs, the proof of ownership, co-ownership and possession. However, it is indisputable that (as noted in the paragraphs above) the persons who do not possess property could register residence upon the fulfilment of the requirements prescribed by the law. Thus, there is no "exclusion" or "prohibition" on the ground of "property", but the proof of ownership, co-ownership and possession (possession is not the synonym for ownership by the persons who intend to register) constitutes evidence of the valid basis for registration of residence.

62. Marriage and unmarried partnership, as relationships between individuals, but also kinship or adoption (completely different relationship in comparison to marriage) constitute the basis for registration of residence. Furthermore, there is no obligation of concluding marriage in order to register residence, nor the persons who are not married are forbidden from registering residence. The same applies to the parents and children, and the frequent case is that the children (at least several years after they reach the age of majority) register the address where their parents live. However, this does not mean that the children are not allowed to register residence wherever they want if they fulfil the requirements prescribed by the law, nor did the applicant give any reasons in support of that claim. Thus, the applicant attempted to show such relationships as discriminatory without giving any valid reason in this regard. The Constitutional Court noted in its Decision No. *U-5/15* that "by regulating the right to permanent residence and by checking the registered permanent residence addresses in such a manner, the legislator does not call into question the right of any citizen of Bosnia and Herzegovina freely to choose his/her place of residence nor does it restrict the freedom of movement within the meaning of Article II (3) (m) and Article II (5) of the Constitution of BiH". The applicant failed to submit clear and convincing evidence, which could lead to a different decision in the present case.

63. Given the fact that the applicant pointed to members of the Roma national minority as a population the needs of whom the legislator failed to take into account when passing the challenged provisions, thereby making the registration of residence more difficult for them, the Constitutional Court notes again that the members of the Roma national minority have the same rights to register residence as other citizens of Bosnia and Herzegovina and under the same conditions. The fact that members of Roma national minority in many cases "are not even registered", which was alleged by the applicant, indisputably poses a problem that the State should take care of. However, it is also indisputable that this problem has not resulted from the challenged provisions of the Law on Registration of Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina, nor has it resulted from the application thereof. It clearly follows from the aforementioned that the challenged provisions do not lead to discrimination against members of the Roma national minority, nor are they denied any right in this regard.

64. Therefore, the Constitutional Court concludes that the challenged provisions are not in contravention of Article II (4) of the Constitution of Bosnia and Herzegovina, in conjunction with Article II (3) (m) of the Constitution of Bosnia and Herzegovina. Furthermore, the Constitutional Court concludes that it does not need to consider other allegations on discrimination in relation to the rights under the European Convention and other international documents.

VII. Conclusion

65. The Constitutional Court concludes that the provisions of Article 8, paragraphs 2, 3, 4, 5 and 6, Article 8a and Article 32(3) (d) of the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina are compatible with Article I (2), II (2), II (3) of the Constitution of Bosnia and Herzegovina and Article II (4) of the Constitution of Bosnia and Herzegovina in relation to the right to liberty of movement and residence. The Constitutional Court concludes that the challenged provisions clearly stipulate a wide range of reasonable and objective evidence necessary for registration of residence. They are prescribed in the public interest and pursue a legitimate aim and also stipulate "additional" evidence necessary for the procedure of verification of the nationals who have their residence registered, being an obligation of the competent authority. The provisions apply to all citizens of Bosnia and Herzegovina equally.

66. Having regard to Article 59 (1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

67. Pursuant to Article 43 of the Rules of the Constitutional Court, Vice-President Mirsad Ćeman gave a statement of dissent from the majority decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Case No. U-11/19

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Milorad Dodik, Member of the Presidency of Bosnia and Herzegovina for review of the constitutionality of the Law Amending the Law on the Flag of Bosnia and Herzegovina (the *Official Gazette of Bosnia and Herzegovina*, 23/04)

Decision of 15 July 2021

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (the *Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Mr. Mirsad Ćeman, Vice-President

Mr. Valerija Galić,

Ms. Seada Palavrić,

Mr. Zlatko M. Knežević,

Ms. Angelika Nussberger, and

Ms. Helen Keller

Having deliberated on the request filed by **Mr. Milorad Dodik**, a Member of the Presidency of Bosnia and Herzegovina, in the Case no. **U-11/19**, at its session 15 July 2021, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding on the request of Mr. Milorad Dodik, Member of the Presidency of Bosnia and Herzegovina, for review of the constitutionality of the Law Amending the Law on the Flag of Bosnia and Herzegovina (the *Official Gazette of Bosnia and Herzegovina*, 23/04),

it is hereby established that the Law Amending the Law on the Flag of Bosnia and Herzegovina (the *Official Gazette of Bosnia and Herzegovina*, 23/04) is compatible with Article I(6) 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 in the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 8 November 2019, Mr. Milorad Dodik, Member of the Presidency of Bosnia and Herzegovina filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the constitutionality of the Law Amending the Law on the Flag of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina*, 23/04).

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 12 November 2019, the Parliamentary Assembly of Bosnia and Herzegovina, as the authority that adopted the challenged act, was requested to submit a response to the request.

3. On 2 December 2019, the Presidency of Bosnia and Herzegovina ("the Presidency") and the Parliamentary Assembly of Bosnia and Herzegovina ("the Parliamentary Assembly") were requested to submit information on whether the Presidency, after the adoption of the Law Amending the Law on the Flag of Bosnia and Herzegovina, had adopted an act to approve that Law for the purposes of Article I(6) of the Constitution of Bosnia and Herzegovina.

4. The House of Representatives submitted its response on behalf of the Parliamentary Assembly on 11 December 2019, and the Constitutional-Legal Commissions submitted their respective responses on behalf of the House of Representative and House of Peoples on 19 and 23 December 2019. The Presidency failed to submit its response to the request.

III. Facts of the Case

a) Allegations from the request

5. The applicant claims that the Law Amending the Law on the Flag on Bosnia and Herzegovina, which was adopted by the Parliamentary Assembly of Bosnia and Herzegovina in 2004, was not approved by the Presidency within the meaning of Article I(6) of the Constitution of Bosnia and Herzegovina. Therefore, according to the applicant, the Law in question is unconstitutional.

6. The applicant further alleges that the Law on the Flag of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina*, 19/01) was adopted by the Parliamentary Assembly of Bosnia and Herzegovina and approved by the Presidency of Bosnia and Herzegovina by a Decision to Approve the Design and Shape of the Flag of Bosnia and Herzegovina. Therefore, the provision of Article I(6) of the Constitution of Bosnia and Herzegovina was complied with.

7. The applicant also claims that none of the amendments included in the Law Amending the Law on the Flag of Bosnia and Herzegovina is compatible with the Constitution of Bosnia and Herzegovina. The reason being that the text of that Law, which was adopted by the Parliamentary Assembly of Bosnia and Herzegovina, is not in force, for it has not been approved by the Presidency.

b) Reply to the request

8. In its response to the request, the House of Representatives alleges that they forwarded the letter of the Constitutional Court to the Constitutional-Legal Commission of that House to give it an opportunity to express its opinion on the request. The House of Representatives also stressed that the House of Representatives of the Parliamentary Assembly had not appointed a Constitutional-Legal Commission yet.

9. In its response to the request, the Constitutional-Legal Commission of the House of Representatives of the Parliamentary Assembly alleges, *inter alia*, that "after a discussion it unanimously established that the Parliamentary Assembly, in accordance with its responsibilities referred to in Article IV(4) of the Constitution of Bosnia and Herzegovina, had adopted the Law Amending the Law on the Flag of Bosnia and Herzegovina (the *Official Gazette of Bosnia and Herzegovina*, 23/04).

10. In its response to the request, the Constitutional-Legal Commission of the House of Peoples of the Parliamentary Assembly alleges, *inter alia*, as follows: "Having considered your request for giving a response to the request for review of constitutionality and the letter related to the request of the Constitutional Court of Bosnia and Herzegovina, the Constitutional-Legal Commission established the following: 1. The Law Amending the Law on the Flag of Bosnia and Herzegovina was adopted by the Parliamentary Assembly of Bosnia and Herzegovina and it was published in the *Official Gazette of Bosnia and Herzegovina*, 23/04)…; Following a discussion, the Constitutional-Legal Commission unanimously decided to leave it up to the Constitutional Court of Bosnia and Herzegovina to decide on the request".

IV. Relevant Law

11. The **Constitution of Bosnia and Herzegovina**, in its relevant part, reads as follows:

Article I(6)
Symbols

Bosnia and Herzegovina shall have such symbols as are decided by its Parliamentary Assembly and approved by the Presidency.

Article VI(3)(a)

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 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 VI(5)

Decisions of the Constitutional Court shall be final and binding.

12. The **Law on the Flag of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 19/01), in its relevant part, reads:

Article 1

This Law regulates the shape and design of the flag of Bosnia and Herzegovina, as well as its display at the level of the State of Bosnia and Herzegovina.

Article 2

The flag of Bosnia and Herzegovina represents Bosnia and Herzegovina and is displayed as the symbol of Bosnia and Herzegovina.

Article 3

The flag of Bosnia and Herzegovina is of a blue colour. Right of centre there is a triangle of yellow colour. Running parallel to the left side of this triangle is a row of white five pointed stars in a line from the top edge of the flag to the bottom edge. The flag of Bosnia and Herzegovina is of a rectangular shape. The relationship between the length and width is 1:2.

Article 5

The flag of Bosnia and Herzegovina shall be officially displayed at the level of the State of Bosnia and Herzegovina in the following ways:

a) On all buildings of the Presidency of Bosnia and Herzegovina, the Council of Ministers and its three Ministries, the Parliamentary Assembly of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina, the Standing

Committee of Military Matters, the Commission of Human Rights, the Central Bank and the Permanent Election Commission following its formation and on any other building of the common institutions or institution which is administered by or reporting to the common institutions.

b) On all buildings of Embassies and Consulates of Bosnia and Herzegovina.

c) On official occasions of the departure of the members of the Presidency of Bosnia and Herzegovina abroad and on their return from abroad.

d) On official means of transport used by the members of the Presidency of Bosnia and Herzegovina.

e) On all occasions of official international visits, competitions and other gatherings (political, scientific, cultural - artistic, sports and others) at which Bosnia and Herzegovina is participating or is represented.

f) At the border crossings of Bosnia and Herzegovina

In all cases referred to in the previous paragraph, no other flag from Bosnia and Herzegovina shall be displayed together with the flag of Bosnia Herzegovina.

Official display of the flag in the Entities and unofficial use of the flag will be regulated by a separate law.

Article 6

Disrespect for the flag of Bosnia and Herzegovina is a punishable offense. Necessary legislation shall be adopted by the Entities within 2 months from the entry into force of this Law.

Article 7

This Law shall be published in the "Official Gazette of Bosnia and Herzegovina" and in the official gazettes of the Entities.

13. The **Decision to Approve the Design and Shape of the Flag of Bosnia and Herzegovina by the Presidency of Bosnia and Herzegovin**a (*Official Gazette of Bosnia and Herzegovina*, 28/01) reads:

I.

Design and shape of the flag of Bosnia and Herzegovina, which were determined in the Law on the Flag of Bosnia and Herzegovina by the Parliamentary Assembly of Bosnia and Herzegovina is hereby approved, the Official Gazette of BiH, 19, of 3 August 2001.

II.

This Decision shall come into force on the date of its publication in the Official Gazette of BiH.

14. The **Law Amending the Law on the Flag of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 23/04) reads:

Article 1

In Article 5(1)(a) of the Law on the Flag of Bosnia and Herzegovina (Official Gazette of BiH, 19/01) the words "its three Ministries" shall be replaced with the words "its Ministries; after the words "the Constitutional Court of Bosnia and Herzegovina",, the following words shall be added: "the Court of Bosnia and Herzegovina, Prosecutor's Office of Bosnia and Herzegovina"; the words "the Permanent Election Commission following its formation" shall be replaced with the words "the Election Commission of Bosnia and Herzegovina".

In paragraph 1 of the same Article, item g) shall be added to read:

"At the entrances of the facilities of the Armed Forces of Bosnia and Herzegovina".

Paragraph 2 of Article 5 shall be amended to read:

In all cases referred to in the previous paragraph, with the exception of item g), no other flag from Bosnia and Herzegovina shall be displayed together with the flag of Bosnia and Herzegovina.

Article 2

Article 6 shall be amended to read:

"The use of the flag of Bosnia and Herzegovina in contravention of the provisions of Articles 3 and 4 of the Law and the failure to display the flag of Bosnia and Herzegovina in compliance with 5 of the Law shall constitute a minor offence for which a fine shall be imposed on:

1. Governmental body, company or any other legal person in the amount ranging from BAM 1,500 to BAM 7,500;

2. Responsible person within the governmental body, company or any other legal person in the amount ranging from BAM 300 to BAM 750;

3. Person who performs an independent economic activity in the amount ranging from BAM 300 to BAM 750;

4. Citizen in the amount ranging from BAM 100 to BAM 400.

A protective measure of seizure of items used for the perpetration of minor offence shall be imposed on the offenders of the minor offence referred to in paragraph 1 of this Article."

Article 3

This Law shall come into force on eight day from the date of its publication in the Official Gazette of Bosnia and Herzegovina.

V. Admissibility

15. 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.

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.

16. In the present case, it is indisputable that for the purposes of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court has jurisdiction to decide on the constitutionality of a law at the State level, more specifically, on the Law Amending the Law on the Flag of Bosnia and Herzegovina. In addition, the request for review of constitutionality was filed by a member of the Presidency, which means that the request was filed by an authorized persons within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. Bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court establishes that the request is admissible, as it was lodged by an authorized person and that there is not a single reason under Article 19 of the Rules of the Constitutional Court rendering this request inadmissible.

VI. Merits

17. The applicant claims that the Law Amending the Law on the Flag of Bosnia and Herzegovina is not compatible with Article I(6) of the Constitution of Bosnia and Herzegovina, as the Presidency did not approve it after the Parliamentary Assembly adopted it. The Constitutional Court recalls that Article 3 of the Law in question prescribes that it shall come into force on the eighth day from the date of its publication in the *Official Gazette of Bosnia and Herzegovina*. The Law Amending the Law on the Flag of Bosnia and Herzegovina was published in the *Official Gazette of Bosnia and Herzegovina*, 23/04, of 25 May 2005, which means that it came into force.

18. The Constitutional Court recalls that symbols in constitutional context were the subject of the Decision *No. U-4/04.* In that decision, the Constitutional Court emphasized, *inter alia*, as follows: "…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. No doubt that the symbols convey certain emotions and meaning which those who recognize their history, tradition and culture in those symbols experience in a specific way. The symbols are not pure images and decorations but each of them carries certain deeper and hidden meaning…. Moreover, a flag represents the symbol which sublimates achievements, hope and ideals of all citizens of a country" (see, Constitutional Court, Partial Decision on Merits, of 31 March 2006, paragraph 113, published in the *Official Gazette of Bosnia and Herzegovina*, 47/06, available at www.ustavnisud.ba).

19. Given the fact that Article I(6) of the Constitution of Bosnia and Herzegovina reads: "Bosnia and Herzegovina shall have such symbols as are decided by its Parliamentary Assembly and approved by the Presidency", it is indisputable that the Constitution of Bosnia and Herzegovina provides for joint competence of the Parliamentary Assembly and Presidency in determining the symbols Bosnia and Herzegovina. The joint competence means that the Parliamentary Assembly shall adopt a decision on symbols and, in order for that decision to be compatible with the Constitution of Bosnia and Herzegovina, it must be approved by the Presidency.

20. The Constitutional Court recalls that the Parliamentary Assembly, at the session of the House of Representatives held on 6 June 2001 and at the session of the House of Peoples held on 23 May 2001, adopted the Law on the Flag of Bosnia and Herzegovina. Article 1 of that Law stipulates: "This Law regulates the shape and design of the flag of Bosnia and Herzegovina, as well as its display at the level of the State of Bosnia and Herzegovina". Article 3 of the same Law determines design and shape of the flag, and Articles 5 and 6 prescribe the place and manner in which the flag shall be displayed, and stipulate that disrespect for the flag of Bosnia and Herzegovina is a punishable offense. Article 7 stipulates that the Law shall be published in the *Official Gazette of Bosnia and Herzegovina and in the Official Gazettes of the Entities.* The Law on the Flag of Bosnia and Herzegovina was published in *Official Gazette of Bosnia and Herzegovina,* 19/01, of 3 August 2001.

21. At the session held on 12 October 2001, the Presidency adopted a Decision to Approve the Design and Shape of the Flag of Bosnia and Herzegovina. Article I. of that Decision reads: "The design and shape of the flag of Bosnia and Herzegovina, which was determined in the Law on the Flag of Bosnia and Herzegovina by the Parliamentary Assembly of Bosnia and Herzegovina is hereby approved, the *Official Gazette of BiH*, 19 of 3 August 2001, and Article II of that Decision reads: "This Decision shall enter into force on the date of its publication in the *Official Gazette of BiH*". The Decision in question was published in the *Official Gazette of BiH*, 28/01, of 13 November 2001.

22. Subsequently, the Parliamentary Assembly adopted the Law Amending the Law on the Flag of Bosnia and Herzegovina. That Law came into force on the eighth day from the date of its publication in the *Official Gazette of Bosnia and Herzegovina*. No decision of the Presidency in relation to that Law has been published in the *Official Gazette of BiH,* and the Presidency did not submit any response to the Constitutional Court's request for information on whether the Presidency had adopted any act to approve that Law.

23. As to the present request, the Constitutional Court notes that the case does not relate to a Decision or a Law of the Parliamentary Assembly that determines the flag as a symbol of Bosnia and Herzegovina in terms of the type, design and shape of that symbol (given the fact that it is determined in the Law on the Flag of Bosnia and Herzegovina), but it concerns the Law Amending the Law on the Flag of Bosnia and Herzegovina, which regulates the issue of display of the flag of Bosnia and Herzegovina in a different way and stipulates punishable offence in case of disrespect for specific law provisions. The fact is that the Law on the Flag of Bosnia and Herzegovina, as a unique law, regulates also the issues of the flag as a symbol, its design and shape, but also the issues of its display and sanctions in case of disrespect for specific law provisions. However, in terms of Article I(6) of the Constitution of Bosnia and Herzegovina, the joint competence of the Parliamentary Assembly and Presidency exclusively relates to the type, design and shape, *i.e.* the content of the symbols of Bosnia and Herzegovina. Other issues, such as the manner and obligation to display it, sanctions in case of disrespect for specific law provisions and other issues fall within the responsibilities of the Parliamentary Assembly, which may regulate them by a unique law, as mentioned above, or by a special law.

24. In view of the above, the Constitutional Court concludes that the Law Amending the Law on the Flag of Bosnia and Herzegovina, which was adopted by the Parliamentary Assembly and which came into force on the eighth day from the date of its publication in the *Official Gazette of BiH*, is compatible with Article I(6) of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

25. The Constitutional Court concludes that the Law Amending the Law on the Flag of Bosnia and Herzegovina (the *Official Gazette of Bosnia and Herzegovina,* 23/04) is compatible with Article I(6) of the Constitution of Bosnia and Herzegovina, as it stipulates the display of the flag and the responsibility in case of disrespect for specific law provisions, which is an exclusive competence of the Parliamentary Assembly. Therefore, it does not determine which and what kind of symbols Bosnia and Herzegovina shall have, which is a joint competence of the Parliamentary Assembly and the Presidency. Thus, following the adoption of the Law by the Parliamentary Assembly, unlike the allegations of the applicant, the approval of that Law by the Presidency is not necessary in terms of Article I(6) of the Constitution of Bosnia and Herzegovina.

26. Pursuant to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

27. Pursuant to Article 43 of the Rules of the Constitutional Court, a Separate Dissenting Opinions of Vice-President Miodrag Simović and Judge Zlatko M. Knežević are annexed to the present Decision.

28. In view of Article VI(5) 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 VICE-PRESIDENT MIODRAG SIMOVIĆ

At the 122nd plenary session of 15 July 2021, in the case no. *U-11/19*, the Constitutional Court, by a majority vote, adopted a decision establishing that the Law Amending the Law on the Flag of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina*, 23/02) is compatible with Article I(6) of the Constitution of Bosnia and Herzegovina. I did not support this decision of the Court, which was adopted upon a request lodged by Milorad Dodik, a member of the Presidency of Bosnia and Herzegovina, for the following reasons:

(1) The principle of constitutionality requires the legislature to comply with the norms contained in the constitution in its regular legislative activity. In order to exercise this principle, there is a function of the constitutional judiciary or review of constitutionality. It sanctions a violation of the constitution as the supreme law. In the event of a conflict between the constitution and a law, either the constitution will take precedence over the conflicting law or the ordinary law will change the constitution. A middle solution is not possible.

(2) Article I(6) of the Constitution of Bosnia and Herzegovina stipulates that "Bosnia and Herzegovina shall have such symbols as are decided by its Parliamentary Assembly and approved by the Presidency." Both conditions for determining the symbols of the State of Bosnia and Herzegovina are therefore set cumulatively: a) a decision is required (it does not have to be just a law, but also another decision) of the Parliamentary Assembly of BiH and b) approval of the Presidency of BiH. In the present case, the constitutional obligation, relating to the approval by the Presidency of BiH, was not complied with.

(3) The importance of complying with the constitutional provision of Article I(6) also stems from the fact that the authors of the Constitution of Bosnia and Herzegovina in Dayton failed to define state symbols constitutionally. The signatories agreed to authorize the Parliamentary Assembly of BiH to decide on the symbols, but with the restriction that the Presidency of BiH must approve the decision. As is well known, it was not possible to reach an agreement on common state symbols in the BiH Parliamentary Assembly for years. Thus, on 3 February 1998, the High Representative for BiH simply imposed the symbols (Decision imposing the Law on the Flag of BiH - *Official Gazette of BiH*, 1/98). In addition, state symbols, such as the flag, coat of arms and anthem, are usually part of the identification with the state.

(4) The decision of the Constitutional Court also calls into question the constitutional competences of the Presidency of Bosnia and Herzegovina under Article V(3) of the Constitution of Bosnia and Herzegovina, referred to in the subchapter correctly titled

"Powers". However, despite that title, this paragraph does not contain an exhaustive list of powers of the Presidency. Also, the Presidency has the constitutional powers granted to it under Article V(4) and (5), as well as under other articles of the BiH Constitution, as set out below. One of those competences is set out in Article I(6) of the Constitution.

(5) The competencies of the Presidency of Bosnia and Herzegovina listed in paragraph 3 of Article 5 of the Constitution are divided into two categories - those that require a "decision" of the Presidency and those that involve actions of lesser legal significance than decision-making such as "reporting", "coordinating" and "proposing". The competence referred to in Article I (6) of the Constitution is of particular importance because it includes an "approval" by the Presidency of Bosnia and Herzegovina, which is of a binding nature.

(6) Certainly, the Constitutional Court is not bound by the standpoint of the doctrine, but for its part, it is obliged to formulate its own interpretation that will oppose, by convincing constitutional and legal arguments, the "wrong" doctrinal interpretation of constitutional law. Instead of such a response, the majority position of the Constitutional Court followed a second, more comfortable path. Hesitating between "judicial restraint" and "judicial activism", the Constitutional Court made a mistake. Therefore, the Court, exaggerating in its own "judicial restraint", impressed by the political significance of the constitutional dispute, apparently relented before the obligation to get into the heart of the constitutional dispute in question.

To conclude, if the Constitutional Court, in this case, had relied on the Constitution of Bosnia and Herzegovina and the undivided standpoint of BiH constitutional doctrine, it would have certainly considered that it was about a binding rule under Article I(6), which has a constitutional character. Instead of the decision determining the unconstitutionality in the procedure of passing the impugned law, the Court essentially made the decision dismissing the request for review of the constitutionality of the law in question. It is evident that in this case, the role of the Constitutional Court does not correspond to the one assigned to it by the constitution authors.

SEPARATE DISSENTING OPINION OF JUDGE ZLATKO M. KNEŽEVIĆ

At its plenary session held on 15 and 16 July 2021, the Constitutional Court of Bosnia and Herzegovina, deciding on the request for review of the constitutionality of the Law on Amendments to the Law on the Flag of Bosnia and Herzegovina (*Official Gazette of BiH,* 23/04), lodged by authorized applicant Milorad Dodik, a member of the Presidency of Bosnia and Herzegovina, adopted a decision establishing that the challenged Law on Amendments is in accordance with the Constitution of Bosnia and Herzegovina, *i.e.* with Article I(6) of the Constitution.

I did not accept the decision of the majority and voted against it for the following reasons:

- It is indisputable that the Law on the Flag of Bosnia and Herzegovina (*Official Gazette of BiH,* 19/01) was adopted in accordance with the provision of the Constitution of Bosnia and Herzegovina governing the matter in question, *i.e.* with Article I(6). Article requires that after the adoption of the decision/law on the flag by the Parliamentary Assembly, the decision/law shall be approved by the Presidency of Bosnia and Herzegovina. That was done, and it is reasoned in detail in Decision *U-11/19*.

- However, the Law on Amendments to the Law on the Flag of Bosnia and Herzegovina was **NOT** passed in the same way and following the same procedure, which is actually indicated by the authorized applicant, given that the Presidency of Bosnia and Herzegovina never approved the impugned Law. The same is also stated in detail in the Decision no. *U-11/19*.

- The conclusion made by the majority is that the authority of the Presidency of Bosnia and Herzegovina refers to the type, design, shape and content of the flag and that, therefore, the Parliamentary Assembly is authorized to pass amendments but that the Presidency does not have the authority to approve the decision/law, *i.e.* the provision of Article I(6) does not refer to amendments to the law, for it concerns the manner and obligation to display the symbols, sanctions for non-compliance, and some other issues.

- I consider that the decision of the Court, as such, is wrong for at least two substantial reasons:

1. According to the reasoning of the decision, the basic text of the law and its possible amendments do not have the same ***legal nature*** or the **same legal force**. It is a well-known fact that the law and its amendments **must** be passed in the same way, as they have the same force and effect. Although the reasoning of the decision (paragraph 19)

acknowledges that this matter concerns a shared competence between the Parliamentary Assembly and the Presidency, there is no argument to **transfer** this shared competence in favour of only one holder of the shared authority (Parliamentary Assembly). All the more so because Article I(6) of the Constitution concerns symbols (and the flag is a symbol) determined by the Parliamentary Assembly and confirmed by the Presidency. Therefore, this is about a basic law and all its amendments must be adopted in the same way and following the same procedure, as provided by the Constitution. Perhaps part of the reasoning in paragraph 23 of the Decision would have its *ratio* if it were some other law that would regulate the manner and obligation of display, but even then, there would be serious doubts as to the correctness of such a conclusion.

2. In my view, the second wrong conclusion in the decision is even more serious. The Presidency of Bosnia and Herzegovina has its exclusive competence determined by the Constitution, and no authority can diminish or remove the competence of the Presidency by its decision. The Constitutional Court can and ought to interpret the provisions of the Constitution, but it can in no way engage into in decision-making by which it would diminish the competence of the Presidency. Such a position introduces the possibility that some law/decision of another body diminishes the competence of the Presidency. It is indisputable that decision-making on some other issues can be handed over to the competence of the Presidency by law, but it can never be diminished. The competence of the highest executive authority (the Presidency, according to our Constitution) is always interpreted in constitutional disputes in such a way that the competences determined by the Constitution are always strictly complied with. In the present case, it is not about the competence that is **derived from** some other laws, but about an express constitutional norm. In my view, the Presidency, as an institution in whole, has no interest in having its competencies diminished. I therefore cannot accept the competences of the Presidency to be diminished, for that breaches an explicit constitutional norm.

3. For those reasons, I am unable to accept the proposed decision and I therefore voted against it.

Case No. U-4/21

DECISION ON ADMISSIBILITY AND MERITS

Request of seven delegates of the Council of Peoples of the Republika Srpska for review of the constitutionality of the Law on Forests of the Republika Srpska (*Official Gazette of the Republika Srpska*, 75/08, 60/13 and 70/20)

Decision of 23 September 2021

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3) (a) of the Constitution of Bosnia and Herzegovina, Article 57 (2) (b), Article 59 (1) and (2) and Article 61 (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Mato Tadić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Ms. Seada Palavrić,

Mr. Zlatko M. Knežević,

Ms. Angelika Nussberger, and

Ms. Helen Keller

Having deliberated on the request filed by the **seven delegates of the Council of Peoples of the Republika Srpska,** in the Case no. **U-4/21**, at its session held on 23 September 2021, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding the request filed by the seven delegates of the Council of Peoples of the Republika Srpska for review of the constitutionality of the Law on Forests of the Republika Srpska (*Official Gazette of the Republika Srpska*, 75/08, 60/13 and 70/20),

it is hereby established that the provisions of Article 3, Article 4 (1), Article 5 (2) (dj) and (3), Article 18 (1) and (2), Article 22 (1) and (2), Article 23 (1), Article 24 (1), Article 28 (2), Articles 31 and 33, Article 34 (1) (l) and (2) and (3), Articles 35 and 36, Article 37 (2), Article 46 (3), Article 47 (5), Article 48 (2), Article 49, Article 50 (2), Article 51 (3), Article 52 (1), Article 54 (1), Article 55 (1), Article 57 (1), Article 58 (2), Article 60 (1), (3), (4) and (5), Article 61 (3), Article 62 (1), (2), (5), (6) and (8), Article 63 (3), Article 64, Article 65 (2), (3) (b), (v) and (i), Article 66, Article 71 (3) and (4), Article 72 (5), (6) and (7), Article 73 (1) and (2), Article 74 (2) and (5), Article 75, Article 77 (2), (3) and (5), Article 79, Article 80 (2), Article 81 (2), Article 82 (2), (3), (7) and (8), Article 84, Article 85 (1) and (2),

Article 88 (1) (g), Article 89 (1), (2), (6) and (10), Article 90 (2), Article 92 (1) and (3), Article 95 (1), Article 97 (1) and (2), Article 98, Article 101 (1) (g), (dj) and (j), Article 102 (1) (dž) and š), Article 104 (1), (2), (3), (4) and (5) and Article 107 (3) (z) and (i) of the Law on Forests of the Republika Srpska (*Official Gazette of the Republika Srpska*, 75/08, 60/13 and 70/20), in the part reading "owned by the Republic", are not in conformity with Articles I (1), III (3) (b) and IV (4) (e) of the Constitution of Bosnia and Herzegovina.

The National Assembly of the Republika Srpska is hereby ordered, in accordance with Article 61 (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to harmonize, no later than six months of the date of delivery of this Decision, the provisions of Article 3, Article 4 (1), Article 5 (2) (dj) and (3), Article 18 (1) and (2), Article 22 (1) and (2), Article 23 (1), Article 24 (1), Article 28 (2), Articles 31 and 33, Article 34 (1) (l) and (2) and (3), Articles 35 and 36, Article 37 (2), Article 46 (3), Article 47 (5), Article 48 (2), Article 49, Article 50 (2), Article 51 (3), Article 52 (1), Article 54 (1), Article 55 (1), Article 57 (1), Article 58 (2), Article 60 (1), (3), (4) and (5), Article 61 (3), Article 62 (1), (2), (5), (6) and (8), Article 63 (3), Article 64, Article 65 (2), (3) (b), (v) and (i), Article 66, Article 71 (3) and (4), Article 72 (5), (6) and (7), Article 73 (1) and (2), Article 74 (2) and (5), Article 75, Article 77 (2), (3) and (5), Article 79, Article 80 (2), Article 81 (2), Article 82 (2), (3), (7) and (8), Article 84, Article 85 (1) and (2), Article 88 (1) (g), Article 89 (1), (2), (6) and (10), Article 90 (2), Article 92 (1) and (3), Article 95 (1), Article 97 (1) and (2), Article 98, Article 101 (1) (g), (dj) and (j), Article 102 (1) (dž) and š), Article 104 (1), (2), (3), (4) and (5) and Article 107 (3) (z) and (i) of the Law on Forests of the Republika Srpska (*Official Gazette of the Republika Srpska*, 75/08, 60/13 and 70/20), in the part reading "owned by the Republic", with Articles I (1), III (3) (b) and IV (4) (e) of the Constitution of Bosnia and Herzegovina.

The National Assembly of the Republika Srpska is hereby ordered to notify the Constitutional Court of Bosnia and Herzegovina, no later than three months after the expiration of the time limit referred to in the foregoing paragraph, about the measures taken with a view to enforcing this Decision, in accordance with Article 72 (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 26 February 2021, Mihnet Okić, Džemaludin Šabanović, Muris Čirkić, Samir Baćevac, Alija Tabaković, Faruk Djozić and Ahmet Čirkić, seven delegates of the Council of Peoples of the Republika Srpska ("the applicant"), filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the constitutionality of the Law on Forests of the Republika Srpska (*Official Gazette of the Republika Srpska*, 75/08, 60/13 and 70/20, "the challenged Law").

2. At the same time, the applicants requested that the Constitutional Court render a decision on an interim measure prohibiting the application of the challenged law pending a final decision by the Constitutional Court on the request in question.

II. Procedure before the Constitutional Court

3. On 5 March 2021, the National Assembly of the Republika Srpska ("the National Assembly"), pursuant to Article 23 of the Rules of the Constitutional Court, was requested to submit its reply to the request.

4. The National Assembly submitted its reply on 24 June 2021.

III. Request

a) Allegations stated in the request

5. The applicant deems that the challenged law is in violation of the provisions of Article I (1), Article III (3) (b) and Article IV (4) (e) of the Constitution of Bosnia and Herzegovina, as well as Article 2 of Annex II to the Constitution of Bosnia and Herzegovina. It is pointed out that despite clear prohibitions for the issue of state property to be resolved unilaterally, and despite a clear position of the Constitutional Court in the cases nos. *U-1/11*, *U-8/19* and *U-9/19* that the said issue falls within the exclusive jurisdiction of Bosnia and Herzegovina, the National Assembly passed the challenged law which, in the opinion of the applicant, unilaterally resolved the issue of part of the state property of BiH.

6. The provisions of the challenged law, as further stated, apply to all forests and forestland, irrespective of the form of ownership. Under Article 2 of the challenged law, forests and forestland are natural goods of general interest and enjoy special care and protection of the Republika Srpska. The applicant indicates that despite a series of decisions of the Constitutional Court (nos. *U-1/11*, *U-8/19* and *U-9/19*), according to which the state property is the ownership of the State of BiH, the National Assembly prescribed under Article 3 of the challenged law that forests and forestland in the

territory of the RS are the ownership of the Republika Srpska and other legal and natural persons. It is highlighted that forests and forestland owned by legal and natural persons make a minor portion of this public good. The applicant deems that Article 3 of the challenged law is contrary to the mentioned provisions of the Constitution of BiH, as, under the said Article, the Republika Srpska unconstitutionally assigned the right of ownership of forests and forestland to the Entity of RS. In the opinion of the applicant, unconstitutionally assigned right of ownership of forests and forestland was the basis for further definition of disposal and management of forests and forestland, as done in other provisions of the challenged law. The applicant holds that the mentioned provisions of the challenged law, which regulate the right of management of forests and forestland "owned by the Republic" (the words "owned by the Republic" are marked in bold in the request), are in contravention of the Constitution of BiH. Therefore, the entire law is unconstitutional and the applicant challenges it in its entirety.

7. As to the state property, the applicant refers to the following: the 1994 Law on the Transformation of Social Property into State Property, the Decision of the Constitutional Court no. *U-1/11* of 13 July 2012 and positions referred to in that Decision on the continuity of the State of BiH and state property, the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina and two Entity laws prohibiting the disposal of state property in the territory of the Entities. The applicant stated that, despite the fact that the issue of state property is the issue that falls primarily within the jurisdiction of the State of BiH, the Entity of Republika Srpska tried to resolve it unilaterally and contrary to the Constitution of BiH. Thus, it passed the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban, which law stipulated that it was the property owned by the Republika Srpska (in respect of which the Constitutional Court rendered the Decision no. *U-1/11*). The applicant stated that similar thing occurred with regard to the challenged law.

8. The applicant further states that the Law on the Transformation of Social Property passed by RBiH in 1994 established that on the day of entry into force of that law RBiH became the holder of the right of ownership of socially owned property, as prescribed under Article 1 of that Law. In addition, the applicant emphasises that BiH concluded the Agreement on Succession Issues among Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the Federal Republic of Yugoslavia (done in Vienna on 29 June 2001, which was ratified on 28 November 2001 by the decision of the Presidency of BiH). Under Article 2 of Annex A to the Succession Agreement "Immovable State property of the former SFRY which was located within the territory of the former SFRY shall pass to the successor State on whose territory that property is situated". The applicant considers that the Succession Agreement undoubtedly shows that the State of BiH is an owner of the immovable property of the former SFRY, which, upon the dissolution of the former SFRY, was situated in the territory of BiH. Bosnia and Herzegovina, as a subject of international

law and a signatory to this multilateral agreement (Succession Agreement), which was ratified by its competent authorities and bodies, has the obligation to comply with the said agreement.

9. As to the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina and the two Entity laws prohibiting the disposal of state property in the territory of the Federation of BiH and the RS, which were enacted by the decision of the High Representative for BiH, it is pointed out that the mentioned laws are still in force given the fact that no law on state property at the level of BiH has been passed. Next, it is mentioned that Article 1 (1) and (2) of the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina determined the immovable property that is regarded as a state property of BiH.

10. The applicant highlights that the continuity of the State of BiH, as prescribed under Article I (1) of the Constitution of BiH, in the present case implies the continuity of the right of the State of BiH to regulate the issue of state property that belonged to it based on the right of disposal, management or use. That property, as the applicant deems, certainly includes forests and forestland, which the challenged law declared public good owned by the RS. The mentioned property constitutes part of the property that was allocated to the State of BiH under the Succession Agreement, in respect of which the Constitutional Court, in its Decision no. *U-1/11*, established that it might be the subject of disposal only in accordance with the laws at the level of BiH. Therefore, as indicated by the applicant, a unilateral solution that was established by the challenged law constitutes a violation of Article I (1) of the Constitution of BiH.

11. It is pointed out that the Succession Agreement (Articles 1 and 2 of Annex A) undoubtedly show that the State of BiH is the owner of the state property. In the Decision no. *U-1/11,* the Constitutional Court defined the term of "state property", and established that, by its nature, it serves primarily to all the people in the State and represents a reflection of statehood, sovereignty and territorial integrity of BiH. In the opinion of the applicant, despite the fact that it is obvious that forests and forestland, as referred to in the challenged law, are part of the state property, which became the property of the State of BiH under the Succession Agreement, the challenged law prescribes that the said property is *ex lege* the public good owned by the Republika Srpska. In such a way the State of BiH is deprived of the right to exercise its international obligations prescribed under Article III (3) (b) of the Constitution of BiH.

12. The applicant states that the challenged law also violates Article IV (4) (e) of the Constitution of BiH, which bestows upon the Parliamentary Assembly of BiH the jurisdiction concerning other issues required for the exercise of the commitments of the State. It is stated that the state property is an issue that falls within the exclusive jurisdiction of the State of BiH and its authorities, which may be observed from a number of laws that were enacted by the decision of the High Representative for BiH.

Those are the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina and the two Entity laws prohibiting the disposal of state property in the territory of the Federation of BiH and the RS respectively.

13. In addition, the applicant alleges that the 1993 Law on Forests of the Republic of Bosnia and Herzegovina is still in legal force. This law was passed by the Presidency of the Republic of BiH on 4 October 1993, first as an Ordinance on Forests with Legal Force (*Official Gazette of the Republic of BiH*, 23/93), which was confirmed as a law under the Law Confirming Ordinances with Legal Force (*Official Gazette of the Republic of BiH*, 13/94). Bearing in mind the constitutional principle of the rule of law referred to in Article I (2) of the Constitution of BiH and the continuity of regulations referred to in Article 2 of Annex II to the Constitution of BiH, the applicant alleges that the 1993 Law on Forests of the Republic of BiH is still part of the legal system of BiH, for after the entry into force of the Constitution of BiH "the competent authority of BiH" failed to render any decision whatsoever which would determine differently the management of forests and forestland in the territory of BiH. Furthermore, in the opinion of the applicant, the mentioned law is not in contravention of the Constitution of BiH. By passing the challenged law, in the view of the applicant, the authorities of the Entity of the RS call into question the application of the mentioned Law on Forests of the Republic of BiH, thereby violating Article I (2) of the Constitution of BiH and Article 2 of Annex II to the Constitution of BiH.

14. The applicant proposed that the Constitutional Court render a decision granting the request for review of the constitutionality of the challenged law and establish that the challenged law is not in conformity with Article I (1), Article III (3) (b) and Article IV (4) (e) of the Constitution of BiH, as well as Article 2 of Annex II to the Constitution of BiH, and that it shall cease to be in force on the day following the day of the publication of the decision in the *Official Gazette of BiH*.

15. The applicant proposed, for preventing detrimental consequences that the challenged law might generate, that the Constitutional Court issue an interim measure prohibiting the application of the challenged law pending a final decision by the Constitutional Court. The challenged provisions, as alleged, would make possible the registration of state property in the land books in favour of the Entity of Republika Srpska, which is situated in the territory of the mentioned Entity and is under the disposal ban. That would make it possible for the disposal of that property by the authorities of the Entity of Republika Srpska and the resulting damage would be hard to repair. In addition, the process to resolve the issue of state property would be made more difficult, which is of great importance for continued negotiations with the European Commission in the process of the application of Bosnia and Herzegovina for a candidate status for admission into the European Union.

b) Reply to the request

16. In its reply to the request, the National Assembly primarily challenges the authorization of the applicant to initiate a proceeding, within the meaning of Article VI (3) (a) of the Constitution of Bosnia and Herzegovina, as the Council of Peoples of the RS does not represent one separate chamber of the National Assembly. This follows from Article 69 (2) of the RS Constitution. Therefore, it is clear, as the National Assembly infers, that the Council of Peoples, which possesses a restrictive jurisdiction, represents one separate body for the protection of the vital national interest of any of the constituent peoples, and not the second chamber of the RS National Assembly.

17. In the opinion of the National Assembly, the mentioned request is ill-founded, therefore the Constitutional Court should dismiss it, as well as the request for the adoption of an interim measure. To support the aforementioned, it is indicated that Amendment XXXII to Article 68 paragraph 6 of the Constitution of the Republika Srpska prescribes that the Republic, among other things, regulates and secures property and obligations-related relations and the protection of all forms of property. It is indicated that paragraph 8 of the same Article prescribes that the Republic regulates the basic objectives and directions of economic, scientific, technological, demographic and social development, development of agriculture and villages, *etc*. In addition, Article 59 (2) of the Constitution of the Republika Srpska prescribes that the law regulates the protection, use, improvement and management of goods of public interest. In accordance with Article 64 of the Constitution, the Republic, among other things, protects and encourages rational use of natural resources with a view to protecting and improving the quality of life, protecting, and renewing the environment in general interest. Further, it is indicated that based on the mentioned provisions of the Constitution of the Republika Srpska, which are the constitutional basis for passing the respective law, it clearly follows that the Republika Srpska has the jurisdiction to pass the Law on Forests. Thus, it has the jurisdiction to regulate all issues of relevance to the forests and forestland, as goods of general interest, including the issue of ownership of forests and forestland.

18. In addition, the National Assembly alleges that the applicant's position is ill-founded where suggesting that the challenged law is unconstitutional for it regulates the issues of management and administration of forests and forestland as part of state property, and that the issue of state property is within the exclusive jurisdiction of the State of BiH and its authorities. It is indicated that the Law on Forests regulates the issues of relevance to forests as a good of general interest for the purpose of advancing and sustainably using forests and forestland, as well as developing forestry in the Republika Srpska. Thus, the challenged law regulates comprehensively the area of forests in the Republika Srpska and its provisions apply to all forests irrespective of the form of ownership. This law applies equally to forests and forestland owned by natural and legal persons, which is the reason why the allegations made by the applicant are not true in that they suggest that this law regulates the disposal of state property.

19. The National Assembly points out that the interpretation of the applicant is particularly unacceptable concerning the term of state property itself. Namely, while referring to the reasoning provided for certain decisions of the Constitutional Court of BiH (*U-1/11*, *U-8/19* and *U-9/19*) the applicant reached a conclusion that forests and forestland are a public good and, accordingly, a part of state property the regulation of which falls within the jurisdiction of the BiH institutions. This understanding is contrary also to the decisions of the Constitutional Court, which the applicant referred to, as the Decision no. *U-1/11* speaks about property the owner of which is BiH, however, there is no identification of public good with state property, that is to say that neither this nor other decisions read that Bosnia and Herzegovina is an owner of all public goods, nor that all public goods constitute state property. Such a thing does not ensue from either the Constitution of BiH or any other legal act or international convention. The National Assembly further indicates that the applicant alleges that the earlier decisions of the Constitutional Court, primarily the Decision no. U-1/11, established that the exclusive jurisdiction to regulate state property rested on BiH, but not even the mentioned decision or other decisions for that matter noted or presumed that it implied the exclusive jurisdiction of Bosnia and Herzegovina to regulate the area of forests and forestland. This is understandable, as such a conclusion would be contrary to the Constitution of BiH.

20. Namely, as further mentioned, the area of forestry is not envisaged under Article III (1) of the Constitution of BiH as an exclusive jurisdiction of the institutions of BiH, which undoubtedly follows from the text thereof. Even if the position of the Constitutional Court was taken into account that the exclusive competences of BiH are not exhausted by the list under Article III (1) of the Constitution of BiH, and that the complete text of the Constitution of BiH has to be taken into account, the area of forests still remains outside the exclusive jurisdiction of the institutions of BiH, unless the Entities agreed on that issue within the meaning of Article III (5) (a) of the Constitution of BiH. However, as there is no approval of the Entities regarding this issue, *i.e.* there is no consensus for the institutions of BiH to assume exclusive jurisdiction for the regulation of forests, there are no conditions to establish additional jurisdiction of the institutions of BiH based on Article III (5) (a) of the Constitution of BiH.

21. In the opinion of the National Assembly, the allegations of the applicant that the challenged law is in violation of Article I (1), Article I (2), Article III (3) (b) and Article IV (4) (e) of the Constitution of BiH are unfounded.

22. As to Article I (1) of the Constitution of BiH, the National Assembly indicates that the mentioned Article prescribes strictly the continuity of the subjectivity of BiH under the international law, which does not result in legal continuity of property, *i.e.* the continuity of ownership of forests and forestland. The portion of the mentioned provision "... with its internal structure modified as provided in this Constitution", actually means that the legal continuity does not rule out the internal structure as modified and defined

under the Constitution of BiH. In other words, as further mentioned, the continuity of state property may exist only with the respect for the internal structure as modified under the Constitution of BiH, which clearly establishes the demarcation of jurisdiction between the institutions of BiH and those of the Entities. Thus, when regulating the issue of forests it is necessary to respect the internal structure and the separation of powers in accordance with the Constitution of BiH, which undoubtedly bestows the competence for the regulation of this issue on the Entities. It is also indicated that Article III (3) (a) of the Constitution of BiH regulates residual responsibilities of the Entities, accordingly prescribing 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.

23. As to Article I (2) of the Constitution of BiH, the National Assembly states that the applicant's allegations are ill-founded as a whole. This suggests that the National Assembly has no constitutional basis to regulate by law the issue of management and administration of forests and forestland, as part of the state property, as it concerns a matter already regulated under the Law on Forests at the state level (the Law of the Republic of BiH passed as an Ordinance in 1993 and which was confirmed by virtue of the Ordinance with a Legal Force in 1994). Namely, the responsibilities for the regulation of certain issues, including the issue of management and administration of forests, are prescribed by the Constitution of BiH, wherefrom it follows that it is an issue that falls within exclusive jurisdiction of the Entities. Accordingly, in the opinion of the National Assembly, the allegations are unfounded that the challenged Law on Forests is in violation of the provisions of Article I (2) of the Constitution of BiH, which laid down democratic principles, reading that Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections. In addition, it is mentioned that the applicant refers to the constitutional principle of continuity of regulations under Article 2 of Annex II, and that, in keeping with the foregoing, the Law on Forests of the Republic of BiH is still in force and that there is an obligation of all the lower instance authorities, including the legislator in the Republika Srpska, to comply with and to uphold the mentioned law. The National Assembly indicates that the Law on Forests of the Republic of BiH is contrary to the basic principles on which of the Constitution of BiH rests, *i.e*. to the principle of consensus of the constituent peoples, which did not exist in order for this issue to be regulated at the state level, or regarding the text of the law itself. That this law is not in force and that it has not been applied after the passing of the Constitution of BiH, as the National Assembly points out, is clearly indicated by the fact that there is a number of laws at all levels of the government in BiH, which regulate the issue of forests. Accordingly, the Law on Forests in the Federation of BiH was passed in 2002, in the Brčko District the law in force is the Law on Forests of the Brčko District of BiH passed in 2010, while there are laws on forests also at the cantonal level in the Federation of BiH. In the Republika Srpska, the 2008 challenged law is in force, which rendered ineffective the 1994 Law on Forests of the RS (*Official Gazette of*

the Republika Srpska, 13/94). Therefore, there is no obligation for any authority in BiH to establish that the Law on Forests of the Republic of BiH is no longer in force, for upon the entry into force of the Constitution of BiH, which this law is in contravention of, this law is no longer *ipso iure* in force. Besides, the Law on Forests of the Republic of BiH is not applicable in practical sense, as under this law the responsibilities rested with the authorities, which ceased to exist following the passing of the Constitution of BiH.

24. As to Article III (3) (b) of the Constitution of BiH, which prescribes that 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, contrary to the applicant's allegations that the challenged law is in violation of the mentioned provision of the Constitution of BiH, the National Assembly holds that the challenged law has been passed based on a power contained in the Constitution of the Republika Srpska, which is in conformity with the Constitution of BiH. It is indicated that the Constitution of the Republika Srpska, in Amendment XXXII to Article 68 paragraph 6, assigns a power to the Republic to regulate and ensure property relations and to protect all forms of property. In the opinion of the National Assembly, the challenged law also arises from the Constitution of BiH, which enumerates in Article III (1) the issues within the jurisdiction of the institutions of BiH, which do not include the issues of forests, simultaneously prescribing in Article III (3) (a) 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.

25. In the opinion of the National Assembly, the allegations are ill-founded that the challenged law violated also Article IV (4) (e) of the Constitution of BiH, according to which the Parliamentary Assembly of BiH shall have responsibility for such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities. Contrary to the allegations made by the applicant, the National Assembly is of the opinion that when interpreting the challenged law it has to be linked to Article III (1), which enumerates issues within the jurisdiction of the institutions of BiH which do not include the issues concerning the ownership of forests and forestland.

26. In the opinion of the National Assembly, other allegations made by the applicant when referring to the Agreement on Succession Issues among the former Yugoslav Republics are purposeless and can in no way be of relevance to the establishment of the constitutionality of the challenged law.

27. In view of the aforementioned, the National Assembly is of the opinion that the challenged law is not in violation of the provisions of Article I (1), Article I (2), Article III (3) (b) and Article IV (4) (e) of the Constitution of BiH, which is the reason why it proposed that the Constitutional Court dismiss the request.

IV. Relevant Laws

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

Article I
Bosnia and Herzegovina

1. Continuation

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.

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 III
Responsibilities of and Relations between the Institutions of Bosnia and Herzegovina and the Entities

3. Law and Responsibilities of the Entities and the Institutions

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.

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 IV
Parliamentary Assembly

4. Powers

The Parliamentary Assembly shall have responsibility for:

(...)

e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities

Annex II
Transitional Arrangements

2. Continuation of Laws

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

29. The **Law on Forests** (*Official Gazette of the Republika Srpska*, 75/08, 60/13 and 70/20)

Unofficial consolidated text drafted by the Constitutional Court will be used for the purpose of this Decision, reading as follows:

Article 1

(1) This Law shall regulate forest politics, planning, utilisation and management of forests and forestland, protection of forests, financing and value of forests, forests and forestland cadastre, forestry information system, property and legal relations and other issues of importance for forests and forestland for the enhancement, sustainable management of forests and forestland and forestry development.

(2) The provisions of this Law shall refer to forests and forestlands irrespective of ownership.

Article 2

(1) Forests and forestland are goods of public interest and are subject to special care and protection of the Republika Srpska ("the RS").

(2) The right of use of forests and forestland may be subject to restriction if in public interest.

Article 3

(1) The forests and forestland on the territory of the Republic are owned by the Republic and other natural and legal persons.

(2) The total area covered by forests owned by the Republic cannot be reduced except the cases referred to in Article 42 of the Law.

(3) The forests and forestland owned by the Republic cannot be alienated except if consolidated or in the cases provided for by this Law.

Article 4

(1) The forests and forestland owned by the Republic are managed and administered by the Ministry of Agriculture, Forestry and Water Management („the Ministry").

(2) The forests and forestland shall be administered in accordance with criteria and principles of sustainable management.

(3) The criteria for sustainable management of forests are as follows:

a) conservation and enhancement of forest ecosystems and their contribution to the global carbon sequestration (cycle),

Article 5

(1) The activities of public interest shall include study through research, forestry, protection, planning, management, maintenance and enhancement of forests.

(2) General/public interest under paragraph 1 of this Article shall be protected by:

a) maintenance and enhancement of existing forests and by increasing the total area covered by forests,

b) protection of forests and forestlands,

c) conservation and enhancement of generally beneficial forest functions,

d) increasing the contribution of the forestry sector to the total social and economic development of the RS, by optimal production of wood and non-wood products and other forest values,

e) drawing up strategic Plans and Programs for the territory of RS,

f) preserving ownership of existing forests owned by the Republic,

(...)

(3) The Government of the Republika Srpska ("the Government") shall control the realisation of general interest in the forests owned by the Republic through the activities of the Ministry and realisation of the Contract concluded with the Public Forestry Company.

Article 9

(1) National Assembly of RS adopts a Strategy of Forestry Development which representing foundation for development of Forestry Program of the Republic.

(...)

Article 10

(1) The Forestry Program of the RS is the basic document providing participating, comprehensive, inter-sector and continuous process of planning, implementing, monitoring and assessing the forest policy with a view to achieving a sustainable management of forests of all forms of ownership, together with an Implementation Action Plan.

(...)

Article 18

(1) Forest Management Plans shall be created with regard to the forests owned by the Republic and privately owned forests.

(2) One Forest Management Plan shall be created for the forests of one forest-economic area owned by the Republic;

(...)

Article 22

(1) The public forest company shall submit a developed forest management plan for the forests owned by the Republic and the municipality shall submit a developed forest management plan for the privately owned forests to the Ministry at least 60 days before the expiry of the validity of the forest management plan.

(2) The Ministry is obliged to submit the Forest Management Plan, within a time limit of 30 days from the day of reception of the Forest Management Plan for the forests owned by the Republic, to the municipality, for the territory of which the Forest Management Plan is developed, for the purpose of giving it an opportunity to give its opinion.

(...)

Article 23

(1) The public forest company shall develop forest management plans for the forests owned by the Republic.

(...)

Article 24

(1) The realization of the Forest Management Plan owned by the Republic shall be carried out based on execution designs.

(...)

Article 28

(...)

(1) The Annual Forest Management Plan with regard to the forests owned by the Republic must be compatible with the Forest Managements Plans.

(...)

Article 29 (3)

(...)

(1) The requirements of the use of other forest products of the forests owned by the Republic shall be passed by the Minister.

III. ADMINISTRATION AND MANAGEMENT OF THE FORESTS

1. Administration and management of the forests owned by the Republic

Article 31

(1) The administration and management of the forests and forestlands owned by the Republic is an activity of general interest.

(2) The Ministry shall carry out inspections and shall monitor the works executed by the public forest company and shall carry out an annual analysis of the activities, including the work performance and proposal for the measures related to further use of the forests and forestlands owned by the Republic, including the maintenance thereof.

Article 33

(1) The Public Forest Company „Šume Republike Srpske" a.d. shall perform a part of the activities related the management of the forests and forestlands (the use of the forests and forestlands owned by the Republic, including the maintenance thereof) based on a special agreement with the Ministry upon a prior approval by the Government.

(2) The Public Forest Company „Šume Republike Srpske" a.d. (hereinafter referred to as the "user of the forests and forestland owned by the Republic") shall perform a part of the activities related to the management of the forests and forestlands owned by the Republic, which form part of forest-economic areas and karst areas, through the organisational units which are created by it and form its integral part.

Article 34 (1) subparagraph 1 and (2) and (3)

(1) The user of the forests and forestlands owned by the Republic shall perform the activities related to the use of the forests and forelands owned by the Republic, including the maintenance thereof and a part of the activities related to the management of forests and forestlands, as follows:

(...)

l) guarding and maintaining the boundary marks between the forests owned by the Republic and privately owned forests;

(2) In performing the activities related to the use of the forests and forestlands owned by the Republic, including the maintenance activities, the user of the forests and forestlands owned by the Republic, is obliged to preserve and to increase the value of forests and, in using the forests, forestlands and other potentials of the forests and the entire area and contents of the forests, to provide the conditions for further development and forest functions of general benefit, to achieve the best economic effects in accordance with this Law and other regulations and to harmonize its plans and activities with the plans and activities of other users of natural resources that perform an economic activity in the same field.

(3) In accordance with paragraph 2 of this Article and in compliance with the principles referred to in paragraph 2 of this Article, the user of the forests and forestlands owned by the Republic shall;

a) ensure the economic function of the forests by providing the continuity of the yields of wood other forest products and functions;

(...)

Article 35 (a)

The user of the forests and forestlands owned by the Republic has the right integrally to use the forests and forestlands owned by the Republic in order to gain profit, including primarily:

a) the production and trade in wood assortments;

(...)

Article 36

(1) The Government may, upon proposal by the Ministry, restrict the activities of the user of the forests and forestlands owned by the Republic or deprive it of the activities related to the use of the forests and forestlands owned by the Republic on a temporary basis, including the obligation of maintenance of the whole or a part of the forests or forestland if the user does not perform its activities in accordance with this Law and agreement until the user complies with measures ordered and harmonizes its activities with the applicable legislation.

(2) The activities related to the use of the forests and forestland owned by the Republic, which are restricted or denied on a temporary basis, including the obligation of maintenance, shall be regulated in detail in an agreement between the Ministry and the user of the forests and forestlands owned by the Republic.

Article 37 (2)

(...)

(2) In order to improve the conditions of the works performed in forests and implementation of the measure of sustainable management of the forests owned by the Republic, the contractors to perform the works in forests could be associated.

Article 46(3)

(...)

(1) Notwithstanding paragraph 1 of this Article, the establishment of priority welfare functions of forests, if such forests or parts thereof are less than 20 hectares, shall be performed by the Ministry, upon the previously obtained opinion from the owner of private forests or from the users of forests and forestland owned by the Republic, as

well as from the legal person performing technical tasks in the forests owned by private owners and by local communities.

Article 47(5)

(...)

(5) If the funds referred to in paragraph 4 of this Article are not secured, the user of forests and forestland owned by the Republic, i.e. the owner of the forest, shall not be obliged to implement the measures stipulated under the Act referred to in paragraph 1 of this Article.

Article 48 (2)

(...)

(2) The user of forests and forestland owned by the Republic shall have the responsibility to monitor the forests health status via the Reporting and Forecasting Service in its composition and shall keep the Ministry and public informed thereof.

Article 49

The user of forests and forestland owned by the Republic shall have the obligation to reforest burnt areas, areas where rejuvenation and forestation were not successful, as well as areas which were devastated (illegal clear-cutting), deforested or where rare species of trees were illegally cut, within the time limit not longer than two years.

Article 50 (2)

(...)

(2) The owner of forests and the user of forests and forestland owned by the Republic shall have the obligation to monitor the impact of biotic and abiotic factors on the forests health condition and to undertake in a timely fashion the measures to protect the forests and forestland in accordance with paragraph 1 of this Article.

Article 51 (3)

(...)

(3) If the owners of forests and the user of forests and forestland owned by the Republic fail to implement the activities referred to in paragraphs 1 and 2 of this Article, a forestry and hunting inspector shall order the execution thereof at the expense of the owners of forests or the user of forests and forestland owned by the Republic.

Article 52 (1)

(1) The owners of forests and the user of forests and forestland owned by the Republic shall have the obligation to inform the Ministry of the outbreaks of pests and the damage that occurred in the forest and on the forestland.

Article 54(1)

(1) In emergency situations, when necessary, the Minister shall prescribe for appropriate measures in protecting forests to be undertaken, which measures are to be implemented by the competent institutions, the owners of forests and the user of forests and forestland owned by the Republic.

Article 55 (1)

(1) The owners of forests and the user of forests and forestland owned by the Republic shall have the obligation to adopt the Forest Fire Protection Plan.

Article 57 (1)

(1) Natural and legal persons who cause damage to the forest shall have the obligation to compensate the damage that has occurred to the owner of forests or the user of forests and forestland owned by the Republic according to the Forest damage compensation price list to be applied to all forests irrespective of the form of ownership.

Article 58 (2)

(2) The owners of forests and the user of forests and forestland owned by the Republic shall have the obligation to prevent actions referred to in paragraph 1 of this Article, as well as to clean garbage, with the right to full reimbursement of costs from the legal or natural persons who have disposed of garbage, or on the basis of a decision, or an administrative decision issued by the competent administration authority with the reimbursement of costs.

Article 60 (1), (4) subparagraph a and (5)

(1) Citizens have free access to the forest owned by the Republic for the purpose of enjoyment, rest and recreation where they are personally responsible for their own safety.

(4) The Ministry, the owner of forests or the user of forests and forestland owned by the Republic may restrict or prohibit the right to stay and freely move in the forest if, without an obtained permit, visitors engage in the following:

a) Erecting temporary facilities, tents and set up camps,

(5) The user of forests and forestland owned by the Republic and the owners of forests shall have the right to compensation for damage on the forest, land and infrastructure facilities, inflicted by legal or natural persons, in the event of non-compliance with the prohibitions referred to in paragraph 4 of this Article.

Article 61 (3)

(3) It shall be prohibited to visitors, while staying in the forest, to damage vegetation, disturb wild animals and to damage or destroy their habitats, the land and forest mat, as

well as to disturb and interrupt the owners of forests or the user of forests and forestland owned by the Republic in the exercise of their respective rights related to forests.

Article 62 (1), (2) subparagraph a and (5), (6) and (8)

(1) Pasture in the forests owned by the Republic shall be prohibited.

(2) If there is no risk from endangering the functions of the forest, including biodiversity, the user of forests and forestland owned by the Republic may issue a permit for pasture, or feeding with acorns, except for the pasture and browsing of goats, in the following cases:

a) Where trees are of such height that livestock cannot damage them,

(5) The user of forests and forestland owned by the Republic has the right to charge the pasture according to the price list.

(6) The user of forests and forestland owned by the Republic shall establish the conditions for pasture, or feeding with acorns (the time interval for pasture, or feeding with acorns, the type of livestock, the number of livestock heads, the amount of the fee and such like).

(8) The user of forests and forestland owned by the Republic shall designate and mark the roads for driving livestock to pasture and feeding with acorns in the forests and pasture on the forestlands and watering points.

Article 63 (3)

(3) The user of forests and forestland owned by the Republic, as a user of the hunting ground, and other users of the hunting ground are obliged to monitor the damage caused by game animals in the forest.

Article 64

(1) The protection of forests from misappropriation, use, destruction and other illegal actions (disposal of waste and toxic harmful substances, forest pollution, destruction of boundary signs and markings etc.) shall be provided by the owners of forests, and the user of forests and forestland owned by the Republic.

(2) In accordance with paragraph 1 of this Article, the owners of forests and the user of forests and forestland owned by the Republic shall be obliged to provide for immediate forest protection.

(3) The protection tasks of forests owned by the Republic may be performed by a worker who possesses a minimum secondary education in forestry – forestry technician (hereinafter: the forest warden), as well as a person authorized by the user of forests and forestland owned by the Republic, who also meet other conditions stipulated by special regulations.

Article 65 (2), (3), subparagraphs b, v and i

(2) The forest warden and the person authorized by the user of forests and forestland owned by the Republic shall have the right, by showing their official identification card, to request from the person caught committing a misdemeanour punishable under this Law, or criminal offenses relating to forests, or persons for whom there is a reasonable suspicion that they have committed such offenses, personal documents for the purpose of establishing their identity.

(3) The forest warden is an official authorized person and has the rights and obligations to engage in the following:

b) Protects the boundary signs from destruction and illegal use of forests and forestland owned by the Republic,

v) In the event of arbitrary occupation of forests and forestland owned by the Republic as well as regarding the illegal actions in forests performed by other legal and natural persons, he/she shall undertake appropriate measures in accordance with this law and shall notify the relevant services in a timely fashion,

i) Through authorized persons of the user of forests and forestland owned by the Republic, requests assistance from the Ministry of the Interior if he/she has been prevented by the perpetrator of an illegal action from performing his tasks of forest protection.

Article 66

(1) The maintenance of seed facilities, except for seed facilities for the production of seeds of known origin, shall be performed by the user of forests and forestland owned by the Republic in the manner ensuring maximum production of quality forest seeds and making it easier to pick and collect seeds.

(2) The measures of the management of the starting material for the production of forest seeds are prescribed by planning documents prepared by the user of forests and forestland owned by the Republic, and approved by the Ministry.

Article 71(3), (4)

(3) The production of wood assortments in the forests owned by the Republic is carried out according to the principles of maximum utilization with the application of standards.

(4) Wood assortments are produced following the previous marking of cross section by a person specializing in forestry, IV grades secondary school, (tree gauge handler) who is engaged by the user of forests and forestland owned by the Republic, or the owner of the forest.

Article 72 (5), (6) and (7)

(5) The competent inspection authority as well as the person authorized by the user of forests and forestland owned by the Republic has the right to confiscate a tree if

placed on the market contrary to the provisions referred to in paragraphs 1, 2 and 4 of this Article.

(6) The control of the timber traffic shall be performed by persons authorized by the user of forests and forestland owned by the Republic, forests guards, the inspection for forestry and hunting and market inspection.

(7) The stamping of a cut tree and the issuance of a dispatch statement is performed by persons authorized by the user of forests and forestland owned by the Republic, whereas the stamping of a cut tree and the issuance of a dispatch statement for a tree from the forests in private ownership is performed by the authorized representative of the executor of specialized and technical tasks.

Article 73

(1) The owners of forests or the user of forests and forestland owned by the Republic shall be obliged to organize and carry out all works concerning the forest management at the time and in the manner ensuring the maintenance and establishment of forest order.

(2) If the established forest order is changed, the owners of forests, the user of forests and forestland owned by the Republic shall be obliged to establish forest order in the prescribed manner within 30 days at the latest.

Article 74 (2) and (5)

(2) The Commission for Technical Acceptance is founded by the user of forests and forestland owned by the Republic.

(5) If it has been established during the technical acceptance that the works have not been successfully and with quality carried out according to the execution project, the user of forests and forestland owned by the Republic is obliged to remove the established shortcomings within the time limit set by the Commission referred to in paragraph 2 of this Article, or within two years at the latest.

Article 75

The owner, or the possessor of a given land plot shall have the obligation to allow unobstructed passage across own property to the user of forests and forestland owned by the Republic and to the owner of the forest without an access road, for the purpose of unhindered performance of activities concerning the forest management, whereas the owner, or possessor, shall have be entitled to compensation for passage and damage caused.

Article 77 (2), (3) and (5)

(2) The user of forests and forestland owned by the Republic has the right to use other forest products, for a fee of 3% of the product's sale price allocated in the special account of the user of forests and forestland owned by the Republic, which fee it has

the obligation to direct at revitalization of other forest products at locations where they originate from.

(3) A public competition shall be announced for forest management areas where the user of forests and forestland owned by the Republic does not collect other forest products.

(5) A fee referred to in paragraph 4 of this Article is paid in the special account of the user of forests and forestland owned by the Republic by the 5 day of the month for the previous month and is used exclusively for the revitalization of other forest products at locations where they originate from.

Article 79

The building and putting into operation of charcoal plants, limestone plants, sawmills, wood processing plants, industrial plants and other plants in the forest, as well as at a distance of up to 100 meters from the edge of the forest for the forests owned by the Republic, require the consent of the Ministry and of the user of forests and forestland owned by the Republic, whereas for the forests in private ownership the consent of the authorities of local self-government units is required.

Article 80 (2)

(2) The owners of forests and the user of forests and forestland owned by the Republic may request other legal and natural persons who benefit from infrastructure to participate in the costs of the building and maintenance thereof proportionately to the benefit they have.

Article 81 (2)

(2) Planning, building and maintenance of roads in the function of forest management are carried out by the user of forests and forestland owned by the Republic, in accordance with the planning documents to which the Ministry gave the consent.

Article 82 (2), (3), (7) and (8)

(2) The user of forests and forestland owned by the Republic shall be obliged to maintain forest roads.

(3) Notwithstanding paragraph 1 of this Article, forest roads may be used by other legal persons and citizens under conditions laid down by the user of forests and forestland owned by the Republic and the local self-government unit authority for the roads which building they funded.

(7) Local self-government unit authorities and the user of forests and forestland owned by the Republic, in cooperation with the authority in charge of traffic and the Ministry of the Interior, will erect and maintain signs of forest roads and follow the traffic in accordance with the provisions of this Article, and in cases where road signs and surveillance are not sufficient barriers may be used.

(8) Damage on forest roads done by third persons has to be compensated to the user of forests and forestland owned by the Republic, based on the compensation price list it adopts.

Article 84

(1) The user of forests and forestland owned by the Republic is obliged to provide, under the same conditions, for the necessary minimum of forest wood assortments to the local companies for mechanical wood processing from the areas where those assortments originate from, for the purpose of encouraging local entrepreneurship and supporting village and homeland development.

(2) Provision of the necessary minimum of forest wood assortments referred to in paragraph 1 of this Article shall be established by the user of forests and forestland owned by the Republic on the basis of the criteria prescribed by a decision of the Government, which take into account the relevance of local businesses for mechanical wood processing, for that local community.

Article 85 (1) and (2)

(1) The user of forests and forestland owned by the Republic and the owner of forests through the executor of specialized and technical tasks shall be obliged to keep and update as prescribed the forest and forestland cadastre and to notify the Ministry about the changes that have occurred by 31 March at the latest for the previous year.

(2) The Ministry shall integrate the cadastre of the user of forests and forestland owned by the Republic and of the owner of forests referred to in paragraph 1 of this Article.

Article 88, subparagraph g

The funds referred to in Article 87, paragraph 1 of this Law are provided for from:

g) the fees for the lease of forestland owned by the Republic and the fees for the expropriation of land from forest production referred to in Article 92 of this Law,

Article 89 (1), (2), (6) and (10)

(1) The fees for the use of forest and forestland owned by the Republic (the funds for simple reproduction) are earmarked from the realized total income of the user of forests and forestland owned by the Republic, whereas the earmarked funds cannot be lower than 10% of the value of the sold forest assortments established according to the prices in the forest on the stump, according to the price list of the user of forests and forestland owned by the Republic.

(2) The fees referred to in paragraph 1 of this Article shall be paid in the special account of the user of forests and forestland owned by the Republic on a monthly basis and is used within the forest management area, namely the forestry holding where they were collected.

(6) The user of forests and forestland owned by the Republic shall be obliged to pay a fee for the development of undeveloped parts of the municipality from which the sold assortments originate in the amount of 10% of the funds obtained from the sale of forest wood assortments established under the price list, at ex-truck road prices.

(10) The user of forests and forestland owned by the Republic shall pay the fee referred to in paragraph 6 of this Article on a quarterly basis by 5th day of the month for the previous quarter. The user of forests and forestland owned by the Republic shall not be obliged to pay the said funds if the local self-government unit failed to adopt the annual plan on expenditure of earmarked funds.

Article 90 (2)

(2) The basis for the calculation of the fee for carrying out the works of general interest in the forests in private ownership in the amount 10% is the market value of the net cut wood mass established at the scene of loading into a means of transportation (ex-truck road) according to the prices list of the user of forests and forestland owned by the Republic.

Article 92 (1) and (3)

(1) A lease user shall be obliged to pay a fee for the lease of a forestland owned by the Republic in the public revenues account of the Republic.

(3) The funds collected based on the lease of forestland will be used for the purchase and grow new forests owned by the Republic.

Article 95 (1) subparagraph a

(1) The fee for the improvement of forest functions for public benefit (expanded reproduction) is used for the financing of the design and realization of the Forestry Program of the Republika Srpska, the Forestry Development Strategy of the Republika Srpska, Long-term Karst Area Management Program, for the financing of forests and forestland management in the karst areas, for the performance of activities of the Forestry Council of the Republika Srpska, for the establishment and maintenance of the information system in forestry, for the establishment and maintenance of forests and forestland cadastre, for the financing of the demarcation of the boundaries of forests and forestland owned by the Republic, for making and conducting forest inventories across large areas, for the support to the protected areas through improvement and development of social forest functions and realization of projects on forests improvement in all forms of ownership of forests and forestland, as well as for the following:

a) Growth of new forests,

Article 97 (1) and (2)

(1) It shall be prohibited to sell and misappropriate in other ways forests and forestland owned by the Republic.

(2) The Ministry may exchange a part of a forest and forestland owned by the Republic where it is not possible to organize rational management (a small isolated forest, enclave or semi-enclave) with the owners whose forests are isolated, or located as enclaves or semi-enclaves within the complex of forests owned by the Republic, with the consent of the Government.

Article 98

(1) The forests owned by the Republic cannot be leased.

(2) The forestland owned by the Republic can be leased until such time it gets used for the purpose established under the planning documents and under the conditions set forth in this Law.

(3) The forestland owned by the Republic, which has been leased, cannot be used for the construction of permanent facilities, except in special cases of general interest, pursuant to a decision of the Government.

(4) The forestland owned by the Republic is leased by the Ministry with the consent of the user of forests and forestland owned by the Republic.

(5) The Minister shall prescribe the conditions and manner of leasing the forestland owned by the Republic.

Article 101 (1) subparagraphs g, đ and j

(1) business company or other legal person shall be punished for a misdemeanour with a fine in the amount from BAM 5,000 to BAM 15,000 if they:

g) carry out the realization of the Basis for forests owned by the Republic without an execution project in accordance with Article 24, paragraph 1 of this Law,

đ) fail to carry out the works of the use of forests and forestland owned by the Republic, including the obligation to maintain them in accordance with Article 34 of this Law,

j) fail to pay a fee for the use of forests and forestland owned by the Republic, as well as a fee for the municipality development in accordance with Article 89 of this Law,

Article 102 (1) subparagraphs dž and š

(1) A company or other legal person shall be fined KM 3,000.00 to 9,000.00 for an offence, if:

dž) sells and otherwise alienates the forest and forestland owned by the Republika, contrary to the provisions of Article 97, paragraph 1 of this Law, and

š) builds permanent facilities on forestland owned by the Republika, which has been leased, contrary to the provisions of Article 98, paragraph 3 of this Law.

Article 104

(1) The boundaries of forests and forestland owned by the Republic must be determined and marked.

(2) Undetermined boundaries of forests and forestland owned by the Republic shall be determined within ten years from the day this Law enters into force, based on the annual program adopted by the user of forests and forestland owned by the Republic, with the consent of the Ministry.

(3) Funds for determining and marking the boundaries of forests and forestland owned by the Republic shall be provided from special purpose funds for forests and funds of forest users and forestland owned by the Republic, in the amount determined by the program referred to in paragraph 2 of this Article.

(4) The boundaries of forests and forestland owned by the Republic shall be determined by a decision of the competent regional unit of the Republic Administration for Geodetic and Property-Legal Affairs, and at the request of the user of forest and forestland owned by the Republic or holders of private forests.

(5) The user of forests and forestland owned by the Republic shall be obliged to mark the borders of forests and forestland owned by the Republic and to maintain border signs.

Article 107 (3) subparagraphs z and i

(3) Within nine months from the day this Law enters into force, the Minister shall issue:

z) Regulation on the conditions and manner of replacement of forests and forestland owned by the Republic, and

i) Regulation on the conditions and manner of leasing of forestland owned by the Republic.

(...)

V. Admissibility

30. In examining the admissibility of the present request, the Constitutional Court invoked the provisions of Article VI (3) (a) of the Constitution of Bosnia and Herzegovina.

31. 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.

32. The request for review of constitutionality was filed by seven delegates of the Council of Peoples of the Republika Srpska, which has a total of 28 delegates, which makes up ¼ of members of either chamber of a legislature of an Entity, which means, contrary to the assertions made by the National Assembly of the Republika Srpska, that the request was filed by an authorized subject, within the meaning of Article VI (3) (a) of the Constitution of Bosnia and Herzegovina, (see, the Constitutional Court, Decision on Admissibility no. *U-7/10* of 26 November 2010, paragraph 21, available at the website of the Constitutional Court: www.ustavnisud.ba).

33. Having regard to the provisions of Article VI (3) (a) of the Constitution of Bosnia and Herzegovina and Article 19 (1) of the Rules of the Constitutional Court, the Constitutional Court finds that the present request is admissible, as it was filed by an authorized subject, therefore, there is no single formal reason under Article 19 (1) of the Rules of the Constitutional Court rendering the request inadmissible.

VI. Merits

34. The applicant claims that the impugned law is inconsistent with Articles I (1), I (2), III (3) (b) and IV (4) (e) of the Constitution of BiH and Article 2 of Annex II to the Constitution of BiH. The essence of the allegations from the request is that the applicant claims that the said law is unconstitutional, because throughout almost the entire text (except Articles 1 and 2) this law prescribes that the Republika Srpska owns forests and forestland, except forests and forestland owned by other natural and legal persons. In the opinion of the applicant, the above stated is contrary to the relevant case law of the Constitutional Court, according to which the legislator at the State level must first decide this type of property.

35. The Constitutional Court notes that Article 1 of the impugned law stipulates that this law shall regulate policy and planning, management and administration of forests and forestland, forest protection, financing and value of forests, cadastre of forests and forestland and information system in forestry, and property-law relations. Article 1 of the impugned law also regulates other issues of importance for the forest and forestland for the

purpose of improvement and sustainable use of forests and forestland and development of forestry. Article 2 of the disputed law stipulates that forests and forestland are natural goods of general interest and that they enjoy special care and protection of the Republika Srpska. Article 3 stipulates that forests and forestland on the territory of the Republika Srpska are owned by the Republika Srpska and other legal and natural persons, and then consistently throughout the entire text of the law it is stated "owned by the Republika" where referring to forests and forestland that are not owned by other natural and legal persons.

36. As regards the current case law relating to state property issues, the Constitutional Court points out that in the Decision no. *U-1/11* (see, Constitutional Court, Decision on Admissibility no. *U-1/11* of 13 July 2012, available on the website of the Constitutional Court *www.ustavnisud.ba*), it examined whether the Republika Srpska had the constitutional competence to enact the Law on the Status of State Property Located on the Territory of the Republika Srpska and under the Disposal Ban. However, in that decision, the Constitutional Court explains what is considered the State property. Thus, paragraph 62 states: "State property, although similar in its structure to civil-law private property, is a specific legal concept enjoying a special status for this reason. State property is characterized by the public law nature of the relationship between the subjects and the use of that property as well as its owner. It includes, first, movable and immovable objects in the hands of public authorities and can include furthermore a "public good" (sea water and seabed, river water and river beds, lakes, mountains and other natural resources, public transport networks, traffic infrastructure, *etc*.). It, by its nature, primarily serves all people in the country. As such, the "public good" may be exempted from legal transaction (*res extra commercium*) due to its importance, as it is the only way to preserve and protect it."

37. In addition, in paragraph 77 of the Decision no. *U-1/11*, the Constitutional Court emphasizes that that the subject-matter regulated by the challenged Law is "the immovable property which Bosnia and Herzegovina got on the basis of the International Agreement on Succession Issues", and "the immovable property over which the former SR BiH had the right to manage and to dispose of". However, in the continuation of the reasoning (see paragraph 82), the Constitutional Court further clarifies that the notion of state property cannot be understood only as real property in terms of buildings and other, and further emphasizes: "The Constitutional Court reiterates that the state property has a special status that encompasses, on the one hand, movable and immovable objects in the hands of public authorities used to exercise that authority and, on the other hand, the state property can include a public good, which, by its nature, primarily serves all people in the country (running water, protection of climate-related living conditions and protection of other natural resources such as forests and state infrastructural networks within the meaning of Annex 9 to the General Framework Agreement for Peace in BiH, *etc*.). Such property reflects the statehood, sovereignty and territorial integrity of

Bosnia and Herzegovina. Furthermore, the interest of BiH should not be disregarded when it comes to preserving its "public good", as a part of the state property serving all citizens of BiH and as a part which is not essential in order for specific competence of certain administrative-territorial level of government to be effectively exercised in the state. In addition, this property may serve as "another means for financing the expenses necessary for performing the operations of the Institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina, within the meaning of Article IV (4) (b) in conjunction with Article VIII (3) of the Constitution of Bosnia and Herzegovina."

38. It follows from the cited case law of the Constitutional Court that forests, as public goods, are considered state property. Earlier in the Decision *U-1/11*, the Constitutional Court took the position that forests are part of state property (running water, protection of climate conditions, protection of other natural resources, such as forests, necessary state infrastructure network in terms of Annex 9 of the General Framework Agreement for peace in BiH, *etc*., as stated in the cited paragraphs 62 and 82 of Decision *U-1/11*). The Constitutional Court also considers in this case that "forests and forestland" "owned by the Republika Srpska", as prescribed by the disputed articles of the law, are covered by the notion of state property as stated in the relevant part of Decision *U-1/11*.

39. Regarding the constitutional competence of the Republika Srpska to regulate the legal status of forests and forestland as its property, the Constitutional Court points out that in Decision *U-1/11* it stated that "it cannot support the position of the RS National Assembly that this issue automatically falls under the so-called residual jurisdiction of the Entities" (*op. cit. U-1/11*, paragraph 80). In this regard, the Constitutional Court points out that Article III (1) of the Constitution of BiH contains a catalogue of competencies of BiH institutions, but that the competencies of BiH institutions are also listed in other provisions of the Constitution of BiH. The Constitutional Court concludes that "in terms of Article I(1) of the Constitution of BiH, BiH has the right to continue to regulate "state property" of which it is the owner, meaning all issues related to the concept of "state property" in both civil and public law. This conclusion is the only possible logical and material content of the notion of "identity and continuity" from the cited provision. Furthermore, the Constitutional Court reiterates that, although each level of government enjoys constitutional autonomy, the entity's constitutional jurisdiction is subordinated to the obligation to be in accordance with the Constitution of BiH and "decisions of the institutions of BiH". This clearly follows from the provisions of Article III (3) (b) of the Constitution of BiH. In addition, the right of the State of BiH to regulate the issue of state property derives from the provision of Article IV (4) (e) of the Constitution of BiH. Namely, if we take into account the previous conclusions, primarily that the State of BiH has the right to continue to regulate the State property, *i.e.* that it is the title owner of state property, and that the provisions of Article IV (4) (e) of the Constitution of BiH prescribe the competence of the Parliamentary Assembly necessary for the performance

of state duties, and that state property reflects the statehood, sovereignty and territorial integrity of BiH, there is no doubt that this provision gives the State of BiH and the Parliamentary Assembly the authority to regulate the issue of state property. Therefore, this is the exclusive competence of BiH arising from Articles I (1), III (3) (b) and IV (4) (e) of the Constitution of BiH" (*op. cit. U-1/11*, paragraph 80).

40. As the impugned articles of the law stipulate that forests and forestland are "owned by the Republic", they are thus legally recorded as property of the Republika Srpska and assigned to the Republika Srpska. It has been previously explained that state property (property of the State of BiH) includes (also) forests and forestland. Therefore, the Constitutional Court must conclude that the disputed provisions of the Law on Forests are not in accordance with Articles I (1), III (3) (b) and IV (4) (e) of the Constitution of BiH.

41. Regarding the allegations from the response to the request that this law also applies to forests and forestlands owned by other natural and legal persons, the Constitutional Court emphasizes that it sees no problem with the jurisdiction of the Republika Srpska over forests owned by other persons in terms of compliance with the Constitution of BiH. The main problem with the disputed law, as stated above, is the registration of the Republika Srpska as the owner of forests and forestland (not owned by other natural and legal persons), which the Constitutional Court considers to be state property (property of the State of BiH) until otherwise decided at the State level.

42. The Constitutional Court points out that the Law on Temporary Prohibition of Disposal of State Property (*Official Gazette of Bosnia and Herzegovina,* 18/05 and 29/06, 85/06, 32/07, 41/07, 74/07, 99/07 and 58/08) is in effect and is passed by the High Representative for BiH. The Constitutional Court also points out that Article 4 of the Law stipulates that the ban on disposing of state property remains in force until the entry into force of the law governing the criteria to be applied for determining the property owned by BiH, the Federation of BiH, the Republika Srpska and the Brčko District of BiH. The Constitutional Court also points out that this Law also determines the rights of ownership and management of state property or until the High Representative decides otherwise. The fact that the Law on State Property has not been enacted yet does not mean, in the opinion of the Constitutional Court, that the Entities can regulate the issue of ownership of state property, which is not yet defined at the level of BiH by its own laws. In addition, the Constitutional Court reiterates that the decision in this case does not prejudge the regulating of the issue of state property, including forests and forestland by BiH, Republika Srpska, the Federation of BiH and the Brčko District of BiH.

43. In view of the above, the Constitutional Court decides to give the National Assembly a period of six months during which it is ordered to harmonize the disputed provisions of the law with the Constitution of BiH. The Constitutional Court is aware that all forests that are not owned by legal and natural persons must be cared for and

managed by someone because of the importance of forests as a public good and natural wealth that is of a general interest. It is indisputable that the Republika Srpska should perform activities regarding the management and protection of forests and forestland, as determined by Articles 1 and 2 of the Law on Forests. However, it cannot prescribe by law that forests and forestland are in its ownership until the issue is determined at the State level as to which State property or public goods and natural resources are the property of BiH, and which are the property of the Entities. Given the structure of the Law on Forests, the Constitutional Court notes that, in case of quashing all disputed provisions of the law that this court found to be inconsistent with the Constitution of BiH, then no action could be taken according to law and this would result in neglect of natural goods. Therefore, taking into account the importance of the law and the issues it regulates, the Constitutional Court concludes that it is necessary to give the National Assembly a deadline for harmonizing the disputed provisions of the law with the Constitution of BiH, and within which the National Assembly will eliminate the established violations of the Constitution of BiH in the manner it chooses itself.

44. In view of the above, the Constitutional Court concludes that the disputed provisions of the Law on Forests are not in accordance with Articles I (1), III (3) (b) and IV (4) (e) of the Constitution of Bosnia and Herzegovina. The issues related to determining the ownership status of state property, as well as the competence in this regard between the State and the Entity bodies, should be regulated by a law that will be passed at the State level, as these issues fall within the exclusive competence of the State of BiH according to the mentioned provisions of the Constitution of BiH.

Other allegations

45. Since it has determined that the disputed provisions of the Law on Forests are not in accordance with Articles I (1), III (3) (b) and IV (4) (e) of the Constitution of Bosnia and Herzegovina, the Constitutional Court holds that it is not necessary to consider separately the other allegations of the applicant who claims that the provisions of Article I (2) and Article 2 of Annex II to the Constitution of BiH have been violated.

46. Finally, the Constitutional Court highlights again that the issue of state property has not been resolved since the date on which the Constitution of BiH came into force, *i.e.* since 14 December 1995. Therefore, there is an absolute necessity and a positive obligation of BiH to resolve this issue as soon as possible (*op. cit.* U-1/11, paragraph 84).

VII. Conclusion

47. The Constitutional Court concludes that the disputed provisions of the Law on Forests are not in accordance with Articles I (1), III (3) (b) and IV (4) (e) of the Constitution of Bosnia and Herzegovina, as the issues related to determining the ownership status of state property, as well as the competence in this regard between the State and the Entity

bodies, should be regulated by a law that will be passed at the State level. These issues fall within the exclusive competence of the State of BiH according to the mentioned provisions of the Constitution of BiH.

48. Pursuant to Article 59 (1) and (2) and Article 61 (4) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

49. In view of the decision of the Constitutional Court in the present case, it is not necessary to consider separately the applicant's proposal for an interim measure.

50. Pursuant to Article 43 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of Judge Zlatko M. Knežević is annexed to the present Decision. Vice-President Miodrag Simović gave a statement of dissent from the majority decision.

51. Pursuant to Article VI (5) 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 Zlatko M. Knežević

Ad I.

At its plenary session, the Constitutional Court of Bosnia and Herzegovina passed a decision in the case *U-4/21*, declaring the provisions of the Law on Forests of the Republika Srpska unconstitutional (as stated in the operative part of the decision).

In essence, the Constitutional Court declared unconstitutional all provisions whereby the Republika Srpska declared itself the owner (titleholder) of forests and forestland in the Republika Srpska, and decided to leave in effect the provisions whereby legal and physical persons can be the owners (titleholders) of forests and forestland.

Regretfully, with all the respect for the views of my colleagues, I am unable to accept the position taken by the majority for the following reasons.

Ad II.

For reasons of expediency, in this separate opinion I will not repeat my views previously presented on the provisions of the Constitution of Bosnia and Herzegovina. Those are the regulation of competencies between the State and the Entities, the constitutional autonomy of the Entities when it comes to the regulation of property relationships, the right and obligation of both the state and entity levels to adhere to the division of competencies, constitutional compliance of the Constitution of the Republika Srpska with the provisions of the Constitution of Bosnia and Herzegovina, as confirmed in several decisions of the Constitutional Court of Bosnia and Herzegovina, the need for the Constitutional Court **to interpret and not to create** the provisions of the Constitution of Bosnia and Herzegovina, the necessity for the Constitutional Court to distance itself from the doctrine of constitutionalism where it is contrary to explicit constitutional provisions and the position that the Constitutional Court acts as a **constitutional remedial mechanism** and **is not a framer of constitution**.

Certainly, my dissenting opinion in the case *U-1/11*, and the majority in this decision relies on the majority opinion in that case, is sufficient to indicate tendencies that are unacceptable to me in the task of interpreting the Constitution. Thus, it can be considered that this general, the introductory part in the case *U-1/11* (of my dissenting opinion) constitutes an integral part of the dissenting opinion in the case *U-4/21*. Therefore, I am not going to reiterate the mentioned dissenting opinion, but I do emphasise it.

Ad III.

However, the majority decision in the present case goes much further than the positions in the case *U-1/11*, so I have to emphasize the key reasons for not accepting the decision.

Namely, at the risk of simplification, but with the intention not to convey the complete reasoning of the decision (which is available) in this text, in my opinion the decision of the majority is reduced to three disputable issues (in addition to the general views already mentioned in Ad II.).

Those are:

- **the identification of a public good with state property**;

- the issue of **serious violation of the constitutional system of Bosnia and Herzegovina** in terms of tolerance, and even emphasizing different legal solutions on the same issue (forests), to the acceptance of the **discriminatory status** of one constitutional category (the Republika Srpska in relation to the other Entity and the Brčko District of Bosnia and Herzegovina), which is notoriously contrary to the constitutional principle of the **rule of law**;

- the majority position by which the Constitutional Court sets itself up as a **superior** to the Parliament of Bosnia and Herzegovina, as it moved from the category of negative legislator (which our Constitution prescribes as the jurisdiction of the Constitutional Court) to the category of positive legislator **before the enactment of the law**. To clarify, the jurisdiction of the Constitutional Court, as to **the laws passed**, is to assess whether a provision or the law in whole is in accordance with the Constitution and not to order the Parliament, in a situation where the law **has not been passed**, what has to be in the law or what must not be in the law (as in the present case).

Ad III. a)

As to the identification of the public good with state property, it is unclear what the majority was guided by in the decision and the reasoning of the decision where the majority decided so. Namely, ever since the French law school, which introduced public goods into law, public goods represent specific categories that are considered general goods, which a state organization, in the broadest sense of the word, can limit in use, disposal or, in our terminology, management, but which has to have **an owner** if they meet the conditions introduced by Roman law, and which has been serving as the basis of property law to date. Certainly, there are public goods on which there can be no ownership in any case, such as air, but the management up to the ownership can be arranged on a derivative (transmission of radio and television waves and low-frequency telecommunication system). Laws on telecommunications and national frequencies, and international agreements on mutual use or restrictions speak about it, without special reference.

However, the public good is not identified anywhere with only one category of property, in this case, state property. Such a strained argument does not exist here even if in some other decisions it could be claimed, albeit with very strained interpretations, that state property is what belongs to Bosnia and Herzegovina, as a successor, under

the succession agreements with other members of the former federal state, and what had been titled as property of the federal state or its institutions, or that it is part of the property under decisions of the body envisaged by the Constitution (Presidency of Bosnia and Herzegovina in the part of military property acquired by succession from the former federal army). The reference to the indirect effect of laws passed by the OHR is a bad argument, as one could enter into a discussion of the constitutionality of such laws and what does it mean "binding decisions and measures" in the constitutional order of Bosnia and Herzegovina. The argument referring to decisions taken during the war in 1993 is even weaker, as it conflicts with an explicit constitutional provision on regulations passed during the war, and which are in conflict with the new constitutional organization (*modified by this Constitution*), and it could even be said to be, in essence, a counter-argument. The paradox of the decision in question is that the paragraphs in the reasoning contradict each other, so it is unclear what the final reasoning is.

I have already stated that I will not explain in detail the constitutional division of powers and competences here, but I cannot help but notice that it is about *autoplagiarism* in the present decision, where the previously passed decision is a basis of the new decision, and these decisions have neither a firm nor constitutional basis, for there is no constitutional provision supporting such a decision.

If we look at the enacting clause of the decision, we come to the paradoxical conclusion that the constitutional category (Entity of Republika Srpska) cannot be the owner of one real property (forests and forestland), and everyone else can. Thus, the owners can be legal persons and natural persons, and it turns out that Bosnia and Herzegovina can also be the owner, but only the Republika Srpska cannot. I think that this issue is too serious to allow myself to trivialize this position, but the question arises: *What if some legal or natural person donates forests (forest as a cadastral unit) to the Republika Srpska*? How this will be recorded in the cadastre? Are they allowed to make a registration in favour of the Republika Srpska, *i.e.* are notaries allowed to draft such a contract at all? We could go even further, we can conclude that this form of **new nationalization** from the entity level to the state level is discriminatory for it is not of a general nature, since the property of legal and natural persons survives. We can then say that legal persons owned by the Republika Srpska (public companies) may be owners of forests and forestland!

These remarks only speak of all possible interpretations of an unfortunate decision by which the mechanisms of the public good and state property are mutually opposed and which blindly followed its position.

AD III. b)

When I speak about the violation of the rule of law and discriminatory position, it suffices to repeat briefly the allegations in the reasoning that the Brčko District of BiH owns forests and forestland in its area, and the biggest paradox is the Federation

regulation on forests and forestland, which, paraphrased, states that forests and forestland are state property owned by the Federation of BiH! I do not intend to talk about cantonal regulations in this area, for they are not the same constitutional categories.

So, we have not only inconsistent but also opposing legal systems which, this time, are not due to a mistake of the legislator, but due to the reaction of the Constitutional Court, which stubbornly defends its position that it can decide only on the basis of request for review of constitutionality, and it is silent and does not want to see that by a unilateral decision it undermines the rule of law and the constitutional balance of the equality of constitutional categories (in this case, the Entities). All the more so because the constitutional principle, above the normative part, is the rule of law, and such a decision is in violation of it. If, by any chance, the Constitutional Court, by its decision, had decided equally towards all constitutional categories precisely for the protection of the constitutional principle of the rule of law, it could have been said that the decision came from the authorisation of constitutional division of competences between constitutional categories, but that it had been **justly** negative towards everyone in Bosnia and Herzegovina. Unfortunately, all of us in the Constitutional Court are thus sliding towards non-recognition of our decisions, and we show that the allegations of unfair treatment are correct, and everything that already constitutes a negative odium towards the Constitutional Court.

On top of all that, after the decision declaring the Republika Srpska as a **non-owner**, we also impose an obligation on the Republika Srpska to manage, protect, cultivate and whatever else is specified as the obligations under the Law on Forests and Forestland. This obligation is of a permanent nature until the Parliament of Bosnia and Herzegovina passes the law on state property. Let us not say the law on forests of Bosnia and Herzegovina (for it is clear to the majority that such an authority does not exist in the Constitution of Bosnia and Herzegovina), which would be logical, as it has already gone so far that way.

I repeat, the main problem in this decision is the mutual opposition of positions in the reasoning, and it is only clear that according to the position of the majority, in fact, there is no single or even common constitutional system of Bosnia and Herzegovina but a partial one, which is dependent on requests submitted or views of authorized applicants.

AD III. c)

Finally, about the tendencies of leaving the constitutional zone of the negative legislator towards the unconstitutional zone of the positive legislator.

The Constitutional Court has very clear competences under the Constitution. In addition, the Constitutional Court rightly insists that all who are obliged to enforce them enforce decisions, and that everyone complies with them. That is the essence of the constitutional remedial mechanism, *i.e.* the interpreter of the Constitution. However, this

also means that the Constitutional Court, when it comes to reviewing the constitutionality of a law, **must not** order the legislator in advance how the future legal text should read. It is a notorious premise of a democratic society according to which sovereignty is in the hands of the people, citizens, voters, and whose will is represented by democratically elected representatives.

There are constitutional systems in which the Constitutional Court has the authority to give a preliminary opinion on the text of a bill submitted by the legislature of a particular democracy. In the theory of constitutional law, the mentioned authority is also extremely disputable, so that such constitutional systems have mechanisms of restrictions, and even certain forms of negotiation before a final position. However, regardless of the partial steps out of the classic position of a negative legislator, no authority of the constitutional court to be a positive legislator exists in democratic systems, *i.e.* to tell the legislator how a certain legal norm or law should read. The legislature, precisely for essential democratic reasons, passes laws, and the constitutional corrective decides one or more times whether a certain norm is in line with the constitution.

In the present case, the decision exceeds that limit and orders the legislator what should not be in the future law. Therefore, the legislator says you need to pass a law on state property and, in that law, you must not envisage that the Republika Srpska be the owner of forests and forestland in any way (and some other real properties as it follows from other decisions that are not the subject-matter of this analysis), or the representatives in the legislative body from the Republika Srpska are told that they can only pass a law by which the Republika Srpska cannot be the titular of ownership of forests and forestland (let us dwell on this issue only). I assume I do not have to speak about such a possibility, and until then - until the very, very distant future, if such a law will exist at all - there will be legal chaos, various legal solutions and all in favour of violating the rule of law in Bosnia and Herzegovina.

If the decision, for example, had said that the relevant provisions of the law had been unconstitutional but that the Constitutional Court, due to the absence of the law at the level of Bosnia and Herzegovina and similar or identical solutions in the other two constitutional categories, had decided to leave them in force pending the enactment of the law or to protect the rule of law, even by unconstitutional norms, the legislator would have had the task of harmonising the entire legal system in this area and there would not have been imbalance within the system. This decision did not achieve the goal of constitutional review, nor did it strengthen Bosnia and Herzegovina as a constitutional system. In addition, the Constitutional Court did not act as a constitutional remedial mechanism.

Quite the opposite, actually.

For these and some other reasons, which I presented in detail at the plenary session, I was unable to accept the proposed decision and I voted against it.

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Case No. U-8/21

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Zoran Tegeltija, Chairperson of the Council of Ministers of Bosnia and Herzegovina, for resolving a dispute between the Ministry of Civil Affairs of Bosnia and Herzegovina and the Federation Ministry of Interior in the case of acquiring citizenship of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, initiated upon the application filed by A.G., a citizen of the Arab Republic of Egypt

Decision of 23 September 2021

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (the *Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Mr. Mirsad Ćeman, Vice-President

Mr. Valerija Galić,

Ms. Seada Palavrić,

Mr. Zlatko M. Knežević,

Ms. Angelika Nussberger, and

Ms. Helen Keller

Having deliberated on the request filed by **Mr. Zoran Tegeltija, the Chair of the Council of Ministers of Bosnia and Herzegovina**, in the Case no. **U-8/21**, at its session 23 September 2021, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding on the request of Mr. Zoran Tegeltija, Chairperson of the Council of Ministers of Bosnia and Herzegovina, for resolving a dispute between the Ministry of Civil Affairs of Bosnia and Herzegovina and the Federation Ministry of Interior in the case of acquiring citizenship of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, initiated upon an application filed by A.G., a citizen of the Arab Republic of Egypt,

it is hereby established that the Ruling of the Federation Ministry of Interior number 01-03-03/2-10-1-845/20 of 1 February 2021 is in accordance with Article I(7) of the Constitution of Bosnia and Herzegovina.

The Ruling of the Federation Ministry of Interior number 01-03-03/2-10-1-845/20 of 1 February 2021 is rendered effective.

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 in the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 27 May 2021, Mr. Zoran Tegeltija, Chairperson of the Council of Ministers of Bosnia and Herzegovina, filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for resolving a dispute between the Ministry of Civil Affairs of Bosnia and Herzegovina ("the Ministry") and the Federation Ministry of Interior ("the Federation Ministry") in the case of acquiring citizenship of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, initiated upon the application filed by A.G., a citizen of the Arab Republic of Egypt, ("the person applying for citizenship or A.G.").

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, on 9 June 2021, the Government of the Federation of Bosnia and Herzegovina ("the FBiH Government") was requested to submit a response to the request.

3. The FBiH Government submitted its response on 8 July 2021.

III. Request

a) Allegations in the request

4. The applicant proposed that the Constitutional Court, in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, resolve the dispute that arose between the Ministry and the Federation Ministry and A.G., a citizen of the Arab Republic of Egypt, who filed the application for acquiring citizenship of Bosnia and Herzegovina and citizenship of the Federation of Bosnia and Herzegovina ("citizenship of BiH, citizenship of FBiH or citizenship of BiH/FBiH").

5. The applicant pointed out that the Federation Ministry, by refusing the application of Mr. A.G. for admission to citizenship of BiH/FBiH violated the provision of Article 1(7) of the Constitution of BiH and the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), as well as the provisions of substantive regulations governing the field of citizenship

of BiH/FBiH, namely the provisions of the Law on Citizenship of BiH, the Law on Citizenship of FBiH and the Criminal Code of FBiH ("the CC of FBiH").

6. In the reasoning of his request, the applicant pointed out that the Federation Ministry had erroneously applied the substantive regulations in the field of citizenship and criminal law, erroneously evaluated the evidence and, therefore, incompletely and incorrectly established the facts, which ultimately resulted in the unlawful ruling, refusing the A.G.'s application for admission to citizenship of BiH/FBiH. Accordingly, it is stated in the request that the Federation Ministry arbitrarily applied the provisions of Article 10 of the Law on Citizenship of BiH, Article 9 of the Law on Citizenship of FBiH and Articles 119 and 125 of the CC of FBiH, given that A.G. applied for citizenship by facilitated naturalization, so the interpretation given in the disputed ruling is unfounded that A.G. does not meet the requirements of Article 9 of the Law on Citizenship of BiH and Article 8 of the Law on Citizenship of the FBiH, *i.e.* that there are reasons to believe that A.G. poses a threat to the security of BiH. According to the allegations in the request, the aforementioned provisions prescribe the requirements for admission to citizenship by facilitated naturalization, which can in no way be subject to a margin of appreciation of the Federation Ministry, which interpreted the data on the deleted conviction for A.G. as non-fulfilment of the requirements for admission to citizenship, including the conclusion that A.G. posed a threat to security of BiH. Namely, along with the application for citizenship, A.G. submitted the evidence of fulfilment of legal requirements, including a marriage certificate confirming that he is married to a citizen of BiH/FBiH and that the marriage still lasts, a proof that he has been granted permanent residence in BiH, a proof that there is no threat to the security of BiH and a proof that he is not registered in the criminal records. In the consent granting procedure, the Ministry received the mentioned ruling of the Federation Ministry, after which it was determined that the judgment of the Municipal Court in Sarajevo ("the Municipal Court"), No. 65 0 K 602538 16 Kps of 26 October 2016, was considered a decisive fact. By the mentioned judgment, A.G. was imposed a sentence of conditional imprisonment of 8 (eight) months with the probation period of one (1) year for the criminal offense of Possessing and Enabling Enjoyment of Narcotic Drugs under Article 239 of the CC of FBiH. A prison sentence of up to one (1) year may be imposed for the mentioned criminal offense. The Ministry took into account that the mentioned judgment became final on 9 November 2016 and that, pursuant to the provisions of Article 125 of the CC of FBiH, the sentence in question was *ex lege* deleted from the criminal records after the period of one year from the expiration of the probation period had elapsed. For that reason, by the deletion of the sentence from the criminal records, every person, including A.G. is considered to have no prior convictions. In view of the aforementioned, the Ministry took the position that the Federation Ministry wrongly concluded that A.G. had the status of a convicted person and posed a threat to the security of BiH, since the Federation Ministry interpreted the data on the deleted conviction as non-fulfilment of the requirements under Article 9(d)

of the Law on Citizenship of FBiH. In the opinion of the applicant, the aforementioned indicates a violation of the right to a fair trial, the right to private and family life, home and correspondence and the right to an effective remedy under Articles 6, 8 and 13 of the European Convention.

7. The provision of Article 32 of the Law on Citizenship of BiH stipulates that the decision of the competent Entity authority shall enter into force two months after being submitted to the Ministry and that, in case of disagreement with the Entity authority, the Ministry shall refer the case to the competent Entity authority for reconsideration and, if the Entity authority decides identically and a dispute remains between the competent Entity authority and BiH, the case shall be referred to the Constitutional Court for a final decision. Considering that, in the circumstances of the present case, there is a dispute between the State and Entity bodies, the applicant proposed that the Constitutional Court resolve the dispute with respect to the acquisition of citizenship of BiH/FBiH.

b) The facts of the case in respect of which the request was filed

8. On 16 September 2020, A.G. submitted an application to the Federation Ministry for the acquisition of BiH citizenship and FBiH citizenship by facilitated naturalization.

9. On 1 February 2021, the Federation Ministry issued a Ruling number 01 03 03/2-10-1-7845/20 refusing the request of A.G. for acquiring citizenship of BiH/FBiH. In the reasoning it is stated that during the procedure it was established that A.G., by judgment of the Municipal Court No. 65 0 K 602538 16 Kps of 26 October 2016, got a sentence of conditional imprisonment of 8 (eight) months for the criminal offense of Possessing and Enabling Enjoyment of Narcotic Drugs under Article 239, paragraph 3 of the CC of FBiH. The aforementioned judgment became final on 9 November 2016. Taking into account that fact and other evidence collected, the Federation Ministry established that A.G. did not meet the requirement for acquiring citizenship under Article 9(d) of the Law on Citizenship of FBiH, for he posed a threat to the security of BiH and, therefore, did not meet the requirements for acquiring citizenship by naturalization and that there were reasonable grounds to suspect that approval of naturalization would endanger the security of BiH and FBiH.

10. On 9 February 2021, the Federation Ministry submitted the ruling of 1 February 2021 to the Ministry for approval.

11. The Ministry issued a conclusion number 06-1-30-3-539/21 of 12 February 2021, establishing that A.G. met the requirements of Article 10 of the Law on Citizenship of BiH in the procedure of acquiring citizenship of BiH and of FBiH. In the reasoning of the conclusion it is stated that the Federation Ministry erroneously applied the substantive regulations in the field of citizenship and criminal law and that the ruling refusing the A.G.'s application contained a number of irregularities and contradictions for the reason

that A.G. applied for citizenship by facilitated naturalization and that the Federation Ministry, in assessing the fulfilment of requirements for acquiring citizenship, referred to non-compliance with the provisions of Article 9 of the Law on Citizenship of BiH and Article 8 of the Law on Citizenship of FBiH. In addition, as further reasoned, the Federation Ministry, at its discretion and without grounds, considered as a decisive fact, the existence of a final judgment sentencing A.G. to conditional imprisonment, ignoring the fact that the sentence imposed under Article 125 of the CC of FBiH is *ex lege* deleted from the criminal records and that, by deleting the sentence, the person is considered to have no prior convictions, including A.G. who applied for citizenship of BiH/FBiH by facilitated naturalization. The Ministry ultimately concluded that in the present case all the requirements under Article 10 of the Law on Citizenship of BiH were met and that there was no obstacle to issue a guarantee to A.G. in the procedure of admission to the citizenship of BiH/FBiH.

12. After reconsidering the case, the Federation Ministry submitted a response to the Ministry with regard to the aforementioned conclusion and, in that connection, stated the following: that the Ministry found that A.G. met the requirements under Article 10 of the Law on Citizenship of BiH; that the conclusion in question contained a number of irregularities and illegalities as it was contrary to Article 9(d) of the Law on Citizenship of BiH; that A.G. does not meet the requirements for acquiring citizenship under the stated provision of the State law as well as the provisions under Articles 8 and 9 of the Law on Citizenship of FBiH; that prior to the Ruling on the A.G.'s application, the Federation Ministry *ex officio* requested the competent state authorities to carry out all security checks to verify that A.G. (as well as all aliens who submit such an application) posed a threat to the security of BiH, which includes data on possible criminal proceedings and convictions for a criminal offense committed in the territory of BiH; that after the checks carried out by the Federation Police Administration ("the FPA"), the act number 09-11-11/3-03-7-331/20 of 2 December 2020 was submitted to the Federation Ministry, based on which it was established that A.G. had committed the criminal offense of Possessing and Enabling Enjoyment of Narcotic Drugs under Article 239, paragraph 3 of the CC of FBiH, for which he had been convicted by the judgment of 26 October 2016, which became final on 26 November 2016.

13. As to the unfoundedness of the allegations in the conclusion of the Ministry that A.G. meets the requirements for acquiring the citizenship of BiH/FBiH, the Federation Ministry underlined the following: that the A.G.'s application for acquiring citizenship was refused for he had committed a criminal offense in the territory of the State of BiH, the citizenship of which he wanted to acquire, and that, therefore, he did not meet the requirement for acquiring citizenship under Article 9(d) of the Law on Citizenship of FBiH; that the Federation Ministry is responsible for the issues of citizenship of BiH/FBiH and that it is obligated to submit its Ruling to the Ministry for approval, as was done in the specific case in terms of Article 202 paragraphs 1 and 2 of the Law on

Administrative Procedure of the FBiH ("the LAP"), that the Ministry, contrary to the aforementioned provision of the LAP, engaged in a decision on the merits by issuing a conclusion in which it was determined that A.G. meets the requirements of Article 10 of the Law on Citizenship of BiH. In response to the Ministry as to the aforementioned, the Federation Ministry reasoned that the decision to refuse the application for citizenship is final in administrative procedure, and that an administrative dispute may be initiated against the mentioned Ruling, and stated the reasons for which it considers that the conclusion of the Ministry is incorrect and unlawful. In this regard, it is stated, *inter alia*, that the Ministry misjudged the possibility of applying Article 9 of the Law on Citizenship of BiH and Article 8 of the Law on Citizenship of FBiH (acquisition of citizenship based on naturalization); that in the specific case it is a matter of acquiring the citizenship of BiH/FBiH based on the permanent residence in the territory of BiH, *i.e.* by facilitated naturalization, where the overall factual situation established in the procedure is assessed; that such a position was confirmed in numerous decisions of the Cantonal Court in Sarajevo emphasizing the importance of applying Article 8, paragraph 2 of the FBiH Law on Citizenship and the importance of the discretion of the State of BiH and its competent authorities to decide on acquiring citizenship in a situation where an alien apply for citizenship by facilitated naturalization; that the discretion is directly incorporated in Article 9, paragraph 2 of the Law on Citizenship of BiH and in Article 8, paragraph 2 of the Law on Citizenship of FBiH; that it does not suffice that the party (applicant) meets only the general requirements for acquiring citizenship, but, by applying the analogy in accordance with the principle *ius domicile*, naturalization of an adult alien must be treated as a complete legal basis for acquiring citizenship of BiH/FBiH, guided primarily by the public interest of FBiH/BiH.

14. As to the unfoundedness of the allegations in the conclusion that the Federation Ministry, on its own initiative and without grounds, considered the final judgment of conviction against A.G. as decisive, the following is stated: that the identical provisions of Article 23 of the Law on Citizenship of BiH and the Law on Citizenship of FBiH prescribe the cases in which the citizenship of BiH/FBiH may be withdrawn, specifically that citizenship may be withdrawn when a citizen is convicted by a final judgment within or outside BiH and that a criminal offense, which is the reason for withdrawing the citizenship of BiH/FBiH that has already been acquired, is specified by its name and essential elements. As stated by the Federation Ministry, this means that, in accordance with the aforementioned legal provisions, A.G. could have been deprived of citizenship if he had already obtained it, for the criminal offence which he was convicted of, given that he was convicted by the judgment for the criminal offense of Possessing and Enabling Enjoyment of Narcotic Drugs under Article 239, paragraph 3 of the CC of FBiH. Therefore, it was assessed that the allegations of the Ministry that A.G. met the requirements for acquiring citizenship of BiH/FBiH were unfounded and that the Ministry justified its position that the requirements for acquiring citizenship by

facilitated naturalization were met given the fact that the sentence imposed on had been deleted from the criminal records. In this regard, it is pointed out that the act of deleting a sentence from the criminal record of a convicted foreign citizen in no way does it mean that, pursuant to the provisions of the CC of FBiH, an alien is not considered convicted in connection with meeting the requirements for acquiring citizenship. As further stated, the provisions of the Law on Citizenship of BiH/FBiH relating to citizenship and requirements for its acquisition are *lex specialis* in relation to the provisions of the CC of FBiH, which prescribe the procedure of deleting a sentence from criminal records and has no relevance in the procedure of acquiring citizenship of BiH/FBiH. In addition, it is highlighted that the criminal offence of Possessing and Enabling Enjoyment of Narcotic Drugs is stipulated in Chapter XXI of the CC of FBiH titled Criminal Offences against the Health of People and Property. That was why the FMoI found that A.G. did not meet the requirements for acquiring citizenship of BiH/FBiH and, at its discretion, determined that A.G. posed a threat to the security of BiH. In that context, the Federation Ministry states that, in the circumstances of the particular case and given the position expressed in the conclusion of the Ministry, the issue arises in respect of the BiH's interest to admit to its citizenship the convicted alien, who has already been convicted of a crime against the health of people and property. In addition, as a precaution, it is noted that an alien, by a formal act of acquiring BiH citizenship, acquires the right to biometric personal documents (identity card, passport) and, therefore, acquires many rights in BiH and abroad, so, in the opinion of the Federation Ministry, it is not in the interest of Bosnia and Herzegovina to admit to its citizenship the person convicted of one of the most serious forms of crime, prescribed by the provisions of the CC of FBiH.

15. As to the unfoundedness of the allegations in the conclusion that the Intelligence and Security Agency of BiH ("the OSA") is the only competent Institution of BiH that determines whether someone is a threat to the security of BiH or not, the following is stated: that the Federation Ministry, when receiving applications for citizenship, has the obligation to obtain security clearance data not only from the OSA but also from other state security police bodies such as the Ministry of Security of BiH, the Federation Police Administration, whose security checks include checks by all police agencies throughout BiH, namely the State Investigation and Protection Agency (the SIPA), the RS Ministry of the Interior, ten cantonal ministries of interior and available records of the Federation Police Administration. Only after that, the results of all security checks are evaluated, together and in relation to each other, and a ruling is rendered taking into account the original competence of the Federation Ministry regarding the acquisition and cessation of FBiH citizenship (by release) and supervision over the implementation of the provisions of the Law on Citizenship of FBiH.

16. As to the unfoundedness of the allegations made by the Ministry in the contested conclusion that the right to an effective remedy of A.G., the person applying for citizenship, was violated, the Federation Ministry stated that A.G. could have initiated

an administrative dispute against the ruling refusing the application for citizenship of BiH/FBiH (as follows from the instruction on legal remedy), that the Cantonal Court is competent in the case in question to resolve a party's complaint in an administrative dispute, and that in that context the Ministry, including the applicant, "rose" above the competent court and prevented the person applying for citizenship from availing himself of an ordinary remedy. In that way, as further stated, the applicant dealt with the merits of the case and put himself in the role of a second-instance body, thereby exceeding the legal authority under Article 202, paragraphs 1 and 2 of the LAP in conjunction with Article 32 of the Law on Citizenship of BiH. The Federation Ministry holds that in terms of the aforementioned provisions, the Ministry has the exclusive competence and authority to give or refuse giving consent to the ruling of the Federation Ministry and not to establish the factual situation in the form of a conclusion by determining that the applicant meets the requirements of Article 10 of the BiH Citizenship Law.

17. Finally, taking into account the jurisdiction of the Constitutional Court in terms of Article VI(3) of the Constitution of BiH, the Federation Ministry highlights that the application in question, especially in a situation where the party has not yet exercised its legal right to an ordinary remedy, does not raise a constitutional issue, for it is about an ordinary administrative procedure which was carried out by applying all the rules and principles of the LAP, based on which the ruling was made upon the evaluation of all evidence in the case-file and which was reasoned.

b) Response to the request

18. In its extensive response to the request, the FBiH Government states, *inter alia*, that the applicant disregarded the fact that A.G. has the possibility to challenge the decision of the Federation Ministry, by which he was denied citizenship, in an administrative dispute, that the Federation Ministry's rulings, deciding on the applications of aliens for citizenship, as in the present case, are final and no appeal is allowed against them, but an administrative dispute may be initiated before the competent court (Cantonal Court in Sarajevo) in accordance with the provisions of the LAP. The FBiH Government emphasizes that resolving the alleged dispute before the Constitutional Court would mean prejudging the decision of the ordinary court in the administrative dispute, which is obligated to assess whether the Federation Ministry's ruling was made in a correct and lawful manner, and would mean prejudging the proceedings that may be instituted before the Supreme Court of FBiH and the Constitutional Court. As further stated, the content of the request completely coincides with the content of the conclusion of the Ministry, which the FBiH Government considers inconsistent with Article 9(d) of the Law on Citizenship of BiH. In this connection, it is noted that the dispute arose when the Federation Ministry refused the application for citizenship of A.G. and the Ministry did not agree with such a decision, putting itself in the role of a second instance body, which is not provided for in the Law on Citizenship of BiH or the Law on Citizenship

of FBiH. Taking into account the aforementioned facts which primarily refer to the competence of the Federation Ministry that decides on the application for citizenship and the competence of the Ministry that gives or does not give consent to such a decision, without having the role of a second instance body, the FBiH Government underlines that the Federation Ministry, upon completion of the security checks and the results of those checks, which were evaluated individually and together, concluded that A.G., the person applying for citizenship, posed a threat to the security of BiH, and, exercising its discretion incorporated in the substantive regulation of the Law on Citizenship of BiH/FBiH, issued the ruling refusing the application for acquisition of citizenship. This position was confirmed in numerous judgments of the Cantonal Court in Sarajevo and the Supreme Court of FBiH (the numbers and dates of judgments listed in the response), which corroborated the position that in the procedure regarding an alien's application for citizenship the act of deleting a sentence from criminal records is not essential, and that it does not suffice that the person applying for citizenship only meets the general conditions for acquiring BiH/FBiH citizenship by facilitated naturalization, but the naturalization of an alien must be treated as a complete legal basis for acquiring citizenship of BiH/FBiH, guided by the public interest of BiH/FBiH. In the opinion of the FBiH Government, the Constitutional Court, in its case *AP-5302/10*, pointed to the legitimacy of the discretion of the State in deciding on an application for admission of an alien to citizenship, wherein it concluded that "decision-making on granting and revoking citizenship belongs to the sphere of public powers of a state and that is therefore excluded from the protection offered by Article 6 of the European Convention". In that context, in the opinion of the FBiH Government, given the fact that the person applying for citizenship, A.G., had been convicted of a criminal offense which belongs to the criminal offenses against the health of people and property, it is indisputable that the Federation Ministry acted properly where it concluded that A.G. posed a threat to the security of BiH, and refused his application for citizenship. If the views expressed in the request submitted were accepted as well-founded, according to the FBiH Government, in that case the question arises what is the interest of BiH to accept aliens who have already been convicted of serious crimes in its territory and to give them biometric personal documents that, *inter alia*, entail the enjoyment of other rights, *e.g.* the enjoyment of a visa-free regime. In addition, it pointed to a completely identical situation in another case, relating to the request of an alien from the Islamic Republic of Pakistan whose application for citizenship was refused and the Ministry, as an Institution of BiH, gave its consent to such a decision, and then the Cantonal Court in Sarajevo dismissed the lawsuit in the administrative dispute, holding that the deletion of the sentence from the criminal records in the circumstances of the case at issue was not a key circumstance. In the opinion of the FBiH Government, it follows from the aforementioned that the Ministry takes a different position in two identical cases, putting itself in the role of a second instance body, *i.e.* of an ordinary court. Finally, the FBiH Government points out that the request for resolving the dispute before the Constitutional Court of BiH is ill-founded, since the Ministry is not a second

instance body having the competence to decide on the merits of the application for BiH/FBiH citizenship, while the person applying for citizenship had the right to an ordinary remedy by filing a lawsuit in an administrative dispute before the competent Cantonal Court. The Government considers that this case is not a dispute in terms of Article VI (3) (a) of the Constitution of BiH or a dispute in which the final decision should be adopted by the Constitutional Court, and that therefore the submitted request in terms of Article 19 of the Rules of the Constitutional Court is not admissible. Finally, it was proposed that the request is rejected as such or, if the Constitutional Court finds it admissible, it should be dismissed in terms of Article 59 (3) of the Rules of the Constitutional Court.

IV. Relevant Law

19. The **Constitution of Bosnia and Herzegovina,** in its relevant part, reads:

Article I
Bosnia and Herzegovina

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, colour, 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

20. The **Law on Citizenship of Bosnia and Herzegovina –** Official consolidated text (*Official Gazette of Bosnia and Herzegovina*, 22/16), in its relevant part, reads:

Acquisition by naturalization

Article 9

(1) A foreigner who has submitted an application for acquisition of BiH citizenship may acquire it by naturalization if he/she fulfils the following conditions:

a. That he/she has reached 18 years of age;

b. That he/she has been a permanent resident on the BiH territory for at least three years preceding the application;

c. That he/she has an adequate knowledge of an alphabet/script and a language of one of the constituent peoples of BiH;

d. That he/she has not been subject to the security measure of expulsion of a foreigner from the country or to the safeguard measure of removal of a foreigner from BiH, by an authority established in accordance with the Constitution, and that this measure is still in force;

e. That he/she was not sentenced to a term of imprisonment for a premeditated crime for longer than three years within 8 years of the submission of his/her application;

f. That he/she renounces or otherwise loses his/her former citizenship before he/she acquires the BiH citizenship, unless a bilateral agreement mentioned in Article 14 provides otherwise. The renunciation or cessation of the former citizenship shall not be required if it is not allowed or cannot be reasonably required;

g. That he/she is not subject to criminal proceedings, except when it is not reasonable to require a proof of fulfilling this condition;

h. That he/she does not pose a threat to the security of BiH;

i. That he/she has a permanent source of income in an amount that allows his/her existence or that he/she is able to provide a reliable proof of funds available for his/her support;

j. That he/she has settled all taxes or other financial obligations;

k. That he/she has signed a statement on accepting the legal system and constitutional order of BiH; and

l. That he/she has effective assurances of acquisition of BiH citizenship.

(2) Naturalization shall not be granted, even when the applicant fulfils the general naturalization requirements, if there are reasonable grounds to believe that the State security and public order and peace will be jeopardized by such act, or if naturalization is not consistent with the State interests or for any other reason as determined on the grounds of the overall assessment of the applicant.

Acquisition by facilitated naturalization

Article 10

A foreign spouse of a BiH citizen may acquire BiH citizenship under the following conditions:

a. *That their marriage lasted for at least five years before submitting the application and that it is still effective at the time of submitting the application;*
b. *That he/she renounces or otherwise loses his/her former citizenship before he/she acquires the BiH citizenship, unless a bilateral agreement mentioned in Article 14 provides otherwise; the renunciation or cessation of the former citizenship shall not be required if it is not allowed or cannot be reasonably required;*
c. *That he/she has been granted permanent residence on the territory of BiH;*
d. *That he/she does not pose a threat to the security of BiH.*

Article 32

(1) Decisions mentioned in Article 31 paragraph (2), with the exception of decisions taken under Article 6, 7, 8 and 42, must be submitted to the BiH Ministry of Civil Affairs, within three weeks of the date of decision.

(2) The decision of the competent Entity authority shall enter into force two months after being submitted to the BiH Ministry of Civil Affairs, unless this Ministry finds that conditions stipulated in Articles 9, 10, 11, 12, 13, 14, 21 and 22 have not been fulfilled. In that case, the competent authorities must refer the matter back to the competent Entity authority for reconsideration. Decisions taken under Articles 6, 7 and 8 shall enter into force upon their registration by the competent authority.

(3) If, following a reconsideration process, a dispute remains between the competent authorities of the Entity and BiH, the matter must be submitted for a final decision to the Constitutional Court, in accordance with Article VI(3) of the BiH Constitution.

21. The **Law on Citizenship of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 34/16), in its relevant part, reads:

Article 8
Conditions for acquiring citizenship by naturalization

(1) A foreigner who has submitted an application for acquisition of Federation citizenship may acquire it by naturalization if he/she fulfils the following conditions:

a. *That he/she has reached 18 years of age;*
b. *That he/she has been a permanent resident in the territory of Bosnia and Herzegovina for at least three years preceding the application, provided that at the time of submission of the application he/she has a permanent residence in the territory of the Federation;*

c. *That he/she has an adequate knowledge of an alphabet/script and a language of one of the constituent peoples of BiH;*

d. *That he/she has not been imposed a security measure of expulsion of an alien from Bosnia and Herzegovina or the Federation or a protective measure of removal of an alien from the territory of Bosnia and Herzegovina or the Federation by the competent body established by the Constitution of Bosnia and Herzegovina or the Constitution of the Federation of Bosnia and Herzegovina, and that this measure is still in force;*

e. *That he/she was not sentenced to a term of imprisonment for a premeditated crime for longer than three years within 8 years of the submission of his/her application;*

f. *That he/she renounces or otherwise loses his/her former citizenship before acquiring the citizenship of the Federation, unless otherwise provided by the bilateral agreement referred to in Article 15 of this Law. Renunciation or cessation of previous nationality shall not otherwise be required if it is not permitted or cannot reasonably be required;*

g. *That he/she is not subject to criminal proceedings, except when it is not reasonable to require a proof of fulfilling this condition;*

h. *That he/she does not pose a threat to the security of Bosnia and Hercegovina and the Federation;*

i. *That he/she has a permanent source of income in an amount that allows his/her existence or that he/she is able to provide a reliable proof of funds available for his/her support in accordance with the relevant regulations of Bosnia and Herzegovina;*

j. *That he/she has settled all taxes or other financial obligations in accordance with the relevant regulations of Bosnia and Herzegovina;*

k. *That he/she has signed a statement on accepting the legal system and constitutional order of Bosnia and Hercegovina and the Federation;*

l. *That he/she has effective assurances of acquisition of citizenship of Bosnia and Herzegovina and the Federation, in accordance with the relevant regulations of Bosnia and Herzegovina.*

(2) Acquisition of citizenship by naturalization shall not be granted even if the applicant meets all the conditions for naturalization referred to in paragraph (1) of this Article if there are reasonable grounds to suspect that granting naturalization to that person would endanger the security of Bosnia and Herzegovina and the Federation, and public order and peace, or if naturalization is not in the interests of Bosnia and Herzegovina and the Federation for any other reason as determined on the grounds of the overall assessment of the applicant.

Article 9
Conditions for acquiring citizenship by facilitated naturalization

A foreign spouse of a FBiH citizen may acquire BiH citizenship under the following conditions:

a. That their marriage lasted for at least five years before submitting the application and that it is still effective at the time of submitting the application;

b. That he/she renounces or otherwise loses his/her former citizenship before he/she acquires the FBiH citizenship, unless a bilateral agreement mentioned in Article 15 provides otherwise; the renunciation or cessation of the former citizenship shall not be required if it is not allowed or cannot be reasonably required;

c. That he/she has been granted permanent residence in the territory of Bosnia and Herzegovina, provided that at the time of submitting the application he/she has a permanent residence in the territory of the Federation;

d. That he/she does not pose a threat to the security of Bosnia and Herzegovina and the Federation.

22. The **Criminal Code of the Federation of Bosnia and Herzegovina** (the *Official Gazette of the Federation of Bosnia and Herzegovina*, 36/03, 37/03 - correction, 21/04 - correction, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16 and 75/17). For the purposes of the present Decision, an unofficial consolidated text prepared in the Constitutional Court of BiH shall be used, which reads:

Article 119
Beginning and Duration of Legal Consequences Incident to Conviction

(1) The legal consequences incident to conviction take effect on the day of effectiveness of the sentence.

(2) The legal consequences incident to conviction that consist of a bar on the acquisition of particular right may not exceed ten years from the day on which the punishment has been served, pardoned or amnestied, or has been barred by the statute of limitation, except for certain legal consequences for which law provides a shorter period of duration.

(3) The legal consequences incident to conviction cease by the deletion of the sentence.

Article 121
Rehabilitation

(1) Following release from the institution where they had served sentences of imprisonment, long-term imprisonment or juvenile imprisonment or after being

pardoned or amnestied, or after the punishment was barred by the statute of limitation, convicted persons shall freely enjoy all rights provided by the constitution, law and other regulations, and may acquire all rights other than those whose exercise is limited as a result of a security measure imposed on them or a legal consequence of the conviction.

(2) The provision of paragraph 1 of this Article also applies to persons on parole, unless their rights are limited by special provisions on release on parole.

Article 125
Deletion of Conviction

(1) On the condition that the perpetrator of the criminal offence has not been convicted yet again of a new criminal offence, the conviction shall be deleted by the force of law upon the expiry of the following time periods:

a) A sentence by which a perpetrator of a criminal offence has been released from punishment shall be deleted from the criminal record, provided that he does not perpetrate a new criminal offence within the period of one year from the date when the verdict becomes final.

b) A suspended sentence shall be deleted from the criminal record one year after the expiration of the probation period, unless the person convicted has perpetrated another criminal offence within that period.

c) A fine or a sentence of imprisonment of up to one year shall be deleted from the criminal record three years after the day on which the punishment was served, pardoned or barred by the statute of limitations, provided that the convicted person does not perpetrate a new criminal offence within that period.

d) The sentence of imprisonment for a term exceeding one and up to three years shall be deleted from the criminal record five years after the day on which the punishment was served, pardoned or barred by the statute of limitations, provided that the convicted person does not perpetrate another criminal offence within that period.

e) The sentence of imprisonment for a term exceeding three and up to five years shall be deleted from the criminal record ten years after the day on which the punishment was served, pardoned or barred by the statute of limitations, provided that the convicted person does not perpetrate another criminal offence within that period.

f) The sentence of imprisonment for a term exceeding five and up to ten years shall be deleted from the criminal record fifteen years after the day on which the punishment was served, pardoned or barred by the statute of limitation, provided that the convicted person does not perpetrate another criminal offence within that period.

(2) Upon petition by a convicted person, the court may decide to delete a sentence of imprisonment for a term exceeding 10 years from the criminal record, if a period of twenty years has expired from the day on which the punishment was served, pardoned or barred by the statute of limitations, provided that the convicted person has not perpetrated another criminal offence within that period.

(3) In deciding on deleting the sentence, the court shall take into account the conduct of the convicted person after serving his sentence, the nature of the criminal offence, and other circumstances that might be relevant to evaluate whether the deletion is warranted.

(4) The sentence of long-term imprisonment shall not be deleted from the criminal record.

(5) Conviction shall not be deleted from criminal records for as long as another criminal proceeding is ongoing for a new criminal offence.

(6) Conviction shall not be deleted from criminal records for as long as security measures are in place, or until the property gain acquired by the perpetration of the criminal offence has been entirely confiscated.

(7) Should the sentence be deleted in accordance with the provisions of paragraphs (1) through (3) of this Article, the perpetrator of a criminal offence shall be considered as having no previous convictions.

23. The **Criminal Procedure Code of the Federation of Bosnia and Herzegovina** (the *Official Gazette of the Federation of Bosnia and Herzegovina*, 35/03, 37/03 - corrections, 56/03 corrections, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13 and 59/14), in the relevant part, reads:

Article 227
Information from Criminal Records

(1) Information contained in the criminal record may be revealed to the court, the prosecutors' offices and bodies of internal affairs in connection with criminal proceedings conducted against a person who had been previously convicted, to competent bodies in charge of the execution of criminal sanctions and competent bodies participating in the procedure of granting amnesty, pardon or deletion of sentence.

(2) Information from the criminal record may, upon the presentation of a justifiable request, be revealed to governmental bodies if certain legal consequences of the conviction or security measures are still in force.

(3) At their request, citizens may be given information on their criminal record if the information is necessary for exercising their rights.

(4) No one has the right to demand that citizens present evidence on their being convicted or not being convicted.

(5) Provisions of paragraphs 1 through 4 of this Article are special provisions of equal relevance for the Federation of Bosnia and Herzegovina Law on Freedom of Access to Information.

24. The **Law on Administrative Procedure** (*the Official Gazette of the Federation of Bosnia and Herzegovina*, 2/98 and 48/99), in the relevant part, reads:

Article 202, paragraphs 1 and 2

(1) Where the law or any other regulation based on the law provides that a decision shall be issued by one authority with the consent of another authority, the authority taking a decision shall draft the decision and provide it, together with case files, to another authority for obtaining consent and the latter may give its consent by an endorsement on the very decision or by a special act. In that case, the decision shall be issued when another authority gives its consent and it shall be deemed as an act of the authority that took a decision.

(2) In the case referred to in paragraph 1 of this Article, the authority taking a decision shall draft the decision and communicate it together with case files to another authority for obtaining consent and the latter may give its consent by its confirmation on the very decision or by a special enactment. In that case, the decision shall be issued when another authority gives its consent and it shall be considered as an enactment of the authority that took a decision.

V. Admissibility

25. In examining the admissibility of the request the Constitutional Court invokes the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

26. 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.

27. In the present case, the applicant is Mr. Zoran Tegeltija, Chairman of the Council of Ministers of Bosnia and Herzegovina, meaning that the request was filed by an authorized person within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. Taking into account the provision of Article 21, paragraph 1 of the Rules of the Constitutional Court, the Constitutional Court holds that the request is admissible, for, pursuant to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court has jurisdiction to decide, *inter alia*, any dispute between the Institutions of Bosnia and Herzegovina and the Entities. The applicant pointed out that there was a dispute between the Ministry and the Federation Ministry, as the competent authorities at the State level and Entity level, and highlighted that the Entity level of government had arbitrarily applied substantive law in connection with the A.G.'s application for admission to citizenship of BiH/FBiH, implying a violation of the rights under Article I(7) of the Constitution of BiH, Articles 6, 8, 13 and 14 of the European Convention and the provisions of the Law on Citizenship of BiH, the Law on Citizenship of FBiH and the CC of FBiH. The arguments in the request are based on the assertion that the Federation Ministry, by misapplying the provisions in the field of citizenship and criminal law, in deciding on the A.G.'s request, erroneously assessed the evidence and incompletely and incorrectly established the facts of the case, which ultimately resulted in an unlawful ruling. The applicant pointed out the content of the provision of Article 32 of the Law on Citizenship of BiH, which, in the relevant part, reads: *(3) If, following a reconsideration process, a dispute remains between the competent authorities of the Entity and BiH, the matter must be submitted for a final decision to the Constitutional Court, in accordance with Article VI(3) of the BiH Constitution.*

28. In view of the above, it follows that the request filed with the Constitutional Court under Article VI(3)(a) of the Constitution of BiH essentially relates to the allegation of a dispute between the authorities at the State level and at the Entity level over conflicting opinions regarding the acquisition of BiH/FBiH citizenship and the legal consequences of not giving consent by the State level of government to the Entity level of government. In the opinion of the Constitutional Court, despite the opinions expressed by the Government of FBiH and the Federation Ministry as to the inadmissibility of the request, this is especially important, for in the procedure of acquiring citizenship of BiH/FBiH, in the present case, the Ministry as an Institution of BiH and the Federation Ministry as an Entity body passed two conflicting acts wherein they took different positions on the same issue, so it follows that such a dispute, in terms of Article VI(3)(a) of the Constitution of BiH, can be resolved only in the proceedings before the Constitutional Court.

VI. Merits

29. The applicant proposed that the Constitutional Court resolve the dispute that arose between the Ministry and the Federation Ministry as the competent authorities at the State level and at the Entity level in connection with A.G.'s application for admission

to citizenship of BiH/FBiH, indicating a violation of the rights under Article I(7) of the Constitution of BiH, Articles 6, 8, 13 and 14 of the European Convention and the substantive provisions of the Law on Citizenship of BiH, the Law on Citizenship of FBiH and the relevant provisions of the CC of FBiH relating to the legal consequences of deleting a criminal conviction from criminal records.

30. The Constitutional Court first recalls that deciding on granting and revoking citizenship belongs to the sphere of public powers of a state and that this issue in Bosnia and Herzegovina is governed by constitutional provisions, as well as by the Law on Citizenship of BiH, the Law on Citizenship of FBiH and the Law on Citizenship of Republika Srpska. In addition, according to the case law of the European Court of Human Rights, the procedures followed by public authorities to determine whether an alien should be allowed to acquire citizenship or be deprived of that right are of a discretionary, administrative nature and do not involve the determination of civil rights and obligations within the meaning of Article 6 of the European Convention (see ECtHR, Judgment in the case of *V.P. versus the United Kingdom*, Application No. 13162/87 54 DR 21, p.2). Bearing in mind that, in addition to the provision of Article I(7) of the Constitution of BiH, the applicant refers to the provisions of the European Convention (Articles 6, 8, 13 and 14), which concern A.G. as an individual and, at the same time, as a person applying for citizenship, and given that citizenship belongs to the sphere of public powers of a country, including Bosnia and Herzegovina, the Constitutional Court will examine only the dispute between the Ministry and the Federation Ministry, *i.e.* the dispute between the State level of government and the Entity level of government and not the dispute between the Federation Ministry and the person applying for citizenship as an individual.

31. Given that this is about a dispute which does not involve the determination of civil rights and obligations under the European Convention, the Constitutional Court will resolve the dispute based on the provisions of Article I(7) of the Constitution of BiH and the provisions of relevant laws the application of which is questioned by the applicant, pointing to the arbitrariness of the Federation Ministry to that end (application of relevant laws).

32. The Constitutional Court first notes that, in the present case, the Federation Ministry, deciding in the first instance on the A.G.'s application for BiH/FBiH citizenship, issued a ruling refusing the application. The mentioned ruling states the reasons why the Federation Ministry assessed that A.G. as an alien and, at the same time, the person applying for citizenship of BiH/FBiH did not meet the requirements for acquiring citizenship referred to in Article 9(d) of the Law on Citizenship of FBiH, *i.e.* posed a threat to the security of BiH and FBiH. In that context, the conviction in the territory of BiH/FBiH of the person applying for citizenship for the criminal offense of Possessing and Enabling Enjoyment of Narcotic Drugs, for which he was sentenced by the final judgment of the

Municipal Court to conditional imprisonment of eight months, was highlighted as a key circumstance. In addition, it is underlined that the aforementioned criminal offense is a serious criminal offense regulated by the CC of FBiH in the part of criminal offenses against the health of people and that the person applying for citizenship therefore poses a threat to the security of the State of BiH. In this connection, it is highlighted that pursuant to Article 8 paragraph 2 of the Law on Citizenship of FBiH, acquisition of citizenship by naturalization shall not be granted even if the applicant meets all the conditions for naturalization referred to in paragraph (1) of this Article (general conditions) if there are reasonable grounds to suspect that granting naturalization to that person would endanger the security of BiH and the Federation of BiH, or if naturalization is not in the interests of BiH and the Federation of BiH or for any other reason as determined on the grounds of the overall assessment of the applicant. In addition to the aforementioned, the Federation Ministry refers to the content of the provision of Article 9 paragraph 1 of the Law on Citizenship of BiH, which coincides with the provision of the aforementioned Entity law, which, as reasoned, derives from the discretion of each State to admit or refuse citizenship to an alien, and that there is no obligation of the State to grant its citizenship, provided that a proper procedure is followed and a lawful ruling is passed. The Federation Ministry took an identical position after reconsidering the case due to the Ministry's disagreement with such a position and, in response to the Ministry, presented more detailed reasons in connection with the proper procedure carried out by the Federation Ministry and with the lawfulness of the ruling based on the aforementioned substantive provisions of the Law on Citizenship of BiH and the Law on Citizenship of FBiH, which was stated (also) in the FBiH Government's response in respect of the proceedings before the Constitutional Court.

33. Unlike the aforementioned, in the procedure of giving consent to the previous ruling of the Federation Ministry, the Ministry issued a conclusion containing a completely opposite position and opinion. Specifically, the Ministry found that A.G. met the requirements of Article 10 of the Law on Citizenship of BiH (facilitated naturalization), that the Federation Ministry arbitrarily applied substantive regulations in the field of citizenship (Article 9, paragraph 2 of the Law on Citizenship of BiH and Article 8, paragraph 2 of the Law on Citizenship of FBiH, governing naturalization), and criminal law, for it unfoundedly considered, as a decisive fact, the existence of a final judgment sentencing A.G. to conditional imprisonment, ignoring the fact that the sentence had been deleted from the criminal records (Article 125 of the CC of FBiH) and that, by deleting the sentence, the convicted person is considered to have no prior convictions, so that A.G. who applied for BiH/FBiH citizenship by facilitated naturalization, is to be considered to have no prior convictions.

34. In this connection, the Constitutional Court points out that the present request raises the issue of acquiring citizenship by facilitated naturalization in connection with the legal consequences of deleting a criminal conviction from criminal records. The Constitutional

Court highlights that the Law on Citizenship of BiH and the Law on Citizenship of FBiH prescribe the requirements under which an alien may acquire BiH/FBiH citizenship by naturalization and by facilitated naturalization. Both laws, in addition to the general requirements for acquiring citizenship prescribed in Article 9, paragraph 1 of the Law on Citizenship of BiH and Article 8, paragraph 1 of the Law on Citizenship of FBiH, prescribe in paragraph 2 that naturalization will not be granted if there are reasonable grounds to suspect that approved naturalization would endanger the security of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, or if naturalization is not consistent with the interests of Bosnia and Herzegovina or for any other reason as determined on the grounds of the overall assessment of the factual situation of the applicant determined in the procedure. In the opinion of the Constitutional Court, the facilitated naturalization is governed by the provisions of Article 10 of the Law on Citizenship of BiH and Article 9 of the Law on Citizenship of FBiH, so the provisions regulating the issue of acquiring citizenship by naturalization and facilitated naturalization cannot be considered separately, as implied in the request, for the aforementioned provisions substantively and conceptually represent one whole, *i.e.* follow one another. In this connection, the Constitutional Court supports the position taken in the disputed ruling of the Federation Ministry that, in deciding on the fulfilment of the requirements for acquiring citizenship, these provisions cannot be applied independently of each other.

35. The next (and) most important issue in the request refers to the legal consequences of deleting a criminal conviction in the procedure of acquiring BiH/FBiH citizenship. The argument of the applicant, *i.e.* of the Ministry, is that the conditional sentence of the person applying for citizenship has been deleted from the criminal records and that he should therefore be considered as not having prior convictions. The request further states that the Federation Ministry exceeded the limits of its discretion by arbitrarily concluding that the substantive regulations in the field of citizenship derogate from the application of the CC of FBiH. On the other hand, the Federation Ministry, opposing such a position and opinion, holds that that the regulations in the field of citizenship (Law on Citizenship of BiH and Law on Citizenship of FBiH) are *lex specialis* in relation to the CC of FBiH and that the act of deleting a sentence from the criminal record of a convicted foreign citizen does not mean that an alien is not considered convicted under the provisions of the CC of FBiH, in terms of meeting the requirements for acquiring BiH/FBiH citizenship.

36. In view of the aforementioned conflicting opinions and views, the Constitutional Court recalls that it follows from the provision of Article 125, paragraph 1, subparagraph (b) of the CC of FBiH that the deletion of a conviction by force of law for certain convictions occurs automatically, after a certain time, unless the person convicted has perpetrated another criminal offence within that period. The length of that period is determined differently in the law, depending on the type of criminal sanction that was imposed on the convict. Furthermore, paragraph 7 of the cited Article stipulates

that should the sentence be deleted in accordance with the provisions of paragraphs (1) through (3) of this Article, the perpetrator of a criminal offence shall be considered as having no previous convictions. However, the mentioned provision cannot be viewed in isolation but in connection with the provisions on rehabilitation (Article 121 of the CC of FBiH and Article 117 of the CC of BiH), *i.e.* the provisions relating to giving information from the criminal record and the powers that exist in that regard. The necessity to consider these provisions in their mutual relation arises from the key question, which reads: what are the legal consequences of deleting a conviction. In the present case, the Constitutional Court takes into account that the person applying for citizenship, A.G., was convicted by a final judgment and got a sentence of conditional imprisonment of eight months with the probation period of one year for the criminal offense (of possessing and enabling enjoyment of narcotic drugs), and that the aforementioned sentence was deleted from the criminal record. As to the legal significance of deleting a conviction, which is necessarily related to the provisions on the rehabilitation of convicted persons, the Constitutional Court recalls (taking into account the type of criminal sanction) that it is a matter of the so-called limited rehabilitation, which is characterized, *inter alia*, by the fact that a person whose conviction has been deleted from the criminal record has not been explicitly granted the status of non-conviction. The aforementioned has the consequence that the competent authorities involved in the criminal proceedings, regardless of whether the conviction has been deleted from the criminal record and regardless of the passage of time since the previous conviction, have the right to use information on a person's previous conviction, given that the provision of Article 227 of the FBiH Criminal Procedure Code ("the CPC of FBiH") stipulates that information contained in the criminal record may be revealed to *the court, the prosecutors' offices and bodies of internal affairs*. The objective of such a rehabilitation system is the interest and protection of society against crime. In this connection, the Constitutional Court recalls the relevant part of the provision of Article 121 of the CC of FBiH (rehabilitation), stipulating that, *inter alia*, *convicted persons shall freely enjoy all rights provided by the constitution, law and other regulations, and may acquire all rights other than those whose exercise is limited as a result of a security measure imposed on them or a legal consequence of the conviction.* The limited operation of the mechanism of deleting a conviction is also a consequence of the fact that the law does not contain special provisions on the restriction and prohibition of providing data from criminal records, *i.e.* that it does not recognize the so-called "presumption of non-conviction", as the data, as previously stated, can be given to courts, the prosecutors' offices and bodies of internal affairs. It, therefore, follows that the deletion of a conviction from the criminal record does not achieve a *de facto* annulment of the conviction and the criminal sanction covered by that deleted conviction, just as deleting a conviction does not lead to the legal annulment of a previous conviction, since data on convictions can be revealed to courts, prosecutor's offices and bodies of internal affairs (police), for the purpose of performing tasks within their competence. In this connection, it is obvious that the scope

and consequences of deleting a conviction from the criminal record are limited and do not apply to all potentially interested persons. In this context, the Constitutional Court recalls that the deleted conviction and the deleted legal consequences of the conviction must not be mentioned in the criminal record certificate, which is issued to citizens based on data from criminal records. However, this does not mean that the entry made in the register of convictions is annulled and that such data is not kept in the criminal records that can be revealed to courts, prosecutor's offices and bodies of internal affairs in terms of Article 227 of the CPC of FBiH, as reasoned above.

37. In view of the above, the applicant's allegations that the Federation Ministry arbitrarily applied substantive regulations in the field of citizenship and criminal law and that it exceeded its powers in relation to the legal consequences of deleting a conviction cannot be accepted, for the opposite arises from the provision of Article 227 of the CPC of FBiH. Taking into account the clear legal provisions of the Law on Citizenship, and the clear, argument-based and detailed reasons behind the ruling of the Federation Ministry, the Constitutional Court cannot conclude that in the present case the substantive law was arbitrarily applied in refusing the A.G.'s application for acquiring BiH/FBiH citizenship. In addition, the Constitutional Court recalls that, according to the documentation submitted and the challenged ruling, the Federation Ministry, in cooperation with the state and entity authorities, carried out security checks of the person applying for citizenship. Also, after collecting the data in that way, assessed that in the procedure of acquiring citizenship, the circumstance could not be disregarded that, by a final judgment, A.G. was convicted in the territory of BiH/FBiH of a serious criminal offence stipulated in Chapter XXI of the CC of FBiH under the title Criminal Offences against the Health of People and Property and that he, therefore, did not meet the requirements for acquiring BiH citizenship. By assessing the data collected as well as the conviction of 26 October 2016 pronounced to the person applying for citizenship, for committing the criminal offense of possessing and enabling enjoyment of narcotic drugs, regardless of the nature of the sentence (conditional sentence), which had been deleted from the criminal records, the Federation Ministry concluded that granting citizenship to the person concerned would endanger the security of BiH and FBiH. In view of the above, it follows that the Federation Ministry took into account the provision of Article 125 of the CC of FBiH, governing deletion of a conviction and which, in the circumstances of the present case, is brought into connection with its legal consequences, including the conclusion that deleting the conviction related to the procedure in question (acquisition of citizenship) is of no relevance, and that, in the present case, the laws governing the issue of citizenship are *lex specialis* in relation to the provision of Article 125 of the CC of FBiH.

38. In view of all the above, in the opinion of the Constitutional Court, the applicant's reference to the arbitrary application of the provisions of Article 10(d) of the Law on Citizenship of BiH and Article 9(d) of the Law on Citizenship of FBiH, prescribing the requirements for acquiring citizenship by facilitated naturalization, is unfounded

and, so the Constitutional Court finds nothing to indicate arbitrariness in the conduct of the Federation Ministry, as an entity body, which concluded that A.G., as an alien and at the same time the person applying for citizenship of BiH/FBiH, did not meet the requirements for acquiring citizenship.

39. In view of the above, the Constitutional Court is of the opinion that the Federation Ministry, in the procedure of acquiring citizenship, initiated by the application filed by A.G., did not violate the provisions of Article I(7) of the Constitution of Bosnia and Herzegovina, thereby (also) resolving the present constitutional dispute.

VII. Conclusion

40. The Constitutional Court finds that the Federation Ministry, as an Entity body, did not act arbitrarily in the procedure of deciding on the application for citizenship of BiH/FBiH where it refused the application filed by A.G. from the Arab Republic of Egypt. It finds so as it assessed based on the established facts that the Federation Ministry was correct in deciding that A.G., as the person applying for citizenship of BiH/FBiH, did not meet the requirements prescribed in Article 10 of the Law on Citizenship of BiH and Article 9 of the Law on Citizenship of FBiH for acquiring citizenship by facilitated naturalization. Furthermore, the Federation Ministry's assessment was correct in finding that A.G., in terms of Article 9 paragraph 2 of the Law on Citizenship of BiH and Article 8 paragraph 2 of the Law on Citizenship of FBiH, posed a threat to the security of the Federation of Bosnia and Herzegovina.

41. Pursuant to Article 59 (1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

42. Pursuant to Article VI(5) 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

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

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Case No. U-1/18

DECISION ON ADMISSIBILITY AND MERITS

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Decision of 1 February 2018

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić, and

Mr. Giovanni Grasso

Having deliberated on the request filed by **County Court in Banja Luka (Judge Milan Blagojević)**, in the case no. **U-1/18**, at its session held on 15 February 2018 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by County Court in Banja Luka (Judge Milan Blagojević) for review of the compatibility of Articles 182(1), 208(2) and 433(1) of the Civil Procedure Code (*Official Gazette of the Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13) 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 is hereby dismissed.

It is hereby established that Articles 182(1), 208(2) and 433(1) of the Civil Procedure Code (*Official Gazette of the Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13) are compatible 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.

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

Reasoning

I. Introduction

1. On 29 December 2017, the County Court in Banja Luka (Judge Milan Blagojević; "the applicant") filed the request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the compatibility of Articles 182(1), 208(2) and 433(1) of the Civil Procedure Code (*Official Gazette of the Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13) ("the CPC") 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 European Convention"). The request was registered with the Constitutional Court under number *U-1/18*.

2. On 5 January 2018, the applicant lodged the request with the Constitutional Court for review of the compatibility of Article 433(1) of the CPC with Articles II(3)(e), II(3)(h) and II(4) of the Constitution of Bosnia and Herzegovina and Articles 6, 10 and 14 of the European Convention. The mentioned request was registered with the Constitutional Court under the case No. *U-3/18*.

II. Procedure before the Constitutional Court

3. Pursuant to Article 32(1) of the Rules of the Constitutional Court, the Constitutional Court decided to merge the mentioned requests and to conduct one set of proceedings and to adopt a single decision under the case No. *U-1/*18.

4. Pursuant to Article 23 of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska ("the National Assembly") was requested on 5 and 12 January 2018 to submit its response to the request.

5. The National Assembly failed to do so within the given time limit.

III. Request

a) Allegations in the request

6. The applicant holds that the provisions of Articles 182(1), 208(2) and 433(1) of the CPC ("the impugned provisions") are incompatible with Articles II(3)(e), II(3)(h) and II(4) of the Constitution of Bosnia and Herzegovina and Articles 6, 10 and 14 of

the European Convention (right to a fair trial, right to freedom of expression and non-discrimination).

7. As regards the provision of Article 182(1) of the CPC, the applicant points out that the introduction of a legal mechanism of default judgement the essence of which is that if a defendant, who has been duly served with a complaint where the plaintiff requested the issuing of a default judgement, fails to submit a written response to the complaint within the prescribed time limit, the court will render a judgement granting the claim (default judgement), unless the claim is *manifestly* unfounded.

8. The applicant further emphasizes that the impugned provision as well as the whole mechanism of default judgement are unconstitutional, as they are contrary to Article II(3)(h) and, consequently, to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Articles 6, 10 and 14 of the European Convention. In this respect, the applicant points out that Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention provide the right to freedom of expression, but also the right of an individual not to express his/her thoughts and that he/she must not suffer any legal consequences whatsoever for such behaviour. The applicant holds that silence of a party to the proceedings (the same refers to witnesses and experts in the judicial proceedings) must not be legally sanctioned, and that is exactly what has been done by Article 182 of the CPC in 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. Namely, it clearly follows, in the view of the applicant, that Article 182(1) of the CPC imposes an obligation on the defendant that he/she must submit a written response to the complaint within the prescribed time limit, and if he/she fails to do so, he/she will be legally sanctioned in such a manner that the court will render a default judgement. Therefore, in the applicant's opinion, it clearly follows that, contrary to Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention, the State coerces an individual to express his/her thoughts (in a written form), otherwise, he/she would be subject to the aforementioned legal sanction.

9. In addition, as regards the provision of Article 228(2) of the Civil Procedure Code, the applicant indicates that the relevant provision prescribes that a default judgement cannot be contested for erroneously or incompletely established facts. In the applicant's opinion, the aforementioned is unconstitutional and, in practical terms, the legislator introduced a ban on a party to the proceedings to express his/her thoughts on legally relevant facts and even if the party does so in an appeal against the default judgement, the court, in view of the said legal ban, cannot review that judgement in respect of the state of facts. The applicant holds that it amounts to a violation of the freedom of expression referred to in Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention. Furthermore, the impugned provision, according to the applicant, is in violation of the right to a fair trial, which is inherent in all stages of legal

proceedings, including appellate proceedings, as guaranteed by Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention. In addition, the applicant holds that the mentioned provision is also in violation of Article 14 of the European Convention. In that context, the applicant points out that, based on the relevant legal provision, the legislator, unconstitutionally and without reasons that may be justified by the public interest, discriminates against those parties to legal proceedings where a default judgement is rendered when compared to all those parties to civil proceedings where such a judgement is not rendered.

10. As to Article 433(1) of the CPC, the applicant indicates that, by this provision, the legislator unconstitutionally imposed the ban so that the judgment or ruling concluding small claim court proceedings cannot be challenged in appellate proceedings for erroneously or incompletely established facts. The applicant points out that this ban cannot be justified by the public interest given that all parties, including the plaintiff in the particular case, are unlawfully discriminated against with respect to all other parties involved in disputes which are not small claims disputes (where the value of claims exceeds BAM 5,000) and in which the judicial decisions may also be challenged for erroneously or incompletely established facts. In addition to the aforementioned, the applicant is of the opinion that the legislator, by the impugned provision, prescribed the ban on a party to the proceedings to express his/her thoughts in appellate proceedings on legally relevant facts in terms of Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention. The applicant points out that there is no appropriate application of substantive law without correctly and completely established facts and in the absence of the appropriate application of substantive law there is no fair trial in any judicial proceedings, including small claims court proceedings.

11. The applicant points out that, objectively speaking, in the present society small claims disputes in which the value of claims is between BAM 3,000 and 4,000 are very important for the majority of people where their property is concerned. Therefore, in the applicant's opinion, the parties to small claims disputes are discriminated against by the impugned provision when compared to the parties involved in disputes which are not small claims disputes (BAM 5,000) and who are allowed to challenge such judgements also on the ground of erroneously and incompletely established facts.

12. In connection with the aforementioned, the applicant refers to the recent decision of the Constitutional Court in the case No. *U-7/17* (paragraph 33), where it is pointed out that where appellate courts do exist, the requirements of Article 6 of the European Convention must be complied with, so as for instance to guarantee to litigants an effective right of access to a court for the determination of their civil rights and obligations. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. When this position is consistently applied, in the applicant's opinion, that means that there is no effective right of access

to an appellate court if the legislator unconstitutionally provides for the mechanism of a default judgement by Article 182 of the CPC nor is there such an effective right if the legislator, also unconstitutionally, provides for bans as stipulated by Articles 208(2) and 433(1) of the CPC.

b) Facts of the case in respect of which the request is lodged

13. The applicant states that the Basic Court in Gradiška issued default judgement no. 72 0 P 056561 P of 6 December 2016 since the defendant failed to submit a response to the complaint. The defendant lodged an appeal against the first instance judgement for erroneously and incompletely established facts. In addition, the applicant underlines that the value of the dispute in the relevant litigation is BAM 500 and, therefore, the defendant in that case is banned from contesting the relevant default judgement on the ground of erroneously and incompletely established facts not only because of the ban under Article 208(2) of the CPC but also because of the ban under Article 433(1) of the CPC and the appellate court, in considering the relevant appeal, is faced with the same ban.

14. Furthermore, the applicant states that in its judgement no. 71 0 Mal 043497 17 Mal 2 of 8 August 2017, which is challenged by the plaintiff's appeal, the Basic Court in Banja Luka, in its instructions of legal remedy, stated that the first instance judgement may be challenged only for violations of provisions of civil procedure or for misapplication of substantive law. The case against which the appeal has been failed relates to the issue of debt payment for a loan in the amount of BAM 396.80. In his appeal, the plaintiff indicates the erroneous evaluation of evidence by the first instance court.

IV. Relevant Law

15. The **Civil Procedure Code of RS** (*Official Gazette of the RS*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13), as relevant, reads:

Article 1

This law shall define rules of procedure based on which the basic courts, county courts, county commercial courts, higher commercial courts and the Supreme Court of Republika Srpska shall hear and decide on civil disputes unless otherwise stipulated by a separate law.

Article 4

Unless otherwise provided, the court shall decide on claims on the basis of an oral, direct and public hearing.

Article 69

The complaint with attachments shall be served on the defendant within thirty (30) days after the day of receipt of a correct and complete complaint by the court.

Article 70

After receipt of the complaint with attachments, the defendant shall be obliged to give a written response to the complaint within thirty (30) days.

When serving the defendant with the complaint, the court shall inform the defendant about his/her obligation referred to in paragraph 1 of this Article, the required contents of the response and the consequences of not responding to the complaint within the set time limit.

Article 182

1) If a defendant, who was duly served with a complaint, fails to submit a written response to the complaint within the prescribed time limit, where the plaintiff requested the issuing of a default judgement the court shall render a judgement accepting the claim ("Default Judgement"), unless the claim is obviously unfounded.

2) A statement of claim is obviously unfounded when:

1. *the statement of claim is in obvious contradiction with the facts stated in the complaint;*
2. *the facts on which the statement of claim is based are in obvious contradiction with the evidence submitted by the plaintiff or the generally known facts.*

3) If the claim is obviously unfounded, the court shall render a judgement refusing the claim.

4) Default judgement shall not be rendered on the claim or a part of the claim which may not be disposed of.

Article 208 (1) and (2)

1) A judgement can be appealed on the following grounds:

1. *Violation of the provisions of the civil procedure law*
2. *Erroneously or incompletely determined state of facts;*
3. *Misapplication of the substantive law.*

2) A default judgement cannot be contested for erroneously or incompletely determined state of facts.

Article 429

For the purposes of this Law, small claim disputes are those where the monetary claim does not exceed 5,000 KM.

Small claim disputes shall also include disputes which are not of pecuniary nature but for which the plaintiff has stated in the complaint that s/he will accept certain

monetary sum that does not exceed the amount referred to in paragraph 1 of this Article in lieu of the obligation disclosed in the complaint. (Article 321(1))

Small claim disputes shall also include those disputes in which the main subject matter is not of pecuniary nature but the transfer of a moveable asset with value, as stated in the complaint by the plaintiff, that does not exceed the amount referred to under paragraph 1 of this Article (Article 321(2))

Article 433

The judgment or the decision concluding the small claims proceedings may be contested only due to the procedural errors and to the misapplication of substantive law.

The court shall be obliged to state reasons due to which the appeal may be lodged in the judgment or decision mentioned in the paragraph 1 of this Article.

Parties may lodge the appeal against the first instance judgment or decision mentioned in paragraph 1 of this Article within fifteen (15) days.

In small claims proceedings, the time limit referred to in Article 179, paragraph 2 and Article 192, paragraph 1 of this Law shall be fifteen (15) days.

V. Admissibility

16. In examining the admissibility of the request, the Constitutional Court invokes the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina.

Article VI(3)(c) of the Constitution of Bosnia and Herzegovina reads:

(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.

17. The request for review of the constitutionality was submitted by the County Court of Banja Luka (Judge Milan Blagojević), meaning that the request was filed by an authorised person pursuant to Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (see, Constitutional Court, Decision on the Admissibility and Merits no. *U-5/10* of 26 November 2010, paragraphs 7 through 14, published in the *Official Gazette of Bosnia and Herzegovina* no. 37/11). Bearing in mind the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Constitutional Court's Rules, the Constitutional Court establishes that the present request is admissible, as it was submitted by an authorised person and because there is no single reason under Article 19(1) of the Constitutional Court's Rules rendering this request inadmissible.

VI. Merits

18. The applicant requested that the Constitutional Court decide whether the challenged provisions are compatible with Articles II(3)(e), II(3)(h) and II(4) of the Constitution of Bosnia and Herzegovina and with Articles 6, 10 and 14 of the European Convention.

19. The challenged provisions of Articles 182(1), 208(2) and 433(1) of the Civil Procedure Code read as follows:

Article 182(1) of the Civil Procedure Code

If a defendant, who was duly served with a complaint, fails to submit a written response to the complaint within the prescribed time limit, where the plaintiff requested the issuing of a default judgement the court shall render a judgement accepting the claim ("Default Judgement"), unless the claim is manifestly ill-founded.

Article 208(2) of the Civil Procedure Code

A default judgement cannot be contested for erroneously or incompletely determined state of facts.

Article 433(1)

A judgment or a ruling concluding the small claims proceedings may be contested only for to the violation of the civil procedure provisions and for misapplication of substantial law.

Right to a fair trial

20. Article II(3)(e) 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.

21. Article 6(1) of the European Convention, as 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. (...)

22. The Constitutional Court first recalls that its task within the meaning of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina is to answer to the applicant's question whether the challenged provisions on whose validity its decision depends is compatible with the Constitution of Bosnia and Herzegovina and the European Convention. In view

of the aforementioned, in the present decision, the Constitutional Court will not give any opinion or instruction to the ordinary court as regards a resolution of the relevant case in respect of which the request was filed, given that the issue of application and interpretation of the substantive law falls under the competence of ordinary courts (see, *mutatis mutandis,* Constitutional Court, Decision on Admissibility and Merits, *U-5/13* of 5 July 2013, paragraph 30, available at www.ustavnisud.ba)

23. The applicant challenges the mentioned provisions and holds that they are contrary to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, as the parties to the proceedings, in the determination of their civil rights and obligations, are barred from having effective access to a court. Thus, it follows that the issue of violation of the constitutional right of access to a court, as a segment 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, is raised by the request in question. Therefore, the Constitutional Court will examine that aspect of the request.

24. In this connection, the Constitutional Court recalls that "the right to a court" is a constituent element of Article 6(1) of the European Convention and it also includes the right of access, *i.e.* the right to file a civil claim. However, according to the case law of the European Court of Human Rights, that right is not absolute but may be subject to limitations. In that context, the European Court of Human Rights, in the case of *Lončar v. Bosnia and Herzegovina*, indicated that the right of access to a court secured by Article 6(1) is not absolute but may be subject to limitations; these are permitted by implication, since the right of access by its very nature calls for regulation by the State, which may vary in time and in place according to the needs and resources of the community and of individuals. Therefore, in the view of the European Court of Human Rights, in laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention's requirements rests with the Court. Limitations on the right to a court are compatible with Article 6 only if they do not restrict or reduce the access left to the litigant in such a way or to such an extent that the very essence of the right is impaired. Lastly, such limitations will not be compatible with Article 6(1) if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In addition, the European Court of Human Rights indicates in the cited Decision that it is not the Court's task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention. This applies in particular to the interpretation by courts of rules of a procedural nature, such as time limits governing the submission of documents or lodging of appeals (see, European Court of Human Rights, *Lončar v. Bosnia and Herzegovina*, Judgment of 25 February 2014, paragraphs 37 and 38).

25. Bringing the aforementioned into connection with the relevant request, the Constitutional Court notes that the applicant considers that the default judgment is a type of sanction imposed on the defendant, since Article 182(1) of the Civil Procedure Code first imposes the obligation on the defendant to submit a written response to the complaint, which the defendant must do within the prescribed time limit, otherwise he will be subject to a legal sanction as the court will render a default judgment. According to the applicant, such a negative consequence for the defendant could follow only after the hearing at which the plaintiff would present the facts and evidence in support of the facts, where the defendant would have the same right to deny the allegations presented by the plaintiff.

26. In this connection, the Constitutional Court observes that the European Court noted in the *Gankin and Others v. Russia* judgment that Article 6 of the Convention does not guarantee the right to personal presence before a civil court but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. Article 6(1) of the Convention leaves to the State a free choice of the means to be used in guaranteeing litigants these rights. Thus, the questions of personal presence, the form of the proceedings – oral or written – and legal representation are interlinked and must be analysed in the broader context of the "fair trial" guarantee of Article 6 of the Convention. The Court should establish whether the applicant, a party to the civil proceedings, had been given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present his case under conditions that did not place him at a substantial disadvantage *vis-à-vis* his opponent. Finally, the Court reiterates that, in determining issues of fairness of proceedings for the purposes of Article 6 of the Convention, it must consider the proceedings as a whole, including the decision of the appellate court (see, ECtHR, *Gankin and Others v. Russia,* judgment of 31 May 2016, paragraph 25).

27. Furthermore, as regards the form of proceedings, the right to a "public hearing" under Article 6(1) of the European Convention has been interpreted in the Court's established case-law to include an entitlement to an "oral hearing". Nevertheless, the obligation under this Article to hold a hearing is not an absolute one. An oral hearing may not be necessary due to the exceptional circumstances of the case, for example when it raises no questions of fact or law which cannot be adequately resolved on the basis of the case file and the parties' written observations. Article 6 of the European Convention allows States to organise their legal systems in a manner which facilitates expeditious and efficient judicial proceedings, including the possibility of issuing a default judgment. However, this may not be done at the expense of other procedural guarantees. Also, provided that an oral hearing has been held at first instance, a less strict standard applies to the appellate level, at which the absence of such a hearing may be justified by the special features of the proceedings at issue. Thus, leavetoappeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the

requirements of Article 6 of the Convention, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court (*ibid.* para 26).

28. The Constitutional Court observes that a default judgment is a novelty in civil procedural law, which is incorporated in the 2003 Civil Procedure Code. In order for the court to render a default judgment wherein a complaint is admitted under Article 182 of the Civil Procedure Code, it is necessary cumulatively to satisfy very strict requirements. The first requirement is that the plaintiff proposed that a default judgment be rendered. The second requirement is that the court informed the defendant of consequences of a failure to submit a response to the complaint within the prescribed time limit. The third requirement is that the complaint was duly filed, and the fourth requirement is that the complaint is not manifestly ill-founded.

29. In view of the aforementioned, the Constitutional Court notes that the first three requirements are of a technical nature and a court establishes them by examining certain documents, as follows: a copy of the complaint that must contain the plaintiff's proposal for rendering a default judgment, a copy of the court's summons attached to the complaint, which is to be submitted to the defendant and in which the defendant is instructed so as to know what does a response to the plaintiff's complaint must contain and what consequences he/she will bear in case of the failure to submit the response to the complaint within the time limit prescribed by the law (Article 70(2) of the Civil Procedure Code), and the internal delivery book or acknowledgment of service slip proving that the complaint was duly served on the defendant. The fourth requirement constitutes a legal assessment of the court based on the complaint and submitted evidence, proving that the claim is not manifestly ill-founded. Furthermore, the Constitutional Court notes that paragraph 2 of Article 182 of the Civil Procedure Code explicitly stipulates that a claim is manifestly ill-founded when it is manifestly contrary to the facts alleged in the complaint or if the facts being the basis of the complaint are in manifest contradiction to the pieces of evidence proposed by the plaintiff himself/herself or to the generally known facts. In that case, the law prescribes rendering a judgment to dismiss the complaint.

30. Taking into account the aforesaid, the Constitutional Court observes that the prescribed procedural guarantees (meaning that the complaint together with the documents attached thereto was indubitably served on the defendant, including the instructions as to the consequences which he/she could bear in case of the failure to submit a response to the complaint within the prescribed time limit of 30 days) give a reasonable opportunity to the defendant to be informed and to respond to the submissions and evidence proposed by the opposing party to the proceedings and to present his/her case before the court under the conditions which do not place him/her in a less favourable position *vis-à-vis* the opposing party to the proceedings. The Constitutional Court further observes that in the case that the defendant fails to submit a response to the complaint, the court takes as a starting point the presumption that the defendant admits the facts and evidence alleged

in the complaint, since the complaint, including all evidence and allegations, has been served on him and he has been given the opportunity to respond within the prescribed time limit (30 days), *i.e.* he has the procedural opportunity to prevent a default judgment from being rendered. According to the Constitutional Court, the aforementioned does not appear unreasonable in any way whatsoever nor does it place an excessive burden on the defendant who is given the opportunity to respond to the allegations in the complaint, *i.e.* to the allegations of the opposing party to the proceedings. Thus, it follows that the challenged provision did not place the defendant in an unequal position *vis-à-vis* the plaintiff. Therefore, the principle of equality of arms in civil proceedings has been met.

31. In addition to the aforesaid, the Constitutional Court observes that the legislator prescribed a default judgment with the aim of ensuring expeditious and efficient civil proceedings and, finally, a trial within the reasonable time. Furthermore, the Constitutional Court observes that the European Court of Human Rights noted that Article 6(1) of the European Convention allows that contracting states, within their margin of appreciation, organize their legal systems in a manner which facilitates expeditious and efficient civil proceedings, including a regulation making it possible to render a default judgment.

32. In view of the above, the Constitutional Court considers that the introduction of the legal mechanism of a default judgement into the civil procedural law through the impugned provision of Article 182(1) of the Civil Procedure Code pursues the legitimate aim of ensuring efficient and cost effective civil proceedings. Namely, based on the procedural guarantees prescribed in respect of a default judgement, a proportional relationship between the need to pursue a legitimate aim in the public interest and the defendant's interest to have his right of effective access to a court secured in civil proceedings is achieved. In addition, the impugned provision in no way puts a defendant in civil proceedings in an unequal position against a plaintiff. Furthermore, the Constitutional Court considers that the very essence of the right to a fair trial and the right of access to a court, as an element of the mentioned right, is not impaired, taking into account the legal requirements which must be satisfied in respect of the defendant in order for a court to pass a default judgement. Consequently, the Constitutional Court concludes that the provision of Article 182(1) of the Civil Procedure Code is compatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

33. Next, the Constitutional Court will examine the allegations of the applicant in respect of the issue of compatibility of Article 208(2) (appeal against a default judgment) and Article 433(1) (appeal in small claims disputes) of the Civil Procedure Code. With regard to the aforementioned provisions, the applicant raises the issue in respect of the scope *i.e.* the boundaries of the right to file an appeal, as the applicant considers that there is a violation of the right to a fair trial and the right of access to a court, as an element of the aforementioned right, since there is no possibility to challenge a default judgment on the ground of erroneously or incompletely established facts.

34. In this connection, the Constitutional Court points out that Article 6(1) of the European Convention does not compel contracting states to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 of the European Convention (see, European Court of Human Rights, *Delcourt v. Belgium*, Judgment of 17 January 1970, Series A no. 11, p.14, paragraph 25). In addition, according to the case-law of the European Court of Human Rights, any courts of appeal or courts of cassation must provide the fundamental guarantees of Article 6(1) of the European Convention and it does not follow that the first instance courts do not have to provide the required guarantees (see, European Court of Human Rights, *De Cubber v. Belgium*, judgment of 26 October 1984, Series A, no. 86, paragraph 32). Namely, according to the case-law of the European Court of Human Rights, Article 6(1) of the European Convention concerns primarily courts of first instance and it does not require the existence of courts of further instance. It is indicated that it is true that its fundamental guarantees, including impartiality, must also be provided by any courts of appeal or courts of cassation which a Contracting State may have chosen to set up (see the above cited *Delcourt* judgment, Series A no. 11, p. 14, and the *Sutter v. Switzerland* judgment of 22 February 1984, Series A no. 74, p. 13, paragraph 28). Nevertheless, according to the case-law of the European Court of Human Rights, even when this is the case it does not follow that the lower courts do not have to provide the required guarantees. Such a result would be at variance with the intention underlying the creation of several levels of courts, namely to reinforce the protection afforded to litigants.

35. Bringing the aforementioned into connection with the relevant request, the Constitutional Court notes that the impugned provisions (Article 208(2) and Article 433(1) of the Civil Procedure Code) stipulate that a default judgement cannot be contested for erroneously and incompletely established facts, *i.e.* that the judgment or ruling concluding the small claims proceedings may be challenged only for violations of the provisions of civil procedure and misapplication of substantive law. According to the aforementioned, no appeal for erroneously and incompletely established facts can be filed in either case.

36. As already stated, according to the case-law of the European Court of Human Rights, a State is not required to ensure the right to file an appeal in its legal system. However, in the event that the State sets up courts of appeal and foresees the right to file an appeal, the aforementioned implies that the parties to civil proceedings before courts enjoy fundamental procedural guarantees afforded by Article 6(1) of the European Convention (independent and impartial tribunal, “equality of arms”, reasonable length of proceedings, *etc.*). However, the aforementioned does not mean that the guarantees of the right to a fair trial relate to the scope *i.e.* the boundaries of the right to file an appeal. In the opinion of the Constitutional Court, the aforementioned is actually at the

discretion of each State, and a failure to regulate the right to file an appeal in no way does mean that it is in violation of the right of access to a court or any other fundamental guarantee of the right to a fair trial. Therefore, in the event that a State sets up courts of appeal, the State enjoys a certain margin of appreciation to regulate this sphere according to the requirements and needs of its legal system and to determine the scope *i.e.* the boundaries of the right to file an appeal.

37. The aforementioned limitations do not deny the right of the parties to civil proceedings to file an appeal but they just limit the scope of that appeal so that it cannot be lodged on the grounds of erroneously or incompletely established state of facts. Therefore, taking into account the case-law of the European Court of Human Rights, followed by the Constitutional Court where deciding the cases falling within its jurisdiction under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, this Court is of the opinion that such a limitation does not appear to be unreasonable or excessive, as it is essentially consistent with the efficiency of civil proceedings as well as with the legal nature of disputes. Therefore, it follows that the legal arrangements foreseen by the impugned provisions, in the view of the Constitutional Court, do not impair the very essence of the right of access to a court and do not impose an excessive burden on the parties to civil proceedings.

38. Namely, as to an appeal related to a default judgment, the Constitutional Court notes that the legislator, in the provisions of Articles 69 and 70 of the Civil Procedure Code, prescribes an obligation that the complaint must be served on the defendant and that the defendant is obligated to give a written response to the complaint. Therefore, the legislator has ensured that a defendant, in his/her written response, can give his/her answer also about the facts of the statement of claim filed by the plaintiff. Therefore, if the defendant fails to respond within the legal time limit to the allegations stated in the complaint, including his/her response to the factual part thereof, the court, upon a motion of the plaintiff and upon the fulfilment of legal requirements, will render a default judgment. The Constitutional Court notes that it is a type of sanction for a defendant and his/her failure to give the response to the complaint. However, since the facts are established in the course of first instance proceedings, which is not the case with a default judgment, it would therefore be contradictory in such a situation to allow the right to file an appeal on the grounds of erroneously or incompletely established state of facts, which should be examined for the first time from that aspect by the court of appeal. In addition to the aforementioned, as already pointed out, such a legal arrangement is neither unreasonable nor does it impair the very essence of the right of access to a court, given that the parties to civil proceedings, *per se*, must take an active part in availing themselves of all available legal actions, including the response to the complaint, in order for the parties to civil proceedings to realize other rights in the subsequent stages of the proceedings, as stipulated by the Civil Procedure Code. A failure to comply with the aforementioned means that such parties to civil proceedings cannot be protected

subsequently in appellate proceedings. Furthermore, the mentioned limitation set forth by the impugned provision is a result of circumstance that the default judgment is based on the assumption that the defendant, who failed to give a response to the complaint within the specific time limit, admits that the plaintiff's statement of facts given in the complaint is true. Accordingly, it follows that the court, rendering the default judgment, is bound by that assumption and its possibilities to review the correctness of the assumption are limited.

39. Furthermore, as to the right to file an appeal in small claims disputes, the Constitutional Court notes that the legislator, in the provision of Article 429(1) of the Civil Procedure Code, prescribes the type of disputes covering small claims. Therefore, the legislator determined within its margin of appreciation what disputes include small claim disputes, taking into account the importance and nature of certain cases as well as the efficiency of civil proceedings. Moreover, it follows that, in small claims disputes, an active role of the parties to civil proceedings before a first instance court, where the parties enjoy all the guarantees of the right to a fair trial without limitations, is of large importance. Hence, in small claims disputes, the parties to civil proceedings are obligated fully to discuss the state of facts by proposing all evidence based on which they prove the grounds of their allegations as well as to deny another party's allegations. The aforementioned, in the view of the Constitutional Court, is neither excessive nor unreasonable in relation to the parties to civil proceedings in small claims disputes.

40. In view of the above, one comes to the conclusion that the parties to civil proceedings are not denied the right of access to a court or any other fundamental guarantee of the right to a fair trial for the impossibility of filing an appeal for erroneously or incompletely established state of facts in respect of default judgments or small claims disputes. The aforementioned legal arrangements just impose limitations on the right of access to a court to an appropriate extent and, in view of the standards of the European Convention, it is allowed since it is at the discretion of each State to regulate the right to file an appeal. However, as already pointed out, such limitations established by the impugned provision are not unreasonable, *i.e.* they do not impose an excessive burden on the parties to these proceedings in such a way that the parties are prevented from exercising the very essence of the right of access to a court. In view of the above, the Constitutional Court holds that the legislator, by the impugned provisions, in no way denies the fundamental procedural guarantees of parties to civil proceedings under Article 6(1) of the European Convention, which also must be adhered to by courts of appeal, and those limitations established by the impugned provision have a reasonable justification that is not contrary to the right of access to a court, as the applicant considers.

41. In view of the above, the Constitutional Court concludes that the impugned provisions are compatible with the provision of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

Other allegations

42. As to the applicant's allegations about the right not to be discriminated against under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention, the Constitutional Court notes that these allegations, although not explicitly stated, are brought into connection with the right to a fair trial. In this connection, the Constitutional Court also recalls that discrimination exists if it results in a differential treatment of individuals in similar situations and such treatment has no objective or reasonable justification. To be justified, the treatment must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved have to exist (see, European Court of Human Rights, *Marckx v. Belgium*, paragraph 33). Taking into account the aforementioned, the Constitutional Court notes that the applicant, apart from his allegations that the impugned provisions (Article 208(2) and Article 433(1) of the Civil Procedure Code) are in violation of the said right, failed to offer any argument that would lead to a clear conclusion that the parties to civil proceedings are discriminated against based on the impugned provisions. Therefore, the Constitutional Court considers that the applicant's allegations are ill-founded as regards the right not to be discriminated against under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in connection with the right to a fair trial.

43. As to the applicant's allegations 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 European Convention, the Constitutional Court points out that the freedom of expression, within the meaning of the mentioned provisions, cannot be associated with the right to express thoughts in civil proceedings, within the meaning of the Civil Procedure Code, in a way asserted by the applicant. As already stated, the impugned provisions impose procedural discipline with a view to satisfying certain principles, such as the efficiency of proceedings and reasonable length of proceedings, while the sanction for non-compliance with the mentioned principles does not fall within the scope of protection guaranteed by Article 10 of the European Convention. Therefore, it follows that the impugned provisions in no way raise an issue under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention. Consequently, the applicant's allegations in this part are ill-founded, too.

VII. Conclusion

44. The Constitutional Court concludes that the provisions of Article 182, Article 208(2) and Article 433(1) of the Civil Procedure Code are compatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, as the impugned provisions are not in contravention of the fundamental procedural guarantees afforded by the right to a fair trial and, in particular, by the right of access

to a court, as an element of the right to a fair trial, since the limitations imposed on the parties to civil proceedings by those provisions are neither unreasonable nor excessive.

45. In addition, the Constitutional Court concludes that the provisions of Article 182, Article 208(2) and Article 433(1) of the Civil Procedure Code are compatible with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in connection with the right to a fair trial, as the applicant, apart from his allegations, failed to offer any argument that would lead to a clear conclusion that the parties to civil proceedings are discriminated against based on the impugned provisions.

46. Finally, the Constitutional Court concludes that the provisions of Article 182, Article 208(2) and Article 433(1) of the Civil Procedure Code are compatible with Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention, given the fact that the freedom of expression and the protection afforded by Article 10 of the European Convention cannot be associated with the specific procedural requirements contained in the Civil Procedure Code, which are prescribed with a view to satisfying certain principles, such as the efficiency of proceedings and reasonable length of proceedings.

47. Having regard to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

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Case No. U-6/19

DECISION ON ADMISSIBILITY AND MERITS

Request of the Cantonal Court in Sarajevo (Judge Silvana Brković Mujagić) for review of the compatibility of the provisions of Article 2 (2) and (3) and Article 4 of the Law on the Amount of Default Interest Applicable to Unsettled Debts (*Official Gazette of the Federation of Bosnia and Herzegovina*, 56/04, 68/04, 29/05 and 48/11) with Article II (3) (e) and (k) of the Constitution of Bosnia and Herzegovina, Article 6 (1) of the European Convention, Article 1 of Protocol No. 1 to the European Convention and Article I (2) of the Constitution of Bosnia and Herzegovina

Decision of 4 October 2019

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1), (2) and (3), and Article 61(1), (2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić, and

Mr. Giovanni Grasso

Having deliberated on the request filed by the **Cantonal Court in Sarajevo,** in the case no. **U-6/19**, at its session held on 4 October 2019, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

Deliberating on the request filed by the Cantonal Court in Sarajevo for the review of compatibility of the provisions of Article 2 (2) and (3) and Article 4 of the Law on the Amount of Default Interest Applicable to Unsettled Debts (*Official Gazette of the Federation of Bosnia and Herzegovina*, 56/04, 68/04, 29/05 and 48/11),

it is hereby established that the provisions of Article 2 (2) and (3) of the Law on the Amount of Default Interest Applicable to Unsettled Debts (*Official Gazette of the Federation of Bosnia and Herzegovina*, 56/04, 68/04, 29/05 and 48/11) are not in conformity 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 provisions of Article 2 (2) and (3) of the Law on the Amount of Default Interest Applicable to Unsettled Debts (*Official Gazette of the*

***Federation of Bosnia and Herzegovina*, 56/04, 68/04, 29/05 and 48/11) are hereby rendered ineffective, because they are not in conformity 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.**

In accordance with Article 61 (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the provisions of Article 2 (2) and (3) of the Law on the Amount of Default Interest Applicable to Unsettled Debts (*Official Gazette of the Federation of Bosnia and Herzegovina*, 56/04, 68/04, 29/05 and 48/11) shall be rendered ineffective on the day following the day of the publication of the decision of the Constitutional Court in the *Official Gazette of Bosnia and Herzegovina***.**

It is hereby established that Article 4 of the Law on the Amount of Default Interest Applicable to Unsettled Debts (*Official Gazette of the Federation of Bosnia and Herzegovina*, 56/04, 68/04, 29/05 and 48/11) is compatible 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.

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 May 2019, the Cantonal Court in Sarajevo (Judge Silvana Brković Mujagić; "the applicant") filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the compatibility of the provisions of Article 2 (2) and (3) and Article 4 of the Law on the Amount of Default Interest Applicable to Unsettled Debts (*Official Gazette of the Federation of Bosnia and Herzegovina,* 56/04, 68/04, 29/05 and 48/11) with Article II (3) (e) and (k) of the Constitution of Bosnia and Herzegovina, Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), Article 1 of Protocol No. 1 to the European Convention and Article I (2) of the Constitution of Bosnia and Herzegovina.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the House of Peoples and the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina were requested on 22 May 2019 to submit their respective replies to the request.

3. The House of Peoples and the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina failed to submit their respective replies to the request. However, the Government of the Federation of Bosnia and Herzegovina ("the Government") submitted its opinion on the request on 13 June 2019.

III. Request

a) Allegations stated in the request

4. The applicant stated that there is a procedure pending before the applicant court following the appeal lodged by the enforcement creditor Niko Vasilj ("the enforcement creditor") against the insurance company "Sarajevo osiguranje" d.d. Sarajevo ("the enforcement debtor"), for the enforcement of the judgment of the Basic Court in Ljubuški no. P-188/91 of 10 January 1992, which became final on 10 February 1992 and enforceable on 25 February 1992. The judgment orders, as stated, the payment of due annuities over the lost earnings for the period from 23 April to 30 October 1991, and the future rent (until circumstances have changed), along with statutory default interests from maturity and pending final payment, under the Law on the Amount of Default Interest applicable at the time of the adoption of the judgment. The applicant indicated that the ruling of the Municipal Court in Sarajevo, against which an appeal was lodged, accepted that no interest for the war would be calculated for the enforcement creditor, namely from 18 September1991 until 23 November 1995, while applying Article 2, paragraph 2 of the Law on the Amount of Default Interest Applicable to Unsettled Debts. This is, by its contents, identical to Article 37 of the Law on Amendments to the Law on Insurance of Property and Persons of the Federation of Bosnia and Herzegovina, which the Constitutional Court of BiH founds as unconstitutional in 2004.

5. In that context the applicant recalled that, by its Decision on the Merits no. *U-50/01* of 30 January 2004, the Constitutional Court established the unconstitutionality of the provision of Article 37 of the Law on Amendments to the Law on the Insurance of Property and Persons of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina,* 6/98; "the Law on Insurance") with Article II (3) (k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. The mentioned provision read that *As regards the amount of compensation for damages pertaining to principal debt determined by enforceable*

documents (judicial decisions and judicial settlements and out-of-court settlements from the insurance field), no interest is calculated for the whole war period or immediate war threat in Bosnia and Herzegovina, and is identical to the provision of Article 2, paragraph 2 of the Law on the Amount of Default Interest Applicable to Unsettled Debts. Under that provision, as further stated, the enforcement debtor (the insurance company) was exempted from any statutory default interest for the war period to the insurance beneficiaries (damaged persons, enforcement creditors), while according to the new legislative solution, 2011 amendments introduced an interest at an annual rate of 0.5% for the same war period, only for a certain category of enforcement creditors. Namely, for those who have claims arising from insurance whose proceedings had been finalized. The second category of enforcement creditors, whose proceedings had not been or had been finalized but not enforced prior to the entry into force of the Law, are entitled to the annual interest rate of 12% (Article 4 of the Law). In that way, in the opinion of the applicant, a clear and open difference was created among the enforcement creditors, depending on whether such proceedings had been finalized, or enforced for that matter or not. According to the applicant, such provisions had endeavoured, to the largest degree, to protect the role and position of the insurance companies in BiH, to the detriment of insurance beneficiaries and their property. Therefore, it is not clear why the insurance companies enjoy the privilege of initial non-payment of statutory default interests during the wartime (under the Law applied in the period from the passing thereof in 2004 to the 2011 amendments to the Law), and then, since 2011, the default interest of 0.5% per annum was introduced for the enforcement creditors whose procedures had been finalized before and during the wartime. Other statutory annual interest rates of 18% and 12% apply to other business companies and citizens.

6. In addition, the applicant pointed to the case law of the Constitutional Court of BiH analysing the application of the Law on the Amount of Default Interest Applicable to Unsettled Debts, specifically Article 2, paragraph 2 of the said Law. From that provision it follows that, following the lodging of appeals, violations of the right to property were established. Thus, it was concluded that it is unconstitutional and thus illegal to write off retroactively the appellants' interest rates during the war, and the courts do so by applying the mentioned Law thereby violating constitutional rights of citizens safeguarded under Article II (3) (k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

7. The applicant further alleged that amendments to the Law on the Amount of Default Interest Applicable to Unsettled Debts, which took place in 2011, introducing the annual rate of 0.5% on claims arising from insurance for the wartime period (Article 2, paragraph 3) do not constitute a substantial change for the property of the enforcement creditor. In that context, it was mentioned that it was not a substantial amendment aimed at protecting the property of the creditors of insurance companies, but an illusory move,

which continues to deprive the creditors of the right to a statutory default interest. In addition, the interests introduced in 2011 of annual rate of 0.5% pertains solely to such creditors who have legally binding and enforceable judgments (as is the case with the enforcement creditor in the present case) and requested the effectuation of the payment of their claim. It follows from the aforementioned that the interest rate had been applied retroactively in the cases of proceedings finalized by legally binding titles (judgments), which is deemed inadmissible. In the applicant's opinion, it follows from the disputed provisions that the creditors whose proceedings lasted longer are in a more favourable position. This is so because interests are calculated differently depending on when their claims against insurance companies were established, in such a way that those creditors (damaged persons) whose claims had been established earlier were "punished" with lower interest rates.

8. Therefore, the applicant proposed that a special decision establishes the unconstitutionality of the provisions of Article 2 (2) and (3) and Article 4 of the Law on the Amount of Default Interest Applicable to Unsettled Debts, so that citizens do not have to come before the Constitutional Court of BiH individually in order to establish (each for oneself) a violation of the right to property and of the right to equal and fair proceeding, as the law tackles the one and the same question in a different and contradictory fashion. Finally, the applicant indicated that the provision of Article 4 of the Law on the Amount of Default Interest Applicable to Unsettled Debts is not in conformity with the provision of Article I (2) of the Constitution of BiH, which prescribes the rule of law. In that context, it was indicated that the mentioned provision is unclear and contradictory and that it does not meet "the quality" that a law must meet in order to be in conformity with Article I (2) of the Constitution of Bosnia and Herzegovina. In so doing, it was pointed to the lack of standards concerning clarity, transparency and foreseeability, as the interest rates were prescribed retroactively, without a clearly defined public interest (only in favour of one form of company, namely insurance company). In the present case it is not clear who Article 4 of the Law applies to and since when and how it applies as to Article 2 (2) and (3) of the same Law, as it is unclear whether the provisions of Article 2 (2) and (3) rule out the application of Article 4, or Article 4, which prescribes the interest rate of 12% for unfinalized proceedings or those proceedings that had been finalized but not enforced, rules out the application of Article 2 (2) and (3).

9. Therefore, the applicant proposed that it be reviewed whether the provisions of Article 2 (2) and (3) and Article 4 of the Law on the Amount of Default Interest Applicable to Unsettled Debts are compatible with 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 (1) of the European Convention, and Article I (2) of the Constitution of Bosnia and Herzegovina, and to adopt a decision on the merits.

b) Reply to the request

10. In its reply to the appeal, the Government pointed to the constitutional basis for the passing of the Law on the Amount of Default Interest Applicable to Unsettled Debts. According to it, it is within the exclusive authority of the Federation of Bosnia and Herzegovina to pass regulations on finances and financial institutions of the Federation of Bosnia and Herzegovina, as well as the fiscal policy. The reply further reads that Article 37 of the Law on Amendments to the Law on the Insurance of Property and Persons (*Official Gazette of the Federation of Bosnia and Herzegovina,* 6/98) had been rendered ineffective in 2005, that the Law on the Amount of Default Interest Applicable to Unsettled Debts had been passed in 2004 as *lex specialis* bringing in an equal position all creditors who had the default interest calculated and paid before and after the entry into force of the respective law. In that context, the Government recalled the contents of legal provisions, which review of compatibility was sought, indicating that in 2011 the Law on Amendments to the Law on the Amount of Default Interest Applicable to Unsettled Debts was passed, which introduced the default annual interest rate of 0.5% for the period from 18 September 1991 to 23 December 1996 on the amounts of the compensation for damage determined by enforceable documents and out of court settlements arising from insurance defined under the Law on the Insurance of Property and Persons. That made it possible to implement the Decision of the Constitutional Court of BiH no. *U-50/01* relating to the constitutionality of the provision of Article 37 of the Law on Amendments to the Law on the Insurance of Property and Persons (given that meanwhile it had been rendered ineffective in 2005) and that the identical provision existed in Article 2, paragraph 2 of the Law on the Amount of Default Interest Applicable to Unsettled Debts. The amount of the interest rate established under Article 2 (3) (by amendments of the annual rate of 0.5%) is deemed appropriate for the period concerned, given that it was the period of the state of war and immediate threat of war when almost no economic activities had been taking place. In support of such allegations, the Government recalled the Law on Establishment and on the Manner of Settlement of Internal Obligations of the Federation of Bosnia and Herzegovina, which prescribes in Article 17 (4) that the interest on wartime claims, contained in the enforceable decision rendered in a court or administrative procedure, in the period from the day of the passing of the basic law to the day of the emission of bonds, shall be written off. Accordingly, the Government is of the opinion that the provisions of the Constitution of BiH and of the European Convention were not violated, as the applicant claims. Also, it was mentioned that the present case should be viewed in a wider context of pre-war and wartime developments, during which period galloping hyperinflation, negative real interest rate, devaluation of YU dinar had existed, which resulted in two denominations taking place during the war (nine zeros had been erased), whereby minor amount of the compensation for the default interest was essentially the consequence of macroeconomic trends and developments before the war, and not of the violation of the right to property, as the applicant deems. The amount of the rate of default interest, although established as fixed, depends on a series of economic

parameters a well as on the regular interest rate, which depends on the risk of a country, conditions for the procurement of loan funds and the movement of reference rates on the financial market, economic development in the country, demand for loans and the rate of inflation. Bearing in mind that the claims arising from unsettled debts relate to the period of the state of war and immediate threat of war, the Government deems that while reviewing the constitutionality of the mentioned provisions it is necessary to take into account all the aforementioned circumstances representing the general interest. Given the existence of the general interest, while maintaining equal legal status of all creditors, the Government is of the opinion that the request is ill-founded and it should be dismissed as such.

IV. Relevant Law

11. The **Constitution of Bosnia and Herzegovina**, Article I (2) reads as follows:

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.

12. The **Law on Default Interest Rate** (*Official Gazette of the Federation of Bosnia and Herzegovina,* 18/96), in so far as relevant, reads as follows:

Article 3

The application of regulations on the amount of default interest rate applied in the territory of the Federation of Bosnia and Herzegovina shall cease on the day of the entry into force of this law.

Article 4

This law shall enter into force on the day of the publication in the Official Gazette of the Federation of Bosnia and Herzegovina.

13. The **Law on Default Interest Rate** (*Official Gazette of the Federation of Bosnia and Herzegovina,* 27/98), in so far as relevant, reads as follows:

Article 1

This law stipulates the amount of the default interest rate for debtor-creditor relations, in the event where the debtor is in default on meeting financial obligations.

Article 2

A debtor who is in default on meeting a financial obligation shall owe, in addition to the principal debt, a default interest on the amount of debt pending the payment, under the annual rate of 18%.

Compound method of calculation of a default interest shall apply for the period shorter than one year.

Article 3

The provisions of this law shall not apply to debtor-creditor relations regulated by other laws.

Article 4

The Law on Default Interest Rate (Official Gazette of the Federation of Bosnia and Herzegovina, 18/96) shall cease to be in force on the day of entry into force of this law.

14. The **Law on Amendments to the Law on Default Interest Rate** (*Official Gazette of the Federation of Bosnia and Herzegovina,* 51/01), in so far as relevant, reads as follows:

Article 1

In the Law on Default Interest Rate (Official Gazette of the Federation of Bosnia and Herzegovina, 27/98), in Article 2, paragraph 1, the number "18" shall be replaced by the number "12".

15. The **Law on the Amount of Default Interest Applicable to Unsettled Debts** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 56/04, 68/06-*corrigendum,* 29/05 and 48/11). For the purpose of this decision, unofficial revised text prepared in the Constitutional Court of BiH shall be used, which reads as follows:

Article 1

This Law stipulates the manner of calculation of the default interest on the unsettled debts arising from creditor-debtor relations and debts arising from damage compensation based on mandatory insurance in the period from 1 December 1989 to the date of entry into force of the Law on Amendments to the Law on the Default Interest Rate (Official Gazette of the Federation of Bosnia and Herzegovina, 51/01).

Article 2

A default interest at an annual rate of 12% shall be paid on the debt referred to in Article 1 of this Law, arising from the creditor-debtor relations on the territory of the Federation of Bosnia and Herzegovina.

The default interest referred to in paragraph 1 of this Article shall not be calculated for the period of the state of war from 18 September 1991 to 23 November 1995.

Notwithstanding the provisions referred to in paragraphs 1 and 2 of this Article, a default interest at an annual rate of 0.5% shall be paid on the amounts of the compensation for damage (the principal debt) determined by enforceable documents (judicial judgments and judicial settlements) and out of court settlements arising from insurance defined under the Law on the Insurance of Property and Persons (Official Gazette of the Federation of Bosnia and Herzegovina, 2/95 and 6/98) for the period from 18 September 1991 to 23 December1996.

Article 4

Procedures for the establishment of the amount of default interest referred to in Article 1 of this Law, which have not been completed before the day of entry into force of this law, or which had been completed but not enforced, shall be completed under the provisions of this Law and at an annual interest rate of 12%.

16. The **Law on Amendments to the Law on Insurance of Property and Persons of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 6/98) and Decision of the Constitutional Court no. *U-50/01*:

Article 37

As regards the amount of compensation for damage (principal debt) determined by enforceable documents (judicial decisions and judicial settlements) and out-of-court settlements in the insurance field, no interest shall be calculated for the entire period of war or immediate threat of war in Bosnia and Herzegovina.

17. By the Decision no. *U-50/01* of 30 January 2004, while deciding the request of the Cantonal Court in Široki Brijeg, the Constitutional Court established that Article 37 of the Law on Amendments to the Law on the Insurance of Property and Persons of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina,* 6/98) is not compatible with 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 ordered the Parliament of the Federation of BiH to bring in line Article 37 of the Law on Amendments to the Law on the Insurance of Property and Persons of the Federation of BiH ("the Law"), not later than three months from the day of the publication of this decision in the *Official Gazette of Bosnia and Herzegovina,* with the Constitution of Bosnia and Herzegovina and the European Convention, and to inform the Constitutional Court of the measures undertaken with a view to enforcing that decision. In its Ruling no. *U-50/01* of 1 April 2006, the Constitutional Court established that the Parliament of the Federation of BiH failed to enforce the Decision of the Constitutional Court of Bosnia and Herzegovina no. *U-50/01* of 30 January 2004.

18. The **Law on Insurance Companies in Private Insurance** (*Official Gazette of the Federation of Bosnia and Herzegovina,* 24/05), in so far as relevant, reads as follows:

Article 85

The Law on Insurance of Property and Persons (Official Gazette of the Federation of Bosnia and Herzegovina, 2/95, 7/95 6/98 and 41/98), with the exception of Articles 66, 69, 70, 71 and 72, and the Ordnance setting up the Insurance Companies in the Federation of BiH Surveillance Office (Official Gazette of the Federation of Bosnia and Herzegovina, 18/97 and 42/00) shall cease to be in force upon the entry into force of this Law.

V. Admissibility

19. In examining the admissibility of the request, the Constitutional Court invokes the provisions of Article VI (3) (c) of the Constitution of Bosnia and Herzegovina.

20. Article VI (3) (c) of the Constitution of Bosnia and Herzegovina reads:

(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.

21. The applicant is the ordinary court in Bosnia and Herzegovina, and the issue pertains to whether a law, on which validity its decision depends, is in conformity with the Constitution of Bosnia and Herzegovina, which means that the request was filed by an authorized person pursuant to Article VI (3)(c) of the Constitution of Bosnia and Herzegovina (see, Constitutional Court, Decision on Admissibility and Merits no. *U-5/10* of 26 November 2010, paragraphs 7 through 14, published in the *Official Gazette of Bosnia and Herzegovina,* 37/11). Bearing in mind the provisions of Article VI (3) (c) of the Constitution of Bosnia and Herzegovina and Article 19 (1) of the Rules of the Constitutional Court, the Constitutional Court deems that the present request is admissible, as it has been submitted by an authorized applicant and because there is not a single formal reason under Article 19(1) of the Rules of the Constitutional Court rendering this request inadmissible.

VI. Merits

22. In the present case the applicant holds that the provisions of Article 2 (2) and (3) and Article 4 of the Law on the Amount of Default Interest Applicable to Unsettled Debts are not compatible with Article I (2) of the Constitution of Bosnia and Herzegovina, Article II (3) (k) and (e) of the Constitution of Bosnia and Herzegovina, and the provisions of Article 1 of Protocol No. 1 to the European Convention and Article 6(1) of the European Convention. By referring to the Decision of the Constitutional Court no. *U-50/01*, as well as to the relevant case law of the Constitutional Court in appellate cases following the decision in the case no. *U-50*/01, the applicant proposed that the compatibility of the mentioned provisions be reviewed first and foremost in connection with Article II (3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention, as they essentially concern the property in the form of a legally binding judgment establishing the principal debt with the statutory default interests, which (property) had been acquired before the passing of the disputed Law.

23. 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.

24. 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 Constitutional Court recalls that the review of constitutionality is considered in general terms (*erga omnes*), and not in relation to the specific case (*inter partes*), which was the reason for filing the request (see the Constitutional Court, Decision in the Case no. *U-15/11* of 30 March 2012, paragraph 63). The Constitutional Court will, therefore, while keeping in mind the allegations of the applicant and its own case law that was referred to in the request, consider the conformity of the provisions of Article 2 (2) and (3) and Article 4 of the Law on the Amount of Default Interest Applicable to Unsettled Debts, first and foremost, within the meaning of the standard of the right to property referred to in Article II (3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention.

26. In support of her claims as to the incompatibility of the mentioned provisions with the Constitution of BiH and the European Convention, the applicant alleged: first, that Article 2 (2) continued to carry an unconstitutional provision of Article 37 of the Law on Amendments to the Law on the Insurance of Property and Persons, which had not been in force since 2005, through retroactive abolishment of the default interest for the wartime period; second, that Article 2 (3) again retroactively, concerning legally binding enforceable documents (judicial judgments, judicial settlements and out of court settlements) arising from insurance defined by the Law on the Insurance of Property and Persons, established the default interest at a minor amount of 0.5% per annum for the wartime period from 18 September 1991 to 23 December 1996[1]; third, that Article 4

1 The Constitutional Court wishes to note, concerning the mentioned legal notion "state of war" defined to last in the period from "18 September 1991 to 23 November 1995", as a reminder, that the period defined as stated above does not correspond to the official decisions on the declaration and cessation of the state of war in Bosnia and Herzegovina. In that context, the Constitutional Court recalls that the Decision declaring immediate state of war (*Official Gazette of the Republic of Bosnia and Herzegovina*, 1/92 and 13/94 of 9 June 1994) declared immediate threat of war

privileged the creditors whose proceedings had been finalized, but have not been enforced, because they were given the right to a default interest of 12%; fourth, that the relationship between the provisions of Article 2 (3) and Article 4 of the Law is contradictory, as it is unclear whom it applies to and since when, which is the reason why, according to the applicant, the mentioned provision is ideal for arbitrary interpretation and application.

Article 2 (2) of the Law on the Amount of Default Interest Applicable to Unsettled Debts

27. In relation to the provision of Article 2 (2) of the Law on the Amount of Default Interest Applicable to Unsettled Debts, the Constitutional Court observes that the applicant links the allegations as to the incompatibility of this provision with the Constitution and the European Convention to the Decision of the Constitutional Court no. *U-50/01*, and the case law that followed that decision regarding the resolution of individual appeals before the Constitutional Court.

28. Article 2 (2) of the Law reads as follows: *The default interest referred to in paragraph 1 of this Article shall not be calculated for the period of the state of war from 18 September 1991 to 23 November 1995*.

29. The Constitutional Court emphasizes that it is undisputed that the present case concerns the existence of property safeguarded under Article II (3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention, and that there is interference with property. Property is a legitimate expectation that one will collect the payment of a corresponding amount of the statutory default interests awarded by a legally binding decision. The interference with property is the prohibition prescribed by law that the statutory default interest would not be calculated for the period of the state of war from 18 September 1991 to 23 November 1995.

30. The Constitutional Court recalls that the Decision on Merits no. *U-50/01* of 30 January 2004 tackled as the subject-matter of the review of constitutionality the provision of Article 37 of the Law on Amendments to the Law on the Insurance of Property and Persons of the Federation of Bosnia and Herzegovina, which read as follows: *As regards the amount of compensation for damage (principal debt) determined by enforceable documents (judicial decisions and judicial settlements) and out-of-court settlements in the insurance field, no interest shall be calculated for the entire period of war or immediate threat of war in Bosnia and Herzegovina.* In the mentioned decision, the Constitutional Court concluded that the mentioned Article is not compatible with Article II (3)(k) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of

in the territory of Bosnia and Herzegovina. The state of war was abolished by the Decision abolishing the state of war dated 22 December 1995 (*Official Gazette of R BiH*, 50/95) while the state of immediate threat of war was lifted by the Decision dated 23 December 1996 (*Official Gazette of F BiH*, 25/96 of 23 December 1996).

Protocol No. 1 to the European Convention, on the ground that the objective of Article 37 of that Law was not specified that would justify the interference with property. In addition, Article 37 interferes with property rights safeguarded under the Constitution of Bosnia and Herzegovina and the European Convention.

31. Due to the failure to enforce the final and binding Decision no. *U-50/01*, the Constitutional Court passed the Ruling dated 1 April 2006 wherein it established that the Parliament of FBiH failed to enforce the Decision no. *U-50/01* of 30 January 2004, whereby in paragraph 5 of the mentioned Ruling it provided the following reasoning: *The Constitutional Court notes that the Parliament of the Federation of BiH passed a new law, upon which passing the Law on Amendments to the Law on Insurance of Property and Persons ceased to be in force, including the disputed Article 37. However, the Parliament of the Federation of BiH had passed* ***before that*** *the new Law on the Amount of Default Interest Applicable to Unsettled Debts (Official Gazette of the Federation of BiH, 56/04 of 23 October 2004), which prescribed in Article 2 (3), which was afterwards amended by the Law on Amendments to the Law on the Amount of Default Interest Applicable to Unsettled Debts (Official Gazette of the Federation of BiH, 29/05 od 18 May 2005), that the default interest shall not be calculated for the period of the state of war from 18 September 1991 to 23 November 1995, thereby* ***de iure and de facto*** *retaining the same legal status as it was at time of the applicability of the provision of Article 37 of the Law on Amendments to the Law on Insurance of Property and Persons.*

32. Furthermore, the Constitutional Court indicates that the challenged provision of Article 2 (2) of the Law, in addition to pointing out its unconstitutionality in the Ruling no. *U-50/01* of 1 April 2006, was the subject-matter of the analysis conducted by the Constitutional Court (also) within the scope of Article VI (3) (b) of the Constitution of Bosnia and Herzegovina (and) resolving individual appeals in connection with the application of the said provision, following the adoption of the pilot decision no. *U-50/01*. From that aspect, the Constitutional Court recalls that it had reached the following conclusion in the following cases: *AP-1311/06* of 31 January 2009, AP-2326/09 of 26 February 2009 and *AP-407/08* of 28 April 2010 raising the issue of the calculation of default interest arising from insurance (all available at: www.ustavnisud.ba), that it was unconstitutional and thus illegal to write off (the appellants') statutory default interest rates for the period of the war, pursuant to Article 2 (2) of the Law on the Amount of Default Interest Applicable to Unsettled Debts. That was so, as the Law changed retroactively conditions for the payment of legally awarded statutory default interest, and that the new Law on the Amount of Default Interest Applicable to Unsettled Debts practically retained the same legal situation as was at the time of the applicability of Article 37 of the Law on Amendments to the Law on Insurance of Property and Persons.

33. The Constitutional Court bore in mind that the appellants had legally binding enforceable titles (judicial judgments or judicial settlements) in all the aforementioned cases (in the capacity of plaintiffs or enforcement creditors before ordinary courts), arising

from mandatory insurance adopted before the Law on the Amount of Default Interest Applicable to Unsettled Debts (which entered into force in 2004) and that, therefore, (the appellants each for oneself) through the application of Article 2 (2) of the Law, which prescribes that *the default interest would not be calculated for the period of the state of war from 18 September 1991 to 23 November 1995*, were retroactively deprived of the right to a default interest, because, at the time of the onset of the insured case and adoption of legally binding judgments (enforceable titles), they justifiably expected to receive a default interest in the event of default on payment in accordance with the Law and the contract entered into with the insurance company.

34. In the present case, the Constitutional Court deems that there are no reasons for a change in its positions and conclusions articulated in the Decision no. *U-50/01* (already cited) and the Ruling on failure to enforce the Decision no. *U-50/01* (1 April 2006), wherein it was pointed to unconstitutionality of the presently challenged provision of Article 2 (2) of the Law, with a clear and well-reasoned reasoning, and that the challenged provision retained *de facto* and *de iure* the same legal situation as was at the time of the applicability of (unconstitutional) Article 37 of the Law on Amendments to the Law on Insurance of Property and Persons, which wrote off retroactively the default interest for the wartime period. The same applies to the case law referred to in Article VI (3) (b) of the Constitution of Bosnia and Herzegovina (already cited cases: *AP-1311/06*, *AP-2326/09* and *AP-407/0*8) in the context of the application of Article 2 (2) of the Law, and conclusions and reasons referred to in the cited decisions in relation to the violation of the right to property of the appellants.

35. The challenged provision of Article 2 (2) of the Law had been passed in 2004 and had been applied up until 2011, when amendments to the Law had been passed and adopted, also challenged, paragraph 3 of Article 2 of the Law. However, the 2011 amendments to the Law did not delete the challenged provision of Article 2 (2) of the Law, but continued to exist in the Law. Bearing all that in mind, especially when one takes into account the case law of the Constitutional Court referred to in the Decision no. *U-50/01* and in eth Ruling on (non)enforcement of that decision dated 1 April 2006, as well as the case law referred to in the cited cases: *AP-1311/06*, *AP-2326/09* and *AP-407/08*, the Constitutional Court may, without further examination as to the standards of the right to property, conclude that the challenged provisions of Article 2 (2) of the Law are not in conformity with Article II (3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

Article 2 (3) of the Law on the Amount of Default Interest Applicable to Unsettled Debts

36. The applicant based the claims about incompatibility of the provision of Article 2 (3) of the Law on the Amount of Default Interest Applicable to Unsettled Debts 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, on retroactive amendments to legally binding enforceable documents (judicial judgments and settlements and out of court settlements) arising from insurance, through stipulating the default interest at an annual rate of 0.5%. This was not essentially aimed at protecting the property of creditors, but at protecting the property of insurance companies that deprive already devalued property of pre-war and wartime creditors (which claims were established by legally binding and enforceable documents). The applicant deems that the disputed provision does not have the necessary quality to satisfy the standards of the right to property guaranteed by the Constitution.

37. Article 2 (3) of the Law reads as follows: *Notwithstanding the provisions referred to in paragraphs 1 and 2 of this Article, a default interest at an annual rate of 0.5% shall be paid on the amounts of the compensation for damage (the principal debt) determined by enforceable documents (judicial judgments and judicial settlements) and out of court settlements arising from insurance defined under the Law on the Insurance of Property and Persons (Official Gazette of the Federation of Bosnia and Herzegovina, 2/95 and 6/98) for the period from 18 September 1991 to 23 December1996.*

38. In this case too, in the opinion of the Constitutional Court, property undisputedly does exist as safeguarded under Article II (3) (k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. Property is a legitimate expectation that one will collect the payment of a corresponding amount of the statutory default interests awarded by a legally binding decision.

39. The interference with property is reflected in the provision, which radically reduced the rate of the default interest from 12% per annum to 0.5% per annum for the period from 18 September 1991 to 23 December 1996, only so for the holders of enforceable documents (judicial judgments and judicial settlements) arising from insurance of property and persons. The Government referred to the prescribed amount of default interest of 0.5% per annum, for the relevant period, as “minor” in its reply to the request for the review of compatibility of the challenged provision of Article 2 (3) of the Law. The court case file, which was the motive for filing this request, contains the statement of the court expert reading that there is no point in calculating the default interest at the annual rate of 0.5%, as it is such a minor amount that may not be shown bearing in mind, also, the minor amount of the principal debt, which was decreased multiple times on the basis of the currency denominations prescribed by law.

40. In view of the aforementioned, in the opinion of the Constitutional Court, it follows that the disputed norm of Article 2 (3) of the Law deprived *de facto* the holders of enforceable documents arising from insurance of property and persons of the awarded right to a default interest, as it is a specific category of persons who had obtained the enforceable title before the start of wartime operations, where the amount of the principal debt was shown in the former YU dinars. When currency denominations are applied to

the amount of the principal debt (in order to be able to show the awarded amount in the official currency of BiH) one gets a very small amount. In addition, when one calculates a "minor" default interest at annual rate of 0.5%, that amount of default interest means nothing, as it is so minor that it cannot be shown. This is to say that, although the challenged provision of Article 2 (3) of the Law, passed only in 2011, prescribes an exception to paragraph 2 of the same Law, which ruled out completely the calculation of the awarded statutory interest for the wartime period, the prescribed amount of annual rate of 0.5% is so minor in practice that, as a matter of fact, it amounts to nothing. For the holders of enforceable documents arising from insurance of property and persons (who have the right to payment of a default interest) the amount generated by the calculation of the annual interest of 0.5% for the relevant period, constitutes exclusively a bare right (*ius nudus*).

41. In view of the aforementioned, the Constitutional Court ought to examine further whether the mentioned deprivation of property is in conformity with the standards of that right, primarily whether a public interest exists for such deprivation of property.

42. First of all, the Constitutional Court recalls that Article 1 of Protocol No. 1 to the European Convention in itself (*per se*) (does not) rule out a possibility of retroactive deprivation of property, as is the case here. However, for something like that, there must be a clear and unambiguous public interest that may be used to justify the deprivation of property retroactively so as to reduce the "property" awarded earlier by a legally binding judicial decision (default interest). In the present case, the Constitutional Court did not receive the reply from the Parliament of the Federation of BiH as the body passing the Law that contains the challenged provision. However, the Constitutional Court did receive the reply from the Government as the proponent of the Law, wherein it was mentioned what the public interest entailed in the present case. Therefore, in its reasoning, the Constitutional Court will examine the existence of a public interest as defined by the Government in its reply.

43. In the opinion of the Constitutional Court, it follows from the submitted reply that the Government deems as the public interest, concerning the retroactive amendment to the law, by prescribing the annual rate of 0.5%, the fact that during the wartime period (that the prescribed calculation of a default interest applies to) no economic activities had taken place, for which reason the prescribed amount, although "minor", is nevertheless realistic. Before continuing the consideration, the Constitutional Court emphasizes that the present case *de facto* concerns a complete deprivation of property, for the annual interest rate of 0.5% for the relevant period represents nothing to the holders of the legally binding judicial decisions but the bare right. Thus, this is not about the free appreciation of the competent legislative authority about what amount of default interest is adequate and that should be prescribed as such (e.g. it is not about reducing the default interest from 18% per annum, as was the case before, to the present 12% per annum),

which assessment the Constitutional Court should not interfere with. Instead, it is about *de facto* complete deprivation of a certain property right.

44. As to the claim of the Government that "almost no economic activities had taken place" during the wartime period, the Constitutional Court indicates that the challenged provision, actually, protects the interests of insurance companies solely (as it is indisputable that they are obliged to make payments according to the legally binding titles awarding default interests). This is to say that insurance companies are the ones to pay default interests awarded under the legally binding judicial decisions from the funds of those companies, and not the Government from the budgetary funds. On the other hand, as to the references to the Law on Establishment and Settlement of Internal Liabilities, under that law the debtor is the Federation of BiH. The payments made by insurance companies from their funds are in no way linked to the liabilities that the public authority has, to finance from budgetary funds authorities and activities necessary for the functioning of the society as a whole. Solutions applied in the Law on the Manner of Settlement of Internal Liabilities of FBiH have a clear public interest, as unchecked payments to a large number of creditors would jeopardize the financing of vital services (education system, healthcare, police, administration etc.). In addition, the Law on the Manner of Settlement of Internal Liabilities has the detailed systematization and analysis of debts. The Constitutional Court finds additional problem in relation to the existence of the public interest in the provision of Article 4 of the Law, which (not clear why) prescribes an advantage for the persons whose proceedings are still pending and that will be finalized at the default interest rate of 12% per annum. It follows from the aforementioned that the persons who possess legally binding and enforceable titles issued before the war relating to the area of insurance of property and persons (which have not been enforced), are placed at a disadvantage in this way, as they were *de facto* deprived of a default interest for the wartime period, while persons whose proceedings are still pending (with a possibility that some proceedings started before the war have still been pending) have been placed at an advantage in this way, because their proceedings will be finalized by the application of a default interest at an annual rate of 12%.

45. Bearing in mind that the Government failed to address all the aforementioned dilemmas in its reply, the Constitutional Court notes that no strong, convincing and unambiguous public interest was proven in the present case, on the basis of which it would be possible to justify such serious interference with property rights as is the case in the present case, and that there is retroactive interference with acquired rights arising from legally binding judicial decisions, the Constitutional Court concludes that the challenged provision is in contravention of the property right guaranteed under the Constitution of Bosnia and Herzegovina.

46. The Constitutional Court concludes that Article 2 (3) of the Law is not in conformity with Article II (3) (k) of the Constitution of Bosnia and Herzegovina and Article 1 of

Protocol No. 1 to the European Convention. Therefore, it is not necessary to further examine whether the interference was proportionate to the goal pursued.

Article 4 of the Law on the Amount of Default Interest Applicable to Unsettled Debts

47. The applicant deems that the challenged provision does not have the necessary quality to satisfy the standards of the right to property, as it does not meet the condition of precision and clarity of a legal norm, and that it is not equal to everyone, since it makes a difference between proceedings that had been completed and proceedings that had been finalized but not enforced prior to entry into force of the Law. The applicant raises an issues also as to the amount of the prescribed default interest of 12% per annum, indicating that the mentioned provision is contradictory to the provision of Article 2 (3) of the Law and that it is unclear when and to whom the annual rate of 0.5% is applied, and when and to whom the annual rate of 12% is applied.

48. Article 4 of the Law reads as follows: *Procedures for the establishment of the amount of default interest referred to in Article 1 of this Law, which have not been completed before the day of entry into force of this law, or which had been completed but not enforced, shall be completed under the provisions of this Law and at an annual interest rate of 12%.*

49. It clearly follows that this provision applies to the procedure of establishment of the amount of a default interest and the manner of calculation of a default interest on unsettled debts arising from debtor and creditor relations and the compensation for damage arising from mandatory insurance (both basis defined in Article 1 of the Law).

50. According to the assessment of the Constitutional Court, it follows that the mentioned provision is clear, precise/foreseeable and accessible and that, according to it, the default interest is calculated under the annual rate of 12%, whereby creditors who have claims arising from debtor and creditor relations and creditors who have claims arising from the compensation for damage arising from mandatory insurance were placed in an equal position. This is to say that this provision does not constitute the interference with the constitutional right to property.

51. In view of the aforementioned, the Constitutional Court concludes that the provision of Article 4 of the Law on the Amount of Default Interest Applicable to Unsettled Debts is in conformity with Article II (3) (k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

Other allegations

52. Bearing in mind the conclusion of the Constitutional Court regarding nonconformity of the provision of Article 2 (2) and (3) of the Law on the Amount of Default Interest

Applicable to Unsettled Debts with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, and conformity of the provision of Article 4 of the Law on the Amount of Default Interest Applicable to Unsettled Debts with 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 deems that it is not necessary to analyse the mentioned provisions in connection with Article I (2) of the Constitution of Bosnia and Herzegovina, Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.

VII. Conclusion

53. The Constitutional Court concludes that the provisions of Article 2 (2) and (3) of the Law on the Amount of Default Interest Applicable to Unsettled Debts (*Official Gazette of the F BiH*, 56/04, 68/04, 29/05 and 48/11) are not in conformity 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.

54. The Constitutional Court concludes that Article 4 of the Law on the Amount of Default Interest Applicable to Unsettled Debts (*Official Gazette of the F BiH*, 56/04, 68/04, 29/05 and 48/11) is in conformity 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.

55. Having regard to Article 61 (1), (2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

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Case No. U-10/19

DECISION ON ADMISSIBILITY AND MERITS

Request of the Municipal Court in Cazin (Judge Erol Husić) for review of the compatibility of Article 69(2), (3), (4), (5), (6), (7), (8), (9) and (10) of the Law on Enforcement Procedure of the FBiH (*Official Gazette of the Federation of Bosnia and Herzegovina*, 32/03, 52/03, 33/06, 39/09, 35/12 and 46/16 and the *Official Gazette of Bosnia and Herzegovina*, 42/18) with Article II(1) of the Constitution of Bosnia and Herzegovina, Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention

Decision of 6 February 2020

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and Article 61(1) and (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić, and

Mr. Giovanni Grasso

Having deliberated on the request filed by the **Municipal Court in Cazin,** in the Case no. **U-10/19**, at its session held on 6 February 2020, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

In deciding the request filed by the Municipal Court in Cazin (Judge Erol Husić) for review of compatibility of the provisions of Article 69(3) and (4) of the Law on Enforcement Procedure of the FBiH (*Official Gazette of the Federation of Bosnia and Herzegovina*, 32/03, 52/03, 33/06, 39/09, 35/12 and 46/16 and the *Official Gazette of Bosnia and Herzegovina*, 42/18),

it is hereby established that the provisions of Article 69(3) and (4) of the Law on Enforcement Procedure of the FBiH (*Official Gazette of the Federation of Bosnia and Herzegovina*, 32/03, 52/03, 33/06, 39/09, 35/12 and 46/16 and the *Official Gazette of Bosnia and Herzegovina*, 42/18) are not compatible 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 Parliament of the Federation of Bosnia and Herzegovina is hereby ordered, pursuant to Article 61(4) of the Rules of the Constitutional

Court of Bosnia and Herzegovina, to harmonise, within six months from the date of publication of the present Decision in the *Official Gazette of Bosnia and Herzegovina*, the provisions of Article 69(3) and (4) of the Law on Enforcement Procedure of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina*, 32/03, 52/03, 33/06, 39/09, 35/12 and 46/16 and the *Official Gazette of Bosnia and Herzegovina*, 42/18) 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 Parliament of the Federation of Bosnia and Herzegovina is hereby ordered, pursuant to Article 72(5) of the Rules of the Constitutional Court, to inform the Constitutional Court of Bosnia and Herzegovina, within the time limit set forth in the preceding paragraph, of the measures taken in order to enforce 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 31 October 2019, the Municipal Court in Cazin (Judge Erol Husić; "the applicant") filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the compatibility of Article 69(2), (3), (4), (5), (6), (7), (8), (9) and (10) of the Law on Enforcement Procedure of the FBiH (*Official Gazette of the Federation of Bosnia and Herzegovina*, 32/03, 52/03, 33/06, 39/09, 35/12 and 46/16 and the *Official Gazette of Bosnia and Herzegovina*, 42/18) with Article II(1) of the Constitution of Bosnia and Herzegovina, 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").

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the House of Peoples and the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina were requested on 15 November 2019 to submit their respective replies to the request.

3. The House of Peoples and the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina failed to submit their respective replies to the request, however the Government of the Federation of Bosnia and Herzegovina ("the Government") submitted its opinion on the request on 16 December 2019.

III. Request

a) The present case concerning which the request was filed

4. The applicant stated that it was proposed in the enforcement proceedings initiated by enforcement claimant *Sudo Luka doo* Velika Kladuša against the enforcement debtor Hazim Beganović, for the payment of debt in the amount of BAM 550.00, that the debt be settled by foreclosure and sale of the movable items of the enforcement debtor.

5. In deciding on the motion, the applicant issued a decision on enforcement of the movable items of the debtor. The first foreclosure was unsuccessful, as no movable items were found at the debtor's place that were suitable to be the subject of the enforcement. The applicant informed the enforcement claimant thereof and invited the enforcement claimant to propose a new foreclosure of movable items. The enforcement claimant proposed, thereafter, the change of the item and means of enforcement wherein it specified as the subject of the enforcement the real property co-owned by the enforcement debtor. In deciding on the mentioned motion, the applicant issued a Conclusion inviting again the enforcement claimant to propose a new item and means of enforcement as the enforcement of the real property of the enforcement debtor was found to be disproportionate, given the debt of the enforcement debtor in the amount of BAM 550.00. The enforcement claimant proposed again that the enforcement be executed against the movable items of the enforcement debtor. The applicant then issued a decision terminating the enforcement proceeding, discontinued all enforcement actions it undertook and dismissed as unfounded the motion of the enforcement claimant for the change of items and means of enforcement.

6. In deciding on the appeal of the enforcement claimant against the decision to terminate the proceedings, the Cantonal Court in Bihać ("the Cantonal Court") issued a decision granting the appeal, quashing the first-instance decision and remitting the case for the renewed proceeding. It was stated in the reasoning that the applicant, before issuing the decision on the motion of the enforcement claimant for enforcement of the co-owned share of real properties of the enforcement debtor, invited the enforcement claimant to propose a new item or means of enforcement, justifying the adoption of such a decision (conclusion) by apparent disproportion between the amount of the claim by the enforcement claimant and the property of the enforcement debtor (co-owned share of the real property). According to the view of the Cantonal Court, the enforcement claimant has the right to have his/her claim settled within the meaning of Article 8(3) of the Law on Enforcement Procedure. It follows from the case file that the settlement action could

not have been taken against the movable items of the enforcement debtor, which is the reason why the enforcement claimant proposed a new real property of the enforcement debtor as the subject of the enforcement. To that end the Cantonal Court indicated that in a situation of apparent disproportion between the claim and the subject of enforcement, the enforcement debtor had the right, within the meaning of Article 71 of the Law on Enforcement Procedure, to propose the enforcement action against a new item, the approximate value of which was equal to the value of the debt, in order to prevent the enforcement action against the real property, which was possibly of the higher amount than the amount claimed by the enforcement claimant. The Cantonal Court concluded that the applicant, by terminating the enforcement proceedings, erroneously applied the provision of Article 64(4) of the Law on Enforcement Procedure (the completion of enforcement), which was the reason why the challenged ruling was quashed and the case referred back for retrial.

b) Allegation made in the request regarding the unconstitutionality of the challenged provisions

7. The applicant alleged that there was a number of enforcement proceedings with the same factual and legal basis pending before that court, according to which the enforcement claimants sought from the enforcement debtors, on the basis of legally binding enforceable documents, the settlement of their claims against the real properties which the enforcement debtors co-owned. Bearing in mind that the values of the claims filed by enforcement claimants were mainly minor amounts (in the present case, the claim amounts to BAM 550.00) compared to the value of the portion of the real property co-owned by the enforcement debtors, the applicant considers that the provision of Article 69(2), (3), (4), (5), (6), (7), (8), (9) and (10) of the Law on Enforcement Procedure of the FBiH, which regulates the manner of the enforcement action against real properties with co-ownership or joint ownership, offers a possibility for an enforcement proceeding against the property of the persons who do not have any real and legal connection with the liability of the enforcement debtor, thus, against the property of other co-owners who have their rights over the real property concerned.

8. The applicant, additionally, held that the consistent application of the mentioned provision could result in the foreclosure of property of co-owners who were not enforcement debtors on the real property, which was subject to enforcement for the settlement of debt, which was not their debt but the debt of the enforcement debtor. Also, in the opinion of the applicant, the enforcement debtor could find himself in a situation to lose, over a minor amount of debt to the enforcement claimant, the property of much greater value, specifically without his co-owned share of the real property subject to enforcement. In that context, the applicant particularly emphasized that the provision of Article 69 (4), (5) and (6) of the Law on Enforcement Procedure of the FBiH created an illusory situation treating the value of the co-owned share and the settlement in such a manner as if the dissolution of co-ownership had already been executed, while *de*

facto and *de iure*, co-ownership still existed. According to the applicant, the mentioned provision does not provide for proportionality between the protection of the legitimate aim in the form of the settlement of the enforcement claimant and the right to property of co-owners who are not enforcement debtors. The applicant, without minimizing the right of the enforcement claimants to realize in the enforcement proceeding their right to property through the payment of the claim, holds that the standard of proportionality should be incorporated into the mentioned provision so as to limit the value of the claim and the burden on the enforcement debtor's property for the purpose of settling that claim, both for the interests of co-owners of real property against which the enforcement is carried out who are not enforcement debtors and for the interest of enforcement debtors. In that connection, it was mentioned that there were frequent situations in practice where due to minor amounts of debt to the enforcement claimant (of several hundred convertible marks) the enforcement was carried out against a real property, irrespective of whether real property was co-owned or was exclusive ownership of the enforcement debtor. Therefore, in such situations a question arose as to the existence of proportionality between the same right, the right to property, which was enjoyed by the opponent parties to the proceedings and the justification of such enforcement. Specifically, the question arises as to the justification to deprive, over minor amounts of the claims by the enforcement claimant, the enforcement debtor of the right to property, which is of far greater value than the claim, as well as to the justification to deprive, through the application of the provision of Article 69 of the Law on Enforcement Procedure of the FBiH, of the right to property the persons, co-owners who are not enforcement debtors, who can be linked in any way whatsoever to the relation between the enforcement claimant and the enforcement debtor.

9. In the applicant's opinion, the intention of the legislator is clear to ensure, through consistent implementation of the mentioned provision, the payment of the enforcement claimant's claim and to ensure in that way the implementation of decisions of courts and other authorities with the aim of fulfilling the obligation towards the enforcement claimant. However, without establishing the proportionality in enforcement to protect the right to property of the parties to the proceedings, particularly of co-owners who are not enforcement debtors, the applicant points out a reasonable doubt as to the existence of any public interest, which would serve as the basis for the application of the disputed provision of Article 69 of the Law on Enforcement Procedure of the FBiH. In addition, according to the applicant, the application of that provision leads to the collision with the provisions of Articles 2, 17, 25 and 26 of the Law on Real Property Rights of the FBiH, under which the right of (co)ownership is guaranteed in full scope, therefore it is illogical to treat the provisions of the Law on Enforcement Procedure of the FBiH as *lex specialis* vis-à-vis the Law on Real Property Rights.

10. Therefore, the applicant proposed that the Constitutional Court review the compatibility of the provision of Article 69(2), (3), (4), (5), (6), (7), (8), (9) and (10) of the Law on Enforcement Procedure of the FBiH with the provisions of Article II(1) and

Article II(3)(k) of the Constitution of Bosnia and Herzegovina, in conjunction with the provision of Article 1 of Protocol No. 1 to the European Convention, which guarantee the highest level of internationally recognized human rights and fundamental freedoms.

b) Reply to Request

11. In its reply to the appeal, the Government indicated that the provision of Article 69 of the Law on Enforcement Procedure was the subject-matter of the Draft Law on Amendments to the Law on Enforcement Procedure of the FBiH, which was prepared by the FBiH Ministry of Justice. Legal amendments to Article 69 of the Law on Enforcement Procedure of the FBiH, along with the proposal of amendments to the provision of Article 89 of the Law on Enforcement Procedure, will be submitted for legislative procedure as soon as possible (without any other details). Attached to the opinion, the Government submitted the text of the proposed amendments to the mentioned provision. Based on the proposal submitted by the Government, it is possible to conclude that proposed amendments to Article 69 of the Law on Enforcement Procedure go in the direction as regulated by the Law on Enforcement Procedure of the Republika Srpska, i.e. concerning the enforcement against a share co-owned by the co-owner who is not an enforcement debtor and who has no debt to the enforcement claimant, to seek explicit consent of such co-owner.

IV. Relevant Law

12. The **Law on Enforcement Procedure** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 32/03, 52/03- *Corrigendum*, 33/06, 39/06- *Corrigendum*, 39/09, 74/11- Decision of the Constitutional Court, 35/12 – Ruling of the Constitutional Court of BiH, 46/16, 36/17 - Decision of the Constitutional Court of BiH and 55/18 – Ruling of the Constitutional Court of BiH), in so far as relevant, reads as follows:

Article 69
Real Property as an Object of Enforcement

(1) Unless otherwise provided, real property may be object of enforcement only in its entirety as defined by regulations governing property and other property rights.

(2) The share of co-owned real property may be an independent object of enforcement regarding which the rules of this Law are applied accordingly concerning the enforcement against real property.

(3) In the event of an enforcement procedure against a co-owned share, upon the motion of the enforcement claimant, enforcement debtor or other co-owner, the Court will order in the Decision on enforcement that the entire real property and the co-owned share that is the object of enforcement be offered for sale. In the Decision on enforcement the court will specify, depending on the fulfillment of conditions referred to in paragraph 4 of this Article, that it will decide by its Conclusion referred to in paragraph 3 of Article 90 of

this Law whether the object of sale is the entire real property or only its co-owned share. In the same Decision the Court will order that the registration of enforcement in the Land Book referred to in Article 72 of this Law be applicable to the entire real property.

(4) If the sale price of the co-ownership share of the real property is substantially higher in the event of the sale of the entire real property, the Court will order the sale of the entire real property acting as if it were a motion of co-owner for the division of physically indivisible asset, as provided by regulations governing co-ownership relations.

(5) In the case referred to in paragraph 4 of this Article, co-owners who are not enforcement debtors have the right to settlement in the value of their co-ownership shares from the amount obtained through the sale of assets prior to the settlement of the enforcement claimant and other persons who are set to receive settlement in enforcement procedure and before the compensation for the costs of the enforcement procedure.

(6) Co-owners who are not enforcement debtors have the right to request to be ceded the asset, which is the object of enforcement, if they deposit the amount, which corresponds to the value of the enforcement debtor's share in that asset.

(7) The Court will advise the co-owner who is not an enforcement debtor and whose share in the asset, which is the object of enforcement, was contested to institute a litigation against the enforcement claimant and against the enforcement debtor if he/she contests the co-owner's right to prove his/her right, unless he/she can prove their right in an enforcement procedure by way of a legally binding judgment, public document or a private document certified under the law. The provisions of this Law stipulating the conduct of the court upon objections raised by third persons shall apply accordingly to the instituted litigation, as well as to the rights of co-owners to seek therein the postponement of the enforcement procedure.

(8 If the co-owner referred to in paragraph 7 of this Article may prove his/her right by way of a legally binding judgment, public document or a private document certified under the law, the Court will proceed as if their right had not been contested.

(9) The circumstance that the Court took it in the enforcement procedure as if the right of the person referred to in paragraph 7 of this Article had not been contested within the meaning of the provisions of that paragraph or paragraph 8 of this Article shall not affect the right of the enforcement claimant or enforcement debtor to exercise their rights against the person concerned in a separate litigation.

(10) Provisions of paragraphs 2 through 9 of this Article accordingly apply to the owners of joint property (joint owners). If there is no consensus among the enforcement debtor and other owners of joint property concerning their rights on the shared asset, the court will advise, in the form of a Conclusion, the owner of joint property who contests the enforcement debtor's rights to the shared asset to prove his/her rights in a litigation. The provisions of this Law stipulating the conduct of the Court upon objections raised by third persons shall apply accordingly to the instituted litigation, as well as to the rights of owners of joint property to seek therein the postponement of the enforcement procedure.

(11) If the right of usufruct has been established on a real property or on its percentage share of ownership, it may be an independent object of enforcement, provided that the enforcement debtor can satisfy his/her claims out of the fruits realized from such rights based on some legal relationship (rent, lease), regarding which the rules of this Law governing enforcement over rights shall apply accordingly.

3. Appraisal of Real Property

Article 80
Manner of Appraisal

(1) The Court shall determine the manner of appraising real property by issuing a Conclusion immediately after it issues the Decision on enforcement. If so necessary, the Court shall hold a hearing with the parties before issuing the conclusion.

(2) The appraisal of real property shall commence after the Decision on enforcement becomes enforceable, and may commence even before such time on the motion of the enforcement claimant if he/she ensures beforehand means necessary for the appraisal and agrees to bear the costs of the appraisal even if the enforcement is discontinued.

(3) Real property shall be appraised based on an expert's evaluation and other facts to determine its market value on the date of the appraisal. During the appraisal of the real property, its decreased value will be taken into account on account of certain rights that will remain on the property after the sale.

(4) In lieu of the appraisal stipulated in paragraph 3 of this Article, the Court may request a relevant authority of the tax administration to provide the data on the value of the real property.

(5) In the enforcement procedure against co-owned share referred to in Article 69 of this Law, the appraisal will contain the established values for the real property in entirety and for the co-ownership share, as well as the value of the co-ownership share that would be obtained in the event of the sale of the entire real property, in accordance with paragraph 4 Article 69 of this Law.

(6) The provisions referred to in paragraphs 1 through 4 of this Article shall not be applied if the parties and other persons to be settled in the enforcement procedure reach a consensus on the value of the real property.

Article 81
Objection to Insufficient Settlement

(1) Any person who has a right to be paid from the sale price of real property, and whose right takes precedence over the enforcement claimant in the order of priority, may propose that the enforcement be discontinued if the appraised value of the real property does not cover even partially the amount of enforcement claimant's claim.

(2) A proposal for discontinuation of enforcement may be submitted within eight days from the date of service of the Conclusion on sale.

(3) Upon the proposal of the right holder and on meeting the conditions referred to in paragraph 1 of this Article, the Court shall issue a Decision to discontinue the enforcement procedure.

(4) In the event of a discontinuation of enforcement referred to in paragraph 1 of this Article, the enforcement claimant who initiated the enforcement shall cover the costs of the proceedings.

Article 82
Conclusion on Sale

(1) After conducting a proceeding for determining the value of the real property, the Court shall issue a Conclusion on sale of the real property, setting forth the value of the real property and stipulating the manner and conditions of sale, as well as the time and place of sale, if the sale is being carried out at a public auction.

(2) In the enforcement procedure against co-owned share referred to in Article 69 of this Law, the Conclusion on sale will contain separate data for the entire real property and for the co-ownership share, which is the object of enforcement, as well as a note that the Court will decide on the final object of sale in accordance with paragraph 3 Article 90 of this Law.

(...)

Article 83
Right of Preemption

(1) A person who has a legal or contractual right of preemption entered in the Land Book has precedence over the highest bidder if he/she acknowledges, immediately following the termination of the auction, that he/she will buy the real property on the same conditions.

(2) If the real property is sold by direct settlement, the Court shall instruct the holder of the registered right of preemption, or the holder of the legal right of preemption to acknowledge within a specified time, whether he/she will exercise that right; otherwise, such right will expire.

13. The **Law on Enforcement Procedure** (*Official Gazette of the Republika Srpska*, 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13, 98/14, 5/17 – Decision of the Constitutional Court of the RS, 43/17 – Decision of the Constitutional Court of BiH, 90/17 – Decision of the Constitutional Court of BiH, 58/18 – Ruling of the Constitutional Court of BiH and 66/18)

For the purpose of the present Decision, an unofficial consolidated text made in the Constitutional Court of BiH, is used and, as relevant, reads:

Real Property as an Object of Enforcement

Article 69

(1) Unless otherwise provided, real property may be object of enforcement only in its entirety, as defined by regulations governing property and other property rights.

(2) The share of co-owned real property may be an independent object of enforcement regarding which the rules of this Law are applied accordingly concerning the enforcement against real property.

(3) In the event of an enforcement procedure against a co-ownership share, upon the motion of the enforcement claimant, enforcement debtor or other co-owner, the Court will order in the Decision on enforcement that the entire real property and the co-ownership share, which is the object of enforcement, be offered for sale, only if explicitly agreed to by the co-owner of the real property who is not the enforcement debtor. Prior to issuing the Decision on enforcement, the Court has to obtain the explicit consent of the co-owner of the real property who is not the enforcement debtor. In the Decision on enforcement the Court will decide by its Conclusion referred to in Article 90 of this Law whether the object of sale is the entire real property or only its co-owned share. In the same Decision the Court will order that the registration of enforcement in the Land Book referred to in Article 72 of this Law be applicable to the entire real property. The statement of a co-owner who is not an enforcement debtor has to be processed by a Notary Public, and if the co-owner who is not an enforcement debtor fails to present the document processed by the Notary Public within 15 days, it shall be considered that he/she has not given the consent to the sale of his/her co-ownership share.

(3a) In the event that there is no explicit consent of the co-owner of the real property referred to in paragraph 1 of this Article, who is not an enforcement debtor, the Court will continue the enforcement procedure against the enforcement debtor's co-ownership share.

(4) In the event that the co-owner of the real property who is not the enforcement debtor has given an explicit consent to the sale of the entire real property, and the sale price of the co-ownership share of the real property is substantially higher in the event of the sale of the entire real property, the Court will order the sale of the entire real property acting as if it were a motion of co-owner for the division of physically indivisible asset, as provided by regulations governing co-ownership relations.

(5) In the case referred to in paragraph 4 of this Article, co-owners who are not enforcement debtors have the right to settlement in the value of their co-owned shares from the amount obtained through the sale of assets prior to the settlement of the enforcement claimant and other persons who are set to receive settlement in enforcement procedure and before the compensation for the costs of the enforcement procedure.

(6) Co-owners who are not enforcement debtors have the right to request to be ceded the asset, which is the object of enforcement, if they deposit the amount, which corresponds to the value of the enforcement debtor's share in that asset.

(7) The Court will advise the co-owner who is not an enforcement debtor and whose share in the asset, which is the object of enforcement, was contested to institute a litigation against the enforcement claimant and against the enforcement debtor if he/she contests the co-owner's right to prove his/her right, unless he/she can prove their right in an enforcement procedure by way of a legally binding judgment, public document or a private document certified under the law. The provisions of this Law governing the conduct of the court upon objections raised by third persons shall apply accordingly to the instituted litigation, as well as to the rights of co-owners to seek therein the postponement of the enforcement procedure.

(8) If the co-owner referred to in paragraph 7 of this Article can prove his/her right by way of a legally binding judgment, public document or a private document certified under the law, the Court will proceed as if their right had not been contested.

(9) The circumstance that the Court took it in the enforcement procedure as if the right of the person referred to in paragraph 7 of this Article had not been contested within the meaning of the provisions of that paragraph or paragraph 8 of this Article shall not affect the right of the enforcement claimant or enforcement debtor to exercise their rights against the person concerned in a separate litigation.

(10) Provisions of paragraphs 2 through 9 of this Article shall apply accordingly to the owners of joint property. If there is no consensus among the enforcement debtor and other owners of joint property concerning their rights on the shared asset, the court will advise, in the form of a Conclusion, the owner of joint property who contests the enforcement debtor's rights to the shared asset to prove his/her rights in a litigation. The provisions of this Law governing the conduct of the Court upon objections raised by third persons shall apply accordingly to the instituted litigation, as well as to the rights of owners of joint property to seek therein the postponement of the enforcement procedure.

(11) If the right of usufruct has been established on a real property or on its percentage share of ownership, it may be an independent object of enforcement, provided that the enforcement debtor can satisfy his/her claims out of the fruits realized from such rights based on some legal relationship (rent, lease), regarding which the rules of this Law governing enforcement over rights shall apply accordingly.

14. The **Law on Property Rights** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 66/13 and 100/13, in so far as relevant, reads as follows:

Article 2
Restrictions of Property Rights

(1) The right of ownership and other property rights may be denied against the will of the owner or restricted only in the public interest and under the conditions provided by law in accordance with the principles of the international law.

(2) It is possible to restrict or regulate separately by law, in the public interest, particularly for the purpose of protecting natural riches, the environment, human health,

cultural and historical heritage and such like, the manner of use and disposal of certain property.

Article 17
Substance of Ownership Right

(1) Ownership is a property right, which authorizes the owner to possess the property freely and of own will, to use and dispose of it, and to preclude everyone else from that right within the scope stipulated by law.

(2) Everyone shall have the obligation to refrain from violating the right of ownership of another person.

1. Co-ownership

Article 25
Notion

(1) Co-ownership shall exist when two or more persons have the right of ownership on the same property, each according to their share proportionate to the whole (aliquot part).

(2) If co-ownership shares are not specified, they are presumed to be equal.

Article 26
Aliquot Part of Property

(1) A co-owner is the owner of such aliquot part, which is commensurate with his/her co-ownership share, therefore concerning that share he/she has all powers that an owner is entitled to, if, considering the nature of an aliquot part, he/she is capable of exercising them.

(2) The aliquot part of property is considered an independent property in legal transactions.

Article 27
Use and Disposal of Property

(1) A co-owner shall have the right to possess and to use property proportionate to his/her aliquot part, without violating the rights of other co-owners. A co-owner may dispose of his/her share without the consent of other co-owners.

(2) When a co-owner of real property is selling his/her share, other co-owners shall have the right of preemption, unless otherwise provided by this Law.

(3) A co-owner who has the intention to sell his/her co-ownership share shall have the obligation to send by registered mail under the rules of civil procedure, or to notify via Notary Public thereof other co-owners by specifying accurate land books and cadastral details of the real property, the price and other conditions of the sale.

(4) If the offered co-owners fail to notify the offeror in the same way in which the offer has been made within 30 days from the day of receiving the offer of accepting the offer, the co-owner may sell his/her share to another person, not at a lower price or more favourable conditions though.

(5) If the co-owner fails to sell his/her co-ownership share within six months upon the expiry of the deadline to accept the offer, he/she shall have the obligation, in the event of a new sale, to comply with the provisions of paragraph 3 of this Article.

(6) If a co-owner fails to make an offer to other co-owners in accordance with the provisions of paragraphs 3 and 5 of this Article, or if, after making an offer, he/she sells to a third person his/her co-ownership share under more favourable conditions, co-owners who have the right of preemption may request via court for the contract to be annulled and that the ownership on the respective co-ownership share be transferred to them under the same conditions.

(7) A lawsuit referred to in paragraph 6 of this Article may be filed within 30 days from the day when the holder of the right of preemption has learnt of the sale and conditions of sale, not later than one year from the day of the conclusion of the contract.

(8) The right of preemption of co-owners shall be precluded if the real property concerned, according to its culture, cadastre and land books, is marked as an access road.

15. The **Law on Property Rights** (*Official Gazette of the Republika Srpska*, 124/98, 3/09 – *Corrigendum*, 58/09, 95/11, 60/15, 18/16 – Decision of the Constitutional Court and 107/19)

For the purpose of the present Decision, an unofficial consolidated text made in the Constitutional Court of BiH, is used and, as relevant, reads:

Restrictions of Property Rights

Article 2

(1) The right of ownership and other property rights may be denied against the will of the owner or restricted only in the public interest and under the conditions provided by law, in accordance with the principles of the international law.

(2) It is possible to restrict or regulate separately, in the public interest, and particularly for the purpose of protecting natural riches, the environment, human health, cultural and historical heritage and such like, the manner of use and disposal of certain property.

Notion

Article 25

(1) Co-ownership shall exist when two or more persons (co-owners) have the right of ownership on the same property, each according to their share proportionate to the whole (aliquot part).

(2) If co-ownership shares are not specified, they are presumed to be equal.

Aliquot Part of Property

Article 26

(1) A co-owner is the owner of such aliquot part, which is commensurate with his/her co-ownership share, and concerning that share he/she has all powers that an owner is entitled to, if, considering the nature of an aliquot part, he/she is capable of exercising them.

(2) The aliquot part of property is considered an independent property in legal transactions.

Article 27
Use and Disposal of Property

(1) A co-owner shall have the right to possess and to use property proportionate to his/her aliquot part, without violating the rights of other co-owners. A co-owner may dispose of his/her share without the consent of other co-owners.

(2) When a co-owner of real property is selling his/her share, other co-owners shall have the right of preemption, unless otherwise provided by this Law.

(3) A co-owner who has the intention to sell his/her co-ownership share shall have the obligation to send by registered mail under the rules of civil procedure, or to notify via Notary Public thereof other co-owners by specifying accurate land books and cadastral details of the real property, the price and other conditions of the sale.

(4) If the offered co-owners fail to notify the offeror in the same way in which the offer has been made within 30 days from the day of receiving the offer of accepting the offer, the co-owner may sell his/her share to another person, not at a lower price or more favourable conditions though.

(5) If the co-owner fails to sell his/her co-ownership share within six months upon the expiry of the deadline to accept the offer, he/she shall have the obligation, in the event of a new sale, to comply with the provisions of paragraph 3 of this Article.

(6) If a co-owner fails to make an offer to other co-owners in accordance with the provisions of paragraphs 3 and 5 of this Article, or if, after making an offer, he/she sells to a third person his/her co-ownership share under more favorable conditions, co-owners who have the right of preemption may request via court for the contract to be annulled and that the ownership on the respective co-ownership share be transferred to them under the same conditions.

(7) A lawsuit referred to in paragraph 6 of this Article may be filed within 30 days from the day when the holder of the right of preemption has learnt of the sale and conditions of sale, not later than one year from the day of the conclusion of the contract.

(8) The right of preemption of co-owners shall be precluded if the real property concerned, according to its culture, cadaster and land books, is marked as an access road.

16. **The Law on Non-Contentious Procedure** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 2/98, 39/04 and 73/05), in so far as relevant, reads as follows:

4. Division of Co-owned Assets and Real Properties

Article 161

In the procedure of the division of co-owned assets and real properties, the Court shall decide on the division and the manner of division of such assets and real properties.

Article 162

The procedure of the division of co-owned assets and real properties may be initiated upon a proposal of a co-owner, while the proposal has to include all co-owners.

The proposal contains the details about the object of division, the size of the share and about other property rights of every co-owner.

When a real property is concerned, it is necessary to specify the details from land books or cadaster and to attach relevant written evidence as to the right of ownership, the right of easement and other property rights, as well as to the possession of a real property.

The proposal shall be submitted with the Court in which area the asset or real property is located, and if co-owned assets or real properties are located in the area of several courts, each of the courts shall have the competence.

Article 163

If the Court, while acting on the proposal, establishes that co-owners find disputable the right to assets, which are the object of division, or the right to property, that the size of the share in assets is disputable, or the co-owned property, or that it is disputable which assets or rights make part of the co-owned real property, the Court will discontinue the procedure and advise the proponent to institute a litigation within 15 days.

If the proponent referred to in paragraph 1 of this Article fails to institute a litigation, the proposal shall be considered withdrawn.

Article 164

On receiving the proposal, the Court will schedule a hearing, to which it will summon all co-owners and persons who hold some property right concerning the object of division.

Article 165

If co-owners or persons who hold some property right concerning the object of division reach during the procedure a settlement on the conditions and manner of division, the Court will enter the settlement into the record as a court settlement.

Article 166

If the persons referred to in Article 165 of this Law fail to reach a settlement on the conditions and manner of division, the Court will hear them, present the necessary evidence, as well as expert evaluation when so necessary, and will, on the basis of the results of the overall procedure, in accordance with the relevant regulations of the substantive law, issue a Decision on the division of co-owned assets or real properties, while taking care of satisfying the justified requests and interests of co-owners and persons who hold some property right concerning the object of division.

When deciding who should get what asset, the Court will particularly bear in mind special needs of individual co-owners as to why that co-owner should get such an asset.

If the division of assets is to be carried out by the sale thereof, the sale will be approved and conducted under the provisions of the Law on Enforcement Procedure.

Article 167

The Decision on division contains the following: object, conditions and manner of division, details about physical parts of the asset and rights held by individual co-owners, as well as rights and obligations of co-owners established under the division.

In the Decision on division the Court will decide on the manner of the exercise of the right of easement and of other property rights on the parts of the asset that has been physically divided among co-owners.

17. The **Law on Non-Contentious Procedure** (*Official Gazette of the Republika Srpska*, 36/09 and 91/16), in so far as relevant, reads as follows:

5. Division of Co-owned Assets and Property

Article 172

In the procedure of the division of co-owned assets and property, the Court shall decide on the division and the manner of division of such assets and property.

Article 173

(1) The procedure of the division of co-owned assets and property may be initiated upon proposal of a co-owner, while the proposal has to include all co-owners.

(2) The proposal contains all the details about the object of division, the size of the share and about other property rights of every co-owner. When a real property is concerned, it is necessary to specify the details from land books or cadastral data and to attach relevant written evidence as to the right of ownership, the right of easement and other property rights, as well as to the possession of a real property.

(3) The proposal shall be submitted with the Court in which area the asset or property is located, and if co-owned assets or property are located in the area of several courts, each of the courts shall have the competence.

Article 174

(1) If the Court, while acting on the proposal, establishes that co-owners find disputable the right to assets, which are the object of division, or the right to property, that the size of the share in assets is disputable, or the co-owned property, or that it is disputable which assets or rights make part of the co-owned property, the Court will discontinue the procedure and advise the proponent to institute a litigation within 15 days.

(2) If the proponent fails to institute a litigation within the specified deadline, the proposal shall be considered withdrawn.

Article 175

On receiving the proposal, the Court will schedule a hearing, to which it will summon all co-owners and persons who hold some property right concerning the object of division.

Article 176

If co-owners or persons who hold some property right concerning the object of division reach during the procedure a settlement on the conditions and manner of division, the Court will enter the settlement into the record as a court settlement.

Article 177

(1) If the persons referred to in Article 176 of this Law fail to reach a settlement on the conditions and manner of division, the Court will hear them, present the necessary evidence, as well as expert evaluation when so necessary, and will, on the basis of the results of the overall procedure, in accordance with the relevant regulations of the substantive law, issue a Decision on the division of co-owned assets or property, while taking care of satisfying the justified requests and interests of co-owners and persons who hold some property right concerning the object of division.

(2) When deciding who should get what asset, the Court will particularly bear in mind special needs of individual co-owners as to why that co-owner should get such asset.

(3) If the division of assets is to be carried out by the sale thereof, the sale will be approved and conducted under the provisions of the Law on Enforcement Procedure.

Article 178

(1) The Decision on division contains the following: object, conditions and manner of division, details about physical parts of the asset and rights held by individual co-owners, as well as rights and obligations of co-owners established under the division.

(2) In the Decision on division the Court will decide on the manner of the exercise of the right of easement and of other property rights on the parts of the asset that has been physically divided among co-owners.

V. Admissibility

18. In examining admissibility of the request the Constitutional Court invoked the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina.

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

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.

19. In the present case, the applicant is an ordinary court in Bosnia and Herzegovina and the issue relates to whether the law, on whose validity its decision depends, is compatible with the Constitution of Bosnia and Herzegovina, which means that the request was filed by an authorized person for the purposes of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (see Constitutional Court, Decision on Admissibility and Merits no. *U-5/10* of 26 November 2010, paragraph 7-14, published in *Official Gazette of BiH,* 37/11). Taking into account the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the Constitutional Court has established that the request is admissible as it was filed by an authorized person and as there is not any other reason under Article 19(1) of the Rules of the Constitutional Court, which would render the request inadmissible.

VI. Merits

20. The applicant requested the Constitutional Court to decide on the compatibility of the impugned provisions of Article 69(2), (3), (4), (5), (6), (7), (8), (9) and (10) of the Law on Enforcement Procedure of the FBiH with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

21. The Constitutional Court notes that it considers a request for review of the compatibility in a general sense (*erga omnes*) and not in relation to this specific case (*inter partes*), in respect of which the request was filed (see, Constitutional Court, Decision on Admissibility and Merits no. *U-15/11* of 13 March 2102, paragraph 63). Therefore, the Constitutional Court will review in an abstract manner with respect 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.

22. 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) right to property.

23. 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.

24. The Constitutional Court holds that the applicant' allegations that the provisions of Article 69(2), (3), (4), (5), (6), (7), (8), (9) and (10) of the Law on Enforcement Procedure of the FBiH are incompatible 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 may be summarized as follows: a) the impugned provisions are contrary to the standard of proportionality as they make it possible that the enforcement debtor's property, which is of much higher value than the amount claimed by the enforcement claimant against the enforcement debtor, can be sold; b) the impugned provisions are in contravention of the provisions of Articles 2, 17, 25 and 26 of the Law on Real Property Rights of the FBiH, under which the right of (co)ownership is guaranteed in full scope, therefore it is illogical to treat the provisions of the Law on Enforcement Procedure of the FBiH as *lex specialis* vis-à-vis the Law on Real Property Rights; and c) the impugned provisions provide a possibility for an enforcement proceeding to be conducted concerning the property of persons who do not have any real and legal connection with the liability of the enforcement debtor and a possibility to sell the property of co-owners who are not enforcement debtors on the real property, which is subject to enforcement for the settlement of debt, which is not their debt but the debt of the enforcement debtor.

25. As to the applicant's allegations referred to in subparagraph (a) above, the Constitutional Court indicates that Article II(2) of the Constitution of Bosnia and Herzegovina provides that the rights and freedoms referred to in the European Convention and its Protocols apply directly in BiH (and) that they (rights and freedoms under the European Convention) have priority over all other law. The Constitutional Court has consistently reiterated in its decisions that the obligation to apply directly the European Convention is vested in all courts and all bodies, which decide the rights and obligations contained in the European Convention. The proportionality standard is enshrined in the right to property under Article 1 of Protocol No. 1 to the European Convention and the courts are required to apply it to specific cases, based on the cited provision of the Constitution of BiH.

26. As to the applicant's allegations referred to in subparagraph (b) above, the Constitutional Court notes that, in its previous case-law, it has consistently indicated that the applicants referred to in Article VI(3)(c) of the Constitution of BiH cannot request the Constitutional Court to decide how to apply the relevant law in each particular case. Therefore, the applicant's dilemma, which law is *lex specialis*, is a matter to be resolved by the ordinary courts, and it is not an argument for examining the compatibility of the impugned provisions under Article VI(3)(c) of the Constitution of BiH.

27. However, the applicant's allegations referred to in (c) above that it ensues from the relevant parts of the provisions of Article 69 of the Law on Enforcement Procedure of the FBiH that the entire real property and the co-owned portions of the persons who are not enforcement debtors (Article 69 (3) and (4); "other co-owners") can be the object of enforcement, *i.e.* the persons who do not have any connection with the debt of the enforcement debtor towards the enforcement creditor, raise, in the opinion of the Constitutional Court, the issue of compatibility of the impugned provisions with the other co-owners' right to property referred to in Article 1 of Protocol No. 1 to the European Convention. As already stated, the impugned provisions provide the possibility for an enforcement proceeding to be conducted on the entire property, including the other co-owners' portions and, therefore, the question is whether the interference with the property which includes that circle of persons is justified, since Article 69(3) and (4) of the Law on Enforcement Procedure of the FBiH provide for the possibility to sell the entire real property in the enforcement proceedings to settle the debt towards the enforcement creditor, without prior consent by other co-owners who have no debt towards the enforcement creditor.

28. In order to examine the compatibility of the impugned provisions with the standards of the right to property under Article 1 of Protocol No. 1 to the European Convention, the Constitutional Court will make a comparative analysis of the legal position of the co-owners under the provisions of the Law on Real Property Rights, as a basic law governing the mechanism of (co)ownership right and the legal position of co-owners, which is specified in the impugned provision of Article 69(3) and (4) of the Law on Enforcement Procedure of the FBiH.

29. Such a situation requires answers to the following questions: a) whether a co-owner in the enforcement proceedings is in the same or more difficult position with respect to the comparative provisions of the Law on Real Property Rights; and b) whether the comparative provisions of the Law on Real Property Rights, when compared to the Law on Enforcement Procedure of the FBiH, regulate the transactions relating to the co-ownership portions differently.

30. According to the relevant provisions of the Law on Real Property Rights (Articles 25 and 26), co-ownership exists where two or more persons have the right of ownership on a particular thing, each being entitled to a part defined in proportion to the whole

(aliquot part), and the aliquot part of property is considered an independent property in legal transactions. Analogous to the right of ownership, it follows that the co-owner, in proportion to his aliquot part of the property, has the right to own, use and dispose (the use, which includes alienation). Accordingly, the same rights that the owner has. Pursuant to Article 2 of the Law on Real Property Rights, the right of ownership may be denied against the will of the owner or restricted only in the public interest and under the conditions provided by law (protection of natural resources, cultural and historical heritage), and by analogy, the right of co-ownership is restricted for the same reasons (and) further restricted by the rights of other co-owners. Thus, for example: pursuant to Article 27, paragraph 1 of the Law on Real Property Rights), a co-owner has the right to possess and to use property proportionate to his/her aliquot part, without violating the rights of other co-owners. The same provision stipulates that a co-owner may dispose of his/her share without the consent of other co-owners. This essentially implies that a co-owner may alienate his/her aliquot part or sell it but, in the exercise of his/her right, he/she is restricted by the prescribed procedure (Article 27 of the Law on Real Property Rights), specifically by the pre-emptive right of other co-owners which may or may not be exercised, but ultimately allows the co-owner to dispose of its co-ownership, which includes, among other things, the sale to co-owners or third parties if other co-owners are not interested. It follows from the foregoing that the co-owners of the real property, while acting according to their right, which is proportionate to the whole, without endangering the right of the other co-owners, cannot prevent the legal transaction of the aliquot part of the real property of any of the co-owners who wishes to exercise that right.

31. Turning to the relevant provision of Article 69(3) and (4) of the FBiH Law on Enforcement Procedure, it follows that the subject of enforcement may be the entire property in which the aliquot parts are held by other co-owners (who are not enforcement debtors). It also follows that there is no requirement that the other co-owners give their prior consent for the purpose of the entire property to be sold in order to settle the debt, which is not theirs.

32. First of all, the Constitutional Court notes that it follows from the provision of Article 69(3) and (4) of the Law on Enforcement Procedure that the court, in the enforcement procedure, may decide to sell the entire property if it estimates that the sale price of the co-ownership part would be significantly higher. In this case, the court, in the enforcement procedure, applies the procedure prescribed under the Law on Non-Contentious Procedure (Articles from 161 through 167 of the FBiH Law). The relevant provisions of the said Law prescribe the possibility of physical division of real property resulting either in an agreement of the parties or in a civil division. Therefore, the result is the legal turnover of the co-ownership parts (to one of the co-owners or by sale to third parties) and the settlement of the co-owners against the amount obtained by the sale. In addition, analogous to the pre-emptive right of the co-owners under the relevant provisions of the Law on Property Rights, other co-owners under the provision

of Article 69(6) of the FBiH Law on Enforcement Procedure, may require that the item under enforcement be ceded if they deposit the amount corresponding the value of the enforcement claimant's portion in the asset. It follows from the foregoing that the other co-owners in the enforcement procedure, in analogy to the relevant provisions of the Law on Property Rights, cannot prevent the legal transaction of the entire real property in which they have aliquot parts.

33. Upon summarizing the above stated, it follows that (under the provisions of the Law on Property Rights (Article 27) and according to the procedure of the Law on Non-Contentious Procedure), only one co-owner may request the sale of his/her co-owner's portion on the property, regardless of whether (i) the other co-owners want it. A co-owner seeking to sell his/her co-owner's portion does not need consent of other co-owners but has to follow a procedure that aims to protect the other co-owners. In that context, he/she will first offer them his/her co-owner's portion, but if the other co-owners do not buy that co-owner's portion, the entire property will be ultimately sold during the auction that is enforced by the court. In this case, there should be no dispute between the co-owners, or the claim of one co-owner against the other, etc. Therefore, it is enough that one co-owner wants to sell his/her co-owner's portion and the other co-owners cannot prevent him/her from doing so unless they buy his/her co-owner's portion.

34. A different situation is governed by the challenged provisions of Article 69(2) through (10) of the Law on Enforcement Procedure of FBiH, with the specific possibility under paragraphs (3) and (4) of the mentioned provision, that the entire property (including portions of other co-owners who are not enforcement debtors) may be sold in the enforcement procedure without consent of other co-owners to settle the debt that only the co-owner has, who is at the same time the enforcement debtor. It follows that the legal position of the co-owners according to the challenged provisions and the provisions of the Law on Real Property (Article 27) is not similar in comparison as the enforcement procedure allows for the sale of the entire property and not only of the co-ownership portions of the co-owner, who is at the same time the enforcement debtor, without the consent of other co-owners. That further implies that other co-owners who are not enforcement debtors cannot prevent the sale of their co-ownership portions by invoking their co-ownership right. The only way to prevent the sale of the entire property is to purchase the portion of the respective co-owner – the enforcement debtor. If, however, the whole property is sold, the other co-owners have the right to satisfaction in the amount of their co-ownership portions from the amount obtained by the sale, and before the settlement of all other persons participating in the enforcement proceedings (creditors, *etc.*).

35. It follows from the analysis of the relevant provisions of the Law that the ownership right, as well as the co-ownership right is limited. It is indisputable that the right to property permits interference but exclusively if certain conditions provided for in Article

1(2) of Protocol No. 1 to the European Convention are fulfilled. This interference, in the present case, is stipulated by the Law, *i.e.* the provisions of Article 69(3) and (4) of the Law on Enforcement Procedure, which do not include the consent of the other co-owners if the court orders the sale of the entire property to settle the debt of only one co-owner (enforcement debtor). However, the issue arises whether in such a situation a public interest of settling the debt of the enforcement debtor can be achieved without sacrificing the property of other co-owners. The Constitutional Court finds that the public interest of meeting the obligation towards the enforcement debtor can be pursued through sale of the enforcement debtors' co-ownership aliquot share and not through sale of entire property with co-ownership portions of (also) other co-owners. The possibility of selling the entire property in the enforcement procedure, including portions of other co-owners who are not enforcement debtors, without their consent, in order to settle the debt of only one co-owner does not meet, in the opinion of the Constitutional Court, the proportionality standard, for it places an excessive burden on other co-owners in relation to the co-owner - enforcement debtor, since the sale of the whole property is the result of his/her debt alone.

36. The Constitutional Court notes that it follows from the response of the Government that the proposed amendments to the provision in question go in the direction as regulated by the Law on Enforcement Procedure of the Republika Srpska, i.e. concerning the enforcement against a share co-owned by the co-owner who is not an enforcement debtor and who has no debt to the enforcement claimant, to seek explicit consent of such co-owner. Although the Constitutional Court's task in the present case is to examine the compatibility of the applicable provisions of Article 69 of the Law on Enforcement Procedure with the standards of the right to property, which was done by the Constitutional Court, without having an obligation to comment on the view of the Government, it follows that the aim of the mentioned amendments was the harmonization of the regulations of the Federation of Bosnia and Herzegovina and Republika Srpska, which is in accordance with the principles of the rule of law and legal certainty.

37. Bearing in mind the above stated, as well as the abovementioned standards of property rights, the Constitutional Court holds that the disputed provision of Article 69(3) and (4) of the Law on Enforcement Procedure is not 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. The Constitutional Court notes that during the examination it confined itself to Article 69(3) and (4) of Law on Enforcement Procedure, which essentially concern the sale of property in an enforcement procedure for the purpose of settling a debt which does not belong to all co-owners but exclusively to the co-owner – enforcement debtor, while other paragraphs of Article 69 (2, 5, 6, 7, 8, 9 and 10) of the Law on Enforcement Procedure do not at all raise the issue of compatibility with the standards of the right to property referred to in the cited provision of the Constitution.

38. In view of the above, the Constitutional Court concludes that Article 69(3) and (4) of the Law on Enforcement Procedure of the FBiH is not compatible with Article II(3)(k) of the Constitution Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

VII. Conclusion

39. The Constitutional Court concludes that Article 69(3) and (4) of the Law on Enforcement Procedure of F BiH is not compatible with Article II(3)(k) of the Constitution Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, as they place an excessive burden on other co-owners in relation to the co-owner - enforcement debtor, whose debt is settled in the enforcement procedure by the sale of the entire property, including co-ownership portions of other co-owners, which is in contravention of the proportionality standard.

40. Pursuant to Article 59(1) and (2) and Article 61(1) and (4) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Case No. U-6/20

DECISION ON ADMISSIBILITY AND MERITS

Request of the County Court in Banjaluka (Judge of the County Court in Banjaluka Milan Blagojević) for the review of compatibility of the provision of Article 128, paragraph 4 of the Law on the Rights of Combatants, Military Invalids and the Families of Fallen Combatants of the Homeland War of the Republika Srpska (*Official Gazette of the Republika Srpska*, 134/11, 9/12 and 40/12) with Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention, Article 13 of the European Convention, Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention and Article 17 of the European Convention

Decision of 26 March 2021

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3) (c) of the Constitution of Bosnia and Herzegovina, Article 57 (2) (b), Article 59 (1) and (2) and Article 61 (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Ms. Angelika Nussberger and

Ms. Helen Keller

Having deliberated on the appeal of **the County Court in Banjaluka (Judge Milan Blagojević)** in the case no. **U-6/20,** at its session held on 26 March 2021 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

While deciding on the request filed by the County Court in Banjaluka (Judge Milan Blagojević) for the review of constitutionality of the provision of Article 128, paragraph 4 of the Law on the Rights of Combatants of the Homeland War of the Republika Srpska (*Official Gazette of the Republika Srpska*, 134/11, 9/12 and 40/12)

It is established that Article 128, paragraph 4 of the Law on the Rights of Combatants, Military Invalids and the Families of Fallen Combatants of the Homeland War of the Republika Srpska (*Official Gazette of the Republika Srpska*, 134/11, 9/12 and 40/12) is not compatible 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 National Assembly of the Republika Srpska is hereby ordered, in accordance with Article 61 (4) of the Rules of the Constitutional Court

of Bosnia and Herzegovina, within six months at the latest from the date of the publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*, to harmonize Article 128, paragraph 4 of the Law on the Rights of Combatants, Military Invalids and the Families of Fallen Combatants of the Homeland War of the Republika Srpska (*Official Gazette of the Republika Srpska*, 134/11, 9/12 and 40/12) 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 National Assembly of the Republika Srpska is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within the time limit referred to in the foregoing paragraph, in accordance with Article 72 (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, of the measures taken in order to enforce this Decision.

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*.

Reasoning

I. Introduction

1. On 1 July 2020, the County Court in Banjaluka (Judge of the County Court in Banjaluka Milan Blagojević; "the applicant") filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for the review of compatibility of the provision of Article 128, paragraph 4 of the Law on the Rights of Combatants, Military Invalids and the Families of Fallen Combatants of the Homeland War of the Republika Srpska (*Official Gazette of the Republika Srpska*, 134/11, 9/12 and 40/12; "the Law on the Rights of Combatants") 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 European Convention"), Article 13 of the European Convention, Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention and Article 17 of the European Convention.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 (2) of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska ("the RSNA") was requested on 6 July 2020 to submit its reply to the request.

3. The RSNA did not submit a reply within the time limit given for the reply. By a submission dated 4 August 2020, the RSNA requested additional time to submit a reply to the request. The RSNA submitted its reply to the request on 9 September 2020.

III. Request

a) Allegations stated in the request

4. The applicant raised the question of compatibility of Article 128, paragraph 4 of the Law on the Rights of Combatants with the Constitution of Bosnia and Herzegovina and the European Convention, because he held that the cited provision constitutes "an unconstitutional prohibition not only for administrative authorities, but also for courts in administrative disputes to be able to base their decision, when establishing and deciding the mentioned civil rights, on the statements of a party and witness, if there are no other evidentiary materials such as a military identity card which carries the registration of the participation in the war, a certificate issued by a military unit on that participation or on being killed, i.e. on death occurring as a result of the engagement in a military unit." As the applicant alleged, a fair trial requires that the witnesses and parties be heard, in order to establish correctly and completely the relevant facts. Otherwise, there can be no fair trial.

5. The applicant emphasized that Article 6 of the European Convention prescribes the right to a fair hearing by an independent and impartial tribunal, "which did not occur, not only when the party, owing to the mentioned provision of law, cannot challenge by way of a lawsuit in an administrative dispute an administrative act for the reason that an administrative authority failed to hear the witnesses proposed by the party in relation to decisive facts, rather this cannot be done by the competent court either, bearing in mind that in the present case, for the reasons that cannot be held against the plaintiff, he did not possess a material piece of evidence (an appropriate military identity card), while the cited provision of law prohibits the establishment of the fact of his military engagement in the relevant period solely by means of the testimonies of the plaintiff as a party and the testimonies of witnesses". Therefore, on the grounds of such provision of law, the court conducting a procedure in an administrative dispute should dismiss the lawsuit, although the party is entitled to the right to a fair trial, which implies the party's right for all his evidence to be taken into consideration, including evidence "in the form of his testimony and the testimonies of the proposed witnesses". The party's right to a fair trial was denied under the cited provision of law, because the court cannot hold a fair trial owing to such unconstitutional provision of law. For the aforementioned reasons, the cited provision of law is contrary to 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.

6. In addition, the applicant is of the opinion that such provision of law is in violation also of the right to an effective remedy referred to in Article 13 of the European Convention, "which prescribes that everyone whose rights as set forth in this Convention

are violated, including the right to a fair hearing, shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". Bearing in mind the contents of the disputed provision of law referred to in Article 128, paragraph 4 of the Law on the Rights of Combatants, given the already presented reasons, the cited provision "evidently violates the right to an effective remedy, namely in the present case the respective lawsuit in this administrative dispute. The reason being that the unconstitutional legal norm prevented the said lawsuit from being an effective remedy in this administrative dispute".

7. For the aforementioned reasons, the applicant claims that the disputed provision of law violated also Article 14 of the European Convention, which prescribes that the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, "including on the ground of any other status of the right holder". In the opinion of the applicant, the cited provision of law, in essence, on the ground of his military engagement during the war in the mentioned period, discriminated against the plaintiff by denying him the right, on the ground of that status, to a fair hearing and the right to an effective remedy, wherein fully justifiably he could ask for himself as a party to the proceedings as well as for the proposed witnesses to be heard, as "allowed evidence everywhere in a civilized world". However, the cited provision of law prohibits such a thing not only to the administrative authority, but also to the competent court adjudicating the administrative dispute, which amounts not only to the violation of the right to a fair trial and the right to an effective remedy, but this also amounts to the violation of the right to non-discrimination.

8. The applicant deems that all the aforementioned reasons indicate that the domestic legislator abused its right by means of the disputed provision of law, "as the said provision was used to commit an act aimed at unconstitutional restriction of all the aforementioned rights and to the extent greater than that permitted by the European Convention, whereby the cited provision of law violated also Article 17 of the European Convention".

9. In view of all the aforementioned reasons, the applicant proposes that the request be decided within the shortest time possible, bearing in mind two crucial reasons. One of the reasons being that the decision of this County Court in the respective administrative dispute depends on the decision of the Constitutional Court concerning the request filed, and the second reason is based on the fact that this case has been listed in the plan of cases to be resolved during 2020, which means that according to the said plan it should have been finalised by the end of 2020.

b) The facts of the case concerning which the request was filed

10. The Ruling of the Ministry for Labour, War Veterans and Disabled Persons' Protection ("the Ministry"), no. 16-03/5-5-835-911/09 of 17 September 2019, in paragraph 1 of the enacting clause, dismissed as ill-founded the request of D.M. ("the

plaintiff") for the recognition of his engagement during the war in the period from 18 August to 24 December 1991 with the Pakrac Territorial Defence and from 09 January to 01 July 1992 with the Prijedor Military Post 7388(8316). Paragraph 2 of the enacting clause of the ruling established that the Vob-8 official records registered the engagement of the plaintiff in the period from 30 July 1992 to 15 March 1996 in three different Banjaluka Military Posts. It follows from the ruling that the plaintiff attached to the request a copy of the identity card, a copy of the military identity card, the certificate of the Department for War Veterans and Disabled Persons' Protection of the City of Banjaluka dated 31 March 2009, certified statements of the witnesses M.K. and M.R, and copies of military identity cards for the witnesses.

11. In the ruling the Ministry invoked Article 12 of the Rulebook on the Contents and Method of Keeping Military Records ("the Rulebook"), which prescribes that the time which the members of the SFRY Armed Forces, i.e. the RS Armed Forces, had spent in the war that had not been registered in the official records, is to be recognized as participation in the war only if the party attaches appropriate evidence of their engagement. Within the meaning of the mentioned article, evidence include the following: a) the military identity card of the Military Post under which the party had been engaged, and b) any other document certified by the stamp of the competent Military Post.

12. The Ministry decided as stated in paragraph 1 of the enacting clause of the ruling, for the reason that the plaintiff failed to submit a single piece of relevant material evidence for the recognition of the disputed period of engagement in the war, in accordance with Article 12 of the Rulebook. In doing so, the Ministry emphasized that, in accordance with Article 128, paragraph 4 of the Law on the Rights of Combatants, the statements of a party and witnesses shall not be deemed sufficient evidentiary material in a procedure of the recognition of the engagement in the war.

13. The plaintiff instituted an administrative dispute against the Ministry for the annulment of the disputed ruling referred to in paragraph 10 of this Decision. The plaintiff stated in the lawsuit that his original wartime military identity card had been destroyed in the war in "an action undertaken by the Croatian Defence Council and the Army of BiH in the area of Mrkonjić Grad and Bočac on 10 September 1995", that he had been issued a duplicate of the wartime military identity card at the military sector in charge of the issuance thereof, but that the issued duplicate was incomplete as it lacked the data for the period at issue. The plaintiff indicated in the lawsuit that he had proposed in the course of the administrative procedure the hearing of the witnesses M.K. and M.R. who would testify about the facts relevant for the correct resolution of his request, but that the Ministry had turned a deaf ear on the proposal. Therefore, the plaintiff indicates that the defendant Ministry should not have limited itself to solely one piece of evidence, disregarding its obligation to obtain other evidence that were indicated, whereby the plaintiff claimed that the Ministry failed to conduct the procedure correctly, given that the facts of the case were not correctly established.

14. The plaintiff presented in the lawsuit new pieces of evidence, thus proposing that the hearing be opened exceptionally and the proposed witnesses heard.

c) Reply to the request

15. In the reply to the request, among other things, the RSNA indicated that the applicant's allegations were ill-founded insofar as they suggested that the disputed provision was in contravention of Article II (3) (e) of the Constitution of BiH and Article 6 (1) of the European Convention, as well as Articles 13, 14 and 17 of the European Convention, and that the request should be dismissed. In support of such a position the RSNA indicated that the provision of Article 128, paragraph 4 of the Law on the Rights of Combatants "does not contain a single element on which basis the right to a fair trial could be jeopardized". What is more, the provision of Article 128, paragraph 4 of the Law on the Rights of Combatants, both in terms of formal law and in terms of substantive law, cannot be linked to the right to a fair trial...". The RSNA claims that such a provision of law ensures legal certainty, because, otherwise, a situation might come about in which official records might be ignored and be completely ruled out as an objective category, whereby "statements, which are strictly of subjective and supplemental nature" would become objectively relevant, which is unacceptable in terms of legal certainty. According to the assessment of the RSNA, such a provision prevents discrimination all the more so, because it requires, first and foremost, "valid material evidence" on the basis of which specific personal rights may be established. In the reply the RSNA pointed also to the relevance of the facts, for which establishment the challenged provision prescribes that the statements of the party and witnesses have limited evidentiary power. Proving the fact of engagement in the war of the members of armed forces (combatants), and then establishing the status and possible rights derived from that status (such as: the status of a combatant – the right to a veteran's allowance and such like) may not be regarded as matters of minor importance. What is of special importance for this case is that these are the facts concerning which the competent military authorities had kept official records, which is one of the reasons for the prescription of restrictions referred to in Article 128, paragraph 4 of the Law on the Rights of Combatants. The RSNA emphasized that the RS Constitutional Court rendered the Ruling no. *U-10/08* of 26 November 2009, which did not grant the initiative to institute a procedure for the review of constitutionality of identical provisions of the Law on the Rights of Combatants. In view of all the aforementioned, the RSNA concluded that the request is completely ill-founded, as the provision of Article 128, paragraph 4 of the Law on the Rights of Combatants does not violate any of the rights that the applicant referred to.

IV. Relevant Law

16. The **Law on the Rights of Combatants, Military Invalids and the Families of Fallen Combatants of the Homeland War of the Republika Srpska** (*Official Gazette*

of the Republika Srpska, 134/11, 9/12 – Corrigendum, 40/12 and 18/15 – Decision of the Constitutional Court):

Article 1

This Law regulates the conditions, method and procedure for the establishment of the status and rights of combatants, military invalids and the family members of the persons who had fallen while discharging their military service, or while discharging the activities related to that service, the method of securing monetary funds, and other issues of relevance to the exercise of the rights prescribed by this Law.

Article 2

(1) Within the meaning of this Law, a combatant is a person who:

a) had participated in the armed operations, armed combat in the territory of the former Socialist Federative Republic of Yugoslavia ("SFRY") in the composition of the SFRY armed forces and state security forces and the military formations under the command of such forces, in the period from 17 August 1990 to 18 May 1992, in the defence of SFRY, or the Republika Srpska,

b) had participated in the war in the former SFRY, or Bosnia and Herzegovina, in the period from 19 May 1992 to 19 June 1996, as a member of the armed forces of the Republika Srpska, had discharged military and other duties in the defence of the Republika Srpska.

(2) Within the meaning of this Law, a combatant is a person who, as a volunteer, in the period after 18 May 1992, had been a member of the armed forces of the Republika Srpska and, as such, had discharged military and other duties in the defence of the Republika Srpska.

(3) Within the meaning of this Law, a combatant is a person who had discharged military and other duties in connection with the participation in the armed operation undertaken during the peacetime in the defence of the Republika Srpska.

(4) Within the meaning of this Law, a combatant is a person who had participated in the anti-fascist and liberation combat during the 20th century as a member of the Serbian, Montenegrin or Yugoslav Army, or as a combatant in the People's Liberation War (translator's comment: Yugoslav Front of World War II).

III – RIGHTS OF COMBATANTS

Article 30

Combatants are entitled to the following:

a) combatant's allowance,

b) incentive for employment and self-employment of demobilized combatants,

v) compensation to decorated combatants,

g) healthcare and other rights in connection with healthcare,

d) separate pensionable service in separate duration,

đ) employment priority,

e) housing priority,

ž) other rights in accordance with special regulations.

VII – PROCEDURE FOR EXERCISE OF RIGHTS

Article 87

(1) In the first instance, the status and rights under this Law are decided by the municipal, or city/town administration authorities in charge of the war veterans and disabled persons' protection affairs, unless the law stipulates otherwise.

(2) An appeal against an administrative decision/ruling issued by the authority referred to in paragraph 1 of this Article is decided by the Ministry.

(3) An appeal shall not stay enforcement of the administrative decision/ruling.

(4) If the appeal is granted, the Ministry will quash the first instance administrative decision/ruling and only decide the matter differently, or refer back the case to the first instance authority for a new procedure.

(5) Notwithstanding the provision of paragraph 4 of this Article, when simultaneously deciding an appeal and reviewing the administrative decision/ruling rendered within the meaning of Article 99, paragraph 4 of this Law, the administrative decision/ruling that increased the percentage of disability for the party, or established a greater scope of rights within the meaning of Article 102 of this Law, and the administrative decision/ ruling rendered within the meaning of Article 103 of this Law, the Ministry will annul the first instance ruling and only decide the matter differently, or refer back the case to the first instance authority for a new procedure.

Article 88, paragraph (1)

(1) The fact as to the engagement of a combatant shall be established solely on the basis of a certificate issued by the Ministry of Defence, or the Ministry of the Interior for the members of that Ministry, while the fact as to the absence from the unit based on sick leave shall be established solely on the basis of the findings and opinions of the competent military medical commissions.

IX – PROVISION FOR MONETARY FUNDS FOR EXERCISE AND USE OF RIGHTS

Article 116

(1) The funds necessary for the exercise and use of rights prescribed by this Law shall be provided for in the budget of the Republika Srpska.

(2) The payment of income provided under this Law will be made on the basis of the planned funds in the budget of the Republika Srpska for the fiscal year.

Article 128

(1) The Ministry shall decide a request of a party for the recognition of the military engagement in the wartime, in the period from 17 August 1990 to 19 June 1996, as well as a request for the establishment of the fact of a person's killing, death and disappearance, or the capturing, wounding, injuring and hurting of the members of the armed forces of the former SFRY, or the Republika Srpska in the said period.

(2) The Ministry shall decide also a request of a party for the establishment of the fact of a person's killing, death and disappearance, or the capturing, wounding, injuring and hurting of the members of the armed forces of the former Republic of Srpska Krajina, as well as of persons referred to in Article 11 of this Law.

(3) A request accompanied with evidence is to be filed with the first instance authority, which carries out previous harmonization with the records of the Ministry.

(4) The statements of a party and witnesses will not be considered sufficient evidentiary material in the procedure referred to in paragraphs 1 and 2 of this Article.

(5) Administrative decisions/rulings referred to in paragraphs 1 and 2 of this Article may not be appealed, however an administrative dispute may be instituted.

(6) The Minister shall adopt a rulebook regulating the contents and method of keeping military records.

17. The **Rulebook on the contents and method of keeping military records** (*Official Gazette of the Republika Srpska*, 66/12 and 1/17), in so far as relevant, reads as follows:

Article 1

This Rulebook regulates the contents and method of keeping military records on persons who had performed a military service, the keeping up to date of such records, and procedures related to such records.

Article 2

The notion "military records" includes the records of conscripts who had performed a military service, which records were generated and kept in the former Ministry of Defence of the Republika Srpska, the former Army of the Republika Srpska and the Ministry of the Interior of the Republika Srpska.

Article 3

The military records at the disposal of the Ministry for Labour, War Veterans and Disabled Persons' Protection ("the Ministry") on which basis it decides within the scope of the jurisdiction established under the Law on the Rights of Combatants, Military

Invalids and the Families of Fallen Combatants of the Homeland War of the Republika Srpska ("the Law") comprise the following:

a) The records of the unit commands and institutions of the Army of the Republika Srpska, and

b) The records of the Ministry of the Interior of the Republika Srpska.

Article 11, paragraph (2)

(2) The recognition of military engagement in armed forces in the wartime pertains to the periods of engagement in the wartime, for which no records exist either with the municipal/city authorities, or with the Ministry, as well as the recognition of military training and the serving of military service as participation in the wartime.

Article 12

(1) The period of time that the members of the armed forces of SFRY, or of the Republika Srpska, had spent in the wartime, which had not been registered in the official records, shall be recognized as participation in the wartime solely if a party presents appropriate evidence on their engagement.

(2) Evidence, within the meaning of paragraph 1 of this Article, includes the following:

a) a military identity card, if the period of engagement had been registered in the military identity card in the column "participation in the wartime", a certificate issued by the competent military post with which a party had been engaged, and

b) any other document certified by a stamp of the competent military post, or a stamp of the Ministry of the Interior.

Article 15

(1) A party shall file a request for the recognition of military engagement in the armed forces in the wartime, within the meaning of Article 11, paragraph 2 of this Rulebook, with the Ministry, through the competent municipal/city administration authority with which they had been kept in the military records.

(2) Along with the request, a party shall be obliged to attach evidence on the basis of which it is possible to establish facts pertaining to their engagement in the wartime.

(3) Evidence, within the meaning of paragraph 2 of this Article, include the following: a military identity card, permit to move, payroll, weapons sign-out sheet, a statement of a party specifying precisely all time periods and battlefields in which they had been engaged during the said time periods, the names of immediate chiefs, and statements of witnesses as to their engagement and other evidence certified by a competent municipal authority, on which basis it is possible to establish the facts as to the engagement in the wartime.

(4) A municipal/city administration authority shall be obliged, prior to forwarding the request to the Ministry, to check in their records the facts as to the engagement of persons in the armed forces or in other defence structures: civil protection, labour duty unit, community service or courier service.

(5) A municipal/city administration authority shall be obliged to forward to the Ministry a certificate of the participation in the wartime for the applicant and other data from their official records pertaining to the applicant's engagement in the wartime.

(6) Following the completion of an administrative procedure, the Ministry will update the data in its official records as to the length of the military engagement recognized upon the request of a party.

(7) A municipal/city administration authority shall be obliged to harmonize the recognized time period of the military engagement with its official records and to issue a new certificate on the military engagement.

18. The **Law on General Administrative Procedure** (*Official Gazette of the Republika Srpska*, 13/02, 87/07 - Corrigendum, 50/10 and 66/18)

Principle of free assessment of evidence

Article 10

Which facts will be taken as evidence shall be decided by an authorized official in their own conviction on the basis of a conscientious and careful assessment of each piece of evidence separately and all pieces of evidence together, as well as on the basis of the results of the entire procedure.

B. PROVING

1. General provisions

Article 147

The facts on the basis of which an administrative decision/ruling is to be taken (decisive facts) shall be established by evidence.

Everything that is suitable for establishing the state of affairs and that corresponds to an individual case shall be used as a means of evidence, such as: documents, that is to say a microfilm copy of a document or a reproduction of such a copy, the statements of witnesses, the statements of a party, the findings and opinion of experts, investigations etc.

19. The **Law on Administrative Disputes** (*Official Gazette of the Republika Srpska*, 109/05 and 63/11)

Article 10

An administrative act may be disputed if:

1) the act contains such shortcomings that prevent the assessment of the legality thereof, or shortcomings rendering it null and void;

2) in the act concerned the law, regulations based on the law or general act were not applied at all, or were not properly applied;

3) if the act was issued by an unauthorized authority;

4) in the administrative procedure prior to the issuance of the act, actions were not taken according to the rules of procedure, and especially if the facts of the case were not established completely and correctly, or if an incorrect conclusion was drawn from the established facts regarding the facts of the case;

5) if the competent authority, while deciding based on free assessment, exceeded the limits of the authorization bestowed upon it under the law and decided contrary to the authorization that was bestowed upon it.

Article 19, paragraph (1)

A lawsuit may not present new facts and propose new evidence, unless they indubitably indicate that the facts of the case are apparently different from those established in the administrative procedure and provided that the plaintiff provides evidence that he/she was not able, without his/her fault, to present or propose them before the conclusion of the administrative procedure.

Each party shall be obliged to prove the facts they refer to. If the party fails to present evidence as to the allegations they made, or it is not possible to establish with certainty some crucial fact on the basis of the evidence presented, the court will decide on the existence thereof by applying the rule on the burden of proof.

Article 25

The Court shall decide the administrative disputes as a single judge or in a session of a panel.

Due to the complexity of a disputed matter, or if otherwise concluded that it is necessary for better clarification of the matter, the Court may decide to hold an oral hearing. The Court may decide to hold an oral hearing also in the event that one of the parties proposed in the lawsuit, or in the timely reply to the lawsuit, the holding of the hearing.

Article 29

The Court shall decide the dispute, as a rule, based on the facts established in the administrative proceeding.

If the Court establishes at the hearing the facts of the case that are different from the facts of the case established in the administrative procedure and redresses the violations of the rules of administrative procedure, the Court will annul the disputed administrative

act and the first instance administrative act if it contained the same shortcomings, and will decide the administrative matter itself (the dispute of full jurisdiction).

In the case referred to in paragraph 2 of this Article, the Court shall, as a rule, establish the facts of the case at the hearing, or through a single member of the court panel, or through another petition court. If the Court establishes the facts of the case through another petition court, that court shall be obliged to comply with the request and notify the parties that they may attend the hearing set for the presentation of evidence.

V. Admissibility

20. In examining the admissibility of the request, the Constitutional Court invoked the provisions of Article VI (3) (c) of the Constitution of Bosnia and Herzegovina.

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

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.

22. The request for the review of constitutionality was filed by the County Court in Banjaluka (Judge Milan Blagojević), which means that the request was filed by an authorized person under Article VI (3) (c) of the Constitution of Bosnia and Herzegovina (see Constitutional Court, Decision on Admissibility and Merits no. *U-5/10* of 26 November 2010, paragraphs 7-14, published in the *Official Gazette of BiH*, 37/11).

23. In view of the provisions of Article VI (3) (c) of the Constitution of Bosnia and Herzegovina and Article 19 (1) of the Rules of the Constitutional Court, the Constitutional Court deems that this request is admissible as it was filed by the authorized entity, and there is not a single formal reason under Article 19 (1) of the Rules of the Constitutional Court rendering the request inadmissible.

VI. Merits

24. The applicant requests that the Constitutional Court decides on the compatibility of Article 128, paragraph 4 of the Law on the Rights of Combatants with Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention, which, among other things, guarantees the right to a fair hearing before an independent and impartial tribunal.

25. The challenged provisions of Article 128, paragraph 4 of the Law on the Rights of Combatants read as follows: "The statements of a party and witnesses will not be

considered sufficient evidentiary material in the procedure referred to in paragraphs 1 and 2 of this Article".

26. Article II (3) of the Constitution of Bosnia and Herzegovina, in its relevant provision, 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.

27. Article 6, paragraph 1 of the European Convention, in its relevant part, 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.

28. The Constitutional Court recalls that it reviews the constitutionality in general sense (*erga omnes*), and not pertaining to the case at hand (*inter partes*), which was the cause for the request to be filed (see Decision of the Constitutional Court in the Case no. *U-15/11* of 30 March 2012, paragraph 63). The Constitutional Court will, therefore, bearing in mind the allegations made by the applicant, consider the compatibility of the provision of Article 128, paragraph 4 of the Law on the Rights of Combatants within the meaning of the standard 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.

29. As the European Court and the Constitutional Court have consistently indicated in their jurisprudence, the right to a fair trial under Article 6 (1) of the European Convention ensures, among other things, that 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, i.e. a court.

30. The applicant claims that the provision of Article 128, paragraph 4 of the Law on the Rights of Combatants violates the principle of a fair hearing before an independent and impartial tribunal, as it "prohibits not only to the administrative authorities, but also to the courts in the administrative dispute, when establishing and deciding the mentioned civil rights, to be able to base their decision on the statements of the party and witnesses, if there are no other evidentiary means, such as the military identity card with the registered participation in the wartime." The applicant claimed that the cited provision of law in an unconstitutional way as it prohibits for the competent court in an administrative dispute to consider at all the allegations made by a party in the lawsuit indicating that he/she had been engaged by the military during the wartime in the specific

period of time, as a member of the armed forces of the former SFRY, i.e. the Republika Srpska, if such allegations of the party are based on the statement of the party or the statements of witnesses.

31. On the other hand, the RSNA, in the reply to the request, among other things, indicated that the legal restriction was prescribed in accordance with the legal certainty and removal of discrimination, in order to avoid the disregard for the relevant records in the recognition of rights and the use of "subjective evidentiary means" to prove such important facts in that area, and that such legal restriction does not violate any right safeguarded under the Constitution of Bosnia and Herzegovina and the European Convention, which the applicant referred to unfoundedly.

32. First and foremost, considering the allegations stated in the request the Constitutional Court concludes that the request essentially focusses on the issue of whether the legislator interfered, by way of Article 128, paragraph 4 of the Law on the Rights of Combatants, with the autonomy of the court, or of the administration authority to autonomously, under the rules of the procedural law and the principles of free assessment of evidence, establish the crucial facts relevant for decision-making and the application of the substantive law and thus restricted the access to Court for the individual. In this respect the Constitutional Court recalls that one of the most relevant elements of a system based on the rule of law is the separation of powers into legislative, executive, i.e. administrative, and judicial (see, the Constitutional Court, *AP-863/04* of 13 September 2005, paragraph 11, available on the website of the Constitutional Court: www.ustavnisud.ba). The fundamental task of the judiciary is to interpret and apply the laws, whereby the legislator and the executive authority have to observe the independence of the judiciary. The independence of the judicial authority in the Entity of the Republika Srpska is ensured in the Constitution "The judiciary shall be autonomous and independent from the executive and legislative authority in the Republika Srpska" (Article 121a of the Constitution of the Republika Srpska). The Constitutional Court recalls that it considered in detail in the Decision no. *U-22/14* (see, the Constitutional Court, Decision on Admissibility and Merits no. *U-22/14* of 4 December 2014, paragraph 25, published in *the Official Gazette of BiH*, 101/14, also available on the website of the Constitutional Court: www.ustavnisud.ba) the standards of impartiality and independence of the court, as applied by the European Court of Human Rights ("the European Court"), which, among other things reads that "the court has to function independently from the executive authority and has to base its decisions on its free thinking, facts and appropriate legal basis".

33. The Law on the Rights of Combatants regulates the conditions, method and procedure for the establishment of the status and rights of combatants, military invalids and the family members of the persons who had fallen while discharging their military service, or while discharging the activities related to that service, the method of securing monetary funds, the procedures for exercising the said rights, and other issues of

relevance to the exercise of the rights prescribed by this Law (paragraph 1). Pursuant to Article 88, paragraph (1) of the Law on the Rights of Combatants, the recognition of the status of a combatant shall be established solely on the basis of a certificate issued by the Ministry of Defence, or the Ministry of the Interior for the members of that Ministry. The Constitutional Court observes that the legislator prescribed in Article 128 of the Law on the Rights of Combatants (the cited Article is contained in transitional and final provisions of the Law on the Rights of Combatants) a special procedure for recognizing the military engagement in the wartime in the relevant period in cases where there is no record of that fact either at the municipal/town authorities or at the Ministry. Although Article 128 of the Law on the Rights of Combatants does not prescribe it explicitly, the Constitutional Court based that conclusion on the provisions of Article 11, paragraph 2, and Article 15 of the Rulebook elaborating in more detail the special procedure for recognizing the engagement in armed forces in the wartime, which is stipulated by Article 128 of the Law on the Rights of Combatants (see the relevant regulations).

34. Namely, the Constitutional Court observes that Article 128 of the Law on the Rights of Combatants prescribes the jurisdiction of the Ministry to decide in the first instance on the recognition of the military engagement in the wartime, in the period from 17 August 1990 to 19 June 1996, as well as on a request for the establishment of the fact of a person's killing, death and disappearance, or the capturing, wounding, injuring and hurting of the members of the armed forces of the former SFRY, or the Republika Srpska in the said period (paragraph 1), and also on a request of a party for the establishment of the fact of a person's killing, death and disappearance, or the capturing, wounding, injuring and hurting of the members of the armed forces of the former Republic of Srpska Krajina, as well as of persons referred to in Article 11 of this Law (paragraph 2). Paragraph 3 of Article 128 of the Law on the Rights of Combatants prescribes that a request accompanied with evidence is to be filed with the first instance authority, which carries out previous harmonization with the records of the Ministry, while the challenged paragraph 4 of the same Article prescribes that the statements of a party and witnesses will not be considered sufficient evidentiary material in the procedure referred to in paragraphs 1 and 2 of this Article. Paragraphs 5 and 6 prescribe a legal remedy against the first instance ruling, i.e. the obligation of the Ministry to adopt a rulebook regulating the contents and method of keeping military records.

35. Therefore, bearing in mind the contents of the provisions of Article 128 of the Law on the Rights of Combatants, the Constitutional Court observes that paragraph 3 does not explain which evidence is needed for determining the rights referred to in paragraphs 1 and 2 of Article 128 of the Law on the Rights of Combatants, however paragraph 4 of the cited Article *explicite* specifies pieces of evidence, which *per se* "are not sufficient" (the testimonies of a party and witnesses). Thereafter, on the basis of the contents of the provision of Article 128, paragraph 4 of the Law on the Rights of Combatants, contrary to the claims of the applicant, the Constitutional Court does not observe that it

prohibits the competent administration authorities and the court to assess "insufficient" evidence, i.e. the testimonies of the party and witnesses. However, according to the assessment of the Constitutional Court, the cited provision of law prohibits that the court and the administration authority establish, on the basis of the free assessment of solely such "insufficient" evidence, the crucial facts relevant for the decision-making on the administrative matter and, possibly, on the basis of the established facts of the case, recognize to the party the right referred to in the Law on the Rights of Combatants. In that case, they would have acted contrary to Article 128, paragraph 4 of the Law on the Rights of Combatants, i.e. such a decision would not be in accordance with the law. Therefore, according to the assessment by the Constitutional Court, the problem arises when the party possesses solely "insufficient" evidence for the recognition of the right referred to in the Law on the Rights of Combatants.

36. The Constitutional Court observes that the linguistic interpretation of Article 128, paragraph 4 of the Law on the Rights of Combatants, first and foremost, could have yielded a conclusion that the legislator divided evidence into "the sufficient one" and "the insufficient one". Such conclusion is additionally corroborated in the allegations of the RSNA, which, in its reply to the request, divided evidence into "valid material evidence" and "subjective evidence of supplemental nature, with limited evidentiary power".

37. As regards such division of evidence, the Constitutional Court points, first and foremost, to the position of the European Court on the general approach to evidence in the procedure under the Convention, which is explained in the judgment of *Nachova and others v. Bulgaria*, paragraph 147 (2005). It clearly shows the Court's broad approach to evidence, without procedural restrictions. ... "…The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact..."

38. The Constitutional Court emphasizes that the system of free evaluation of evidence does not determine a rank of evidence, according to which one piece of evidence would have a greater probative value in a procedure than another one, e.g. that a non-public (private) document always has a greater probative value than a witness's testimony. What is more, the system of free evaluation of evidence does not recognize for some facts to be proven only by certain evidentiary means. The Law on General Administrative

Procedure prescribes in Article 147 the evidentiary means for the determination of decisive facts, which equally include the testimonies of parties and witnesses. The Constitutional Court observes that the other procedural laws in Bosnia and Herzegovina (laws on civil procedure, and laws on criminal procedure) do not recognize the division of evidence into "sufficient" and "insufficient". Also, the Constitutional Court indicates that Article 10 of the Law on General Administrative Procedure, which prescribes that "an authorized official will decide which facts will be taken as evidence as per his/her own conviction on the basis of a conscientious and careful assessment of each piece of evidence separately and all pieces of evidence together, as well as on the basis of the results of the entire procedure". Other procedural laws in Bosnia and Herzegovina, on the basis of which ordinary courts make decisions, regulate the question of the admissibility of evidence almost identically. For the sake of illustration, Article 8 of the RS Law on Civil Procedure prescribes that "a court will decide on the basis of free evaluation of evidence which facts will be taken as evidence". The Constitutional Court observes that the competent court deciding in an administrative dispute was bestowed under the Law on Administrative Disputes an authorization to open a public hearing under the conditions prescribed by law (Article 25, paragraph 2 of the Law on Administrative Disputes) and to establish the facts of the case according to the system of free evaluation of evidence (Article 29, paragraph 2 of the Law on Administrative Disputes).

39. In such circumstances, in the system of free evaluation of evidence, according to which all procedures in Bosnia and Herzegovina are conducted (administrative, civil, criminal procedures), a question arises as to whether the legislator has the authorization to prescribe by law which evidence "is not sufficient". That raises the question whether the legislator in that way interferes with the independence of the judicial and administrative authority, which, under the law, is the only one authorized to assess evidence in a procedure and to establish the facts of the case and thus also restricts the access to court as it blocks a full assessment of a request. As a matter of fact, a question arises as to whether "the insufficiency" of a piece of evidence may be decided by the legislator, in a situation where procedural laws in Bosnia and Herzegovina, under which procedures are conducted, do not recognize the notion "insufficient" piece of evidence. The fundamental task of the court (and of the administration authority) is to establish, by way of free evaluation of evidence, completely and correctly the facts of the case, which is the basic presumption for the correct application of the substantive law and the issuance of a lawful decision. Concerning that role of the court, the Constitutional Court has indicated constantly in its decisions that "the Constitutional Court will not interfere with the evidence of the parties to the proceedings which the courts had given credence to, on the basis of free margin of appreciation, for that is exclusively the role of courts, even when the statements of witnesses at a public hearing and under oath are contradictory to one another (see, the Constitutional Court, Decision no. *AP-612/04* of 30 November 2004 and the judgment of the European Court of Human Rights, *Doorson v. The Netherlands*,

6 March 1996, published in Reports no. 1996-II, paragraph 78)". The Constitutional Court has constantly emphasized in its decisions "that it has no competence to substitute ordinary courts in the assessment of facts and evidence, rather, in general, the task of the ordinary courts is to assess the facts and evidence they presented (see European Court, *Thomas v. The United Kingdom*, judgment of 10 May 2005, Application no. 19354/02)".

40. According to the separation of powers, the Entities in Bosnia and Herzegovina have the constitutional authorization to regulate and secure the war veterans and disabled persons' protection, as an area of general social interest, which attributes a public law character to the Law on the Rights of Combatants. The fact that the funds for the exercise and use of the rights prescribed by this law are allocated from the budget of the Entity, and, given the character of the rights that the Law on the Rights of Combatants recognizes, which "are not of minor significance", as the RSNA indicated in its reply to the request, gives the legislator a discretionary power to regulate this area in a way so as to protect the public interest. However, the Constitutional Court deems that the discretionary power of the legislator must not interfere with the very essence of the right to a fair trial through the direct interference with the judicial competence. As a matter of fact, such discretionary power does not give the legislator the competence to prescribe *explicite* by law which pieces of evidence "are not sufficient". This would disrupt the system of the separation of power into the legislative, executive, judicial and administrative authority.

41. Furthermore, it would restrict the access to court of the individual. This is an "inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlie much of the Convention." (see *Golder v. The United Kingdom*, judgment of 21 February 1975, Series A no. 18, pp 13-18, §§ 28-36). According to the jurisprudence of the European Court of Human Rights, access to court is, however, "not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State." (see *Fogarty v. The United Kingdom*, no. 37112/97, 21 November 2001, § 33). The Court holds that "a limitation will not be compatible with Article 6 (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 *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I, § 59). In the present case access to court for those who cannot present any evidence other than statements of the party or statements of witnesses is limited in such a way that the essence of the rights under Article 6 (1) are affected as they cannot present their case. The difficulties caused to them by those limitations are not counterbalanced in any way (see *Fitt v. The United Kingdom* (GC), no 29777/96, §§ 45-46 ECHR 2000-II).

42. According to the jurisprudence of the European Court of Human Rights, access to court has to be not only theoretical and illusory, but practical and effective. Therefore,

the courts must be able to assess a case brought before them in all aspects. This includes the power to quash in all respects, on questions of fact and law, the challenged decision (*Veeber v. Estonia,* no. 1, of 7 November 2020, no. 37571/97, paragraph 70).

43. In the system of free evaluation of evidence only the court (an authority deciding a legal issue under the law) has the legal authorization to examine in a procedure the validity of evidence, as to whether it is "a sufficient" piece of evidence or not. Therefore, in such circumstances, the Constitutional Court cannot accept the allegations of the RSNA that the legal restriction was imposed for the purpose of protecting the legal certainty. Excluding potentially relevant pieces of evidence *a priori* cannot contribute to creating legal certainty; it rather restricts the court's elucidation of the facts of the case. References of the RSNA to the administrative decision/ruling of the Constitutional Court of the Republika Srpska, which did not grant the initiative to institute a procedure for the review of the constitutionality of identical provisions of the Law on the Rights of Combatants is irrelevant to the decision-making in the present case. The Constitutional Court deems that other objections raised by the RSNA, which the Constitutional Court took into account during the decision-making, had no influence on the Constitutional Court to reaching a different decision.

44. Therefore, the Constitutional Court deems that the provision of Article 128, paragraph 4 of the Law on the Rights of Combatants, which prescribes that the testimonies of the parties and witnesses "are not sufficient" evidence to establish facts, constitutes an inadequate restriction, which makes it impossible for the judicial and administrative authorities, as independent pillars of the State, to act in compliance with the legal authorizations and the fundamental principle of free evaluation of evidence. According to the Constitutional Court, such restriction is apparently not in conformity with Article 6 (1) of the European Convention, which guarantees access to court and the right to a fair hearing before an independent and impartial tribunal.

45. In view of all the aforementioned, the Constitutional Court deems that the challenged provision is not in conformity with the provision of Article II (3) (e) of the Constitution of Bosnia and Herzegovina and the provision of Article 6 (1) of the European Convention.

Other allegations

46. In view of the conclusion of the Constitutional Court as to the violation of the right to a fair trial, the Constitutional Court deems that it is not necessary to consider the allegations of the applicant as to the violations of the right to non-discrimination under Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention, the right to effective legal remedy under Article 13 of the European Convention and the right to the prohibition of abuse of rights under Article 17 of the European Convention.

VII. Conclusion

47. The Constitutional Court concludes that the provision of Article 128, paragraph 4 of the Law on the Rights of Combatants is not compatible with Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention. This is for the reason that the legislator, by availing itself of the discretionary power aimed at protecting the public interest by prescribing under the law that the testimonies of parties and witnesses "are not sufficient evidence" to establish decisive facts, interfered with the judicial competence and the autonomy of the judicial and administrative authorities to establish, autonomously, in a procedure prescribed by law, on the basis of free evaluation of evidence, the facts of the case and to decide pursuant to the law, for such restriction, essentially, is not compatible with the right to a fair hearing before an independent and impartial tribunal.

48. Having regard to Article 59 (1) and (2) and Article 61 (4) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

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Jurisdiction – Article VI(3)(b)
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Case No. AP-1638/17

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Ms. Bogdana Tomović from Han-Pijesak, represented by Mr. Milan Romanić, a lawyer practicing in Banja Luka, for a failure of the Prosecutor's Office of Bosnia and Herzegovina to complete the investigation in case no. T20 0 KTRZ 0001145 06

Decision of 17 January 2018

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The Constitutional Court of Bosnia and Herzegovina, sitting as a Grand Chamber, in accordance with Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 57 (2) (b), Article 59 (1) and (2) and Article 74 of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of Bosnia and Herzegovina,* 94/14), composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović and

Ms. Seada Palavrić

Having deliberated on the appeal of Mses. **Bogdana Tomović** and **Gordana Gvozdenović** in the case no. **AP-1638/17**, at its session held on 17 January 2018, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Bogdana Tomović and Gordana Gvozdenović is hereby granted.

A violation of the right to prohibition of inhuman treatment referred to in Article II (3) (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Prosecutor's Office of Bosnia and Herzegovina is hereby ordered immediately to take measures aimed at deciding on the appellants' complaints against the Order on Termination of Investigation of 17 January 2012 in case no. T20 0 KTRZ 0001145 06 in accordance with Article II (3) (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to Article 74 of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Council of Ministers of Bosnia and Herzegovina is hereby ordered to pay appellants Bogdana Tomović and

Gordana Gvozdenović, within 3 months as from the date of delivery of the Decision, the amount of BAM 1,000.00 each as compensation for non-pecuniary damages for a violation of their rights safeguarded by Article II (3) (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, including the obligation to pay the appellants, after the expiry of the above time limit, statutory default interest on any unpaid amount or portion of the amount of compensation determined by this Decision.

Pursuant to Article 72 (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Prosecutor's Office of Bosnia and Herzegovina and the Council of Ministers of Bosnia and Herzegovina are hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of the delivery of the Decision, of the measures taken with a view to enforcing 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 26 April 2017, Ms. Bogdana Tomović ("appellant Tomović") from Han-Pijesak, represented by Mr. Milan Romanić, a lawyer practicing in Banja Luka, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for a failure of the Prosecutor's Office of Bosnia and Herzegovina ("the Prosecutor's Office of BiH") to complete the investigation in case no. T20 0 KTRZ 0001145 06. The appeal is registered as case no. *AP-1638/17*.

2. Due to the failure to finalise the investigation in the same case of the Prosecutor's Office of BiH, on 5 May 2017, Ms. Gordana Gvozdenović ("appellant Gvozdenović"), also represented by lawyer Milan Romanić, filed an appeal with the Constitutional Court. The appeal is registered as case no. *AP-1742/17*.

II. Procedure before the Constitutional Court

3. Given that two appeals relating to the same factual and legal grounds are lodged with the Constitutional Court, in accordance with Article 32 (1) of the Rules of the Constitutional Court, the Constitutional Court adopted the decision on joining the cases

AP-1638/17 and *AP-1742/17,* wherein one proceedings will be conducted and a single decision will be issued under no. *AP- 1638/17*.

4. Pursuant to Article 23 of the Rules of the Constitutional Court, on 10 May 2017, the Prosecutor's Office of BiH was requested to submit its response to the appeal *AP-1638/17* and on 19 May 2017 to submit its reply to the appeal in the case *AP-1742/17*.

5. On 8 December 2017, the Prosecutor's Office of BiH was again requested to submit its response to the appeal in case *AP-1742/17*. It was also requested to transmit a copy of the Order on Conducting the Investigation of 2 October 2006, the Order on Termination of Investigation of 17 January 2012, and the criminal charges of the Ministry of Interior of the Republika Srpska ("the Ministry of Interior") of 29 May 1996 and 27 April 2005. In addition, it was requested to give a clear statement as to whether the appellants Gvozdanović and Tomović had the status of injured persons in case no. T20 0 KTRZ 0001145 06.

6. On 19 May 2017, the Prosecutor's Office of BiH submitted its response to the appeal *AP-1638/17* and, on 15 December 2017, it submitted the requested documents and response to the appeal *AP-1742/17.*

III. Facts

7. The facts of the case, as they appear from the appellants' allegations and the documents submitted to the Constitutional Court may be summarized as follows.

8. Appellant Tomović is mother of Zdravko Tomović who was killed as a soldier of the former Yugoslav National Army ("the JNA") on 3 May 1992 during the attack on the JNA convoy in Sarajevo at Dobrovoljačka Street, and appellant Gvozdenović is sister of Obrad Gvozdenović who was killed as the JNA lieutenant on 2 May 1992 at Skenderija, Sarajevo.

9. In addition, on 29 May 1996, the Ministry of Interior, Public Security Centre Sarajevo, lodged the criminal charges to the Basic Public Prosecutor's Office Sarajevo against a number of persons for the attack on the JNA convoy in Sarajevo at Dobrovoljačka Street on 3 May 1992, for the existence of grounds for suspicion that they had committed the criminal offence of war crimes against prisoners of war and war crimes of unlawful killing and wounding the enemy (Articles 144 and 146 of the Criminal Code of the Republika Srpska).

10. In addition, on 27 April 2005, the Ministry of Interior, Public Security Centre Istočno Sarajevo, lodged a Report with County Prosecutor's Office Istočno Sarajevo, by which it supplemented the criminal charges of 29 May 1996, extending it to the events of 2 May 1992.

11. On 13 May 2005, the Prosecutor's Office of BiH received the case of the County Prosecutor's Office Istočno Sarajevo including the criminal charges of 29 May 1996 and 27 April 2005.

12. On 2 October 2006, the Prosecutor's Office of BiH issued the Order on Conducting the Investigation no. KT-RZ 168/06 against E. G., H. E., Z. B., J. D., J. P., E. Š., D. V., F. M., Dž. T., J. B., R. J., J. K., D. D. and I. H. for the attack on the JNA convoy in Sarajevo at Dobrovoljačka Street of 3 May 1992, due to the existence of grounds for suspicion that they had committed the criminal offence of war crimes against civilians referred to in Article 173(1)(a), (c) and (f), war crimes against wounded and sick referred to in Article 174 (1) (a) and (b), war crimes against prisoners of war referred to in Article 175 (1) (a) and (b), unlawful killing and wounding the enemy referred to in Article 177 (1) and (2), violation of law and customs of war under Article 179(1), all in conjunction with Article 80 (1) and (2) of the Criminal Code of Bosnia and Herzegovina ("the CCBH").

13. On 18 January 2012, the Prosecutor's Office of BiH informed appellant Tomović that it issued the Order on Termination of Investigation in case no. T20 0 KTRZ 0001145 06 against E. G., H. E., Z. B., J. D., J. P., E. Š., D. V., F. M., Dž. T., J. B., R. J., J. K., D. D. and I. H. for the attack on the JNA convoy in Sarajevo at Dobrovoljačka Street of 3 May 1992 on 17 January 2012 due to the lack of evidence that the abovementioned persons committed the criminal offence.

14. However, the information further states that in the course of investigation the Prosecutor's Office of BiH established that the following acts were criminal offences:

1. murder of colonel Budimir Radulović, colonel Miro Sokić, soldier Miodrag Đukić, lieutenant colonel Boško Jovanić, colonel Boško Mihajlović, colonel Gradimir Petrović, as well as the wounding of colonel Mićo Pantelić, captain Dragan Stanković, captain Laslo Pravda, soldier Slobodan Bojanić, soldier Zvezdan Arsić, captain Ratko Katalina, soldier Zoran Adžić, colonel Ljubinko Lukić, soldier Milenko Perić, soldier Dragan Pantić, lance corporals Ivica Simić and Slavko Petrović, because the fire was opened at the victims when they were incapable of combat;
2. murder of Normela Šako and wounding of soldier Dragan Kovačević and colonel Dušan Kovačević, because the fire was opened at the victims at the moment they were in the military ambulance;
3. physical abuse of sergeant major Gojko Vukšić, colonel Slavoljub Belošević, captains Milan Legen, Miroslav Čabo, Nenad Erić and Danilo Beribak after they were taken prisoners at Dobrovoljačka Street,

and that the Prosecutor's Office of BiH would continue to conduct the investigative actions with the aim of revealing the identity of direct perpetrators of those acts and other persons possibly being liable.

15. Concerning other deaths and wounding, the Prosecutor's Office of BiH states that it was established in the course of investigation that they were result of the lawful actions because the victims were legitimate targets at the moment the fire was opened at them and concludes that in that connection it will undertake no further investigative actions.

16. The information does not indicate which deaths and wounding are not the criminal offences, but it is stated in the Order on Termination of Investigation that, *inter alia*, the investigation concerning the murder of soldier Zdravko Tomović is terminated since his death was the result of legitimate actions.

17. Appellant Gvozdenović found out about the relevant Order indirectly, through media.

18. The appellants filed complaints to the Prosecutor's Office of BiH against the Order on Termination of Investigation no. T20 0 KTRZ 0001145 06 of 17 January 2012, in accordance with the provisions of Article 216(4) of the Criminal Procedure Code of Bosnia and Herzegovina ("the CPC BiH").

19. In their complaints, the appellants point out that there was a long delay in starting the investigation in the particular case, it was conducted incompetently, and all with the aim of covering up the traces, *i.e.* not establishing all relevant facts that would lead to the indictment of the suspects. They state that the criminal charges in the case had been filed on 29 May 1996 and supplemented on 27 April 2005, and the investigation was opened only on 2 October 2006. It is further stated that, given the information their families gathered, they doubt that the investigation really lasted as of 2 October 2006 to 18 January 2012. They hold that there were large "gaps" or stoppages in the course of investigation due to political influence exerted on the Prosecutor's Office of BiH and the lack of real will in the Prosecutor's Office of BiH to deal objectively and professionally with the case "Dobrovoljačka ulica". The appellants further state that during the investigation neither the Prosecutor's Office of BiH nor the other investigative bodies, *i.e.,* law enforcement authorities, have interviewed them as injured/damaged persons although they were accessible all that time on their addresses known to the Prosecutor's Office of BiH. In addition, appellant Gvozdenović states that she possesses knowledge that other families of officers and soldiers have not been questioned either. That is also the case with wounded officers and soldiers of the then JNA and numerous witnesses, national and international journalists, who witnessed the attack on the visibly marked JNA ambulance which was moving with medical personnel from the Military Hospital through Skenderija towards "Dom JNA" building, in which appellant Gvozdenović's brother was fatally injured on 2 May 1992. Appellant Tomović states that she also has knowledge that other families of officers and soldiers were not interviewed or the wounded soldiers and officers of the then JNA or the then members of UN who were escorting and securing the convoy of vehicles which was moving from the JNA Command on Bistrik to Lukavica on 3 May 1992, in accordance with previous agreement of the JNA command (General Kukanjac)

and the then President of BiH Presidency, Mr. Alija Izetbegović. For example, the then commander of UNPROFOR, Canadian General McKenzie, or other participants and witnesses of the event were not questioned. In view of the above, the appellants could not agree to the conclusion of the Prosecutor's Office of BiH that it was established in the course of investigation that deaths and wounding of the members of JNA, and amongst them of appellant Tomović's son and appellant Gvozdenović's brother, were the result of the legal actions because the victims were legitimate targets at the moment the fire was opened on them, and they described knowledge they possess on the circumstances in which soldier Zdravko Tomović and colonel Obrad Gvozdenović were killed.

20. Thereafter, the appellants urged the Office of the Chief Prosecutor to decide on their complaints. They attached to the appeal the urgencies of 30 September 2013, 28 April 2014 and 28 March 2016.

21. The appellants' representative lodged a complaint to the Office of Disciplinary Prosecutor of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina ("the ODP") against the then Chief Prosecutor of the Prosecutor's Office of BiH. By the letter of 11 November 2016 the ODP informed the appellants' representative that their complaint was rejected.

22. In addition, on 23 April 2015, the appellants' representative filed the criminal charges against the then Chief Prosecutor of the Prosecutor's Office of BiH at the time of submission of the complaint against the Order on Termination of Investigation (2012).

23. According to the case-file, the Prosecutor's Office of BiH has not decided on the complaints against the Order on Termination of Investigation of 17 January 2012 and the appellants have never received any response to their letters of urgency either.

IV. Appeal

a) Allegations of the appeal

24. The appellants point out that they submit their appeals for the Prosecutor's Office of BiH has not finalise the investigation pending since 2 October 2006 in case no. T20 0 KTRZ 0001145 06 for the attack on the JNA convoy in Sarajevo at "Dobrovoljačka ulica" on 3 May 1992, in which the son of appellant Tomović and the brother of appellant Gvozdenović were killed. They point out that the Order on Termination of Investigation does not reason why the Prosecutor holds that the investigation should be conducted for the deaths of seven persons, wounding of 14 persons and maltreatment of six captured JNA members and the investigation should not be conducted for remaining 35 killed soldiers (amongst which are the son of appellant Tomović and the brother of appellant Gvozdenović) and officers of JNA, and other wounding and abuse of captured soldiers.

25. In addition, the appellants allege that they lodge their appeal because they have no knowledge on whether it was acted in accordance with the Order of the Prosecutor's Office of BiH of 17 January 2012, *i.e.*, whether the investigative actions aiming at the determination of identity of perpetrators were really conducted in the Prosecutor's Office of BiH. They also lodged the appeals because they hold that their complaints relating to the second part of the Order concerning other killings and wounding in the same event, when the son of appellant Tomović and the brother of appellant Gvozdenović were killed, should have been considered. The appellants do not see why some killings and wounding in the same convoy as the consequence of the same attack are held unlawful and some lawful, or why some killings and wounding are considered to transpire due to lawful actions and some due to unlawful actions.

26. In their appeal and the complaint, the appellants state that the Prosecutor's Office of BiH failed to interview the witnesses of events of 2 and 3 May 1992 in which their close relatives were killed, and they described the knowledge they obtained on the circumstances in which soldiers Tomović and Gvozdenović had died.

27. In addition, the appellants hold that the available remedy - complaint against the Order on Termination of Investigation of 17 January 2012, due to the inactivity of the Prosecutor's Office of BiH, is not the effective remedy, given that five years have already passed and their complaint was neither approved nor rejected. This speaks of the inactivity and inefficiency of the work of the Prosecutor's Office of BiH.

28. The appellants also hold that the investigation in this case is not objective and impartial since some high-ranking officials in Bosnia and Herzegovina were identified as suspects under command liability.

29. In view of the above, the appellants hold that their right not to be subjected to torture or to inhuman or degrading treatment or punishment referred to in Article II (3) (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") and the right to private and family life under Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 (1) of the European Convention have been violated. In case *AP-1742/17* the violation of the right to effective legal remedy under Article 13 of the European Convention has been indicated.

30. With regard to the violation of their constitutional rights, the appellants requested compensation of non-pecuniary damages, appellant Tomović in the amount of BAM 5,000 and appellant Gvozdenović in the amount of BAM 3,300.

b) Response to the appeal

31. In its response to the appeal in the case *AP-1638/17*, the Prosecutor's Office of BiH points out that, against the Order on Termination of Investigation in the case T20

0 KTRZ 0001145 06 of 17 January 2012, the injured persons lodged a larger number of complaints (21 in total), including also appellant Tomović, who lodged a complaint in the capacity of injured person – mother of killed soldier Zdravko Tomović. After the receipt of all of the above complaints, pursuant to a decision of the then Acting Chief Prosecutor of the Prosecutor's Office of BiH, a team was established for the work on complaints in the case-file T20 0 KTRZ 0001145 06. The ultimate goal of the team was to prepare the proposal of draft decisions regarding the lodged complaints. Furthermore, on 15 August 2012, the then Acting Chief Prosecutor of the Prosecutor's Office of BiH issued the decision amending the decision on the establishment of team for work on complaints in the case T20 0 KTRZ 0001145 06. Then, on 5 February 2013 and 15 March 2013, the Chief Prosecutor of the Prosecutor's Office of BiH adopted the decision amending the decision on the establishment of team for work on complaints in the case T20 0 KTRZ 0001145 06. Thereafter, on 30 December 2014, the Chief Prosecutor of the Prosecutor's Office of BiH adopted the decision on the establishment of team for work on complaints in the case T20 0 KTRZ 0001145 06. This was modified by the ruling of the Chief Prosecutor of the Prosecutor's Office of BiH of 1 December 2015 and by the decision amending the decision on the establishment of team for the work on complaints in the case T20 0 KTRZ 0001145 06 of 1 February 2016. The Prosecutor's Office of BiH further states that the team for work on the complaints currently consists of seven members who have been holding regular meetings in the previous period with the aim of fulfilling their tasks – adoption of draft decisions on the complaints concerned. The meetings of the team were scheduled and held on 12 March 2015, 29 May 2015, 10 September 2015, 17 September 2015, 29 September 2015, 19 November 2013, 26 December 2015, 23 March 2016, 8 April 2016, 26 April 2016, 11 May 2016, 20 May 2016, 12 July 2016, 15 July 2016, 4 October 2016 (postponed), 17 February 2017, 10 April 2017, 24 April 2017, and 19 May 2017 (the date of preparation of the response). The team for work on the complaints has not adopted its final proposal of the decision and the Acting Chief Prosecutor did not adopt its decision. In addition, the Prosecutor's Office of BiH indicates that the provisions of the Civil Procedure Code of Bosnia and Herzegovina does not provide for the time limit for the decisions on complaints and that the present case is a very complex and big criminal case.

32. Instead of the response to the appeal *AP-1742/17*, the Prosecutor's Office of BiH informed the Constitutional Court that it maintains its reply to the appeal *AP-1638/17* (appellant Bogdana Tomović) in all of the statements presented. It is also pointed out that the prosecutor's decision on the lodged complaints in the instant case has not been adopted yet.

V. Relevant law

33. The **Criminal Procedure Code of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06,

29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13), in its relevant part, reads as follows:

Article 216
Order for Conducting an Investigation

(1) The Prosecutor shall order the conduct of an investigation if grounds for suspicion that a criminal offense has been committed exist.

(2) The order on conducting the investigation shall contain: data on perpetrator if known, descriptions of the act pointing out the legal elements which make it a crime, legal name of the criminal offense, circumstances that confirm the grounds for suspicion for conducting an investigation and existing evidence. The Prosecutor shall list in the order which circumstances need to be investigated and which investigative measures need to be undertaken.

(3) The Prosecutor shall issue order that the investigation shall not be conducted if it is evident from the report and supporting documents that a reported act is not a criminal offense, if there are no grounds to suspect that the reported person committed the criminal offense, if the statute of limitation is applicable or if the criminal offense is a subject to amnesty or pardon or if any other circumstances exist that preclude criminal prosecution.

(4) The Prosecutor shall inform the injured party and the person who reported the offense within three (3) days of the fact that the investigation shall not be conducted, as well as the reasons for not doing so. The injured party and the person who reported the offense have a right to file a complaint with the Prosecutor's Office within eight (8) days.

Article 224
Cessation of Investigation

(1) The Prosecutor shall order that the investigation of a suspect should cease if it is established that:

a) the act committed by the suspect is not a criminal offence,

b) the circumstances that exclude criminal liability of the suspect exist except in the case under Article 206 of this Code,

c) there is insufficient evidence that the suspect committed a criminal offence;

d) that the act is covered by amnesty, pardon or statute of limitations or if there are some other obstacles that preclude prosecution.

(2) The Prosecutor shall inform the injured party enjoying the rights under Article 216 of this Code, the suspect if he was questioned and the person that reported the crime about the cessation and grounds for cessation of the investigation in writing.

(3) In the cases under Item c) of Paragraph 1 of this Article the Prosecutor may reopen the investigation at a later date if new facts and circumstances imply that there are grounds for suspicion that the suspect committed a criminal offence.

VI. Admissibility

34. 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.

35. In accordance with Article 18 (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.

36. In the opinion of the Constitutional Court, it stems from the allegations of the appeal that the appellants raise the issue of (in)efficiency of the investigation.

37. Consequently, the Constitutional Court notes that in the instant appeal the appellants do not actually dispute the decision in merits – a judgement of any other court in Bosnia and Herzegovina which, in terms of Article VI (3)(b) of the Constitution of Bosnia and Herzegovina, may be the subject of dispute before the Constitutional Court. Thus, the issue arises as to the admissibility of the present appeal.

38. In that connection, the Constitutional Court points out that, in accordance with Article 18 (2) of the Rules of the Constitutional Court, exceptionally, the Constitutional Court may examine an appeal where 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.

39. In view of the above, following its previous case law raising similar issues in the context of the violation of rights safeguarded by Article II (3) (a) and (b) of the Constitution of Bosnia and Herzegovina and Articles 2 and 3 of the European Convention, and in the context of Article 18 (2) of the Rules of the Constitutional Court, the Constitutional Court holds that it has jurisdiction to take a decision in the particular case (see, Constitutional Court, Decision on Admissibility and Merits *AP-3950/16* of 15 February 2017, available at www.ustavnisud.ba).

40. Finally, the requirements provided for in Article 18 (3) and (4) of the Rules of the Constitutional Court have been met in the particular case since it is not manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

VII. Merits

41. The appellants claim a violation of their rights under Article 3 of the European Convention, Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 (1) of the European Convention, for the Prosecutor's Office of BiH did not carry out an effective investigation into the murders of their close relatives. Appellant Gvozdenović also claims a violation of the right to an effective remedy under Article 13 of the European Convention.

Prohibition of Inhuman Treatment

42. Article II(3)(b) 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:

b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment.

43. Article 3 of the European Convention reads:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

44. In view of the allegations of the appeal concerned, the issue arises as to whether the suffering imposed on the appellants, as the investigation by the Prosecutor's Office of BiH into the deaths of their closest relatives had been going on for many years and which they claim to be ineffective, may be considered a torture, inhuman or degrading treatment or punishment, which is prohibited by Article 3 of the European Convention.

45. In that connection, the Constitutional Court primarily indicates that Article 3 of the European Convention protects some of the basic values of a democratic society. It is one of "absolute rights" of the European Convention. The states can never deviate from observing it, even at the time of war.

46. As to the procedural guarantees of Article 3 of the European Convention, the prohibition of torture and inhuman treatment imposes an obligation on states effectively to investigate all claims of such conduct and, if needed, to prosecute alleged perpetrators. The responsibility is part of the positive obligations of the state under the European Convention, *i.e.*, the responsibility of state authorities to undertake steps or measures to protect the rights of an individual under the European Convention. The basis for imposing such an obligation can be found in Article 1 of the European Convention, which requires the High Contracting Parties to secure to everyone within their jurisdiction the rights and freedoms defined in the European Convention. Positive obligations are also based on the principle that rights under the European Convention must be practical and

effective, not theoretical and illusory. In many cases, the European Court of Human Rights ("the European Court") established the procedural violation of Article 3 of the European Convention although it was not possible to prove that there had been an ill-treatment (see, European Court, *Kmetty v. Hungary*, judgement of 16 December 2003, paragraphs 38-43).

47. The Constitutional Court notes that the ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the European Convention. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see, European Court, *Ireland v. the United Kingdom*, Judgement of 18 January 1978, Series A, p. 65, paragraph 162). As to the conduct of authorities, special factors to be taken into account are the conduct of the authorities; the extent to which the investigation into the event was undertaken (see, European Court, *Çakici v. Turkey*, judgement of 10 May 2001, Decisions and Reports 2001, IV, paragraph 156; Human Rights Chamber, CH/99/2150, *Unković v. the Federation of Bosnia and Herzegovina*, Decision of 10 May 2002, pgs. 111-119).

48. In addition, the Constitutional Court refers to its own case-law *AP-143/04* of 23 September 2005, wherein it pointed out that the fact that the authorities failed to initiate an official investigation into the disappearance and the violent deaths of the appellants' family members and to inform the appellants about that cannot leave the appellants indifferent. It must evoke in them "a feeling of fear, anxiety and inferiority, which may humiliate or degrade the victim", which amounts to inhuman treatment prohibited by Article 3 of the European Convention. In the relevant decision, the Constitutional Court further stressed that the competent authorities in Bosnia and Herzegovina and the Entities were obliged to undertake reasonable measures to obtain information concerning the circumstances of violent deaths of the appellants' family members. This primarily involved identifying those responsible for violent deaths of the appellants' family members and their sanctioning in accordance with the law. However, the competent authorities failed to carry out reasonable steps aimed at the identification of persons responsible for the death of appellants' family members and failed to inform the appellants on the measures taken for the period of almost ten years. In the relevant case, the Constitutional Court also found the omission in the failure to comply with the positive obligation on the part of both the State and the Entities. This entails taking reasonable steps to conduct an impartial investigation into the violent deaths of members of the appellants' families, which led to the violation of right under Article 3 of the European Convention.

49. In this connection, the Constitutional Court notes that, procedurally, the positive obligation of the State under Article II (3) (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention requires the State authorities to use all possibilities and to carry out all reasonably achievable steps to identify the

perpetrators and to bring them to justice. The State does not and could not have the absolute obligation to achieve the goal that may prove unattainable.

50. In the instant case, starting from the positive obligation of the State effectively to investigate the case concerned under Article 3 of the European Convention and, if necessary, to prosecute alleged perpetrators, the Constitutional Court, first of all, notes that this investigation was conducted vis-à-vis the event of 2 May 1992. In addition, appellant Gvozdenović holds that the relevant investigation should have also covered the occurrences of 2 May 1992 in which her brother lost his life, as both events were covered by the same criminal charges due to the existence of grounds for suspicion that the criminal offence of war crimes had been committed. In that connection, the Constitutional Court notes that the Prosecutor's Office of BiH has not contested that both appellants have the status of injured person in this case. The criminal charges for the events (of 3 May 1992) were lodged on 29 May 1996, and supplemented on 27 April 2005 (for the events of 2 May 1992). The Prosecutor's Office of BiH received the case from the County Prosecutor's Office Istočno Sarajevo. The investigation in connection to the relevant incident, the attack on the JNA convoy in Sarajevo at Dobrovoljačka Street of 3 May 1992 in which the son of appellant Tomović had been killed was opened only on 2 October 2006, which was 14 years after the critical event. In that connection, the Constitutional Court recalls that, in the number of its cases against Bosnia and Herzegovina wherein it considered the allegations of the appellants that there was no effective investigation into the disappearance and death of their close relatives, the European Court took into account only the period after 2005. That is the time when the domestic system for work on the cases relating to serious violations of international humanitarian law was capacitated upon the establishment of the War Crimes Section within the Court of Bosnia and Herzegovina (see, European Court, P*alić v. Bosnia and Herzegovina*, Judgment no. 4704/04 of 15 February 2011, paragraph 70).

51. In addition, given the severity of the criminal offence and the time that has elapsed from the moment it was committed, it is obvious that evidence gathering to substantiate the grounds for suspicion that some persons committed the criminal offence is difficult, which is otherwise typical for all war crimes cases. Thus, the instant case is an extremely complex case both in terms of facts and in terms of legal issues.

52. The Constitutional Court further notes that, in its response to the appeal, the Prosecutor's Office of BiH indicated that the injured persons, including the appellants, have lodged a number of complaints (total of 21 complaints) against the Order on Termination of Investigation of 17 January 2012; that the Prosecutor's Office of BiH formed a team for the work on the relevant complaints; that, as of that time until 16 February 2016, the number of decisions was adopted concerning the composition of the team (6 decisions in total); that as of 18 March 2015 to 19 May 2017 (as the date of preparation of the response), the team held eighteen meetings with the aim of preparing

draft decision on all complaints, and it indicated the complexity of the case and the provisions of the CPC BiH under which the time limit for the solution of complaints is not prescribed. In this connection, the Constitutional Court recalls the position of the European Court in the decision *Stjepanović and Others v. Bosnia and Herzegovina* of 16 December 2014, in paragraphs 28 and 29 (wherein the European Court considered the applicants' allegations that there had not been an effective investigation into the disappearance and death of their son) is that the standard of expedition in such historical cases is much different from the standard applicable in recent incidents where time is often of the essence in preserving vital evidence at a scene and questioning witnesses while their memories are fresh and detailed. Moreover, the European Court stressed in the cited decision that the special circumstances prevailing in Bosnia and Herzegovina (taking into consideration only the period since 2005, after the establishment of the War Crimes Section within the Court of Bosnia and Herzegovina, when the domestic legal system became capable of dealing with serious violations of international humanitarian law) and the large number of war crimes cases pending before local courts are taken into account when assessing the compliance with minimum standards of the right to a fair trial. The European Court indicated that in 2008 the domestic authorities adopted the National War Crimes Strategy which provides a systematic approach to solving the problem of the large number of pending war crimes cases, which is one of its objectives to process the most complex and top priority cases within seven years (that is, by the end of 2015) and other war crimes cases within fifteen years (that is, by the end of 2023) and that the European Court of Human Rights has found in the case of *Palić v. Bosnia and Herzegovina* that time-frame to be reasonable (see, *op.cit.*, *Palić v. Bosnia and Herzegovina*, paragraph 51).

53. However, all the aforementioned cannot be interpreted as creating a possibility for the Prosecutor's Office of BiH to continue the investigation indefinitely. Actually, it would be contrary to the positive obligation of the State, pursuant to Article II (3) (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, to conduct an effective investigation into the death of the appellants' close family members who had died during the critical events of 2 and 3 May 1992. In this connection, the Constitutional Court, guided by the standards established in the cited case of *Stjepanović et al. v. Bosnia and Herzegovina*, notes that the investigation in this particular case had been opened in 2006. This was shortly after the legal system in Bosnia and Herzegovina had been capacitated to work on this type of case (2005) and after the criminal complaint was supplemented. In addition, the Constitutional Court notes that after six years, in January 2012, the Prosecutor's Office of BiH issued the Order on Termination of Investigation. It stated that during the investigation it was determined that the deaths and injuries of a number of persons were the result of lawful acts, for the victims had been legitimate targets at the relevant time. Furthermore, the Prosecutor's Office of BiH concluded that it would conduct no further investigation in that regard. The notice was sent to the appellant Tomović, and which the appellant Gvozdenović

learned about indirectly. However, it did not state by name which deaths and injuries the aforementioned conclusion refers to.

54. The Constitutional Court further notes that the appellants had lodged the complaints against the aforementioned Order, as the only remedy available to them, which, according to the case-file, have not been decided to date, *i.e.* after six years have passed. In that connection, the Constitutional Court notes that the statement of the Prosecutor's Office of BiH indicating that the time limit to solve the complaints has not been prescribed by the CPC BiH is correct. However, this does not mean that the Prosecutor's Office has an "unlimited" deadline to decide on the relevant complaints. Moreover, the provisions of the CPC, in particular Article 224 (Cessation of Investigation) in conjunction with Article 216 (Order for Conducting the Investigation), imply the intention of the legislator to have the relevant proceedings finalised as soon as possible (given the deadlines related to the issuance of an order not to conduct an investigation - notifying the injured party within three days, or filing a complaint within eight days). This was so especially taking into account the authorization of the Prosecutor that, in terms of Article 224, paragraph 3 of the CPC BiH, s/he may reopen the investigation if new facts and circumstances have been obtained, which indicate that there are grounds for suspicion that the suspect committed a criminal offence. In addition, the Constitutional Court notes that, after the submission of appellants' complaints, the Prosecutor's Office of BiH issued a number of decisions by which it changed the composition of the team, which was formed to decide on those complaints. The team held eighteen meetings but it has not decided on the appellants' complaints or the complaints of other injured persons. Furthermore, the Prosecutor's Office of BiH did not indicate in any way in the response to the appeal (apart from the changes in the composition of the team and holding the meetings) that it has taken any particular actions to determine the merits of the allegations made by the appellants and other injured parties in their complaints. This was so especially bearing in mind that the appellants in their objections made specific allegations regarding the examination of certain persons as witnesses. Moreover, it is not evident from the facts of the case that the Prosecutor's Office of BiH in any way informed the appellants of the measures taken in terms of a positive public obligation of the public authorities under Article II (3) (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention. In addition, the Prosecutor's Office of BiH, even after six years, failed to consider the complaints of the victims and the case file and failed to determine whether the Prosecutor's decision of 17 January 2012 to suspend the investigation was correct, and to inform the victims of its decision. All of this intensifies the feeling of strong restlessness and inferiority of the appellants. This is humiliating or degrading to the victim.

55. In view of the above, the Constitutional Court took into consideration the specific circumstances of the case. In particular, it considered the fact that the appellants' complaints against the Order on Termination of Investigation of 17 January 2012 in

the case concerning the events of 2 and 3 May 1992 in which the appellants' close relatives lost their lives have not been decided even after six years. During that time, the Prosecutor's Office of BiH mainly dealt with the organisational issues relating to the work on the aforementioned complaints and not with the determination of the merits of the appellants' allegations and the allegations of other injured parties in their complaints. It thereby called into question its seriousness and commitment to work on this case. Therefore, the Constitutional Court holds that the Prosecutor's Office of BiH failed to fulfil its obligation under Article II (3) (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention.

56. As to the independence of the investigation, the Constitutional Court notes that the appellants' allegations that the investigation in the instant case is not objective and impartial. This was so, given the fact that the high-ranking officials of Bosnia and Herzegovina were identified as the suspects under the command responsibility. However, this points to the general discontent with the work of the Prosecutor's Office of BiH as to the conduct of investigation, due to the manner of work and the attitude towards the appellants in the present case. Thus, the Constitutional Court did not deal with that issue.

57. In view of the above, the Constitutional Court concludes that Article II (3) (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention have been violated.

As to the compensation for non-pecuniary damages

58. The appellants sought compensation for non-pecuniary damages due to the violation of their constitutional rights. Pursuant to Article 74 of the Rules of the Constitutional Court, the Constitutional Court may award compensation for non-pecuniary damages. The Constitutional Court recalls that, unlike proceedings before ordinary courts, it awards compensation for non-pecuniary damages in special cases of a violation of human rights and fundamental freedoms.

59. In view of the decision in the instant case and guided by the principles of fairness, the Constitutional Court holds that the appellants should be paid the amount of BAM 1,000.00 each as compensation for non-pecuniary damages. The Council of Ministers of Bosnia and Herzegovina is obliged to pay the compensation within three months as of the date of receipt of the present Decision, including the obligation to pay the appellants, after the expiry of the above time limit, statutory default interest on any unpaid amount or portion of the amount of compensation awarded by this Decision.

Other allegations

60. Having regard to the decision of the Constitutional Court as to the violation of Article II (3) (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the

European Convention, the Constitutional Court holds that it is not necessary separately to consider other allegations from the appeals.

VIII. Conclusion

61. Without dealing with the issue of the justification of issuance of the Order on Termination of Investigation and complaints against it, the Constitutional Court concludes that there is a violation of the appellants' right under Article II (3) (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention. The violation is found as the competent Prosecutor's Office, in the case concerning the death of the appellants' close relatives, failed to decide even after six years on the appellants' complaints against the Order on Termination of Investigation in that case. In doing so, it failed to offer a single reason for such length of proceedings that could be held reasonable and justified.

62. Pursuant to Article 59 (1) and (2) and Article 74 of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP-5204/15

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Ms. Štefica Galić, from Ljubuški, represented by Mr. Nusmir Huskić, a lawyer practicing in Sarajevo, against the Judgment of the Cantonal Court in Široki Brijeg, No. 63 0 P 017942 15 Gž of 18 September 2015 and the Judgment of the Municipal Court in Ljubuški, No. 63 0 P 017942 12 P of 7 May 2015

Decision of 13 March 2018

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The Constitutional Court of Bosnia and Herzegovina, in accordance with Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 18 (3) (h), Article 57 (2) (b) and Article 59 (1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), sitting as a Grand Chamber composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović and

Ms. Seada Palavrić

Having deliberated on the appeal of **Ms. Štefica Galić** in the case no. **AP-5204/15**, at its session held on 13 March 2018 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Ms. Štefica Galić filed against the Judgment of the Cantonal Court in Široki Brijeg No. 63 0 P 017942 15 Gž of 18 September 2015 and the Judgment of the Municipal Court in Ljubuški No. 63 0 P 017942 12 P of 7 May 2015 in relation to the right referred to in 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 and the right referred to in 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 II(3)(e) of the Constitution of Bosnia and Herzegovina is hereby dismissed as ill-founded.

The appeal of Ms. Štefica Galić filed against the Judgment of the Cantonal Court in Široki Brijeg No. 63 0 P 017942 15 Gž of 18 September 2015 and the Judgment of the Municipal Court in Ljubuški No. 63 0 P 017942 12 P of 7 May 2015 in relation to the right referred to in 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 rejected as *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 27 November 2015, Ms. Štefica Galić ("the appellant"), from Ljubuški, represented by Mr. Nusmir Huskić, a lawyer practicing in Sarajevo, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") against the Judgment of the Cantonal Court in Široki Brijeg ("the Cantonal Court"), No. 63 0 P 017942 15 Gž of 18 September 2015 and the Judgment of the Municipal Court in Ljubuški ("the Municipal Court"), No. 63 0 P 017942 12 P of 7 May 2015.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 (2) and (3) of the Rules of the Constitutional Court, on 22 September 2017, the Constitutional Court requested the Cantonal Court, the Municipal Court, Mr. Ivan Filipčić ("the first defendant") and Mr. Ivan Šušnjar ("the second defendant"), as parties to the proceedings, to submit their responses to the appeal. Since the delivery to the first defendant was unsuccessful on two occasions (undeliverable, marked "addressee unknown"), on 8 February 2018, the Constitutional Court requested Mr. Ivan Herceg, a lawyer practicing in Ljubuški, who was appointed as a temporary legal representative of the first defendant in the proceedings before the courts, to submit a response to the appeal.

3. On 27 September 2017, the Cantonal Court and the Municipal Court submitted their respective responses to the appeal. On 4 October 2017, the second defendant submitted his response. The first defendant failed to do so.

III. Facts of the Case

4. 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.

5. By Judgment of the Municipal Court No. 63 0 P 017942 12 P of 7 May 2015, which was upheld by Judgment of the Cantonal Court No. 63 0 P 017942 15 Gž of 18 September 2015, the appellant's claim requesting that the defendants pay her the amount of BAM 6,000 in damages for defamation was dismissed. In the proceedings before the Municipal Court, the parties to the civil proceedings considered it undisputed that the appellant's husband Nedeljko Galić had deceased on 17 October 2010. It was also indisputable that,

after Nedeljko Galić's death, Ms. Svetlana Broz made the film about the appellant's husband, titled "Neđo from Ljubuški", and that the film was shown in Ljubuški on an unspecified date, after which "numerous reactions through portals followed." In addition, it was established that the second defendant imparted to the Poskok.info portal articles from other portals entitled "Neđo far away from Ljubuški", whose author was the first defendant, and "Is there fascism in Ljubuški" and "Herzegovinian Schindler", written by other authors.

6. The appellant filed a lawsuit against the aforementioned defendants and the Poskok.info portal, but subsequently withdrew the lawsuit in relation to the portal. The appellant stated in the lawsuit that on 17 July 2012, the article "Neđo far away from Ljubuški" signed by the second defendant was published on the "website". In that article, it was written, *inter alia*, that a self-taught photographer, without school, property and any special talents was the owner of the small obscure shop. His only trump card was the surname worn by several partisans, to whom he was related, from the village of Bijača located along the border with Metković. And a family is a family. The Neđo's shop was near the municipal militia where documents with photographs were issued. The police officers sent frightened peasants in a strict voice to take photos at the shop of Neđo, so that they did not dare to go somewhere else, thinking that only Neđo's photos were valid, which was not far from the truth." After that, as the appellant alleges in the lawsuit, on 19 July 2012, an article entitled "Is there fascism in Ljubuški" was published on the "portal", in which it is stated, according to the appellant's interpretation, that the media public had fun for several days with the tragicomic news from Ljubuški and "Neđo from Ljubuški", a film made by Svetlana Broz, and with the events related to this film. Several patriotic associations reacted against it. In addition, it is stated that the film is a textbook example of glorifying the selective truth and an attempt to discredit the entire Ljubuški region and all persons of Croatian nationality from Ljubuški, and that Ljubuški was presented in the media as a fascist hotbed where all those who think differently are harassed and terrorized. Furthermore, according to the appellant, on 21 July 2012, the second defendant published "on the portal" an article entitled "Croatian Schindler serves as a confirmation of the thesis on the genocidal Croats in BiH" which states, *inter alia*: "Neđo Galić was an unprecedented hero at the Herzegovinian coordinates who in 1993 was saving the pitiable Ljubuški Bosniaks from the Croatian "death camp" Heliodrom. The article states that Neđo Galić, before the start of the Homeland War, was UDBA's informant and petty whistle-blower whose photos caused terrible inconvenience to the Croats in Ljubuški. Also, it stated that Galić, an indoctrinated communist and arch-atheist, abhorred the church and believers and participated in persecution and demonization through collaboration with UDBA (the former State Security Service), but when he got a cancer he began attending churches and religious conferences and seeking salvation through faith. In addition, the article states that it is a public secret in Ljubuški that Neđo Galić was the one who, during the war in a relatively peaceful local community, such as Ljubuški, "was rescuing Muslims" by arranging visas for them to

go abroad to work for a fee." The appellant states in the lawsuit that in the present case it is a matter of disseminating false facts that "insult the moral dignity of deceased Neđo Galić and his family", and that since the publication of these articles she has suffered mental anguish "due to contempt of the local community" and that it all caused serious harm to her reputation.

7. The Municipal Court first concluded that the appellant "as the legal heiress inherited the right to a share in the Company '88' d.o.o. for audio-visual services and trade", which had been owned by her husband, and that therefore "as a legal heiress she has the right to file a lawsuit seeking damages" under the Law on Protection against Defamation. In addition, the Municipal Court found that the second defendant had received the article "Neđo far away from Ljubuški" from the first defendant, "in the form of an author's opinion". Furthermore, the court found that the text contained a facsimile of a letter from the former State Security Service of the Mostar Centre from 1982. The letter stated that the appellant's husband "was providing the former State Security Service with interesting security data he had obtained". In addition, the Municipal Court stated that the second defendant asserted in his statement that he had not published the article "Herzegovina Schindler", that he had not read that text, nor that he knew the author of that article. In addition, the Municipal Court stated that the second defendant published on the Poskok.info portal the article "Neđo Galić was not a collaborator of the UDBA (former Yugoslav Secret Services), which was a rebuttal of the disputed article [of the first defendant], written by Pero Kvesić, that [the appellant] did not read the mentioned rebuttal because after the publication of the article of [the first defendant], which was accompanied by threatening and humiliating comments, she no longer visited the Poskok.info portal (according to the [appellant's] statement)." In addition, the Municipal Court stated that the expert's finding during the proceedings established that the appellant "had been exposed to prolonged stressful events before publishing the record on the disputed content portal, which caused her post-traumatic stress [...] and that the disputed articles were not the trigger, but caused [the appellant's] fear of high intensity, and especially the article of [the first defendant]".

8. In view of the above, the Municipal Court concluded that there was no doubt that the screening of the film "Neđo from Ljubuški" had provoked violent reactions by viewers and readers "on other portals and not only on the Poskok.info portal." Furthermore, the Court stated that "the [appellant's] arbitrary allegations that the allegations made on the Poskok.info portal published by [the second defendant] were essentially false, except perhaps in insignificant elements, were not acceptable." The Municipal Court reasoned that the disputed articles communicated value judgments about the appellant's husband, "and that [the appellant] had previously approved the shooting and showing of the film about the deceased husband." The Municipal Court also reasoned that given that it was a film as an author's work that had been shown publicly, the film was subject to critical review by the public, *i.e.* subject to "expressing an opinion on the mentioned

film". Accordingly, the Court concluded that the appellant had to prove "which of the facts stated in the article are essentially false, and what is the basis of her claim". The Municipal Court referred to the relevant provisions of the Law on Protection against Defamation, and to the essence of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), and pointed out that, according to the European Court of Human Rights, "journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation." The Municipal Court also stated that although the court does not have to approve the polemical, or indeed aggressive, tone used by journalists, Article 10 not only protects the substance of the ideas and information expressed, but also their mode of expression." In addition, the Municipal Court stated that the definition of defamation contained in Article 4 (1) (d) and Article 6 (1) of the Law on Protection against Defamation shows that an essential element of defamation is that the person is identified with a third person and that false facts are disseminated against that person. However, in the present case, the Court concluded that it was not a matter of disseminating facts, but of value judgments "about a work of art – film", and such expression is not subject to civil liability for defamation. In addition, the Court stated that the appellant's hurt feelings were not decisive for the conclusion that this particular case was about defamation, and that she was not entitled to compensation in the case at hand.

9. The Cantonal Court dismissed the appellant's appeal against the first-instance decision, briefly stating that it "considers that the published articles did not meet the conditions for damages for it was not a matter of defamation but of a value judgment". It reiterated the position taken by the first-instance court that the appellant's hurt feelings did not suffice to draw a different conclusion.

IV. Appeal

a) Allegations stated in the appeal

10. The appellant holds that the challenged decisions are in violation of 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 her right under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention, and the appellant also refers to a violation of Article 17 of the European Convention. The appellant first states that "by making such a decision, the courts violated the right to the prohibition of abuse of rights, protected by Article 17 of the European Convention", in conjunction with Article 10 of the European Convention and the right to a fair trial. As to an alleged violation of the right to a fair trial, the appellant states that the judgments lacked the reasoning, that the courts acted with bias, *i.e.* that they acted "in favour of the defendants", and that they arbitrarily drew conclusions about "the appellant's liability for the damage caused to her", and ordered the appellant to present evidence she could

not present." In addition, according to the appellant, the court completely disregarded the expert's finding and opinion that "the contents from the Poskok.info portal on which the articles in question were published had the most intense effect on [the appellant]", causing her fear, and that this was contrary to the court's allegations that [the appellant's] hurt feelings were not decisive for the assessment and conclusion that the particular case was about defamation." Furthermore, the appellant challenges the court's conclusion that she had to prove which of the facts communicated in the articles were false, stating that the court "consciously disregards the fact that these are negative facts that cannot be proven as such." Moreover, the appellant states that the court, at the preparatory hearing, ordered the defendants to submit "a decision, document or written trace establishing that Neđo Galić was convicted, suspected or that he was prosecuted for embezzlement or fraud or any other crime against the state, anthem, flag or other acts related to ethnic relations, hatred or intolerance", but the defendants failed to do so. Therefore, the appellant holds that this led the court to establish the facts in an erroneous manner.

11. The appellant also states that the court based the decision on the "alleged fact that the Poskok.info portal published the Pero Kvesić's article titled "Neđo Galić was not a collaborator of the UDBA", holding that the article was published as a rebuttal. However, as the appellant further states, the court relied only on the testimony of the second defendant, since the article in question was not proposed or presented as evidence, "nor is there any evidence of its publication and/or existence." The appellant holds that this part of the second defendant's statement could have been assessed by the court "only by concluding that [the second defendant] indicated to the court by this article that he was aware that the original article harmed [the appellant] and that this 'second article' was a form of admitting the damage caused." In addition, the appellant states that the second defendant stated in his testimony that he "knew that the disputed article was, as he states, 'garbage', but he still published it", which the courts ignored. Furthermore, the appellant states that although the court found her request unfounded within the meaning of the Law on Protection against Defamation, "it should not have disregarded the existence of non-pecuniary damage inflicted on [the appellant], within the meaning of the provisions of the Law on Obligations". Moreover, the appellant states that "she firmly maintains the allegations that this is a case of defamation", but that the court is not bound by the legal qualification of the statement of claim. Besides, the appellant states that in addition to the mental anguish that she "still suffers today", she cannot rule out damage to her reputation and honour, taking into account the generally accepted norms and standards, and the aforementioned is confirmed by the fact that the appellant changed her address of residence, all because of the local community's contempt she has been experiencing in Ljubuški."

12. In addition, the appellant points out that the allegations in the disputed articles are "everything except an expressed opinion or value judgments". Namely, she holds that the statements that her late husband "was an UDBA's informant and petty whistle-blower whose photos caused terrible inconvenience to the Croats in Ljubuški, and that "it is a

public secret that Neđo Galić was rescuing Muslims by arranging visas for them for a fee," and that "he abhorred the church and believers and participated in their persecution and demonization through collaboration with UDBA," are provable facts. Therefore, the appellant holds that no proper distinction was made between the facts and value judgments, as well as that the substantive law was erroneously applied, for she was harmed by defamatory statements, and the courts failed to provide adequate protection to her.

b) Responses to the appeal

13. In their responses, the Cantonal Court and the Municipal Court stated that they maintained the reasoning in the impugned decisions and that they considered that the rights invoked by the appellant were not violated.

14. In his extensive response to the appeal, the second defendant states, *inter alia*, that the appellant unjustifiably charges him with publishing the article of the author Dalibor Milas, given that article was originally published on the Bljesak.info portal, and not on the Poskok.info. In addition, he states that the appellant was trying to "deceive the judicial institutions" that there was no article by Pero Kvesić who defended "the character and work" of Neđo Galić in his articles. Namely, the second defendant alleges that the appellant, represented by a lawyer, agreed that the article of Pero Kvesić titled "Neđo was not a collaborator of the UDBA" should be included in the file, as well as that she agreed to include that the article of the second defendant "How the battle for Ljubuški was lost", which he published under the pseudonym of "Nikola Zirdum, which is public and is known to be about the [second defendant]". In addition, the second defendant points out that in that article, he states that a street in Ljubuški should be named after Neđo Galić, even if he saved one man only, regardless of what he had done in the former system. These two articles published on the Poskok.info portal are proof that the second defendant "did not raise a hue and cry in opposition to Ms. Galić, nor her family whom he [knows] and [regards highly]". Furthermore, the second defendant underlines that the appellant "deceives the Constitutional Court by putting [him] words in his mouth that [he] did not actually say." In this connection, he clarifies that in his testimony given before the court, when speaking about Pero Kvesić, he stated "that this man is of the same political origin as [the appellant], that he is [his] cousin, and that he is a Communist, and that he was appalled by the events in Ljubuški", but also that he said "Ivan, I think that the article of [the first defendant] is garbage, but if I were the editor, would publish it and then I would react to it." In addition, the second defendant states that, by the article, the first defendant really caused a storm of public outrage against the character and work of Neđo Galić, for he had attached a document to the article in which the then UDBA officer praised the collaborative efforts of Mr. Galić. The public thus learnt that the late Neđo was awarded for humanism, although in the former system he had worked for the UDBA or was a valuable collaborator. [...] Isn't that information in the public interest?"

15. The second defendant also holds that the "indictment material" against him cannot be the article of an author who "has his name and surname and who was originally published on other portals." At the same time, it raises the issue of whether the appellant could sue him if he took oven an article from the Tačno.net portal (edited by the appellant), "if she did not like it later, and it had been originally published on her portal." In this connection, the second defendant points out that pursuant to Article 7 of the Law on Protection against Defamation, there is no liability for defamation if it is about an article communicated, which was published by someone else. He also points out that he holds that in this case his approach has been professional, and that he, as a journalist, is obliged to inform the public "about what is happening" and to publish all reactions to the public event, "including a critical opinion written in the form of articles."

V. Relevant Law

16. The **Law on Protection against Defamation** (*the Official Gazette of the Federation of BiH*, 52/02, 19/03 and 73/05), as relevant, reads:

Article 4
Definitions

The terms used in this Law have the following meanings:

d) defamation – the act of harming the reputation of a natural or legal person by making or disseminating an expression of false fact identifying that natural or legal person to a third person.

Article 6
Liability for Defamation

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.

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.

6. Where the expression of false fact identifies a deceased person, the first-degree heir of that person may bring a request under this Law, under the condition that the expression caused harm to the reputation of the heir.

Article 7
Exemptions from Liability

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; (...)

c) the making or dissemination of the expression was reasonable

(...)

VI. Admissibility

Admissibility *ratione materiae*

17. In examining the admissibility of the appeal in respect of the allegations of 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, the Constitutional Court invoked the provisions of Article VI (3) (b) of the Constitution of Bosnia and Herzegovina and Article 18 (3) (h) of the Rules of the Constitutional Court.

18. Article VI (3) (b) of the Constitution of Bosnia and Herzegovina reads:

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.

19. Article 18 (3) (h) of the Rules of the Constitutional Court reds:

(...)

(3) An appeal shall also be inadmissible in any of the following cases:

h) the appeal is ratione materiae incompatible with the Constitution; (...)

20. The appellant challenges the aforementioned judgments, claiming that those judgments violated her right under Article II (3) (h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention.

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:

(...)

h) Freedom of expression.

22. 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.

23. It undisputedly follows from the appeal and challenged judgments that the appellant in the present case is a plaintiff that requested protection against alleged defamation; this means that the statement of claim has not been directed against the appellant for any of her expression. Since Article 10 of the European Convention safeguards freedom of expression and paragraph 2 of this Article regulates cases which include restrictions on the exercise of freedoms, the Constitutional Court holds that the appellant has not been "a victim" of a violation of Article 10 of the European Convention (see Constitutional Court, Admissibility Decision and Merits *AP-90/06* of 6 July 2007, paragraph 18, available at www.ustavnisud.ba). In view of the above, the Constitutional Court holds that the appellant's allegations regarding a violation of Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention must be rejected as incompatible ratione materiae with the Constitution of Bosnia and Herzegovina.

Admissibility as to the other allegations

24. As to the remainder of the appeal concerning a violation of the appellant's right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, the Constitutional Court points out that, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, it has appellate jurisdiction over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

25. Pursuant to Article 18 (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 has been 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.

26. In the present case, the subject matter of the appeal is the judgment of the Cantonal Court No. 63 0 P 017942 15 Gž of 18 September 2015, against which there is no other effective remedy available under the law. Furthermore, the challenged judgment was delivered to the appellant on 29 September 2015 and the appeal was filed on 27 November 2015, that is, within the 60-day time limit, as provided for under Article 18 (1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18 (3) 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 that would render the appeal inadmissible.

27. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18 (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal meets the admissibility requirements.

VII. Merits

28. The appellant challenges the aforementioned decisions, claiming that they are in violation of her right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention as well as her right under Article 17 of the European Convention.

29. The Constitutional Court notes that the appellant holds that the disputed articles caused serious harm to her reputation and to the reputation of her late husband, and she legally classifies her arguments as a violation of the right to a fair trial under Article 6 of the European Convention. However, the "right to protection of reputation" is a right which is protected by Article 8 of the European Convention as part of the right to respect for private life, so the Constitutional Court, following the case law of the European Court of Human Rights, will examine in the present case whether the ordinary courts gave sufficient and relevant reasons for denying protection under the mentioned Article, that is, whether the contested decision struck a fair balance between two competing rights: the right to the protection of reputation and the right to freedom of expression.

The right to respect for private life

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:

[...]

(f) The right to respect for private and family life, home and correspondence

31. Article 8 of the European Convention, as relevant, 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 wellbeing 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.

32. In accordance with the case law of the European Court of Human Rights, the Constitutional Court holds that an individual's right to reputation is part of the right

to respect for private life protected by Article 8 of the European Convention (see, Constitutional Court, *inter alia*, Decision on Admissibility and Merits no. *AP-4431/15* of 31 January 2018, paragraph 36 with further references, published at www.ustavnisud.ba). However, in the present case, the appellant filed a lawsuit seeking the protection of reputation of her late husband, and the protection of her reputation for the defamatory statements about her late husband, and she reiterated these allegations in the appeal. Therefore, the Constitutional Court will examine whether the appellant's allegations fall within the scope of Article 8 of the European Convention.

33. In this connection, the Constitutional Court first notes that the courts concluded that the appellant "has the right to file a claim for damages" under the Law on Protection against Defamation, as she, being the legal heir behind her late husband, inherited a share in his joint stock company. However, the Constitutional Court notes that Article 6 paragraph 6 of the Law on Protection against Defamation stipulates that the heir of the first order may file a claim for damages within the meaning of that Law only on condition that "the impugned expression caused harm to the reputation of the heir." In addition, the Constitutional Court notes that in the challenged decisions the courts did not distinguish between the appellant's claim for damages with regard to the right to the protection of reputation of her late husband and her right to the protection of reputation on account of what was alleged about her late husband in the impugned articles. In this connection, the Constitutional Court points out that the European Court of Human Rights took a very strong position that the right claimed under Article 8 of the European Convention was not transferable to the heirs. Namely, in its case-law, the European Court of Human Rights consistently highlighted that the right claimed under Article 8 of the Convention was of an eminently personal nature and belonged to the category of nontransferable rights (see European Court of Human Rights, *Dzhugashvili v. Russia*, Judgment of 9 December 2014, Application no. 41123/10, paragraphs 22-24, with further references). It, therefore, means that the heir does not have the legal standing to claim damages for harm caused to the reputation of his/her ancestor and the European Court of Human Rights, as regards such allegations, rejects the applications as being incompatible *ratione personae* with the provisions of the Convention (*idem*, paragraph 25).

34. In view of the above and taking into account Article 6 paragraph 6 of the Law on Protection against Defamation, the Constitutional Court points out that the appellant could not succeed in the lawsuit to protect the reputation of her late husband. Therefore, the Constitutional Court will not consider the allegations in the appeal concerning the right to protection of reputation of the appellant's husband. However, the issue remains whether the attacks on his reputation violated the appellant's right under Article 8 of the European Convention.

35. In this connection, the Constitutional Court points out that in its recent case law, the European Court of Human Rights accepted that the reputation of a deceased member of a person's family may, in certain circumstances, affect that person's private life and

identity, and thus come within the scope of Article 8 (see *Putistin v. Ukraine*, Judgment of 21 November 2013, Application no. 16882/03, paragraph 33, and *op. cit*. Judgment in the case of *Dzhugashvili v. Russia,* paragraph 30). In the aforementioned judgments, the European Court of Human Rights concluded that the applications were admissible in respect of the alleged violation of the applicants' reputation in those cases, and that the applications required an examination of the fair balance that has to be struck between the applicants' right to respect for their private life and the right of a journalist to freedom of expression guaranteed under Article 10 of the European Convention.

36. In view of the above and taking into account Article 6 paragraph 6 of the Law on Protection against Defamation, the Constitutional Court holds that in the present case, part of the allegations in the appeal concerning the appellant's right to protection of reputation falls within the scope of Article 8 of the European Convention. Furthermore, the impugned decisions dismissing that part of the appellant's claim undoubtedly constitute an interference with her right under Article 8 of the European Convention, which is both lawful and has a legitimate aim - protection of the rights of others and protection of freedom of expression of journalists under Article 10 of the European Convention.

37. The Constitutional Court will further examine whether the courts struck a fair balance between these two rights by the challenged decisions. In this regard, the Constitutional Court highlights that the criteria relevant for assessing the proportionality of an interference in such cases are established in the case law of the European Court of Human Rights and summarized in the case of *Von Hannover v. Germany (no. 2)*. These criteria are: contribution to a debate of general interest, how well known is the person concerned and what is the subject of the report, prior conduct of the person concerned, circumstances in which information was obtained and its truthfulness, content, form and consequences of the publication and, where applicable, the seriousness of the sanction imposed (see European Court of Human rights, *Von Hannover v. Germany (no. 2)*, Judgment of 7 February 2012, Applications nos. 40660/08 and 60641/08, paragraphs 108-113). The Constitutional Court holds that these criteria are *mutatis mutandis* applicable in the present case.

38. As to the question whether the challenged articles contributed to a debate of public interest, the Constitutional Court points out that, in its case law, the European Court of Human Rights has taken the position that it is an integral part of freedom of expression, guaranteed under Article 10 of the Convention, to seek historical truth. It is not the Court's role to arbitrate the underlying historical issues, which are part of a continuing debate between historians. A contrary finding would open the way to a judicial intervention in historical debate and inevitably shift the respective historical discussions from public forums to courtrooms (*op. cit*. Judgment *Dzhugashvili v. Russia,* paragraph 33). Turning to the present case, the Constitutional Court notes that the impugned articles were published as a reaction to a film entitled "Neđo from Ljubuški", which was made

about the appellant's late husband. The film shows the role of the appellant's husband in rescuing his fellow Bosniak citizens in 1993, for which he was posthumously awarded the Civic Courage Prize. As it is about recent events that are still, from a historical point of view, of great interest and importance for the public and for relations in society in general, the Constitutional Court considers that it can be concluded that the impugned articles contributed to a debate of public interest.

39. In addition, as to whether the appellant's husband was a well-known public figure and what was his role in society, the Constitutional Court recalls that the limits of acceptable criticism are wider as regards a public person than as regards a private individual. However, even private individuals lay themselves open to public scrutiny when they enter "the arena of public debate" (see European Court of Human Rights, *Bodrožić v. Serbia*, Judgment of 23 June 2009, Application no. 32550/05, paragraph 54 with further references). In the aforementioned case of *Dzhugashvili v. Russia*, the European Court of Human Rights points out that it is appropriate to distinguish between defamatory attacks on a private person affecting the reputation of his family, and legitimate criticism of a public figure who, "by taking up leadership roles, expose themselves to outside scrutiny" (*op. cit*. Judgment in the case of *Dzhugashvili v. Russia,* paragraph 30). In this connection, the Constitutional Court notes that the film, which was the subject of the impugned articles, dealt with the role of the appellant's husband in the mentioned events, and that it highlighted his positive contribution to the protection of Bosniac fellow citizens at the time when the conflict between Croats and Bosniacs broke out, in respect of which he was awarded posthumously the prize for humanism. In addition, the impugned articles did not refer to the private life of the appellant's husband, but exclusively to his role in the events historically important for the community in which he lived and worked, *i.e.* in the public sphere. Furthermore, as the courts found, the appellant gave consent to the authors of the film to make the film and to make it public, so it was reasonable to expect public reactions. In addition, it was also reasonable to expect that the film would be subject to critical public scrutiny and would not be accepted by everyone. The impugned articles were just such reactions to the film about the role of the appellant's husband in the relevant events. According to the position of the Constitutional Court and the mentioned standards of the European Court, such a critical reaction requires a greater degree of tolerance where seeking a restriction on freedom of expression in respect of private life. On the other hand, the disputed articles do not mention the appellant's name, do not talk about her role or actions, nor interfere with her private life. They only talk about her husband's role and actions. Although it cannot be said that the articles in question could not have had any effect on the appellant's reputation, the Constitutional Court considers that the appellant was affected by the impugned articles, but only in an indirect manner.

40. As to the manner of obtaining information and its truthfulness, the Constitutional Court notes that the appellant disputes, *inter alia*, the statement that the film about her

husband is "an example of the glorification of selective truth and an attempt to discredit the entire Ljubuški region and all persons of Croatian nationality from Ljubuški, and that Ljubuški was presented in the media as a fascist hotbed where all those who think differently are harassed and terrorized" and that the film "serves as a confirmation of the thesis on the genocidal Croats in BiH." In this connection, the Constitutional Court recalls its own case-law and the case-law of the European Court of Rights, according to which a distinction must be made between facts and value judgments, the latter not being as such susceptible of proof. The classification of a statement as a fact or a value judgment is a matter which, in the first place, falls within the margin of appreciation of the national authorities, in particular the domestic courts. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it (*op.cit.* Judgment *Bodrožić*, paragraph 50 with further references and Constitutional Court, *inter alia*, *AP-787/04*, Decision on Admissibility and Merits of 20 December 2005, paragraph 36). In addition, no individual taking part in a public debate on a matter of general concern, including journalists, must overstep certain limits as regards, in particular, respect for the reputation and rights of others, but he or she is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements (see European Court of Human Rights, *Lindon, Otchakovsky-Laurens and July v. France*, Judgment of 22 October 2007, Application no. 21279/02 and 36448/02, paragraph 56 with further references).

41. In the present case, in the challenged decisions the courts took the position that the challenged statements were value judgments and, as such, not being susceptible of proof, and the Constitutional Court accepts such a conclusion as correct. As to the statement in the article titled "Herzegovina Schindler" that "it is a public secret" that the appellant's husband "was rescuing Muslims by arranging visas for them for a fee", the Constitutional Court, given the context in which such a statement was made, also accepts the view of the ordinary courts that it is a value judgment. Namely, the impugned statement was made in the article criticizing the "selective approach" to the events dealt with in the disputed film, which was made about the appellant's husband and his very positive role in the war. Exaggerated and provocative language was used in all the impugned statements, but the Constitutional Court considers that their content is generally within the limits of acceptable criticism of the role of the appellant's husband as a person given an important historical role in the film within the community in which he had lived and worked. The Constitutional Court considers that in such circumstances a certain space must be given for a critical approach and a different view of the same historical events, although certain limits must be complied with, which in the present case, according to the Constitutional Court, were not overstepped.

42. However, the Constitutional Court notes that the courts reached the same conclusion in relation to the statement made in the disputed articles, including the article of the first defendant "Neđo far away from Ljubuški", that the appellant's husband "was a collaborator of the UDBA" before the war. In this connection, the Constitutional Court

points out that the European Court of Human Rights pointed out that "calling someone a fascist, a Nazi or a communist cannot in itself be identified with a factual statement of that person's party affiliation", but it is necessary to assess the overall context in which such expressions are used (*op.cit.* Judgment *Bodrožić*, paragraph 52 with further references). Nevertheless, in the present case the Constitutional Court notes that the first defendant based such a statement on a document of the former State Security Service in which it was explicitly stated that the appellant's husband "had been providing the former State Security Service with interesting security data he had obtained." This indicates that the first defendant did not say about the appellant's husband that he was "a collaborator of the UDBA", within the meaning of a value judgment by which he wanted to assess the social activities of the appellant's husband in a critical or offensive or provocative manner. On the contrary, the first defendant based that statement on an official document which he came across and which he published as part of the impugned article. Therefore, the Constitutional Court holds that the courts failed correctly to classify such a statement when they assessed that it was a value judgment. However, although this is about a factual statement, the Constitutional Court cannot accept the allegations in the appeal that the first defendant should have provided sufficient evidence on the truth of such a statement, since in the article he published an official document on which he based that statement. This further means that he apparently based such a statement on a credible source, which is why the impugned statement cannot be considered defamation. Therefore, although the courts did not properly classify the impugned statement, it cannot be said that they erred in concluding that the statement did not amount to defamation, as there was a reasonable and sufficient basis for such a statement.

43. As to the allegations in the appeal relating to the second defendant, who took over all the disputed articles from other portals and published them on the Poskok.info portal, the Constitutional Court considers it necessary to emphasize that the media have the task of imparting information and ideas of public interest, and the public also has a right to receive them. Were it otherwise, the media would be unable to play its vital role of "public watchdog". In this connection, the European Court of Human Rights highlights that the punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so (see European Court of Human Rights, *Jersild v. Denmark*, Judgment of 23 September 1984, Application no. 15890/89, paragraph 35). Such a view was upheld in the case law, highlighting that a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas (see European Court of Human Rights, *Milisavljević v. Serbia*, Judgment of 4 April 2017, Application no. 50123/06, paragraph 37, with further references). In view of the above, the Constitutional Court notes that in the present case it is undisputed that the

second defendant was not the author of the disputed articles, but that he only imparted what others said about the appellant's husband, and that there is nothing to indicate that he acted maliciously. Given that the Constitutional Court has already concluded that the courts struck a fair balance between the first defendant's right to freedom of expression, as the author of the impugned article, and the appellant's right to protection of her reputation, the same conclusion must be made in respect of the second defendant, who imparted that article and two other disputable articles of similar content.

44. In view of the above, the Constitutional Court finds that the impugned judgments struck a fair balance between the appellant's right to respect for private life under Article 8 of the European Convention and the right of defendants to freedom of expression under Article 10 of the European Convention. Consequently, the Constitutional Court concludes that in the present case there has been no violation of the appellant's right under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

Other allegations

45. The appellant also complains of a violation of the right to a fair trial under Article 6(1) of the European Convention. However, as it has been already said, the allegations made in that sense essentially concern the right under Article 8 of the European Convention, which has already been decided by the Constitutional Court. Other allegations made by the appellant in this regard (that the judgments were not reasoned, that the courts were biased, that the conclusions in the decisions were made in an arbitrary manner and that the court did not take into account the expert findings) concern, in essence, the appellant's dissatisfaction with the established facts and the manner in which the substantive law was applied. In this connection, the Constitutional Court recalls its consistent case law according to which it is not, in general, competent to review the manner in which the ordinary courts established the facts and applied positive legal regulations, unless the decisions of those courts violate constitutional rights. In addition, the Constitutional Court reiterates that it cannot generally substitute its own appraisal of the facts or evidence for that of the ordinary courts, unless the ordinary courts' appraisal seem obviously arbitrary (see Constitutional Court, *inter alia*, Decision on Admissibility and Merits no. *AP-4778/15* of 17 January 2018, paragraph 24 with further references, published at www.ustavnisud.ba).

46. In the case at hand, the Constitutional Court holds that the ordinary courts gave sufficient and clear reasons for their decisions and the Constitutional Court does not hold that such reasons are arbitrary. The Constitutional Court notes that the reasoning of the second-instance judgment is indeed short, but given that in the appeal against the first-instance decision the appellant did not state anything she had not already stated before the first-instance court, the Constitutional Court cannot conclude that such reasoning is inadequate, since the second instance court explicitly referred to the reasoning given in

the first-instance decision. In addition, the appellant failed to substantiate her allegations about the alleged bias of the courts, so it must be concluded that these allegations are also unfounded. Since the appellant failed to offer any arguments to justify her claim that there was a violation of procedural guarantees under the right to a fair trial, except that she was dissatisfied with the outcome of the relevant proceedings, the Constitutional Court holds that there has been no 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(1) of the European Convention.

47. As to the appellant's reference to Article 17 of the European Convention, the Constitutional Court points out that this Article does not guarantee any substantive right the protection of which could be sought either before an ordinary court or the Constitutional Court. Namely, Article 17 of the European Convention prohibits the abuse of rights guaranteed by the European Convention. In addition, this means that if a conduct or activity is aimed at the destruction of any of the rights and freedoms set forth in the European Convention or at their limitation to a greater extent than is provided for therein, then such conduct does not enjoy the protection afforded under the Convention rights. Such would be a case where *e.g.* an individual would seek the protection under Article 10 of the European Convention concerning speech which the European Court of Human Rights considers to undermine the fundamental values of the Convention such as tolerance and non-discrimination (such would be racist hate speech, antisemitism, *etc.*). However, the fact that the appellant is dissatisfied with the challenged judgments does not provide the possibility of applying the principles under Article 17 of the European Convention, so the Constitutional Court will not further examine these allegations.

VIII. Conclusion

48. The Constitutional Court concludes that there has been no violation of the appellant's right to reputation as part of the right to respect for private life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. The Court found no violation in the situation where the impugned article expressed a critical opinion about the appellant's late husband and his role in historical events that arouse public interest and attention, and all that as a critical reaction to the film made about the appellant's husband and his positive role in those events, and which was shown to the public. In addition, there was no violation as the courts struck a fair balance between the appellant's right under Article 8 of the European Convention and the right of journalists to freedom of expression under Article 10 of the European Convention.

49. Furthermore, the Constitutional Court concludes that there has been no violation of the right to a fair trial under Article II (3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention. There is nothing that would indicate a violation of the guarantees under the right to a fair trial and where the courts

gave relevant reasons in those decisions, which the Constitutional Court does not consider arbitrary.

50. Pursuant to Article 18 (3)(h) and Article 59 (1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP-668/15

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mustafa Hota, represented by Nedim Ademović, a lawyer practicing in Sarajevo, against the Judgment of the Cantonal Court of Sarajevo no. 09 0 U 01211211 U of 28 November 2014 and Ruling of the Federation Ministry for Affairs of War Veterans and Disabled War Veterans of the Defensive-Liberation War no. UP-II-03-41-29/11 of 23 February 2011 and Ruling of the Office for the War Veterans' Affairs, Health Care and Social Protection of the Municipality of Stari Grad, Canton Sarajevo no. UP-I-08-41-8107/04 of 6 April 2005

Decision of 22 March 2018

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić, and

Mr. Giovanni Grasso

Having deliberated on the appeal of Mr. **Mustafa Hota** in case no. **AP-668/15**, at its session held on 22 March 2018 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Mustafa Hota against the Judgement of the Cantonal Court of Sarajevo no. 09 0 U 01211211 U of 28 November 2014, Ruling of the Federal Ministry for Affairs of War Veterans and Disabled War Veterans of the Defensive-Liberation War no. UP-II-03-41-29/11 of 23 February 2011 and Ruling of the Office for the War Veterans' Affairs, Health Care and Social Protection of the Municipality of Stari Grad, Canton Sarajevo, no. UP-I-08-41-8107/04 of 6 April 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 11 February 2015, Mustafa Hota ("the appellant"), represented by Nedim Ademović, a lawyer practicing in Sarajevo, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") against the judgment of the Cantonal Court of Sarajevo ("the Cantonal Court") no. 09 0 U 01211211 U of 28 November 2014 and ruling of the Federation Ministry for Affairs of War Veterans and Disabled War Veterans of the Defensive-Liberation War ("the Federation Ministry") no. UP-II-03-41-29/11 of 23 February 2011 and ruling of the Office for the War Veterans' Affairs, Health Care and Social Protection of the Municipality of Stari Grad, Canton Sarajevo ("the War Veterans' Affairs Office") no. UP-I-08-41-8107/04 of 6 April 2005.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 12 May 2017, the Cantonal Court, the Federation Ministry and the War Veterans' Affairs Office were requested to submit their respective replies to the appeal.

3. Pursuant to Article 34 of the Rules of the Constitutional Court, on 5 October 2017, the Constitutional Court requested the Parliament of the Federation of BiH and Federation Ministry to submit their respective replies and interpretation of Article 36(1)(3) and Article 37(1)(2) of the Law on Rights of War Veterans and Members of Their Families ("the Law on Rights of War Veterans").

4. The Cantonal Court, the Federation Ministry and the War Veterans' Affairs Office submitted their replies to the appeal during the period from 24 to 31 May 2017. As regards the request of the Constitutional Court of 5 October 2017, the Federation Ministry submitted its reply on 16 October 2017, while the Parliament of Federation of BiH failed to submit its reply.

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.

Introductory notes

6. The appellant was the member of the R BiH Army from 6 April 1992 until 4 August 1994.

7. According to the ruling issued by the R BiH Army Commander of Military Unit 5459 of 4 August 1994, the appellant was released from the R BiH Army due to his

incapacity for military service. In the reasons for the ruling, it is stated that based on the findings, evaluation and opinion of the Military Medical Board of 26 July 1994, the appellant is declared incapable for military service due to his illness precisely described in the ruling. In the course of the proceeding it was established that he was injured during his service in the Armed Force of R BiH for three times.

8. According to the ruling of the War Veterans' Affairs Office no. 08/1-560-465 of 10 June 1998, the appellant was granted the capacity of disabled war veteran of IV group with 80% of the military operations related disability due to the inflicted wounds and it was established that he is entitled to personal war veteran disability benefit of monthly amount of BAM 77.00 the orthopaedic support device of II/C degree in monthly amount of BAM 43.00, and other rights in accordance with the Law on Basic Rights of Disabled War Veterans and Families of Fallen Soldiers. In the mentioned ruling it was determined that the appellant has been granted the rights referred to in that ruling since 1 July 1998 and that he will be granted these rights as long as the legally prescribed requirements for accruing and enjoying those rights exist. In that ruling it was also determined that the mentioned ruling is subject to review by the second instance authority.

9. According to the certificate of the Public Institution "Employment Office of the Canton of Sarajevo" - the Employment Bureau of Stari Grad of 28 March 2012, it was confirmed that the appellant has been registered in the records of that Bureau as unemployed person since 15 February 2012. It is stated in the certificate that according to Article 28 of the Law on Employment Mediation and Social Security of Unemployed Persons, the appellant is not entitled to financial compensation, health insurance and pension or disability insurance.

Challenged decisions

10. According to the ruling of the Veterans Affairs Office no. UP-I-08-41-8107/04 of 6 April 2005, the appellant, as a disabled war veteran with recognized disability was deprived of the capacity of the disabled war veteran (DWV) as of 31 December 2004. In the same ruling it was stated that the ruling of the Veterans' Affairs Office no. 08/I-560/465 of 10 June 1998 has been quashed (which recognized his status of disabled war veteran and established that he is entitled to personal disability benefit, orthopaedic support devices and other rights under the Law on Basic Rights of the Military Disabled Veterans and Families of Fallen Soldiers).

11. In the reasons for the ruling, the War Veterans Affairs Office stated that the appellant, pursuant to the ruling of the War Veterans' Affairs Office no. 08/1-560-465 of 10 June 1998, was granted the capacity of the war veteran with disability of IV group with 80% disability rate. Further, it is stated that the mentioned body, based on Article 63(1) of the Law on Rights of War Veterans and Members of their Families ("Law on Rights of War Veterans"), *ex officio*, initiated the proceeding for establishing the percentage

of disability. Furthermore, bearing in mind Article 36(1)(3) of the Law on Rights of War Veterans, whereby it was stipulated that the rights according to that law cannot be exercised by persons convicted by a legally binding judgment for the commission of serious criminal offences against the constitutional order of Bosnia and Herzegovina and the constitutional order of the Federation of Bosnia and Herzegovina, and for the criminal offences against humanity and international law and criminal offences against the Armed Force, on 3 February 2005, the War Veterans' Affairs Office addressed the FBiH Ministry of Justice seeking that this Ministry issue a certificate attesting to existence or non-existence of criminal record for the appellant. Furthermore, it was pointed out that in 2 March 2005 the War Veterans' Affairs Office, following the instruction of the Ministry of Justice, addressed the Ministry of Interior in Sarajevo to obtain the requested data. In the course of the proceeding, on 14 March 2005, the Cantonal Court submitted the letter with attached judgment rendered by that court no. K-119/03 of 2 December 2003, which became legally binding. The appellant was convicted for the criminal offence of war crime against civilian population under Article 142(1) of the Criminal Law of SFRY by this judgment. Given that the presented irrefutable facts, the War Veterans Affairs' Office established, by application of Article 37(1)(2) in conjunction with Article 36(1)(3) of the Law on Rights of War Veterans that the appellant's right to war veteran disability benefits ceases to be in effect in accordance with Article 37(1)(2) of the mentioned Law. In other words, he cannot exercise that right as he was convicted by a legally binding court judgment no. K-118/03 of 2 December 2003 for the commission of grave criminal offence against humanity and international law – criminal offence of war crime against civilian population.

12. The appellant filed the complaint against the mentioned ruling issued by the War Veterans' Affairs Office with the Federation Ministry, which issued the ruling no. UP-II-03-41-29/11 of 23 February 2011 and dismissed the complaint as ill-founded. In the reasons for the ruling, it is stated that the first instance body correctly applied the substantive law to the established facts and, therefore, the appellant's complaint was dismissed as ill-founded by application of Article 237(2) of the Law on Administrative Procedure in the administrative proceeding.

13. The appellant initiated an administrative dispute proceeding before the Cantonal Court against the ruling of the Federation Ministry by filing a lawsuit. While deciding the appellant's claim, the Cantonal Court dismissed the claim as ill-founded in its judgment no. 09 0 U 01211211 U of 28 November 2014.

14. In the reasons for the judgment, the Cantonal Court stated that, while examining the lawfulness of the challenged administrative act within the scope of the limits of the claim and within the meaning of Article 34 of the Law on Administrative Disputes, the claim is considered unfounded. Starting from the provisions of Article 36(1)(3) of the Law on Rights of War Veterans and Article 37(1)(2) of the mentioned Law, the Cantonal Court

pointed out that given that in the case at hand the first instance body and the defendant (the Federation Ministry) established, which follows from the data in the case-file, that the plaintiff is convicted by a legally binding judgment and pronounced guilty of the criminal offence of war crime against civilian population – Article 142(1) of the Criminal Law of SFRY, and it also follows that the first instance body and the defendant adopted correct decisions – the first instance body by revoking the right of the war disabled veteran as of 31 December 2004 and the second instance body when it dismissed the complaint of the plaintiff as ill-founded. Furthermore, the Cantonal Court noted that the appellant's statements that he is in a difficult financial situation and that the mentioned decision have been in violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), are irrelevant and have no effect on the resolution of this administrative dispute since the decision of administrative bodies is not in contravention with the European Convention. In addition that decision is not in violation of any rights of the appellant safeguarded under the Convention, given that the appellant, while committing the criminal offence he was convicted of, acted in contravention of the provisions of the International Humanitarian Law – in particular, Article 3(1)(a)(IV) of the Geneva Convention relative to the Protection of Civilian Persons in Times of War.

IV. Appeal

a) Allegations of the appeal

15. The appellant considers that the challenged decisions are in violation of his right to a fair trial under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, as well as his right under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, and the right under Article 7 of the European Convention. As regards his extensive statements in the appeal, the appellants stated that he is a war veteran with determined disability rate of 80%. Further, he noted that pursuant to Article 36 of *Law* on *Rights of War Veterans and Members of their Families,* he was deprived of his right to disability benefit, and financial assistance for orthopaedic support devices, including other rights in accordance with the Law due to an enforceable judgment, whereby it was established that he had committed the criminal offence of war crime against civilian population. He pointed out that in the mentioned criminal case judgment, he was convicted to nine years in prison. He served his prison sentence of eight years, four months and seven days. Furthermore, it was noted that by the ruling of 10 June 1998 and based on Article 92 of the Law on Basic Rights of the Military Disabled Veterans and Families of Fallen Soldiers, the appellant was granted the right to disability benefit of war veteran, as well as the monthly military disability allowance and the financial assistance for orthopaedic support device, including other rights stipulated under this Law and the appellant has been entitled to these rights since 1 July 1998 on permanent basis, and

is to be entitled to it as long as the legal conditions exist in this regard. Therefore, the appellant is of the opinion that he acquired public rights of social and property related character that may be defined as his property, where he referred to the decision of the Constitutional Court no. AP-4609/12 of 12 June 2013. Further, the appellant noted that he was deprived of the right to property by the challenged judgment. Finally, the appellant considers that his right to property was violated because the interference of the State with his right to property was not proportionate to the aim pursued, as stipulated under the European Convention. He stated that he was deprived of the right to disability benefit, the right to financial assistance for orthopaedic support device and the right to health care by the challenged decision. He noted that in his capacity as a former member of the R BiH Army he, systemically, does not fall within the scope of civil law that regulates the matter of social rights (Law on Pension and Disability Insurance), as he is not a civil victim but the military victim of war and he has to exercise his rights through the laws regulating the rights of demobilised war veterans. Further, he is of the opinion that Article 37(2) in conjunction with Article 36(3) of the *Law* on *Rights of War Veterans* envisages permanent revocation of rights and that is in contravention with the positive provisions of criminal legislation. He stated that pursuant to Article 121 of the Criminal Code of the F BiH following the release from the institution where they had served sentences of imprisonment, the convicted persons *shall freely enjoy all rights provided by the constitution, law and other regulations, and may acquire all rights other than those whose exercise is limited as a result of a security measure imposed on them or a legal consequence of the conviction*. Therefore, as he stated, Article 121 of the Criminal Code of the F BiH provides for no possibility for any further revocation of rights. To the contrary, it prescribes their rehabilitation. The appellant is of the opinion that this specific law arrangements under the Law on Rights of War Veterans constitutes civil sanction against the appellant and leaves the appellant, as a war disabled person with 80% of disability, without **basic means of subsistence in order to survive.**

16. As to violation of the right to prohibition of inhuman punishment under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, the appellant stated that, in the case at hand, he was imposed criminal and civil sanction in an inhuman manner. He emphasized that he is aware of the gravity of the criminal offence he was convicted of by a legally binding decision. However, he is of the opinion that the punishment must not amount to physical and psychological sufferings of convicted persons regardless of the fact that the State did not inflict directly any physical or psychological pain. The appellant considers that the mentioned punishment has a special weight in his case as he is a disabled person.

17. As regards the violation of the right to prohibition of retroactive punishment under Article 7 of the European Convention, the appellant stated that in the specific case of deprivation of appellant from his legally determined civil rights of social character is the consequence of the commission of criminal offence of which he is convicted. Further,

it is noted that the Law on Rights of War Veterans envisages retroactive deprivation of acquired rights in the review process and the deprivation of these rights may be defined solely as administrative sanction under administrative law or civil sanction under civil law for commission of criminal offence and it has to have justification in, *inter alia*, Article 7 of the European Convention. It was noted that the appellant, at the time of commission of criminal offence when the Law on Basic Rights of Disabled War Veterans and Families of Fallen Soldiers was in effect, could not predict this sanction as it was not envisaged. Therefore, the matter is about retroactive punishment, which was prohibited based on Article 7 of the European Convention.

18. The appellant holds that in the case at hand the mentioned rights of the appellant were violated and that it is justified for the Constitutional Court to quash the judgment of the Cantonal Court and remit the case for renewal of administrative proceeding, and, based on Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, and in the spirit of the decision of the Constitutional Court *U-106/03* of 27 October 2004, to review the constitutionality of the Law on Rights of War Veterans *ex officio*, and also to order the Parliament of FBiH to harmonize the Law with the standards of human rights and freedoms under the Constitution of Bosnia and Herzegovina and the European Convention.

a) Reply to the appeal

19. In its reply to the appeal, the Cantonal Court pointed out that the appellant's allegations did not bring the lawfulness of the decision of that court into question and, therefore, the appellant's rights safeguarded under the Constitution of BiH and European Convention were not violated.

20. In its reply to the appeal the Federation Ministry stated that the appellant points out that during the period from the commission of criminal offence until 2004, when the Law on Rights of War Veterans entered into effect, the sanction of revocation of acquired rights was not envisaged by law and that was the reason why he acquired his rights in 1994 on temporary basis and, in 1998, on permanent basis (the right acquired in accordance with the Law on Basic Rights of Disabled War Veterans and Families of Fallen Soldiers). However, as noted by the Federation Ministry, Article 63(2) *Law* on *Rights of War Veterans* of the Law on Rights of War Veterans, it is stipulated that the process of review of the first instance procedural decisions adopted in accordance with paragraph 1 of this provision shall be carried out within 12 months from the day of issuance of the relevant procedural decision, whereas the relevant first instance body shall submit the procedural decision for review immediately after the expiry of the deadline for submission of complaint, and not later than three months from the day of issuance of the relevant procedural decision, while under Article 69(1) of the mentioned Law, as regards persons referred to in Articles 1, 2, 3, and 4 of this Law, the following

laws shall cease to be applicable: Law on Basic Rights of Disabled War Veterans and Families of Fallen Soldiers, Law on Protection of Members of the Territorial Defence and Other Veterans of the Republic of Bosnia and Herzegovina, Law on Exceptional Financial Insurance of Disabled War Veterans and Families of Fallen Soldiers, and Law on Protection of Disabled War Veterans and their Families and Families of Fallen and Missing Soldiers. In view of the aforesaid, and given the fact that that body rendered the decision in accordance with the Law on Rights of War Veterans (*lex specialis law)* and that is not in contravention of the European Convention and given the fact that the appellant, while committing the criminal offence he is convicted of, had acted in contravention of the provisions of the international humanitarian law - Article 3(1)(a) IV of the Geneva Convention Relative to Protection of Civilian Persons in Times of War, the Federation Ministry considers that the appeal is not justified. In its reply of 16 October 2017, the Federation Ministry noted that the purpose of passing of Article 36(1) (3) and Article 37(1)(2) of the Law on Rights of War Veterans is that the members of the Armed Force convicted of the mentioned criminal offences be prevented from exercising the rights under that law. The aforementioned provisions, as it is pointed out, are tasked, *inter alia*, with distancing the members of the Armed Force exercising the right under the aforementioned law who did not commit any of the criminal offences, from the offenders who committed serious criminal offences.

21. In its reply to the appeal, the War Veterans Office noted that in the procedure before that body the facts were completely and properly established and the substantive law was properly applied and the appellant's rights he refers to in his appeal were not violated by that decision.

V. Relevant Law

22. The **Law on Rights of War Veterans and Members of Their Families** (*Official Gazette of Federation of BiH,* 33/04, 56/05, 70/07, and 9/10), in the relevant part, reads:

Article 1(1)

This Law regulates the terms, conditions and method of exercise of rights by disabled war veterans and members of their families, members of families of martyrs, members of families of fallen, dead and missing veterans (hereinafter: the families of fallen, dead and missing veterans) and demobilized veterans, deserving persons from the defensive-liberation war, as well as other issues from the field of protection of war veterans and disabled veterans.

Article 2(1), (2) and (7)

(1) For the purpose of this Law, the war veteran shall be the member of the Army of the Republic of Bosnia and Herzegovina, the Croatian Defence Council and police force of the competent body of internal affairs ("the Armed Force"), who took part in the defence of Bosnia and Herzegovina (the beginning of the aggression on the municipality

of Ravno) from 18 September 1991 until 23 December 1996, i.e. until the cessation of immediate war danger, and who was demobilized by the issuance of ruling of the relevant military body, as well as the person who took part in the preparation for defence and in defence of Bosnia and Herzegovina during the period before 18 September 1991 while being engaged by the order of the relevant body.

(2) Within the meaning of this provision the participation in defence of Bosnia and Herzegovina implies that the participation in armed resistance and activity in direct connection with resistance.

(7) According to the General Framework for Peace in Bosnia and Herzegovina, members of the so-called National Defence of the Autonomous Province of Western Bosnia are not considered to be defenders and veterans by this Law. Their and the rights of family members are regulated by Law on Basic Social Protection of Civilian Victims of the War and Protection of Families with Children (Official Gazette of Federation of BiH, 36/99, 54/05 and 39/06).

Article 8(1)
Rights of disabled war veterans

The rights of a war veteran are the following:

1. *Right to personal disability benefit*
2. *Right to cash assistance for medical care and other person's help*
3. *Right to financial assistance for orthopaedic support device*
4. *Other rights referred to under Chapter VI of this Law.*

Article 36(1)(3)

Pursuant to this Law, the mentioned rights cannot be exercised in the following cases:

(...)

3. by persons convicted by a legally binding judgment for the commission of serious criminal offences against the constitutional order of Bosnia and Herzegovina and the constitutional order of the Federation of Bosnia and Herzegovina, and for the criminal offences against humanity and international law and criminal offences against the Armed Force;

Article 37(1)(2)

Pursuant to this Law, the mentioned rights shall cease to be in effect:

(...)

2. in cases determined under Article 36 of this Law after the judgment of the relevant court becomes legally binding;

(...)

Article 63

As regards the beneficiary who meets the requirements of exercising the rights in accordance with the provisions of the Law, the relevant body shall, ex officio, issue a new ruling until 31 December 2004.

Review of the first instance ruling issued in accordance with paragraph 1 of this provision shall be carried out within 12 months from the day the ruling was issued, where the relevant first instance body shall submit the ruling for the purpose of review immediately after the expiry of the deadline for lodging complaint and not later than three months from the day the ruling was issued.

Article 69(1)

On the day of entry into force of this Law, as regards persons referred to in Articles 1,2,3, and 4 of this Law, the following laws shall cease to be applicable: Law on Basic Rights of Disabled War Veterans and Families of Fallen Soldiers (Official Gazette of R BiH, 2/92, 6/94 and 13/94), Law on Protection of Members of the Territorial Defence and Other Veterans of the Republic of Bosnia and Herzegovina (Official Gazette of R BiH, 4/92 and 13/94), Law on Exceptional Financial Insurance of the Disabled War Veterans and Families of Fallen Soldiers (Official Gazette of R BiH, 33/95, 37/95, and 17/96), Law on the Protection of Disabled War Veterans' Families and Families of Fallen and Missing Veterans (National Gazette of HR-HB, 36/94 and 24/95) and the Law on Protection of War Veterans (Official Gazette of SR BiH, 35/90).

VI. Admissibility

23. 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 court in Bosnia and Herzegovina.

24. Pursuant to Article 18(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.

25. In the present case, the subject matter of the appeal is the judgment of the Cantonal Court no. 09 0 U 012111211 U of 28 November 2014 against which there are no other remedies available under the law. Furthermore, the appellant received the challenged judgment on 13 December 2014 and the appeal against this decision was filed on 11 February 2015 *i.e.* within a 60-day time limit, as provided for by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) 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. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18 (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the present appeal meets the admissibility requirements.

VII. Merits

27. The appellant claims that the challenged decisions are in violation of his rights under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention and in violation of his right 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.

Right to property

28. Article II(3)(k) 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:

k) The right to property.

29. Article 1 of Protocol No. 1 to the European Convention, as relevant, 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.

30. The appellant considers that his right, 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 was violated by the challenged decisions.

31. 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, relates to deprivation of possessions subjecting it to 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. These three rules are not "different" in the sense of not being interconnected, the second and third rules relate to specific cases of interference by the state with the right to peaceful enjoyment of possession and should be interpreted within the general principle specified in the first rule.

32. The notion of "possessions" referred to in Article 1 of Protocol No. 1 to the European Convention should not be interpreted in an restrictive manner, but it should be understood so as to include the acquired rights as well, such as funds, shares or financial claims based on contracts or delinquent responsibility, including specific economic and social incomes prescribed by law. On the other hand, Article 1 of Protocol No. 1 to the European Convention protects the existing property only, but it does not include, in general, the right to acquire the property in the future. A person that complains of interference with its property must prove the right to property indeed existed (see the European Court of Human Rights, *Marckx vs Belgium,* judgment of 13 June 1979, Volume 31, paragraph 50).

33. In considering whether under the circumstances of the case at hand the violation of Article 1 of Protocol No. 1 to the European Convention occurred, one should first establish whether the appellant is the title holder of the rights falling within the scope of Article 1 of Protocol No. 1 to the European Convention. In the present case the Constitutional Court notes that by the ruling of the War Veterans Office of 10 June 1998 the appellant was granted, in his capacity as a disabled war veteran, personal military disability benefit and financial assistance for orthopaedic support device in designated monthly amounts, which makes "the existing possessions" within the meaning of Article 1 of Protocol No. 1 to the European Convention (*mutatis mutandis*, Decision on Admissibility and Merits no. *AP-133/06* of 13 September 2007, paragraph 25, available on webpage of the Constitutional Court, www.ustavnisud.ba).

34. Furthermore, the Constitutional Court should establish whether there was interference with the property of the appellant and, if so, whether the interference was in accordance with law and whether it is in public interest and whether it was proportionate to legitimate aim sought to be achieved, i.e. whether there was a fair balance struck between the rights of the appellant and general interest demands. In connection with the first issue, the Constitutional Court holds that by the challenged decision of the administrative bodies and ordinary court, whereby the appellant's capacity as a disabled war veteran was established, and whereby the by the quashed ruling of the War Veterans' Office of 10 June 1998, the interference with the appellant's property safeguarded under Article 1 of Protocol No. 1 to the European Convention occurred.

35. The next question the Constitutional Court should give answer to is whether the interference with the appellant's right to property is in accordance with the law. In that regard, the Constitutional Court points out that the challenged decisions are based on the provisions of Article 36(1)(3) and Article 37(1)(2) of the Law on Rights of War Veterans. Bearing in mind the aforesaid, the Constitutional Court considers that the administrative bodies and ordinary court gave clear and precise reasons in the challenged decisions regarding their positions in connection with application of the quoted law provisions that do not seem to be arbitrary or unacceptable. Furthermore, the Constitutional Court points out that the Law on Rights of War Veterans has been published in the Official Gazette and

that means that it is accessible to the citizens and that it, clearly and precisely, regulates the matter of exercise of rights by the war veterans. In the reasons for the challenged decisions, the Constitutional Court sees no arbitrariness when it comes to application of the relevant law provisions that are transparent and clear and therefore, it follows that the interference with the appellant's right to property is carried out in accordance with the law. Having in mind this, the Constitutional Court finds that there are clear legal grounds in the instant case for interference with the appellant's property and that the interference in question was in accordance with the law.

36. Furthermore, the Constitutional Court considers that establishing that the appellant's right ceased to exist in accordance with the Law on Rights of War Veterans serves the legitimate aim in general interest. In particular, the Constitutional Court points out that the Law on Rights of War Veterans (Article 1) regulates the conditions and manner in which special rights of disabled war veterans are acquired, including the terms, conditions and method of exercise of rights by disabled war veterans and members of their families, members of families of martyrs, members of families of fallen, dead and missing veterans and demobilized veterans, i.e. the deserving persons from the defence and liberation war. In this connection, the Constitutional Court observes that the aim of the legislator was to ensure that there are special rights of those soldier who proved themselves in the defence and liberation of BiH in which numerous war crimes were committed during the war and who complied with the highest values of obligation to take part in the war, the honour and obligation to be loyal to the Armed Force, wherein they did not violate the rules of international humanitarian law (whose purpose is the protection of victims of war and regulating the manner in which hostilities are conducted). Further, the Constitutional Court observes that the legislator created provisions according to which the war veterans are treated differently and prescribed that the rights according to the Law on Rights of War Veterans are not granted to the war veterans convicted by legally binding decisions for the war crimes against humanity and international law, thus those persons that violated rules of international humanitarian law recognized in all civilized nations. As regards the differential treatment of certain war veterans, the Constitutional Court should give answer to the question whether such differential treatment imposes an excessive burden on the appellant. In other words, the Constitutional Court should give answer to the question whether the interference with the appellant's property is proportional to the legitimate aim sought to be achieved. Having analysed in the instant case the need to protect the appellant's right to property and the need to pursue to a legitimate aim in the public interest, the Constitutional Court concludes that the challenged decisions placed no excessive burden on the appellant in pursuance of legitimate aim and that he was not brought into different position unlike others in the analogous situation.

37. Therefore, the Constitutional Court finds that in the instant case there was no 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.

Prohibition of inhuman punishment

38. Article II(3)(b) of the Constitution of BiH 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.

39. Article 3 of the European Convention reads:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

40. The Constitutional Court emphasizes that Article 3 of the European Convention that stipulates that *no one shall be subjected to torture or to inhuman or degrading treatment* protects one of the absolute rights of the European Convention. The states can never depart from compliance with that right not even during the war.

41. The Constitutional Court reiterates that it expressed a position in its case law that the torture or inhuman treatment must attain a minimum level of security if it is to fall within the scope framework of Article 3 of the European Convention (see, the Constitutional Court, Decision no. *AP- 81/04* of 28 January 2005, *Official Gazette of Bosnia and Herzegovina*, 30/05). The assessment of this minimum is, in the nature of things, relative; it depends on all circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see European Court of Human Rights, *Ireland v. United Kingdom*, Judgment of 18 January 1978, Series A no. 25, page 65, paragraph 162). In addition, the Constitutional Court emphasizes that a certain level of suffering exists when there is sufficient evidence on sustained injuries (see the former Human Rights Chamber for Bosnia and Herzegovina, Decision on Admissibility and Merits *CH/97/34*, Šljivo *v. Republika Srpska*) as well as that the applicant must submit at least some elements of evidence which relate to alleged inhuman treatment (see decision of the Ombudsman for Human Rights, case no. 331/97*, R.G. v. the Federation of Bosnia and Herzegovina*, Reports of 6 April 1998, paragraph 109).

42. In regards to the allegations on the violation of the right under Article 3 of the European Convention, the Constitutional Court notes that the appellant himself emphasized that the state did not inflict upon him directly any physical or mental pain. Furthermore, the Constitutional Court notes that as to the challenged rulings the appellant did not offer any proof on whether the instant case involves infringement upon or attack on appellant's physical or mental integrity that exceeds the limits of minimal degree of intensity that would in terms of mentioned standards raise an issue of violation of the appellant's right

to prohibition of torture, inhuman or degrading treatment or punishment. Therefore, the Constitutional Court dismisses these appellant's claims as ill-founded.

43. Constitutional Court concludes that the appellant's allegations on violation of the right under Article II(3)(b) of the Constitution of BiH and Article 3 of the European Convention are ill-founded.

No punishment without law

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

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

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

45. The Constitutional Court emphasizes that the referenced Article expresses the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). Criminal offences and relevant penalty must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see the European Court, *Cantoni v. France*, Judgment of 15 November 1996, paragraph 29).

46. The concept of a "penalty" in Article 7(1) of the European Convention is, like the notions of "civil rights and obligations" and "criminal charge" in Article 6(1), an autonomous Convention concept in respect to the definition of same notions in domestic law. To render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision. The starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the concerned measure (especially the punitive aim thereof); its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity (see *Welch v. the United Kingdom,* judgment of 15 November 1996, paragraph 28; *Del Rio Prada v. Spain*, Judgment of 21 October 2013, paragraph 82). However, the severity of the measure is not in itself decisive, however, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned. In applying

these standards, the European Court particularly established the following measures as penalty: confiscation order in terms of criminal offence after establishing guilt, within its punitive nature, in addition to its preventive and compensatory nature (*op. cit. Welch v. United Kingdom*, paragraphs 29 to 35) etc. Contrary to that the following measures are excluded from the concept of penalty: suspension of right to pension of civil servant after the disciplinary procedure (see the European Court, *Haioun vs. France*, Judgment of 7 September 2004); impeachment of president after the impeachment procedure for gross violation of the Constitution (see the European Court, *Paksas v. Lithuania*, Judgment of 6 January 2011).

47. Appellant finds that there was a violation of the right to prohibition of retroactive punishment considering that the deprivation of appellant from his legally determined civil rights by the challenged ruling as the consequence of the commission of criminal offence the appellant is convicted of, represents administrative or civil sanction for commission of criminal offence. As the appellant, at the time of commission of criminal offence when the Law on Basic Rights of Disabled War Veterans and Families of Fallen Soldiers was in effect, could not have predicted this sanction as it was not provided for, in his opinion this represents a retroactive punishment as prohibited based on Article 7 of the European Convention.

48. As to the allegations of the appellant that the instant case involves administrative or civil sanction, the Constitutional Court stresses that the challenged administrative decisions were adopted in the review process as prescribed by law wherein it was being established whether the appellant meets legal conditions for exercising certain social rights under the Law on Rights of War Veterans. In that regard, the Constitutional Court finds that the challenged decisions do not have punitive aim, they do no fall within the concept of penalty nor the scope of penalty for the committed offence (op.cit. *Del Rio Prada vs. Spain*) within meaning of standards of Article 7 of the European Convention. Therefore, the Constitutional Court finds the appellant's allegations on retroactive punishment as ill-founded.

49. The Constitutional Court concludes there is no right to prohibition of retroactive punishment under Article 7 of the European Convention.

Other allegations

50. As to the appellant's request that the Constitutional Court is to review, based on Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and in the spirit of the Decision of the Constitutional Court of BiH *AP-106/03* of 27 October 2004, e*x officio,* the constitutionality of *Law* on *Rights of War Veterans* and issue an order to the Parliament of F BiH to harmonise this Law with the standards of human rights and freedoms form the Constitution of Bosnia and Herzegovina and the European Convention, the Constitutional

Court primarily emphasizes that the constitutionality of the law is examined within the scope of its abstract jurisdiction under Article VI(3)(a) of the Constitution of BiH and under Article VI(3)(c) of the Constitution of BiH, the Constitutional Court is competent to establish whether the law, on which validity depends decision of any court in BiH, is compatible with the Constitution of BiH, European Convention or laws of Bosnia and Herzegovina.

51. In the instant case, the Constitutional Court emphasizes that the case involves appellate jurisdiction under Article VI(3)(b) of the Constitution of BiH under which the Constitutional Court does not establish the constitutionally of laws. Also, the Constitutional Court observes that it was not requested in the instant proceedings before the Cantonal Court which adopted the challenged judgment that the Constitutional Court acts under Article VI(3)(c) of the Constitution of BiH. In relation to the referenced decision of the Constitutional Court *U-106/03* the Constitutional Court observes that after it established the violation of the constitutional right of the appellant, it ordered the Government of Federation of BiH to secure constitutional rights of the appellant. In referenced decision, the Constitutional Court noted that with the aim of interpreting Article VI(3)(c) of the Constitution of BiH, it arrived at the conclusion that the Constitutional Court has jurisdiction to carry out the review of constitutionality in terms of Article VI(3)(c) of the Constitution of BiH, in the proceedings arising under the appellate jurisdiction, if necessary.

52. Furthermore, the Constitutional Court emphasizes that in its hitherto case-law established that the respective legal provisions do not meet the necessary legal quality to the extent required for the observance of standards referred to in the European Convention which is contrary to the principle of the rule of law referred to in Article I(2) of the Constitution of Bosnia and Herzegovina and thus established the violations of the appellant's rights, annulled challenged judgments of regular court and ordered the governments of the entities to take measures to secure observances of rights under Constitution of BiH and European Convention (*mutatis mutandis*, the Constitutional Court, Decision *AP-2843/07* of 12 January 2010 and *AP-369/10* of 24 May 2013, available on webpage of the Constitutional Court www.ustavnisud.ba). Considering that the Constitutional Court did not find violation of the right the appellant invoked in the appeal, the Constitutional Court concludes that this case-law is not applicable in the instant case.

VIII. Conclusion

53. The Constitutional Court concludes that the challenged decisions are not 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, as, in the case at hand, the interference with the appellant's right to property was in compliance with the

law, it pursued the legitimate aim and reasonable relation of "proportionality" between the means used and aim sought to be achieved.

54. In addition, there is no violation of Article II(3)(b) of the Constitution of BiH and Article 3 of the European Convention when the appellant failed to offer evidence on whether the instant case represents an infringement upon or attack on appellant's physical or mental integrity that exceeds the limits of minimum degree of intensity which would within the meaning of referenced standards raise an issue of violation of the appellant's right to prohibition of torture, inhuman or degrading treatment or punishment.

55. There is no violation of right to prohibition of retroactive punishment under Article 7 of European Convention when challenged administrative decision have no punitive purpose nor they enter upon the concept of "penalty" or the scope of penalty for committed criminal offence.

56. Pursuant to Article 59(1) and (3), the Constitutional Court has decided as set out in the enacting clause of this decision.

57. Pursuant to Article 43(1) of the Rules of the Constitutional Court, Judge Seada Palavrić gave her statement of dissent with regard to the decision of majority.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP-1101/17

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Ms. S.A. from Živinice, represented by Ms. Nedžla Šehić, a lawyer practicing in Sarajevo, against the Judgment of the Supreme Court of the Republika Srpska, no. 71 0 P 025573 16 Rev 2 of 4 January 2017, the Judgment of the County Court in Banja Luka no. 71 0 P 025573 14 Gž of 29 May 2014, and the Judgment of the Basic Court in Banja Luka no. 71 0 P 025573 97 P of 10 May 2013

Decision of 22 March 2018

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18(4), Article 57(2)(b), Article 59(1) and (2) and Article 62(1), (4) and (6) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić, and

Mr. Giovanni Grasso

Having deliberated on the appeal of Ms. **S.A.**, in case no. **AP-1101/17,** at its session held on 22 March 2018, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Ms. S.A. against the judgment of the Supreme Court of Republika Srpska no. 71 0 P 025573 16 Rev 2 of 4 January 2017 and the judgement of the County Court in Banja Luka no. 71 0 P 025573 14 Gž of 29 May 2014 in the part relating to the costs of proceedings 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 as well as 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 is hereby established.

The judgment of the Supreme Court of the Republika Srpska, no. 71 0 P 025573 16 Rev 2 of 4 January 2017 and the judgement of the County

Court in Banja Luka no. 71 0 P 025573 14 Gž of 29 May 2014 are hereby quashed in the part relating to the costs of proceedings.

The case shall be referred back to the County Court in Banja Luka, which is obligated to employ an expedited procedure and to take a new decision in line 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 and 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 County Court in Banja Luka is ordered to inform the Constitutional Court, within a time limit of 90 days from the date of delivery of this Decision, on the measures taken to enforce the Decision in accordance with Article 72(5) of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina.

The appeal lodged by Ms. S.A. against the judgment of the Supreme Court of the Republika Srpska, no. 71 0 P 025573 16 Rev 2 of 4 January 2017 and the judgement of the County Court in Banja Luka no. 71 0 P 025573 14 Gž of 29 May 2014 and the judgement of the Basic Court in Banja Luka no. 71 0 P 025573 97 P of 10 May 2013 is hereby rejected in the part relating to compensation for non-pecuniary damages as 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 25 March 2017, Ms. S.A. ("the appellant") from Živinice, represented by Ms. Nedžla Šehić, a lawyer practicing in Sarajevo, filed an appeal 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. 71 0 P 025573 16 Rev 2 of 4 January 2017, the judgment of the County Court in Banja Luka ("the County Court") no. 71 0 P 025573 14 Gž of 29 May 2014, and the judgment of the Basic

Court in Banja Luka ("the Basic Court") no. 71 0 P 025573 97 P of 10 May 2013. The appellant also requested that the Constitutional Court issue an interim measure, whereby the Constitutional Court would suspend the procedure of compulsory collection of costs in favour of the Republika Srpska Attorney's Office ("the RS Attorney's Office") and decide that such measure "would be applied in all other proceedings initiated for the collection of costs of representation of the Attorney's Offices in Bosnia and Herzegovina (Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska) in the cases related to compensation of damages caused by war crimes". On 11 July 2017, the appellant submitted a supplement to the appeal.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) and (3) of the Rules of the Constitutional Court, on 4 September 2017 the Supreme Court, the County Court and the Basic Court and the RS Attorney's Office were requested to submit their respective replies to the appeal.

3. The Supreme Court submitted its reply to the appeal on 6 September, the County Court did so on 12 September, and the RS Attorney's Office submitted its response to the appeal on 7 September 2017. The Basic Court failed to submit its reply to the appeal.

III. Facts of the Case

4. 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:

5. On 23 May 2007, the appellant filed a complaint before the Basic Court against the Republika Srpska ("the respondent") whereby she requested compensation for non-pecuniary damages in the total amount of BAM 50,000, as between 11 July 1992 and 21 may 1993 she had been detained in the camps and prisons, where she had been exposed to torture and inhuman treatment. Deciding on this statement of claim, the courts in all three instances dismissed the appellants claim as being statute barred. Namely, the courts concluded in all three of the challenged judgements that the time-limit for compensation of damages under Article 377(1) of the Law on Obligations, to which the appellant referred, is applied only in case where the request for compensation of damage relates to an identified perpetrator of criminal offence that caused the relevant damage and when the existence of criminal offence and criminal liability is established by the binding convicting judgement in respect of that person. However, in the present case, the appellant directed her statement of claim against the respondent as a legal entity whose liability is based "on the liability of another, and not on its direct liability as a perpetrator of the criminal offence in terms of Article 154(1) of the Law on Obligations". Therefore, according to the position of courts in the challenged judgements, Article 376 of the Law on Obligations is to be applied in the particular case under which the claim for compensation of caused damage expires in three years after the injured party found

out about the damage and about the person who caused the damage, and in any case, this claim expires in five years from the date when the damage was inflicted. The courts took into account that the state of war was terminated by the decision of the National Assembly of the Republika Srpska on 19 June 1996, thus concluding that as of that date the statute of limitation period, which was suspended during the war, started to run again. Given that the lawsuit was lodged on 23 May 2007, thus, after the expiry of time limits set forth in Article 376 of the Law on Obligations, the courts concluded that the claim became time-barred.

6. In addition, by the judgement of the Basic Court under no. 71 0 P 025573 97 P of 10 May 2013 the appellant is obliged to compensate the respondent for the costs of proceedings in the amount of BAM 3,000.00 with the statutory default interest as of the date of judgement to the date of settlement in full, while the respondent's request for compensation of the costs of proceedings "in a remaining part relating to the difference between the requested and the awarded amount" is dismissed. In the reasoning of the judgement the Basic Court stated that the respondent has the right to compensation of the costs of proceedings in accordance with Article 386(1) of the Civil Procedure Code ("the CPC") since the appellant did not succeed with her claim against the respondent. Furthermore, the court stated that it exempted the appellant from paying a court fee, upon her request, given that it established that she was unemployed, that she was in a "difficult financial situation, and it especially took into account the subject-matter of the particular dispute as well as the value appropriate for the collection of court fee". The Basic Court concluded that "it is beyond dispute that the funds the plaintiff has for her sustenance would be reduced by the payment of court fees to such an extent that it would endanger her social security". However, the Basic Court obliged the appellant to compensate the respondent for the costs of proceedings in the total amount of BAM 3,000.00 which was assessed on the basis of the Tariff for Lawyers' Fees and Costs (*Official Gazette of the Republika Srpska*, 68/05) ("the Tariff"), including the preparation of the complaint and the participation of the respondent's legal representative in three hearings with a lump-sum fee".

7. Deciding on the appeal, in the judgement no. 71 0 P 025573 14 Gž of 29 May 2014, the County Court concluded, *inter alia*, that the costs of proceedings were correctly determined and that the RS Attorney's Office, pursuant to Article 395 of the RS CPC, was entitled to the costs in accordance with the Tariff and "the specified request of the respondent".

8. By the challenged judgement no. 71 0 P 025573 16 Rev 2 of 4 January 2017, the Supreme Court dismissed the appellant's revision-appeal without offering specific reasons for dismissing the allegations in the revision-appeal with regard to the costs of proceedings.

IV. Appeal

a) Allegations in the appeal

9. The appellant holds that the challenged judgements are 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 for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), 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, as well as the right to effective legal remedy under Article 13 of the European Convention.

10. Firstly, the appellant presents at length the reasons to hold that the courts erroneously evaluated that her claim was time-barred and that the challenged decisions were therefore unlawful because the "party to the hostilities (Republika Srpska) is liable for all the acts committed by persons who were members of its armed forces or persons who, although not being an immediate perpetrator, were responsible for the actions of armed forces". In addition, the appellant points out that in this manner she was "deprived of the access to court to obtain just compensation from the liable person (State-Entity), which she is entitled to in accordance with law and the positions previously taken by the Constitutional Court of Bosnia and Herzegovina".

11. Moreover, the appellant challenges the decisions on the costs of proceedings and makes reference to the judgement of the European Court of Human Rights ("the European Court") in *Cindrić and Bešlić v. Croatia*. The appellant especially points out that in the relevant decision the European Court established that the order imposed on the applicants by the domestic courts to pay the costs of the State's representation in the civil proceedings in which they sought damages in connection with the killing of their parents, according to the tariff applicable to attorneys, had violated their right to property and had infringed their right of access to a court under Article 6(1) of the European Convention. Consequently, the appellant proposes the Constitutional Court to grant the appeal, establish a violation of the aforementioned rights, and refer the case back for retrial with an instruction for taking a new decision in an expedited procedure.

12. In her motion for an interim measure, the appellant points out that the interim measure would be necessary as in Bosnia and Herzegovina numerous enforcement procedures have been pending for the enforced collection of awarded litigation costs relating to the RS Attorney's Office representation in judicial disputes for compensation of damages caused by war crimes and that the RS Attorney's Office "has already sent a letter to the appellant requesting her to settle those costs". In addition to the supplement to the appeal, the appellant enclosed the ruling of the Municipal Court in Živinice no. 33 0 P 0783088 17 I of 19 June 2017, dismissing her objection lodged against the ruling allowing the enforcement of 7 March 2017. In her appeal, the appellant did not

challenge this ruling allowing the appeal but she indicated that, in the objection filed against that ruling, she referred to the above mentioned judgement of the European Court and that the Municipal Court in Živinice stated that the relevant judgement of the European Court could not be directly applied in the enforcement procedure and that the procedure cannot be terminated based on that judgment, "as in that way the enforceable document is actually contested and the relevant judgement can be applied only in civil proceedings". For that reason, the appellant maintained her request for the expedited issuance of the interim measure, stating that without it the enforcement would be carried out "irrespective of the fact that it is obviously contrary to [the European Convention], and the mere subsistence of the appellant, whose standard of living is already on the edge of subsistence, would be additionally threatened.

a) Responses to the Appeal

13. In their responses to the appeal, the Supreme Court and the County Court state that they maintain their factual and legal conclusions referred to in the reasoning of their judgements and that they hold that there is no violation of the rights referred to by the appellant.

14. The respondent, through the RS Attorney's Office, disputed the allegations presented in the appeal and pointed out that there is no violation of the rights referred to by the appellant. In the remaining part of the reply, the RS Attorney's Office underlines that "the appellant's right to a hearing within a reasonable time have not been violated" and that the "County Court in Banja Luka undertook all necessary measures to secure that the cases are decided within a reasonable time".

V. Relevant Law

15. The **Law on Obligations** (*Official Gazette of SFRY, 29/78, 39/85, 45/89 and 57/89, Official Gazette of Republika Srpska, 17/93, 3/96, 39/03 and 74/04)*, as relevant, reads:

Claim for compensation of damage

Article 376(1) and (2)

(1) Claim for compensation of caused damage expires in three years after the injured party found out about the damage and about the person who caused the damage.

(2) In any case, this claim expires in five years from the date when the damage was inflicted.

Claim for compensation of damage caused in a criminal offence

Article 377

(1) When the damage is caused in a criminal offence, and a longer limitation period is anticipated for prosecution for criminal offence, the request for compensation

of damage addressed to the competent person expires with the end of time period determined for limitation period of prosecution for criminal offence.

(2) The interruption of prosecution for criminal offence also implies the suspension of prescription relating to the request for compensation of damage.

(3) The same rule applies to the suspension of prescription.

16. The **Civil Procedure Code of the Republika Srpska** (*Official Gazette of the Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13), in the relevant part, reads:

Article 386(1)

The party that has lost the litigation entirely shall be obliged to compensate the costs to the adverse party.

[...]

Article 387(1) and (2)

When deciding on the costs which shall be to the party, the court shall take into account only the costs necessary for conducting the litigation. When deciding which costs have been necessary and the amount thereof, the court shall thoroughly evaluate all circumstances.

If there is a prescribed tariff for remuneration for the work of attorneys or for other costs, the costs shall be measured up according to the tariff.

[...]

Article 395

Provisions on expenses shall be applied to the parties represented by the Attorney's Office and the Free Legal Aid Centre.

The costs of the litigation under paragraph 1 of this Article shall include the costs in accordance with the Tariff for remuneration for the work of attorneys in the Republika Srpska.

Article 396(1)

At the specific request of the party, the court shall decide on the compensation of costs, without holding the hearing.

[...]

Article 400

The court shall exempt a party from paying the costs of proceedings if, according to his/her general financial situation, the party cannot compensate the costs without jeopardizing the necessary support of him/herself and his/her family.

Exemption from paying the costs of proceedings shall include exemption from paying court taxes and depositing advance payment for the costs of witnesses, experts, on-the-spot investigation, translation and interpretation and court advertisements. The court may exempt a party from paying all or a part of costs of the proceedings.

Article 401

When making ruling on exemption from paying the costs of proceedings, the court shall carefully consider all circumstances, especially the value of the dispute, number of persons supported by the party and income of the party and the family members.

Article 402

The ruling on exemption from paying the costs of proceedings shall be rendered by first instance court at the party's motion.

The party shall be obliged to submit proof of financial situation, including means, with the motion.

When necessary, the court may ex officio obtain and provide the necessary information about the financial situation of a party requesting exemption and also it may hear the adverse party thereof. (...)

VI. Admissibility

Formal requirements for admissibility

17. 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.

18. In accordance with Article 18(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.

19. In the present case, the subject-matter of the appeal is the judgment of the Supreme Court no. 71 0 P 025573 16 Rev 2 of 4 January 2017, against which there are no other effective remedies available under the law. Furthermore, the appellant received the challenged judgement on 24 January 2017, and the appeal was filed on 25 March 2017, *i.e.* within a time limit of 60 days as prescribed by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) of the Rules of the Constitutional Court, for there is no formal reason rendering the appeal inadmissible.

20. However, considering the issue of whether the appeal is manifestly (*prima facie*) ill-founded, which is the admissibility requirement under Article 18(4) of the Rules of the Constitutional Court, the Constitutional Court considers that, given its jurisprudence in the same or similar cases, *prima facie* admissibility of the appellate allegations on the compensation of non-pecuniary damage should be assessed separately from those related to the awarded costs of proceedings.

***Prima facie* admissibility**

21. When deciding on *prima facie* admissibility regarding part of the challenged judgements related to the decision on compensation of damages, the Constitutional Court invoked the provisions of Article 18(4) of the Rules of the Constitutional Court.

22. Article 18(4) of the Rules of the Constitutional Court reads:

The Constitutional Court shall reject an appeal as being manifestly (prima facie) ill-founded when it establishes that there is no justified request of the party to the proceedings, or that the presented facts cannot justify the allegation of the existence of a violation of the rights safeguarded by the Constitution and/or when the Constitutional Court establishes that the party to the proceedings has not suffered the consequences of a violation of the rights safeguarded by the Constitution, so that the examination of the merits of the appeal is superfluous.

23. In examining the admissibility of the appeal, the Constitutional Court must establish, *inter alia*, whether the requirements for consideration of the merits listed in Article 18(4) of the Rules of the Constitutional Court have been satisfied. In that regard, the Constitutional Court indicates that, according to its own jurisprudence and the case-law of the European Court of Human Rights, the appellant must specify violations of his/her rights safeguarded by the Constitution of Bosnia and Herzegovina and these violations must be deemed probable. An appeal is manifestly ill-founded if it lacks *prima facie* evidence, indicating with sufficient clarity that the alleged violation of human rights and freedoms is possible (see ECHR, *Vanek vs. Slovakia*, Judgment of 31 May 2005, Application no. 53363/99, and Constitutional Court, Decision no. *AP-156/05* of 18 May 2005), or if the facts in respect of which the appeal is filed manifestly do not constitute a violation of rights referred to by the appellant, *i.e.* the appellant does not have an "arguable claim" (see, ECHR, *Mezőtúr-Tiszazugi Vízgazdálkodási Társulat v. Hungary*, Judgement of 26 July 2005, Application no. 5503/02), or if it is established that the appellant is not a "victim" of violations of the rights safeguarded by the Constitution of Bosnia and Herzegovina.

24. The Constitutional Court notes that the appellant holds that a violation the rights referred to by the appellant in this part of challenged judgements is a result of an arbitrary application of the substantive law, *i.e.* of the provisions of Article 376 of the

Law on Obligations, which stipulates the general limitation periods for bringing claims for compensation for damages. Namely, the appellant holds that the provisions of Article 377 of the Law on Obligations, which stipulates the particular limitation periods where damages are caused by a criminal offence, should have been applied, regardless of the fact that the defendant is the Republika Srpska and not an immediate perpetrator.

25. However, the Constitutional Court points out that it has considered a number of cases carrying the similar factual and legal issues, *inter alia*, in case no. *AP-4288/11* (see, Constitutional Court, Decision on Admissibility and Merits no. *AP-4288/11* of 9 December 2014, available at www.ustanisud.ba), where the Constitutional Court refer red to its jurisprudence established in the Decision no. *AP-4128/10* (see, the Constitutional Court, Decision on Admissibility and Merits no. *AP-4128/10* of 28 March 2014, available at www.ustavnisud.ba). In the aforementioned decision *AP-4288/11*, the Constitutional Court recalled that according to the opinion of the European Court, the existence of the statute of limitations is not, *per se*, incompatible with the European Convention. What is important to establish is whether the nature of the time-limit concerned and/or the manner in which it had been applied were compatible with the European Convention, *i.e.* that the application of the statutory limitation periods may be regarded as foreseeable for the applicants, having regard to the relevant legislation and the particular circumstances of the case. The Constitutional Court also took into account that in the case *Baničević v. Croatia* the European Court observed that Article 377 of the Law on Obligations provides for a longer statutory limitation period for claims for damages if the damage was caused by a criminal offence. This longer statutory limitation period, as reasoned by the European Courts of human Rights, thus operates in favour of the victims of crime, allowing them to claim compensation within the longer statutory time-limit prescribed for the criminal offence at issue. However, according to the established case-law of domestic courts, this statutory limitation period is applicable only where it has been established by a final judgment of the criminal court that the damage was caused by a criminal offence (*idem*, *AP- 4288/11*, paragraphs 25-26). In addition, as to the appellant's reference to the Decision of the Constitutional Court no. *AP-289/03* of 19 November 2004, the Constitutional Court emphasizes that this court decides on the circumstances on a case-by-case basis, and by considering the circumstances of the case at hand, it has established that there was no arbitrary application of the substantive law, as was already reasoned (*idem, AP-4128/10*, paragraph 45).

26. In view of the above, the Constitutional Court indicates in the aforementioned decisions that the ordinary courts established that the lawsuit for compensation for damages caused by an unlawful deprivation of liberty was filed by the appellant outside the statutory time limits set forth in Article 376 of the Law on Obligations and that it could not be said that the courts' stance was arbitrary that the provision of Article 377 of the Law on Obligations may be applied solely to the perpetrator of a criminal offense and not to a third person who is generally held responsible for the damage rather than

the factual perpetrator of a criminal offense and, therefore, only the provision of Article 376 of the Law on Obligations may be applied to the third person. Therefore, the time limits referred to in Article 377 of the Law on Obligations are solely applicable to the perpetrator of a criminal offense, who is responsible for the damage under the principle of subjective liability (culpability), and not to third persons who may be liable for the damage instead of the factual perpetrator of the criminal offence under the principle of assumed responsibility (more details *ibid, AP-4288/11*, paragraphs 29-34).

27. Following the above case-law, in a number of subsequent decisions the Constitutional Court concluded that the allegations on 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 and 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 situations identical or similar to the one in the present appeal, are manifestly (*prima facie*) inadmissible (see, the Constitutional Court, Decision on Admissibility and Merits in the case no. *AP-3250/12* of 16 September 2015, *AP-1137/14* of 10 November 2015, *AP-1023/13* of 16 March 2016, *AP-5460/14* of 11 January 2017, and others, all available at www.ustavnisud.ba).

28. In the particular case, the Constitutional Court holds that a different conclusion cannot be reached and, as an alternative to the repetition of the same detailed arguments already presented in its prior decisions, refers the appellant to the aforementioned case-law. In view of the above and the consistent case-law of the European Court of Human Rights and the Constitutional Court, and the positions stated in the present decision, the Constitutional Court considers that there is nothing to indicate that the appellant's allegations relating to the dismissal of her claim for compensation of non-pecuniary damage in the case at hand would raise the constitutional issues to which she referred, *i.e.* there is nothing that suggests that the appellant has an "arguable claim" in terms of Article 18(4) of the Rules of the Constitutional Court. The Constitutional Court, therefore, concludes that the allegations on the violation of the right to a fair trial and the right to property with regard to the compensation of non-pecuniary damage are manifestly (*prima facie*) ill-founded.

29. Furthermore, as regards the appellant's allegations on the violation of the right to an effective remedy referred to in Article 13 of the European Convention, the Constitutional Court points out that the appellant failed to explicitly indicate the rights in connection with which the right under Article 13 of the European Convention was violated. However, it may be concluded on the basis of her appeal that the allegations on the violation of this right are brought into connection with the right to a fair trial and the right to property. In this respect, the Constitutional Court notes that the appellant had and used the possibility to lodge legally prescribed remedies in civil proceedings. The fact that those remedies have not resulted in the appellant's success in the civil proceedings cannot lead to the

conclusion on absence of or ineffectiveness of such legal remedies and the Constitutional Court, therefore, concludes that the allegations on the violation of the right to an effective remedy are manifestly (*prima facie*) ill-founded as well.

30. On the other hand, in assessing *prima facie* admissibility of the allegations in the appeal related to the award of costs in the proceedings, the Constitutional Court observes that the appellant based her allegations on the violation of the right to a fair trial (access to a court) and the right to property on the relevant case-law of the European Court of Human Rights and that she presented arguments which cannot be considered manifestly unfounded. Taking into account all circumstances of the present case, the Constitutional Court holds that it cannot be said that the appeal in this part is manifestly (*prima facie*) ill-founded, and it will examine the merits thereof.

VII. Merits

31. The appellant challenges the aforementioned judgments in the part relating to the awarded costs of the proceedings, claiming that the obligation imposed on her to compensate the respondent for the costs of the proceedings calculated according to the Attorneys' Tariff have violated her right of access to a court as part of the right to a fair trial and the right to property referred to in Article II(3)(e) and (k) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention and Article 1 of Protocol No. 1 to the European Convention as well as the right not to be discriminated against under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention.

Right to property

32. 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.

33. Article 1 of Protocol No. 1 to the European Convention, in the 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.

[...]

34. The appellant's allegations refer to the order obliging her to pay the costs of the RS Attorney's Office in accordance with the Attorneys' Tariff. It is, therefore, beyond dispute that this concerns the appellant's "property" in terms of Article 1 of Protocol No. 1 to the European Convention and the interference with her right to peaceful enjoyment of property.

35. Further, the Constitutional Court reiterates 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 of the same Article, recognizes that the Contracting States are entitled, *inter alia*, 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 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, the European Court, *Sporrong and Lönnorth v Sweden*, Judgment of 23 September 1982, Series A, no. 52, paragraph 61). In the particular case, the Constitutional Court will examine the case in the light of the general rule under the first sentence of the first paragraph of Article 1 of Protocol No. 1 to the European Convention (see, the European Court, *Cindrić and Bešlić v. Croatia*, Judgement of 6 September 2016, paragraph 92).

36. In addition, in order for an interference with the peaceful enjoyment of property to be justified, it must be not only lawful as prescribed by the European Convention but it must serve a legitimate aim in the public interest and must, also, maintain a reasonable proportionality between the means employed and the aim pursued. The interference with the right to property must not go beyond that which is necessary to achieve a legitimate aim and the holders of the right should not be subjected to an arbitrary treatment or required to bear an excessive burden in the realization of legitimate aim (see, the European Court, *Sunday Times v. The United Kingdom*, Judgement of 26 April 1979, Series A, no. 30, paragraph 49 and *Malone v. The United Kingdom*, Judgement of 2 August 1984, Series A, no. 82, paragraphs 67 and 68).

Lawfulness of interference

37. In the present case, the Constitutional Court observes that the interference with the appellant's property is prescribed by the Civil Procedure Code of the Republika Srpska, which satisfies all requirements of "lawfulness" in terms of Article 1 of Protocol No. 1 to

the European Convention: the law was published and available and the provision applied is clear and precise. Furthermore, the appellant did not dispute the lawfulness of the provision on the basis of which she was obliged to reimburse the costs of proceedings, but the application of the relevant provision in her particular case. The Constitutional Court, therefore, has no reason to conclude that the interference with the appellant's property was not lawful, as required under Article 1 of Protocol No. 1 to the European Convention (*op. cit. Cindrić and Others*, paragraph 93).

Existence of legitimate aim

38. The next issue to address is whether the interference with the appellant's peaceful enjoyment of property had a legitimate aim. In this connection, the Constitutional Court notes that the provision of Article 386(1) of the RS CPC comprises a general rule that party that has lost a litigation shall be obliged to reimburse the costs of proceedings, *i.e.* the unsuccessful party has to pay the successful party's costs. In addition, under Article 395(1) and (2) the same rule is also applied in the case where the party is represented by the Attorney's Office, and the costs are calculated in accordance with the lawyers tariff where the fees are in principle calculated in relation to the value of the subject-matter of the dispute, and the value of the dispute generally corresponds to the amount the plaintiff requests by his/her statement of claims.

39. The Constitutional Court points out that the European Court of Human Rights in above cited case C*indrić and Others* noted that the rationale behind the "loser pays" rule is to avoid unwarranted litigation and unreasonably high litigation costs by dissuading potential plaintiffs from bringing unfounded actions without bearing the consequences. The European Court of Human Rights considers that, by discouraging ill-founded litigation and excessive costs, those rules generally pursue the legitimate aim of ensuring the proper administration of justice and protecting the rights of others and that, therefore, the "loser pays" rule cannot in itself be regarded as contrary to Article 1 of Protocol No. 1 to the European Convention (*op. cit. Cindrić and Others*, paragraph 96 with further references). In addition, the European Court also points out that this view is not altered by the fact "that those rules also apply to civil proceedings to which the State is a party, thus entitling it to recover from an unsuccessful party the costs of its representation. The State should not be considered to have limitless resources and should, like private parties, also enjoy protection from ill-founded litigation" (*idem.*).

40. In view of the above positions of the European Court of Human Rights, the Constitutional Court holds that the order to the appellant to reimburse the costs of the proceedings in the particular case pursued a legitimate aim. The Constitutional Court will continue with the consideration of the crucial issue – whether a fair balance was stuck between the general interest and the appellant's right under Article 1 of Protocol No. 1 to the European Convention.

Proportionality between the interference with the right to property and a legitimate aim

41. A already stated above, any interference must achieve a "fair balance" between the demands of the general interest of the community (legitimate aim) and the requirement of protecting the individual's fundamental rights and that is not possible to achieve if the person concerned had to bear a "disproportionate and excessive burden" (see, the European Court, *James and Others v. the United Kingdom*, Judgement of 21 February 1986, Series A, no. 98, paragraphs 46 and 50). In assessing compliance with Article 1 of Protocol No. 1 to the European Convention, the European Court underlined that it must make an overall examination of the various interests in issue, bearing in mind that the European Convention is intended to safeguard rights that are "practical and effective". That further means that the Court "must look behind appearances and investigate the realities of the situation complained of "(*op. cit. Cindrić and Others*, paragraph 98 with further references).

42. The Constitutional Court recalls that the European Court of Human Rights in the case *Cindrić and Others v. Croatia* (paragraph 99) stated that the central issue in that case concerns the fact that the applicants were ordered to reimburse the costs of the State's representation by the State Attorney's Office in an amount equal to an attorneys' fee, because their claim for damages in connection with the killing of their parents had been dismissed in its entirety on the grounds that the State was not liable for damage resulting from the killings committed on the territory of the Krajina, which at the material time had been outside the control of the Croatian authorities. Further, the Court emphasized that the applicants did not challenge the rule contained in the Civil Procedure Act but they rather claimed that the manner in which the rule was applied in the particular circumstances of their case had placed an excessive individual burden on them (paragraph 100).

43. The Constitutional Court observes that the crucial issue indicated by the appellant in the present case is that she was ordered to compensate the costs of the proceedings in respect of the representation of public authority by the RS Attorney's Office in the full amount equal to the attorney's fee. Similar to the conclusions made by the European Court in the case *Cindrić and Others*, the Constitutional Court also notes that under Article 386(1) of the RS CPC there is no flexibility whatsoever in relation to the obligation of the party that lost the litigation to compensate the costs to the adverse party. Namely, that provision prescribes that "the party that has lost the litigation entirely shall be obliged to compensate the costs to the adverse party". In addition, as already stated, under Article 395(1) and (2), the provisions regulating the costs are also applied "to the parties represented by the Attorney's Office", and those costs include "all costs and fees in accordance with [the lawyers tariff]".

44. Turning back to the case *Cindrić and Others v. Croatia,* the Constitutional Court recalls that the European Court (paragraph 103), *inter alia*, underlined that the applicants brought their claim for non-pecuniary damage under the Liability Act. That Act provides that the State is liable for damage resulting from death caused by "acts of terrorism or other acts of violence committed with the aim of seriously disturbing public order by provoking fear or stirring up feelings of insecurity in citizens". After listing the jurisprudence of the Supreme Court which, during the same period when the applicants lodged their lawsuits, granted a number of identical claims, the European Court concluded (paragraph 107) that it cannot therefore be said that the applicants' civil action against the State was devoid of any substance or manifestly unreasonable. The applicants' view that the damage caused to them by the killing of their parents was covered by the Liability Act was not unreasonable, since at that time it was not possible for the applicants to know whether the killing of their parents would be regarded as a terrorist act or as war-related damage.

45. In the case at hand, the Constitutional Court reemphasize that the appellant lodged the lawsuit in which she presented the claim for compensation of non-pecuniary damage that she suffered as a victim of war crime. In the conducted proceedings it is established beyond reasonable doubt that the appellant has a status of camp inmate in Bosnia and Herzegovina because she was detained in the camp in the period between 11 July 1992 and 21 May 1993, but her claim is statute barred given that she filed her lawsuit on 23 May 2007 and the time limit for the statute of limitations started to run as of 19 June 1996. Furthermore, the courts concluded that the longer statute of limitations period under Article 377 of the Law on Obligations cannot be applied in the appellant's case but only in the case of immediate perpetrator of the criminal offence sentenced by a legally binding judgement. In this connection, the Constitutional Court has already indicated in this decision that it consistently takes the same position on a compensation claim for non-pecuniary damage that is statute-barred in such or similar cases is concerned. Furthermore, the Constitutional Court points out that the appellant's allegations are correct that courts in the Federation of Bosnia and Herzegovina, at the time when she filed her lawsuit, were granting such requests, while courts in the Republika Srpska were dismissing such claims. However, the case-law of the courts in the Federation of Bosnia and Herzegovina was subsequently modified and the new stances of the Constitutional Court followed, as reasoned above (see paragraphs 25-27 of the present Decision).

46. In view of the above and given the similar conclusions by the European Court of Human Rights in the case of *Cindrić and Others v. Croatia*, the Constitutional Court considers that it cannot be said that the appellant's lawsuit at the time of filing the claim against the respondent "was devoid of any substance or manifestly unreasonable", as the courts in Bosnia and Herzegovina took different positions as to the application of Article 377 of the Law on Obligations to the public authorities (*mutatis mutandis, op. cit., Cindrić and Others*, paragraph 107). In addition, the Constitutional Court also notes

that the first instance court exempted the appellant from payment of court fees with the reasoning that she "is in a difficult financial situation, and especially evaluated the subject matter of the dispute as well as the value adequate for the collection of fee", and "it is beyond dispute that the funds the appellant has for her sustenance would be reduced by the payment of court fees to such an extent that it would endanger her social security". However, at the same time, the first instance court obliged the appellant to pay the Republika Srpska, represented by the RS Attorney's Office, the full amount of the costs of the other party to the proceedings, *i.e.* BAM 3,000.00, assessed on the basis of the Attorneys' Tariff. In this respect, the Constitutional Court especially points out that the RS Attorney's Office is financed from the Republika Srpska budget and, therefore, is not in the same position as an attorney, as well as that the full amount of the costs awarded is not trivial, especially given the appellant's financial situation on the basis of which the first instance court exempted the appellant from payment of court fees. Taking into account the aforementioned as well as the specific circumstances of the particular case, and especially the fact that, at the time the appellant lodged her lawsuit, the jurisprudence of the courts in Bosnia and Herzegovina was different with regard to the application of Article 377 of the Law on Obligations, related to a longer limitation period and, therefore, the appellant could expect to succeed in the proceedings on her claim, the Constitutional Court holds that the payment of the costs of proceedings in full, as ordered by the courts in the present case, amounts to an excessive burden on the appellant, which is disproportionate to a legitimate aim sought to be achieved.

47. The Constitutional Court, therefore, establishes that the appellant's 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 has been violated.

Right to a fair trial

48. The appellant considers that ordering her to bear the full costs of the proceedings, as determined by the challenged judgements, amounts to a violation of her right of access to a court, as part 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.

49. Article II(3) 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(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. […]

50. The Constitutional Court points out that Article 6(1) of the European Convention secures to everyone the right to have any claim relating to his/her civil rights and obligations brought before a court or tribunal. In this way, that provision embodies the "right to a court", of which the right of access to a court, that is, the right to institute proceedings before a court in civil matters, is one aspect. The right of access to a court is not absolute but may be subject to limitations. As the European Court indicated in its case-law, these limitations are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals". In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Nonetheless, the limitations applied must not restrict 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(1) of the European Convention if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*op. cit., Cindrić and Others*, paragraphs 116-117 with further references; also *mutatis mutandis,* the Constitutional Court, Decision on Admissibility and Merits no. *AP-774/04* of 20 December 2005, paragraphs 417-418, published in the *Official Gazette of Bosnia and Herzegovina* no. 39/06).

51. In the present case, the Constitutional Court accepts that ordering the appellant to pay the costs of the Republika Srpska representation under the Lawyers' Tariff may be interpreted as a restriction hindering the right of access to a court (see, *op. cit., Cindrić and Others*, paragraph 119 with further references). In this connection, the Constitutional Court points out that in the examination of the right to property it has already established that the "loser pays" rule, *i.e.* the one who lost the litigation is obliged to reimburse the costs of proceedings to the adverse party, pursues the legitimate aim of ensuring the proper administration of justice and protecting the rights of others by discouraging ill-founded litigation and excessive costs of proceedings (see paragraph 39 above). Furthermore, as to the question whether such a limitation is proportionate to the legitimate aim pursued, the Constitutional Court refers to its findings in respect of Article 1 of Protocol no. 1 to the European Convention. On the same grounds on which it established the violation of Article 1 of Protocol No. 1 to the European Convention in the particular case, the Constitutional Court reiterates that the order to the appellant to pay the full amount of costs of proceedings to the RS Attorney's Office, as the representative of the respondent Republika Srpska in the instant case, evaluated on the basis of Lawyers' Tariff, amounts to the disproportionate limitation of the appellant's right of access to a court.

52. The Constitutional Court, therefore, holds 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 has been violated.

VIII. Conclusion

53. The Constitutional Court concludes that 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, and the right of access to a court, as an aspect 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 have been violated. This was so as the appellant is obliged to pay the full amount of costs of proceedings to the RS Attorney's Office, which represented the Republika Srpska as respondent party in the proceedings for compensation of non-pecuniary damages suffered by the appellant as a victim of war crime, where the costs are evaluated in the full amount on the basis of Attorney's Tariff. Such a decision of the court places a disproportionate burden on the appellant in the circumstances of the particular case.

54. Having regard to Article 18(4), Article 59(1) and (2) and Article 62(1), (4) and (6) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of the Decision.

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

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP-4077/16

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Ms. Izeta Šehagić, represented by the Association "Vaša prava BiH" from Sarajevo, against the Judgment of the Cantonal Court in Sarajevo, no. 09 0 U 020038 14 U of 23 August 2016, the Ruling of the FBiH Pension and Disability Insurance Institute in Mostar, no. FZ3/2-1069534174 of 20 January 2014 and the Ruling of F BiH Pension and Disability Insurance Institute - Cantonal Administrative Service in Sarajevo, no. FZ 12/2-35-UP-1-8362/13-1069534174 of 6 November 2013

Decision of 11 October 2018

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3)(b) of the Constitution of Bosnia and Herzegovina, Article 57 (2)(b), Article 59 (1) and (2) and Article 62 (1) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in a Grand Chamber and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović, and

Ms. Seada Palavrić

Having deliberated on the appeal of **Ms. Izeta Šehagić** in the case no. **AP-4077/16**, at its session held on 11 October 2018 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Izeta Šehagić is hereby granted.

It is hereby established that there had been a violation of the right to prohibition of discrimination under Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 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 for the Protection of Human Rights and Fundamental Freedoms.

The Judgment of the Cantonal Court in Sarajevo, no. 09 0 U020038 14 U of 23 August 2016 is quashed.

The case shall be referred back to the Cantonal Court in Sarajevo, which is obliged to take a new decision in an urgent procedure, in accordance with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 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 for the Protection of Human Rights and Fundamental Freedoms.

The Cantonal Court is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of delivery of this Decision, of the measures taken in order to enforce this Decision, in accordance with Article 72 (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The Decision is communicated to the Government of the Federation 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 2016, Ms. Izeta Šehagić ("the appellant") from Sarajevo, represented by the Association "Vaša prava BiH" from Sarajevo, 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. 09 0 U 020038 14 U of 23 August 2016, the Ruling of the FBiH Pension and Disability Insurance Institute in Mostar ("the F BiH Institute"), no. FZ3/2-1069534174 of 20 January 2014 and the Ruling of F BiH Pension and Disability Insurance Institute - Cantonal Administrative Service in Sarajevo ("the Cantonal Administrative Service"), no. FZ 12/2-35-UP-1-8362/13-1069534174 of 6 November 2013.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the Cantonal Court, the F BiH Institute and the Cantonal Administrative Service were requested on 19 July 2018 to submit their respective replies to the appeal.

3. The Cantonal Court submitted its reply to the appeal on 25 July 2018. The F BiH Institute submitted its reply on 22 August 2018. The Cantonal Administrative Service failed to submit a reply to the appeal.

III. Facts of the Case

4. 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.

5. On 24 July 2013, the appellant filed a request with the Cantonal Administrative Service for the recognition of the right to a family pension following the death of Mr. Mehmed Ferhatović, based on their common-law marriage.

6. The Ruling of the Cantonal Administrative Service no. FZ 12/2-35-UP-1-8362/13-1069534174 of 6 November 2013, which was upheld by the Ruling of the F BiH Institute of 20 January 2014, dismissed as unfounded the appellant's request for the recognition of the right to family pension. It follows from the reasoning provided for the ruling that, in the procedure conducted, based on the evidence presented and the assessment thereof in accordance with the provisions of Article 9 of the Law on Administrative Procedure, it was established that Mr. Mehmed Ferhatović, born on 11 September 1950, had been a beneficiary of the disability pension with the FBiH Institute, in accordance with the provisions of the Law on Pension and Disability Insurance. He was a beneficiary as of 30 September 2003 up until 1 July 2013, when he passed away. It was also established that the appellant had lived in a common-law marriage with the late beneficiary Mr. Mehmed Ferhatović. The Cantonal Administrative Service referred to the provisions of Article 60 of the Law on Pension and Disability Insurance, which prescribes that "a family pension may be granted to the members of the family: a spouse, children born during a marriage, outside marriage, adopted children, stepchildren who were supported by the beneficiary, grandchildren and other children without parents who were supported by the beneficiary up until his death. A family pension may be granted to a spouse from a divorced marriage if a court decision established the right to support." Assessing that the cited Article 60 of the Law on Pension and Disability Insurance prescribes that a family pension may be granted to a spouse as well as to a divorced spouse provided that they prove that a court decision established their tight to receive support, and that the mentioned article did not recognize the right to a family pension in favour of a common-law partner, the Cantonal Administrative Service dismissed the appellant's request as ill-founded.

7. The Cantonal Court rendered in an administrative dispute the Judgment no. 09 0 U 020038 14 U of 23 August 2016 dismissing the lawsuit. In the reasoning of the judgment the Cantonal Court stated, among other things, that it follows indisputably from the information available in the administrative case file that the appellant had lived in a common-law marriage with the late Mr. Mehmed Ferhatović. It also stated that since the provisions of Article 60 of the Law on Pension and Disability Insurance clearly prescribe who is entitled to a family pension, and since the said right has not been prescribed in favour of a common-law partner, the Cantonal Court concluded that the appellant does not meet the requirements for the acquisition of the right to family pension in accordance with the provisions of Article 60 of the Law on Pension and Disability Insurance.

8. In particular, the Cantonal Court referred to the provisions of Article 60 of the Law on Pension and Disability Insurance and, in that respect, concluded that the defendant (the F BiH Institute) and the first instance administration authority had correctly established

that the appellant does not meet the requirements for the recognition of the right to family pension after the death of Mr. Mehmed Ferhatović. He passed away on 1 July 2013 (Death Certificate in the name of Mehmed Ferhatović, kept for Stari Grad Sarajevo under ordinal number 164 for the year 2013). This was so, as the appellant failed to prove that a marriage had existed between her and Mehmed Ferhatović. In addition, she failed to prove that, accordingly, provided she met other requirements prescribed by law, she is entitled to a family pension, in accordance with the provisions of Article 60 of the Law on Pension and Disability Insurance.

9. In addition to the aforementioned, the Cantonal Court indicated that the appellant's references to the Law on Family Relations (that a common-law marriage is equal to a marriage), and indications in the lawsuit and appeal that the purpose of Article 60 of the Law on Pension and Disability Insurance is to ensure to the closest family circle of the beneficiary the income in the event of a death of the beneficiary, which includes the plaintiff in accordance with the provision of Article 2 of the Family Law of F BiH, in the opinion of the court, could not have had a bearing on a different solution of this administrative matter. This was so "given that the notion of a widower or a widow with a significance attributed to it by the Law on Pension and Disability Insurance presumes the existence of a marriage until the moment of death of one of the spouses, as a pension and disability insurer." Therefore, the Cantonal Court concluded that the appellant's allegations indicating that a marriage and a common-law marriage are equal in accordance with the provisions of the Law on Family Relations did not have a bearing on taking a decision in the appellant's favour. Further, this was so because the applicable provisions in the present case are those of the Law on Pension and Disability Insurance. In view of the aforementioned, the Cantonal Court dismissed the lawsuit as ill-founded, in accordance with the provisions of Article 36, paragraphs 1 and 2 of the Law on Administrative Disputes.

IV. Appeal

a) Allegations stated in the appeal

10. The appellant holds that the challenged decisions violated her right under Article II (3)(e), (f), (k) and Article II (4) of the Constitution of Bosnia and Herzegovina and Articles 6, 8 and 14 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. The allegations about the violation of the mentioned rights come down to the allegations that the substantive law had been applied to the established facts of the case and interpreted arbitrarily. Namely, the appellant deems that she, as a common-law partner of the late insurance holder Mehmed Ferhatović, according to her factual situation, is not different from "a spouse on a paper". In that respect, the appellant indicated that the purpose of Article 60 of the Law on Pension and Disability

Insurance is to ensure to the closest family circle of the deceased person the income in the event of his death. She is of the opinion that she, as a common-law partner, "falls in that circle", and that she is entitled to a family pension under Article 60 of the Law on Pension and Disability Insurance. In addition, the appellant indicated that the procedure before the competent administrative authorities and the Cantonal Court "had lasted for an unjustifiably long period of time", thus she deems that her right to a fair trial within a reasonable time was violated.

b) Reply to the appeal

11. In the reply to the appeal, the Cantonal Court indicated that the appellant's rights she referred to in the appeal had not been violated before that court, because the judgment had been rendered in accordance with the applicable regulations and based on the documents attached to the case file. It was proposed that the appeal be dismissed as ill-founded.

12. The F BiH Institute stated that the challenged decisions were based on the correct application of the substantive law. Therefore, it held there had been no violation of the constitutional rights that the appellant referred to in the appeal.

V. Relevant Law

13. The **Family Law of F BiH** (*Official Gazette of FBiH*, 35/05, 41/05 and 31/14), in so far as relevant, reads as follows:

Article 2

The family, for the purpose of this Law, is a community of life of parents and children, and other blood relatives, family by marriage, adoptive parents and adopted children, and persons from a common-law marriage if they live in a joint household.

Article 3

The common-law marriage, for the purpose of this Law, is a community of life of a woman and a man who are not married or in a common-law marriage with another person, which has lasted for a minimum of three years, or less if a child is born in such union.

Article 213

(1) Mutual support of marriage and common-law partners, parents and children, and other relatives shall be their responsibility and right when so provided by this Law.

Article 224

A marriage partner who does not have sufficient means of subsistence or is unable to earn them from their property, while he/she is incapable of work or is unable to get employed, shall be entitled to support by their marriage partner commensurate with their abilities.

Article 230

A common-law partner who meets the requirements referred to in Articles 3 and 224 of this Law shall be entitled to support by another common-law partner after the common-law marriage has ended.

Article 263

(1) The property acquired by common-law partners through work during common-law marriage, which meets the requirements referred to in Article 3 of this Law, shall be considered their property in common-law marriage.

(2) The provisions of this Law on Marital Property shall apply to the property referred to in paragraph 1 of this Article.

14. The **Law on Pension and Disability Insurance** (*Official Gazette of F BiH*, 29/98, 32/01, 73/05, 59/06, 4/09 and 55/12), in so far as relevant, reads as follows:

Article 2

The rights under the pension and disability insurance are as follows: the right to old-age pension, the right to disability pension, the right to family pension, the rights of beneficiaries with altered work capacity, the right on the basis of physical disability.

Article 60

The family pension may be received by the following family members: a spouse, children born in wedlock, out of wedlock, adopted children, stepchildren supported by the beneficiary, grandchildren and other children without parents supported by the beneficiary until his/her death.

The family pension may be also received by a spouse from a divorced marriage, if a court decision established the right to spousal support.

15. The **Law on Pension and Disability Insurance** (*Official Gazette of F BiH*, 13/18), in so far as relevant, reads as follows:

Article 69
(Family members of the late beneficiary)

The family members of the late beneficiary, or the pension holder, are:

a) a spouse (a widow, or a widower),

b) a divorced spouse, if a legally binding court judgment awarded the right to spousal support,

c) a child born in wedlock, or out of wedlock, and adopted child,

d) a stepchild, if supported by the late beneficiary, or pension holder,

e) a grandchild without both parents if supported by the late beneficiary, or pension holder.

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 court in Bosnia and Herzegovina.

17. Pursuant to Article 18 (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.

18. In the present case, the subject matter challenged by the appeal is the Judgment of the Cantonal Court, no. 09 0 U 020038 14 U of 23 August 2016, against which there are no other effective remedies available under the law. Furthermore, the appellant received the challenged judgment on 25 August 2016 and the appeal was lodged on 24 October 2016, *i.e.* within 60-days' time limit, as provided for by Article 18 (1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18 (3) and (4) of the Rules of the Constitutional Court because there is no formal reason rendering the appeal inadmissible nor is it manifestly (*prima facie*) ill-founded.

19. Having regard to the provisions of Article VI (3)(b) of the Constitution of Bosnia and Herzegovina, Article 18 (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that the respective appeal meets the admissibility requirements.

VI. Merits

20. The appellant challenges the decisions by claiming that they are in violation of her rights under Article II (3)(e), (f), (k) and Article II (4) of the Constitution of Bosnia and Herzegovina, as well as Articles 6, 8 and 14 of the European Convention, and Article 1 of Protocol No. 1 to the European Convention, including the right to a decision within a reasonable time. Given the allegations made in the appeal and the fact that the appellant referred to the violation of the prohibition of discrimination under Article 14 of the European Convention in conjunction with the right to property under Article 1 of Protocol No. 1 to the European Convention, the Constitutional Court will consider the appellant's allegations in the light of 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 1 of Protocol No. 1 to the European Convention.

Non-discrimination in conjunction with the right to property

21. 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.

22. 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.

23. 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:

[...]

(k) The right to property.

24. 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 appellant deems that her 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 were violated, because of the fact that she, as a common-law partner, was unable to acquire the right to family pension under the Law on Pension and Disability Insurance, although the common-law marriage is made completely equal to the marriage under the Family Law of the Federation of BiH.

26. In that connection, the Constitutional Court recalls that it has discussed an almost identical legal issue in the Decision no. *AP-4207/13* (see, the Constitutional Court, Decision on Admissibility and Merits no. *AP-4207/13* of 30 September 2016, available on the website of the Constitutional Court: www.ustavnisud.ba). Namely, the disputable

matter in the mentioned decision was whether the appellant may, as the testator's common-law partner, be recognized the status of a legal heir who is in the first line of hereditary succession. In that decision, the Constitutional Court concluded that "by applying the 1980 Inheritance Law without respect for the determination in the 2005 Family Law of F BiH on consistent equalization of the common-law marriage lasting for more than three years with the marriage concerning all rights and obligations, including property rights, and by dismissing the appellant's request that he be recognized the right to take part in the probate proceedings as an heir in the first line of hereditary succession, the courts violated the prohibition of 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."

27. In the mentioned decision, the Constitutional Court indicated, among other things, that "the Family Law of F BiH was passed in 2005 and that the legislator, having accepted the fact that the common-law marriage, under the former Family Law, was legally recognized equal to marriage, as well as the evolution of social relationships in general, and families and family ties, consistently regulated this equality in respect of all rights and obligations, including property rights, too. On the other hand, the Inheritance Law, which was in force at the time when the decisions were adopted, had been passed in 1980. It had never been amended in order to recognize the equality of these two unions, not even after the new Family Law of F BiH was passed, up until 2014 when the new Inheritance Law of F BiH was passed. Under the mentioned Law, Article 9 explicitly prescribes that a testator will be inherited by his/her common-law partner who has the same right to inheritance as married partners, provided that the common-law marriage meets the conditions prescribed under the Family Law of F BiH and lasted until the death of the testator."

28. Also, in the cited case the Constitutional Court took into account that "the proponent of the new Inheritance Law of the Federation of BiH and then the legislator adopting the new Law recognized the discrepancy between the two laws and concluded that such discrepancy resulted in discriminatory treatment of common-law partners and removed the discrepancy by the new regulation. Such conduct, in the opinion of the Constitutional Court, falls within a wide margin of appreciation that the State has in regulating such relationships. In addition, the Constitutional Court underlines that it is irrelevant to assess whether or not one law is a *lex specialis* when compared to the other. Namely, the Family Law of F BiH regulates, *inter alia*, the matters of the family and family relationships and makes equal the common-law marriage, lasting for more than three years, to marriage in respect of rights and obligations, while the inheritance law regulates the issue as to family members who are entitled to inherit from the testator. In such a situation, it was reasonable to expect, as already confirmed in the legislator's new inheritance law, that the common-law couples were made equal to the married couples also in respect of inheritance."

29. Furthermore, the Constitutional Court recalls that in the cited decision it kept in mind that "the 1980 Inheritance Law was in effect at the time when the challenged decisions were passed and that that Law did not recognize the inheritance rights to common-law couples. However, pursuant to Article II (4) of the Constitution of Bosnia and Herzegovina, the European Convention applies directly in Bosnia and Herzegovina and has priority over all other law. The aforementioned, *inter alia*, means that the laws that are inconsistent with the European Convention have to be applied in such a manner so as not to violate the rights under the European Convention. Therefore, in a situation where it is undisputed that the common-law marriage between the appellant and the testator started at the time when the 2005 Family Law of F BiH had already been in force, which not only included the principle of equality between the common-law marriage and marriage from the former Family Law, but also consistently made equal these two unions in respect of rights and obligations, and given that the common-law marriage between the appellant and the testator lasted until the testator's death and that the legislator itself, when passing the new Inheritance Law, pointed out that a difference in treatment between common-law and married partners regarding inheritance was discriminatory, the Constitutional Court holds that the 1980 Inheritance Law was not applied by consistently complying with 'the determination in the family law on the equal treatment of the marriage and common-law marriage'."

30. By connecting the aforementioned positions from the cited Decision no. *AP-4207/13* with the respective case, the Constitutional Court is of the opinion that they are applicable in the present case too. Specifically, the Constitutional Court indicates that the challenge decisions indisputably established that the common-law marriage existed between the appellant and the late Mehmed Ferhatović, which lasted for 17 years. In addition, it met the requirements to be considered a common-law marriage within the meaning of the relevant provisions of the Family Law. The ordinary court and the administration authorities had consistently indicated in the challenged decisions that the common-law marriage was made equal to the marriage under the Family Law. However, they concluded that the correct interpretation of this provision might not result in a conclusion that this union was made equal to the marriage concerning everything, but only concerning certain rights. In doing so, they referred to the provision of Article 60 of the Law on Pension and Disability Insurance, thereby concluding that the mentioned law is a *lex specialis,* which "did not provide a possibility for the recognition of the right to a family pension to a common-law partner."

31. The Constitutional Court observes that in the present case, at the time of the adoption of the challenged decisions, the 1998 Law on Pension and Disability Insurance had been in force, which, following its subsequent amendments neither mentioned nor granted rights to common-law partners. However, the Constitutional Court reiterates that, under Article II (2) of the Constitution of Bosnia and Herzegovina, the European Convention shall apply directly in Bosnia and Herzegovina and shall have priority over all other law. That, among

other things, means that the laws, which have not been harmonized with the European Convention have to be applied in such a way so as not to violate the rights referred to in the European Convention. This is to say there is a situation when it is indisputable that the common-law marriage between the appellant and Mehmed Ferhatović, as the insurance holder, had started and lasted during the time when the 2005 Family Law of F BiH had been in force, which had consistently made equal the marriage and common-law marriage concerning rights and obligations. In addition, it is undisputable that the said union had lasted up until the death of Mr. Mehmed Ferhatović. The Constitutional Court, by observing the principles laid down in the cited Decision no. *AP-4207/13* deems that the 1998 Law on Pension and Disability Insurance was not applied so as to consistently comply with "the determination set forth in the family law on equal treatment of the marriage and common-law marriage". Therefore, the Constitutional Court deems that the appellant cannot suffer the detrimental consequences of the fact that the relevant laws had not been harmonized before in order to implement the consistent determination of the legislator to remove discrimination in the treatment of common-law and married partners, also with respect to the exercise of the right to a family pension.

32. In view of the aforementioned, the Constitutional Court deems that the application of the 1998 Law on Pension and Disability Insurance in a way as done by the ordinary courts and administration authorities in the challenged decision did not have a reasonable and objective justification. As a result thereof, the appellant had been deprived in a discriminatory manner of a possibility to acquire the right to a family pension.

33. In addition, the Constitutional Court emphasizes that the new Law on Pension and Disability Insurance was published on 21 February 2018 in the *Official Gazette of F BiH*, 13/18, which, again, failed to take into account the common-law marriage, as it also failed to regulate the acquisition of the rights when it comes to common-law partners. Therefore, the Constitutional Court deems it beneficial for this decision to be communicated to the Government of the Federation of BiH for the purpose of harmonizing the Law on Pension and Disability Insurance with the Family Law concerning the rights and obligations of common-law partners.

34. Therefore, the Constitutional Court holds that in the present case there is a violation of the prohibition of 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.

Other allegations

35. Given the conclusion as to the 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 holds that there is no need to consider separately the appellant's allegations as to the violation of the rights under Article II (3) (e), (f) and (k) of the Constitution of Bosnia and Herzegovina and Articles 6 and 8 of the European Convention or Article 1 of Protocol No. 1 to the European Convention.

VIII. Conclusion

36. The Constitutional Court concludes that the ordinary court and administration authorities violated the prohibition of 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. They have done so by applying the 1998 Law on Pension and Disability Insurance without observing the determination referred to in the 2005 Family Law on consistently making equal the common-law marriage (which lasted for 17 years) with the marriage in terms of all rights and obligations, including property rights. In addition, they have done so by dismissing the appellant's request that she, as a member of the family of the deceased insurance holder, is recognized the right to a family pension.

37. Having regard to Article 59 (1) and (2) and Article 62 (1) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP-2916/16

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Ms. Ljiljana Zimonjić from Belgrade, Republic of Serbia, represented by Mr. Nikica Gržić, a lawyer practicing in Sarajevo, against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, no. 65 0 P 46060 15 Rev 2 of 19 April 2016

Decision of 31 January 2019

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić, and

Mr. Giovanni Grasso

Having deliberated on the appeal of **Ms. Ljiljana Zimonjić,** in the case no. **AP-2916/16,** at its session held on 31 January 2019 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Ms. Ljiljana Zimonjić is hereby granted.

A violation of the right to property under Article II (3)(k) of the Constitution of Bosnia a Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedom is hereby established.

The judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, no. 65 0 P 046060 15 Rev 2 of 19 April 2016 is hereby quashed.

The case shall be referred back to the Supreme Court of Bosnia and Herzegovina, which is to follow an 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 Federation of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months from the date of delivery of this Decision, about the measures taken in order to enforce this Decision, in accordance with Article 72 (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 11 July 2016, Ms. Ljiljana Zimonjić ("the appellant") from Belgrade, Republic of Serbia, represented by Mr. Nikica Gržić, a lawyer practicing in Sarajevo, filed 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. 65 0 P 46060 15 Rev 2 of 19 April 2016.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 (2) and (3) of the Rules of the Constitutional Court, the Supreme Court, Cantonal Court of Sarajevo, Municipal Court of Sarajevo ("the Municipal Court") and Federation of Bosnia and Herzegovina, represented by the Federation Public Attorney's Office Sarajevo ("the defendant") were requested on 24 and 25 April 2018 to submit their respective replies to the appeal.

3. The Supreme Court, Cantonal Court and Municipal Court and defendant submitted their respective replies in the period from 26 April 2018 to 22 May 2018.

III. Facts of the Case

4. 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.

Introductory remarks

5. In inheritance decision no. 65 0 O 177704 10 0 of 7 July 2011, the Municipal Court of Sarajevo established that the estate of deceased R.Z. ("the appellant's predecessor") consisted of the rights and obligations arising out of the Purchase Contract - the purchase of an apartment allocated by the Housing Fund of the Yugoslav People's Army

("JNA"), which was concluded between the Socialist Federative Republic of Yugoslavia ("SFRY) – Socialist Alliance of People's Defence ("SSNO") – Military Institution for Management of the JNA Housing Fund "Beograd" as a seller ("the seller") and the appellant's predecessor as a buyer. Also, the court established that the appellant was declared legal heir to the estate mentioned above.

As to the proceedings concluded with the contested decisions

6. In judgment no. 65 0 P 046060 12 P 2 of 24 April 2015, the Municipal Court dismissed as a whole a claim lodged by the appellant's predecessor. In the claim, he requested the court to order the defendant to pay him the amount of BAM 139,800.00 and default interests as of 21 July 2007 until the payment in full and to reimburse him the procedure costs.

7. The Municipal Court noted in the reasons for its judgment that on 14 February 1992 the appellant's predecessor and seller had concluded a valid contract on the purchase of the apartment located in Sarajevo. However, the appellant's predecessor had not registered the right of ownership of that real property, since a legally binding decision had been taken at an earlier point. By that decision, it was established that he was not entitled to do so, since he continued serving in the Yugoslav Amy after 19 May 1992 and 14 December 1995. Thus, he could not be regarded as displaced person. In order to act in compliance with the Decision on Admissibility and Merits of the Human Rights Commission within the Constitutional Court of BiH, no. *CH/00/4442* of 8 June 2005, wherein the defendant was ordered to take further steps without delay and to secure the payment of compensation under Article 392, paragraph 2 of the Law on Sale Apartments with Occupancy Rights (the "Law on Sale of Apartments"), in 2007 the defendant paid the appellant's predecessor the amount of 21,436.46 EUR, that is BAM 41,968.00 as a compensation for the apartment. The appellant's predecessor returned the mentioned amount as it considered it inappropriate in terms of the compensation provided for in Article 39e of the Law on Sales of Apartments, given the fact that he was of the opinion that he was entitled to the market value of the apartment. During civil proceedings wherein the appellant's predecessor claimed compensation for the market value of the apartment, it was established, through a court civil engineering expert, that the amount of the market value of the apartment was BAM 139,800.00. The parties did not raise any objection to that evidence. Next, it was established during the proceedings that the appellant's predecessor and the appellant following his death had found a permanent solution to her housing problem as she was granted one and a half -bedroom apartment for an undetermined lease period in Belgrade. She was granted the apartment based on the ruling of the Housing Commission (UP-1 number 11327-35/98 of 12 July 2012), which was considered a right equivalent to the occupancy right, given the fact that the apartment could be purchased in accordance with the same principle as the apartments with occupancy right.

8. In this connection, the Municipal Court noted that given the established facts, which were not disputed between the parties, the issue arose whether the appellant's predecessor had the right to receive compensation under Article 39e of the Law on Sale of Apartments, and, if he did, whether the amount of the apartment was equal to the market value of the real property or some other amount. In this connection, the Municipal Court pointed to the provision of Article 39e of the Law on Sale of Apartments, Decision on Admissibility and Merits of the Constitutional Court, *no. U-15/11* of 30 March 2012, case law of the European Court of Human Rights (the "European Court") in the cases of *Mara Mandić and Others v. Bosnia and Herzegovina* (Application no. 1495/07) and *Ivan Ćaldović and Others v. Bosnia and Herzegovina* (Application no. 44212/05). Next, the Municipal Court also noted that the defendant had failed to pass appropriate regulations, i.e. amendments to the regulations related to the amount of compensation referred to in Article 39e of the Law on Sale of Apartments in compliance with the decision of the Constitutional Court of BiH *no. U-15/01*, which was its responsibility as a legislative authority.

9. Taking into account the aforementioned, the Municipal Court concluded that the appellant's predecessor was not entitled to the market value of the apartment, which was the subject-matter of the valid Purchase Contract – the purchase of real property, dated 14 February 1992, as the appellant's predecessor had acquired the right equivalent to the occupancy right in Serbia. Next, bearing in mind the views expressed by the Constitutional Court of BiH and European Court (their decisions are binding) – namely, that any category of persons who had legally valid contracts but did not have the right to register their right and repossess apartment should have the right to receive compensation from the defendant – the Municipal Court concluded that the appellant's predecessor was entitled to compensation in the present case. However, the appellant's predecessor had failed to present any other allegation or evidence as to the amount of compensation he was entitled to (except the market value), and in that regard, as explained by the court, there were no criteria nor were there any regulation. In this connection, the Municipal Court noted that the ordinary court did not have jurisdiction (notably not the first-instance court) to take on the legislative role, to create regulations and to determine independently, without any criteria, compensations to be afforded to that category of persons in such cases. If the ordinary courts had acted so, law would have been applied arbitrary and the persons belonging to the same category would likely have been treated differently. In fact, they would likely have been placed in an unequal position, which was inadmissible as the disputed situations with respect to military apartments' property issues would have only been prolonged. In this connection, the Municipal Court concluded that there was no evidence indicating the amount of the claim, that it was neither determined nor determinable. This was the reason why the claim had been dismissed as a whole. Furthermore, the Municipal Court noted that Article 127 of the Civil Procedure Code could not be applied, since that issue had to be resolved in a uniform manner applied to all persons concerned. This was the defendant's obligation to be met as soon as possible.

10. In judgment no 65 0 P 046060 15 Gž of 22 September 2015, the Cantonal Court dismissed an appeal of the appellant's predecessor as ill-founded. In the reasons for the mentioned judgment, the Cantonal Court presented the reasons for the first-instance judgment and noted that the first-instance court had correctly found that the appellant's predecessor was not entitled to the market value of the disputable apartment as he had acquired a right equivalent to the occupancy right in Serbia. Also, the Cantonal Court noted that the first-instance court had correctly dismissed the claim as a whole as the appellant had failed to submit evidence proving the amount of the claim, as noted above (*ibid.*).

11. In judgment no. 65 0 P 046060 15 Rev 2 of 19 April 2016, the Supreme Court dismissed a revision-appeal of the appellant's predecessor. Having presented the facts established by the lower-instance courts, the Supreme Court noted, *inter alia,* that the requirements for filing a revision-appeal on the ground of erroneous application of substantive law were not met. In this connection, the Supreme Court noted that given the content of the provision of Article 39e, paragraphs 1 and 2, of the Law on Sale of Apartments, the appellant's predecessor was entitled only to pecuniary compensation for the apartment in question. In addition, such a compensation had been finally awarded to him in a decision of the Commission for Human Rights with the Constitutional Court of BiH but he had refused to accept it. The mentioned provision of Article 39e of the Law on Sale of Apartments, as further explained, did not provide for a pecuniary compensation at the market price at the time of reimbursement, but only for funds paid in accordance with the contract, raised by easy-access account interest rate. However, in the case at hand, that was not the amount claimed, i.e. BAM 139,800.00, since that amount was the market price of the apartment in question, as found by the court expert. In this connection, the Supreme Court observed that the appellants' predecessor had found a solution to his housing problem as he had been allocated a one and a half bedroom apartment taken on lease in Belgrade. Thus, he was not entitled to the market value of the apartment in question.

IV. Appeal

a) Allegations from the appeal

12. The appellant complains that the challenged decisions are in violation of her right to a fair trial under Article II (3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"). In addition, they are 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. The appellant primarily complains of the arbitrariness in the conclusion that the amount indicated in the specified claim was neither proven nor determinable considering the appellant had

determined that the amount indicated in the claim corresponded to the market price, BAM 41,968.00. However, the appellant's predecessor had refused that amount by considering it inappropriate. In addition, the appellant alleges that the arbitrariness in the conduct of the ordinary court is reflected in the fact that according to the binding Decision on Admissibility and Merits of the Commission for Human Rights with the Constitutional Court of BiH, *no. CH/00/4341, CH/00/4437* and *CH/00/4442*, the defendant was ordered to take all necessary steps to secure urgent payment of compensation to the appellant's predecessor under Article 39e, paragraph 2 of the Law on Sale of Apartments. According to the mentioned decision, the appellant's predecessor was entitled to the compensation for the apartment purchased from the former JNA, whereas the ordinary courts took a different decision. In this connection, the appellant complains that such conduct of the defendant and ordinary courts deprived her of property and, thus, violated her right to property under Article 1 of Protocol No. 1 to the European Convention. Taking into account the aforementioned, the appellant proposed that the Constitutional Court find a violation of the mentioned rights, quash the contested judgment and refer the case back to the Supreme Court for a new decision.

b) Response to the Appeal

13. The Supreme Court alleged that it maintained the reasons for its decision upon revision-appeal and that the violations of the rights the appellant complained of in the appeal had not occurred.

14. The Cantonal Court alleged that the violations of the rights the appellant complained of in her appeal had not occurred.

15. The Municipal Court alleged that it had considered the points of facts and law of the dispute in question and had taken into account the decisions of the Constitutional Court and European Court regarding the matter of military apartments and concluded that the ordinary court did not have jurisdiction to decide on the amount of the compensation in question. It also alleged that any decision in this regard would be arbitrary and might be discriminatory against the persons in the same legal situation. Thus, given the fact that there were no precise and clear criteria to determine the compensation in question and established fact that the appellant was not entitled to the market price of the military apartment, the Municipal Court noted that it had not acted unlawfully when it had dismissed the appellant's claim as exhaustively noted in the reasons for the first-instance judgment.

16. The defendant alleged that the appellant, having left the apartment in Sarajevo, had acquired an equivalent right based on a newly created housing fund and Ministry of Defence of the Republic of Serbia, which was the reason why it considered that the case related to a duplicate solution to the housing by the same housing fund. The defendant alleged that such an acquisition of occupancy right would be in direct contravention of the national jurisdiction. Furthermore, in the defendant's opinion, from the aspect of the

points of facts and law, the present case was identical to the cases of *Aleksić Tihomir v. Bosnia and Herzegovina* (Application no. 38233/05), *Mandić and Others v. Bosnia and Herzegovina* (Application no. 1495/07) and case in the Constitutional Court's decision no. *AP-1207/08* of 23 November 2012. Taking into account the previously mentioned, the defendant believes there are obviously no violations the appellant refers to.

V. Relevant Law

17. The **Law on Sale of Apartments with Occupancy Right** (*Official Gazette of the Federation of Bosnia and Herzegovina,* 27/97, 11/98, 22/99, 27/99, 7/00, 32/01, 61/01, 15/02, 54/04, 36/06, 45/07, 51/07, 72/08, 23/09 and 5/10), in the relevant part, reads:

Article 39

It shall be considered that the holder of the right under the contract of purchase and sale of the apartment at the disposal of the FBiH Ministry of Defense, entered with the former SSNO in accordance with the Law on Securing Housing for the JNA (Official Gazette of the SFRY, 84/90) and the by-laws for its implementation, has concluded a legally binding contract if the contract of purchase and sale of the apartment was made in writing and entered into before 6 April 1992 and if it was submitted for verification to the competent tax administration and if the purchase price was established in accordance with the then applicable Law and paid in full within the time limit specified in the contract.

Article 39a

The Government of the Federation of Bosnia and Herzegovina shall issue an order for the registration of the occupancy right holder as the owner of the apartment with the competent court if the occupancy right holder over the apartment at the disposal of the FBiH Ministry of Defence uses the apartment legally and if s/he entered into a legally binding contract of purchase and sale of the apartment with the SSNO before 6 April 1992 in accordance with the laws referred to in Article 39 of this Law.

Article 39e

The holder of the right under the contract of purchase and sale, who entered into the legally binding contract referred to in Article 39(1) of this Law and who abandoned the apartment in the Federation of Bosnia and Herzegovina and then acquired a new occupancy right or a right commensurate with that right under the same housing fund or new housing funds of armed forces established by the countries created from the former SFRY, upon acquiring a new apartment, shall not be entitled to register the right of ownership over that apartment.

Instead of the registration of the ownership right, the holder of the right under the contract of purchase and sale referred to in paragraph 1 of this Article shall be entitled to compensation referred to in paragraph 3 of this Article.

Instead of the registration of the ownership right under the concluded contract, the holder of the right under the contract of purchase and sale, who entered into the legally binding contract referred to in Article 39(1) of this Law and who remained in military service of any armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995 and who has not acquired a new occupancy right or a right commensurate with that right, shall be entitled to compensation payable by the Federation of Bosnia and Herzegovina in the amount paid under the contract, plus the accrued interest payable on ordinary deposits.

Instead of the registration of the ownership right over the apartment, the holder of the right under the contract of purchase and sale, who entered into the legally binding contract referred to in Article 39(1) of this Law and whose apartment has been occupied in accordance with the applicable laws by a user who has entered into an agreement on use of the apartment or a contract of purchase and sale of the apartment, shall be entitled to compensation payable by the Federation of Bosnia and Herzegovina as specified in paragraph 2 of this Article, apart from the holder of the right under the contract of purchase and sale referred to in paragraph 1 of this Article.

Remark: *In its ruling on the failure to enforce decision, no. U-15/11 of 16 January 2013, which was published in the Official Gazette of Bosnia and Herzegovina, 11/13 of 12 February 2013, the Constitutional Court established that the Parliament of the Federation of Bosnia and Herzegovina had failed to enforce the decision of the Constitutional Court of Bosnia and Herzegovina no. U-15/11 of 30 March 2012, and it established that the provisions of Article 39e, paragraphs 3 and 4 of the Law on Sale of Apartments with Occupancy Rights (Official Gazette of the F BiH, 27/97, 11/98, 22/99, 27/99, 7/00, 32/01, 61/01, 15/02, 54/04, 36/06, 45/07, 51/07, 72/08, 23/09 and 5/10), in the part related to the determination of compensation, would cease to be in force on the date following the date of publishing that decision in the Official Gazette of Bosnia and Herzegovina.*

18. The **Law on Cessation of the Application of the Law on Abandoned Apartments** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01, 15/02, 24/03, 29/03 and 81/09), in its relevant part, reads:

Article 3.a

As an exception to Article 3, paragraphs 1 and 2 of this Law, regarding apartments declared abandoned on the territory of the Federation of Bosnia and Herzegovina, and which are at the disposal of the Federation Ministry of Defence, the occupancy right holder shall not be considered a refugee if on 30 April 1991 s/he was in active service in the SSNO (Federal Secretariat for National Defence), JNA (i.e. not retired) and was not a citizen of Bosnia and Herzegovina according to citizenship records, unless s/he had residence approved to him or her in the capacity of a refugee, or other equivalent protective status, in a country outside the former SFRY before 14 December 1995.

A holder of an occupancy right referred to in paragraph 1 of this Article, who acquired a new occupancy right or a right equivalent to that right based on the same housing fund of the JNA or the funds of the armed forces will not be considered a refugee if s/he remained in the active military service of any armed forces of the states created on the territory of the former SFRJ shall net be considered a refugee nor will such a person have the right of return of apartment.

19. The **Civil Procedure Code** (*Official Gazette of the F BiH*, 53/03, 73/05, 19/06, 98/15), in its relevant part, reads as follows:

Article 127

Should it be established that a party is entitled to damages, monetary sum or things that are not unique in themselves and are replaceable, but the amount of money or the quantity of things cannot be precisely determined or might be determined only with disproportionate difficulties, the court shall decide on the matter according to its evaluation.

VI. Admissibility

20. 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.

21. In accordance with Article 18(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.

22. In the present case, the appellant challenges the judgment of the Supreme Court, no. 65 0 P 046050 15 Rev of 19 April 2016 against which there are no other effective remedies available under the law. Furthermore, the challenged judgment was served on the appellant via her attorney on 12 May 2016, and the appeal was filed on 11 July 2016, i.e. within a time limit of 60 days as prescribed by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court as there is no formal reason rendering the appeal inadmissible or manifestly (*prima facie*) ill-founded.

23. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18(1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court found that the appeal concerned meets the requirements as regards the admissibility thereof.

VII. Merits

24. The appellant claims that the challenged decision is in violation of 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 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.

25. Taking into account the appellant's allegations, the Constitutional Court notes that it is necessary first to consider the issue of the alleged violation of the right to property under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

a) Right to property

26. 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:

...

k) The right to property.

27. 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 derived 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.

28. The first issue which the Constitutional Court is called upon to decide is whether the appellant has "possessions" which enjoy the protection under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. In this connection, the Constitutional Court recalls that the notion "possessions" in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions", for the purposes of this provision (see ECtHR, *Gasus Dosier – und Fördertechnik GmbH. v. Netherlands,* judgment of 23 February 1995, Series A, no. 306-B, page 46, paragraph 53). Furthermore, the Constitutional Court notes that the European Court concluded in the Đokić v. Bosnia and Herzegovina case that a contract to purchase a military apartment concluded before the dissolution of the SFRY constituted "possessions" for the purposes

of Article 1 of Protocol No. 1 (see ECtHR, *Đokić v. Bosnia and Herzegovina*, Application no. 6518/04, judgment of 27 May 2010, paragraph 50). Thus, taking into the fact that in the present case, just like in the Đokić case, it was not disputable that the appellant, as a legal successor of her predecessor, had a legally binding contract to purchase the apartment and that she had a guaranteed right to compensation for her apartment she could not repossess, the Constitutional Court holds that the appellant is the holder of the right safeguarded by Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, i.e. that she has "possessions" for the purposes of the mentioned provision.

29. Next, dismissal of the appellant's claim for the payment of the market value of the apartment obviously amounted to the interference with her right to property. In this connection, the Constitutional Court recalls 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 of the same Article, recognizes that the Contracting States are entitled, *inter alia*, 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 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, the European Court, *Sporrong and Lönnorth v. Sweden*, judgment of 23 September 1982, Series A, no. 52, paragraph 61). The Constitutional Court also recalls that in the *Đokić* case the European Court noted that the complexity of the legal situation in BiH prevented the contract on purchase of the military apartment from being classified in a precise category (on the one hand, the impugned purchase contract was regarded as legally valid and, on the other hand, the applicant was unable to have his flat restored to him and to be registered as its owner pursuant to that contract) so that it had considered the case from the aspect of the first rule enunciated in the first sentence of Article 1 of Protocol No. 1 to the European Convention, and which is of a general nature and enunciated the principle of peaceful enjoyment of property (see *Đokić*, paragraph 56). Thus, the Constitutional Court will consider the appeal from the aspect of that rule, since the case is identical to the *Đokić* case.

30. The next question the Constitutional Court is called upon to answer is whether the interference with the appellant's peaceful enjoyment of property was prescribed by the law and, if so, whether it was in the public or general interest and whether it was proportionate, i.e. whether it struck a fair balance between the appellant's right and general public interest or whether an excessive individual burden was placed on her.

31. In assessing the lawfulness of the interference with property, the Constitutional Court reiterates that according to the case law of the European Court, the first and most

important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph recognises that the States have the right to control the use of property by enforcing "laws". Moreover, the principle of legal certainty is inherent in all the Articles of the Convention and must be complied with regardless of which of the three rules under Article 1 of Protocol 1 is applicable. This principle implies existence and compliance with the national laws which are adequately available and sufficiently precise and which meet the basic requirements related to the notion of "law" (see ECtHR, *Iatridis v. Greece,* judgment of 25 March 1999*, Reports of Judgments and Decisions* 1999-II, para 58). It follows that the issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights becomes relevant only once it has been established that this requirement is satisfied.

32. However, the Constitutional Court also noted that the European Court, when considering the issue of "lawfulness" of the interference with the right to property in the case of *Vijatović v. Croatia,* noted that the lack of a sufficiently precise and foreseeable statutory provision might be remedied by domestic courts giving a clear and precise interpretation (see ECtHR, *Vijatović v. Croatia,* judgment of 16 February 2016, Application no. 50200/13, paragraph 54). Similarly, the European Court, when considering the lawfulness of the interference with other rights enumerated in the European Convention (for instance, the right to respect for private life), expressed the view that in case of lack of the provisions providing the requirement for interference with the rights and freedoms of the European Convention and its Protocols, those rights could still adequately be protected by the domestic courts' case law, without the State having been obliged to set up a legislative framework in order to comply with its positive obligation under the European Convention (see, *mutatis mutandis,* ECtHR, *Köpke v. Germany,* Decision on Admissibility of 5 October 2010).

33. Turning to the instant case, the Constitutional Court recalls that the Constitutional Court, in its decision no. *U-15/11,* wherein it complied with the case law of the European Court in the Đokić case, found that the provisions of Article 39e, paragraphs 3 and 4, of the Law on Sale of Apartments, in the part related to the determination of compensation, were not compatible with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. In that decision, the Constitutional Court noted, *inter alia*, that "the European Court established [in the Đokić case] that the compensation as provided for under provision of Article 39e of the Law on Sale of Apartments with Occupancy Right does not strike a fair balance within the meaning of Article 1 of Protocol No. 1 to the European Convention. The Constitutional Court supports such view of the European Court and holds that the compensation stipulated under Article 39e of the Law on Sale of Apartments with

Occupancy Right, as satisfaction for the deprivation of the right to repossession of the apartment (restitution) does not strike a fair balance between the demands of the general interest of the community and the interests of the right holders. The previously mentioned is true because by the payment of such compensation the right holders who were deprived of their property would have to bear 'an excessive burden'. In the opinion of the Constitutional Court, the compensation that would be paid in such cases would not match the approximate amount of satisfaction for the deprivation of property" (see Constitutional Court, Decision on Admissibility and Merits, no. *U-15/11* of 30 March 2012, paragraph 85, published in the *Official Gazette of BiH*, 37/12, available at www.ustavnisud.ba). The Constitutional Court recalls that in the ruling on failure to enforce decision no. *U-15/11* of 15 January 2013 (published in the *Official Gazette of BiH*, 11/13), the Constitutional Court established that the Parliament of the Federation of BiH had not enforced the mentioned decision no. *U-15/11* and that the provisions of Article 39e, paragraphs 3 and 4, of the Law on Sale of Apartments, in the part related to the determination of compensation, ceased to be in force on the date following the date of publication of that decision in the *Official Gazette of BiH*. The Constitutional Court observes that up until the moment of adoption of this decision, the relevant authority did not fulfil its obligation under the decision of the Constitutional Court no. *U-15/11*. It failed to adopt the provisions stipulating the manner of determination of compensation in accordance with the decision of the Constitutional Court and decisions of the European Court on this matter.

34. Taking into account the aforementioned, the Constitutional Court concludes that the legal system of the Federation of Bosnia and Herzegovina does not provide for a legal provision determining the manner of awarding appropriate compensation for interference with the right to property in the cases such as this one. However, when it comes to this matter, it is obvious that the views of the European Court and Constitutional Court are harmonized. In particular, the Constitutional Court observes that in the Đokić judgment the European Court noted that Article 1 of Protocol No. 1 did not guarantee a right to full compensation in all circumstances, but neither of the amounts offered to the applicant was reasonably related to the market value of the impugned apartment. The European Court also noted that while it was true that even a total lack of compensation could be regarded as justifiable under Article 1 of Protocol No. 1 in exceptional circumstances, the Court did not consider the circumstances of the Đokić case to be such (contrast *Jahn and Others v. Germany*, Applications nos. 46720/99, 72203/01 and 72552/01, paragraph 117, ECHR 2005-VII, concerning land acquired under the land reform implemented from 1945 in the Soviet Occupied Zone). Next, the Constitutional Court observes that the European Court, in the Đokić case, when determining the amount of compensation took *the current value of the disputed flat* as relevant. Furthermore, the Constitutional Court notes that the European Court, in the *Mago and Others* case (see ECtHR, *Mago and Others v. Bosnia and Herzegovina,* Applications nos. 12959/05, 19724/05, 47860/06, 8367/08, 9872/09 and 11706/09 of 3 May 2015, paragraph 121), reaffirmed the view

expressed in the Đokić case and noted that "in accordance with the Court's settled jurisprudence, a judgment in which it finds a breach, imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, paragraph 32, ECHR 2000-XI). Given the facts that the applicants agreed to accept compensation instead of the repossession of the apartment, the defendant Government should pay them the current value of the disputed apartments …"

35. Similarly, the Constitutional Court notes that the compensation, which was not equal to the market value of the disputed apartment even in the ordinary court's opinion, was offered to the appellant, and that the appellant refused it. Given that fact and notably the fact that Article II(2) of the Constitution of Bosnia and Herzegovina stipulates that the provisions of the European Convention shall have priority over all other law, and that Article II(6) of the Constitution of Bosnia and Herzegovina stipulates that all courts shall apply and conform to the human rights and fundamental freedoms under the European Convention, the Constitutional Court cannot adhere to the findings of the ordinary courts which, while interpreting the provisions which were rendered ineffective, established that the appellant was not entitled to the market value of the apartment. The Constitutional Court also does not hold that the compensation she was entitled to could not be determined for the "lack of a sufficiently precise and foreseeable statutory provision". In particular, as it follows from the decisions of the European Court, which the Constitutional Court adheres to, the starting point to determine the compensation in the case related to the military apartments was the market value of the apartment. In addition, the compensation that would be based on the provisions that are not in force any longer, would not be appropriate. The Constitutional Court therefore holds that given the lack of a sufficiently precise and foreseeable statutory provision prescribing the amount of compensation in accordance with the decision of the European Court and Constitutional Court, the ordinary courts should have taken into account the case law of the European Court and Constitutional Court in such cases. This is so, as the Constitutional Court is of the opinion that that case law provides sufficient information for determining compensation in the proceedings before the ordinary courts. Having acted differently, the ordinary courts failed to protect the appellant's right to property regardless of the fact that the relevant authority failed to enforce the binding decisions of the European Court and Constitutional Court and to set up an appropriate regulatory framework. Such an interpretation of the ordinary courts and the failure of the relevant legislative and executive authorities to act in compliance with the binding decisions of the European Court and Constitutional Court, placed an excessive burden on the appellant as she sustained harmful consequences of the failure to enforce the binding court decisions of the European Court and Constitutional Court. Such a legal situation has been lasting for some time, although the rules to resolve the issue of compensation to be awarded to the persons that are prevented from peaceful enjoying their property

follow from the decisions of the European Court and Constitutional Court. In addition to that, the Constitutional Court observes that it cannot be presumed how long will such a situation last, which means that the ordinary courts' interpretation implying that a law does not exists would further deprive the appellant and other persons in such situations of their property. This would be in direct contravention of the decisions of the European Court and Constitutional Court and, thus, in contravention of the principle of the rule of law under Article II(1) of the Constitution of Bosnia and Herzegovina. Given such circumstances, the Constitutional Court holds that interference with the appellant's right to peaceful enjoyment of property was not "prescribed by the law" within the autonomous meaning of that notion under Article 1 of Protocol No. 1 to the European Convention.

36. In addition, the Constitutional Court observes that the Supreme Court also concluded that the appellant was not entitled to the market value of the apartment, as a one and a half bedroom apartment for lease in Belgrade was allocated to her. In this connection, the Constitutional Court notes that it follows from the *Mago* judgment rendered by the European Court that the issue whether the applicant had been allocated a replacement apartment or the right equivalent to the occupancy right in other former Republics of the SFRY is relevant only in the context of the occupancy right holder. Particularly, this is the case when an applicant had exclusively had the status of occupancy right holder or when he/she had not concluded a valid contract on the apartment purchase (see ECtHR, *Mago,* paragraphs 95, 97, 100, 103 and 104). The Constitutional Court followed such a case law, in similar cases in which the ordinary courts established that the appellants had concluded valid contracts on the purchase of military apartments within the meaning of Article 39 of the Law on Sale of Apartments. In addition, they concluded that, under Article 39e, paragraph 2 of the Law on Sale of Apartments, they were entitled to receive compensation from the Federation of Bosnia and Herzegovina in accordance with the relevant legislation instead of registration of ownership right on the basis of the concluded contracts. Therefore, the Constitutional Court found a violation of the appellants' right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Protocol No. 1 to the European Convention. It submitted its decision to the Government of the Federation of Bosnia and Herzegovina obligating it to ensure the appellants' constitutional rights in compliance with the standards expressed in its decision no. *U-15/11* adopted at an earlier point (see Decisions on Admissibility and Merits, *no. 1205/08* of 13 July 2012 and *AP-726/15* of 7 September 2017). Thus, the fact that the appellant acquired an equivalent right in another State successor to the SFRY where she had a legally binding contract on the apartment purchase is of no impact on her right to receive compensation for deprivation of property.

37. Finally, with regard to the defendant's allegations that the appellant's case is equal to the cases in the decisions of the European Court *Aleksić Tihomir v. Bosnia and Herzegovina* (Application no. 38233/05), *Mandić and Others v. Bosnia and Herzegovina* (Application no. 1495/07) and decision of the Constitutional Court, no. *AP-1207/08* of

23 November 2012, the Constitutional Court notes that compensation for interference with the right to property was not requested in the mentioned cases but the restitution of apartments. Therefore, the mentioned case law cannot apply to the present case.

38. Thus, the Constitutional Court holds that Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention have been violated. The Constitutional Court therefore holds that the challenged judgment of the Supreme Court should be quashed and the case should be referred back for new proceedings.

b) Right to a fair trial

39. Given the fact that the Constitutional Court has found in the previous paragraphs that the challenged judgments are in 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, the Constitutional Court does not find it necessary to separately consider the appellant's allegations on the violation of right to a fair trial under Article II (3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.

VIII. Conclusion

40. The Constitutional Court concludes that the challenged judgments are in 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. They are in violation as the ordinary courts, when deciding on the case, disregarded the constitutional obligation of direct application of the European Convention and binding decisions of the European Court and Constitutional Court. Therefore, such an interference with the appellant's right to peaceful enjoyment property cannot be regarded as "lawful".

41. Having regard to Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of the Decision.

42. Pursuant to Article 43 of the Rules of the Constitutional Court, Vice-President Mirsad Ćeman and Judge Seada Palavrić gave their statements of dissent from the majority decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP-324/18

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Ms. Malika Nora Flici-Jurić from Sarajevo, represented by the Association "Vaša prava Bosne i Hercegovine", against the Judgment of the Cantonal Court in Sarajevo No. 09 0 U 021969 14 U of 21 November 2017, Decision of the Ministry of Labour, Social Policy, Displaced Persons and Refugees of the Sarajevo Canton No. 13-03-35-1444/14 of 31 July 2014 and the Decision of the Service for Veterans' Affairs, Labour, Social Affairs and Healthcare of the Municipality of Novi Grad Sarajevo No. 07-35-3968/AZ of 6 June 2014

Decision of 27 November 2019

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Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article (57)(2)(b) and Article 59 (1)and (2) and (3) and Article 62 (1) of the Rules of the Constitutional Court of Bosnia and Herzegovina - Revised Text (*Official Gazette of Bosnia and Herzegovina*, 94/14), the Constitutional Court of Bosnia and Herzegovina, sitting in Plenary in the following composition:

Zlatko M. Knežević, President

Mato Tadić, Vice-President

Mirsad Ćeman, Vice-President

Valerija Galić,

Miodrag Simović, and

Seada Palavrić

Having deliberated on the appeal of **Ms. Malika Nora Flici-Jurić**, in the case no. **AP-324/18**, at its session held on 27 November 2019, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Ms. Malika Nora Flici-Jurić is partially granted.

It is established that the right to prohibition of 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 in conjunction with the right to family life 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 has been violated.

The case is remitted to the Cantonal Court in Sarajevo, which is obligated to adopt a new decision by urgent procedure, in accordance with 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 in conjunction with the right to family life referred to in 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 Cantonal Court is ordered to notify the Constitutional Court of Bosnia and Herzegovina of the measures taken to enforce this decision within three months from the date of delivery of this decision, in accordance with Article 72 paragraph (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal of Ms. Malika Nora Flici-Jurić is dismissed as ill-founded in relation to the right to a decision within a reasonable time as an element 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, in the procedure concluded by the Judgment of the Cantonal Court in Sarajevo No. 09 0 U 021969 14 U of 21 November 2017.

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 18 January 2018, Ms. Malika Nora Flici-Jurić ("the appellant") from Sarajevo, represented by the Association "Vaša prava Bosne i Hercegovine", filed 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. 09 0 U 021969 14 U of 21 November 2017, Decision of the Ministry of Labour, Social Policy, Displaced Persons and Refugees of the Sarajevo Canton ("the Ministry") No. 13-03-35-1444/14 of 31 July 2014 and the Decision of the Service for Veterans' Affairs, Labour, Social Affairs and Healthcare of the Municipality of Novi Grad Sarajevo ("the Service") No. 07-35-3968/AZ of 6 June 2014.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the Cantonal Court, the Ministry and the Service were requested on 20 September 2019 to submit their respective responses to the appeal.

3. The Cantonal Court, the Ministry and the Service submitted their respective responses to the appeal in the period from 4 to 7 October 2019.

III. Facts of the Case

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

5. By the decision of the Service No. 07-35-3968/AZ of 6 June 2014, the appellant's request for exercising the right to remuneration, instead of a salary, for a woman - mother in employment while absent from work due to pregnancy, childbirth and child care was dismissed as ill-founded.

6. In the reasons for the decision it has been established that the appellant submitted the request in question on 20 May 2014, that she had given birth to a child on 5 May 2014, and that she was employed at the French Primary School CIFS Sarajevo ("the French School") from 11 March 2013 to 30 August 2014 and that she is a national of the French Republic ("France"). In this connection, the Service concluded that the appellant claim is unfounded in accordance with the provision of Article 5a of the Law on Social Protection, Protection of Civilian Victims of War and Protection of Families with Children of the Sarajevo Canton ("Law on Social Protection") because the appellant is a French citizen.

7. The appellant filed an appeal against the decision of the Service, which was dismissed by the Ministry as unfounded in Decision No. 13-03-35-1444 / 14 of 31 July 2014.

8. In the reasons for that decision, it was stated that the first-instance decision was correct and legal and that the correct reasons were given for that decision which were also accepted by that body.

9. The appellant filed a lawsuit against the decision of the Ministry, which was dismissed by the Cantonal Court in Judgment No. 09 0 U 021969 14 U of 21 November 2017.

10. In the reasoning of the judgment, the Cantonal Court, having regard to the provision of Article 5a of the Law on Social Protection and the indisputable fact that the appellant is not a citizen of Bosnia and Herzegovina, which, in the opinion of that court, is a condition for exercising the right in question, concluded that the administrative authorities have correctly applied substantive law to the fully and correctly established factual situation when they rejected the appellant's claim as unfounded. At the same time, the Cantonal Court assessed that the complaint of the lawsuit that the said legal provision is unconstitutional and discriminatory without having effect on resolution of this administrative dispute in a different manner. This was so because, as it explained, it is a norm of imperative character, the constitutionality of which is not examined by that court but by the Constitutional Court in the procedure for reviewing the constitutionality of the said legal provision.

IV. Appeal

a) Allegations from the appeal

11. The appellant claims that the impugned decisions violated her right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"). In addition, they violated the right to private and family life, home and correspondence referred to in Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, and the right to non-discrimination referred to in Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention. They also violated the right to general prohibition of discrimination as referred to in Article 1 of Protocol No. 12 to the European Convention.

12. As regards the allegations of a violation of the right to a fair trial, the appellant submits that the reasoning of the impugned decisions does not meet the standards of Article 6 of the European Convention. Namely, the appellant claims that the Cantonal Court, in the reasoning of the impugned judgment, did not refer to the allegations of the lawsuit regarding the issue of discrimination giving, as it claims, superficial and unclear reasons that only the Constitutional Court has the authority to examine the constitutionality of norms of an imperative character, in the process of reviewing constitutionality. The appellant points out that such an explanation indicates an obvious unawareness of the Constitution of Bosnia and Herzegovina. According to the Constitution, it is possible for an ordinary court to directly apply any of the provisions of the Constitution of Bosnia and Herzegovina and the European Convention. Furthermore, the appellant considers that the disputed decisions violated the right to a fair trial in the specific case in the segment of application of substantive law. They are in violation because, as she claims, the Cantonal Court, apart from the provisions of the Constitution of Bosnia and Herzegovina and the European Convention, could apply the provisions of Article 2 paragraphs 1 and 2 and Article 24, paragraph 1 of the Law on Prohibition of Discrimination of Bosnia and Herzegovina. In addition, the appellant considers that in the specific case, there was also a violation of her right to a trial within a reasonable time as a segment of the right to a fair trial. In this regard, she points out that more than three years passed between the date of the request and the adoption of the impugned judgment of the Cantonal Court. This, in her opinion, is not a justified deadline in the present case. Namely, the appellant considers that the specific case was not a complex case, and that, on the other hand, it was a case, which, by its nature, required urgent resolution.

13. Regarding the allegations of violation of rights from Article II(2)(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention, the appellant claims that she was discriminated against when compared with other mothers in connection with

the exercise of one of the social protection rights, only because she is not a citizen BiH. In her opinion, there is no reasonable or objective justification or proportionality for such a measure in the specific case. The appellant points out that when making the disputed decisions it was not taken into account that she has a regulated stay in BiH based on the marriage with a BiH citizen, that her minor child is a BiH citizen and that, as she states, she is equal to BiH citizens in fulfilling obligations towards the State of BiH. Namely, the appellant states that she regularly pays contributions for Pension and Disability Insurance and health insurance and contributions in case of unemployment, under the same conditions as BiH citizens. The appellant points out that the prohibition of discrimination is determined by the Constitution of Bosnia and Herzegovina, the European Convention, the Law on Prohibition of Discrimination, and the provisions of Article 11, paragraph 2, item b) of the Convention on the Elimination of All Forms of Discrimination against Women. She further points out that Article 10, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights stipulates that "special protection must be provided" for mothers and that they should be given the right to a reasonable time before and after the birth of their children. In addition, it stipulates that working mothers should enjoy paid leave or leave with appropriate social security benefits during this period. It also points to the content of the provisions of Article 27 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The appellant specifically refers to the case law of the European Court of Human Rights in the case of *Dhabi v. Italy.*

14. With regard to the allegations of a violation of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the appellant points out that the impugned decisions prevented her from exercising her right to remuneration in the present case and again points to the case law of the European Court in the case of *Dhabi v. Italy*.

b) Responses to the appeal

15. The Cantonal Court states that it fully upholds the impugned judgment, which, in the opinion of that court, did not violate Articles 6 and 8 in conjunction with Article 14 of the European Convention, nor did it violate the provisions of the Law on Prohibition of Discrimination. The court considers that the appeal is unfounded and proposes that it be dismissed.

16. The Ministry considers that the appellant was not discriminated against in this specific administrative matter in the context of the application of legal acts regulating the specific legal issue. Namely, it points to Article 5, paragraph 1, item e) of the Law on Prohibition of Discrimination. It points out that in this regard the Assembly of Sarajevo Canton, as the legislator, decided to prescribe by Article 5a (now Article 6) of the Law on Social Protection that this right cannot be exercised by persons who are not citizens of BiH. This is in accordance with the provision of Article 5, paragraph 1, item e) of the

Law on Prohibition of Discrimination. Also, the Ministry points out that the Parliament of the Federation of BiH, in the Law on Basis of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children, did not state the right of foreign nationals to financial remuneration during pregnancy and childbirth of a woman - a mother who is employed.

17. The Service stated that BiH citizenship, with a one-year residence in the Sarajevo Canton, is the first and basic condition for exercising all rights prescribed by the Law on Social Protection. The Service considers that in the procedure of resolving the appellant's request, it acted in accordance with the rules of procedure and in accordance with the applicable substantive regulations, and that in this particular case there is no discrimination. In addition, in relation to the legal provisions that were in force at the time of resolving the appellant's request, the Service points out that these provisions have been amended in terms of exercising the right by foreign nationals in employment. Namely, they have been amended by the Law on Amendments to the Law on Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of Sarajevo Canton*, 28/18).

V. Relevant Law

18. The **Law on Social Protection, Protection of Civilian Victims of War and Protection of Families with Children** (*Official Gazette of the Sarajevo Canton,* 16/02, 8/03, 2/06, 21/06, 17/10, 26/12, 15/13, 18/14 and 25/14). For the purposes of this Decision, the unofficial consolidated text of the said law prepared in the Constitutional Court of BiH is used and was published in the Bosnian language. The relevant part reads:

Article 5a

Rights under the Cantonal Law cannot be exercised by persons who are not citizens of Bosnia and Herzegovina.

19. The **Law on Social Protection, Protection of Civilian Victims of War and Protection of Families with Children** (*Official Gazette of the Sarajevo Canton,* 38/14 - consolidated text, 38/16 and 44/17). For the purposes of this Decision, the unofficial consolidated text of the said law prepared in the Constitutional Court of BiH is used and it was published in the Bosnian language. The relevant part reads:

Article 6

Rights under this law may not be exercised by persons who are not citizens of Bosnia and Herzegovina.

2. The right to remuneration, instead of a salary, for a woman-mother in employment, while she is absent from work due to pregnancy, childbirth and child care.

Article 148

Notwithstanding Article 7 of this Law, the right to remuneration, instead of the salary, for a woman-mother in employment, while she is absent from work due to pregnancy, childbirth and child care (hereinafter: remuneration of the salary of a woman-mother) may be exercised by persons having residence status in Sarajevo Canton and the established status of a displaced person.

Article 149

Salary remuneration for a woman-mother who has concluded an employment contract or a decision on employment and application for compulsory employment insurance at least 12 months before going on maternity leave, is determined in the amount of 60% of the average salary, provided that this amount shall not be less than the lowest salary in the Federation of Bosnia and Herzegovina. Salary remuneration for a woman-mother who has concluded an employment contract or has been issued decision on employment and has less than 12 months before going on maternity leave and applies for compulsory insurance based on employment, is determined in the amount of 30% of the average salary.

20. The **Law on Amendments to the Law on Social Protection, Protection of Civilian Victims of War and Protection of Families with Children** (*Official Gazette of the Sarajevo Canton*, 28/18) reads in the relevant part:

Article 2

In Article 6, after the words: "Herzegovina", a punctuation mark "comma" shall be added, including the words: "unless otherwise prescribed by this Law".

Article 19

In Article 148, after paragraph 1, a new paragraph 2 shall be added, which reads: "Notwithstanding Article 6 of this Law, the right to remuneration, instead of salary, for a woman-mother may be exercised by foreign nationals to whom the competent authority approved the permanent stay in Bosnia and Herzegovina and who meets the conditions regarding residence in the Sarajevo Canton and the conditions prescribed by Article 149 of this Law."

21. The **Law on Prohibition of Discrimination** (*Official Gazette of Bosnia and Herzegovina,* 59/09 and 66/16). For the purposes of this Decision, an unofficial consolidated text prepared in the Constitutional Court of BiH shall be used, which reads:

Article 2
(Discrimination)

(1) Discrimination, in terms of this Law, shall be every different treatment including every exclusion, limitation or preference based on real or assumed features

towards any person or group of persons on grounds of their race, skin colour, language, religion, ethnic affiliation, national or social origin, connection to a national minority, political or any other persuasion, property, membership in trade union or any other association, education, social status and sex, sexual expression or sexual orientation, and every other circumstance with a purpose or a consequence to disable or endanger recognition, enjoyment or realization, of rights and freedoms in all areas of public life. (2) Prohibition of discrimination shall be applied to all public bodies, all natural and legal persons, in public and private sector, in all spheres, especially: employment, membership in professional organisations, education, training, housing, health, social protection, goods and services designated for public and public places together with performing economic activities and public services.

Article 5
(Exceptions from Principle of Equal Treatment)

Legal measures and actions shall not be considered discriminatory when reduced to unfavourable distinction or different treatment if based on objective and reasonable justification. Following measures shall not be considered discriminatory if they realize a legitimate goal and if there is a reasonable relation ratio of proportionality between means used and goals to be achieved and when: […] e) they are based on citizenship in a way prescribed by the Law; […]

Article 24
(Harmonization of other regulations with this law)

(1) In the event of non-compliance of other laws with this Law in proceedings under this Law, this Law shall apply. (2) All laws and general regulations shall be harmonized with the provisions of this Law within one year from the day this Law enters into force.

VI. Admissibility

22. 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.

23. Pursuant to Article 18 (1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective remedies available under the law against a judgment or a decision challenged by the appeal have been exhausted and if the appeal is lodged within a time limit of 60 days as from the date on which the appellant received the decision on the last effective remedy he/she used.

24. In the present case, the subject challenged by the appeal is the judgment of the Cantonal Court No. 09 0 U 021969 14 U of 21 November 2017, against which there are no other effective remedies available under law. The appellant received the challenged judgment on 23 November 2017 and the appeal was lodged on 18 January 2018, *i.e.* within

the time limit of 60 days, as prescribed by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court because it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason that would render the appeal inadmissible.

25. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16 (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal meets the admissibility requirements.

VII. Merits

26. The appellant considers that the impugned decisions violated her rights under Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, including the right to take a decision within a reasonable time and the rights under Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. In addition, they were in violation of her rights under Article II (4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention, and Article 1 of Protocol No. 12 to the European Convention.

27. The Constitutional Court notes that the appellant in particular points to 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 the present case, but that she did not explicitly state the rights in connection with which that right has been in violation. However, bearing in mind the allegations of the appeal, the Constitutional Court considers that the appellant connects the allegations of violation of that right with the right to family life from Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. In doing so, the Constitutional Court recalls that the appellant, a French national, in this context, challenges the decisions of ordinary courts and administrative bodies dismissing her claim for salary remuneration while absent from work due to pregnancy, childbirth and childcare. They did so with reasoning that the positive regulations (which were in force at the time of the disputed decisions being rendered) stipulate that persons who are not citizens of BiH cannot exercise that right. In this regard, the Constitutional Court points to the case law of the European Court according to which parental leave, parental benefits and family allowance fall within the scope of Article 8 of the European Convention in the context of the right to family life. In addition, in such cases Article 14 of the European Convention in conjunction with Article 8 of the European Convention is applicable (see, *inter alia*, the European Court, *Petrović v. Austria*, Application No. 156/1996/775/976, Judgment of 27 March 1998 *Weller v. Hungary*, Application No. 4439/05, judgment of 30 June 2009, paragraph 29, *Konstantin Markin v. Russia*, Application No. 30078/06, Judgment of 22 March 2012; *Dhabi v. Italy*, Application No. 17120/09, Judgment of 8 July 2014, § 41). Referring to the facts of the present case, the Constitutional Court notes that the

appellant's request for payment of salary compensation while absent from work due to pregnancy, childbirth and childcare was dismissed by the impugned decisions solely because, according to the then applicable regulations, the appellant, as a person who is not a citizen of BiH, could not exercise that right. This certainly represents a differential treatment that the Constitutional Court needs to examine. This is why Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention are applicable in the present case. Accordingly, the Constitutional Court will first examine the appellate allegations in the light of Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with the right to family life under Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

Non-discrimination in conjunction with the right to family life

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

29. 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.

30. Article II (3) (f) 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:

f) The right to private and family life, home, and correspondence.

31. Article 8 of the European Convention 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 wellbeing 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.

32. According to the case law of the European Court of Human Rights and the Constitutional Court, a difference in treatment will be discriminatory if there is no objective and reasonable justification for it, or if it does not seek to achieve a legitimate objective or if there is no reasonable relationship of proportionality between the measure applied and the legitimate aim (see, e.g., the European Court, *Burden v. the United Kingdom*, judgment of 29 April 2008, paragraph 60). In addition, discrimination may also exist in situations where it arises as a result of the same treatment of persons in different situations, i.e. "when the state does not ensure, without objective and justifiable reason, different treatment of persons whose situations differ significantly" (see European Court, *Thlimmenos v. Greece*, judgment of 6 April 2000). In addition, the Constitutional Court reminds that the prohibition of discrimination is qualitative and not absolute and that states in this sense can have a wide margin of appreciation. Whether this field of discretion will be broad or narrow depends on: a) the nature of the law in question (it is broader, for example, in the case of social and economic rights, e.g. see the European Court, *Stec v. The United Kingdom*, judgment of 12 April 2006, and very narrow when it comes to fundamental rights); b) the degree of interference (whether a certain measure partially or completely denies a right, see the European Court, *Aziz v. Cyprus*, judgment of 22 April 2004); and c) the public interest (for example, the strong public interest in combating differential treatment of persons in a specific status such as maternity leave, requires a greater degree of justification for differential treatment on that basis).

33. On the other hand, the Constitutional Court recalls that, according to the case law of the European Court, very compelling reasons should be given before differential treatment based solely on nationality could be considered compatible with the European Convention (see European Court, *Gaygusuz v. Austria*, judgment 16 September 1996, paragraph 42, *Koua Poirrez v. France*, Application No. 40892/98, judgment of 30 December 2003, paragraph 46, *Andrejeva v. Latvia*, Application No. 55707/00, judgment of 18 February 2009 and *Ponomaryov v. Bulgaria*, Application no. 5335/05, judgment of 28 November 2009). In addition, the Constitutional Court points out that maternity leave is not only a matter of social policy, but also of human rights and their protection (see, the Constitutional Court, Decision No. *U-12/09* of 28 May 2010, paragraph 28, available at the Constitutional Court's website www.ustavnisud.ba). Furthermore, the Constitutional Court, *mutatis mutandis*, points to the case law of the European Court of Human Rights in cases concerning the provision of social assistance to non-national families (*Niedzwiecki v. Germany*, Application no. 58453/00, judgment of 15 February 2006; *Okpisz v. Germany*, Application no. 59140/00, judgment of 15 February 2006; *Weller v. Hungary*, op. cit.; *Fawsie v. Greece*, Application no. 40080/07, judgment of 28 October 2010 and *Saidoun v. Greece*, Application no. 40083/07, judgment of 28 October 2010). Thus, the European Court found a violation of Article 14 of the European Convention in conjunction with Article 8 of the European Convention on the ground that the authorities had not provided a reasonable justification for the practice of excluding

non-nationals legally residing in the countries concerned from the right to certain benefits solely based on their nationality.

34. In this connection, the Constitutional Court, *mutatis mutandis*, also points to the case law of the European Court of Human Rights in *Dhabi v. Italy* (cited in paragraph 27 above), which was also referred to by the appellant in the present case. There the court also found a violation of Article 14 of the European Convention in conjunction with Article 8 of the European Convention. In the mentioned case, the applicant was a Tunisian citizen in the relevant period, who entered Italy based on a legal residence and work permit, and was employed by a specified company and insured with the National Social Insurance Institute (hereinafter: NISO) and his family consisted of his wife and their four minor children. In the proceedings before the competent authorities of Italy, his request for payment of the family allowance provided for in "Article 65 of Law no. 448 of 1998", under the terms of which NISO paid the allowance in question to families consisting of Italian citizens living in Italy with at least three minor children, whose annual income was below the specified amount. In the present case, the Court concluded that there was no doubt that the applicant had been treated differently from workers who were citizens of the European Union and who, like him, had large families, and that the rejection of his application was based solely on the applicant's citizenship, who, at that time, was not a citizen of a member state of the European Union. The European Court also concluded in that decision that very compelling reasons should be given before that court could consider that differential treatment, based solely on nationality, was compatible with the European Convention and, in those circumstances, notwithstanding large margin of appreciation by state authorities in the field of social protection, the arguments put forward by the Government are not sufficient to satisfy the requirement of the court that there was a reasonable proportionality relationship in that case which would make the disputed differential compatible with the requirements of Article 14 of the European Convention.

35. Referring to the connection of the mentioned case-law with the facts of the specific case, the Constitutional Court, first of all, reminds that in the challenged decisions the appellant's request was dismissed for payment of salary compensation while she is absent from work due to pregnancy, childbirth and child care. It was dismissed solely because under Article 5a) of the then valid Law on Social Protection, this right could not be exercised by persons who are not citizens of BiH (the appellant is a citizen of France). In doing so, the Constitutional Court notes that administrative bodies and ordinary courts, neither in the proceedings in which the impugned decisions were rendered, nor in the response to the appeal, except for the reference to the regulations valid at the time of rendering the impugned decisions, provided any other reasons and arguments for differential treatment of the appellant in relation to BiH citizens in the context of the right to salary compensation while absent from work due to pregnancy, childbirth and

child care, in terms of proportionality between the means used and the goal pursued to be achieved. In this context, the Constitutional Court notes that the administrative bodies and the ordinary court did not explain in the disputed decisions why the appellant's allegations that she makes regular payments of contributions for Pension and Disability Insurance, health insurance and unemployment insurance under the same conditions as BiH citizens and that her child is a BiH citizen, cannot lead to a different decision in a specific legal matter. In addition, the Constitutional Court notes that even in the responses to the appeal they did not provide an answer to similar allegations that the appellant repeats in the appeal. Thus, it undoubtedly follows from the above that the only reason why the appellant's request was dismissed by the contested decisions is a legal provision applicable at the time of the contested decisions. According to them, the appellant does not have that right solely because of her citizenship. In this regard, the Constitutional Court reiterates that despite wide margin of appreciation in the field of social protection, the different treatment of state bodies in such cases, which is based exclusively on citizenship, according to the aforementioned case law of the European Court, must be based on compelling reasons. This is especially because maternity leave is not only an issue related to social policy, but also an issue related to human rights and their protection. In particular, it relates to the human rights of a sensitive category of the population - mothers. However, the Constitutional Court considers that such reasons were completely absent in the specific situation. This is supported by the fact that the legislator recognized the issue as disputable. After the adoption of the disputed decisions, in 2018, the Law on Amendments to the Law on Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Sarajevo Canton*, 28/18) was adopted amending Article 6 of the Law on Social Protection (former Article 5a) and adding a new paragraph 2 in Article 148 of the law. This allowed the foreign nationals to also exercise the right to remuneration, instead of a salary, for a woman (mother), under certain conditions. Bearing in mind the above, the Constitutional Court considers that in the specific case (the appellant's request was rejected solely due to her citizenship) neither the administrative bodies nor the ordinary court offered reasons and arguments in support of the fact that in the appellant's case there was a reasonable relationship of proportionality. This would make the disputed differential treatment (on grounds of nationality) compatible with the requirements of Article 14 of the European Convention. In addition, such a thing does not arise from the facts of the particular case.

36. Therefore, the Constitutional Court finds that there is 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 family life from Article II (3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

The right to a fair trial

37. Article II (3)(f) 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:

f) The right to private and family life, home, and correspondence.

38. Article 6 (1) 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.

39. The Constitutional Court notes that in the present case it is about an administrative procedure and an administrative dispute procedure regarding the exercise of the right to monetary compensation, which is of a civil nature. The appellant enjoys guarantees 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 (see, the Constitutional Court, Decision on Admissibility and Merits *AP-3299/14* of 7 March 2017, available at the Constitutional Court's website www.ustavnisud.ba).

As regards the trial within a reasonable time

40. The Constitutional Court first of all points out that, according to the consistent case law of the European Court of Human Rights and the Constitutional Court, the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case, taking into account the criteria established by the case law of the European Court of Human Rights, conduct of the parties to the proceedings and the competent court or other public authorities, and the significance of the particular legal matter for the appellant (see European Court, *Mikulić v. Croatia*, Application no. 53176/99 of 7 February 2002, Report no. 2002-I, para. 38).

41. With regard to the appellate allegations of violation of the right to a decision "within a reasonable time", the Constitutional Court notes that the proceedings in question were initiated on 20 May 2014 and that it was concluded by passing the judgment of the Cantonal Court of 21 November 2017. Thus, the proceedings in question lasted for three and a half years. Furthermore, the Constitutional Court notes that the case is of great importance for the appellant, and given the facts to be established and the legal issues to be considered in this case, it is not a complex procedure, and the appellant's behaviour did not contribute to the length of the proceedings. With regard to the conduct of administrative bodies and the Cantonal Court, the Constitutional Court notes that administrative bodies, within short deadlines (in the case of a first instance administrative body it was within less than a month, and in the case of a second instance administrative body it was within less than

two months) rendered decisions in a particular case. However, it took a little longer for the Cantonal Court (more than three years) to reach a decision in that case. However, bearing in mind all the above factors, as well as the fact that the length of the proceedings as a whole is taken into account, and given the fact that the appellant reached a final decision in a particular case before filing the appeal, the Constitutional Court considers that in these circumstances the proceeding did not exceed the limits of a "reasonable time" within the meaning of Article 6 (1) of the European Convention and that the length of the proceedings is proportionate to the circumstances of the particular case.

42. In view of the above, the Constitutional Court finds that the allegations of the appeal concerning the violation of the right to a fair trial in the context of the right to a trial within a reasonable time under Article 6 § 1 of the European Convention are unfounded.

As regards other aspects of the right to a fair trial and in relation to Article 1 of Protocol No. 12 to the European Convention

43. Having regard to the finding of 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 on the Right to Family Life under Article II (3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the Constitutional Court considers that there is no need to consider the appellant's allegations of violation 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 relation to other aspects of that right. In addition, there is no need to consider allegations of violation of Article 1 of Protocol No. 12 to the European Convention - general prohibition of discrimination.

VIII. Conclusion

44. The Constitutional Court concludes that in the proceedings concerning the appellant's request for payment of salary remuneration while absent from work due to pregnancy, childbirth and childcare, the administrative authorities and the ordinary court did not offer reasons and arguments in support of the claim that there was a reasonable proportionality relationship in the appellant's case. This does not arise from the facts of the specific case either. The proportionality relationship would make the disputed differential treatment (solely on the grounds of nationality) compatible with the requirements of Article 14 of the European Convention. Thus there was 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 family life under Article II (3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

45. On the other hand, the Constitutional Court concludes that there is no violation of the right to a trial within a reasonable time as an element 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. This is so as in a situation where the total length of the present proceedings of three and a half years conducted at three judicial instances is proportionate to the circumstances of the particular case.

46. Pursuant to Article 59 (1), (2) and (3) and Article 62 (1) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP-1664/18

DECISION ON ADMISSIBILITY AND MERITS

Appeal of United Media Distribution S.R.L. from Bucharest, the Republic of Romania, "Sport Klub" d.o.o. Sarajevo, the United Media S.à.r.l. from Luxembourg and "Telemach" d.o.o. Sarajevo, represented by Nihad Sijerčić and Mirna Milanović-Lalić, against the Verdicts of the Court of Bosnia and Herzegovina nos. S1 3 U 020722 17 Uvp of 23 January 2018 and S1 3 U 020722 16 U of 16 November 2017 and the Ruling of the Competition Council of Bosnia and Herzegovina no. 06-26-2-006-143-II/15 of 23 December 2015

Decision of 26 March 2020

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 57 (2) (b), Article 59 (1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in a Grand Chamber and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović, and

Ms. Seada Palavrić

Having deliberated on the appeal of the **United Media Distribution S.R.L. from Bucharest**, **the Republic of Romania, et al**., in the case no. **AP-1664/18**, at its session held on 26 March 2020 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by the United Media Distribution S.R.L. from Bucharest, the Republic of Romania, "Sport Klub" d.o.o. Sarajevo, the United Media S.à.r.l. from Luxembourg and "Telemach" d.o.o. Sarajevo against the Verdicts of the Court of Bosnia and Herzegovina nos. S1 3 U 020722 17 Uvp of 23 January 2018 and S1 3 U 020722 16 U of 16 November 2017 and the Ruling of the Competition Council of Bosnia and Herzegovina no. 06-26-2-006-143-II/15 of 23 December 2015, is dismissed as ill- founded.

Reasoning

I. Introduction

1. On 14 March 2018, the United Media Distribution S.R.L. from Bucharest, the Republic of Romania ("the appellant United - Romania"), "Sport Klub" d.o.o. Sarajevo ("the appellant "Sport Klub""), the United Media S.à.r.l. from Luxembourg ("the appellant United - Luxembourg") and "Telemach" d.o.o. Sarajevo ("the appellant "Telemach""), represented by Nihad Sijerčić and Mirna Milanović-Lalić, filed an appeal

with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") against the Verdicts of the Court of Bosnia and Herzegovina ("the Court of BiH") nos. S1 3 U 020722 17 Uvp of 23 January 2018 and S1 3 U 020722 16 U of 16 November 2017 and the Ruling of the Competition Council of Bosnia and Herzegovina ("the Competition Council") no. 06-26-2-006-143-II/15 of 23 December 2015.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the Court of BiH and the Competition Council were requested on 30 October 2019, while the Association of Cable Operators in Bosnia and Herzegovina ("the Association") and "Elta Kabel" d.o.o. Doboj ("Elta"), which had a procedural position of applicants in the proceedings in which the challenged decisions were delivered, were requested on 21 November 2019 to submit their respective replies to the appeal.

3. The Court of BiH, the Competition Council and "Elta" submitted their replies to the appeal in the period from 7 November to 6 December 2019. The Association failed to submit its reply within the given deadline.

III. Facts of the Case

4. 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.

Introductory remarks

5. The Competition Council, *inter alia*, established by the Ruling no. 05-26-3-002-179-II/13 of 16 November 2013 (paragraph 1 of the enacting clause) that the appellant United - Romania directly and/or through its representative – the appellant "Sport Klub" abused the dominant position on the market, distributing sports channels with football contents of high quality. This also includes the broadcast of Live Package of English Premier League in a way specified in more detail in paragraph 1 of the enacting clause of the ruling, and (paragraph 2 of the enacting clause of the ruling). In addition, it was established that the appellant United - Romania was prohibited to engage in every further activity that constitutes the established abuse of dominant position referred to in paragraph 1 of that ruling, within the meaning of Article 11 (1) (b) of the Law on Competition. The appellant was ordered (paragraph 3 of the enacting clause) to directly and/or through their representative – the appellant "Sport Klub" to harmonize, within the specified deadline, the specified provisions of the applicable contracts on distributions of TV channels of "Sport Klub" concluded with the cable operators in BiH with the Law on Competition. It was ordered to do so within the meaning of paragraph 1 of that ruling and to submit them to the Competition Council. In addition, the respective ruling obliged (paragraph 4 of the enacting clause) the appellant United - Romania to establish, within

30 days, a system of criteria to ensure that all interested operators in BiH may conclude a contract on the distribution of TV channels of "Sport Klub" under transparent and equal conditions.

6. The appellant United - Romania filed a lawsuit against the mentioned ruling of the Competition Council, which was dismissed by the Court of BiH, in its respective Verdict no. S1 3 U 014981 14 U of 1 September 2015. Moreover, the appellant United - Romania filed a request for the review of the mentioned verdict. It was dismissed by the Verdict of the Appellate Panel of the Court of BiH no. S1 3 U 014981 15 Uvp of 30 March 2016.

7. The appellant United - Romania lodged an appeal with the Constitutional Court against the mentioned decisions of the Competition Council and the Court of BiH. It indicated 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 ("the European Convention"). It also indicated 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. The Constitutional Court rendered a Decision on Admissibility and Merits no. *AP-4859/15* of 10 April 2018 dismissing the appeal as ill-founded.

Challenged decisions

8. The Competition Council rendered a Ruling no. 06-26-2-006-143-II/15 of 23 December 2015, following the decision-making in a proceeding upon a request filed by the applicants on 26 January 2014 against the appellant United - Romania, the appellant "Sport Klub" and the appellant "Telemach", and business entities Serbia broadband – Serbian Cable Network Belgrade, Republic of Serbia ("SBB"), and "Total TV BH" d.o.o. for Communications, Banja Luka ("Total TV"). The respective ruling, *inter alia*, (paragraph 1 of the enacting clause of the ruling), established that appellant United - Romania failed to comply with the Ruling of the Competition Council no. 05-26-3-002-179-II/13 of 16 November 2013. It failed to do so by continuing to abuse, in the specified manner, the dominant position within the meaning of Article 10 (2) (c) of the Law on Competition. Thus, (paragraph 2 of the enacting clause of the ruling), it was prohibited, through the appellant "Sport Klub", any further activity constituting the established abuse of the dominant position referred to in paragraph 1 of the said ruling, within the meaning of Article 11 (1) (b) of the Law on Competition. Next, the respective ruling (paragraph 3 of the enacting clause of the ruling) ordered the appellant United - Romania and the appellant "Sport Klub" to make available, within the specified deadline, the General and Technical Conditions for the provision of services and the ruling of the Competition Council to all the interested CATV/IPTV/DTH operators. In addition, it was ordered to conclude, within the specified deadline, the contracts on the distribution of Sport Klub channels with all the interested CATV/IPTV/DTH operators in BiH under

the conditions under which the already applicable contracts were concluded with the business entity "Total TV" and the appellant "Telemach". Also, the respective ruling (paragraph 4 of the enacting clause of the ruling) imposed on the appellant United – Romania a fine for the violation of the law as established in paragraph 1 of the said ruling in the amount of BAM 250,000.00, within the meaning of Article 48 (1) (b) and (d) of the Law on Competition. Paragraph 4 of the enacting clause of the ruling provides that, if the appellant United - Romania fails to pay the imposed fine within the given deadline, it will be collected from the appellant United – Luxembourg. This appellant took over the business activity, regarding the distribution of the Sport Klub channels in Bosnia and Herzegovina during the proceedings, from the appellant United – Romania. In fact, it will be collected coercively, while calculating the default interest during the overdue period under the applicable regulations in Bosnia and Herzegovina from its affiliated business entities registered in Bosnia and Herzegovina – "Total TV" and the appellant "Telemach".

9. The Competition Council noted in the reasoning for the ruling that the parties to the respective proceeding were the applicants ("Elta" and the Association), and the opponent party made up of the appellant United - Romania, the appellant "Sport Klub", the appellant "Telemach", and the business entities "Total TV" and SBB. In relation to the opponent party (pages 4 and 5 of the ruling), the Competition Council stated, *inter alia*, the following: "[the appellant United - Romania], at the time of the institution of this proceeding, was under the control of United media Ltd, registered in Cyprus, which was the company affiliated with the business entity SBB [the appellant 'Telemach'], [the appellant 'Sport Klub'] and the business entity ['Total TV']. On 3 July 2015, the Competition Council received, registered under number [...] the submission of the opponent party providing additional information relevant to the conduct of the proceeding. This particularly pertains to the fact that there had been a change of control of [the appellant United - Romania], and as a result thereof [the appellant United - Romania] is no longer affiliated with the opponent parties. [The appellant United - Romania] is owned, according to the current excerpt from the relevant register from Romania, by a Romanian company ADAF A&A CONSULT SRL [...], which is not affiliated with the business entities SBB, [the appellant 'Telemach'], [the appellant 'Sport Klub'] and ['Total TV']. The change of ownership over [the appellant United - Romania] was carried out, according to the allegations of the opponent party, on 22 April 2015. The activity regarding the distribution of the Sport Klub channels in Bosnia and Herzegovina will be performed in the future by [the appellant United - Luxembourg] which is the affiliated business entirely with the aforementioned business entities against which the proceeding is pending."

10. Based on the reasoning for the ruling, it further follows that the request for the institution of the proceeding and the conclusion on the institution of the proceeding were delivered to the appellants United - Romania, "Sport Klub" and "Telemach" and to other business entities against which the proceeding was conducted. Those were "Total TV"

and SBB. They submitted their respective replies thereto. The applicants submitted the statement of opinion to the reply to the request, to which the appellants and business entities also submitted their respective replies. Next, it follows that on 4 August 2015 an oral hearing was held in the present case, which was attended on behalf of the parties by their legal representatives and authorized attorneys. In addition, it follows that the opponent party (namely, the appellants United - Romania, "Sport Klub" and "Telemach" and business entities "Total TV" and SBB) inspected the case file on 2 November 2015.

11. As to the procedural objection raised by the opponent party in relation to the representation of the Association (as one of the applicants) by a natural person Aco Kabanica, upon inspecting the specified documents the Competition Council established that the said person was a designated person to represent the mentioned legal person in the legal transactions. In addition, from 14 February 2010 onward there have been no interruptions in the continuity of these powers of his. Accordingly, it concluded that the said objection was ill-founded, particularly bearing in mind that the respective proceeding was conducted not only upon the request of that legal person, but also upon the request of "Elta Kabel". As to the procedural objection raised by the opponent party, that gives rise to the conclusion that there was no legal grounds for the institution of the respective proceeding since the conclusion of 9 December 2015 dismissed the request for the review of the Ruling of the Competition Council no. 05-26-3-002-179-II/13 of 16 November 2013, the Competition Council stated, *inter alia*, that the said request was dismissed as the allegations and facts indicated in the request pertained to the period after the delivery of the respective ruling. Thus, they could not have been decided by the said ruling. Accordingly, the Competition Council concluded that the said objection was ill-founded.

12. The Competition Council next noted that, within the meaning of Article 3 of the Law on Competition and Articles 4 and 5 of the Decision establishing the relevant market, the relevant market of products and/or services in the present case represents the market of the distribution of sports channels with football contents of high quality. This includes also the broadcast of Live package of the English Premier League in BiH. Next, the Competition Council established as the relevant geographic market the market of BiH. The Competition Council stated (page 43 of the ruling) that the appellant United - Romania, as a subject with the right to broadcast exclusive sports contents, also including the Live package of Premier league, at the time of the institution of the respective proceeding, was under the control of United Media Ltd., registered in Cyprus. This is company affiliated with the appellants "Sport Klub" and "Telemach" and the business entities SBB and "Total TV". Next, it stated that the appellant "Sport Klub" is the agent for the appellant United - Romania, and that their mutual relationship was regulated under the Contract on the implementation of General Conditions, which entered into effect on 24 January 2014. The appellant "Sport Klub" expressed its consent to comply with and to implement in full the General Rules and Conditions laid down by the appellant United

-Romania in relation to the distribution of the Sport Klub channels in the territory of BiH. The Competition Council noted that during the respective proceeding it was indisputably established that of all the sports channels offering high quality football contents only the Sport Klub channel offered the audio-visual broadcast of the Live package of the English Premier league in the territory of BiH. The Competition Council concluded that the market share of the appellant "Sport Klub", and indirectly that of the appellant United - Romania on the relevant market, amounts to 100,0 %. It so concluded by assessing that only the appellant "Sport Klub" has directly concluded contracts on the distribution of the Sport Klub channels in the territory of BiH. This was done based on the Contract on the Implementation of General Conditions entered into with the appellant United - Romania. Therefore, they have a dominant position on the market within the meaning of Article 9 (2) of the Law on Competition.

13. The Competition Council further noted that the appellant "Sport Klub" concluded only two contracts on the distribution of the Sport Klub channels from the moment of the adoption of general and technical conditions for the conclusion of contracts on the BiH market. It concluded them with the appellant "Telemach" and with the business entity "Total TV" – business entities affiliated with the appellant United - Romania. In addition, it indicated that four operators ("Ask" d.o.o. Ilidža, KGI d.o.o. Goražde and "Logosoft" and BHB TV d.o.o. Lukavac) continued to broadcast the signal under the contracts concluded before the adoption of the General Conditions, whereas others had to go through a procedure of negotiations, which did not result in the conclusion of contracts. The ruling of the Competition Council of 16 November 2013 to adopt the system of criteria, which will ensure that all the interested operators in BiH may conclude a contract on the distribution of the Sport Klub TV channels under transparent and equal conditions. In so doing, it indicated that the General Conditions are not publicly available to the cable operators and that when sending an initial request, they could not know what exceeded the scope established under the General Conditions. In addition, the Competition Council indicated that, during the decision-making, it took into account the fact that the other two business entities, which broadcast sports channels with other exclusive contents – "HD Win" and "Eurosport", concluded contracts with the majority CATV/DTH/IPTV operators.

14. Bearing in mind the aforementioned, the Competition Council assessed that the appellant "Sport Klub", during the process of the conclusion of contracts on the distribution of the Sport Klub channels, applied different conditions for identical transactions. This clearly benefited the affiliated business entities – the appellant "Telemach" and the business entity "Total TV". It also assessed that the conclusion of the contract on the distribution of the Sport Klub channels, while at the same time not concluding contracts with other CATV/DTH/IPTV operators in the territory of BiH, brought the mentioned business entities into a more favourable position when compared to the competitors on the relevant market. In addition to this, it was indicated that it follows from the established

facts of the case that during the monitored period, from 2013 to the adoption of the ruling, there has been a substantial increase in the number of the subscribers with the said affiliated companies. The Competition Council found that the provisions of the Ruling of the Council no. 05-26-3-002-179-II/13 of 16 November 2013 were not implemented in terms of establishing the system of criteria set to ensure that all the interested operators in BiH may conclude a contract on the distribution of the Sport Klub TV channels under transparent and equal conditions. This was so for the reason that differential treatment of cable operators was established in the process of negotiations concerning the conclusion of contracts, as well as that the conditions were not transparently and clearly set. In view of the aforementioned, the Competition Council decided as stated in paragraph 1 of the enacting clause of the ruling. Next, the Competition Council, considering the established violations of the Law, in accordance with the powers referred to in Article 11 (1) (b) and (c), established that it was necessary to impose measures to remove the detrimental consequences of the abuse of the dominant position. Therefore, in that connection, it decided as stated in paragraphs 2 and 3 of the enacting clause of the ruling.

15. In relation to the fine, the Competition Council referred to the provision of Article 48 (1) (b) of the Law on Competition. In that connection, it indicated that based on the financial reports submitted by "the opponent party (submission number [...] of 2 November 2015) it established that [the appellant United - Romania] generated the total revenue of (...)** BAM ((...)**LEI)", and imposed on the appellant United - Romania a fine in the amount of BAM 250,000.00, "which represents (...)**% of the total income [the appellant United - Romania] in 2014". The Competition Council indicated that in determining the amount of the fine it took into account the intention, the period of duration of the violation of the law, as well as the consequences it had on the market competition within the meaning of Article 52 of the Law on Competition. It also took into account particularly aggravating circumstances of the earlier violation of the Law on Competition. In addition, it indicated that, in the event that the fine is not paid within the established deadline, it will be collected coercively, "within the meaning of Article 47 of the Law", while calculating the default interest during the overdue period, under the applicable regulations of BiH.

16. On 28 January 2016, the appellants United - Romania and "Sport Klub" filed a lawsuit with the Court of BiH against the mentioned ruling of the Competition Council pointing, among other things, to a violation of the administrative procedure rules and the erroneously and incompletely established facts of the case. The appellant United - Luxembourg and the appellant "Telemach", as well as the legal entity "Total TV" put forth a submission to the Court of BiH, which was received by the court on 15 February 2016. They requested to enter the administrative dispute at issue as interveners because of the existence of a legal interest. In that submission they stated*, inter alia*, that they support in full the respective lawsuit and that they join the arguments put forth in the said lawsuit, which they inspected.

17. It follows from the submitted documents that the appellant "Telemach" paid on 2 February 2016 the fine imposed under the challenged ruling of the Competition Council.

18. The Court of BiH rendered in the Panel for Administrative Disputes a Verdict no. S1 3 U 020722 16 U of 16 November 2017. The introduction of the said verdict notes that the court rendered a verdict in an administrative dispute of the appellants United - Romania and "Sport Klub" as the plaintiffs against the mentioned ruling of the Competition Council, and the enacting clause of the verdict reads that the lawsuit is dismissed.

19. It follows from the reasoning for the verdict of the Court of BiH that the court accepted as correct the conclusion of the Competition Council that the applicants in the present case were "Elta" and the Association, while the opponent party was the appellant United - Romania, the appellant "Sport Klub" and the appellant "Telemach", and the business entities "Total TV" and SBB. The Court of BiH assessed that the decision of the Competition Council is correct and lawful, and the reasoning for that decision is valid, complete and relevant. Namely, the Court of BiH assessed that, contrary to the objection raised in the lawsuit, the Competition Council, in delivering the challenged ruling, correctly applied the relevant provisions of the Law on Competition, the Decision establishing the relevant market, the Decision defining the categories of a dominant position and the Law on Administrative Disputes. It also noted, in addition, that the Competition Council established the relevant market in accordance with Article 3 of the Law on Competition and Articles 4 and 5 of the Decision establishing the relevant market. Also, it assessed that the Competition Council correctly acted when establishing that the appellants United - Romania and "Sport Klub" abused their dominant position on the relevant market, within the meaning of the provisions of Article 10 (2) (c) of the Law on Competition, by applying different conditions for the same or similar type of affairs with other parties. They have thereby brought the applicants into an unequal and unfavourable competition position, given that it so follows from the evidence contained in the case file, particularly contracts concluded with other business entities. In addition, the Court of BiH assessed that the Competition Council correctly decided when it delivered a decision in paragraph 3 of the enacting clause of the first instance ruling. The Court of BiH concluded that the Competition Council correctly decided on the amount of the imposed fine. Namely, it noted that when imposing the fine, considering the undisputed fact of the violation of the provision of Article 10 (2) (c) of the Law on Competition, the Competition Council imposed on the appellant United - Romania a fine in the amount of BAM 250,000.00. Next, it concluded that, when determining the amount of the fine, the Competition Council took into account the intention and the period of the duration of the violation, as well as the consequences it had on the market competition, within the meaning of Article 52 of the Law on Competition. The Court of BiH also reasoned that the fine was in accordance with Article 46 (3) (d) of the Law on Communications, that it corresponds to the severity of the misdemeanour and that it is proportionate to the fine

prescribed for such type of misdemeanour. In addition, it stated that the reasons for such decision were provided in detail in the reasoning for the challenged act, which reasons were also accepted by that court.

20. According to the assessment of the Court of BiH, contrary to the objections raised in the lawsuit, the Competition Council, based on the correctly conducted proceeding, correctly and completely established facts of the case in the present case and drew a correct conclusion about the relevant facts to which the substantive law was correctly applied. In addition to the aforementioned, the Court of BiH stated that it assessed the remainder of the allegations stated in the lawsuit, but that it found that it was not necessary to reason them separately given that they are not of relevance to the validity of the decision, and they are related to the decision on the principal matter.

21. On 20 December 2017, the appellants United - Romania and "Sport Klub" filed a request for the review of the mentioned verdict of the Court of BiH, wherein, among other things, they essentially reiterated the allegations presented in the lawsuit. In addition, the appellants United - Luxembourg and "Telemach", which designated themselves as interveners on the part of the plaintiff, also filed the request for the review of the mentioned decision. The Court of BiH received it on 20 December 2017. In that request they indicated that they support in entirety the request filed by the appellants United - Romania and "Sport Klub" and that they join the arguments put forth in that request, which they inspected.

22. The Court of BiH, siting in an Appellate Panel, rendered a Verdict no. S1 3 U 020722 17 Uvp of 23 January 2018. The introduction of that verdict of the Appellate Panel reads that the verdict was rendered while deciding the request of the plaintiff - the appellant United - Romania and the appellant "Sport Klub" and the request of the interested parties – the appellant United - Luxembourg and the appellant "Telemach" for the review of a court decision – the Verdict of the Court of BiH, the Panel for Administrative Disputes, no. S1 3 U 020722 16 U of 16 November 2017. The enacting clause of the mentioned verdict of the Appellate Panel reads that the requests for the review of the court decision are dismissed.

23. The reasoning for the verdict carries the assessment that the requests for the review of a court decision are not well-founded. In that connection, the Court of BiH reasoned that it follows from the status in the case file that the Panel for Administrative Disputes of the Court of BiH correctly decided when establishing the standing of the subjects appearing in this administrative dispute. It also provided a detailed reasoning for that by noting that the Competition Council received on 26 January 2014 a request for the institution of a proceeding from the applicant against the appellant United - Romania, the appellant "Sport Klub", the appellant "Telemach" and the business entities SBB and "Total TV" for the abuse of the dominant position, within the meaning of Article 10 of the Law on Competition. Next, in the reasoning for the verdict the Appellate Panel

assessed that the Panel for Administrative Disputes correctly and completely established the facts of the case and correctly applied the substantive law. In that connection, actually, they only reiterated the rest of the contents of the reasoning for the challenged verdict of the Panel for Administrative Disputes (presented in the foregoing paragraphs of this decision). For the aforementioned reasons, the Appellate Panel concluded that the challenged verdict is correct and lawful, and the requests for the review of the said verdict are ill-founded, therefore it dismissed by applying the provision of Article 54 (1) of the Law on Administrative Disputes.

IV. Appeal

a) Allegations set forth in the appeal

24. The appellants claim that the challenged decisions violated their 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 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.

25. In connection with the alleged violation of the right to a fair trial, the appellants claim, first and foremost, that, according to the case law of the European Court of Human Rights ("the European Court") specified in more detail in the appeal, the present proceeding should be considered in the context of the protection that the Constitution of Bosnia and Herzegovina and the European Convention afford concerning criminal proceedings. The appellants deem that the Competition Council and the Court of BiH failed to provide adequate reasoning for their conclusions on decisive facts - relevant market, existence of dominant position and abuse of dominant position in the present case. They indicate that the Competition Council was informed as early as the beginning of the respective proceeding by means of a letter that the appellant United - Luxembourg is the broadcaster of the Sport Klub channels. In addition, they indicate that other appellants have not participated in the relevant market for a long period already, which is why they are unable to enforce the orders referred to in the challenged ruling. However, they indicate that the Competition Council did not extend the procedure to the appellant United - Luxembourg. They indicate that irrespective of that fact the Competition Council obligated, under the challenged ruling, the appellant United - Luxembourg to pay the fine, without making it possible for the said appellant to participate in the respective procedure. They indicate that it is unclear how and based on what regulations the settlement of a fine was imposed on the appellant United - Luxembourg and the appellant "Telemach". This is particularly bearing in mind the fact that the appellant United - Luxembourg did not participate in the respective procedure, and that the appellant "Telemach" was relieved of responsibility in that procedure. All the aforementioned, in the opinion of the appellants, constitutes serious procedural violations and a violation of the right to defines. They indicate that in

the legal remedies used in the respective procedure they pointed to the aforementioned in detail, but that the Court of BiH did not provide the reasoning in accordance with the standards of the right to a fair trial. In addition, the appellants allege, among other things, that the Competition Council examined unlawfully, and in a procedure not provided to do so, its earlier ruling of 16 December 2013. In addition, they allege that the applicant Association was not duly represented and that the challenged ruling was rendered upon the expiry of the deadlines prescribed by law. Furthermore, they claim that the Competition Council failed to afford to the appellants United Media - Romania and "Sport Klub" a legal possibility to state their opinion about all the facts of the case, despite the fact that they submitted a request on two occasions asking for that right to be granted. In addition, they deem that, as it failed to inform the appellants which of their actions it considered disputable, the Competition Council violated their right to defence, and the Court of BiH confirmed that violation.

26. In connection with the alleged violation of the right to property, the appellants deem that a violation of this right occurred in the present case given that the reasons for the reduction of property in the challenged decisions were not reasoned in accordance with the guarantees referred to in the Constitution of Bosnia and Herzegovina and the European Convention, particularly in relation to the appellant United - Luxembourg and the appellant "Telemach".

b) Replies to the appeal

27. The Court of BiH indicates that the allegations set forth in the appeal are almost identical to the allegations set forth in the request for the review of the court decision, concerning which the said court stated its opinion. In its opinion, it rendered a clear, reasoned and lawful decision, while the allegations set forth in the appeal are arbitrary because the Competition Council conducted a procedure regulated by law. It considered that the appellants were allowed a court protection by lodging a request for the review of a court decision with a court that is independent, impartial and based on law.

28. The Competition Council deems the allegations set forth in the appeal to be ill-founded, while it deems the challenged decisions to be correct and lawful. Among other things, it claims that, when delivering the ruling, it provided detailed reasoning for the reasons for the adoption thereof, which the Court of BiH assessed correctly when rendering the challenged verdicts. It deems that the allegations set forth in the appeal about the violation of the right to a reasoned decision are incorrect. It indicates that the dominant position of the appellant United - Romania is clearly established on the relevant market and that the duration of the violation is clearly defined in the present case. In addition, it indicates that, by the date of the adoption of the challenged ruling, it failed to comply with the order set forth in the ruling and that it continued to abuse its dominant position. Bearing in mind the provisions of Article 48 (1) of the Law on

Competition, the Competition Council deems that the appellant United - Romania was punished with a rather mild penalty, which, as it states, amounts to 0.45% of the total revenue of that business entity in 2014. In relation to the allegations set forth in the appeal based on which the Competition Council obligated the appellant United - Luxembourg, the appellant "Telemach" and the business entity "Total TV BH" to pay the fine if the same is not paid by the appellant United - Romania, the Competition Council indicates that the appellant United - Romania and the appellant United – Luxembourg, at the time of the filing of the request for the institution of a procedure and at the time pertaining to the violation of the Law, were part of the same cluster. This also includes the appellant "Telemach" and the business entity "Total TV BH". In addition, the Competition Council alleges that the Court of BiH, in its Verdict no. S1 3 U 014508 13 U of 25 July 2014, took a position that the Competition Council correctly drew a conclusion with the basis in the provisions of "Article 2 (2) pf the Law and Article 53 of the same Law" that it has a legal possibility to collect the imposed fine from the affiliated companies. This is, in fact, provided as an alternative option exclusively and only after the business entity, which was, imposed a fine fails to pay that fine within the given deadline and it appears certain that it will not pay the fine. The Competition Council alleges that Article 2 (2) and (3) provides the application of the Law on Competition also to business entities that have control over other business entities. The provision of Article 48 of the same Law prescribes the pronouncement of a punishment for more severe violations of the Law on Competition. It indicates that, in that sense, the legal provisions specifying the pronouncement of a fine would be completely rendered meaningless if there was no possibility to collect the fine from the affiliated companies.

29. The applicant "Elta Kabel", among other things, claims that the allegations set forth in the appeal are ill-founded in that the right to a reasoned decision was violated in the present case. Namely, it claims that it follows from the case law of the European Court, specified in more detail in the reply to the appeal, that the said right cannot be construed in a way that the court has the obligation in every individual case to present its opinion in detail in relation to every factual allegation and argument presented during the procedure. Next, it indicates that, instead of reiterating the same facts and presenting the identical conclusions, the court, in accordance with the principle of procedural cost-efficiency, in corresponding parts had the right to refer to the reasoning for the challenged act, namely the lower instance verdict. In addition, it deems that, contrary to the allegations set forth in the appeal, the Appellate Section of the Court of BiH provided extensive and sufficient reasoning also regarding the issue of the subjects having the standing to be sued. When it comes to a fine determined in an administrative procedure, the applicant "Elta Kabel" deems that the Court of BiH, also, provided an appropriate reasoning for the circumstances that were assessed when imposing the fine.

V. Relevant Law

30. The **Law on Competition** (*Official Gazette of BiH*, 48/05, 76/07 and 80/09),

An unofficial revised text, prepared at the Constitutional Court of BiH, is used for the purposes of this Decision, which, in its relevant part, reads as follows:

Article 2
(Application)

(1) This Law shall apply to all legal and natural persons that are directly or indirectly engaged in the production, sale of goods and provision of services and whose actions can prevent, restrict or distort market competition in the overall territory of Bosnia and Herzegovina or substantial part of the market ("business entities"), and particularly to:

[...]

(2) This Law shall also apply to any business entities controlling another business entity, as well as business entities under their control. A controlled business entity is considered to be a business entity in which other business entity, directly or indirectly:

a) holds more than half of the share or stocks, or

b) may exercise more than half of the voting rights, or

c) has the right to appoint more than half of the members of management, supervisory board or an appropriate body for managing and controlling the operations, or

d) in other way has the right to manage the operations of the business entity.

(3) This Law shall also apply to business entities with their seat or place of residence abroad, if their activities have significant effect on the market of Bosnia and Herzegovina or its substantial part.

Article 10
(Abuse of a Dominant Position)

(1) Any abuse of a dominant position by one or more business entities on the relevant market shall be prohibited.

(2) The abuse of a dominant position in particular consists in:

[...]

b) prohibiting all further activity of a business entity;

[...]

c) applying different conditions to equivalent or similar transactions with other parties, thereby placing them at a competitive disadvantage;

[...].

IV – DECISION-MAKING PROCEDURE

Article 26
(Rules of the Proceedings)

In the proceedings before the Competition Council, unless otherwise specified by this Law, the Law on Administrative Procedure shall be applied [...]

Article 27
(Initiation of the Proceedings)

(1) The Competition Council shall initiate a proceeding within the meaning of this Law ex officio or on a party's claim.

[...]

Article 43, paragraph 4
(Final Decisions of the Competition Council)

Before the final decision the Competition Council may inform the parties in writing of the content of the decision it intends to issue.

Article 47
(Enforcement of the Decisions of the Competition Council)

The Competition Council may request legal assistance from the competent bodies for the enforcement of the decision concerned if the parties to the proceedings failed to implement or execute the decision.

[...]

V – PENALTY PROVISIONS

Article 48
(Fines for Severe Infringements of the Law)

(1) A business entity or a natural person, shall be fined up to 10 % of value of its total annual turnover earned in the financial year preceding the year when the infringement was committed, if it:

[...]

b) abuses a dominant position as regulated in the provisions referred to in Article 10 of this Law;

[...]

d) fails to comply with the decisions of the Competition Council referred to in Article 42 of this Law;

[...]

Article 52
(Determining the Amount of Fines)

When determining the amount of the fine, the Competition Council shall take into consideration intention and duration of the infringement of the provisions of this Law.

Article 53
(Payment of Fines)

(1) Fines referred to in Articles 48 and 49 of this Law shall also relate to the associations of business entities.

(2) When a fine is imposed on an association of business entities that is not solvent taking into account the turnover of its members, the association is obliged to request contributions from its members to cover the amount of the fine.

(3) If the contributions concerned are not paid to the association within a time limit defined by the Competition Council, any of the business entities - members of the association may be required to pay the fine.

31. The **Law on Communications** (*Official Gazette of BiH*, 33/02, 31/03, 75/06, 50/08, 32/10 and 98/12),

An unofficial revised text, prepared at the Constitutional Court of BiH, is used for the purposes of this Decision, which, in its relevant part, reads as follows:

Article 46, paragraph 3, item d

3. The Agency shall have the authority to apply enforcement measures proportional to the violations in accordance with the following scale:

[...]

d) The amount of the determined financial penalty shall not exceed BAM 150,000 in case of deliberate or negligent violation of individual provisions of the Law or of conditions specified in the license or in the codes of practice and rules of the Agency. The amount of the fine imposed shall be proportionate to the severity of the infringement and, where applicable, with the gross financial benefits derived from the infringement. In case of repeated violations, the fine imposed may not exceed BAM 300,000. The Agency shall devise a schedule of infractions and resulting penalties, which shall be adopted by the Council of Ministers.

[...]

32. The **Law on Administrative Procedure** (*Official Gazette of BiH*, 29/02, 12/04, 88/07, 93/09, 41/13 and 53/16),

The Law on Administrative Procedure (*Official Gazette of BiH*, 29/02, 12/04, 88/07, 93/09 and 41/13), which was applicable at the time of adoption of the challenged decisions, is applied in the present case, which, in its relevant part, reads as follows:

10. Principle of Party Hearing

Article 10

(1) Prior to taking a decision, a party must be given an opportunity to provide his/her position on all the facts and circumstances important for taking a decision.

(2) A decision may be taken without prior provision of the party's position only where this is provided by law.

VI. Admissibility

33. 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.

34. In accordance with Article 18 (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 effective legal remedy that he/she used.

35. The subject matter challenged by the appeal in the present case is the Verdict of the Court of BiH no. S1 3 U 020722 17 Uvp of 23 January 2018, against which there are no other effective legal remedies available under the law, while the appeal was lodged on 14 March 2018, i.e. within a time limit of 60 days as prescribed under Article 18 (1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18 (3) and (4) of the Rules of the Constitutional Court, since there is no formal reason rendering the appeal inadmissible nor is it manifestly (*prima facie*) ill-founded.

36. In view of the provisions of Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 18 (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the respective appeal meets the requirements regarding the admissibility.

VII. Merits

37. The appellants claim that the challenged decisions violated their rights under Article II (3) (e) and (k) of the Constitution of Bosnia and Herzegovina, and Article 6 (1) of the European Convention and Article 1 of Protocol No. 1 to the European Convention.

Right to a fair trial

38. Article II (3) 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 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.

39. 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. [...]

40. The Constitutional Court observes that the appellants challenge the decisions of the ordinary court and of the Competition Council. They established a failure to comply with the earlier ruling of the Competition Council and a continuation of abuse of a dominant position on the relevant market by the appellant United – Romania through the representative the appellant "Sport Klub" within the meaning of the provisions of the Law on Competition and the Decision determining the relevant market. The appellant was prohibited, through the representative – the appellant "Sport Klub", to engage in any activity constituting the established abuse of a dominant position, thus the appellants United - Romania and "Sport Klub" were ordered to undertake certain actions. In addition, a fine was imposed on the appellant United - Romania for a violation of the Law on Competition. It was determined that, if the said appellant fails to pay the fine within the given time limit, it will be collected from the appellant United - Luxembourg, i.e. coercively from its affiliated business entities registered in BiH – the appellant "Telemach" and the business entity "Total TV".

41. Essentially, the appellants deem that their right to a fair trial was violated. It was violated because in the present case the facts of the case were incompletely and incorrectly established and as the substantive law was incorrectly applied. The provisions of procedural law and of the right to defence were violated. In addition, in their opinion, the reasoning for the challenged decisions were not in accordance with the standards of the right to a fair trial.

42. In relation to the issue of applicability of Article II (3) (e) of the Constitution of Bosnia and Herzegovina, and Article 6 of the European Convention in the present case, and in relation to the appellants' claims that the present proceeding should be considered in the context of the protection afforded by the Constitution of Bosnia and Herzegovina and the European Convention vis-à-vis criminal proceedings, the Constitutional Court points to its case law established in the cases nos. *AP-620/15* and *AP-1865/12* (see, Constitutional Court, Decisions on Admissibility and Merits nos. *AP-620/15* of 7 September 2017 and *AP-1865/12* of 8 December 2015, available on the website of the Constitutional Court: www.ustavnisud.ba). The decisions of the Competition Council and the Court of BiH were also challenged, which also established the abuse of a dominant

position of the appellant on the relevant market within the meaning of the provisions of the Law on Competition and other bylaws. Therefore, while upholding its own case law, which raised similar legal issues, according to which those were civil law cases, and deeming that the case law of the European Court the appellants referred is not applicable, the Constitutional Court notes that this is also civil law and not criminal law case. It thus follows that the appellants in the respective proceeding enjoy the guarantees 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, and not the guarantees referred to in paragraphs 2 and 3 of the same article. Accordingly, the Constitutional Court will consider the allegations made by the appellants about the violation of the "right to defence" in the context of the right to equality in proceedings, which is safeguarded under Article 6 (1) of the European Convention.

43. In relation to the allegations set forth in the appeal, the Constitutional Court indicates, primarily, that according to the case law of the European Court of Human Rights ("the European Court") and that of the Constitutional Court, it is not the duty of these courts to review the conclusions of the ordinary courts in relation to the factual situation and the application of the law (see, the European Court, *Pronina v. Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01). Namely, the Constitutional Court has no competence to substitute ordinary courts in the assessment of facts and evidence, rather, in general, the task of the ordinary courts is to assess the facts and evidence they presented (see, European Court, *Thomas v. The United Kingdom*, Judgment of 10 May 2005, Application no. 19354/02). It is the duty of the Constitutional Court to examine, if possibly, the constitutional rights (the right to a fair trial, the right to access to court, the right to an effective legal remedy, etc.) have been violated or neglected, as well as whether the application of law was, possibly, arbitrary or discriminatory. Therefore, within the appellate jurisdiction, the Constitutional Court deals exclusively with the issue of a possible violation of constitutional rights or rights under the European Convention in proceedings before ordinary courts.

44. Next, the Constitutional Court recalls that, according to the established case law of the European Court, Article 6 paragraph 1 of the European Convention obliges the courts, among other things, to give reasons for their judgments. This obligation, however, cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision (see, European Court, *Ruiz Torija v. Spain*, judgment of 9 December 1994, Series A, no. 303-A, paragraph 29). Next, the European Court and the Constitutional Court indicated in numerous decisions that domestic courts have a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, while at the same time being obliged to justify its activities by giving reasons for its decisions by stating the reasons on which they are based (see, European Court, *Kuznetsov et al. v. Russia*, judgment of 11 January 2007, Application

no. 184/02, paragraph 83 with further references, and the Constitutional Court, Decision on Admissibility and Merits no. *AP-2478/06* of 17 September 2008, paragraph 22 with further references, published at: www.ustavnisud.ba). Also, the Constitutional Court recalls that the final decisions of the appellate courts need not have exhaustive reasoning (see, European Commission of Human Rights, Decision on Admissibility no. 8769/97 of 16 July 1981, O.I. 25), but the reasoning concerning relevant allegations set forth in the appeal that it finds to be such.

45. Based on the allegations set forth in the appeal, it follows that the appellants, primarily, deem that the facts of the case were established incorrectly and incompletely and that the substantive law was incorrectly applied. This was so in a situation where non-compliance with the earlier ruling of the Competition Council was established and the continuation of the abuse of a dominant position on the relevant market by the appellant United - Romania through its representative, the appellant "Sport Klub", within the meaning of the provisions of the Law on Competition and the Decision establishing the relevant market and in a situation where it was prohibited, through the representative – the appellant "Sport Klub", to engage in any activity constituting the established abuse of a dominant position. In addition, the appellants United - Romania and "Sport Klub" were ordered to undertake certain actions and that the challenged decisions failed to provide in that connection the reasoning, which are in accordance with the standards of the right to a fair trial.

46. In that connection, the Constitutional Court, firstly, finds it necessary to indicate that it follows from the reasoning for the challenged ruling of the Competition Council that the Competition Council established, by referring to the provisions of Article 3 of the Law on Competition and Articles 4 and 5 the Decision establishing the relevant market, as the relevant market of products and/or services in the present case the market of distribution of sports channels with football contents of high quality. They also include the broadcast of Live package of the English Premier League in BiH, while it established the BiH market as the relevant geographic market. Furthermore, the Constitutional Court observes that the Court of BiH considered the objections regarding the establishment of the relevant market, which, in fact, appear also in the appeal. It noted that the mentioned statement of the Competition Council was correct. Next, the Constitutional Court observes that, based on the reasoning furnished by the Competition Council, which was accepted as correct by the Court of BiH, it follows that it was established indisputably during the proceeding before the mentioned council that in the territory of BiH of all the sports channels offering high quality football contents only the Sport klub channel offers audio-visual broadcast of the Live package of English Premier League. In addition, it was established that during the relevant period the appellant United – Romania was an entity with the right to transfer exclusive sports contents, including the Premier League Live package. Additionally, the appellant "Sport Klub" was the agent for the appellant United - Romania and their mutual relation was regulated by the

Contract on the implementation of General Conditions, which entered into effect on 24 January 2014. Moreover, it follows that, given the fact that only the appellant "Sport Klub" directly concluded contracts on the distribution of the Sport klub channels in the territory of BiH, based on the Contract on the implementation of General Conditions, which was concluded with the appellant United - Romania, the Competition Council reasoned, and the Court of BiH accepted that conclusion as correct, that the market share of the appellant "Sport Klub", and indirectly of the appellant United – Romania, on the relevant market is 100.0% This is the reason why they have a dominant position on the market, within the meaning of Article 9, paragraph (2) the Law on Competition. In addition, the Constitutional Court observes that the Competition Council provided a detailed, sufficiently clear and well-argued reasoning for its conclusion that the appellant United – Romania, through its representative – the appellant "Sport Klub", following the delivery of the Ruling of the said council no. 05-26-3-002-179-II/13 of 16 November 2013, failed to implement the provisions of the said ruling in terms of establishing the system of criteria to ensure that all the interested operators in BiH may conclude a contract on the distribution of the Sport klub TV channels under transparent and equal conditions. It provided such detailed, sufficiently clear and well-argued reasoning for its conclusion that differential treatment of cable operators was established in their process of negotiations for the conclusion of contracts, as well as that the conditions were not set transparently and clearly. In view of the aforementioned, the Constitutional Court deems that the Competition Council provided sufficiently clear and well-argued reasoning to conclude that the aforementioned constitutes the abuse of a dominant position by all the appellants and sufficiently clear reasons for a decision to prohibit the said appellants any activity constituting the established abuse of a dominant position and to order them to undertake certain actions with a view to removing the said violation. In addition, the Constitutional Court observes that the Court of BiH itself considered the objections regarding the abuse of a dominant position by the said appellants and the orders to these appellants to undertake certain actions (specified in paragraph 3 of the enacting clause of the challenged first instance ruling) as they appear, as a matter of fact, in the appeal. It noted that the decision of the Competition Council is correct in this part too. Viewing the reasoning for the challenged decisions in terms of the provisions of Article 10, paragraph (2) and items b) and c) of the Law on Competition, the Constitutional Court finds no arbitrariness in the conduct of the Competition Council and the Court of BiH.

47. Furthermore, in relation to the allegations set forth in the appeal wherefrom it follows that the appellant United – Luxembourg – the broadcaster of the Sport klub channels and other appellants have not participated for a long period already in the relevant market. This was the reason why, in their opinion, the appellants cannot be bound by the challenged decisions. The Constitutional Court observes, firstly, that it follows from the reasoning for the challenged decisions that those decisions indisputably established that during the period relevant for delivering the decision (at the time of instituting the proceeding before the Competition Council) the appellant United - Romania was the subject with the

right to transfer exclusive sports contents, including the Premier League Live package. The appellant "Sport Klub" was the agent for the appellant United – Romania. Also, the Constitutional Court observes that it follows from the reasoning for the challenged decisions that the Competition Council and the Court of BiH had in mind the fact that the appellant United - Luxembourg during the course of the proceedings took over the activity regarding the distribution of the Sport klub channels in Bosnia and Herzegovina from the appellant United - Romania (as stated in paragraph 4 of the enacting clause of the first instance ruling). Next, bearing in mind the contents of the challenged decisions, the Constitutional Court concludes that both the Competition Council and the Court of BiH, when considering the issue of standing to be sued, took into account the provisions of Article 2 of the Law on Competition (which regulate the issue of the application of the Law on Competition, among other things, to the affiliated business entities), although they did not refer to the said provisions explicitly. The Constitutional Court connected all the aforementioned, as well as the contents of the challenged decisions in this part, with the contents of the provisions of Article 2 of the Law on Competition. It particularly had in mind the undisputed conclusion referred to in the challenged decisions that precisely the appellant United - Romania was the subject with the right to transfer exclusive sports contents during the relevant period (at the time of instituting a proceeding before the Competition Council), and not the appellant United - Luxembourg, including the Premier League Live package. Therefore, the Constitutional Court finds no arbitrariness in the application of the substantive law and in the conclusion of the Competition Council and the Court of BiH in relation to the standing to be sued of the subjects in the respective proceeding. It follows that the subjects with the standing to be sued in the present case, among others, were as follows: the appellant United - Romania, the appellant "Sport Klub" and the appellant "Telemach".

48. The Constitutional Court made a connection of all the aforementioned, as well as the contents of the provision of Article 2 of the Law on Competition, with other provisions of the relevant regulations, which the Competition Council and the Court of BiH referred to during the decision-making on a fine in the challenged decisions. Thus, the Constitutional Court, contrary to the allegations set forth in the appeal, finds no arbitrariness in the conclusion of the Competition Council for the imposed fine to be collected from the appellant United – Luxembourg. (This appellant, as already mentioned before, took over, during the course of the respective proceeding, the activity regarding the distribution of the Sport klub channels in Bosnia and Herzegovina from the appellant United - Romania). In fact, it finds no arbitrariness for the fine to be collected coercively, while calculating the default interest during the overdue period by the appellant "Telemach", if the appellant United - Romania fails to pay the fine within the given time limit.

49. In relation to the other allegations set forth in the appeal pertaining to the assertions about the violation of procedural law and the right to equality in a proceeding, the

Constitutional Court observes, first, that these allegations are based on the assertion that the appellant United - Luxembourg did not participate in the proceeding before the Competition Council. In that connection, the Constitutional Court observes that it indeed follows from the facts of the present case that the appellant United - Luxembourg did not participate in the proceeding preceding the delivery of the challenged ruling of the Competition Council. However, the Constitutional Court considered the foregoing considerations related to the alleged violation of the right to a fair trial regarding the standing to be sued of the subjects in the respective proceeding. It also took into account that the challenged ruling of the Competition Council imposed on the appellant, United – Luxembourg, an exclusively alternative obligation of paying a fine (if the fine is not paid by the appellant United - Romania), without a coercion to enforce the fine. It also took into account the fact that the Court of BiH considered the merits of its request for the review of the verdict of the Court of BiH (which dismissed the lawsuit against that ruling of the Competition Council), as a request, as explicitly stated in the introduction of the verdict, of the "interested parties". It noted that no violation of procedural provisions occurred in the present case. Consequently, the Constitutional Court finds no elements pointing to a violation of the principle of equality in a proceeding and a violation of procedural provisions in this segment, particularly the provisions of Article 10 of the Law on Administrative Procedure.

50. Furthermore, the Court considered the allegations set forth in the appeal wherefrom it follows that the Competition Council failed to afford to the appellants United - Romania and "Sport Klub" a legal possibility to state their respective opinions about the facts of the case, and it failed to inform them of their actions it deemed disputable. Thus, the Constitutional Court observes, firstly, that it follows from the facts of the present case, contrary to these allegations, that these appellants were delivered all the submissions of the applicant and that their submissions, which they submitted to the Competition Council, were considered. In addition, it follows that, during the course of the proceeding before the Competition Council, an oral hearing was held which the attorney for the said appellants attended and that thereafter the appellants requested to inspect the case file, which they were allowed to do. In addition, in relation to these allegations set forth in the appeal, the Constitutional Court recalls that Article 43, paragraph 3 of the Law on Competition prescribes that the Competition Council before delivering a final ruling/decision may inform the parties in writing of the contents of the ruling/decision it intends to deliver. However, the Constitutional Court observes that it follows from the very text of the cited provision that the notification of the parties in writing of the contents of the ruling it intends to deliver constitutes only a possibility and not an obligation for the Competition Council. In view of the aforementioned, the Constitutional Court deems that these allegations too about the violation of procedural law and the violation of the right to equality in the proceeding are ill founded. Moreover, the Constitutional Court observes that the Competition Council and the Court of BiH considered other allegations of the appellants about the violation of procedural provisions in the present case, which

the appellants actually reiterated in the appeal. They provided sufficiently clear and well-argued reasoning as to why those allegations cannot lead to a different decision in the present legal matter, in which the Constitutional Court finds no elements of arbitrariness either.

51. In view of all the aforementioned, the Constitutional Court deems that the allegations made by the appellants about the violation of the right to a fair trial under Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention are ill founded.

The right to property

52. Article II (3) 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 fundamental freedoms referred to in paragraph 2 above; these include: […]

k) The right to property.

53. 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.

54. The Constitutional Court recalls that it has to be established whether the present case concerns the property 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. In that connection, the Constitutional Court emphasizes that the word "property" includes a broad spectre of property interests, which constitute a certain economic benefit (see, the Constitutional Court, Decision no. *U-14/00* of 4 April 2001). In that connection, the Constitutional Court observes that it follows from the reasoning for the challenged decisions and the submitted documents that the challenged decisions imposed, in accordance with Article 48, paragraph 1, items b) and d) of the Law on Competition, on the appellant United - Romania a fine in the amount of BAM 250,000.00, which amounts to 0.45% of the total revenue of that business entity in 2014 (as a year preceding the violation of the Law). It is thus undisputed that the mentioned amount of money constitutes the property of the appellant United – Romania, which enjoys the protection 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. The Constitutional Court deems, therefore, that the challenged decisions of the Competition Council, and those of the Court of BiH, which imposed on the appellant United - Romania a fine, constitute the interference with its right to peaceful enjoyment of property. The Constitutional Court, bearing in mind the contents of paragraph 4 of the enacting clause of the challenged ruling of the Competition Council (which imposed the fine), observes that the challenged decisions provided an alternative possibility to collect the fine imposed on the appellant United - Romania, if it fails to pay the fine within the given time limit, *inter alia*. It can be collected from the appellant United – Luxembourg and from the appellant "Telemach". Accordingly, the Constitutional Court observes that the challenged decisions in the present case, under certain conditions (the failure on the part of the first appellant to pay the fine), possibly constituted the right to interference with the right to peaceful enjoyment of property of the mentioned appellants.

55. Furthermore, the Constitutional Court recalls that fines fall within the scope of the second paragraph of Article 1, which, among other things, allows the member states to control the use of property in order to secure the payment of fines. However, this provision has to be interpreted in the light of the general principle set forth in the first sentence of the first paragraph. Accordingly, the condition of lawfulness has to be fulfilled and there has to be a justified relationship of proportionality between the means used and the aim sought to be achieved (see, European Court, *inter alia*, *Allan Jacobsson v. Sweden* (no. 1) of 25 October 1989, Series A, no. 163, page 17, paragraph 55, *Philips v. the United Kingdom*, Application no. 41087/98, paragraph 51, CEDH 2001-VII).

56. The Constitutional Court observes in the present case that the mentioned fine was imposed on the appellant United - Romania pursuant to Article 48, paragraph 1, items b) and d) of the Law on Competition, because of the conduct contrary to the relevant provisions of Article 10, paragraph 2, items b) and c) of the Law on Competition. The amount of the said fine, as it follows from the facts of the present case, does not exceed the maximum prescribed under the provision of Article 48 of the Law on Competition. In addition, the Constitutional Court observes that, when imposing the fine the criteria referred to in Article 52 of the Law on Competition were taken into account, namely the intention and duration of the violation violating the provisions of this Law. Moreover, the Constitutional Court, while bearing in mind the contents of the challenged decisions, deems that the provisions of Article 2 of the Law on Competition were applied although the Competition Council and the Court of BiH did not refer to them explicitly. It deems they were applied, in determining that, if the fine imposed on the appellant United - Romania is not paid within the given time limit, it will be collected from the appellant United – Luxembourg. This appellant, as it stands in the enacting clause of the ruling, took over during the course of the proceedings the activity regarding the distribution of channels, namely coercively from the appellant "Telemach", as stated in the foregoing paragraphs of this decision in the context of the consideration of the right to a fair trial.

In view of the aforementioned, the Constitutional Court deems that the interference with the property in the present case was in accordance with law.

57. Further, the Constitutional Court deems that the imposed fine in the present case serves the achievement of a legitimate aim – securing the enforcement of the decisions of the Competition Council, which has the exclusive competence to establish the existence of prohibited conduct on the market, and to secure and protect the market competition as a value of general significance (see, Constitutional Court, Decision on Admissibility and Merits no. *AP-5465/14* of 10 May 2017, paragraph 56, available at: www.ustavnisud.ba).

58. Next, the Constitutional Court, by following its own case law and the case law of the European Court, indicates that there must be in every individual case a "just relationship" between the requirements of a public interest sought to be achieved and the protection of fundamental rights of individuals. This is not possible to achieve if the appellant has to bear "special and excessive burden" (see, European Court, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A, no. 98, paras 46 and 50).

59. In that connection, the Constitutional Court observes that the amount of the fine imposed on the appellant United - Romania aims to remove the prohibited conduct – abuse of a dominant position. In addition, the Constitutional Court recalls that it was already concluded in this decision that the Competition Council and the Court of BiH did not arbitrarily apply the substantive law when concluding that the appellant United – Romania violated the Law on Competition by abusing a dominant position. Moreover, the Constitutional Court recalls that the appellant United – Romania was imposed the fine within the limit prescribed by law of "up to 10 % of the value of the total annual revenue of the business entity". It follows from the reply to the appeal of the Competition Council that this was within the lower parameters of that prescript limit of 0.45%, although the same appellant had abused the dominant position on the relevant market earlier as well. This was established under the earlier ruling of the Competition Council. In view of the aforementioned, the Constitutional Court was unable to conclude that the imposed fine placed on this appellant in the present case an excessive burden and thus upset a "fair relationship" between the requirement of a public interest sought to be achieved and the protection of fundamental rights of individuals. In addition, the Constitutional Court observes that it follows from the documents in the case file that the imposed fine was paid by the appellant "Telemach". The Court had in view all the aforementioned, and took into account the fact that it follows form the reasoning for the challenged decisions that the appellant "Telemach", in the relevant period, had a status of the person affiliated, within the meaning of Article 2 of the Law on Competition, with the appellant United – Romania. In addition, the dominant position of the appellant United - Romania benefited the appellant "Telemach" it as it resulted in a substantial increase of the number of its subscribers. However, the Constitutional Court was unable to conclude that the creation of an obligation for this appellant to pay the fine imposed on the appellant United – Romania, unless it itself paid it, (which was eventually fulfilled

by the appellant "Telemach"), did not place an excessive burden and thus did not upset a "fair relationship" between the requirement of a public interest sought to be achieved and the protection of fundamental rights of individuals. Moreover, the Constitutional Court was unable to conclude that, in the present case, the creation of a natural obligation (given the fact that the challenged decisions did not impose coercive collection of the fine from the appellant United - Luxembourg) for the appellant United - Luxembourg to pay the fine imposed on the appellant United – Romania, unless it itself paid it, (which was eventually fulfilled by the appellant "Telemach") did not place an excessive burden. In addition, it did not upset a "fair relationship" between the requirement of a public interest sought to be achieved and the protection of fundamental rights of this appellant.

60. In view of the foregoing considerations, the Constitutional Court concludes that the allegations set forth in the appeal about 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 are ill-founded.

VIII. Conclusion

61. The Constitutional Court concludes that there has been no violation of the right to a fair trial under Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention. The circumstances of the present case carry no elements indicative of a conclusion that the facts of the case were established incompletely and incorrectly and that the relevant provisions of the substantive and procedural law were arbitrarily applied or that the challenged decisions are not reasoned. In addition, it does not follow that there is a violation of the principle of equality in the proceedings.

62. The Constitutional Court concludes that there has been no 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. There has been no violation found in a situation where a fine was imposed for the abuse of a dominant position, as prescribed by law. A fine serves the achievement of a legitimate aim, and does not upset a "fair relationship" between the requirement of a public interest sought to be achieved and the protection of fundamental rights of the appellants.

63. Pursuant to Article 59 (1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP-2371/18

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mses. Ana Rostohar, Sarah Cooper and Sandra Rostohar Karamuja from the Republic of Slovenia against the Ruling of the FBiH Prosecutor's Office of the Federation of Bosnia and Herzegovina no. T110 KTA 0003101 18 3 of 12 March 2018, the Notice of the FBiH Prosecutor's Office no. T110 KTA 0003101 17 of 7 December 2017, the Notice of the Cantonal Prosecutor's Office of the Zenica-Doboj Canton no. T 04 0 KTP 0031243 17 of 5 December 2017 and the Order not to conduct investigation of the Cantonal Prosecutor's Office in Zenica no. T 04 0 KTP 0031243 17 of 31 August 2017

Decision of 8 April 2020

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 18 (3) (h), Article 57 (2) (b) and Article 59 (1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in a Grand Chamber and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović and

Ms. Seada Palavrić

Having deliberated on the appeal of Ms. **Ana Rostohar and Others** in the case no. **AP-2371/18**, at its session held on 8 April 2020 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mses. Ana Rostohar, Sarah Cooper and Sandra Rostohar Karamuja against the Ruling of the FBiH Prosecutor's Office of the Federation of Bosnia and Herzegovina no. T110 KTA 0003101 18 3 of 12 March 2018, the Notice of the FBiH Prosecutor's Office no. T110 KTA 0003101 17 of 7 December 2017, the Notice of the Cantonal Prosecutor's Office of the Zenica-Doboj Canton no. T 04 0 KTP 0031243 17 of 5 December 2017 and the Order not to conduct investigation of the Cantonal Prosecutor's Office of the Zenica-Doboj Canton no. T 04 0 KTP 0031243 17 of 31 August 2017, is dismissed as ill-founded in relation to the violation of Article II (3) (a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The appeal lodged by Mses. Ana Rostohar, Sarah Cooper and Sandra Rostohar Karamuja against the Ruling of the FBiH Prosecutor's Office of the Federation of Bosnia and Herzegovina no. T110 KTA 0003101 18 3 of 12 March 2018, the Notice of the FBiH Prosecutor's Office no. T110 KTA 0003101 17 of 7 December 2017, the Notice of the Cantonal Prosecutor's Office of the Zenica-Doboj Canton no. T 04 0 KTP 0031243 17 of 5 December 2017 and the Order not to conduct investigation of the Cantonal

Prosecutor's Office of the Zenica-Doboj Canton no. T 04 0 KTP 0031243 17 of 31 August 2017, is rejected as inadmissible in relation to the 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, 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 19 April 2018, Mses. Ana Rostohar, Sarah Cooper and Sandra Rostohar Karamuja ("the appellants or the first appellant, the appellant S.C. and the appellant S.R-K") from the Republic of Slovenia ("Slovenia"), filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") against the Ruling of the FBiH Prosecutor's Office of the Federation of Bosnia and Herzegovina ("the FBiH Prosecutor's Office") no. T110 KTA 0003101 18 3 of 12 March 2018, the Notice of the FBiH Prosecutor's Office no. T110 KTA 0003101 17 of 7 December 2017, the Notice of the Cantonal Prosecutor's Office of the Zenica-Doboj Canton no. T 04 0 KTP 0031243 17 of 5 December 2017 and the Order not to conduct investigation of the Cantonal Prosecutor's Office in Zenica no. T 04 0 KTP 0031243 17 of 31 August 2017.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the Cantonal Prosecutor's Office in Zenica and the FBiH Prosecutor's Office were requested on 14 January 2020 to submit their respective replies to the appeal, which they did submit.

III. Facts of the Case

3. 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.

Introductory remarks

4. The first appellant is the mother of a minor L.K., born on 1 June 1976 ("the minor L.K." or "the deceased L.K.") who had passed away on 5 August 1983 in Zenica. The appellants S.C. and S. R-K are sisters of the deceased L.K. H.K. is the ex-husband of the

first appellant, the father of the deceased L.K. and of the appellants S.C. and S. R-K., and the husband of M.K-V.

5. The Constitutional Court notes that based on the documents submitted by the appeals it follows:

- that on 6 August 1983 the autopsy of the corpse of the minor L.K. had been performed at the Coroner's Office of the Regional Medical Centre Zenica and the autopsy report had been prepared. "Dr. A. Curkić" performed the autopsy. Following the description of the external and internal finding, the report mentioned the following conclusion: "I. Death was natural and occurred due to acute purulent pneumonia and inflammation of the mucous membranes of the respiratory tract. II. No signs of violence were found on the body."

Procedure before the Cantonal Prosecutor's Office in Zenica and the FBiH Prosecutor's Office

6. On 22 June 2017, the appellants filed criminal charges with the Cantonal Prosecutor's Office in Zenica against the suspects H.K. and M.V-K [the wife of H.K.] "for the criminal offence of murder in a cruel or insidious manner of L.K., the daughter [of H.K.], perpetrated on 5 August 1983 in Zenica." The charges read that the appellants S.C. and S.R-K., together with their sister, the minor L.K., had stayed with their father in Zenica during the summer break (since their parents were divorced and they lived with their mother – the first appellant in Slovenia), and that their sister L.K. had passed away during that time. It was mentioned that up until "30 May 2017 none of them had had no doubts whatsoever that the death of L.K. had been nothing but a tragic result of an illness". Next, they stated that the appellant S.C. and the appellant R-K, "by connecting memories" and particularly through the sessions of "regression therapy", concluded that their father H.K. and his wife M.V-K killed their sister L.K. The motive of H.K. for the murder of L.K., according to the allegations/assumptions referred to in the charges, was "revenge out of jealousy", while the motive of M.V-K was "property gain".

7. While deciding on the reported charges, the Cantonal Prosecutor's Office in Zenica issued on 31 August 2017 an Order not to conduct an investigation no. T 04 0 KTP 0031243 17.

8. The reasoning read that, following the inspection of the criminal charges, the attached evidence, the submissions addressed to the prosecution, as well as complete documents in the case file, a decision was made not to conduct an investigation. It was decided so as the criminal prosecution of the suspects was barred under the statute of limitations, which had expired in the present case. It was indicated that the criminal charges were filed on 22 June 2017, whereas the criminal offence that the suspects were charged with, according to the allegations stated in the charges, had occurred on 5 August 1983. During the relevant

period, three criminal codes had been applied in the territory of Bosnia and Herzegovina, including the territory of the Federation of Bosnia and Herzegovina, as follows: 1976 SFRY Criminal Code ("the SFRY Criminal Code") along with the Criminal Code of SR BiH, which had been passed on 23 May 1977. Next, the Criminal Code of the Federation of BiH was passed in 1998 ("the 1998 FBiH Criminal Code"), which had been published in the *Official Gazette of the Federation of BiH*, 43/98. It had been applicable up until 2003 when new Criminal Code of the Federation of BiH was passed ("the 2003 FBiH Criminal Code"), which entered into force on 1 March 2003. It was noted that all these codes prescribed that a code to be applied to the perpetrator of the criminal offence is the code that was in force at the time of the perpetration of the criminal offence. If the code has been amended once or several times after the perpetration of the criminal offence, the code which is more lenient to the perpetrator will be applied. The SFRY Criminal Code prescribed so under Article 4, paragraphs 1 and 2, the 1998 FBiH Criminal Code prescribed so also under Article 4, paragraphs 1 and 2, while the 2003 FBiH Criminal Code prescribed the application of the more lenient law to the perpetrator under Article 5, paragraphs 1 and 2. Next, bearing in mind the fact that the respective criminal charges charged the perpetrators with the criminal offence of murder in a cruel and insidious manner, which had occurred on 5 August 1983 in Zenica, the Cantonal Prosecutor's Office compared the provisions of the substantive laws that were mentioned. The purpose was to apply the code that is more lenient to the perpetrators.

9. In that respect, it was stated that Article 38 of the SFRY Criminal Code prescribed that "the punishment of imprisonment may not be shorter than 15 days nor longer than 15 years", whereas paragraph 2 prescribed a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty. Article 95, paragraph 1, item (1) of the said Code, pertaining to the application of the mechanism of the statute of limitations, prescribed that criminal prosecution is barred after 25 years had passed from the perpetration of a criminal offence for which the law provides the capital punishment or the punishment of imprisonment for a term of 20 years. Paragraph 2 of the same Article prescribes that criminal prosecution is barred after 15 years had passed from the perpetration of a criminal offence for which the law provides imprisonment for a term exceeding 10 years. Next, Article 96, paragraph 6 of the same Code prescribes that: "there shall be an absolute bar to criminal prosecution when twice as much time has passed as required, in accordance with the law, for the bar to criminal prosecution" (absolute bar under the statute of limitations). It was mentioned that Article 36 of the 1977 Criminal Code of the Socialist Republic of BiH determined and defined a criminal offence of murder. Accordingly, it prescribed for the qualified form of murder the following: "whoever deprives another person of life in a cruel or insidious way, he/she shall be punished by imprisonment for not less than 10 years or by the death penalty".

10. The 1998 FBiH Criminal Code prescribed in Article 37 that imprisonment may not be shorter than 15 days or longer than 15 years, while Article 38 of the same Code

prescribes that long-term imprisonment may be exceptionally imposed. As for the provisions relating to the bar to criminal prosecution under the statute of limitations, this Code prescribed in Article 121, paragraph 1, item 1) that criminal prosecution cannot be instituted 35 years after the perpetration of the criminal offence for which the law provides a punishment of long-term imprisonment. Item 2 of the same paragraph and Article prescribed that criminal prosecution cannot be instituted 15 years after the perpetration of the criminal offence for which the law provides a punishment of imprisonment exceeding 10 years. In the Chapter pertaining to criminal offences against life and limb, this Code prescribed a criminal offence of murder in Article 171. Paragraph 2 of the same Article prescribed a qualified form of the same offence as follows: "the punishment of imprisonment for not less than ten years or long term imprisonment shall be imposed on whoever deprives another person of a life in a cruel or insidious way".

11. The 2003 FBiH Criminal Code, which is currently in force, in relation to the legal mechanism of statute of limitations, in Article 15, paragraph 1, item a), prescribes that criminal prosecution shall not be instituted when thirty-five years have passed from the perpetration of a criminal offence in the case of a criminal offence for which a punishment of long-term imprisonment is prescribed. Item b) of the same paragraph and Article prescribes that criminal prosecution shall not be instituted when twenty years have passed from the perpetration of a criminal offence in the case of a criminal offence for which the punishment of imprisonment for a term exceeding ten years is prescribed. This Code also prescribes and defines the criminal offence of murder, under Article 166, where paragraph 1 prescribes the basic form of this criminal offence. Paragraph 2, item a) of Article 166 prescribes that the punishment of imprisonment for not less than ten years or long-term imprisonment shall be imposed on whoever deprives another person of a life in a cruel or insidious way.

12. Since the suspects in the present case are charged with the perpetration of a grave criminal offence of murder in a cruel or insidious way, the Cantonal Prosecutor's Office in Zenica performed the analysis and interpretation of the mentioned regulations in order to establish whether the statute of limitations expired concerning the suspects. It also did so in order to establish based on which regulation, if it did expire. It regarded and marked as the core dates in issuing a decision 5 August 1983 as the day when, according to the allegations stated in the charges, the criminal offence of murder had been perpetrated in a cruel and insidious way. It marked 22 June 2017 as the date when the criminal charges were filed. In order to resolve this case in a lawful and correct manner, it was noted that the death penalty, which was provided and prescribed in the SFRY Criminal Code, was abolished under the 1995 Constitution. Annexes IV and VI of the Dayton Agreement established that all persons have to be guaranteed rights and freedoms proclaimed in the European Convention and its Protocols, as well as under other acts on human rights. The aforementioned includes Protocol No. 6 to the European Convention and the Second Optional Protocol to the International Covenant on Civil and Political Rights. They abolish the death penalty.

13. In this criminal case, the most favourable law for the perpetrators of the reported criminal offence is the SFRY Criminal Code. It is most favourable for the reason that it is obvious that the criminal prosecution for the persons charged had become barred as far back as 5 August 1998 when 15 years had passed from 5 August 1983. On that date, according to the allegations stated in the charges, the criminal offence had been perpetrated that the suspects were charged with. This conclusion was based on, first of all, the fact that the death penalty had been abolished under the Dayton Agreement. Article 95, paragraph 2 of the SFRY Criminal Code prescribes that the criminal prosecution cannot be instituted after 15 years has passed from the perpetration of the criminal offence. The prison term exceeding 10 years can be imposed for this offence. This punishment was prescribed by Article 36, paragraph 2 of the SR BiH Criminal Code for the criminal offence of murder in a qualified manner. It reads that a prison term of not less than 10 years or a death penalty shall be imposed on whoever deprives another person of life in a cruel or insidious way. That further means that in the present case the criminal prosecution was barred by the relative statute of limitations on 5 August 1998. It was also barred by the absolute statute of limitations. That was the case here as well over 30 years had passed from the perpetration of the criminal offence, according to the allegations stated in the charges (5 August 1983), to the moment of filing the criminal charges. More precisely, on 22 June 2017. In fact, 30 years had passed on 5 August 2013. Thus, the criminal prosecution of the suspects was barred by the absolute statute of limitations on that date. Accordingly, the Cantonal Prosecutor's Office in Zenica, in accordance with 231, paragraph 3 of the Criminal Procedure Code of the Federation of BiH ("the FBiH Criminal Procedure Code") issued an Order not to conduct an investigation. The order was issued because the criminal prosecution was barred by the statute of limitations, which implies the preclusion of criminal prosecution of the perpetrators specified in the criminal charges. The adoption of such a decision, as mentioned, was supported by the fact that the European Court of Human Rights ("the European Court") had adopted an identical decision in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina.* In particular, it adopted the decision that the SFRY Criminal Code would be applied as a more lenient law than the 2003 FBiH Criminal Code.

14. On 11 September 2017, the appellants lodged a complaint with the Office of the Chief Prosecutor of the Cantonal Prosecutor's Office in Zenica against the Order not to conduct an investigation. On 5 December 2017, the Chief Prosecutor issued an Act no. T 04 0 KTP 0031243 17 and informed the appellants that their complaint was dismissed. The Notification read that the Prosecutor's Office held a session on 4 December 2017. At the session, it established, based on the established facts of the case in the respective case file, allegations made in the complaint, and the written Report of the prosecutor in charge, that there were circumstances, which precluded criminal prosecution. This was so given that the criminal prosecution was barred by the relative statute of limitations, which the appellants were informed of by means of the Notification, delivered to them. It

was noted that when issuing the Order not to conduct an investigation and preparing the Notification for the damaged persons, the Prosecutor specified a wrong article concerning the criminal offence for which the Order not to conduct an investigation is to be issued. It noted Article 166, paragraph 2, item a) of the BiH Criminal Code instead of Article 36, paragraph 2 of the R BiH Criminal Code. It clearly followed from the reasoning for the Order not to conduct an investigation and the content of the Notification addressed to the suspects that this was wrong citation of an Article and law for the criminal offence of murder, allegedly perpetrated on 5 August 1983. The Prosecutor correctly reasoned the reasons for the application of Article 36, paragraph 2 of the R BiH Criminal Code for the reported criminal offence and the time limit for the statute of limitations barring the criminal prosecution. There was an oversight that the time limit for the relative statute of limitations barring the criminal offence referred to in Article 36, paragraph 2 of the R BiH Criminal Code allegedly perpetrated on 5 August 1983 had occurred on 5 August 1998, instead of on 5 August 2008. The reason being that the criminal offence referred to in Article 36, paragraph 2 of the R BiH Criminal Code entailed the prescribed punishment of imprisonment of not less than ten years or a death penalty as a maximum punishment for the respective criminal offence. In a situation where it is no longer possible to impose a death penalty, it is possible to impose a prison term of 20 years, which is provided as a substitute for the death penalty under Article 38, paragraph 2 of the SFRY Criminal Code. In view of the aforementioned and by applying Article 95 of the SFRY Criminal Code, the time limit for the relative statute of limitations barring the criminal prosecution is 25 years, applicable from the date of the perpetration of the criminal offence. Therefore, the relative statute of limitations barring the criminal prosecution occurred in the present case on 5 August 2008, and the criminal prosecution cannot be instituted as a result.

15. The FBiH Prosecutor's Office issued an act no. T110 KTA 0003101 17 of 7 December 2017, regarding the request of the appellants dated 13 November 2017, upon considering the data and documentation submitted by the Prosecutor's Office of Bosnia and Herzegovina ("the Prosecutor's Office of BiH"), the Cantonal Prosecutor's Office in Zenica, the Cantonal Prosecutor's Office of the Central Bosnia Canton ("the Cantonal Prosecutor's Office in Travnik"), in response to the letters of the Prosecutor's Office no. T110 KTA 0003101 17 of 22 November 2017. Pursuant to the provision of Article 9 of the Law on the FBiH Prosecutor's Office, the FBiH Prosecutor's Office has informed the appellants of the following:

16. "- Based on the reply of the Prosecutor's Office of BiH no. T20 0KTA 001444717 of 28 November 2017, it follows that all the requests of the appellants, which were submitted to the said Prosecutor's Office with the attached documentation, were submitted on 17 October 2017 to the Cantonal Prosecutor's Office in Zenica. This was so as it was assessed that they were related to their charges filed with the mentioned Prosecutor's Office.

- In relation to the allegations pointing to the work of the Cantonal Prosecutor's Office in Zenica following the charges filed with the said Prosecutor's Office, based on the documentation submitted by the Cantonal Prosecutor's Office in Zenica to the FBiH Prosecutor's Office, along with the replies nos. A-VII -5507/ 17 of 27 November and 4 December 2017, the following was noted:

"1. On 31 August 2017, an Order not to conduct an investigation was issued in the case no. T04 0 KTP 0031243 17. The Order was issued following the charges filed by the appellants with the Cantonal Prosecutor's Office in Zenica on 22 June 2017, against H.K. and M.V-K. This was so according to the allegations stated in the charges for actions perpetrated on 5 August 1983 in Zenica, due to the criminal offence of murder, referred to in Article 166, paragraph 2, item a) of the FBiH Criminal Code, of the minor L.K. Upon receiving the Notification of the issued Order, on 13 September 2017, you have filed a complaint with the Office of the Prosecutor of the Cantonal Prosecutor's Office in Zenica and the decision-making on the complaint is pending;"

[...]

"The Request for the change of jurisdiction due to partiality", which you submitted to the FBiH Prosecutor's Office on 13 November 2017, as already indicated in the letter of this Prosecutor's Office dated 22 November 2017, in relation to the provision of Article 35, paragraph 3 of the FBiH Criminal Procedure Code, was considered pursuant to Article 9 of the Law on the FBiH Prosecutor's Office. In this connection and in consideration of these circumstances, which follow from the documentation submitted to the FBiH Prosecutor's Office, it was concluded that your allegations, which you used to question the impartial and independent conduct on the part of the Cantonal Prosecutor's Offices in Zenica and Travnik, cannot bring into question the lawfulness and efficiency of the conduct of the mentioned Prosecutor's Offices in the mentioned cases.

17. As to the complaints filed by the appellants with the FBiH Prosecutor's Office, on 8 and 16 January 2018, the appellants were informed that the Chief FBiH Prosecutor delivered a Ruling no. T110 KTA 0003101 18 3 of 12 March 2018. It was delivered pursuant to Article 20, paragraph 2 in conjunction with Article 9, paragraph 1 of the Law on the FBiH Prosecutor's Office in conjunction with Article 35, paragraph 3 of the FBiH Criminal Procedure Code. The mentioned Ruling states as follows: "1. The request for the transfer of territorial jurisdiction [filed by the appellants], in the cases before the Cantonal Prosecutor's Office in Travnik no. T06 0 KT 0021107 17 and the Cantonal Prosecutor's Office in Zenica no. T04 0 KT 0031243 17 to other Cantonal Prosecutor's Offices, is rejected as inadmissible. It was rejected as, pursuant to Article 21, paragraph 1, item f) in conjunction with Article 35, paragraph 3 of the FBiH Criminal Procedure Code, the appellants do not have the capacity of the parties" and "2. The complaints filed by the complainants [the appellants], against [...] the Order not to conduct an investigation no. T04 0 KT 0031243 17 of 31 August 2017 and the Notification issued

by the Office of the Prosecutor of the Cantonal Prosecutor's Office in Zenica no. T04 0 KTP 0031243 17 of 4 December 2017, are dismissed as ill-founded."

18. The reasoning for the Ruling read that on 16 January 2018 the appellants filed the complaints with the FBiH Prosecutor's Office against the decision of the Cantonal Prosecutor's Office in Travnik, rendered in the case of that Prosecutor's Office no. T06 0 KT 0021107 17, and against the decision of the Cantonal Prosecutor's Office in Zenica, rendered in the case of that Prosecutor's Office no. T04 0 KT 0031243 17. The mentioned complaint sought, pursuant to Article 20, paragraph 1 of the Law on the FBiH Prosecutor's Office, the transfer of jurisdiction in the mentioned cases to other Cantonal Prosecutor's Offices. It was also sought that, by finding the complaint well founded, the cases be referred back to the said Prosecutor's Offices for new decision-making. As to the request for the transfer of jurisdiction, it was noted that those were the repeated requests. They were also repeated in the request of the applicants filed with this Prosecutor's Office dated 13 November 2017, as to which they were duly informed on 29 November 2017, by means of the letter no. TI 10 KTA 0003101 17 of 22 November 2017. Therefore, it was decided as stated in paragraph 1 of the enacting clause of this Ruling. This was indicated in the mentioned letter addressed to the appellants, bearing in mind that, according to the provision of Article 35, paragraph 3 of the FBiH Criminal Procedure Code, this Prosecutor's Office renders decisions on the transfer of jurisdiction upon the proposal of one of the parties. According to the provision of Article 21, paragraph 1, item f) of the mentioned Code, the applicants do not have the capacity of the parties. [ ]

19. At the same time, the appellants' allegations were assessed as ill-founded that challenged the accuracy of the decisions of the Cantonal Prosecutor's Office in Zenica delivered in the case no. T04 0 KT 0031243 17 indicating that no investigation would be conducted, "because the criminal prosecution was barred by the statute of limitations". According to the position of the FBiH Prosecutor's Office, the conclusion referred to in the decisions delivered by the Cantonal Prosecutor's Office in Zenica was assessed as correct. This was done based on the reasons presented in the mentioned decisions, which were associated with all the relevant provisions of the specified Criminal Codes and amendments thereto. These provisions relate to the applicable special and general provisions with the allegations stated in the charges for the criminal offence. The reasons in the decision also referred to the mentioned decision of the Constitutional Court. The FBiH Prosecutor's Office referred to the allegations stated in the complaint challenging the conclusion referred to in the decisions delivered by the Cantonal Prosecutor's Office in Zenica. The allegations concerned the position that "the 2003 FBiH Criminal Code is more lenient than the 1976 SFRY Criminal Code" by referring to the decision of the European Court in the case of *Ruban v. Ukraine* of 12 June 2016. The F BiH Prosecutor's Office noted that the court in that decision did not address an issue and a possibility "that a court may impose a prison term of twenty years for criminal offence for which the death penalty is prescribed. This was prescribed under the provisions of Article 38, paragraph

2 of the SFRY Criminal Code. These provisions were considered in the decisions of the Cantonal Prosecutor's Office in Zenica in terms of the subsequently relevant mentioned Criminal Codes. They prescribe the punishment of a long-term imprisonment for the criminal offence referred to in the allegations. The decision of the European Court, in Section 2 Court's appraisal, paragraph 37, refers also to the decision of the court in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina*, which decision, in Section C. Merits 2. Court's appraisal, starting from paragraph 65 considered also the issue of mitigating the punishment and the limits of the mitigation. They were the mechanisms that the applicants also referred to. However, in paragraph 68 of that decision, contrary to the allegations made in the complaint of the appellants, it was assessed that even in the event of the application of the said mechanisms the mentioned provisions of the SFRY Criminal Code would be relevant. It follows from the aforementioned that the law, which was applicable at the time of the perpetration of the criminal offence, was applied correctly in the present case. This indicates that the decisions, which were challenged by the complaint, were correct and lawful. This is the reason why a decision was made as stated in paragraph 2 of the enacting clause of this ruling.

20. The Constitutional Court notes that based on the documentation submitted by the appellants, it also follows:

- that on 3 July 2017, the Public Institution Zenica Cantonal Hospital informed the appellant S.R.K., regarding the request for the delivery of a death certificate for L.K., for the purpose of entering her in the registry of deaths, that "[...] following the inspection of the official records of the Pathology Service of the Public Institution Zenica Cantonal Hospital, it was established that no data existed that a Death certificate for L.K. had been issued, and that the official records of the Pathology Service of the Public Institution Zenica Cantonal Hospital did not have this information entered, while the Service did not possess any documentation whatsoever related to this. [...]". At the same time it was indicated that Article 64 of the Law on Healthcare Records (*Official Gazette of FBiH*, 37/12) prescribes that medical records shall be kept for 10 years since the last entry of data."

- that the Cantonal Court in Zenica ("the Cantonal Court") informed, by way of its act of 11 July 2017, the "Law Office Cooper" that regarding the request dated 10 July 2017 for the transcript of the 1983 criminal investigation case file under number Kri 155/83, a detailed search had been performed. Upon inspecting the register Kri for 1983, it was established that the case number Kri-155/83 contains only "the Autopsy report dated 6 August 1983 regarding the death of the minor L.K.". The appellant forwarded the copy of the report to the court by e-mail. It was mentioned that the inspection was extended also through the registers and directories "K" and "Ki", thus it was established that no proceedings had been conducted before the said court against the persons H.K. and M.V-K. After carrying out an examination, the Cantonal Prosecutor's Office in

Zenica established that the case of the applicant M SUP (eng. Secretariat of the Interior) Zenica (without the number of the applicant) under the number KTA-389/83 had been formed "Accidental death L.K." and it had been archived on 1 December 1983. No further actions had been conducted".

- that the Cantonal Court informed, by way of its act of 12 July 2017, the "Law Office Cooper" that it could not comply with the request for the delivery of the transcript of the complete case file number Kri-155/83. It informed that the case number Kri-155/83 had not been found and that an order had been issued to intensify the search for the respective case file. If the case file was not found within the next twenty days in the court archives, the President of the Court would decide whether or not it was necessary to renew the respective case file.

- that on 13 July 2017 the first appellant and the appellant S.C. requested the renewal of the case file no. Kri 155/1983 stating that, being a mother and a sister of the late L.K., they are the parties with the legal interest, not only because of a criminal procedure, but also because of a civil procedure.

- that the Police Administration of the Ministry of the Interior of the Zenica-Doboj Canton, regarding the letter of the first appellant wherein she reported H.K. and M.V-K for the perpetration of the criminal offence of murder of L.K., informed her on 17 July 2017: "that the then Public Security Centre in Zenica, based on the investigation conducted, established that no elements of a criminal offence existed." In addition [...] the records of the said Ministry "had not recorded the event of murder of L.K."

- that on 25 July 2017, the Public Institution "Health Centre" Zenica, regarding the statement by the Emergency Medical Service, informed the appellant S.R-K, as follows: "in the period of the death of L.K., it applied the Rulebook on the manner of establishing the causes of death (*Official Gazette of the SR BiH*, 1/82). [...] In the period of death of L.K., the Regional Medical Centre Zenica had existed as a healthcare institution. OOUR (eng. the Basic Organisation of Associated Labour) Zenica Health Centre had started operating on 1 January 1985. The Public Institution "Health Centre" Zenica, as a legal successor of the Basic Organisation of Associated Labour Zenica Health Centre, did not have at its disposal medial documentation, which belonged to the Regional Medical Centre in Zenica." This act also indicated that, under Article 64 of the Law on Healthcare Records, medical records are kept for 10 years following the last entry of data.

- that the Cantonal Court, by its Order no. 004-0-SuDp-17-000859 of 25 July 2017, ordered the renewal of the criminal investigation case file of the County Court in Zenica no. Kri 155/1983; that a judge H.A. of the said court was appointed to renew the case file, as that case file had not been found. On that occasion, it was established that the archives of the Cantonal Court did not contain a single "Kri" case file dating from 1982, 1983 and 1984... The reasoning read that "The content of the register "Kri" for 1983 indicates that

the case file Kri 155/1983 had been registered on 5 September 1983, that the heading sections read: Investigation action to be carried out (summary). Request granted (date). The Data on detention and the Hearing have no entries, that the section the First and last name of the accused carry the following: the Autopsy report on the body of L.K., and that the heading section the Movement of the case file and remarks carry a designation a/a (*ad acta*). Judge H.A. issued an order on 14 September 2017 in the case Kri: 155/83, ordering that it was necessary to "put the court's stamp on the transcripts of the autopsy reports and then to return the case file to the archives." The appellants were informed of the actions undertaken and a copy of the complete case file was delivered to them, along with a copy of the Transcript of the Autopsy report of the Cantonal Court in Zenica, no. 004-0-SuDp-17-000859 of 9 August 2017."

- that on 7 September 2017, the FBiH Ministry of Justice informed the "Law Office Cooper" of the following: "that Ljubomir Curkić is not on the List of permanent court experts in the territory of the Federation of Bosnia and Herzegovina in medicine, sub-field pathology. The aforementioned person had never been appointed by this mentioned Ministry as a permanent court expert in the territory of the Federation of Bosnia and Herzegovina."

21. Also, the Constitutional Court noted that it follows from the submitted documentation that the Registry Office of the Municipality of Zenica had not entered the death of the minor L.K., and that her remains had been taken to Slovenia where she had been buried.

IV. Appeal

a) Allegations set forth in the appeal

22. The appellants refer in the appeal to the violation of Article II (1) and (2) and Article II (3) (a) and (e) of the Constitution of Bosnia and Herzegovina and Articles 2, 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"). The alleged that L.K. "had died suddenly during the night at her father's apartment on 5 August1983 in Zenica during a visit. No criminal investigation had been conducted. On the basis of new information in 2017, the appellants filed criminal charges for the murder in a cruel and insidious manner." They deemed that the law was erroneously applied in the present case with respect to the statute of limitations barring criminal prosecution to such an extent that it constitutes a violation of constitutional rights of the damaged persons and the rights referred to in the European Convention (Articles 2, 6 and 13). This was so as the last decision of the FBiH Prosecutor's Office, no. T11 KTA 0003101 18 3, provided insufficient reasons that they cannot be reviewed, which satisfies criteria for such a decision to be considered arbitrary. They indicated that they requested during the course of the proceeding "the transfer of jurisdiction from Zenica to Sarajevo for the reason that objective impartiality of the Cantonal Prosecutor's Office in Zenica is not possible given the fact that the same

authority had decided in 1983 on the case on the basis of insufficient documentation (renewed court case file)." They clarified that the then Prosecutor's Office had had in the case file only the autopsy report without a stamp of the institution, without a court warrant. A person who had not been a court expert had performed the autopsy. The autopsy report did not carry the date or the time of death nor was there any other document about the date of death etc. The then competent authority, the Police, informed the mother of the deceased about the death of her child only in a letter dated 17 June 2017 as a reply to her request for access to information. In that letter she was informed that in 1983 a "proceeding" had been conducted in relation to the death of the late L.K. and that it had been established at the time that "no elements of a criminal offence had existed". They stressed that the first appellant relied on good terms that she was on with the cousins of her ex-husband – the suspect during the marriage. Thus, she believed that the information she received from them had been accurate and she had no reason at the time to doubt that they had lied to her or misinformed her about everything that had taken place at the time in 1983 in Zenica. Therefore, had the Cantonal Prosecutor's Office in Zenica not decided that the criminal prosecution was barred by the statute of limitations, an investigation should have been opened, the previous violations of the basic principles of a criminal procedure would have become obvious, as well as violations of the provisions of Article 2 of the European Convention. The provision prescribes that an investigation must be efficient, independent and fast, while the investigation, which was introduced almost 35 years after the event, certainly cannot satisfy the mentioned criteria. Although the statute of limitations barred the criminal investigation as a primarily determined investigation in the event of an accidental death, the appellants nevertheless have the right to other types of investigations, e.g. parliamentary investigations, an investigation by a commission set up for that particular case and such like. The appellants indicated that the issue of the statute of limitations is relevant for a decision as to whether the criminal prosecution is barred by the statute of limitations. They alleged that not a single challenged decision of the Prosecutor's Offices considered the issue of whether the qualification of the alleged criminal offence in the form of a qualified murder (in a cruel and insidious manner), as stated by the parties damaged in the criminal charges, was wrong. This is to say that the allegations made by the damaged persons in the criminal charges were accepted as correct in that the suspected perpetrators H.K. and M.V-K would be considered as perpetrators of the qualified form of murder, if the criminal procedure would result in proving the veracity of the allegations stated in the criminal charges. That means that, if the criminal prosecution had not been barred by the statute of limitations, the investigation and charges for the criminal offence would be made for the criminal offence of a qualified murder referred to in Article 166, paragraph 2, item a) of the FBiH Criminal Code. The same criminal offence of a qualified form of murder is also prescribed in the SR BiH Criminal Code under Article 36, paragraph 2, item (1). The features of the criminal offence are the same in both laws, the difference lies in the period of the statute of limitations barring the criminal prosecution. They alleged that "the old law which was in force at the time

of the criminal offence the 1977 SR BIH Criminal Code prescribed the period of 25 years as the statute of limitations, while the FBiH Criminal Code, "which pertains to our case", prescribed the period of 35 years." In addition, they place special emphasis that not a single decision of the Prosecutor's Offices was in conformity with the judgment in the case of *Ruban v. Ukraine* and that it was "surprising" that the FBiH Prosecutor's Office referred to the case of *Maktouf and Damjanović v. Bosnia and Herzegovina*. The conclusion that the statute of limitations period started to run since 5 August 1983, and not since the last procedural action taken on 1 December 1983, also is indicative of a doubt that the Chief FBiH Prosecutor did not read the case file and that the decision of the Chief FBiH Prosecutor is arbitrary. Next, the appellants alleged that they requested "the transfer of jurisdiction from Zenica to Sarajevo" already before the decision of the Cantonal Prosecutor's Office in Zenica dated 31 August 2017, but that their request was rejected, as it was stated that "the damaged parties had no right to seek the change of jurisdiction". They alleged "in the currently publicly hot case of Dženan Memić, the lawyer for the damaged parties succeeded in his request for the disqualification of the prosecutor filed before the Constitutional Court." If the damaged parties in the present case have no right to request the change of the Prosecutor's Office, it is the task of the FBiH Prosecutor's Office to order the change of jurisdiction if it is aware of a possibility of partiality. Furthermore, the appellants also point to "other omissions that remained unclarified", and alleged in that context what the competent authorities should have done in accordance with the Rulebook on mandatory examination of the dead and determination of the cause of death. The decision of the Cantonal Prosecutor's Office in Zenica, in the Order not to conduct investigation, inflicted severe mental pain on the damaged persons, all the more so as it concerned an event of over 34 years ago.

b) Reply to the appeal

23. In the reply to the appeal, the Cantonal Prosecutor's Office in Zenica stated that the challenged ruling of the FBiH Prosecutor's Office was correct and lawful and that it provided a detailed reasoning for the position of the concerned Prosecutor's Office, as well as that of the Cantonal Prosecutor's Office in Zenica. Therefore, the challenged decisions did not violate the rights of the appellants, which they indicated in their appeal, or other rights guaranteed under the European Convention and the rights prescribed under the Constitution of Bosnia and Herzegovina.

24. The FBiH Prosecutor's Office stated that the appellants were informed about all the undertaken actions, and that the challenged decisions provided sufficient reasons and correct conclusions reached, whereby no violations of the appellants' rights occurred, or violations referred to in the appeal.

V. Relevant Law

25. The **Criminal Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the FBiH*, 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16 and 75/17). An internally revised text, prepared at the Constitutional Court, is used for the purposes of this Decision, which, in its relevant part, reads as follows:

Article 5
Time Constraints Regarding Applicability

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

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

STATUTE OF LIMITATIONS

Article 15, paragraph (1), item a) and paragraph (2)
Application of Statute of Limitations to the Criminal Prosecution

(1) Unless stipulated otherwise in this Code, criminal prosecution shall not be instituted when the following time periods have elapsed since the commission of a criminal offence:

a) Thirty-five years in the case of a criminal offence for which a punishment of long-term imprisonment is prescribed;

(2) If several punishments are prescribed for a single criminal offence, the period of limitation shall be determined according to the most severe punishment prescribed.

Article 16, paragraphs (1) and (6)
Running and Interruption of the Period Set by Statute of Limitations Regarding the Institution of Criminal Prosecution

(1) The running of the period set by statute of limitations to institute criminal prosecution commences on the day on which the criminal offence has been perpetrated. The running of the period set by statute of limitations to institute criminal prosecution concerning criminal offences of permanent character commences on the day of the cessation of illegal situation.

(6) The statute of limitations shall apply in any case when twice as much time elapses as is set by the statute of limitation for the initiation of criminal prosecution.

Article 20
Criminal Offences and Execution of Sentence not Subject to the Statute of Limitations

Criminal prosecution and execution of a sentence are not subject to the statute of limitations for criminal offences that, pursuant to international law, are not subject to the statute of limitations.

Article 166, paragraphs (1) and (2), item a)

Murder

(1) Whosoever deprives another person of life shall be punished by imprisonment for a minimum term of five years.

(2) The punishment of imprisonment for a minimum term of ten years or long-term imprisonment shall be imposed on any person who:

a) cruelly or insidiously deprives another person of life;

26. The **Criminal Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH*, 43/98, 2/99, 15/99, 29/00 and 59/02), in its relevant part, reads as follows:

Mandatory Application of a More Lenient Law

Article 4

(1) The law that was in force 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.

Application of Statute of Limitations to the Criminal Prosecution

Article 121, paragraph (1), item 1) and paragraph (2)

(1) Unless otherwise stipulated in this Code, criminal prosecution shall not be instituted when the following time periods have elapsed since the perpetration of a criminal offence:

1) Thirty-five years in the case of a criminal offence for which a punishment of long-term imprisonment is prescribed under the law;

(2) If several punishments are prescribed for a single criminal offence, the period of limitation shall be determined according to the most severe punishment prescribed.

Running and Interruption of the Period Set by Statute of Limitations

Regarding the Institution of Criminal Prosecution

Article 122, paragraphs (1) and (6)

(1) The running of the period set by statute of limitations to institute criminal prosecution commences on the day on which the criminal offence has been perpetrated.

(6) The statute of limitations shall apply in any case when twice as much time elapses as is set by the statute of limitation for the initiation of criminal prosecution.

Murder
Article 171, paragraphs (1) and (2), item 1)

(1) Whoever deprives another person of life, shall be punished by imprisonment for not less than five years.

(2) The punishment of imprisonment for not less than ten years or long term imprisonment shall be imposed on whoever:

1) deprives another person of life in a cruel or insidious way,

Running and Interruption of the Period Set by Statute of Limitations

Regarding the Institution of Criminal Prosecution

Article 122

(1) The running of the period set by statute of limitations to institute criminal prosecution commences on the day on which the criminal offence has been perpetrated.

(3) The running of the period set by statute of limitations is interrupted by any procedural action taken with a view to prosecuting the perpetrator for the criminal offence perpetrated.

(5) After each interruption, the period set by statute of limitations commences anew.

(6) The statute of limitations shall apply in any case when twice as much time lapses as is set by the statute of limitation for the initiation of criminal prosecution.

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

Imprisonment
Article 38, paragraphs 1, 2 and 3

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

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

(3) For criminal offences committed with intent for which the punishment of fifteen years imprisonment may be imposed, a punishment of imprisonment for a term of twenty years may be imposed for severe forms of that offence.

Statute of Limitations
Article 95, paragraph (1), item 1)

(1) Unless otherwise stipulated in this law, criminal prosecution is barred after the lapse of:

1) twenty five years from the perpetration of a criminal offence for which the law provides the capital punishment or the punishment of imprisonment for a term of 20 years;

2) fifteen years from the perpetration of a criminal offence for which the law provides imprisonment for a term exceeding ten years;

Running and Interruption of the Period Set by Statute of Limitations

Regarding the Institution of Criminal Prosecution

Article 96, paragraphs (1) and (6)

(1) The running of the period set by statute of limitations to institute criminal prosecution commences on the day on which the criminal offence has been perpetrated.

(6) The barring by the statute of limitations shall apply in any case when twice as much time elapses as is set by the statute of limitation for the initiation of criminal prosecution.

28. The **Criminal Code of the Socialist Republic of Bosnia and Herzegovina** (*Official Gazette of the SRBiH*, 16/77), in its relevant part, reads as follows:

Murder
Article 36, paragraphs (1) and (2), item 1)

(1) Whoever deprives another person of life, shall be punished by imprisonment for a term of not less than five years.

(2) Imprisonment of not less than ten years or the death penalty shall be imposed on:

1) Whoever deprives another person of life in a cruel or insidious way;

29. The **Criminal Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the FBiH*, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07,

9/09, 12/10, 8/13 and 59/14). A revised text, prepared by the Constitutional Court, is used for the purposes of this Decision, which, in its relevant part, reads as follows:

Article 1
Application of Rules of Criminal Procedure

This Code sets forth the rules of criminal procedure that are mandatory for the proceedings of the municipal courts, cantonal courts and the Supreme Court of the Federation of Bosnia and Herzegovina (hereinafter: the Supreme Court of the Federation of BiH), the prosecutor and other participants in the criminal proceedings provided by this Code, when acting in criminal matters.

Article 18
Principle of Legality of Prosecution

The prosecutor shall initiate a prosecution if there is evidence that a criminal offence has been committed, unless otherwise prescribed by law.

Article 45, paragraphs (1) and (2), items a) and b)

Rights and Duties

(1) The basic right and the basic duty of the prosecutor shall be the detection and prosecution of perpetrators of criminal offences falling within the jurisdiction of the court.

(2) The prosecutor shall have the following rights and duties:

a) as soon as he becomes aware that "there are grounds for suspicion" that a criminal offence has been committed, to take necessary measures to discover it and investigate it, to identify the suspect(s), guide and supervise the investigation, as well as direct the activities of authorized officials pertaining to the identification of suspect(s) and the gathering of information and evidence;

b) to conduct an investigation in accordance with this Code;

Article 231, paragraphs (1), (3) and (4)

Order for Conducting an Investigation

(1) The prosecutor shall order the conduct of an investigation if grounds for suspicion that a criminal offence has been committed exist.

(3) The prosecutor shall issue order that the investigation shall not be conducted if it is evident from the report and supporting documents that the reported act is not a criminal offence, if there are no grounds to suspect that the reported person committed the criminal offence, if the statute of limitations is applicable, or if the criminal offence is subject to amnesty or pardon, or if there are any other circumstances that preclude criminal prosecution.

(4) The prosecutor shall inform the damaged party and the person who reported the offence within three days about the fact that the investigation shall not be conducted, as well as the reasons for not doing so. The damaged party and the person who reported the offence have a right to file a complaint with the prosecutor's office within eight days.

VI. Admissibility

30. 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.

a) As to Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention

31. In relation to the references made by the appellants to the violation of the right to a fair trial in the context of ineffectiveness of the investigation conducted by the competent authorities on the identification of the persons responsible for the death of the minor L.K., a question justifiably arises as to whether the right of an individual to request the investigation to be conducted against the third persons falls within the scope of Article 6 of the European Convention.

32. The Constitutional Court, under Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, "shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina". In relation to the respective appeal, this constitutional provision means that the jurisdiction of the Constitutional Court is limited to the examination of alleged violations of rights and freedoms within the scope that have been defined, *inter alia*, under Article 6 of the European Convention.

33. According to the linguistic meaning, Article 6 of the European Convention referred to by the appellants in criminal procedures guarantees the right to protection only to someone against whom "well-foundedness of any criminal charge is being established [...]". Namely, only such person may be considered a "victim" within the meaning of Article 6 of the European Convention. Therefore, reverse interpretation of Article 6 of the European Convention, according to which the right to a fair proceeding would be guaranteed also to someone who requested the establishment of well-foundedness of a criminal charge against another person, would exceed the scope of interpretation of Article 6 of the European Convention (see decisions of the Constitutional Court no. *AP-19/02* of 17 March 2004 and no. *AP-408/04* of 18 January 2005).

34. It follows from the aforementioned that the right to a fair trial referred to in Article 6 (1) of the European Convention does not include the right to institute an investigation and a criminal procedure against the third persons and that Article 6 (1) of the European Convention is not applicable to the present case. Since Article II (3) (e) of the Constitution

of Bosnia and Herzegovina, in this case, does not provide a wider scope of protection than Article 6 of the European Convention, it follows that the allegations stated in the appeal in relation to the violation of the right to a fair trial are incompatible *ratione materiae* with the Constitution of Bosnia and Herzegovina.

35. In view of the aforementioned, bearing in mind the provisions of Article 18 (3) (h) of the Rules of the Constitutional Court, the Constitutional Court concludes that the appeal, in relation to 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 (1) of the European Convention, is *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

c) As to the violations of other rights referred to by the appellants

36. In accordance with Article 18 (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 effective legal remedy that he/she used.

37. The Constitutional Court observes that the appellants problematized in the present case the non-conduct of investigation regarding the death of their daughter/sister. In that connection, the Constitutional Court observes that the first question that the Constitutional Court should resolve in this case is the issue of jurisdiction. This is so as it follows from the cited provisions of the Constitution of Bosnia and Herzegovina and the Rules of the Constitutional Court that the Constitutional Court has appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina.

38. In that connection the Constitutional Court observes that the provisions of the FBiH Criminal Procedure Code, which was applied in the present case, did not provide a possibility, in a situation where the Prosecutor's Office would deliver a decision not to conduct an investigation, for the parties who are dissatisfied with such a decision to manage to obtain a decision on the merits – a judgment of any court in Bosnia and Herzegovina. This could, within the meaning of Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, be the subject of contestation before the Constitutional Court. Next, bearing in mind the relevant provisions of the FBiH Criminal Procedure Code, it follows that in such cases the sole legal remedy that is available to the parties to use is a complaint against a decision not to conduct an investigation. In that connection, the Constitutional Court deems that such legislation, that is to say the impossibility for the appellants to get, in accordance with the applicable legislation, a decision on the merits, which may be the subject of review before the Constitutional Court, cannot be blamed on the appellants. This particularly so in a situation where the appeal lodged with the Constitutional Court raises the issues of a violation of the right to life in connection with

the events regarding which the appellants did not have a legal possibility to be involved in the conduct of any proceeding whatsoever. At the same time, the Constitutional Court recalls that Article II (1) of the Constitution of Bosnia and Herzegovina set forth an obligation for the State of BiH and the Entities to ensure the highest level of internationally recognized human rights and fundamental freedoms, as well as that Article 18 (2) of the Rules of the Constitutional Court prescribed a possibility for the Constitutional Court to proceed in a situation where there is no decision of a competent court in BiH.

39. Due to the aforementioned, the Constitutional Court deems that it has jurisdiction in the present case. The aforementioned is supported also by the fact that the Constitutional Court had already resolved in its case-law the appeals lodged over the violations of the right to life and to the prohibition of torture, due to unresolved circumstances under which the death of close persons had occurred. It also delivered decisions according to which the failure to initiate an investigation resulted in the violation of this right (see the Constitutional Court, Decisions nos. *AP-129/04* of 27 May 2005, *AP-143/04* of 23 September 2005 and *AP-3783/09* of 20 December 2012, published on the website of the Constitutional Court: www.ustavnisud.ba).

40. However, that does not mean that the appellants, when lodging an appeal in cases like this one, do not need to meet other conditions referred to in Article 18 of the Rules of the Constitutional Court. On the contrary, all other admissibility requirements have to be met in order to open a possibility for the Constitutional Court to proceed. The subject matter of the appeal in the present case is the failure to initiate a criminal investigation regarding the death of L.M., who is the daughter of the first appellant and the sister of the appellants S.C. and S.R-K. The appeal raised the issues of a violation of the right referred to in Article 2 of the European Convention. Thus, the Constitutional Court, while upholding the mentioned case law raising similar legal issues, deems that the appeal is admissible in such circumstances, although the challenged decision is actually the Order of the Prosecutor's Office not to conduct a criminal investigation.

41. In that connection, the Constitutional Court observes that the appellants were informed about the decision taken by the Chief FBiH Prosecutor dismissing their complaint against the decision not to conduct investigation, and that the mentioned decision was dated 12 March 2018, while the appeal was lodged with the Constitutional Court on 19 April 2018. Due to the aforementioned, the Constitutional Court deems that the appeal meets the admissibility requirements under Article 18 (1) of the Rules of the Constitutional Court, as it was lodged within a time limit of 60 days, within the meaning of the mentioned provision. Finally, the appeal also meets the requirements under Article 18 (3) and (4) of the Rules of the Constitutional Court, since there is no formal reason rendering the appeal inadmissible nor is it manifestly (*prima facie*) ill-founded.

42. In view of the provisions of Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 18 (1), (3) and (4) of the Rules of the Constitutional Court, the

Constitutional Court established that the respective appeal meets the requirements regarding the admissibility.

VII. Merits

43. The appellants alleged the violation of Article II (3) (a) of the Constitution of Bosnia and Herzegovina, and Article 2 of the European Convention, as well as Article 13 of the European Convention. They alleged the violation primarily for the omission of the Cantonal Prosecutor's Office, in particular "the competent public authorities" in 1983 to conduct an efficient investigation, to research the circumstances that led to the death of L.K. They also alleged violation because it was decided that an investigation could not be conducted as the criminal prosecution was barred by the statue of limitations.

Right to life

44. Article II (3) (a) 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:

a) The right to life.

45. Article 2 (1) of the European Convention reads as follows:

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.

46. In the present case, the Constitutional Court observes that the appellants deem there was a violation of their right referred to in Article 2 of the European Convention and Article II (3) (a) of the Constitution of Bosnia and Herzegovina. In particular, a violation of the procedural aspect of that Article. Before considering the present case, the Constitutional Court recalls the relevant principles that the European Court mentioned in the case of *Jelić v. Croatia*, the judgment of 12 June 2014, which reads as follows (for the purpose of this decision, the translation was taken from the following website: https://uredzastupnika.gov.hr):

> "52. As regards the procedural obligation under Article 2 of the Convention, in its judgment in Šilih, (see *Šilih v. Slovenia* [GC], no. 71463/01, § 140, 9 April 2009), the Court clarified that the procedural obligation to carry out an effective investigation under Article 2 constituted a separate and autonomous duty of Contracting States. It therefore considered that an independent obligation capable of binding the State even when the death took place before the critical date arose under Article 2 of

the Convention (see, inter alia, Šilih, cited above, § 159; Varnava and Others v. Turkey [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 147, ECHR 2009; and Velcea and Mazăre v. Romania, no. 64301/01, § 81, 1 December 2009). As the Court has observed, the procedural obligation under Article 2 binds the State throughout the period in which the authorities can reasonably be expected to take measures with the aim of elucidating the circumstances of a death and establish responsibility for it (see Šilih, cited above, § 157). In this context, it should be noted that there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events, since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity (see Brecknell v. the United Kingdom, no. 32457/04, § 69, 27 November 2007).

53. The following criteria were set out in the *Šilih* case:

"162. First, it is clear that, where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction.

163. Second, there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect. Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – will have been or ought to have been carried out after the critical date. However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner."

54. These criteria set out in the *Šilih* case have further been developed in the *Janowiec* case (see *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, 21 October 2013, paragraphs 142-151)."

47. The Constitutional Court recalls that, given the principle of legal certainty, the Court's temporal jurisdiction in respect of compliance with the procedural obligations related to the events occurring before the critical date, is not limitless. As the Court explained in the above-cited *Šilih* case (paragraphs 161 through 163), where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction. Next, there must exist a genuine connection between the death and the entry into force of the European Convention in

respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect. In practice that means that a significant proportion of the procedural steps required by this provision will have been or ought to have been carried out after the critical date. However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner (see also *Agache and Others v. Romania*, no. 2712/02, paragraph 69, 20 October 2009 and the above cited case of *Velcea and Mazăre*, paragraphs 83-85; *Tuna v. Turkey*, no. 22339/03, paragraphs 58-60, 19 January 2010).

48. Also, the Constitutional Court recalls that the European Court considered in a number of cases concerning lengthy investigations into the death of the applicant's relatives what was the moment in which the applicant could or should start to doubt the effectiveness of a legal instrument (see *Şükran Aydın and Others v. Turkey* (Dec.), no. 46231/99, 26 May 2005; *Elsanova v. Russia* (Dec.) no. 57952/00, 15 November 2005; *Frandeş v. Romania* (Dec.), no. 35802/05, 17 May 2011; *Finozhenok v. Russia* (Dec.), no. 3025/06, 31 May 2011; *Attalah v. France* (Dec.), no. 51987/07, 30 August 2011; *Deari and Others v. the Former Yugoslav Republic of Macedonia* (Dec.), no. 54415/09, 6 March 2012; *Gusar v. Moldova and Romania* (Dec.), no. 37204/02, 30 April 2013; *Bogdanović v. Croatia* (Dec.), no. 722541/11, 18 March 2014; *Orić v. Croatia*, no. 50203/12, 13 May 2014; *Gojević-Zrnić and Mančić v. Croatia* (Dec.), no. 5676/13, 17 March 2015; *Radičanin and Others v. Croatia* (Dec.), no. 75504/12; and *Grubić v. Croatia* (Dec.), no. 56094/12, 9 June 2015). In the aforementioned cases, the following was indicated, "where a death has occurred, applicant relatives are expected to take steps to keep track of the investigation's progress, or lack thereof, and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective criminal investigation" (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, paragraph 158, 18 September 2009).

49. As to the present case, the Constitutional Court observes, primarily, that the appellants essentially raise an issue as to the conduct on the part of the public authorities following the death of the minor L.K. in 1983, as well as lack of comprehensiveness (superficiality) of the Cantonal Prosecutor's Office in Zenica and of the FBiH Prosecutor's Office. This, ultimately, resulted in the issuance of the order not to conduct an investigation into the death of L.K., which is inadmissible, in their opinion. In that connection, the Constitutional Court observes that L.K., according to the allegations stated in the appeal, had passed away on 5 August 1983 and that, at the time, the appellants were not of the opinion that the death of L.K. had been caused by the perpetration of a criminal offence. In addition, the Constitutional Court observes that the appellants are close relatives of the deceased L.K. (the mother and sisters). They had not taken any actions whatsoever prior to 22 June 2017, to point to the competent public authorities (Prosecutor's Office) that

there was any doubt that the death of the minor L.K. had not been natural. In addition, that the death had been caused by H.K. (the father of the deceased L.K. and of the appellants S.C. and S.R-K) and his, at the time, common-law wife M.V-K.

50. Next, the Constitutional Court observes that on 6 August 1983, which was immediately after the occurrence of the death of the minor L.K., the autopsy of the corpse of the minor L.K. had been performed at the Regional Medical Centre Zenica Coroner's Office. The medical examiner prepared the autopsy report, which noted that the death was natural and occurred due to acute purulent pneumonia and inflammation of the mucous membranes of the respiratory tract. No signs of violence were found on the corpse of the deceased L.K. In addition, the Constitutional Court observes that, based on the documentation mentioned in this section of the decision entitled "III. Facts of the case", it follows that no criminal investigation had been conducted regarding the death of the minor L.K. The Police Administration of the Ministry of the Interior of the Zenica-Doboj Canton issued an Act on 17 July 2017 informing the first appellant about the following: "that the then Public Security Centre in Zenica, based on the conducted investigation, established that no elements of a criminal offence existed." In addition, [...] the records of that Ministry "had not recorded an event of the murder of L.K.".

51. Since the appellants raise an issue as to the lack of action by the part of the public authorities in 1983, the Constitutional Court notes that, under Article XII of the Constitution of Bosnia and Herzegovina, the Constitution entered into force after the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina as a constitutional act. It replaced and rendered ineffective the Constitution of the Republic of Bosnia and Herzegovina. The General Framework Agreement for Peace in Bosnia and Herzegovina was signed on 14 December 1995, therefore, it follows that the Constitution of Bosnia and Herzegovina entered into force on the same day. In view of the aforementioned, the Constitutional Court will, by connecting the present case with the mentioned criteria referred to in the case law of the European Court, examine whether the procedural aspect of Article 2 of the European Convention was violated. As to the first criterion, or "procedural acts and omissions to act in the period after the entry into force" of the Constitution of Bosnia and Herzegovina, the Constitutional Court observes that in the period from 14 December 1995 to the adoption of the challenged Order not to conduct an investigation, no actions whatsoever had been undertaken as part of a criminal, civil, administrative or disciplinary proceeding. This would lead to possible determination and punishment of the persons responsible or to awarding compensation to the damaged party. The Constitutional Court here also observes that, the trigger in the present case, namely "new material" that appeared after 14 December 1995, for the Prosecutor's Office to proceed and to issue an order not to conduct an investigation, in the opinion of the appellants, was their criminal charge dated 22 June 2017. Namely, this concerns the material, which was "found" after 14 December 1995. In that connection, the Constitutional Court observes that the Cantonal Prosecutor's Office in Zenica, while

deciding on the criminal charge filed by the appellants, delivered the Order not to conduct an investigation no. T 04 0 KTP 0031243 17 of 31 August 2017, since it established that the criminal prosecution was barred by the statute of limitations, which position was confirmed by the Chief Prosecutor of the Cantonal Prosecutor's Office in Zenica and the FBiH Chief Prosecutor.

52. However, a new obligation to conduct an investigation may be established only if the examination of "close connection" or examination of "the values referred to in the Convention" was carried out.

53. As to the examination of the existence of "close connection" between the event that constitutes a trigger and the entry into force of the Convention in respect of the respondent State, as a condition *sine qua non*, for the procedural obligation imposed by Article 2 to come into effect, the Constitutional Court observes that the critical event, according to the allegations made by the appeals, had occurred on 5 August 1983. In addition, the Court observed that the Constitution of Bosnia and Herzegovina entered into force on 14 December 1995. Since it follows from the submitted documentation that the case file had been archived on 1 December 1983, it follows that 12 years had passed from the last action taken with respect to the case file to the entry into force of the Constitution of Bosnia and Herzegovina. Therefore, the mentioned criterion for activating the procedural obligation referred to in Article 2 of the European Convention was not fulfilled (see, by analogy, the case of *Varnava and Others*, cited above, paragraph 166, and the case of *Er and Others v. Turkey*, no. 23016/04, §§ 59-60, ECHR 2012 (excerpts)). Therefore, the Constitutional Court finds that not a single criterion was satisfied in order to establish the "close connection". This was so as the period between the death as an event constituting a trigger and the entry into force of the European Convention was not reasonably short. In addition, a major part of the investigation was not conducted, nor was it supposed to be conducted after the entry into force of the European Convention.

54. Therefore, the period up to 14 December 1995, as the date when the Constitution of Bosnia and Herzegovina entered into force (*mutatis mutandis*, European Court, *M. and Others v. Croatia*, the judgment of 2 May 2017, paragraph 56), *ratione temporis* does not fall within the jurisdiction of the Constitutional Court. Thus, the Constitutional Court cannot examine the allegations stated by the appellants on the failure of the public authorities to act, in accordance with the then applicable regulations after the death of L.K., that is to say in 1983.

55. Since that time, the Cantonal Prosecutor's Office started to proceed in the case only as of 22 June 2017, since the appellants requested the investigation to be conducted against the persons reported for the murder of L.K. However, the Cantonal Prosecutor's Office issued, pursuant to Article 231, paragraph 3 of the FBiH Criminal Procedure Code, an Order not to conduct an investigation, as the criminal prosecution was barred by the statute of limitations. That means to preclude the criminal prosecution with

respect to the perpetrators specified in the criminal charge, namely H.K. and M.V-K. The Constitutional Court recalls that the statute of limitations barring the criminal prosecution is a mechanism, which implies the cessation of the authorization of the state authorities to institute criminal prosecution because a certain period had passed. Also, it recalls that the said mechanism (the statute of limitations in a criminal procedure), unlike in a civil procedure, is not at the disposal of the parties. It occurs irrespective of the will of the perpetrator and no one can renounce the statute of limitations. The statute of limitations periods depend on the gravity of a criminal offence and the prescribe punishment for each criminal offence. Therefore, the statute of limitations barring criminal prosecution may be defined as the statutory right of a perpetrator of a criminal offence not to be prosecuted or punished after a certain period has passed from the perpetration of the criminal offence. Limitation periods, which are a common feature of the domestic legal systems of the Contracting States of the European Convention, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants (see, European Court, *Coëme and Others v. Belgium*, the judgment of 22 June 2000, paras 145 and 146). The statute of limitations barring criminal prosecution implies that a criminal procedure can no longer be instituted after deadlines specified by law have passed (relative statute of limitations). In particular, already commenced procedure cannot continue (absolute statute of limitations). The limitation period starts to run since the day of the perpetration of a criminal offence, and the law provides different limitation periods depending on the prescribed punishment for a criminal offence, whereby the gravest prescribed punishment for that offence is taken into account. The limitation period is interrupted when the competent authorities undertake actions with a view to conducting a criminal procedure. In the event of the interruption of the limitation period, the time that has passed by then, does not count towards the limitation period, it starts to run anew with every undertaken action. The limitation period is interrupted also when the caused commits a new criminal offence during the limitation period, for which the same or graver criminal sanction is prescribed (by either the type or length of the prescribed punishment). This condition can be taken as fulfilled only when a legally binding judgement exists for the new criminal offence, it does not suffice only to have another criminal procedure instituted, and certainly not to have criminal charges filed. Therefore, it is necessary for the legally binding judgment for this new criminal offence to have been delivered during the limitation period, in order for the statute of limitations period to be interrupted.

56. As each interruption extends the statue of limitations period, i.e. it starts to run anew with every interruption, practically the barring by the statute of limitations would never occur had it not been for the mechanism of absolute statute of limitations. The barring by the absolute statute of limitations occurs in any case after twice as much time has passed as provided under the relative statute of limitations period. Upon passing of that time, the procedure can no longer be instituted, i.e. continued, and this time limit is not affected by interruptions and suspensions. Therefore, criminal prosecution is barred

by the relative statute of limitations when the time prescribed by law passes from the moment of the perpetration of a criminal offence to the last action undertaken, and not a single action has been undertaken with a view to prosecute the perpetrator. The absolute statute of limitations occurs when twice as much time has passed than that prescribed for the relative statute of limitations, and it occurs irrespective of the number of actions undertaken by the plaintiff.

57. In the present case, the Constitutional Court observes that the Cantonal Prosecutor's Office had compared the criminal codes that were applicable at the time when, according to the allegations stated in the report, the reported criminal offence had been committed with the criminal codes that were in force subsequently. It established through checks that the most favourable law for the suspects was the SFRY Criminal Code as the general law, which was applied in 1983 together with the 1977 RBiH Criminal Code as a special law. This law prescribed the criminal offence that the appellants stated in the criminal charge. It was stated that Article 38 of the SFRY Criminal Code prescribed that "the punishment of imprisonment may not be shorter than 15 days nor longer than 15 years". Paragraph 2 prescribed that the court may impose a punishment of imprisonment for a term of 20 years for criminal offences for which the death penalty is prescribed. Article 95, paragraph 1, item 1) pertaining to the application of the mechanism of the statute of limitations of the aforementioned Code prescribed that criminal prosecution is barred after 25 years has passed from the perpetration of a criminal offence for which the law provides the capital punishment or the punishment of imprisonment for a term of 20 years. Furthermore, it was indicated that Article 96, paragraph 6 of the same Code prescribed that: "There shall be an absolute bar to prosecution when twice as much time has passed as required, under the law, for the criminal prosecution to be barred by the statute of limitations" (absolute statute of limitations). It was mentioned that Article 36 of the 1977 RBiH Criminal Code stipulated and defined the criminal offence of murder, accordingly the qualified form of murder is prescribed as follows: "whoever deprives another person of life in a cruel and insidious way, shall be punished by imprisonment for not less than 10 years or by the death penalty." Thus, it was assessed in the present case that the criminal prosecution was barred by the relative statute of limitations and that it is not possible to institute criminal prosecution after 5 August 2008, since 25 years had passed from that date, as the appellants stated in the report, the perpetration of the criminal offence of murder of L.K. What is more, the Constitutional Court observes that the appellants stated in the appeal: that "the former law, which had been in force at the time of the perpetration of the criminal offence, the 1977 RBiH Criminal Code, prescribed the limitation period of 25 years, while the FBiH Criminal Code, "which pertains to our case" prescribed 35 years."

58. Finally, the Constitutional Court recalls the position of the European Court that Article 2 of the European Convention does not impose an obligation on the persons in charge of investigation to accommodate each request made by the relatives of the victim

concerning certain actions during the investigation. In this case, it is a fact that the FBiH Prosecutor's Office had examined the lawfulness of the work of the Cantonal Prosecutor's Office in Zenica and established that it had complied with the provisions of the FBiH Criminal Procedure Code. For the aforementioned reasons, the Constitutional Court deems that the circumstances do not exist in the present case, wherein the procedural obligations arising from Article 2 of the European Convention may be revived again, to some extent. Accordingly, the Constitutional Court deems that the right of the appellants referred to in Article II (3) (a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention was not violated in the present case.

59. The Constitutional Court notes that it examined the remaining allegations of the appellants during the decision-making. However, it does not find it relevant to elaborate on them additionally, as it found that the Cantonal Prosecutor's Office in Zenica and the FBiH Prosecutor's Office had provided logical and satisfactory answers to the rest of the appellants' objections. In addition, it found that their allegations could in no way bring into question the right to life.

Effective legal remedy

60. In relation to the allegations made by the appellants about a violation of the right to an effective legal remedy under Article 13 of the European Convention, the Constitutional Court indicates that the appellants stated explicitly that they link the violation of the right referred to in Article 13 of the European Convention to the right to life. In that connection, the Constitutional Court observes that the appellants had and used the possibility to avail themselves of a legal remedy prescribed by law in the relevant proceeding. The fact that the said legal remedy did not result in positive outcome in the present proceeding cannot lead to a conclusion that legal remedies did not exist or were ineffective. Thus, the Constitutional Court concludes that the allegations about a violation of the right to an effective legal remedy referred to in Article 13 of the European Convention in connection with the right to life are ill-founded. In view of all the aforementioned, the Constitutional Court deems that the allegations made by the appellants about the violation of the right to a fair trial under Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention are ill-founded.

VIII. Conclusion

61. The Constitutional Court deems that there has been no violation of Article II (3) (a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention. It found no violation as it did not find an omission in the actions of the Prosecutor's Office when delivering an order not to conduct an investigation. It was established that the criminal prosecution of the reported persons was barred by the relative statute of limitations. This implies the preclusion of criminal prosecution with respect to the

perpetrators specified in the criminal charge. In addition, there was no obligation to reactivate the procedural aspect of that article since the analysis of the case file resulted in establishing that the time span between the death, as an event constituting a trigger and the entry into force of the European Convention, was not reasonably short. In addition, a major part of the investigation was not conducted, or it was supposed to be conducted after the entry into force of the European Convention, 14 December 1995.

62. The Constitutional Court concludes that there has been no violation of the right to an effective legal remedy under Article 13 of the European Convention. There was no violation as the appellants linked the violation of that right to the right to life. In addition, the appellants had a possibility to avail themselves and they did avail themselves of the legal remedies prescribed by law.

63. Pursuant to Article 18 (3) (h), Article 59 (1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP-1217/20

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Ms. Lejla Dragnić from Sarajevo, represented by Ms. Nina Kisić, a lawyer practicing in Sarajevo, against the Order of the Federal Civil Protection Headquarters, no. 12-40-6-148-34/20 of 20 March 2020

Decision of 22 April 2020

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and (3) and Article 72(2), (4) and (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Grand Chamber and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović, and

Ms. Seada Palavrić

Having deliberated on the appeals of **Ms. Lejla Dragnić and A.B.**, in case no. **AP-1217/20**, at its session held on 22 April 2020, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeals lodged by Ms. Lejla Dragnić and A.B. against the Order of the Federal Civil Protection Headquarters, no. 12-40-6-148-34/20 of 20 March 2020 and Order of the Federal Civil Protection Headquarters no. 12-40-6-34-1/20 of 27 March 2020, are partially granted.

A violation of the right to liberty of movement under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, with regard to Ms. Lejla Dragnić, A.B. and any other person in the same situation as to the points of fact and law, is hereby established.

Pursuant to Article 72(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Government of the Federation of Bosnia and Herzegovina and the Federal Civil Protection Headquarters are ordered to harmonize the Order of the Federal Civil Protection Headquarters, no. 12-40-6-34-1/20 of 27 March 2020, with the standards under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention for the Protection of Human

Rights and Fundamental Freedoms within a time limit of 5 days from the delivery of this Decision, as expressed in this Decision.

The appeals of Ms. Lejla Dragnić and A.B., in the part wherein they request the repeal of the Order of the Federal Civil Protection Headquarters, no. 12-40-6-34-1/20 of 27 March 2020, are dismissed as ill-founded.

Pursuant to Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Government of the Federation of Bosnia and Herzegovina and the Federal Civil Protection Headquarters are ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 3 days as of the date of the expiry of the time limit given in paragraph 3 of the enacting clause of this Decision, of the enforcement of the order referred to in paragraph 3 of the enacting clause 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 31 March 2020, Ms. Lejla Dragnić from Sarajevo ("the appellant"), represented by Ms. Nina Kisić, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") against the Order of the Federal Civil Protection Headquarters, no. 12-40-6-148-34/20 of 20 March 2020 ("the First Order"). The appellant also requested the Constitutional Court to adopt an interim measure to prevent further application of the First Order pending a final decision by the Constitutional Court. The appeal was registered under number *AP-1217/20*.

2. On 3 April 2020, the appellant, through her attorney, filed a new appeal against a new Order no. 12-40-6-34-1/20 of 27 March 2020 ("the Second Order"), wherein she requested the Constitutional Court to adopt the same interim measure. That appeal was registered under number *AP-1247/20*.

3. On 3 April 2020, A.B. from Sarajevo ("the appellant"), represented by Ms. Edisa Peštek Zorlak, a lawyer practicing in Sarajevo, filed an appeal against the First Order. The appeal was registered under number *AP-1254/20*.

II. Procedure before the Constitutional Court

4. Given the fact that the appeals concern the same issue, pursuant to Article 23 of the Rules of the Constitutional Court, the Constitutional Court took a decision on the joinder of cases, in which the Constitutional Court shall conduct one set of proceedings and take a single decision under number *AP-1217/20*.

5. Pursuant to Article 23 of the Rules of the Constitutional Court, the Government of the Federation of Bosnia and Herzegovina and Federal Civil Protection Headquarters ("the Federal Headquarters") were requested to submit their respective responses to the appeal. The Government of the Federation of Bosnia and Herzegovina submitted its response to the appeal on 9 April 2020. The Federal Headquarters failed to submit its response.

III. Facts of the case and allegations in the appeal

a) As to appeals no. *AP-1217/20* and *AP-1247/20*

6. The appellant alleges the same facts and allegations in both appeals filed against both Orders.

7. On 20 March 2020, the Federal Headquarters issued the First Order, wherein it imposed confinement on the persons under the age of 18 and over the age of 65 on the territory of the Federation of Bosnia and Herzegovina ("the Federation of BiH"), which was entered into force immediately upon the issuance and the validity of which was until 31 March 2020.

8. The appellant alleges that she was born on 28 September 1951 and that she filed the appeal under Article 18(2) of the Rules of the Constitutional Court, given the fact that there is no decision of a competent court, which she could possibly have only if a sanction is imposed on her for violation of the Order and which would place an "excessive burden on her". The appellant further alleges that she contests the First and the Second Order being general acts which "have been in violation of her human rights and freedoms, and that she has been treated in a discriminatory manner on the ground of her age", "which is the reason why she has sustained irreparable damage on a daily basis" as a person directly affected by the measures referred to in the contested Orders. The appellant further alleges that the Orders are not based on law. In particular, the First and the Second Order, as alleged, were issued in accordance with Article 108 of the Law on Protection and Rescue of People and Property in the Event of Natural and Other Disasters ("the Law on Protection and Rescue"), which does not regulate the issuance of orders to prevent the BiH citizens from exercising their human rights". She further alleges that despite the fact that Article 108(2) stipulates the powers of the civil protection headquarters to "order the implementation of appropriate protection and rescue measures", this does not mean that it stipulates "the issuance of orders preventing the movement of population". Next,

the appellant also alleges that "such an option" is not mentioned in the Decision of the Government to Declare the State of Disaster caused by the Emergence of Coronavirus (COVID-19) in the Federation of BiH, no. 408/20 of 16 March 2020. Furthermore, the appellant alleges that no other law in BiH stipulates the adoption of such a measure.

9. The appellant further points out that Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") safeguards the liberty and security of person and that Article 2 of Protocol No. 4 to the European Convention secures the freedom of movement to all person lawfully within the territory of a State of the Council of Europe and that restrictions on the exercise of these rights may be imposed only in accordance with the law if they are necessary in a democratic society. The appellant highlights that Bosnia and Herzegovina did not notify the Secretary General of the Council of Europe of its "intention to impose restrictions of the rights guaranteed under the European Convention, which is the reason why it has violated its obligations under Article 15 of the European Convention". Furthermore, the appellant refers to the statement made by the President of the Parliamentary Assembly of the Council of Europe, wherein he urges States to abide by the principle of proportionality when adopting emergency measures in order to respond to the crisis caused by COVID-19, and to adopt the measures strictly necessary.

10. Next, the appellant alleges that the measures less rigorous than those preventing her from leaving her home were not considered before the issuance of the Orders. In this connection, the appellant points out that the issuer of the Order should have considered other measures to achieve the same aim, as well as the measures to protect other vulnerable categories. Instead of that, the issuer of the Order, as alleged by the appellant, put her in a life-threatening situation and imposed unreasonable restrictions" preventing her from going to "bank, pharmacy, doctor or from providing necessities" or from "taking her dog for a walk".

11. The appellant is of the opinion that all the aforementioned reduced her freedom to what is called "house arrest" in criminal law and so subject to punishment which is not prescribed by the law in force", which is "logical", given the fact that "the Order itself in not based on the law". In this connection, the appellant alleges that she does not have any possibility to address a court or any other authority which would examine that decision to impose the "house arrest" on her, except the appeal to the Constitutional Court. She further alleges that reducing the movement to one's home, where the conditions "are much better than those in a prison, could be regarded as deprivation of liberty". The additional factor showing that the measure mentioned in the Order constitutes deprivation of liberty is "the fact that it is imposed under threat of sanctions (even "detention" which was mentioned by some political officials), which additionally shows the criminal character of such a conduct". The appellant further alleges that the Orders are fully arbitrary, since the criteria to prohibit the movement of the persons over

the age of 65 are not clear, which is, in fact, "the limit to exercise the right to retirement" under the Labour Law, although there are exceptions to that rule (judges, prosecutors, attorneys, university professors). Next, the appellant is of the opinion that such an Order is not in the interest of public health, as the movement of the appellant is forbidden on a discriminatory ground, regardless of her health condition, whereas it allows the movement of the persons under the age of 65, who exercise the right to disability pension on the ground of, for example, respiratory diseases and, thus, belong to the category of highly vulnerable persons insofar as COVID-19 is concerned".

12. Given the foregoing, the appellant proposes that the Constitutional Court repeal the contested Orders and find the violation of her rights under Article 5 of the European Convention and Article 2 of Protocol No. 4 to the European Convention.

13. As to the interim measure requested, the appellant alleges that a serious violation of human rights "cannot be remedied in proceedings at a later point" and that the interim measure to prevent further implementation of the Order pending a final decision by the Constitutional Court "is in interest of the appellant as a party to the proceedings and in the interest of the State of Bosnia and Herzegovina".

b) As to appeal *AP-1254/20*

14. The appellant filed an appeal as a parent of a child under the age of 18 without indicating the age and name of the child. He alleges, *inter alia*, that the confinement imposed on the persons under the age of 18 prevents him from "providing care and protection for his child" and that this renders his everyday life and life of his child "more difficult". He further alleges that "the fact that the state of emergency is not declared in the Federation of BiH means that differential treatment towards the mentioned age groups of population is not necessary in the given situation". In his opinion, "the authorities did not give any reason for issuing the contested legal act." He claims that "so far the World Health Organisation has not made any recommendation to suggest that the persons under the age of 18 are dangerous persons transmitting the virus". Also, the appellant alleges that "the practice of European countries does not show in any way whatsoever that children contribute to the transmission of virus". Next, the appellant alleges that "the mentioned Order directly affects physical and mental health of children and elderly persons" and that "as a parent he is not able to ensure the life to his child in accordance with the child's best interests".

15. In the appellant's opinion, "the right to the liberty and security of person, right to freedom of movement and residence, right to non-discrimination, right to dignity, right to liberty of person, right to an effective and efficient legal remedy" have been violated. With regard to the violation of the mentioned rights, the appellant refers to the Constitution of Bosnia and Herzegovina, European Convention and International Covenant on Civil and Political Rights.

c) Response to the appeal

16. In its response to the appeal, the Government of the Federation of BiH alleges that on 21 February 2020, the Ministry of Health of the Federation of BiH, in information on the outbreak of novel coronavirus and COVID-19, which the WHO determined as a "public health emergency of international concern", informed the Federal Headquarters of the measures to be taken on the territory of the Federation of BiH in order to prevent the outbreak and transmission of the disease caused by coronavirus. Following a number of measures taken, the Federal Headquarters, as alleged, assessed the situation and proposed that the Government of the Federation of BiH, in accordance with Article 24(11) of the Law on Protection and Rescue, take a decision to declare disaster, whereupon that decision was taken. The Government of the Federation of BiH further alleges that the Federal Headquarters, having considered the epidemiological situation in the Federation of BiH and worldwide and Orders of the Crisis Centre of the Federal Ministry of Health, issued the contested Order on 20 March 2020, whereby the movement of persons under the age of 18 and over the age of 65 was forbidden. In this connection, the Government of the Federation of BiH considered as unfounded the allegations that the Federal Headquarters' conduct towards the mentioned groups is discriminatory, the reason being that the "elderly persons are exposed to a risk of having more severe symptoms if infected by coronavirus because the immune system of elderly persons is weakened so that the consequences are more dangerous for them, and the persons under the age of 18, "although having milder symptoms than the elderly persons and are not so affected by diseases, transmit the virus to elderly persons". The Government of the Federation of BiH also points out that the measure of prohibition of movement imposed on elderly persons as a "vulnerable group of person" was issued because "during the epidemic worldwide, a number of persons belonging to these age groups were infected by coronavirus, and the immunity, i.e. the strength of immune response to infection is an important factor".

17. The Government of the Federation of BiH contests the allegations that there was no legal basis for issuing the Orders contested, since Article 54 of the Law on the Protection of Population against Infectious Diseases stipulates, *inter alia*, protection measures of confinement with the aim of preventing and controlling infectious diseases. Furthermore, the Government of the Federation of BiH alleges that the protection of health of a greater number of people and prevention of spread of epidemic is a legitimate aim sought to be achieved through contested measures and other imposed measures (adapted opening and closing time of stores, closed stores, self-isolation and quarantine). In the opinion of the Government of the Federation of BiH, there is a proportional balance between the contested measures and legitimate aim, and they do not place an excessive burden on individuals, all the more so since, as the Government alleges, "that measure and other measures are subject to continuous reconsideration", which was the reason why they issued a supplement to the contested Order, wherein the movement of the persons under

the age of 18 was allowed while in car, and the movement of persons over the age of 65 was allowed from 8h00 to 12h00 in the period from 6 to 10 April 2020 in order to make it possible for them to get their retirement payments. Taking in into account all the aforementioned, and the fact that "the measures for the protection of the health of people must be taken promptly and effectively, as well as the measures to prevent the spread of virus", the Government of the Federation of BiH proposes that the appeals and request for interim measure be dismissed.

IV. Relevant Law

18. In the **Constitution of Bosnia and Herzegovina,** the relevant provisions read as follows::

Article X
Amendment

[...]

2. Human Rights and Fundamental Freedoms

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 paragraph.

19. Within **the Framework Law on the Protection and Rescue of People and Property in the Event of Natural or Other Disasters in Bosnia and Herzegovina** (*Official Gazette of BiH*, 50/08), the relevant provisions read as follows:

Article 13
(BiH Council of Ministers)

[...]

h) Declare the beginning and the end of the state of natural or other disaster in the territory of Bosnia and Herzegovina upon the proposal of the Coordination Body of Bosnia and Herzegovina for Protection and Rescue or upon the request of the competent bodies of the Entities or the Brčko District of BiH, which have already declared the state of the disaster in their territory.

[...]

Article 17
(Competences of the Coordination Body)

(1) The Coordination Body is an expert operational body of the BiH Council of Ministers and shall be responsible to:

a) propose to the BiH Council of Ministers, upon the request of the Entities or the Brčko District of BiH, to declare the state of a natural or other disaster in the territory of Bosnia and Herzegovina and to declare the end of such state; [...]

20. In **the Law on the Protection and Rescue of People and Material Property from Natural and Other Disasters** (*Official Gazette of the FBiH*, 39/03, 22/06 and 43/10), the relevant provisions read as follows:

Article 1

This Law regulates the system of protection and rescue of people, flora and fauna, material, cultural, historical and other goods and environment (hereinafter: people and material property) from natural disasters, technical, technological, ecological and other disasters or war hazards (hereinafter: natural and other disasters), rights and duties of citizens and bodies of the Federation, cantons and municipalities, companies and other legal entities, and other issues of importance in the field of protection and rescue from natural and other disasters in the Federation of Bosnia and Herzegovina

Article 3

For the purposes of this Law, the notion:

1) natural disasters means any events that are caused by natural forces that cannot be influenced by the human factor such as: earthquake, flood, high snow and wind-driven snow, high-speed wind or hurricane wind, hail, torrential downpours, landslide, drought, cold, and the widespread emergences of human, animal and plant diseases; [...]

Article 106

Civil protection headquarters shall be established as expert operational bodies for the management of protection and rescue activities in the territory of the Federation, that is, in the cantons and municipalities, and for carrying out other protection and rescue activities in accordance with the law and other regulations. These headquarters shall be established by the Federation, cantons and municipalities.

Article 108

In managing the protection and rescue activities, the civil protection headquarters referred to in Articles 106 and 107 of this Law shall carry out the following duties:

1) decide on the use of forces and means of civil protection related to the protection and rescue of endangered and injured people and material property and deploy those forces to the stricken areas;

2) order the implementation of appropriate protection and rescue measures and determine the forces and means to implement those measures;

3) direct, coordinate and manage the protection and rescue activities of all participants involved in protection and rescue in their area;

4) resolve all issues arising during the implementation of protection and rescue operations related to the engagement of civil protection forces and means and the implementation of protection and rescue measures, and self-protection of citizens.

21. In **the Law on the Protection of the Population against Infectious Diseases** (*Official Gazette of the FBiH*, 29/05), the relevant provisions read as follows:

Article 1

This Law regulates infectious diseases the prevention and control of which are of interest to the Federation of Bosnia and Herzegovina (hereinafter: the Federation) and measures for the protection of the population from infectious diseases.

Article 2

For the purposes of this Law, the notions shall mean:

[...]

• an epidemic of an infectious disease is the emergence of an unusual number of diseases resulting from infectious diseases that are on the list of infectious diseases that must be reported or the emergence of new infectious diseases that threaten the health of the population;

[...]

Article 54

The measures provided for in this Law and international sanitary conventions and other international treaties shall be taken to protect the population of the Federation from the appearance of cholera, plague, viral haemorrhagic fevers, yellow fever, SARS and other infectious diseases.

[...]

Aimed at the prevention and control of infectious diseases referred to in paragraph 1 of this Article, the Federal Ministry of Health may order special emergency protective measures against these diseases:

[...]

2. prohibition of movement of the population, i.e. restriction of movement in the infected or directly endangered areas;

[...]

6. other measures in accordance with international regulations.

Article 70

A fine to the amount between BAM 100.00 and BAM 2,000.00 shall be imposed on an individual if:

7. he/she fails to comply with Articles 54, 55 and 56 of this Law;

When the obligation relates to a minor as regards the offences referred to in paragraph 1 items 3, 4, 5, 6 and 7 of this Article, a parent or guardian failing to provide the minor with due care shall be punished by a fine referred to in paragraph 1.

22. The **Convention on the Rights of the Child** [adopted at the General Assembly of the United Nations on 20 November 1989] (*Official Gazette of SFRY – International Treaties*, 15/90, *Official Gazette of RBiH*, 25/93 and the Decision to Withdraw the Reservation to Article 9, paragraph 1 of the UN Convention on the Rights of the Child, *Official Gazette of BiH*, 42/08), as relevant, reads:

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

23. The **Decision to Declare the State of Disaster caused by the Emergence of Coronavirus (COVID-19) in the Federation of BiH** (*Official Gazette of the FBiH*, 21/20), as relevant, reads:

I

The state of disaster caused by the emergence of coronavirus (COVID-19) in the territory of the Federation of Bosnia and Herzegovina is hereby declared.

[...]

IV

The Federal Civil Protection Headquarters is hereby obligated to undertake, in accordance with the FBiH Plan and applicable legal regulations, all activities related to the coordination and management of actions to protect and rescue people in the stricken areas.

[...]

VI

All heads of the administration and administrative organizations of the Federation and the cantons, i.e. heads of municipal/city administration offices and heads of legal entities and other institutions are hereby obligated to ensure the implementation of the order of the competent civil protection headquarters.

VII

The Decision shall enter into force on the day of its adoption and shall be published in the "Official Gazette of the Federation of BiH".

This Decision shall be published through print media and electronic media.

24. The **Decision to Declare the Emergence of a State of Natural or other Disaster in the Territory of Bosnia and Herzegovina** (*Official Gazette of BiH*, 18/20), as relevant, reads:

Article 1
(Subject-matter)

(1) The emergence of a state of natural or other disaster in the territory of Bosnia and Herzegovina is hereby declared due to the risk of a possible epidemic of an infectious disease caused by a new coronavirus (COVID-19), with a view to diminish the risk of rapid spread of the infection in Bosnia and Herzegovina and to secure additional resources to respond to this public health threat.

(2) The prevention and control of the spread of infectious disease caused by a new coronavirus (COVID-19) is of general interest to Bosnia and Herzegovina.

Article 2
(Coordination Body of Bosnia and Herzegovina for Protection and Rescue from Natural or Other Disasters in Bosnia and Herzegovina)

With a view to protect and rescue people and material property, the Council of Ministers of Bosnia and Herzegovina (hereinafter: the Council of Ministers of BiH) shall activate the Coordination Body of Bosnia and Herzegovina for Protection and Rescue from Natural or Other Disasters in Bosnia and Herzegovina (hereinafter: the Coordination Body) and shall order the Coordination Body to carry out its activities in accordance with Article 17 of the Framework Law on the Protection and Rescue

of People and Property in the Event of Natural or Other Disasters in Bosnia and Herzegovina (hereinafter: the Framework Law).

Article 4
(Civil Protection Headquarters of the Entities and the Brčko District of Bosnia and Herzegovina)

(1) The civil protection headquarters of the Entities and the Brčko District of Bosnia and Herzegovina and other crisis headquarters are hereby recommended to undertake all activities to fully implement measures to prevent the spread of infectious disease caused by a new coronavirus (COVID-19).

(2) With a view to preventing the spread of coronavirus (COVID-19), the governments of the Entities and the Brčko District of Bosnia and Herzegovina may also adopt individual measures in accordance with the laws falling within the scope of their jurisdiction. The Coordination Body shall provide information about the measures taken.

[...]

Article 6
(Entry into force)

This Decision shall enter into force on the day of its adoption and shall be published in the Official Gazette of BiH.

25. The **Order of the Federal Civil Protection Headquarters No. 12.40-6-148-34/20** of 20 March 2020 reads as follows:

Pursuant to Article 108 of the Law on the Protection and Rescue of People and Material Property from Natural and Other Disasters (Official Gazette of the Federation BiH, Nos. 39/03, 22/06 43/10) and Article 18 of the Rules of Procedure of the Federal Civil Protection Headquarters Nos. 11-49/14833/11 of 26 October 2011 and 12-02/10-542-4/17 of 4 October 2017 and the Decision of the Government of the Federation of Bosnia and Herzegovina to declare the state of disaster caused by the emergence of coronavirus (COVID-19) in the territory of the Federation of BiH, V. No. 408/2020 of 16 March 2020, the Federal Civil Protection Headquarters hereby issues the following

ORDER

1. A ban on the movement of persons under the age of 18 and over 65 in the Federation of BiH is hereby ordered.

2. The Ministers of the Cantonal Ministries of the Interior shall be responsible for the implementation of this Order.

3. The Ministries referred to in paragraph 2 of this Order shall report to the Federation Civil Protection Headquarters, through the Federal Civilian Protection Operational Centre, on all measures taken to comply with this Order.

4. This Order shall enter into force on the day of its adoption and shall be applicable by 31 March 2020.

26. The **Order of the Federal Civil Protection Headquarters** No. 12.40-6-148-34-1 / 2, of 27 March 2020, reads as follows:

The Order number 12.40-6-148-34/20 of 20 March 2020 shall be applicable until further notice.

This Order shall enter into force on the day of the adoption thereof.

27. The **Order of the Federal Civil Protection Headquarters** No. 12.40-6-148-34-1-1/20, of 17 April 2020, reads as follows:

1. The Orders Nos. 12.40-6-148-34/20 of 20 March 2020, 12.4-6-148-34-1/20 of 27 March 2020 and 12.40-6-148-34-2/20 of 3 April 2020 shall be applicable by 30 April 2020.

2. This Order shall enter into force on the day of the adoption thereof.

V. Admissibility

28. 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 court in Bosnia and Herzegovina.

29. Pursuant to Article 18(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.

30. Pursuant to Article 18(2) of the Rules of Constitutional Court, the Constitutional Court indicates that, exceptionally, it may examine an appeal where 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. In the present case, the appellants claim that the challenged Orders violated their right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention, the right under Article 2 of Protocol No. 4 to the European Convention, and the right to non-discrimination in connection to these rights. The Constitutional Court deems that all three lodged appeals indicate serious violations of the rights under the Constitution of Bosnia and Herzegovina and the European Convention, which makes them, according to the case-law of the Constitutional Court, admissible within the meaning of Article 18(2) of the Rules of Constitutional Court (see, the Constitutional Court, *mutatis mutandis*,

inter alia, Decision on Admissibility and Merits no. *AP-3376/07* of 28 April 2010, available at www.ustavnisud.ba). Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court, because there is neither a formal reason rendering the appeal inadmissible, nor is it manifestly (*prima facie*) ill-founded.

31. Having regard to the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18 (2), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that all three appeals meet the admissibility requirements.

VI. Merits

32. The appellants challenge the impugned Orders, because they held that the said Orders are in violation of 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, the right to freedom of movement under Article 2 of Protocol No. 4 to the European Convention, and the right to non-discrimination under Article 14 of the European Convention in connection to the mentioned rights.

Introductory remarks

33. On 11 March 2020, the World Health Organization ("WHO") declared a pandemic of coronavirus SARS-CoV-2 and the disease named COVID-19 with the call on the governments "to affect the course of the virus transmission through 'urgent and aggressive action', however "all countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights" (see: WHO Director-General's Media Briefing, available at: https://www.pscp.tv/w/1djxXQkqApVKZ). At that moment in time, according to WHO Report, there were more than 118,000 cases in 114 countries reported throughout the world, and over 4,000 people have already lost their lives due to the disease caused by or related to COVID-19. According to the WHO statistics as of 8 April 2020, 212 countries have reported a total 1,317,130 confirmed cases with 74,304 confirmed deaths. In a situation like that, undoubtedly all states have faced an emergency and a huge challenge of undertaking efficient measures to prevent the transmission, to treat a completely new type of virus spreading very quickly, for which no medicine or vaccine existed, as well as to preserve and safeguard constitutional and human rights.

34. In response to this crisis, on 16 March 2020 the FBiH Government rendered a Decision to Declare the State of Disaster caused by the Emergence of Coronavirus (COVID-19) in the Federation of BiH, 408/20 (published in the *Official Gazette of the F BiH*, 21/2, "Decision of the FBiH Government"). This Decision ordered, among other things, "for all FBiH ministries, administrations and administrative organizations, legal

entities and other institutions to make themselves available to the FBiH Civil Protection Headquarters", while the Federal Headquarters was ordered "to undertake, in accordance with the FBiH Plan and the applicable legislation, all activities regarding the coordination and management of people protection and rescue actions in an endangered area". On the basis thereof, the Federal Headquarters adopted a set of measures (an obligation of self-isolation, isolation, ban on crossing the state border, restriction of working hours, ban on work for certain businesses, curfew, etc.), with one of the measures being the prohibition of movement for those under age of 18 and above age 65, which was ordered by the challenged Orders.

35. Also, the Constitutional Court indicates that according to the statistics of the FBiH Ministry of Health ("FBiH MH") as of 20 April 2020 there was a total of 737 confirmed cases of persons infected with the virus and disease COVID-19 and with 31 deaths (statistics taken from the FBiH MH website: https://www.covid-19.ba/ on 20 April 2020), which is a substantial and continuous increase in the number of those infected ever since the outbreak of COVID-19 in FBiH.

Impact of the pandemic crisis on the protection of human rights – possibility and manner for the restriction thereof

36. The protection of population from the COVID-19 threat is a huge and difficult challenge for the authorities in all states. What is clear from the start is that because of such exceptional circumstances it is not possible to maintain regular functioning of the society, particularly when it comes to protective measures, which are necessary to successfully curb the new type of virus, to protect the lives of people, as well as to lessen the great burden on the healthcare services as a result of people falling ill with COVID-19, in order for such services to be able to efficiently respond to the challenge. Therefore, it is clear that measures ordered in such a situation undoubtedly restrict a number of rights referred to in the Convention and the Constitution. The European Convention and the European Court of Human Rights ("the European Court") do not prohibit *a priori* the introduction of such measures. On the contrary, positive obligations ordered in the European Convention in order to pursue a legitimate aim of the protection of the health of people require that member states demonstrate active care and timely reaction. Therefore, a failure to undertake measures, as well as their untimely undertaking, could be considered a violation of the positive obligations of the state. On the other hand, measures restricting human rights, such as the prohibition of assembly, isolation, prohibition of leaving one's own home etc., have to be lawful, pursue a legitimate aim and have to be "necessary in a democratic society", i.e. there has to be proportionality between the measures undertaken and the aim sought to be achieved. These are the rules derived from the hitherto case-law of the European Court and they are as applicable in an emergency as they are applicable during the normal times.

37. Concurrently with the introduction of the measures restricting certain human rights, some of the High Contracting Parties of the Council of Europe have used the possibility of derogation from the European Convention in accordance with Article 15 of the European Convention (by 9 April 2020, eight High Contracting Parties have informed the Secretary General of the Council of Europe of derogations, as follows: Albania, Armenia, Estonia, Georgia, Latvia, Moldova, North Macedonia, Romania and Serbia). Article 15 of the European Convention allows High Contracting Parties to derogate from the European Convention in times of emergency, which COVID-19 pandemic certainly is. However, the right to derogate is "clearly circumscribed by the text of Article 15. Furthermore, and crucially, both the scope and the form of a State's derogation are subject to the scrutiny of the European Court of Human Rights" (see: Reply of the Committee of Ministers of the Council of Europe to the Recommendation of the Parliamentary Assembly of the Council of Europe (PACE) 2125 (2018), document no. 14770 of 5 December 2018). Derogation also has to meet formal requirements of Article 15(3) of the European Convention to keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor, and when such measures have ceased to operate.

38. Bosnia and Herzegovina has not informed the Secretary General of the Council of Europe that it is availing itself of the right to derogate the European Convention pursuant to Article 15 of the European Convention, which is a matter of appreciation of the state authorities, which will not be reviewed either by the European or the Constitutional Court, since that is a possibility and not an obligation. Therefore, the challenged measures will not be considered in the light of Article 15 of the European Convention, but in the light of a possibility of restricting human rights that the European Convention normally provides for. The Constitutional Court recalls that Article II(2) of the Constitution of Bosnia and Herzegovina sets forth the constitutional status of the European Convention, according to which that act shall have priority over all other law. Also, Article II(3) of the Constitution of Bosnia and Herzegovina sets forth the catalogue of rights, which are identical to the rights set forth in the European Convention and protocols to the European Convention, while under Article X(2) of the Constitution of Bosnia and Herzegovina 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 paragraph.

Allegations as to the violation of Article 5 of the European Convention and Article 2 of Protocol No. 4 to the European Convention

39. The appellants alleged that there is a violation of their right under Article II(3) (d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention (deprivation of liberty) and Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention (freedom of movement).

40. Article II(3) of the Constitution of Bosnia and Herzegovina, in the 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:

[...]

d) The rights to liberty and security of person.

[...]

m) The right to liberty of movement and residence.

41. Article 5 of the European Convention, in the relevant part, reads as follows:

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:

[...]

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;

[...]

42. Article 2 of Protocol No. 4 to the European Convention, in the relevant part, reads as follows:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

[...]

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

43. In determining whether the challenged restriction constitutes the deprivation of liberty or the interference with the freedom of movement, the Constitutional Court recalls that the European Court has constantly underlined in its case-law that, in order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 of the European Convention, "the starting-point must be his or her specific situation and account must be taken of a whole range of factors such as the type, duration,

effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance" (see, the European Court, *De Tommaso v. Italy*, judgment of 23 February 2017, Application no. 43395/09, paragraph 80 with further references).

44. The Constitutional Court considered in its recent case-law the violation of the right to freedom of movement in connection with the imposed prohibition measures in a criminal procedure, and indicated that the prohibition measures may be considered within the scope of the standards of two separate rights: the right to freedom of movement under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention, as well as the right 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, all with the aim of more efficient and more affirmative protection of human rights and freedoms under the Constitution of Bosnia and Herzegovina and the European Convention (see, *inter alia*, Decision on Admissibility and Merits no. *AP-3924/17* of 25 October 2017, paragraph 33 with further references, available at www.ustavnisud.ba).

45. The Constitutional Court observes that the essence of the allegations made in the appeal pertains to the fact that the appellant as a person over age 65 and the appellant's child under age of 18 cannot leave their home, go shopping or go to a physician, that is to say that parents cannot take their children to a public area, which "makes everyday life difficult" and "affects the mental and physical condition of children". On the other hand, the Constitutional Court also observes that, an Addendum to this Order no. 12-40-6-148-34-2/20 of 3 April 2020 permitted the persons under the age of 18 to ride in a vehicle and permitted the persons above 65 the movement, among other things, for the purpose of collecting their pensions during the time intervals from 08.00 to 12.00 hrs Monday 6 April through Friday 10 April 2020. In addition, the Constitutional Court observes that there is no real physical duress, neither are drastic fines nor forced detention prescribed over the failure to comply with these measures, which are also factors that have to be taken into consideration.

46. In view of the aforementioned, the Constitutional Court deems that all the allegations made in the appeal ought to be examined from the aspect of the right to freedom of movement under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention.

47. The Constitutional Court recalls that Article 2 of Protocol No. 4 to the European Convention guarantees to everyone the right to liberty of movement, within certain territory, and the right to leave that territory, meaning, the right to travel to any country of his/her choice wherein s/he may be accepted. As already stated above, the measures resulting in the restriction of the right to liberty of movement must be in accordance with law, pursue some of the legitimate aims set forth in Article 2(3) of Protocol No. 4

to the European Convention and be "necessary in a democratic society" (see, op. cit. *De Tommaso* judgement, paras 104 and 105 with further references and op. cit. Decision *AP-3924/17*, paras 37 and 39 with further references). Given the aforesaid, the Constitutional Court holds that the impugned orders indisputably represent an "interference" with the appellants' right to liberty of movement.

As to whether the interference is "in accordance with law"

48. In addition, the Constitutional Court recalls that the expression "in accordance with law" not only requires that the impugned measures should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects. Concerning foreseeability, the European Court of Human Rights points out that a norm cannot be regarded as a "law" unless it is formulated with sufficient precision as to enable citizens to regulate their conduct. They 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. Such consequences need not be foreseeable with absolute certainty, the experience shows this to be unattainable. Again, whilst such certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Further, the level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed. Therefore, as pointed out by the European Court of Human Rights, it is primarily for the national authorities to interpret and apply domestic law (see, ibid. *De Tommaso* judgement, paras. 106 through 108, with further references). The European Court of Human Rights also reiterates that a norm is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities and that a law which confers a discretion must indicate the scope of that discretion, although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law (ibid, paragraph 109, with further references).

49. In the particular case, the Orders are issued pursuant to Article 108 of the Law on Protection and Rescue which in the second paragraph stipulates that the civil protection headquarters have the power to "order the implementation of appropriate protection and rescue measures". The appellants point out that this does imply that it is provided and allowed for the issuance of orders "preventing the movement of population", and that such provision is not contained in any other piece of legislation, and that such restriction is contrary to the Constitution of Bosnia and Herzegovina and the Convention on the Rights of Child, given that "the best interests of a child", as required by the Convention, were not taken into account while adopting these measures. On the other hand, the FBiH Government stressed that the impugned measures are provided for by Article 54

of the Law on the Protection of the Population from Infectious Diseases, and that the unlawfulness is not concerned here but the enforcement of the existing legislation on extraordinary circumstances aiming at the protection of public health.

50. The Constitutional Court notes that both the Law on Protection and Rescue and the Law on the Protection of the Population from Infectious Diseases were published, as prescribed, in the *Official Gazettes* and, therefore, were accessible to everyone in the appropriate manner. In addition, the Constitutional Court indicates that the Law on Protection and Rescue regulates the system of protection and rescue of people and other from natural disasters (Article 1) and that the notion of natural disaster, *inter alia*, encompasses "mass appearance of human, animal and plant diseases" (Article 3(1)). The Law on the Protection of the Population from Infectious Diseases determines which diseases are infectious and provides for the protective measures against these diseases. Since the COVID-19 pandemic is indisputably "mass appearance of human diseases" in terms of the Law on Protection and Rescue, as well as it is a "new infectious disease that threatens the health of population" in terms of the Law on the Protection of the Population from Infectious Diseases, the Constitutional Court considers that Article 108(2) of the Law on Protection and Rescue and Article 54(2)(4) of the Law on the Protection of the Population from Infectious Diseases provided for the possibility of issuing the appropriate orders to prevent the spread of virus. However, the Constitutional Court also holds that the consequences such orders create, from the aspect of conformity with Article 2 of Protocol No. 4 to the European Convention, represent a substantive consideration that must be taken into account while deciding on whether the public authorities have struck a fair balance between the competing interests in the application of the prescribed measures (see, *mutatis mutandis*, ECtHR, *Broniowski v. Poland*, judgement of 22 June 2004, Application no. 31443/96, paragraph 143, with further references and the Constitutional Court, Decision on Admissibility and Merits, *AP-2843/07* of 12 January 2010, paras 28 and 29). The Constitutional Court will, therefore, continue the analyses accepting that the impugned measures, in the extent to which they represent the interference with or the restriction of the appellants' right to liberty of movement, were "in accordance with law" in terms of Article 2 of Protocol No. 4 to the European Convention.

Does interference pursue a legitimate aim?

51. The Constitutional Court notes that it follows from the response of the FBiH Government that the aim sought to be achieved by all the measures adopted so far, including the disputed ones, is "to protect the health of as many people as possible and to prevent the spread of the epidemic in society". The Constitutional Court considers that this is certainly a legitimate aim, as set out in paragraph 3 of Article 2 of Protocol No. 4 to the European Convention.

Is a "fair balance" struck between the general interest of the community and the right to freedom of movement for individuals?

52. The appellants consider that the disputed measures, which relate to the above categories of persons subjected to excessive burden, are disproportionate to the aim sought to be achieved, in particular that the competent authorities have not previously considered any more lenient measures. They state that persons under the age of 18 and over 65 are completely prevented from carrying out the necessary daily activities, such as shopping, going to the doctor and the pharmacy, walking pets, or that the parents cannot take their children to public places due to such measures. This significantly affects their overall health, including physical and mental health. The FBiH Government, on the other hand, points out that these groups are particularly sensitive, since persons over 65 are at greater risk of developing more severe symptoms if they become infected with a new type of virus for which there is neither a vaccine nor is an effective cure discovered, while persons under the age of 18 have milder symptoms if infected, but they can transmit the virus to the elderly.

53. The Constitutional Court points out that there is a great social, political and legal challenge for states facing the COVID-19 pandemic to respond effectively to such a crisis, while ensuring that the measures they take do not jeopardize the long-term interests in protecting fundamental democratic values, the rule of law and human rights. Even during the state of emergency, the rule of law must be complied with. Therefore, in such circumstances, the legislator may amend the existing and/or pass special laws that will be specially adapted to the crisis situation, which will give wider powers to the competent authorities than those they have under the already existing laws. In order to better and more effectively respond to a crisis, such new laws or amendments to existing laws must comply with the Constitution and international standards. Also, during a state of emergency, governments may be given the general authority to issue decrees with legal force, provided that such powers are of a limited nature. The basic purpose of a state of emergency or similar situation is to suppress the development of a crisis and to return to normal as soon as possible. The control of the need for prolonging the state of emergency must be under the control of the legislative body, in order not to abuse and unacceptably prolong such state by the executive branch of power.

54. Bearing in mind these general international requirements, as indicated by the Council of Europe, the Constitutional Court notes, with extreme concern, that in this particular situation faced by Bosnia and Herzegovina due to the COVID-19 pandemic, there was no timely response by the competent legislature, that is, the Parliament of the Federation of BiH. Namely, despite the fact that, as the FBiH Government stated in its response, the Federal Ministry of Health had already reported in February 2020 that the WHO declared that the emergence of the new virus is "a public health emergency of international importance", the FBiH Parliament did not consider it necessary to hold a session then and consider the need to harmonize existing and possibly pass new laws that would make

possible an effective response to the pandemic crisis, while preserving the rule of law and, as far as possible, the constitutional and human rights. On the contrary, it was only at the extraordinary sessions held on 7 April (the House of Representatives) and on 8 April 2020 (the House of Peoples) that amendments were made to the Rules of Procedure of the Houses to allow for emergency sessions to be held online. By way of comparison, the Constitutional Court recalls that on 18 March 2020, the Parliament of the Republic of Croatia passed the Law on Amendments to the Law on the Civil Protection System, which gave the Civil Protection Headquarters the power to make decisions and impose measures to protect the life and health of citizens, preserve property, and economic activities and the environment and conduct equal of treatment of legal entities and citizens.

55. In a situation of complete absence of timely activities by the competent legislative body, the FBiH Government acted by declaring the state of emergency and giving the task to the Federal Headquarters "to undertake, in accordance with the FBiH Plan and applicable legal regulations, all activities related to coordination and management of actions to protect and rescue people at risk. Based on such a decision, the Federal Headquarters began imposing a series of measures, including the disputed orders, to prevent the uncontrolled spread of COVID-19 disease.

56. In this connection, the Constitutional Court again points out that Article 108 (2) of the Law on Protection and Rescue stipulates that civil protection headquarters have the power to "order the implementation of appropriate protection and rescue measures" in cases where a Government Decision declares a state of emergency, whereas Article 54 of the Law on the Protection of the Population from Infectious Diseases provides that the Federal Ministry of Health may order special emergency protective measures against these diseases. The Constitutional Court points out that the stated legal provisions are not sufficiently precise in terms of the type of measures, the limitation of their duration, the obligation of continuous review and the consequences that non-compliance with these measures may have, which may lead to arbitrary decisions. However, the Constitutional Court recalls the provision of Article II(6) of the Constitution of Bosnia and Herzegovina, 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 paragraph 2 above". This provision constitutes a constitutional obligation for every institution or body operating within BiH, including the FBiH, to harmonize all its activities with the rights and freedoms guaranteed by the European Convention and the Constitution of Bosnia and Herzegovina. Therefore, any authority applying a law is obliged to apply it in a way that will not violate the constitutional rights, that is, the rights under the European Convention. This further means that both the Government of the Federation of Bosnia and Herzegovina and the Federal Headquarters must, when authorizing or imposing any measure, take into account that they do not violate human and constitutional rights to a greater extent than necessary, and in particular that the measures are of limited duration,

and also to review and adapt those measures to the current situation within a reasonable timeframe and not to place an excessive burden on those to whom they relate.

57. In this connection, the Constitutional Court notes that the first Order stipulated that the impugned measures would last until 31 March 2020. This order does not provide for any exceptions to both categories of persons covered by it, for example the specific needs of a category of persons under the age of 18 in relation to their health status, especially when it comes to children with special needs (autism, etc.). In particular, the Constitutional Court points out that, with regard to children with special needs, it is necessary to allow for an exception to the general prohibition in such a way that the imposed measures are adapted to their needs and the current situation. It is also indisputable that in relation to children, particular attention should be paid to the effect of enforcement of the imposed measures, i.e. the extent of the benefits and damages they may have on the physical and mental development of children.

58. Furthermore, the fact is disregarded that within the category of persons over age 65, there are those who are active and professionally engaged in legal entities and their work is not prohibited in the state of emergency, such as judicial authorities, i.e. judges and prosecutors who serve in office until the age of 70. Also, the fact that is fully disregarded is that in this category there are persons who have a constitutional right and an obligation to perform certain duties entrusted to them in the legislative and/or executive branches of power (the representatives in legislative bodies in BiH, members of the BiH Presidency, Council of Ministers of BiH, and Entity governments). This is especially true when it comes to the Sarajevo city area, since it is an indisputable fact that it is the seat of the largest part of the mentioned institutions in Sarajevo. Namely, the fact that the exercise of functions in the legislative and/or executive branch does not have any constitutional or legal restriction on the basis of age is completely neglected, but those persons are generally prevented from performing their functions under such a general measure. In this way, the work of the legislative, executive and judicial authorities is largely impeded and they must be able to continue their work in such extraordinary circumstances in a way that will be adapted to those circumstances. The Constitutional Court also notes that no uniform measures have been introduced in the territory of Bosnia and Herzegovina to counteract the virus infection and disease COVID-19. For instance, in the Brčko District of Bosnia and Herzegovina (hereinafter: BD BiH) no such general measure of prohibition of movement has been adopted. However, in the Republika Srpska that measure has been adopted, but without restriction on movement of persons under the age of 18.

59. Although in the response to the appeal it is stated that the Federal Headquarters, taking into account the complete epidemiological situation in the FBiH and also in the light of the Order of the Crisis Centre of the Federal Ministry of Health, issued the disputed orders, it cannot be concluded with certainty from the text of the disputed orders, and based on the FBiH Government's response, that the aforementioned body used the

views of the medical profession and, if it did, it did not inform the public about it. These findings appear to be based on statistics, whose collection and processing methodology are different and the results are variable. In addition, neither from the answers nor from the information published by the Federal Headquarters is it apparent that, prior to the adoption of the impugned general measure of prohibition of movement of persons under age of 18 and over age of 65, alternative and more lenient measures were considered, such as the prohibition of movement at certain times of the day, a ban on access to certain public institutions or sources of infection (the so-called clusters), etc., which would specifically protect these groups if such special protection was needed.

60. In particular, the Constitutional Court points out that the new Order extends the duration of the impugned measures "until further notice". Such uncertainty as to how long these measures will last is unacceptable. Measures to be imposed, especially those which significantly interfere with the human rights guaranteed under the Constitution of Bosnia and Herzegovina and the European Convention, must be strictly limited in time, that is, they may only last as long as it is necessary. In addition, the time-limit obliges the authority imposing the order, in this specific case the FBiH Government and the Federal Headquarters, to review these measures regularly and, in accordance with the situation, to moderate or completely repeal the ordered measures. However, under the new Order on the Duration of Measures "until further notice," it is completely uncertain whether and when the Federal Headquarters will consider the necessity of such a measure, which leaves much room for arbitrariness that is unacceptable.

61. The Constitutional Court also points out that on 3 April 2020, the Federal Headquarters issued an Addendum to the new Order allowing persons over the age of 65 to go out for a certain period of time to take over pension payments and carry out other necessary activities, while continuously inviting other citizens to reduce movement in the same period so as not to create crowds and put the elderly at unnecessary risk. However, the Constitutional Court notes that thereafter neither the FBiH Government, the Federal Headquarters, nor any other competent body (for example, the Federal Ministry of Health) considered and assessed whether and to what extent the movement of persons affected by the measure had possibly contributed to the faster and greater spread of COVID -19, in order to re-examine accordingly the measures which completely prohibit the movement of persons in question. In this connection, the Constitutional Court also points out that this Addendum allows persons under the age of 18 to move in a vehicle (transport from one place to another), but it remains unclear why such a permit does not apply to persons over age of 65, that is, whether the Federal Headquarters has considered this option at all and, if so, for what reasons it has not adopted it. The Constitutional Court also concludes that on 17 April 2020, the Federal Headquarters issued an order declaring that the said orders apply until 30 April 2020, and that this order does not contain any reasoning.

62. The Constitutional Court points out that this is an unprecedented event in modern history and a new way of acting for all executive and, in general, public authorities. There is no comparable legal situation, nor is there the same pattern of behaviour in all member states of the Council of Europe. The Constitutional Court is fully aware of the extreme seriousness of the situation related to COVID-19, the great danger this virus poses to the health of the population, as well as of the assessment of the competent institutions that there is a need to protect the existing health system from a situation in which a large number of people would suddenly be infected and in need of medical assistance. In addition, the Constitutional Court also takes into account the well-known fact that, even at the global level, there is no unique expert position regarding the implementation of appropriate measures. However, in such a situation, the Constitutional Court must also take into account the balance between the needs and protection of society as a whole and the rights of individuals. In this regard, the Constitutional Court reiterates that the possibility of restricting the rights guaranteed by the Constitution of Bosnia and Herzegovina and the European Convention, in addition to the general social benefit, is directly conditioned by a number of factors on the basis of which the existence of a fair balance between the measures taken and the aim sought to be achieved is assessed, and in this particular case, it is especially conditioned by the time duration of their application and the regular review of their necessity. Otherwise, there would be an ample room for arbitrariness in the actions of the competent authorities, which is contrary not only to the principle of the right to freedom of movement, but also to the principle of the rule of law in Article I (2) of the Constitution of Bosnia and Herzegovina, regardless of the state of emergency due to which the measures have been issued.

63. In view of all stated above, the Constitutional Court considers that the impugned measures do not fulfil the requirement of "proportionality" under Article 2 of Protocol No. 4 to the European Convention, because they do not indicate the basis for the assessment of the Federal Headquarters that the groups concerned have a higher risk of contracting or transmitting COVID-19 infection, and no consideration was given to the introduction of milder measures if such risk was justifiably present, and the measures are not strictly limited in time, nor is there an obligation to review them regularly to ensure that they last only as long as 'necessary' within the meaning of Article 2 of Protocol No. 4 to the European Convention, that is, that they should be alleviated or terminated as soon as the situation permits.

64. The Constitutional Court also emphasizes the need for the FBiH Government to regularly monitor the functioning of the Federal Headquarters in order to minimize any restrictions on constitutional rights. In this regard, the Constitutional Court has issued orders relating to the acting of the FBiH Government and the Federal Headquarters referred to in the operative part of this Decision, in order to harmonize their activities with the standards set out in this Decision.

65. In particular, the Constitutional Court emphasizes the obligation, primarily the obligation of the FBiH Government, to publicly explain, on a daily basis, with the participation of eminent representatives of the health care profession, the need for all measures, their duration and possible moderating or tightening. In particular, this relates to the effect of measures in relation to persons under the age of 18, but also to the assessment of the necessary duration of measures in relation to all categories of population.

66. In view of all stated above, the Constitutional Court finds that the impugned measures violated the appellants' right to freedom of movement under Article II (3) (m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention.

67. However, the Constitutional Court cannot grant the part of the appeal where it is requested to repeal the impugned Order given the current situation and the fact that there is certainly a great public interest in imposing certain restrictions, and that negative consequences could arise should the impugned Order be repealed without the competent authorities having had previously the opportunity to review the impugned measures under this Decision and adopt appropriate measures in accordance with the standards set out therein. Therefore, the Constitutional Court decided to leave the impugned Order in force by giving the FBiH Government and the Federal Headquarters short deadlines for reviewing the ordered measures in accordance with this Decision, as stated in the enacting clause. In addition, the clear position of the medical experts concerning continued existence and duration of the relevant measures is also to be included.

68. Furthermore, having regard to what has already been said about the complete absence of adequate action by the FBiH Parliament in relation to the crisis caused by COVID-19 (see paragraph 53 of this Decision), the Constitutional Court decided to transmit this Decision to the FBiH Parliament for action in accordance with its authority.

Compensation

69. For the purposes of Article 74 of the Rules of the Constitutional Court, the Constitutional Court may order compensation for non-pecuniary damages. However, the Constitutional Court recalls that, unlike proceedings before ordinary courts, it determines compensation for non-pecuniary damage in specific cases of violations of guaranteed human rights and fundamental freedoms.

70. In the present case, however, the Constitutional Court considers that, given the overall situation with the crisis caused by COVID-19, the adoption of this Decision is sufficient satisfaction to the appellants and that there is no basis for awarding any compensation.

Other allegations

71. The appellants also complain that by the impugned measures they are discriminated against on the age related grounds when compared with all other citizens of FBiH. In view of the established violation of the right to freedom of movement, the Constitutional Court, relying also on the case-law of the European Court of Human Rights, considers that there is no need to examine separately the allegations of discrimination.

VII. Conclusion

72. The Constitutional Court concludes that the appellants' freedom of movement under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention has been violated. This is so because there is no proportionality or fair balance between the measures ordered by the impugned Order and public interest in the protection of public health, since the impossibility of imposing more lenient measures has not been previously discussed and reasoned, and because the measures imposed are not strictly time-limited. In addition, there is no obligation of the Federal Headquarters to review and extend these measures on a regular basis only if it is "necessary in a democratic society".

73. The Constitutional Court concludes that part of the appeal where it is requested to repeal the impugned Order is unfounded, because such repealing, given the undoubted public interest in imposing certain restrictions, could have negative consequences before the competent authorities have the opportunity to consider the impugned measures in accordance with this Decision.

74. Pursuant to Article 59 (1), (2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

75. In view of this decision, the Constitutional Court shall not consider the request for an interim measure.

76. Pursuant to Article 43 of the Rules of the Constitutional Court, Judge Valerija Galić gave a statement of dissent from the decision of the majority.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP-4436/19

DECISION ON ADMISSIBILITY AND MERITS

Appeal of "Volkswagen" Sarajevo d.o.o. Vogošća represented by Mr. Almir Gagula, a lawyer practicing in Sarajevo, against the Judgment of the Court of Bosnia and Herzegovina no. S1 3 U 026797 19 Uvp of 11 September 2019

Decision of 23 June 2020

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CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting as a Grand Chamber, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57 (2)(b), Article 59 (1) and (2) and Article 62 (1) of the Rules of the Constitutional Court of Bosnia and Herzegovina – consolidated text (*Official Gazette of Bosnia and Herzegovina,* 94/14), composed of the following Judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović and

Ms. Seada Palavrić

Having deliberated on the appeal of **"Volkswagen" Sarajevo d.o.o. Vogošća**, in the case no. **AP-4436/19**, at its session held on 23 June 2020, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of "Volkswagen" Sarajevo d.o.o. Vogošća is hereby granted.

A violation of the right 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 Judgment of the Court of Bosnia and Herzegovina no. S1 3 U 026797 19 Uvp of 11 September 2019 is hereby repealed.

The case shall be remitted to the Court of Bosnia and Herzegovina, which is to take a new decision in an expedited procedure 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.

Pursuant to Article 72 (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Court of Bosnia and Herzegovina is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 90 days as from the date of delivery of this Decision, of the measures taken with a view to enforcing 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 15 November 2019, "Volkswagen" Sarajevo d.o.o. Vogošća ("the appellant"), represented by Mr. Almir Gagula, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court"), against the Judgment of the Court of Bosnia and Herzegovina ("the Court of BiH") no. S1 3 U 026797 19 Uvp of 11 September 2019.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 (2) and (3) of the Rules of the Constitutional Court, on 20 May 2020, the Court of BiH and the Indirect Taxation Authority of BiH ("the Indirect Taxation Authority") were requested to submit their respective replies to the appeal.

3. The Court of BiH and the Indirect Taxation Authority submitted their replies to the appeal on 25 May 2020 and on 10 June 2020, respectively.

III. Facts of the Case

4. 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.

Introductory remarks

5. According to the available documents, the Company "SerWeMa" Germany delivered the goods - milling machine Liebherr L402, worth 285,000.00 euros ("the disputed goods") to the appellant, in accordance with proforma invoice number 301071-0506 of 5 June 2012. On 11 June 2012, the appellant placed the disputed goods in Vogošća Free Zone under number TR 419. On the same date (11 June 2012), the appellant addressed the Indirect Taxation Authority - Sarajevo Regional Centre for the release of the disputed goods for free circulation intended for a manufacturing operation in the free zone, relieved from payment of import duties, in accordance with Article 176 paragraph 4 of the Customs Policy Law of Bosnia and Herzegovina ("the CP"), and the Decision on the requirements to apply a favourable tariff procedure to certain goods that may enjoy certain favourable treatment on account of their end-use. In the request, the appellant referred to the established case law of the Court of BiH, which, in several cases, took the

position that there was no obligation to pay import duties where the equipment was used for the purpose for which the relief was stipulated.

6. An administrative procedure relating to the appellant's request was conducted in which the ruling of 12 September 2012, and a final ruling of 17 April 2013, dismissing the appellant's request referred to in the previous paragraph, were issued. In the administrative dispute initiated by the appellant against the Indirect Taxation Authority for annulment of the final administrative ruling, the Court of BiH, by its ruling no. S1 3 U 013365 13 U of 28 April 2014, repealed the second instance ruling of 17 April 2013, and referred the case back for retrial.

7. In the meantime, while the administrative dispute was pending before the Court of BiH, in May 2013, the Free Zone Sarajevo submitted a motion to the Indirect Taxation Authority - Regional Centre Sarajevo for collection of indirect taxes from the appellant in the total amount of BAM 160,850.91. The motion states that the appellant's request for release of the disputed goods for free circulation intended for a manufacturing operation in the free zone, relieved from payment of import duties, was dismissed, emphasizing that the ruling became final on 8 May 2013. The motion states that the physical inspection of the disputed goods established that the appellant removed the disputed goods from customs supervision, and that, pursuant to the Law on Misdemeanours, a misdemeanour warrant for a customs offence committed was filed against the appellant because, on 27 May 2013, the appellant used the disputed goods without prior approval.

8. Acting in the procedure of "subsequent collection of indirect taxes *ex officio*", the Indirect Taxation Authority - Regional Centre Sarajevo issued ruling no. 03/4-2/IV-UP/I-18 3-1670/13 of 22 July 2013. The ruling obligated the appellant to pay the total amount of BAM 160,850.91, namely the amount of BAM 56,024.05 for customs duties and the amount of BAM 104,826.86 for VAT. It follows that the first-instance body conducted the procedure and established that, under Article 197 of the Customs Policy Law, a customs debt was incurred as of 27 May 2013, due to placing the disputed goods on the market without approval. Consequently, duties were calculated, namely customs duties at the rate of 10%, and VAT at the rate of 17%. In the reasoning of the ruling, the appellant was warned to pay the debt within 10 days from the day of receipt. If not, forced collection including interest would be carried out.

9. According to the available documents, the appellant paid the liability specified in the ruling referred to in the previous paragraph of this decision on 1 August 2013. This was within the deadline given by the ruling in question.

10. In the ruling of the Director of the Indirect Taxation Authority - Regional Centre Sarajevo no. 01/04-1-UP/II-1590/13 of 21 May 2014, the appellant's appeal was granted, the ruling referred to in paragraph 8 of this decision was annulled, and the case was referred back for reconsideration. In decision-making, the second instance body took into

account that the Court of BiH, in the administrative dispute, revoked the second instance ruling dismissing the appellant's request referred to in paragraph 6 of this decision. The second-instance body took into account the provisions of Article 258, paragraph 1 of the Law on Administrative Procedure. According to this Article, upon the revocation of a ruling, the legal consequences of such a ruling should also be revoked, and, accordingly, in the present case, the ruling dismissing the appellant's request had been removed from legal transaction. This meant that the customs authority had not yet decided on the customs procedure requested by the importer in respect of the disputed goods, *i.e.* the procedure of releasing the disputed goods for a free circulation, relieved from import duties based on Article 176, paragraph 4 of the Customs Policy Law. In fact, this mean that it had not yet decided on the appellant's request for exemption from import duties. The second instance body, taking into account the factual circumstances of the present case, concluded that there was no place to establish an obligation on the part of the appellant based on the customs debt, pending a final decision on the appellant's request.

11. The Indirect Taxation Authority - Regional Centre Sarajevo issued a conclusion number 03/6-2/II-UP/I-8-3-1679-I/13 of 25 December 2014, in the new procedure of subsequent collection of indirect taxes *ex officio*. It dismissed, as premature, the motion of the Free Zone Sarajevo for collection of indirect taxes from the customs payer - appellant for the disputed goods placed in the free zone as of 11 June 2012. By the ruling of 4 May 2015, the second instance body dismissed the appellant's appeal against the conclusion in question.

Impugned decisions

12. In the first instance ruling of the Indirect Taxation Authority - Regional Centre Sarajevo no. 03/6-2/II-UO/I-18-3-1670-2/13 of 15 July 2015, which was passed *ex officio*, the appellant was approved the refund of the import duties paid in accordance with the ruling of 22 July 2013 for BAM 160,850.91. In particular, it was approved the amount of BAM 56,024.05 for customs duties and the amount of BAM 104,826.86 for VAT. The same ruling dismissed the appellant's request for payment of default interest on the amount paid, and obligated the appellant to change the data in boxes nos. 22 and 42 of the VAT form in accordance with the ruling in question.

13. According to the reasoning of the ruling, on 7 July 2015, the first instance body received the appellant's urgent request for making a ruling granting the refund of the amount of BAM 160,850.91 plus default interest starting from the day of collection of the amount until the day of the refund.

14. As to the payment of interest, the first instance body stated that the request was unfounded by the application of Article 234, paragraph 1 of the Customs Policy Law, as a *lex specialis*. The Customs Policy Law does not prescribe the payment of statutory default interest unless the three-month time limit has expired since the adoption of the

decision granting the refund, which is not the case here. The first-instance body also referred to and quoted the provisions of Article 229, paragraph 1 of the Customs Policy Law, according to which the appellant was reimbursed the amount of duties paid without interest, for the appellant's request was dismissed in that part.

15. Deciding on the appellant's appeal filed against the first instance ruling, the Director of the Indirect Taxation Authority issued ruling no. 01/4-1-UP/II-507/15 of 14 August 2017, dismissing the appeal. Taking into account the provisions of the Customs Policy Law, as a *lex specialis* applicable in the area of customs duties, the first instance body acted correctly when applying that law and dismissing the request for payment of default interest. In addition, the first instance body assessed as unfounded the appellant's allegations that he had not submitted the request in terms of Article 229 of the Customs Policy Law, which must be made in a form prescribed by the implementing regulations to the Customs Policy Law. The first instance body gave the reasoning that Article 447, paragraph 2 of the Decision on Implementing Regulations to the Customs Policy Law stipulates that the request may be made on a sheet of paper, as was done in this case, since the appellant's submission was comprehensible and contained all the information necessary for decision-making.

16. As to the appellant's allegations that he suffered material damage due to unlawful withholding of unjustifiably collected import duties, the second instance body of the Indirect Taxation Authority stated that this does not fall within issues resolved in the administrative procedure. More specifically, in the procedure of assessing the regularity and lawfulness of the first instance administrative act since it was a matter of judicial jurisdiction.

17. The Administrative Disputes Panel of the Court of BiH, deciding on the appellant's statement of claim for annulment of the second instance ruling of the Director of the Indirect Taxation Authority, rendered judgment no. S 13 U 026797 18 U of 21 March 2019, dismissing the statement of claim in question.

18. Having examined the allegations of the statement of claim, the Court of BiH established that the claim was unfounded. It established this as the impugned ruling was correct and lawful and given that, according to Article 1 of the Customs Policy Law, customs legislation consists of the Customs Policy Law and the provisions adopted by the BiH Parliamentary Assembly, the Council of Ministers and/or the Governing Board to implement them in accordance with EU regulations. Pursuant to paragraph 2 of the same Article, the Customs Policy Law regulates basic elements of the system for the customs protection of economy of BiH (on page 3 of the reasoning, the Court of BiH gave a detailed explanation). According to the Court of BiH, it follows from the above provisions of the Customs Policy Law that this is a special law that forms the basis of customs regulations, which is applied uniformly in the customs territory of BiH and which has higher legal status compared to all other regulations in BiH that

regulate customs policy. Consequently, the conclusion of the Indirect Taxation Authority is correct that in this case the provisions of the Customs Policy Law and by-laws apply, and not the provisions of the Law on the Procedure of Indirect Taxation. Therefore, as clarified by the Court of BiH, Article 1 of the Law on the Procedure of Indirect Taxation regulates the procedure of determining, collecting and controlling indirect taxes and tax offenses. According to paragraph 2 of the same Article, the procedure of conducting and executing activities in the field of customs duties is regulated by the provisions of the Customs Policy Law and, in the alternative, by the Law in question. Accordingly, the Indirect Taxation Authority acted correctly when it dismissed the request for payment of statutory interest by applying Article 234 of the Customs Policy Law. Moreover, given that the money was refunded to the appellant within the legal deadline of three months, it was correctly decided to dismiss the appellant's request.

19. It was established that the appellant's objection was unfounded, where it stated that the subject of the procedure resulting in the ruling, which was the subject of the administrative dispute, was not a request for remission of duties in terms of Article 229, paragraph 2 of the Customs Policy Law. In this connection, the Court reiterated the reasons given in the impugned ruling by the second instance body. In addition, the Court added that the customs authority had correctly treated the appellant's submission of 5 September 2014 as a request for refund of previously collected duties, since the submission was clear and contained all so that it could be acted upon, pointing out also the provision of Article 114 of the LAP.

20. The Appellate Administrative Panel of the Court of BiH rendered Judgment no. S1 3 U 026797 19 Uvp of 11 September 2019, dismissing the appellant's request for review of the court decision. Having examined the request, the Appellate Administrative Panel of the Court of BiH concluded that the Administrative Disputes Panel of the Court of BiH correctly assessed that the impugned decisions of the Indirect Taxation Authority were based on the proper application of the law. In addition, it assessed that the request for payment of default interest was unfounded, since it had no basis in the correct application of Article 234 of the applicable Customs Policy Law. The cited provision prescribes only the right to refund unlawfully collected import and export duties. It does not prescribes the right to payment of statutory default interest except in the case where a decision granting a request for repayment is not implemented within three months of the date of adoption of that decision, which is not the case here.

21. The Customs Policy Law is a special law that forms the basis of customs regulations, which is applied uniformly in the customs territory of BiH and which has higher legal status compared to all other regulations governing the field of customs policy. Thus, it is correct to conclude that the provisions of the Customs Policy Law apply and not the provisions of the Law on the Procedure of Indirect Taxation.

IV. Appeal

a) Allegations stated in the appeal

22. The appellant states that the challenged judgment 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 for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"). The appellant alleges that the first instance body, for some reason (in fact, for quite clear reason), treated the appellant's request for refund of the duties and interest as a request within the meaning of Article 229, paragraph 2 of the Customs Policy Law, as also accepted by the second instance body, but which is not true. This was so as the appellant did not submit a separate request for refund in terms of Customs Policy Law but a submission to the case-file of the first instance body. By this submission, the appellant informed the first instance body about the second instance ruling and, consequently, requested a refund. In this connection, the appellant recalled that the request for refund must be submitted on a special form, and that Article 229 of the Customs Policy Law must be explicitly stated as the basis of the request, and the appellant did not do anything of that.

23. In addition, the appellant points out that, by the rulings granting the refund of duties, the bodies of the Indirect Taxation Authority refused to pay interest by referring to the provisions of Article 234, paragraph 1 of the Customs Policy Law, thereby trying to avoid any material damage to the Indirect Taxation Authority. Therefore, where a taxpayer failed to pay liabilities, the interest is calculated, and where the Indirect Taxation Authority breaches the regulations that should apply correctly, arguments are found to avoid granting the rights, which the appellant has under the law. Accordingly, it is quite expected, according to the appellant, that the competent bodies of the Indirect Taxation Authority will apply the provisions of Articles 229 and 234 of the Customs Policy Law, which have no legal basis in the case of the appellant. In this connection, the appellant clarifies that the mentioned provisions of Articles 229 and 234 of the Customs Policy Law are applicable only in the situation where certain goods have already been under a customs procedure. Therefore, as the appellant asserts in the appeal, in order for the above provisions to apply, the goods had to be under a certain customs procedure (*e.g.* releasing the disputed goods for a free circulation with payment of duties). The party then submits a request to place the goods in another customs procedure that would lead to more favourable customs treatment. In the present case, as asserted by the appellant, the goods in question were not placed under the customs procedure, but the first instance body, at its will, collected the duties unlawfully, and not the appellant.

24. The appellant points out that the Customs Policy Law contains no provision on how to proceed in a situation where the ruling based on which the duties had been paid, was annulled by the Indirect Taxation Authority or the Court of BiH. In addition, the

provisions of Articles 229-232 of the Customs Policy Law do not regulate the specific situation at all. Thus, in the present case the provisions of Articles 1, 2, 239 and 235, paragraph 1 of the Customs Policy Law could not have been applied. Moreover, as the appellant claims, even the by-laws (Decision on Implementing Regulations of the Customs Policy Law) do not regulate situations in which the ruling based on which the customs duties had been paid was annulled by a ruling of the Indirect Taxation Authority or the Court of BiH. Therefore, since the provisions of the Customs Policy Law as a *lex specialis* do not prescribe the specific situation, it is necessary, in terms of Article 1, paragraph 2 of the Law on the Procedure of Indirect Taxation, to seek an answer to the disputed question in the same Law. It is necessary to answer a question as to how to proceed in case of annulment of the ruling based on which the duties were collected.

25. The provision of Article 13 of the Law on the Procedure of Indirect Taxation clearly defines the obligation of the Indirect Taxation Authority to pay default interest. Article 16 of the same Law clearly stipulates that, where the Indirect Taxation Authority or the Court of BiH annulled a ruling, the refund shall be made to include the default interest calculated from the day on which the amount has been paid. The Court of BiH arbitrarily refers to the provisions of the Customs Policy Law. They apply only in case of erroneous declaration of the customs payer, and not in case where the Indirect Taxation Authority has been unlawfully holding the appellant's funds for two years without any fault on the part of the appellant.

26. In view of all the above, the appellant requested that the Constitutional Court establish a violation of the appellant's right to property, and order actions that would remedy the violation of the appellant's right.

b) Response to the appeal

27. In response to the appeal, the Court of BiH maintains the reasons given in the reasoning of the impugned decision, claiming that its decision is not in violation of the appellant's right to property.

28. In its detailed response to the appeal, the Indirect Taxation Authority states, *inter alia*, that the provision of Article 239, paragraph 2 of the Customs Policy Law stipulates that the mentioned Law has higher legal status than all other regulations in BiH governing customs policy. In addition, it states that the provisions of Articles 229 and 234 of the Customs Policy Law completely regulate the issues related to the refund of import duties and the payment of interest on the duties refunded. Given that the Indirect Taxation Authority acted in the manner prescribed by law and, therefore, the appellant's right to property has not been violated. The Indirect Taxation Authority has also referred to the case law of the Constitutional Court in Decision *AP-5007/16*, wherein the position taken is identical to that in the impugned decisions.

V. Relevant Law

29. The **Customs Policy Law of Bosnia and Herzegovina** (*Official Gazette of BiH*, 57/04, 51/06, 93/08, 54/10 and 76/11)

For the purposes of this decision, an unofficial consolidated text, prepared in the Constitutional Court of BiH, is used, which, in the relevant part, reads:

CHAPTER I - SCOPE AND BASIC DEFINITIONS

Article 1

1. Customs legislation shall consist of this Customs Policy Law of BiH (hereinafter called 'the Law') and the provisions adopted by the BiH Parliamentary Assembly, the Council of Ministers and/or the Governing Board to implement them in accordance with EU regulations.

2. The Law shall regulate basic elements of the system for the customs protection of economy of Bosnia and Herzegovina (hereinafter: BiH), the rights and obligations of all operators in the customs procedures, regulates the customs territory, the customs line, the customs frontier line, the customs supervision, the customs clearance procedure and other institutes that regulate the customs protection system.

Section 2 - Decisions relating to the application of customs legislation

Article 6 (2)

2. Such decision shall be taken and notified to the applicant within 30 days of receipt of the application. Where a request for a decision is made in writing, the decision shall be made within the said period, starting on the date on which the request is received by the customs authorities. Such a decision must be notified in writing to the applicant.

CHAPTER I - RELIEFS FROM CUSTOMS DUTY

Article 176 (4)

4. Products and goods specified in Annex to this Law shall be relieved from payment of import duty.

Article 197

1. A customs debt on importation shall be incurred through the consumption or use, in a free zone or free warehouse, of goods liable to import duties, under conditions other than those laid down by the legislation in force. Where goods disappear and where their disappearance cannot be explained to the satisfaction of the customs authorities, those authorities may regard the goods as having been consumed or used in the free zone or free warehouse.

2. The debt shall be incurred at the moment when the goods are consumed or are first used under conditions other than those laid down by the legislation in force.

3. The debtor shall be the person who consumed or used the goods and any persons who participated in such consumption or use and who were aware or should reasonably have been aware that the goods were being consumed or used under conditions other than those laid down by the legislation in force.

4. Where customs authorities regard goods which have disappeared as having been consumed or used in the free zone or free warehouse and it is not possible to apply the preceding paragraph 3 of this Article, the person liable for payment of the customs debt shall be the last person known to these authorities to have been in possession of the goods.

CHAPTER 5 - REPAYMENT AND REMISSION OF DUTY

Article 228

The following definitions shall apply:

a) 'repayment' means the total or partial refund of import or export duties which have been paid;

(...)

Article 229 (1) and (2)

1. Import or export duties shall be repaid if it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 213, paragraph 2 of this Law. (...)

2. Import or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.

Article 234

1. Repayment of amounts of import or export duties or of credit interest or interest on arrears collected on payment of such duties shall not give rise to the payment of interest by the customs authorities. However, interest shall be paid where a decision to grant a request for repayment is not implemented within three months of the date of adoption of that decision.

2. The amount of the interest from paragraph 1 of this Article shall be calculated in such a way that it is equivalent to the amount which would be charged for this purpose on the BiH money or financial market.

Article 239 (1) and (2)

1. This Law, including the Annexes, shall be binding in its entirety and directly applicable in the customs territory of BiH.

2. This Law prevails to other regulations which are regulating the field of customs policy.

30. The **Law on the Procedure of Indirect Taxation** (*Official Gazette of BiH*, 89/05 and 100/13) reads:

Article 1
(Basic principle)

(1) This Law shall regulate the procedure of determining, collecting and controlling indirect taxes and tax offenses.

(2) The procedure of conducting and implementing activities in the field of customs duties shall be regulated by the Law on Customs Policy in Bosnia and Herzegovina (Official Gazette of BiH, 57/04 and 12/05) and, in the alternative, by this Law.

Article 6
(Definition of indirect taxes)

For the purposes of this Law, the term "indirect taxes" shall refer to import and export duties where exclusively stated, excises, value added tax, tolls and all other taxes at the state level charged on goods and services in addition to, or instead of, the aforementioned obligations.

Article 13
(Obligation of the ITA)

(1) The ITA shall be obliged to refund the taxpayer, in accordance with the provisions of this Law, as follows:

a) to make refunds arising from the regulations for each indirect tax,

b) to make refunds of unfounded payments,

c) to make refunds of the costs of guarantees, and

d) payment of default interest.

(2) In addition to the obligations specified in paragraph (1) of this Article, the ITA shall be obliged to perform other obligations determined by this Law, and in connection with the procedure of indirect taxation and the legal system of Bosnia and Herzegovina.

Article 16
(Refund of default interest and costs of guarantees in cases where debt has been annulled)

(1) Where the amounts have been paid or the guarantees have been submitted in order to prevent the enforcement of the ruling, the ITA shall refund the paid amount or the costs of the guarantee if the ruling or the amount of the debt have been annulled by the ruling of the ITA or the competent court. The refund shall be made with accrued default interest from the day on which the amount or the costs of the guarantee has been paid.

(2) The costs of the guarantee and their payment shall be documented by evidence issued by the guarantor. The ITA shall accept the amount requested if it deems it reasonable compared to the normal market prices charged for such guarantees.

(3) The provisions of this Article shall not apply to other cases of guarantees submitted to secure liabilities based on indirect taxes or the amount of debt.

31. The **Law on Administrative Procedure** (*Official Gazette of BiH*, 29/02, 12/04, 88/07, 93/09, 41/13 and 53/16)

In the present case, the unofficial consolidated text of the Law on Administrative Procedure (*Official Gazette of BiH*, 29/02, 12/04, 88/07, 93/09 and 41/13), made in the Constitutional Court of BiH, applicable at the time when the impugned decisions were passed, is used, and which, in the relevant part, reads:

1. The Authority that Takes a Decision

Article 193 (1)

(1) On the basis of facts established in the procedure, the authority responsible for decision- taking shall take a decision on the matter which is the subject of the case.

Article 230 (1) and (2)

(1) If the second-instance authority establishes that the facts were incompletely or incorrectly established in the first-instance procedure, that the rules of the procedure which would influence the resolving of the matter were not taken into account or that that the declaration of the challenged decision is unclear or in contradiction with the explanation, it shall complete the procedure and eliminate the identified deficiencies either alone or via the first-instance authority or any other requested authority and these authorities shall be required to act on request of the second-instance authority. If the second-instance authority finds that on the basis of the facts established in the completed procedure the matter has to be resolved differently than it was resolved by the first-instance decision, it shall revoke the first-instance decision by its decision and resolve the matter by itself.

(2) If the second-instance authority finds that the deficiencies of the first-instance procedure will be more expeditiously and more cost-effectively eliminated by the first-instance authority, it shall revoke the first-instance decision by its decision and return the case to the first-instance authority for renewal of the procedure. In that case, the second-instance authority shall be required to indicate in its decision in which respect the first-instance authority is to complete the procedure and the first-instance authority shall be required to fully comply with the second-instance decision and issue a new decision without delay and maximum within 15 days from the date of receiving the case. A party shall have the right to appeal against the new decision.

7. Legal Consequences of Revocation and Cancellation

Article 258

(1) With the revocation of a decision and declaring it invalid, the legal consequences of such a decision shall also be revoked.

(2) With the cancellation of a decision, the legal consequences which the decision has already caused until the date of cancellation shall not be revoked, but the generation of further legal consequences of the cancelled decision prevented.

(3) The authority that learns on a decision violating the law and the violation may be the reason for the renewal of the procedure, that is, for the revocation, cancellation or amendment of the decision, shall be required to notify, without delay, the authority responsible for the instigation of the procedure and the issuance of a decision.

Obligation to notify the competent authority where there are reasons for reopening the procedure, i.e. for annulment, revocation or modification of the ruling

Article 258a

The authority that finds the ruling in contravention of the law, and the violation of the law may be a reason to reopen the procedure, i.e. to annul, revoke or change the ruling, shall be obliged to inform the authority responsible for initiating the procedure and making the ruling, i.e. to inform the plaintiff about it.

VI. Admissibility

32. 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 court in Bosnia and Herzegovina.

33. Pursuant to Article 18 (1) of the Rules of the Constitutional Court, the Court shall examine an appeal only if all effective remedies available under the law against a judgment or a decision challenged by the appeal have been exhausted. In addition, it shall examine an appeal if it is filed within a time limit of 60 days as from the date on which the appellant received the decision on the last effective remedy she used.

34. In the present case, the subject matter challenged by the appeal is the Judgment of the Court of BiH no. S1 3 U 026797 19 Uvp of 11 September 2019, against which there are no other effective remedies available under the law. Furthermore, the appellant received the challenged judgement on 16 September 2019, and the appeal was filed on 15 November 2019, *i.e.* within a time limit of 60 days as prescribed by Article 18 (1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18 (3) 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.

35. Having regard to Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 18 (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal in question meets the admissibility requirements.

VII. Merits

36. The appellant challenges the judgment of the Court of BiH and claims it is in violation of the right under 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

37. Article II (3) (k) 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 property.

38. Article 1 of Protocol No. 1 to the European Convention, as relevant, reads:

(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.

39. The Constitutional Court notes that the appellant initiated a procedure demanding the payment of default interest on the amount of duties collected unlawfully, and refunded to the appellant by a ruling of the Indirect Taxation Authority. In this connection, the appellant referred to the provisions of the Law on the Procedure of Indirect Taxation. The appellant holds that the disputed decision is in violation of the right to property, for the impugned decisions unlawfully interfered with the right concerned. In this regard, the appellant claims that the provisions of the Customs Policy Law could not have been applied, for in this case it was an unlawful collection of duties for goods that were not subject to customs duty within the meaning of Article 179 of the Customs Policy Law. The provisions of the Customs Policy Law do not regulate the situation in question, but by the Law on the Procedure of Indirect Taxation, namely, by the provisions, which stipulate an obligation of the Administration to pay interest. Therefore, the appellant in the present case does not explicitly raise the issue of the "quality of the law" applied in the present case. It merely claims that the provisions of the Customs Policy Law could not have been applied in the circumstances of the present case.

40. In considering whether there is a violation of the right 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 first has to determine whether the appellant has the right to "property" 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. In this connection, the Constitutional Court recalls that, according to the consistent case law of the European Court of Human Rights and its own jurisprudence, "possessions" within the meaning of Article 1 of Protocol No. 1 can be either "existing possessions" or assets, including claims. In respect of the claims, an applicant can argue that he has at least a "legitimate expectation" that they will be realised (see European Court of Human Rights, *Jantner versus Slovakia*, Judgment of 4 March 2003, Application No. 39050/97, paragraph 27, and the Constitutional Court, Decision on Admissibility and Merits, *AP-2349/06* of 27 February 2008, paragraph 44, available on the website of the Constitutional Court www.ustavnisud.ba). In addition, the Constitutional Court points out that a "legitimate expectation" must be of a nature more concrete than a mere hope, however understandable that hope may be, and be based on a legal provision or a legal act such as a judicial decision (see, European Court of Human Rights, *Kopecký versus Slovakia*, Application No. 44912/98, Judgment of 28 September 2004, paragraphs 48-49, and Constitutional Court, Decision on Admissibility, *AP-2361/06* of 10 January 2008, paragraph 10, available on the website of the Constitutional Court www.ustavnisud.ba).

41. The Constitutional Court notes that the provision of Article 234 of the Customs Policy Law, which was applied in the present case, does not prescribe the obligation of the competent authority to pay default interest on the amount of duties collected unlawfully, unless the three-month time limit has expired since the adoption of the decision granting the refund. This is not the case here. Actually, the competent bodies of the Administration and the Court of BiH based their position that the request for payment of interest was unfounded on the cited provision of the Customs Policy Law. In such circumstances, the question arises as to whether the "legitimate expectation" that the appellant would be paid default interest was based on a legal norm. In this connection, the Constitutional Court notes that during the proceedings the appellant unsuccessfully invoked the provisions of the Law on the Procedure of Indirect Taxation. It held that the provisions of that Law were relevant in his case, since the appellant had not submitted a request for refund of duties within the meaning of Article 229 (2) of the Customs Policy Law. It held that the refund of duties followed the annulment of the impugned decision, and Article 16 of the Law on the Procedure of Indirect Taxation regulates that such a situation. Given the circumstances of the present case and the fact that most of the duties collected unlawfully referred to the amount of VAT (see paragraph 8 of this Decision), the Constitutional Court considers that the provisions of the Law on the Procedure of Indirect Taxation, Article 16 paragraph 1, could establish the appellant's "legitimate expectation" that he would be paid the default interest required. In view of the above, it follows that the appellant in the present case enjoys guarantees 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.

42. Since the impugned decisions dismissed the appellant's request for payment of default interest, the Constitutional Court considers that the impugned decisions interfered with the appellant's right to property.

43. In order for an interference with the peaceful enjoyment of property to be justified, it must be not only lawful as prescribed by the European Convention but it must serve a legitimate aim in the public interest and must, also, maintain a reasonable proportionality between the means employed and the aim pursued. The interference with the right to property must not go beyond that which is necessary to achieve a legitimate aim and the holders of the right should not be subjected to an arbitrary treatment or required to bear an excessive burden in the realization of legitimate aim (see, the European Court of Human Rights, *Sunday Times v. The United Kingdom*, Judgement of 26 April 1979, Series A, no. 30, paragraph 49 and Malone v. *The United Kingdom*, Judgement of 2 August 1984, Series A, no. 82, paragraphs 67 and 68).

44. In the present case, the Constitutional Court notes that the appeal raises the issue of violation of the right to property in a situation where the impugned decisions dismissed the payment of interest on the amount of duties collected unlawfully, which were then refunded by the application of the provisions of Article 234 of the Customs Policy Law. In this connection, the Constitutional Court notes that the allegations of the appeal are aimed at allegations that the provision of Article 234 of the then valid Customs Policy Law could not be applied in the present case. Only the provisions of the Law on the Procedure of Indirect Taxation could be applied. In particular, Article 16, paragraph 1 of that Law, which, according to the appellant, prescribes the specific situation and which also, ensures the payment of default interest to the appellant. As to the appellant's objections raised unsuccessfully during the proceedings, the Constitutional Court notes that the competent bodies of the Administration, as well as the competent Divisions of the Court of BiH, unanimously dismissed these appellant's allegations. They argued that the appellant had submitted a request for refund of duties within the meaning of Article 229 paragraph 2 of the Customs Policy Law. It also argued that in the present case only the provisions of the Customs Policy Law as a *lex specialis* were relevant and not the Law on the Procedure of Indirect Taxation and that by applying the then valid provisions of Article 234 of the Customs Policy Law, the appellant was not entitled to default interest.

45. In the light of the issue raised by the appeal in question, the Constitutional Court will recall first the case law of the European Court of Human Rights. Thus, in the judgment of *Eko-Elda AVEE*, the applicant requested a refund of circa EUR 362,000, which he had unjustifiably paid on the income tax, which was paid to him during the procedure before the competent authorities. The applicant later changed the lawsuit by asking for default interest and his lawsuit was dismissed. In that case, the European Court of Human Rights found a violation of the applicant's right to property. In the reasoning of its judgment,

the European Court of Human Rights stated that "under Article 1 of Protocol No. 1, the payment of interest is intrinsically linked to the State's obligation to make good the difference between the amount owed and the amount ultimately received by the creditor." The European Court of Human Rights pointed out that the tax unduly paid was refunded five years and approximately five months after the applicant sought a refund of the sum that it had unduly paid. The European Court of Human Rights held that the refusal of the tax authorities to pay late-payment interest for such a long period "upset the fair balance that has to be struck between the general interest and the individual interest" (see European Court of Human Rights, *Eco-Elda AVEE v. Greece*, Judgment of 9 March 2006, Application No. 10162/02, paragraphs 28-29). The European Court of Human Rights reached a similar conclusion in the case of *Buffalo S.r.l. in liquidation v. Italy*, while in the case of *Lopac v. Croatia*, in similar circumstances, the European Court of Human Rights found a violation of the right to property. It concluded that the applied regulation did not meet the requirement of the "quality of law" in terms of foreseeability, for the possibility of divergent interpretations.

46. In the present case, the Constitutional Court notes that, according to the available documents, on 11 June 2012 the appellant submitted a request to the competent customs authority for the release of the disputed goods for a free circulation, relieved from payment of import duties, in accordance with Article 176 paragraph 4 of the Customs Policy Law. It was rejected by the final act of the competent body of the Administration, but that the Court of BiH, by a judgment of 28 April 2014, annulled the rulings of the Administration, and referred the case back for retrial. While the administrative dispute before the Court of BiH was pending, the first instance body of the Administration, acting *ex officio*, "in the procedure of subsequent collection of indirect taxes", by its ruling of 22 July 2013, obliged the appellant to pay customs duties and VAT for customs debt accrued on 27 May 2013. In addition, it obligated it due to the use of the disputed goods in production without authorization. Thus, the appellant paid the disputed duties on 1 August 2013 based on that decision in order to avoid the enforcement of the decision. The disputed ruling obliging the appellant to pay customs duties was subsequently annulled upon the appellant's appeal, as the Court of BiH previously annulled the rulings of the competent bodies of the Administration which had dismissed the appellant's request for the release of the disputed goods for free circulation and relieved from payment of import duties. The Constitutional Court notes that, by the second instance ruling of the competent body of the Administration by which the disputed ruling was annulled, the case was remitted to the first instance body for retrial, in which the appellant was granted the refund. Therefore, the procedure in which the appellant was granted the refund was the result of the fact that the second instance body, acting upon the appellant's appeal, annulled as an unlawful the decision by which the appellant was unlawfully obliged to pay customs duties (BAM 56,024.05) and VAT (BAM 104,826.86). They were to be paid because of the customs debt incurred by the use of disputed goods without approval.

47. First, the Constitutional Court notes that the disputed duties did not exclusively relate to the refund of customs duties, but that the major part of the refund of duties related to the refund of VAT. This was completely neglected during the proceedings and complicates the situation in question, primarily, because of the application of the law.

48. The Constitutional Court notes that Article 1, paragraph 1 of the Law on the Procedure of Indirect Taxation prescribes that the mentioned Law regulates the procedure for determining, collecting and controlling indirect taxes and tax offenses, while Article 6 of the same Law defines the term "indirect tax" (see Relevant Law). In addition, the Constitutional Court notes that, with regard to the payment of interest on VAT refunds, the Law on the Procedure of Indirect Taxation explicitly prescribes the obligation of the competent authority to return funds to the taxpayer, including default interest (Article 13 of the mentioned Law). Article 16, paragraph 1 of the Law on the Procedure of Indirect Taxation prescribes a situation that could be relevant in the instant case. It states: "Where the amounts have been paid or the guarantees have been submitted in order to prevent the enforcement of the ruling, the ITA shall refund the paid amount or the costs of the guarantee if the ruling or the amount of the debt have been annulled by the ruling of the ITA or the competent court. The refund shall be made with accrued default interest from the day on which the amount or the costs of the guarantee has been paid". Pursuant to the cited provisions of the Law on the Procedure of Indirect Taxation and given the fact that the major part of duties collected unlawfully related to the refund of VAT (BAM 104,826.86), the question arises whether the circumstances of this case could justify the exclusive application of the then valid Article 234 of the Customs Policy Law. Secondly, the question arises as to why the appellant's reference to the Law on Indirect Taxation was considered irrelevant by the Court of BiH and the competent bodies of the Administration. Given the facts of the case, the competent authorities, the Court of BiH in particular, failed to give a relevant answer to this question to the appellant, especially in light of the relevant circumstances of the case and the fact that Article 1 paragraph 2 of the Law on the Procedure of Indirect Taxation prescribes the subsidiary application of that law (see Relevant Law). The Constitutional Court holds that the Court of BiH should clarify this issue and re-examine the application of the right to a VAT refund in the retrial, taking into account all relevant circumstances of the present case. In this connection, the Constitutional Court refers to the recent case law in case no. *AP-3548/18* (see, Constitutional Court, Decision on Admissibility and Merits no. *AP-3548/18* of 4 June 2020, available on the Constitutional Court's website www.ustavnisud.ba).

49. On the other hand, the issue of refund of unlawfully imposed duties related to the amount of customs duties (BAM 56,024.00), contrary to the appellant's claims, justifies the application of Article 234 of the Customs Policy Law, which excludes the payment of interest. The cited provision prescribes only the right to a refund of unlawfully collected import and export duties, but not the right to the payment of statutory default interest. It

is so, except in the case where the decision granting the refund of collected duties has not been implemented within three months of the date of adoption of that decision, which is not the case in the case at hand. However, the Constitutional Court notes that the cited provision of Article 234 of the then valid Customs Policy Law does not take into account the fact that a longer period could have passed until the decision on the refund of duties, during which the taxpayer was deprived of his property (in this case it is a period of two years). This could raise the issue of guarantees of the right to property under Article 1 of Protocol No. 1 to the European Convention, or under the aforementioned case law of the European Court of Human Rights.

50. The Constitutional Court also points to the relevant provisions of the new Customs Policy Law (*Official Gazette of BiH*, 58/15 - see Relevant Law). Thus, Article 267, paragraph 1 of the new Customs Policy Law stipulates that default interest shall be calculated and paid on the amount of import or export duties refunded pursuant to Article 262, paragraph 1 of that Law, including the amount of interest paid upon paying these duties, from the date of payment of the duties until the date of the repayment thereof.

51. The Constitutional Court recalls the position of the European Court of Human Rights, which finds a violation of the right to property where "the prolonged unavailability of the tax that had been unduly paid by the applicant's company had had a definite and considerable impact on its financial situation". This is so as prolonging the refund of duties paid "upsets the fair balance that has to be struck between the general interest and the individual interest and the need to protect the right to the peaceful *enjoyment* of *property* (*op.cit.*, *Eco-Elda AVEE*). The Constitutional Court notes that the competent bodies of the Administration, as well as the Court of BiH, failed to take into account these aspects when applying Article 234 of the Customs Policy Law, which they should have taken into account, especially in light of the aforementioned case law of European Court of Human Rights. Accordingly, the Constitutional Court holds that the Court of BiH should examine this issue. The Court of BiH will determine whether application of Article 234 of the Customs Policy Law to the amount of the refund was proportionate to the aim pursued. It will determine this in the retrial, taking into account the case law of the European Court and the circumstances of the case (the period of time during which the appellant was unlawfully deprived of the property and the effect on the appellant's business and other relevant circumstances).

52. In view of the above, the Constitutional Court concludes that the interference with the appellant's right to property in the present case was not based on law.

53. The Constitutional Court stresses that it took into account the previous case law of the Constitutional Court that raised similar factual and legal issues, including the one pointed out by the Administration in response to the appeal. However, this case law could not result in a different decision.

54. In view of the above, the Constitutional Court concludes that the disputed decision is in 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.

VIII. Conclusion

55. The Constitutional Court concludes that the disputed decision of the Court of BiH violated 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 unlawful interference with the appellant's property. This was so as the competent bodies of the Administration and the Court of BiH did not consider the fact that the major part of duties collected unlawfully related to the refund of VAT. The above correctly calls into question the exclusive application of the then applicable Customs Policy Law given Article 1, paragraph 2 of the Law on the Procedure of Indirect Taxation and the fact that the provisions of the said Law explicitly prescribe the obligation of the competent authority to return the funds to the taxpayer, including default interest. In other words, the provision of Article 234 of the Customs Policy Law was applied and it related to the refund of unlawfully collected customs duties. The provision was applicable at the relevant time, and excluded the payment of default interest without considering the period that elapsed from the moment when the duties were collected unlawfully until the refund thereof. The aforesaid makes that provision imprecise with respect to the protection of right to property under the European Convention. The mentioned provision was applied without considering the relevant circumstances of the case, in particular the length of time in which the appellant was unlawfully deprived of his property and, consequently, the impact on the appellant's business. Thus, the competent bodies of the Administration and the Court of BiH failed to consider this in order to determine whether the application of the then valid Article 234 of the Customs Policy Law was proportionate to the aim pursued.

56. Pursuant to Article 59 (1) and (2) and Article 62 (1) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of the present Decision.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP-94/21

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Ms. Aida Bilalović and minor L.H. against the Ruling of the Supreme Court of the Federation of BiH, no. 22 0 P 031013 20 Rev of 5 November 2020, Judgment of the Cantonal Court in Tuzla No. 29 0 P 031013 19 Gž of 16 July 2020 and Judgment of the Municipal Court in Kalesija, no. 29 0 P 031013 18 P of 9 September 2019

Decision of 17 February 2021

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (the *Official Gazette of Bosnia and Herzegovina,* 94/14), in Grand Chamber and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović and

Ms. Seada Palavrić

Having deliberated on the appeal of **Ms. Aida Bilalović and minor L.H**. in the case no. **AP-94/21**, at its session held on 17 February 2021, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Ms. Aida Bilalović and minor L.H. is hereby granted.

A violation of 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 Tuzla, no. 29 0 P 031013 19 Gž of 16 July 2020 is hereby quashed.

The case shall be referred back to the Cantonal Court in Tuzla, which is obliged 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(1) of the European Convention for the Protection of Human Rights and Fundamental Freedom.

The Cantonal Court in Tuzla is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months from the date of delivery of the present Decision, of the measures taken in order to enforce this Decision, in accordance with Article 72(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 12 January 2021, Ms. Aida Bilalović and minor L.H. (the "first appellant" and the "second appellant" or the "appellants") from Kalesija, represented by Mr. Izet Mešić, a lawyer practicing in Kalesija, filed an appeal with the Constitutional Court of Bosnia and Herzegovina (the "Constitutional Court"). The appeal was filed against the ruling of the Supreme Court of the Federation of BiH (the "Supreme Court"), no. 22 0 P 031013 20 Rev of 5 November 2020, judgment of the Cantonal Court in Tuzla (the "Cantonal Court") No. 29 0 P 031013 19 Gž of 16 July 2020 and judgment of the Municipal Court in Kalesija (the "Municipal Court"), no. 29 0 P 031013 18 P of 9 September 2019.

II. Procedure before the Constitutional Court

2. In a Decision on Admissibility, no. *AP-3652/20* of 22 December 2020 (available at www.ustavnisud.ba), the Constitutional Court rejected as premature an appeal filed by the appellants on 14 October 2020 against the judgment of the Cantonal Court, no. 29 0 P 031013 19 Gž of 16 July 2020. The appeal was rejected as the appellants had filed a revision-appeal with the Supreme Court against the above-mentioned judgment of the Cantonal Court. There was no final decision on the revision-appeal adopted at the time of deciding the appeal (according to information available to the Constitutional Court). In the reasoning for the decision, the Constitutional Court stated that after its adoption, regardless of the type of the decision, the appellants had the opportunity to re-submit an appeal in which they were obliged to state this decision of the Constitutional Court on the prescribed form of appeal, under paragraph 8(a) "Other decisions".

3. On 21 October 2020, pursuant to Article 23 of the Rules of the Constitutional Court, in case no. *AP-3652/20*, the Cantonal Court, the Municipal Court and the defendant's attorney Senad Huremović (the "defendant") were requested to submit their respective responses to the appeal.

4. The Cantonal Court submitted the response to the appeal on 5 November 2020, the Municipal Court on 12 November 2020. The defendant's attorney did not submit the response to the appeal within the set deadline.

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. In a judgment no. 29 0 P 031013 18 P of 9 September 2019, the Municipal Court dismissed as unfounded a claim of the appellants stating that "it is established that the defendant […] is the biological father of minor [second appellant], born on 24 July 2017 in Tuzla. Thus, the defendant is obliged to accept that this fact be entered in the registers of the Municipality of Kalesija, based on this judgment. Paragraph 2 of the said judgment obliges the appellants to reimburse the defendant for the costs of the proceedings for BAM 1,848.80.

7. In its reasoning, the Municipal Court noted that Article 72(1) and (2) of the Family Law of the Federation of BiH (*Official Gazette of the Federation of BiH*, 35/05) stipulates that a child may file a lawsuit to establish maternity and paternity and that a lawsuit to establish paternity, if the child is a minor, may be filed by her mother if she is exercising parental care. The Municipal Court pointed out that the first appellant based her claim that the defendant was the father of the second appellant on the testimonies of witnesses Sanela Jahić and Abdulah Džaferović, the content of which was stated on page 2 of the reasoning, and the birth certificate for minor person, the second appellant. The birth certificate stated that the name of the second appellant, born in Tuzla on 24 July 2017, was registered under number 16 for 2017, and that the name of the first appellant was entered as the mother, while there was no data on the father.

8. It further noted that the first appellant regarding the circumstance of proving that the defendant was the father of the first appellant "suggested medical expertise by DNA method. However, as the defendant did not respond to the Institute of Genetic Engineering and Biotechnology, University of Sarajevo, on August 14, 2019, when it was ordered to take a swab of the buccal mucosa from the plaintiff and the defendant, this expertise could not be carried out in full." The court further presented the content of the evidence presented and gave the following reasons: "Thus, given the indisputable fact that the birth of the plaintiff, minor ("the second appellant") was entered in the birth register and that it was written that the plaintiff ["the first appellant"] gave birth to her, and given the indisputable fact that the interrogated witnesses confirmed that they had the opportunity to see the first appellant and the defendant when they were intimate, kissing, and witness Sanela Jahić stated that in the summer of 2016 she had the opportunity to see when they made love, according to the court, are not sufficient facts to conclude that the defendant […] was the father of the minor ("the second appellant")." Bearing in mind the above, the Municipal Court dismissed the claim of the appellants as unfounded, finding that based on the evidence presented it could not conclude that the defendant was the father of the second appellant.

9. In judgment no. 29 0 P 031013 19 Gž of 16 July 2020, the Cantonal Court dismissed the appellants' appeal and upheld the first-instance judgment. In the same judgment, the Cantonal Court dismissed the claims of the litigants for reimbursement of the costs of the appellate proceedings.

10. It was noted in the reasons for the judgment that the appellants were challenging the judgment of the first instance court for all the reasons prescribed by the provision of Article 208(1) of the Civil Procedure Code (the "CPC"). The appellants primarily claimed that the first instance court had failed to give reasons with regard to the fact that the defendant had not responded to the DNA test scheduled by this court, although the Family Law provisions obliged him to do so, and therefore it did not give credence to the testimony of interrogated witnesses. In this regard, the Cantonal Court noted that the case file showed that paternity was not established by confession in the specific case, so the appellants had filed a lawsuit to establish paternity, pursuant to Article 72 of the Family Law, which was why they were considered one party (co-litigants). It further stated that, in terms of the relevant provisions of the Family Law, the use of all evidence was permitted in the paternity proceedings, the father of an illegitimate child was presumed to be a person found to have had sexual intercourse with the child's mother during the critical period of conception, unless other evidence proved otherwise. In addition, the Cantonal Court stated that the first instance court, assessing the appellants' allegations, had indisputably accepted the first appellant's proposal for presenting evidence by medical expertise using DNA, conducted by the Institute of Genetic Engineering and Biotechnology, University of Sarajevo. However, the DNA examination for the purpose of testing the defendant's paternity had not been realized because the defendant had failed to show up at the institute's premises at the scheduled time, but only the appellants had appeared from whom a buccal mucosa swab had been taken (kept for the next six months). Therefore, in a situation in which, due to the defendant's failure to respond, a DNA examination could not be conducted, the Cantonal Court considered that the first appellant had had the opportunity to propose the presentation of evidence by an appropriate medical expert. A medical expert would accurately determine the weight and length of the minor child, and the time of conception, the duration of the pregnancy, and whether there were any deviations from date of birth, and other relevant circumstances. However, the first appellant had failed to present the said evidence. It was pointed out that in connection with the factual allegations that the defendant was the biological father of the second appellant, in addition to reading the substantive documentation, the first appellant had presented evidence by testifying as a litigant and examining witnesses Sanela Jahić and Abdulah Džaferović. However, in the opinion of that court, and in the absence of other evidence, the mentioned statements and the content of the substantive documentation were not a sufficient factual and legal basis for establishing that the defendant was the biological father of the second appellant. It was reasoned that "it follows from the appellate judgment that the first instance court gives credence to both the testimony of [the first appellant] and the testimonies of the examined witnesses,

however, according to the court, the facts established based on the presented evidence were not sufficient to draw a conclusion that the defendant is the father of the minor child. It cannot be determined that the defendant is forced to respond to the expertise by DNA analysis (bearing in mind the rule of civil procedure that no coercive means may be used to present evidence by hearing the parties), but that all other means of proof could be taken in the dispute in question." Therefore, according to the Cantonal Court, the appellants' allegations that the first-instance court did not give reasons as to why it did not give credence to her testimony and the testimonies of the examined witnesses to reach a different decision, as well as that it did not give reasons of what importance was the fact that the defendant did not respond to the expertise by DNA method, although the provisions of the Family Law oblige the court to specifically assess and explain it.

11. Namely, it follows from the first-instance judgment that the court gave credence to the testimony of the first appellant and the testimonies of the examined witnesses, but that, according to that court, the facts established based on this presented evidence were not sufficient to conclude that the defendant was a biological father of the second appellant. It could not be determined that the defendant was forced to respond to the expertise by DNA analysis, but all other means of evidence could have been presented in the dispute in question. First, the evidence could be presented by medical expertise according to one of the other known medical methods. The court, in the procedure for establishing paternity, contrary to the appellate reasoning of the appellants, should not have based its decision only on the testimony of the first appellant as the mother of the second appellant and the testimony of witnesses. They stated that at the critical time of conception of the second appellant the defendant had sex with the first appellant, the mother of the second appellant. Rather, the court should have presented other evidence, too.

12. Unlike the allegations in the appeal, according to the Cantonal Court, the reasons for the first instance judgment contain all the elements provided for in Article 191(4) of the CPC. The court, based on a conscientious and careful assessment of each piece of evidence separately, determined proven or unproven facts (Article 8 of the CPC). It also gave, in the reasons for the challenged judgment, an analysis of the evidence presented and reasons as to the facts and law, which are objectively acceptable even in the opinion of this court.

13. In ruling no. 29 0 P 031013 20 Rev of 5 November 2020, the Supreme Court dismissed the appellants' revision appeal as inadmissible and dismissed the appellants' request for reimbursement of the costs of the proceedings incurred in connection with the revision-appeal.

14. The Supreme Court pointed out that, in accordance with the provisions of Article 286 Family Law and in connection with Article 272 of the cited law, a revision-appeal against the judgment rendered by the second instance court in marital disputes, as well

as disputes over parent-child relations and maintenance, was not allowed. Therefore, the Supreme Court, bearing in mind the cited provisions of the CPC and type of dispute (determination of paternity), applying the provision of Article 247(1) of the CPC and in connection with Article 286 of the Family Law, rejected the appellants' revision-appeal as inadmissible. Also, the request of the appellants for reimbursement of the costs of the proceedings incurred in connection with the revision-appeal in the amount of 648.00 KM was rejected as the appellants failed in the revision-appeal proceedings.

IV. Appeal

a) Allegations in the appeal

15. The appellants claim that the impugned judgments have been in violation of their 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"). In addition, they are in violation of 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.

16. With regard to the allegations of violation of their rights, the appellants primarily point out that the disputed judgments are based on arbitrary assessment of evidence, arbitrary application of procedural law. They also point that the judgment of the first instance court does not contain a minimum of reasons for decisive facts in terms of Article 191(4) of the CPC. They oblige courts to set out, in the reasons for their decisions, the parties' requests and their allegations of the facts on which these claims are based, the evidence and assessment of that evidence, as well as the regulations on which they base their decision. They consider that the second-instance court "is trying to justify the first-instance court's actions in giving reasons for dismissing the claim", stating that the appellants failed to propose an expert opinion on certain circumstances, without the court giving reasons for the fact that the defendant failed to undergo DNA expertise, which was approved and scheduled by the first instance court. In this regard, the appellants further point out that, given the current level of development of science and technology, "establishing, denying or disputing paternity only based on the witness statements and claims of litigants simply seem frivolous, and everyone should be aware, even the defendant "who can clearly and unequivocally prove his claim that he is not the biological father of the second appellant by DNA analysis (which cannot be done without him). They also point out that their right to a reasoned court decision has been grossly violated. In this regard, the appellants point to the position of the Supreme Court of the Republika Srpska presented in ruling no. 78 0 P 027816 19 Rev of 17 January 2020. It states, *inter alia*: "In the procedure for establishing paternity, the use of all means of evidence is allowed, so, given the current level of development of science and technology, establishing, denying or disputing paternity only based on the witness

statements and claims of litigants seem frivolous and the defendant should be aware of that as, by DNA analysis, he can clearly and unequivocally prove his claim that he is not the biological father of the first plaintiff. When he refuses that expertise, then such his conduct is not without prejudice to the resolution of the dispute. The lower instance court's findings that the second plaintiff was not in an extramarital affair with the defendant, i.e., that they were not dating and did not have intimate relations at the time of the first plaintiff's conception, were based only on the read testimonies of these witnesses. They did not confirm this relationship, but by the nature of things (because it is a deeply intimate relationship between two people without the presence of anyone), they could not deny it." This ruling was not considered by ordinary courts during the proceedings.

b) Response to the appeal

17. In response to the appeal, the Cantonal Court pointed out that the appellants' allegations were unfounded. The Cantonal Court alleged that it had decided based on a free assessment of evidence, conscientiously and carefully assessing each piece of evidence separately and all evidence together. It further alleged that in the reasoning of the judgment it set out the parties' requests, their allegations of facts, evidence and assessment of evidence, as well as the regulations on which the court based the judgment (Article 191(4) of the CPC). Thus, contrary to the appellants' allegations, the Cantonal Court claims that the decision of this court contains all the grounds on which it is based and that it has a reasoning for each essential element for the outcome of the dispute (pages 2 and 3 of the judgment). In addition, the Cantonal Court noted that it clearly stated in the reasons for its judgment that it had carried out a critical analysis of all presented evidence, concluding that the appellants had failed to prove their factual claims on which they based the claim.

18. In response to the appeal, the Municipal Court also stated that the appellants had failed to prove their factual allegations on which they based the claim, and suggested that the appeal be dismissed as unfounded.

V. Relevant Law

19. The **Family Law of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH, 35/05, 41/05* - correction, 31/14, 32/19 – Decision of Constitutional Court of FBiH and 94/20 - Decision of the Constitutional Court of FBiH) reads:

3. Establishing maternity and paternity by a court decision

Article 72(1) and (2)

(1) A child may file a lawsuit to establish maternity and paternity.

(2) If the child is a minor or has been deprived of legal capacity, a guardian may file a lawsuit on his/her behalf to establish maternity, with the consent of the guardianship authority, and a lawsuit to establish paternity may be filed by his mother if she exercises parental care, or his /her guardian, with the consent of the guardianship authority.

VII. PROCEEDINGS BEFORE THE COURT

General provisions

Article 268

(1) The provisions of this part of the Law determine the rules according to which courts, while acting in special civil proceedings, out-of-court proceedings and special enforcement and insurance proceedings, decide on cases related to parent-child relations, and on marital and other cases regulated by this Law.

(2) In the proceedings referred to in paragraph 1 of this Article, the provisions of the Civil Procedure Code, the Law on Out-of-Court Procedure and the Law on Enforcement Procedure shall apply, unless otherwise provided by this Law.

(3) In the proceedings referred to in paragraph 1 of this Article, and especially when determining deadlines and hearings, the court shall always pay special attention to the need for urgent resolution of the dispute in order to protect the interests of the child.

c) Procedure for establishing or disputing maternity or paternity

Article 295, paragraph (1)

(1) Proceedings in disputes for the purpose of establishing or disputing maternity or paternity shall be initiated by a lawsuit.

Article 299

All persons in the position of plaintiff or defendant are single co-litigants.

Article 302

(1) The court may also determine the facts on which the decision on the subject of the dispute depends by presenting evidence through medical expertise.

(2) In the decision on the presentation of evidence by medical expertise, the court shall determine the deadline by which the evidence should be presented, taking into account all the circumstances of the case, and in particular the urgency of the proceedings.

(3) The court shall deliver summons for the performance of medical expertise on the parties, together with the decision referred to in paragraph 2 of this Article. The summons must specify the institution where the expertise will be performed and the time of the medical expertise.

(4) The parties are obliged to respond to the summons referred to in paragraph 3 of this Article and to undergo medical expertise.

(5) If a party, duly summoned to undergo the expertise by DNA analysis, fails to respond to the summons or fails to undergo this expertise, the court shall issue an order to the judicial police to bring him in for expertise. The costs of this apprehension shall be borne by the apprehended party.

(6) If the expertise by applying other medical methods has not been performed due to the non-response of the party or due to the refusal to perform it, the court shall assess of which importance is that fact.

20. The **Civil Procedure Code** (*Official Gazette of FBiH*, 53/03, 73/05, 19/06 and 98/15). For the purposes of this decision, an unofficial consolidated text prepared in the Constitutional Court of BiH, shall be used and it reads as follows:

Article 8

Which facts to take as proven is decided by the court based on a free assessment of the evidence. The court shall conscientiously and carefully evaluate each piece of evidence separately and all the evidence together.

Article 19 (1) and (4)

(1) A written judgment shall have an introduction, dictum, reasoning and instruction on the right to a legal remedy against the judgment.

(4) In the reasoning, the court shall set out: the requests of the parties, the facts presented by the parties and the evidence presented, which facts the court established, why and how it established them, and if the court established the facts by proving, what evidence was adduced, and how the court assessed those facts. The court shall specify in particular which provisions of substantive law were applied in deciding on the claims of the parties. The court shall give its opinion, if necessary, on the views of the parties on the legal basis of the dispute, and on their proposals and objections on which the court did not give its reasons in the decisions already rendered during the proceedings.

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 other court in Bosnia and Herzegovina.

22. According to Article 18(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. It shall also examine 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.

23. In examining the admissibility of the appeal in question in terms of Article 18(1) of the Rules of the Constitutional Court, the Constitutional Court recalls that previously,

in Decision on Admissibility no. *AP-3652/20* of 22 December 2020, it rejected as a premature an appeal filed by the appellants against the judgment of the Cantonal Court, no. 29 0 P 031013 19 Gž of 16 July 2020, given that the Supreme Court was in the process of reviewing the appellants' revision appeal. In this regard, the Constitutional Court points out that the revision appeal in this case was an ineffective remedy, given that the Supreme Court's decision no. 29 0 P 031013 20 Rev of 5 November 2020 rejected it as inadmissible (which was received by the appellants' representative on 8 January 2021). Following the above, the final decision in this case is the judgment of the Cantonal Court, no. 20 0 P 031013 19 Gž of 16 July 2020. It is in this particular case the subject of the appeal, and it decided on the merits of the appellant's claim. Thus, the Constitutional Court shall examine the allegations in relation to that judgment.

24. Therefore, in accordance with its case law (see, Constitutional Court, Decision *No. AP-2884/06* of 10 January 2008, available on the website of the Constitutional Court www.ustavnisud.ba), as the relevant date of filing the appeal, the Constitutional Court takes into account the date when the appeal was filed in case number *AP-3652/20* of 22 December 2020, which was rejected as premature (available at www.ustavnisud.ba). Considering that on 26 August 2020 the appellants received the challenged judgment of the Cantonal Court no. 29 0 P 031013 19 Gž of 16 July 2020, and that appeal no. *AP-3652/20* was filed on 14 October 2020, it follows that the appeal was filed in a timely manner, i.e. within 60 days from the receipt of the said judgment of the Cantonal Court, which is in accordance with Article 18(1) of the Rules of the Constitutional Court.

25. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court as it is not manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

VII. Merits

26. The appellants point to a violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention"). It also points to 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.

Right to a fair trial

27. 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.

28. Article 6(1) 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.

29. Given that the specific case of establishing paternity concerns the civil rights of the appellants, in the present proceedings they enjoy guarantees 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.

30. The claims of violation of the appellants' right to a fair trial are based on the allegations that the Cantonal and Municipal Courts arbitrarily applied substantive and procedural law, that the judgments do not contain reasons for the decisive facts and reasons for dismissing their claim, within the meaning of Article 8 and Article 191(4) of the CPC. Therefore, given the circumstances of the case, the appellants raise an issue by alleging that they did not give reasons about the decisive fact of what importance is that the defendant was not undergo the DNA expertise, which was approved and scheduled by the first instance court.

31. In this connection, the Constitutional Court first notes that according to the case-law of the European Court of Human Rights and Constitutional Court, it is not the task of these courts to review the ordinary courts' findings relating to the facts and application of the substantive law (see ECtHR, *Pronina v. Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01). Namely, the Constitutional Court is not called upon to substitute ordinary courts in the assessment of facts and evidence, but, in general, it is the task of ordinary courts to assess the presented facts and evidence (see ECtHR, *Thomas v. the United Kingdom*, judgment of 10 May 2005, application no. 19354/02). It is the Constitutional Court's task to examine whether the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective legal remedy, *etc.*) have been violated or disregarded, and whether the application of law was, possibly, arbitrary or discriminatory. Therefore, within its appellate jurisdiction, the Constitutional Court deals exclusively with the issue of a possible violation of the constitutional rights or the rights under the European Convention in the proceedings before the ordinary courts.

32. Thus, the Constitutional Court may exceptionally engage in examination of the manner in which the competent courts established the facts and applied positive legal regulations to such established facts, where it finds that ordinary courts acted arbitrarily in the proceedings of establishment of facts and application of relevant positive legal regulations (see Constitutional Court, decision no. *AP-311/04* of 22 April 2005, paragraph 26). In the context of the aforementioned, the Constitutional Court recalls that it indicated in a number of its decisions that arbitrariness in application of relevant regulations can never result in a fair trial (see the Constitutional Court, decision no. *AP-*

1293/05 of 12 September 2006, paragraph 25 *et seq.*). In view of the above, taking into account the issues raised by the appellant in the present case, the Constitutional Court will first examine whether the challenged decision is based on the arbitrary application of law.

33. The Constitutional Court notes that, by the judgment of the Cantonal Court, as the final decision in the case, the appellants' appeal was dismissed as unfounded and the judgment of the first instance court was upheld. In addition, the Constitutional Court notes that the Cantonal Court, in connection with the appellants' allegations that the first instance court did not give reasons for the importance of the fact that the defendant had not undergone the DNA expertise determined by the first instance court ruling, stated that in such a situation she had the opportunity to propose the presentation of evidence by applying other scientific methods establishing paternity. This, however, she had failed to propose.

34. In this regard, the Constitutional Court notes that the facts of the case show that the first-instance court, although it did not explicitly invoke that provision, within the meaning of Article 302 of the Family Law, granted the appellants' motion for presentation of evidence to test the defendant's paternity by conducting medical expertise by DNA method. This was scheduled for 14 August 2019 at the Institute of Genetic Engineering and Biotechnology, University of Sarajevo. However, it was not carried out, as the defendant did not respond to the summons. In this connection, the Constitutional Court points to the position of the European Court that in the procedure of establishing paternity, what evidence will be conducted and what facts will be determined depends on the national legislation and legal arrangements in them. If the obligation to establish a DNA test as such is provided for in national law, that test must be carried out in any case. If national law does not require that test and there is no measure to compel a person to comply with a court order, then there is no obligation to conduct that test.

35. In this context, the Constitutional Court points out that the European Court, in the judgment of *Mikulić v. Croatia,* considered the issue of conducting a DNA test to establish paternity in which the European Court found a violation of Article 8 of the European Convention. It concluded (paragraph 65) that when deciding paternity, the courts should take into account the basic principle of the best interests of the child. The Court considers that the existing proceedings do not strike a fair balance between the applicant's right to remove her uncertainty as to her personal identity without undue delay, and the right of her alleged father not to undergo DNA testing, and considers that the protection of the interests involved is not proportionate.

36. Furthermore, the Constitutional Court notes that in the said judgment the European Court pointed out: "In this regard, the Court notes that there are no measures under domestic law to compel H.P. to comply with the first-instance court's order to perform DNA testing. Nor is there any direct provision governing the consequences of such

non-compliance. It is true, however, that the courts in civil proceedings, according to Article 8 of the Code of Civil Procedure, must render a judgment according to their own conviction after assessing each piece of evidence separately and all the evidence together. In this respect, the courts are free to reach conclusions taking into account the fact that a party obstructs the establishment of certain facts" (see *Mikulić v. Croatia*, application no. 5317/99 of 7 February 2002, § 61). The Constitutional Court also points out that paragraph 64 of the judgment of the European Court *Mikulić v. Croatia* clearly states that persons in the applicant's situation have a vital interest, protected by the Convention, to receive the information necessary to reveal the truth about an important aspect of their personal identity.

37. Bringing the stated positions of the European Court in connection with the facts of the case, the Constitutional Court notes that the first instance court granted the appellants' proposal to conduct a DNA medical examination to prove the fact that the defendant was the biological father of the first appellant. Next, the Constitutional Court notes that the proposed expertise was not carried out and that the facts established based on the presented evidence (testimony of the first appellant and the testimony of the examined witnesses) were not sufficient to conclude that the defendant was the biological father of the second appellant. This was the reason why the first instance court dismissed the claim. The Cantonal Court accepted the established facts and legal position of the first instance court, further stating that the appellants had the opportunity to propose the presentation of evidence using other scientific methods to establish paternity, which they had failed to propose.

38. In analysing the given reasons of the ordinary courts, the Constitutional Court notes that the provision of Article 302 of the Family Law prescribes the possibility, conditions and manner of presenting evidence by expert analysis of DNA in the case of establishing paternity/ maternity. Next, the Constitutional Court notes that the provision of Article 268(1) of the Family Law, referred to in "Chapter VII - Proceedings before the Court - General Provisions", regulates certain rules according to which courts act when in "special civil proceedings" they decide on "cases regulated by this law". Paragraph 2 of the said Article explicitly stipulates: "In the proceedings referred to in paragraph 1 of this Article, the provisions of the Civil Procedure Code […] shall apply, unless otherwise provided by this Code." In this context, the Constitutional Court notes that this chapter regulates special litigation procedures, including "c) Procedure for establishing or disputing maternity or paternity". Furthermore, the Constitutional Court notes that in connection with this special civil procedure, namely Article 302 of the Family Law, the following is regulated: (1) The facts on which the decision on the subject of the dispute depends may also be established by the court by presenting evidence via a medical expertise". Paragraph (5) explicitly stipulates: "If a party, duly summoned to access the DNA analysis expertise, did not respond to the summons, or was not subject to this expertise, the court shall issue an order to the judicial police to bring the party in for

expert examination. The costs of this apprehension shall be borne by the apprehended party." It is clear from the above that the provision of Article 302 contains special rules regarding the presentation of evidence by a medical expert and that in the given circumstances it is a *lex specialis* in relation to the provisions of the CPC.

39. Given the aforementioned, the Constitutional Court considers that, in terms of Article 302(5) of the Family Law, the obligation of the court was to act *ex officio* and issue an order to the judicial police to bring the defendant to the scheduled expert examination. It also considers that the courts failed to fulfil the obligation and that the courts did not explain why the said provision, despite its explicit and clear content, was not applicable in the case at issue, although it was a "special litigation procedure" within the meaning of the provisions of the Family Law. The courts did not give reasons for that, although the appellants pointed to the importance of the defendant's non-appearance, i.e. refusal to present this evidence, for the outcome of the proceedings. This corresponds to both the provisions of Article 306 (6) of Family Law and the views of the European Court from the *Mikulić* judgment.

40. In this regard, the Constitutional Court notes that, unlike the *Mikulić* case, the FBiH Family Law provides for the obligation to conduct DNA analysis to determine paternity, as well as the court's obligation in the event that a person does not appear for expertise to issue an order to the judicial police to apprehend that person for the purpose of conducting an expert examination. In such circumstances, according to the Constitutional Court, an excessive burden was placed on the appellant by the reasoning of the ordinary courts that the appellant had the opportunity to carry out other scientific methods in connection with establishing the fact that the defendant is the biological father of the second appellant. The rule of "best interests of the child", i.e. the right of the minor appellant to know about her origin and identity, was completely ignored.

41. Accordingly, the Constitutional Court finds that there has been 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. The violation was found as the judgments dismissing the appellants' claim to establish paternity do not contain an objective, logical and convincing reasoning. Rather, in the given circumstances the application of substantive law, specifically the provisions of Article 302 of the Family Law, seems arbitrary.

Other allegations

42. In view of the conclusion on the violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina, the Constitutional Court does not deem it necessary to consider the allegations on the violation of Article II(3)(k) of the Constitution of Bosnia and Herzegovina separately.

VIII. Conclusion

43. The Constitutional Court holds that there has been 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. The violation was found as the judgments dismissing the appellants' claim to establish paternity by DNA expertise, which was approved and scheduled by the first instance court in accordance with the provision of Article 302(5) of the Family Law, do not contain an objective, logical and convincing reasoning. In the given circumstances, the application of substantive law, specifically the provisions of Article 302 of the Family Law, seems arbitrary.

44. Having regard to Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

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

Zlatko. M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP-532/21

DECISION ON ADMISSIBILITY AND MERITS

Appeal of A.Ć., represented by the Joint Attorney Office "Sabina Kadrić and Irma Muhović" from Sarajevo, against the statement of the Clinical Centre of the University of Sarajevo No. 55-33-6-5267 dated 1 February 2021, the notification of the Public Institution Healthcare Centre of the Sarajevo Canton No. 01-05-1427-2/21 of 10 February 2021 and the letter from the Public Institution for the Healthcare Protection of Women and Maternity of the Sarajevo Canton No.10-250/1-01/21 of 9 February 2021

Decision of 5 May 2021

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 57 (2) (b) and Article 59 (1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (the *Official Gazette of Bosnia and Herzegovina,* 94/14), in Grand Chamber and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović, and

Ms. Seada Palavrić

Having deliberated on the appeal of **A.Ć.** in the case no. **AP-532/21**, at its session held on 5 May 2021, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal filed by A.Ć is dismissed as ill-founded. The appeal was filed because the healthcare institutions in the Sarajevo Canton did not make it possible for the appellant to be assisted by healthcare workers from the healthcare system in giving birth at home.

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 February 2021, A.Ć. ("the appellant") from Sarajevo, represented by the Joint Attorney Office "Sabina Kadrić and Irma Muhović" from Sarajevo, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") against the statement of the Clinical Centre of the University of Sarajevo ("the

Clinical Centre") No. 55-33-6-5267 dated 1 February 2021, the notification of the Public Institution Healthcare Centre of the Sarajevo Canton ("the Healthcare Centre") No. 01-05-1427-2/21 of 10 February 2021 and the letter from the Public Institution for the Healthcare Protection of Women and Maternity of the Sarajevo Canton ("the Institute") No.10-250/1-01/21 of 9 February 2021. In the appeal, the appellant also stated a request for an interim measure.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 (2) and (3) of the Rules of the Constitutional Court, the Federal Ministry of Health ("the Federal Ministry"), the Ministry of Healthcare of Sarajevo Canton ("the Cantonal Ministry"), the Clinical Centre, the General Hospital "Prim. Dr. Abdulah Nakaš" Sarajevo ("the General Hospital"), the Healthcare Centre and the Institute, were requested on March 2 and 3, 2021 to submit a response to the appeal within eight days of receiving the letter.

3. The Cantonal Ministry, the Clinical Centre, the General Hospital and the Institute submitted their responses to the appeal in the period from 5 to 16 March 2021.

4. The Federal Ministry and the Healthcare Centre did not submit a response to the appeal within the set deadline.

III. Facts of the Case

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

6. The appellant states that she had several childbirths and that at the time of filing the appeal she has been in the 40th week of pregnancy, which she states is a low risk. Given the current epidemiological situation caused by the coronavirus pandemic, the appellant considered that for her life and the life of her unborn baby, the only safe birth would be one that would take place at home, with the assistance of a midwife and the accessibility of emergency medical care in case of complications.

7. In this regard, on 18 January 2021, the appellant submitted a request for home birth assistance to the Clinical Centre and the Department of Gynaecology and Obstetrics at the General Hospital. In her request, she referred to the Law on Patients' Rights, Obligations and Responsibilities ("the Law on Patients' Rights"), stating that that law prescribes patients' rights to self-determination and the right to free choice. She also referred to the provisions of Article 8 and of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention").

8. The Clinical Centre submitted to the appellant a statement registered under No. 55-33-6-5267 dated 1 February 2021 stating that the healthcare institution performs the

activity of hospital healthcare at the tertiary level of healthcare. This implies providing the healthcare services to patients/pregnant women in hospital conditions, according to the classification of admission of pregnant women for hospitalization/delivery, in accordance with applicable Procedure No. 19 (Admission of pregnant women and mothers to the Clinic for Gynaecology and Obstetrics). This procedure determines the indications for its use and admission of patients for hospital treatment, based on the referral for hospital treatment issued by a family doctor, emergency service, unless there is an urgent admission of patients for hospital treatment without a referral. It also determines the indications for admission of patients for hospital treatment according to the indication of the doctor-consultant within the specialist-consultative activity of the Clinical Centre. In addition, the Clinical Centre stated that respecting the appellant's right to a free choice, it emphasizes that Article 6 of the Law on Patients' Rights defines patients' rights. Every patient is guaranteed the right to free choice, provided that the patient exercises his/her rights on the basis of modern medical doctrine, professional standards and norms, and in accordance with the capabilities of the healthcare system in the Federation of Bosnia and Herzegovina and provided that it previously fulfils its obligations and responsibilities established by law. The Clinical Centre also stated that in order for the appellant to have useful information for childbirth at home in a timely manner, and bearing in mind that the Clinical Centre performs admission of pregnant women and mothers exclusively in hospital conditions, this request can be addressed to the primary level of healthcare. The patients should primarily consult as to their choice with a family doctor from the jurisdiction of healthcare centres or with the staff of the Institute.

9. The General Hospital did not provide the appellant with a response to the request.

10. The appellant's attorneys also sent a request for childbirth assistance from home to the Institute. In a letter No. 10-250/1-01/21 of 9 February 2021, the Institute informed the appellant that the institution provides healthcare services to pregnant women until the 36th week of pregnancy. After that, the competent hospital institution takes over and in the specific case the supervision of pregnancy and childbirth is taken over by the Clinical Centre or General Hospital, for which reason they are unable to comply with the appellant's request. The Institute also pointed out the content of Article 6 of the Law on Patients' Rights. It stated that births in Bosnia and Herzegovina, as in the entire region and almost all countries in Europe are performed in hospital under the constant supervision of gynaecologists and midwives, and with all equipment necessary for a quick and safe completion of labour. This often includes both emergency and surgical interventions. All this carries a certain risk for mother and child and the adopted medical practice is that deliveries are performed in inpatient conditions in maternity hospitals, which can be private, but inpatient type, with all the necessary equipment and medical staff constantly available. The Institute proposed that the appellant address a request to institutions that provide healthcare delivery services within their activities to eventually assess the possibility of performing the procedure of births giving outside those institutions. In

addition, it stated that after giving birth to child she could contact the Institute so that the Visiting Nurse Service could visit the mother and new-born.

11. In the notification No. 01-05-1427-2/21 dated 10 February 2021, the Healthcare Centre stated that this institution did not have the authority to assist in giving birth at home in the presence of a midwife.

IV. Appeal

a) Allegations from the appeal

12. The appellant considers that her right to privacy under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the right to an effective remedy under Article 13 of the European Convention and the right under Article 1 of Protocol No. 12 to the European Convention have been violated.

13. In giving reasons for the allegations, the appellant stated that she considered that her right to private and family life had been violated because the Clinical Centre, General Hospital, the Institute and the Healthcare Centre did not allow her to give birth at home with the assistance of a midwife and emergency medical care. In this regard, the appellant pointed out that the Law on Patients' Rights guarantees a number of rights to patients, the most important of which is the right to free choice and the right to self-determination and consent. Furthermore, the appellant points out that Article 79, paragraph 5, item a) paragraph 7) of the Rulebook on work, internal organization, salaries and compensations of employees and systematization of jobs of the Institute ("the Rulebook of the Institute"), prescribes that Perinatology Service provides a birth giving at home. In connection with the above, the appellant believes that although in Bosnia and Herzegovina the issue of planned home birth giving is not sufficiently regulated, these laws and bylaws provide a sufficient institutional framework for enabling giving birth at home in the presence of a midwife. This leaves room for more detailed legal regulation. Such a situation, according to the appellant, creates legal uncertainty and ample room for the authorities to commit a violation of the right to privacy, primarily the right to self-determination under Article 8 of the European Convention. The appellant further claims that the European Court of Human Rights ("the European Court") in judgment *Ternovszky v. Hungary*, (application no. 67545/09, decision of 14 December 2010) took the view that a woman had the right to choose the circumstances in which she wants to give birth to a child, including the right to choose to give birth at home. The state is obliged to make such a choice legitimate for the woman. In addition, the appellant points out that the Publication of the Institute of Public Healthcare of the F BiH from July 2016 entitled "Health Status of the Population and Healthcare in the Federation of Bosnia and Herzegovina" has indicated bacterial sepsis with 2.6%, as the fifth cause among leading causes of infant death listed as the statistical indicators. In addition, according to the appellant, the current epidemiological situation caused by the appearance and rapid spread of the coronavirus poses a special danger to

the life and health of the appellant and her new-born child as the most vulnerable groups. Therefore, preventing the appellant from having the presence of a midwife at home may jeopardize their lives, and leaving the only choice for childbirth in healthcare facilities is clearly a violation of her right to privacy. The appellant also claims that, due to the violation of Article 8 of the European Convention, bearing in mind the fact that she could not use professional assistance during giving birth to a child at home, unlike those who want to give birth in a healthcare institution, she was discriminated against in enjoying her right to privacy. She points out that she did not have an effective remedy at her disposal either, because the healthcare institutions gave their answers in the form of notifications and responses, and that the General Hospital did not give any response at all.

14. With regard to the request for an interim measure, the appellant proposed that the Constitutional Court adopt an interim measure in such a way as to enable the exercise of the rights guaranteed by the European Convention. The Constitutional Court should have regard to serious human rights violations as described in the appeal, and that the only choice of childbirth is giving birth in healthcare facilities. This would jeopardize her life and health, and life and health of her unborn child given the current epidemiological situation caused by the coronavirus.

b) Responses to the appeal

15. The Cantonal Ministry stated that childbirths in Sarajevo Canton take place within the framework of gynaecological-obstetric medical discipline in hospital care, within the Discipline for Gynaecology and Obstetrics of the Clinical Centre and the Department of Gynaecology and Obstetrics of the General Hospital. Given the current circumstances, there are no conditions for professional organization of childbirth at home, which includes educated midwives and the availability of emergency transport in case of complications. In addition, the relevant national legislation on healthcare services is unclear, including the engagement of midwives, and this issue is not fully regulated. In particular, although the Law on Nursing and Midwifery allows for the establishment of private midwifery practices, the Healthcare Law as a general act has not yet explicitly provided for such a possibility as well as for assistance to parents in childbirth.

16. The Clinical Centre stated that it had provided the appellant with a response to her request for home-based childbirth dated 1 February 2021, with a reasonable explanation as to why they were unable to comply with the specific request. The Clinical Centre further stated that, as the appellant states in her appeal, national positive regulations do not define the provision of home birth in the presence of medical staff. Therefore, the Clinical Centre lacks a legal framework, i.e., clear and precise national legal provisions that would constitute legal basis for granting the appellant's request. Thus, it was not able to act differently than to assess the appellant's request as unfounded and unfeasible. Furthermore, the Clinical Centre pointed out that there had been no violation of Article 8 of the European Convention in the present case, and in that regard referred to the case

law of the European Court in the case of *Dubska and Krejzova v. The Czech Republic* (Applications no. 28859/11 and 28473/12, decision of 15 November 2016). Pursuant to the valid national regulations, midwives, as well as other medical staff, were, in fact, prevented from assisting during childbirth at home, because otherwise their actions would go beyond legal action. Consequently, Clinical Centre would have gone beyond legal action if it had complied with the appellant's request, which would pose a risk of prosecution. Furthermore, the Clinical Centre pointed out that as a healthcare institution it operates in full compliance with all orders and recommendations issued by the World Health Organization, competent crisis staffs issued to prevent the spread of coronavirus. Thus, in accordance with them, it implements enhanced safety and protection measures, both among workers, as well as among other patients who are being treated at Clinical Centre, and that in the midst of the epidemic at the Clinical Centre - Department for Gynaecology and Obstetrics, dozens of women gave birth without any harmful repercussions, which are taken special care of. In terms of the appellant's claims that she was forced to share her most intimate moments with third parties during childbirth in healthcare institutions, the Clinical Centre stated that it considered this allegation as completely absurd. This being so as the primary purpose of medical activity is to protect the health of individuals, families and the entire community population, as prescribed by the Law on Medical Activity. It is not the purpose to encroach on any intimate moments of patients, as the appellant misperceives, which is certainly her subjective experience. After all, the appellant seeks the assistance of a midwife during childbirth at home, so the justified question arises as to how she does not perceive this as sharing her intimacy with a third party. This certainly downplays the reasons for filing this appeal. Finally, the Clinical Centre stated that in the absence of clear provisions governing home birth with the assistance of a midwife, the healthcare institution did not arbitrarily interfere with the appellant's private life. It stressed that it was up to higher legislative bodies to continuously review existing legislation to ensure that it reflects medical and scientific achievements and that the legislation may be innovated in such a way as to establish a legal framework based on which in these and similar cases requests could be granted in the future.

17. The General Hospital stated that it was undisputed that the appellant had the right to give birth at home or in any other place she chose, and that her right had not been denied. Namely, no regulation, procedure or law does prescribes the assistance of a midwife, nor does the General Hospital have the material and human resources to respond to each such individual request, especially in the current situation of healthcare, both in the region and in the world. The appellant was allowed and it was made possible for her to give birth at any time in the premises of the General Hospital as well as in any other healthcare institution of her choice. The premises of the General Hospital are adequately equipped with both equipment and professional staff, and such a birth is the best and safest birth for mother and child, because it is a very real situation that when giving birth at home there are complications such as emergency surgery, delivery by caesarean section or other unforeseen situation. In this regard, according to the General

Hospital, the question arises, if the appellant considers that the healthcare institution cannot protect her and her child from coronavirus inside the premises of the healthcare institution, how does she expect to provide it in the appellant's home where a midwife would assist in childbirth. This midwife would in fact come right from the healthcare institution. The General Hospital considers that the appellant has not been denied or any rights and none of her rights were violated, in particular the rights invoked in her appeal, because there is no obligation that the General Hospital has not performed. Since one of the basic goals of the General Hospital is to ensure availability of healthcare to all under equal conditions, the appellant was granted the rights and activities provided by the General Hospital. Those are in particular the right to free access to services, the right to professional access to the employees of the General Hospital, the right of access to professionally equipped premises, as well as the right to all protection and professional assistance during childbirth.

18. The Institute stated that that institution had not violated any of the appellant's human rights invoked in the appeal. In this regard, the Institute stated that the appellant was informed by letters of 8 and 19 February 2021 that the Institute does not have a registered activity of performing childbirth, nor for assisting in childbirth at home in the presence of a midwife. In addition, this institution provides healthcare services to pregnant women until the 36th week of pregnancy after which the supervision of the pregnancy is taken over by the competent hospital institution. Furthermore, the appellant referred to Article 79, paragraph (5), item a), indent 7) of the Rulebook, which stipulates that the perinatology service also include a birth at home. However, the appellant did not accurately cite the said article, because after the heading *childbirth at home* it is also stated *if impossible to perform childbirth in delivery rooms*. This implies that the Institute will in all cases, when the birth suddenly happens outside the hospital, provide care and support after childbirth in the form of visits by the visiting nurse service of the Institute for mothers and new-borns. Those births are emergency unforeseen births, remote places births, irregular check-ups, etc., births that are not planned or medically assisted at home, as such are not organized in our country. Even in cases of childbirth at home, the mother and the new-born are transported by ambulance to the competent hospital, for examination of the mother and the new-born, and to obtain the necessary documentation for the registration of the new-born in the birth register. In addition, the Institute stated that the Rulebook on the work of the Institute, in the systematization of jobs and in the job description of nurses in that institution, does not state that they perform home births. If the State and the competent ministries were to establish such a healthcare system and enable home birth, it is assumed that the responsibility for this type of birth would be taken over by hospitals that normally deal with childbirth. They would delegate the most experienced midwives, with the most births performed and the most experience, including precise procedures when and how the mother could be transported to the competent hospital as soon as possible in case of need.

V. Relevant Law

19. The **Law on Rights, Obligations and Responsibilities of Patients** (*Official Gazette of the FBiH*, 40/10).

Article 1, paragraph (1)

This law determines the rights, obligations and responsibilities of patients when using healthcare, the manner of using these rights, the manner of protection and promotion of these rights, as well as other issues related to the rights, obligations and responsibilities of patients.

Article 5

The use of healthcare, in accordance with this law, is based on the following principles:

- the patient's right to the greatest objective possible preservation and protection of his health by treatment and disease prevention measures,

- respect for human dignity,

- respect for the patient's physical and mental integrity and personal safety,

- respect for the protection of the patient's personality, including respect for his privacy, worldview, and moral and religious beliefs.

Article 6, paragraph (1), items 4 and 5 and paragraph (2)

This law and regulations enacted pursuant to this law guarantee to each patient

The following rights:

- free choice,

- self-determination and consent, including the protection of the rights of the patient who is not able to give consent,

The patient exercises the rights referred to in paragraph 1 of this Article on the basis of modern medical doctrine, professional standards and norms, and in accordance with the possibilities of the health system in the Federation and provided that it fulfils his obligations in advance and responsibilities established by this law.

The right to information

Article 8

Every patient has the right to all kinds of information about their health, their rights and obligations and how they use them.

Every patient has the right to information about health services that can be provided to him/her in a healthcare institution or private practice.

Right to free choice

Article 16

Every patient has the right to choose freely a doctor of medicine, i.e. a dentist in accordance with the territorial organization of health care.

As an exception to paragraph 1 of this Article, the doctor of medicine, i.e., the dentist chosen by the patient, may, provided that it is not an emergency medical care, refuse the patient's choice, and only in special cases when:

- *treatment would be less successful or impossible,*
- *the selection is not in accordance with the law,*
- *there is a loss of trust between the doctor or the dentist and the patient.*

In the cases referred to in paragraph 2 of this Article, the doctor or dentist is obliged to explain the reason for this refusal and inform the director of the healthcare institution or the holder of the approval for private practice where he is employed.

Every patient has the right to choose freely the proposed medical procedures and measures, in accordance with the law, based on appropriate information on possible risks and consequences for the patient's health.

The right to self-determination and consent

Article 17

The patient has the right to decide freely on everything concerning his life and health, except in cases where it directly endangers the life and health of others.

The right referred to in paragraph 1 of this Article does not imply euthanasia.

As a rule, no medical measure may be taken against the patient's consent.

A medical measure against the will of the patient, i.e. the parent, guardian or legal representative of an incapacitated patient, may be taken only in exceptional cases determined by law and in accordance with medical ethics.

A medical measure against the will of the patient, i.e. parents, guardians or legal representative of an incapacitated patient, may be taken in the conduct of physical examination and other actions for the purposes of criminal proceedings, i.e. mandatory psychiatric expert examination in case of suspicion that the accountability of the suspect or accused for a criminal offense has been excluded or reduced, in accordance with the regulations on criminal procedure of the Federation of Bosnia and Herzegovina.

Article 19

The patient has the right to refuse the proposed medical measure, except in the case when it saves or maintains his life or by not taking it would endanger the life or health of other people.

The competent healthcare professional is obliged to point out to the patient the consequences of his decision to reject the proposed medical measure and to inform the patient about it, request a written statement that is kept in the medical records of the treatment. If the patient refuses to give a written statement, an official note will be made.

In the medical documentation, the competent health professional enters the data on the patient's consent to the proposed medical measure, as well as the refusal of that measure.

The patient can withdraw his statement of refusal of the medical measure at any time, without suffering restrictions on his rights.

Patient's consent form or consent to the proposed medical measure, and the form of the statement on the rejection of a particular medical measure in the rule book is prescribed by the Federal Minister of Health ("the Federal Minister").

Right to personal dignity

Article 30

In all circumstances of providing and using health care, every patient has the right to protection of one's dignity and physical and mental integrity, in addition to respect for one's personality, intimacy, worldview, moral and religious beliefs.

Healthcare professionals should treat patients with kindness, respecting theirs personal dignity.

20. The **Law on Healthcare** (*Official Gazette of the Federation of BiH*, 46/10 and 75/13).

Article 12

On the territory of the Federation, social care for health, is achieved under equal conditions by providing healthcare to the population of the Federation, as well as groups of the population exposed to increased risk of disease, by providing healthcare to persons in connection with prevention, control, early detection and the treatment of diseases of greater socio-medical significance, as well as healthcare for the socially vulnerable population.

The healthcare referred to in paragraph 1 of this Article includes:

- healthcare for women in connection with family planning, as well as during pregnancy, childbirth and maternity after childbirth, regardless of the status of women's health insurance, in accordance with the regulations on health insurance;

Article 34

In the healthcare activity at the primary level of health care, children's healthcare is performed by a paediatric specialist. Women's healthcare activities related to pregnancy, childbirth, motherhood, family planning, early detection of malignant diseases and

treatment of sexually transmitted and other diseases are performed by a gynaecology specialist and midwife. Mental healthcare is provided by a psychiatry specialist and health associates with a university degree.

21. The **Law on Medical Activity** *(Official Gazette of the FBiH, 56/13) as relevant* reads:

Article 6

Medical activity is organized in a way to ensure affordable, fair, comprehensive, good quality, continuous and effective healthcare in accordance with the territorial structure of healthcare and the limits of material possibilities of the healthcare system.

Article 8

Medical activity is organized and carried out in healthcare institutions, private practice, in the community, as well as in social welfare institutions or institutions for execution of criminal sanctions.

22. The **Law on Nursing and Midwifery** *(Official Gazette of the FBiH, 43/13*) as relevant reads:

Article 1

This law regulates the activity of nurses-technicians (hereinafter: nurses) and nurses of midwives (hereinafter: midwives), the manner of performing and organizing activities, the standard of education and conditions for performing the activities of nurses and midwives, rights, obligations and responsibilities of nurses and midwives, and control of safety and quality of work of nurses and midwives in the Federation of Bosnia and Herzegovina (hereinafter: the Federation).

The activity of nurses and midwives is an integral part of the healthcare activity of interest to the Federation, and is performed under the conditions and in the manner prescribed by this Law and other regulations in the field of healthcare.

Article 6 para. (2), (5) and (6)

The activity of midwifery is related to the implementation of midwifery care.

Midwifery care includes all procedures, knowledge and skills for the protection of the health of females before, during pregnancy, childbirth and in postpartum period.

Midwifery care involves the healthcare of females before, during pregnancy, in childbirth and in the postpartum period.

Article 8

Healthcare and midwifery care are an integral part of the healthcare system and are performed in accordance with the regulations on healthcare, regulations on healthcare insurance, as well as the provisions of this law.

Article 9

Healthcare and midwifery care are public activities, and are subject to control of whether education and quality standards are met.

Article 13, paragraph (2)

Midwifery care is organized and carried out in healthcare institutions, private practices and communities.

Article 33

A nurse or midwife has the right to perform a private practice in accordance with the provisions of healthcare regulations.

23. The **Rulebook on Work, Internal Organization, Salaries and Remunerations of Workers and Systematization of Jobs of the Public Institution for Healthcare of Women and Maternity of the Sarajevo Canton** (taken over from the Institute's website www.zzzm.ba) as relevant reads:

Article 79, paragraph (1), item a) and paragraph 5, item a)

(Services within the locality)

(1) The internal organization consists of medical services within locality, systematized by job relatedness, as follows:

a) Perinatology service; (...)

(5) Within the Medical Services, internal organizational units, counselling units, departments and doctor's Institutes:

a) The perinatology service consists of:

1) Counselling for the protection of pregnant women, women that gave birth, and mothers,

(...)

7) Delivery at home (impossibility of delivery in delivery rooms).

VI. Admissibility

24. 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 court in Bosnia and Herzegovina.

25. Pursuant to Article 18(1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective legal remedies available under law against a judgment/decision challenged by the appeal have been exhausted and if the appeal

has been 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 had been served on him/her.

26. The Constitutional Court points out that, pursuant to Article 18 (2) of the Rules of the Constitutional Court, it may exceptionally consider an appeal even when there is no decision of the competent court if the appeal indicates serious violations of rights and fundamental freedoms protected by the Constitution or international instruments.

27. In the present case, the appellant, essentially, does not contest the specific decisions of the competent court or administrative body. However, she claims that the healthcare institutions did not comply with her request that healthcare workers from the healthcare system be engaged in childbirth at home. They are thus violating her right to privacy under Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the right to an effective remedy under Article 13 of the European Convention and the right under Article 1 of Protocol No. 12 to the European Convention.

28. In considering the appellant's allegations, the Constitutional Court first recalls that the European Court has concluded in a number of its decisions that issues related to childbirth, including the choice of place of birth, are fundamentally related to a woman's private life and fall within that notion under Article 8 of the European Convention (see, *inter alia*, European Court of Human Rights, *Ternovszky,* cited above, § 22; *Dubskái Krejzová,* cited above, § 163; and *Pojatina v. Croatia*, Application no. 18568/12, decision of 4 October 2018, paragraph 44). Bearing in mind the stated views, the Constitutional Court considers that they can be fully applied in the circumstances of a particular case. Accordingly, the Constitutional Court finds that the appeal raises issues of the possibility of a serious violation of the rights under the Constitution of Bosnia and Herzegovina and the European Convention, which is why the appeal is admissible within the meaning of Article 18 (2) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements of Article 18 (3) and (4) of the Rules of the Constitutional Court, as there is no formal reason why the appeal is not admissible, nor is it obviously (*prima facie*) unfounded.

29. Having regard to the provisions of Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 18 (2), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court found that the appeal in this part met the conditions of admissibility.

VII. Merits

30. The appellant considers that there was a violation of her right to privacy under Article II (3) f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the right to an effective remedy under Article 13 of the European Convention and the right to non-discrimination under Article II (4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention. The violation occurred because it was impossible to organize the assistance of healthcare

workers from healthcare system during childbirth at home. It also follows from the allegations of the appeal that the appellant considers there has been a violation of her right to non-discrimination under Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in relation to the right to private life.

Right to privacy

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

All persons in the territory of Bosnia and Herzegovina enjoy human rights and fundamental rights freedoms referred to in this Article, paragraph 2, which includes:

f) The right to private and family life, home and correspondence

32. Article 8 of the European Convention as relevant reads:

1. Everyone has the right to respect for his private and family life, his home and correspondence.

2. Public authorities may not interfere with the exercise of this right unless they do so in accordance with the law and necessary in a democratic society in the interests of the national security, public safety or economic well-being of the country, for the purpose of prevention disorder or crime, to protect health or morals, or to protect rights and freedom of others.

33. The Constitutional Court emphasizes that the primary purpose of Article 8 of the European Convention is the protection of individuals from arbitrary interference by the authorities with their rights guaranteed by Article 8 of the European Convention (see European Court, *Kroon v. The Netherlands,* judgment of 27 October 1994, Series A no. C, paragraph 31). Article 8 of the European Convention protects the right of the individual to respect for his/her private and family life and provides that public authorities will not interfere with the exercise of this right, except in cases referred to in paragraph 2 of that Article. In doing so, the Constitutional Court points out that the European Court in the cases of *Ternovszky v. Hungary, Dubská and Krejzová v. the Czech Republic and Pojatin v. Croatia* (cited above) considered similar legal issues raised in a particular case. In fact, they raised the issues of possibility of organizing the assistance of healthcare workers from the healthcare system during home birth. It pointed out that although Article 8 of the European Convention cannot be interpreted as granting the right to give birth at home as such, the fact that in reality it is impossible to assist women when giving birth in a private house fell within the scope of their right to respect for their private life and in accordance with Article 8 of the European Convention. Therefore, the Constitutional Court, starting from the standards that are established in the said cases, shall consider the appellant's appellate allegations in the light of these standards established in the case law of the European Court of Human Rights.

34. Bearing in mind that the case law of the European Court gives rise to the fact that the circumstances of giving birth constitute undeniable part of a person's private life, the Constitutional Court, in this particular case, shall determine whether the legal provisions (which do not prescribe the possibility of childbirth assistance by healthcare workers from healthcare system in the Sarajevo Canton, which has jurisdiction in this area of healthcare), constitute "interference" by public authorities with the right to privacy of the appellant. In this regard, the Constitutional Court points out that in the decision *Dubská and Krejzová v. Czech Republic,* the European Court stated that the issue at dispute in the present case involved "interference with the applicants' right to use the assistance of midwives in childbirth at home due to the threat of sanctions for midwives that were prevented from assisting the applicants by force of law "and that" in in any event, as the Court has already held, the applicable principles relating to justification under Article 8 (2) of the European Convention are very similar regardless of adopted analytical approaches" (*see Dubská and Krejzová v. the Czech Republic*, cited above, § 165). Also, the Constitutional Court points out that the European Court in decision *Kosaitė-Čypienė and Others v. Lithuania* in which, as in the present case, considered the issue of the impossibility of organizing assistance of healthcare workers from the healthcare system during childbirth at home, called for conclusions from the *Dubská and Krejzová* cases and the *Pojatina* case. It accepted that by refusing assistance of healthcare workers from the healthcare system there has been interference with the right to privacy (see, European Court*, Kosaitė-Čypienė and Others v. Lithuania*, application no. 69489/12, decision of 4 June 2019, paras 90 and 91). In accordance with that, the Constitutional Court also considers that in the specific case that the interference with the appellant's right to respect for private life occurred due to the inability to organize the assistance of healthcare workers from the Sarajevo Canton healthcare system.

35. The Constitutional Court, further, stresses that in order to determine whether the interference represents a violation of Article 8 of the European Convention, it needs to be examined whether it was justified based on second paragraph of that provision. In addition, it needs to be examined whether the interference was "in accordance with law" and "necessary in a democratic society" to achieve one of "legitimate aims" listed in Article 8 of the European Convention.

a) Was the interference "in accordance with law"?

36. The Constitutional Court recalls that interference must have some basis in national law. This condition of legality, in accordance with the autonomous meaning of the notion of legality in the European Convention, consists of several elements: (a) the interference must be based on national or international law; (b) the law in question must be adequately accessible so that the individual is adequately informed of the circumstances of the law that may apply to the case; and (c) the law must be formulated with appropriate precision and clarity to allow the individual to adjust his or her actions according to it

(see European Court, *Sunday Times v. the United Kingdom*, judgment of 26 April 1979, Series A no. 30, § 49).

37. In the present case, it is not disputed that the national legal provisions, which prescribe the legal basis for the impugned interference, were available to the appellant. Therefore, the Constitutional Court shall determine whether the above provisions were based on national law and whether they were foreseeable for the appellant.

38. In this connection, the Constitutional Court first notes that the relevant legal provisions of the Law on Healthcare and the Law on Patients' Rights do not explicitly regulate home birth. At the same time, however, the Constitutional Court notes that giving birth at home as such is not prohibited in the national legal system. Namely, there are no provisions in national law that criminalize the actions of women who choose to give birth in this way.

39. On the other hand, with regard to the question of whether healthcare professionals are allowed to assist in childbirth at home, which is essentially based on the appellant's allegations, the Constitutional Court first notes that it follows from the provisions of the Law on Patients' Rights, the Law on HealthCare, the Law on Medical Activity, and the Law on Nursing and Midwifery that qualified medical care for pregnant women during childbirth could be provided only in healthcare institutions organized at the primary, secondary and tertiary level and which are of inpatient type, regardless of whether they are private or public healthcare facilities. In doing so, the Constitutional Court notes that it is indisputable that patients, in accordance with Article 6 (1) of the Law on Patients' Rights, have, *inter alia*, the right to free choice and the right to self-determination and consent, but it is obvious that these rights are not unlimited. This is indicated by the content of Article 6, paragraph 2 of the Law on the Rights of Patients, which stipulates that these rights are exercised based on modern medical doctrine, professional standards and norms, and in accordance with the capabilities of the healthcare system. Therefore, it follows from the above that the question of the extent to which and in what way patients will be able to enjoy the prescribed rights also depends on relevant legal provisions that should explicitly prescribe medical measures and procedures, and the ability of healthcare facilities to ensure that patients exercise these rights. In addition, the Constitutional Court notes that the provisions of Articles 17 and 19 of the Law on Patients' Rights specify the content of the right to free choice and the right to self-determination. It does not follow from the content of these provisions that patients must be provided with medical procedures and measures that are not determined by law. Finally, the Constitutional Court also notes that it does not follow from the above-mentioned regulations that there are provisions that explicitly prohibit midwives and doctors from practicing their profession outside an authorized healthcare institution, i.e. in patients' homes. However, the appellant in the specific case did not request the engagement of healthcare professionals from private practice, so the Constitutional Court will not deal

with this issue in the specific case. Therefore, the Constitutional Court notes that there are no legal provisions explicitly prescribing the possibility and obligation for healthcare workers in public healthcare institutions to assist in planned home births, as a way of exercising the right to free choice and the right to self-determination as the appellant seeks to portray.

40. Also, with regard to the appellant's allegations that the provision of Article 79(5) (a) and (7) of the Rulebook on the work of the Institute stipulating that the Perinatology Service of the Institute has a "department for home birth" (in case of impossibility of childbirth in delivery rooms)" provides a sufficient legal framework for organizing home births, the Constitutional Court notes that the said provision does not in itself indicate the possibility of home birth being organized at the request of mother. Namely, the Constitutional Court notes that in response to the appeal, the Institute stated that this institution provides healthcare services to pregnant women up to the 36th week of pregnancy. In addition, it stated that the said provision implies that the Institute will provide care and support in all cases when childbirth suddenly occurs outside the hospital by organising visit to the mother and the new-born by the visiting nurse service of the Institute. In the circumstances of the present case, the Constitutional Court has no reason to doubt the accuracy of the interpretation of the said provision on the competencies and healthcare services provided by the said healthcare institution. This is why it is not possible to determine that the said provision provides a clear institutional framework for enabling home birth in the presence of a midwife.

41. In view of the above, the Constitutional Court finds that the legal system in the Sarajevo Canton does not allow for the engagement of public healthcare workers, including midwives, gynaecologists and paediatricians, in providing professional assistance during home births. This fact was also confirmed through letters from the Clinical Centre, the Institute and the Healthcare Centre that the appellant received while she was still pregnant. This also follows from the response to the appeal by the Ministry and the General Hospital. In view of the above, the Constitutional Court considers that the impugned interference was foreseeable for the appellant and was in accordance with the law.

c) Did the interference pursue a legitimate aim?

42. The Constitutional Court further notes that it is clear that the policy of encouraging hospital births, which is implemented through the inability to hire healthcare workers to assist in deliveries outside hospitals, as reflected in the relevant legislation, is designed to protect the health and safety of mothers and children during and after childbirth (compare with *Dubská and Krejzová*, cited above, § 172). It can therefore be said that the interference in the present case pursued the legitimate aim of protecting the health and rights of others within the meaning of Article 8 § 2 of the Convention (ibid., § 173).

d) Was the interference necessary in a democratic society?

43. With regard to the applicable standards relating to the consideration of the necessity of interfering with the right to privacy, the Constitutional Court recalls that the European Court has pointed out that interference will be considered "necessary in a democratic society" to achieve a legitimate aim if it satisfies "a pressing social need" . In particular, if it is proportionate to the legitimate aim pursued and if the reasons put forward by the national authorities to justify it are 'relevant and sufficient' (see, *mutatis mutandis*, *Fernández Martinez v. Spain* [GC], no. 56030/07, paragraph 124, ECtHR 2014 (excerpts)). In this regard, the European Court reiterates the fundamental supporting role of the convention system and recognizes that national authorities have a direct democratic capacity when it comes to the protection of human rights. Moreover, due to their direct and continuous contact with key actors in their countries, national authorities are, in principle, in a better position than an international tribunal to assess local needs and conditions (see, for example, *Maurice v. France* [GC], no. 11810 / 03, para 117, with further references, ECtHR 2005-IX). It is therefore primarily the responsibility of the national authorities to make an initial assessment of where a fair balance lies in assessing the need for interference that is in the public interest in comparison with the rights of individuals under Article 8 of the European Convention. Accordingly, by enacting legislation to strike a balance between competing interests, States must, in principle, be allowed to determine the means they deem most appropriate to achieve the objective of reconciling those interests (see *Odièvre,* paragraph 49; *Van Der Heijden v. The Netherlands*, cited above). [GC], No. 42857/05, paragraph 56, 3 April 2012). While it is for the national authorities to make an initial assessment, the final assessment of whether interference in a particular case is "necessary", as the term is to be understood within the meaning of Article 8 of the Convention, remains a matter to be reviewed by the Court [GC], nos. 30562/04 and 30566/04, paragraph 101, ECtHR 2008; *Van Der Heijden*, cited above, § 57).

44. The Constitutional Court also recalls that the European Court has pointed out in its case law that the free margin of appreciation is relatively narrow when the law is crucial for the individual to effectively enjoy personal or key Convention rights. When it comes to a particularly significant aspect of an individual's existence or identity, the margin of appreciation given to the state will be limited. When there is no consensus among the Council of Europe member states, either on the relative importance of the interest in question or the best way to protect it, especially when the case raises sensitive moral or ethical issues, the margin of appreciation will be wider (see *Van der Heijden*, cited above) paragraphs 55-60, with further references, and *Parrillo v. Italy* [GC], No. 46470/11, paragraph 169, with further references, ECtHR 2015). Wide margin of appreciation is, as a rule, provided by the European Convention to the state when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, public authorities are in principle in a much

better position to decide what is in the public interest for social or economic reasons, and the European Court will in principle respect the legislator's decision if it is not "obviously without reasonable foundations" (see *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52 with further references, ECtHR 2006-VI; *Shelley v. the United Kingdom* (decisions), no. 23800/06 , 4 January 2008).

45. In view of the above, the Constitutional Court points out that in the present case it is necessary to determine whether, due to the fact that it was not possible for the appellant to be assisted by healthcare workers from the national healthcare system during the desired home birth, a fair balance was struck between the appellant's right to respect for her private life under Article 8 of the European Convention on the one hand, and the State's interest in protecting the health and safety of mothers and children during and after childbirth, on the other.

46. As regards the legislation in force which, in reality, does not allow women to be assisted by healthcare workers from the healthcare system at home, the Constitutional Court recalls that in the *Dubská and Krejzová* case, the European Court found that a free margin of appreciation is given to the national authorities in that case had to be extended without being unlimited (*Dubská and Krejzová*, paragraphs 182-184). In the light of these considerations, the Court has pointed out that it is necessary to determine whether the interference constitutes a proportionate balance of the competing interests involved, taking into account free margin of appreciation. In cases arising from individual claims, the task of the European Court of Human Rights is to review the relevant legislation either in practice or in theory; it must, as far as possible, confine itself, without disregarding the general context, to the examination of the issues referred in the case before it. Consequently, it is not the task of these courts to substitute their own position for that of the competent national authorities in determining the most appropriate policy for regulating issues relating to the circumstances of childbirth. Instead, the court shall decide on the compatibility of State interference in the present case with Article 8 on the basis of the fair balance examination described above (see *Dubská and Krejzová*, paragraph 184).

47. Given the above views, the Constitutional Court notes that the appellant wished to give birth at home with the assistance of a midwife provided by healthcare institutions of the Sarajevo Canton, and with medical assistance in case of emergency. As a result of the applicable legal provisions, the appellant was brought into a situation that had a serious impact on her freedom of choice: she had to give birth either in a hospital or, if she wished to give birth at home, without the assistance of a midwife and possibly medical assistance with the associated risks for her and her child. In doing so, taking into account the appellant's allegations that she filed the appeal in the 40th week of pregnancy, meaning at the very end of the pregnancy, in the circumstances of the specific case, the Constitutional Court does not have information on how the appellant's birth was organized.

48. The Constitutional Court further notes that the appellant considers that childbirth in a hospital setting jeopardizes the life and health of the appellant and her child due to the current epidemiological situation caused by the emergence and spread of coronavirus, and also refers to statistical indicators of mortality caused by bacterial sepsis. In this regard, the Constitutional Court notes that the General Hospital stated in response to the appeal that it is adequately equipped with both equipment and professional staff. In addition, it stated that childbirth in hospital conditions is the best and safest birth for mother and child, because the situation is quite real that in performing childbirth at home there might be complications in the form of the need for emergency surgery and delivery by caesarean section or other unforeseen situation. In addition, the Clinical Centre pointed out that it fully complies with all orders and recommendations issued by the World Health Organization, the competent crisis headquarters adopted in order to prevent the spread of coronavirus. In accordance with them, it implements enhanced measures of safety and security, both among healthcare professionals and other patients who are undergoing treatments, and that in the midst of the epidemic in that institution, dozens of women gave birth without any harmful repercussion, of which special care is taken. In connection with the above, the Constitutional Court notes that in the allegations of the appeal there is nothing from which it would really follow that the appellant's life or the life of her child is more endangered in case of childbirth in hospital in the Sarajevo Canton, especially since there is nothing to confirm these appellant's claims. The Constitutional Court particularly notes that the publication of the Public Healthcare Institute of the Federation of Bosnia and Herzegovina, which allegedly reported bacterial sepsis as the fifth cause of death, does not indicate that this risk existed in the circumstances of the specific case and after five years have passed (since issuance of the Publication in which the stated data were presented). It notes that especially there is no indication that the risk was greater than the possibility of developing complications during childbirth at home. In addition, when it comes to the risk of childbirth in hospitals, the Constitutional Court points out that from the case law of the European Court presented in the decisions of *Dubska and Krejzova* v. *Czech Republic, Pojatin v. Croatia* and *Kosaitė-Čypienė and others v. Lithuania*, it follows that the risk for mothers and new-borns, was higher in the case of home births than in the case of births in maternity hospitals that had all staff and adequate equipment from a technical and material perspective. Also, even if the pregnancy continued without any complications and could therefore be considered a "low-risk" pregnancy, unexpected difficulties could arise during childbirth, which would require urgent specialist medical intervention, such as a caesarean section or special neonatal care. Moreover, the Court noted that the maternity ward could provide all the necessary emergency medical care, while this would not be possible in the case of home births, even when a midwife was present (see *Dubská and Krejzová*, cited above, § 186).

49. Furthermore, the Constitutional Court notes that the appellant had the opportunity to decide to give birth in any maternity hospital in the Sarajevo Canton, i.e. in the

General Hospital or the Clinical Centre. However, the appellant pointed out that she had a very bad experience with previous births in healthcare institutions, followed by violation of personal dignity and inability to choose a doctor. She also pointed out that pregnancy and childbirth are the most intimate aspects of women's life and that childbirth in healthcare institutions imposes exposing a woman's body and her deepest feelings to other people. In this connection, the Constitutional Court points out that it is not for the Constitutional Court to dispute these appellant's allegations and concerns. Also, the Constitutional Court points out that these concerns cannot be ignored in assessing whether the authorities have struck a fair balance between competing interests. However, the Constitutional Court notes that in the present case the appellant did not submit any evidence to support the allegations concerning the manner and conditions of childbirth in the healthcare institutions in the Sarajevo Canton (see *Kosaitė-Čypienė*, § 105, and the opposite view in *Pojatina,* §§ 81 and 82).

50. Taking into account the foregoing considerations, the Constitutional Court considers that by failing to enact legislation that would allow women to be assisted by healthcare workers in childbirth at home, public authorities have not exceeded their wide margin of appreciation in this matter. The Constitutional Court reiterates that, although the above-mentioned planned home births could be allowed, the public authority, i.e. the legislative bodies are not obliged to do so on the basis of the European Convention, as the appellant unreasonably considers. In particular, as the European Court has pointed out, there is still a great deal of inequality between the legal systems of the Contracting States on this issue (*see Dubská and Krejzová*, cited above, § 183), and it is necessary to respect the gradual development of law in this field. Accordingly, having regard to the particular circumstances of the present case, the Constitutional Court considers that the interference with the appellant's right to respect for her private life was not disproportionate.

51. Therefore, the Constitutional Court concludes that the impugned decisions of ordinary courts in the present case did not violate the appellant's right under Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

2. Right to an effective remedy

52. The appellant considers that there was a violation of her right to an effective remedy under Article 13 of the European Convention in relation to the right to privacy under Article II (3 (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention because the issue of professional assistance was not regulated. Also, the healthcare institutions responded to the appellant's request in the form of "notifications" and "replies" without the General Hospital giving any response to the request.

53. The Constitutional Court recalls that the European Court, in deciding on similar allegations in the case of *Pojatina v. Croatia*, pointed out that Article 13 of the European Convention does not go so far as to guarantee a remedy enabling a Contracting State's law to be challenged before a national authority on the grounds that the said law is contrary to the provisions of the European Convention (see, inter alia, *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 94, ECtHR 2013 (excerpts), and *Roche v. the United Kingdom* [GC], no. 3) 32555/96, paragraph 137, ECtHR 2005-X). In this connection, the Constitutional Court notes that the appellant, when she claims that the issue of professional assistance has not been regulated, essentially challenges the legal provisions. In addition, the Constitutional Court notes that Article 13 of the European Convention does not guarantee that public authorities, in this case healthcare institutions, have to respond to the parties' requests in a certain form or within certain deadlines. In view of the above, the Constitutional Court considers that the appellant's allegations referring to the provision of Article 13 of the European Convention regarding the right to private life are obviously contrary to the stated views, which is why these appellant's allegations are unfounded.

3. Non-discrimination

54. Finally, the appellant claims that she is discriminated against in the enjoyment of her privacy rights due to the violation of Article 8 of the European Convention, and given the fact that she could not use professional assistance during home births, unlike those who want to give birth in a healthcare institution. It follows that in addition to the violation of Article II (4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol 12 to the European Convention, the appellant also alleges a violation of the right to non-discrimination under Article 14 of the European Convention in conjunction with the right to private life under Article (II) (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

55. In this connection, the Constitutional Court notes that Article 14 of the Convention prohibits discrimination in respect of the enjoyment of "the rights and freedoms recognized by the European Convention". Article 1 of the Protocol No. 12 to the European Convention extends the scope of protection to "all rights provided by law" (see European Court, *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, 22 December 2009, § 54). The Constitutional Court considers the previous conclusion that the appellant's right to privacy under Article 8 of the European Convention has not been violated. This also contains the conclusion that the relevant legal provisions do not prescribe the possibility of hiring healthcare workers during home birth. Given a wide margin of appreciation, which the public authority has in a particular case, the Constitutional Court considers that in the circumstances of the present case there is nothing that leads to the conclusion that the appellant, in accordance with the above provisions of the European Convention, could have been discriminated

against in exercising her right to privacy compared to persons who want to give birth in a healthcare institution.

56. Accordingly, the Constitutional Court considers as unfounded the appellant's reference to the violation of the right under Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in relation to the right to private life from Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, and Article 1 of Protocol 12 to the European Convention.

VIII. Conclusion

57. The Constitutional Court concludes that there has been no violation of the appellant's right to privacy under Article (II) (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention since the healthcare facilities in Sarajevo Canton did not make it possible for the healthcare workers from the healthcare system to assist her in childbirth at home. There has been no violation found as the interference with the appellant's right to privacy was based on law, and it pursued the legitimate aim of protecting the health and safety of mothers and children during and after childbirth. In addition, the public authorities did not exceed their wide margin of appreciation.

58. The Constitutional Court also concludes that there has been no violation of the right to an effective remedy under Article 13 of the European Convention in relation to the right to privacy under Article II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. This is so as Article 13 of the European Convention does not guarantee a remedy enabling a Contracting State's law to be challenged before a national authority on the ground that it is contrary to the provisions of the European Convention. In addition, it does not follow from the content of that article that medical institutions had to respond to the appellant in a certain form.

59. Finally, the Constitutional Court concludes that in the present case there has been no violation of the right to prohibition of discrimination under Article II (4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in relation to the right to privacy, and Article 1 of Protocol No. 12 to the European Convention. This is so as in the circumstances of the present case there is nothing to suggest that the appellant, in accordance with the above provisions of the European Convention and the relevant regulations, may have been discriminated against in relation to the exercise of the right to privacy concerning persons wishing to give birth in a healthcare facility.

60. Pursuant to Article 59 (1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

61. In view of the Constitutional Court's decision in the present case, it is not necessary to consider separately the appellant's request for an interim measure.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP-4706/20

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Alem Ibišević from Sarajevo, represented by Mr. Denis Gačanin, a lawyer practicing in Sarajevo, filed for excessive length of the proceedings upon his appeal against a Ruling wherein the detention imposed on the appellant was extended.

Decision of 19 May 2021

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Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), the Constitutional Court of Bosnia and Herzegovina, sitting as Grand Chamber, in the following composition:

Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice- President

Ms. Valerija Galić,

Mr. Miodrag Simović, and

Ms. Seada Palavrić

Having deliberated on the appeal of having considered the appeal of **Mr. Alem Ibišević**, in the case no. **AP-4706/20**, at the session held on 19 May 2021, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. Alem Ibišević is hereby granted.

A violation of the right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established for excessive length of the proceedings – deciding on the appeal against the ruling on the extension of detention of the Municipal Court of Sarajevo, no. 65 0 K 823957 20 Kv8 of 6 November 2020, which the Cantonal Court decided in ruling no. 65 0 K 823957 20 Kž 4 of 29 December 2020.

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 28 December 2020, Mr. Alem Ibišević (the "appellant") from Sarajevo, represented by Mr. Denis Gačanin, a lawyer practicing in Sarajevo, filed an appeal with the Constitutional Court of Bosnia and Herzegovina (the "Constitutional Court") for excessive length of the proceedings upon his appeal against a ruling wherein the detention imposed on the appellant was extended. The appellant also requested the Constitutional Court to impose an interim measure as specified in the appeal. At the request of the Constitutional Court of 30 December 2020, the appellant supplemented his appeal on 31 December 2020.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 11 January 2021 and 19 April 2021, the Municipal Court of Sarajevo (the "Municipal Court"), the Public Prosecutor's Office of the Canton of Sarajevo (the "Cantonal Prosecutor's Office") and Cantonal Court of Sarajevo (the "Cantonal Court") were requested, respectively, to submit responses to the appeal, whereupon they submitted their responses.

III. Facts

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

4. In ruling no. 65 0 K 823957 20 Kpp 16 of 13 August 2020, the Municipal Court (the judge in charge of the preliminary proceedings) ordered a one-month detention of the appellant (and 15 other suspected persons) in accordance with Article 146(1)(b) and (c) of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina (the "Criminal Procedure Code of the FBiH"). The detention was ordered as there was a grounded suspicion that he had committed 29 described acts constituting criminal offences of accepting gifts of other forms of benefits referred to in Article 380(1) of the Criminal Code of the Federation of Bosnia and Herzegovina (the "Criminal Code of the FBiH") and abuse of office or official authority referred to in Article 383(1) of the Criminal Code of the F BiH, in conjunction with Article 31 of the Criminal Code of the F BiH. Upon appeals filed by the suspected persons, the Panel of the Municipal Court issued ruling no. 65 0 K 823957 20 Kv on 28 August 2020, wherein it partially granted the appeals, quashed the ruling on the measure of detention and referred the case back for new decision. In the renewed proceedings, on 2 September 2020, the Municipal Court issued ruling no. 65 0 K 823957 20 Kpp 18, wherein it imposed a one-month detention on the appellant and other suspected persons, by giving the reasons for detention referred to in Article 146(1)(b) and (c) of the Criminal Procedure Code of the FBiH.

5. In ruling no. 65 0K 823957 20 Kv4 of 11 September 2020, the Municipal Court extended the detention imposed on the appellant and other suspected persons for two months. Upon appeals filed by defence counsels of the suspected persons against the mentioned ruling, the case-file was submitted to the Cantonal Court for decision. On 1 October 2020, the Cantonal Court issued a ruling wherein it dismissed as ill-founded the appeals of the defense counsels of the appellant and other suspected persons. It also partially granted the appeals of the defense counsels of two suspected persons, quashed the ruling concerning those suspected persons and referred that part of the case back to the first-instance court for new decision. On 6 October 2020, the Panel of the first-instance court issued ruling no. 65 0 K 823957 20 Kv wherein it extended the measure of detention imposed on those suspected persons.

As to the proceedings to issue the ruling of 6 November 2020

6. On 5 November 2020, the Cantonal Prosecutor's Office submitted request no. T09 0 KTK 0150025 20 to the Municipal Court, seeking a three-month extension of the detention imposed on the appellant and other suspected persons for the reasons referred to in Article 146(1)(b) and (c) of the Criminal Procedure Code of the FBiH and a measure of prohibition concerning one suspected person.

7. In ruling no. 65 0 K 823957 20 Kv8 of 6 November 2020, the Municipal Court extended the measure of detention imposed on the appellant (and 15 other suspected persons) for the additional three months. According to that ruling, the starting point to calculate the detention period was 6 November 2020, and could last until 6 February 2021 or until a further decision of the court (paragraph I of the enacting clause). It was noted in enacting clause that the appeal against that ruling did not stay the enforcement (paragraph II of the enacting clause). In an exhaustive ruling (309 pages), the court gave reasons for its decision. The ruling also contains an instruction related to the legal remedy: "An appeal against this ruling may be filed with the Cantonal Court through the Municipal Court within a time limit of three (3) days from the receipt of the ruling.".

8. On 13 November 2020, the appellant's defense counsel filed an appeal against the ruling on the extension of the detention, of 6 November 2020.

9. The Constitutional Court observes that it follows from the response to the appeal that the Cantonal Court, in ruling no. 65 0 K 823957 20 Kž 4 of 29 December 2020, decided on the appeals.

IV. Appeal

a) Allegations in the appeal

10. The appellant claims that his rights under Articles II(3)(e), (f) and (m) of the Constitution of Bosnia and Herzegovina, and Article 5, 6 and 13 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention") and Article 2 of Protocol No. 4 of the European Convention have been violated in the criminal proceedings conducted against him. The appellant alleges that on 6 November 2020, upon the Cantonal Prosecutor's Office's request for extension of detention and after a hearing, the Municipal Court issued ruling no. 65 0 K 823957 20 Kv 8, wherein the detention imposed on him was extended for the additional three months in accordance with Article 146(1)(b) and (c) of the Criminal Procedure Code of the F BiH, which can last until 6 February 2021 or until a decision of the court. He further alleges that on 13 November 2020, following the extension of the detention for the additional three months in accordance with the Municipal Court's ruling of 6 November 2020, he filed an appeal (within the prescribed time limit) with the Cantonal Court, but the Cantonal Court failed to decide on his appeal within the 45 days and that, therefore, he was still detained without having a binding ruling. Therefore, the appellant claims, that primarily his right to liberty and security of persons under Article 5(4) of the European Convention has been violated. He alleges that it is indisputable that he has had the right to have his detention examined and that the Criminal Procedure Code of the F BiH stipulates a legal remedy, more precisely, an appeal against the ruling of the Municipal Court. He further alleges that the effectiveness of the legal remedy has been brought into question, the reason being the failure of the Cantonal Court to decide on his appeal, although 45 days passed from the date he filed the appeal. In the appellant's opinion, such a long period within which a decision on legal remedy was not rendered could not be justified by any circumstance related to the complexity of the case or number of detainees in the case. He further claims that the mentioned fact has amounted to a situation in which his appeal against the first instance court's ruling on the extension of detention is devoid of effectiveness and, eventually, a violation of his right to an effective legal remedy under Article 13 of the European Convention, irrespective of when the Cantonal Court will render its decision on his appeal. The appellant alleges that the Cantonal Court's failure of act upon his appeal has also jeopardized the fairness of the proceedings guaranteed to the appellant under Article 6 of the European Convention. He proposes that the Constitutional Court should impose an interim measure to order the Municipal Court to release the appellant from detention for failure to act as mentioned above.

b) Response to the appeal

11. In its response, the Cantonal Court alleges that on 29 December 2020, having examined the appeals of the defence counsels of the suspected persons (including the appeal of the appellant's defence counsel), issued ruling no. 65 0 K 823957 20 Kž 4, wherein it upheld the ruling of the Municipal Court, no. 65 0 K 823957 20 Kv 8 of 6 November 2021. The Cantonal Court further alleges that the provisions of Article 325(3) of the Criminal Procedure Code of the F BiH stipulate that the second-instance court

shall decide in a single decision on all appeals against the same verdict, which includes the rulings as well. Given the aforementioned, the Cantonal Court observes that after all counsels and suspected persons receive the rulings on extension of detention, the first-instance court is to wait for the expiry of the deadline for filing appeal before it submits the case to the second-instance court for appellate proceedings. The Municipal Court did so as on 10 December 2020 it submitted the case with 15 appeals of the suspected persons' defence counsels the Cantonal Court for appellate proceedings. Having considered the allegations in the appeal, the Cantonal Court concluded that it had acted in accordance with the time limits prescribed by the law and objective capacity to work on this complex and extensive case of corruption. Bearing in mind the fact that the first-instance ruling contained 300 pages encompassing 17 persons suspected of 250 criminal acts constituting the elements of criminal offences the persons concerned were suspected of in this case, and that the period of time from 10 December 2020, when the case had been submitted to the Cantonal Court for decision on 15 appeals of the defence counsels of the suspected persons, to 29 December 2020, when the second-instance ruling had been rendered, the Cantonal Court had not violated the provisions of the Criminal Procedure Code of the F BiH. In addition, the appellant's and other suspected persons' constitutional rights have not been violated in these criminal proceedings.

12. The Municipal Court alleges that this case is a very complex and comprehensive one, encompassing 17 suspected persons, that the allegations relating to 250 committed acts constituting the elements of criminal offences were dealt with and that the period of time taken for work on this case following the issuance of the ruling on the extension of detention has not been in contravention of the provisions of the Criminal Procedure Code of the F BiH. In addition, it alleges that the constitutional rights of the appellant and other suspected persons have not been violated in these criminal proceedings. The Municipal Court further alleges that that last appeal of the defence counsels of 17 suspected persons in this case was received on 20 November 2020. It further alleges that on 8 December 2020, following the Cantonal Court's decision no. 65 0 K 823957 20 Kž 3 upon appeals, which was submitted to that court together with the case-file on 4 December 2020, it submitted the entire case-file to the Cantonal Court for decision. The Cantonal Court received the case-file and appeals on 10 December 2020.

13. The Cantonal Prosecutor's Office alleges that the case is extremely comprehensive and that it encompasses, upon request of the Cantonal Prosecutor's Office and, thus, contested ruling of the Municipal Court, 16 suspected persons and more that 260 criminals acts. The Cantonal Prosecutor's Office further alleges that in the meantime it received the Cantonal Court's ruling no. 65 0 K 823957 20 Kž of 29 December 2020, wherein it decided on appeals of 16 suspected persons against the ruling of the Municipal Court, of 6 November 2020.

V. Relevant Law

14. The **Criminal Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 35/03, 37/03 – Correction, 56/03 – Correction, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13 and 59/14).

The unofficial consolidated text of the provisions drafted by the Constitutional Court of BiH will be used for the purpose of this decision, reading as follows:

Section 6 Custody

Article 145(1) and (4)
General Provisions

(1) Custody may be ordered or extended only under the conditions prescribed by this Code and only if the same purpose cannot be achieved by another measure.

(4) The duration of custody must be reduced to the shortest necessary time. It is the duty of all authorities 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.

Article 149(3)
Duration of Investigative Custody.

(3) If the proceedings are ongoing for the criminal offense for which a prison sentence of ten (10) years or more may be pronounced, and if there are particularly important reasons, custody may be extended by the Panel of the Supreme Court of the Federation referred to in paragraph 2 of this Article following a reasoned motion of the prosecutor, for no longer than three (3) months. An appeal against the decision of the Panel shall be allowed but shall not stay the execution.

Article 335
General Deadline for Filing the Appeal

(1) An appeal shall be filed with the court that has issued the decision.

(2) Unless otherwise provided by this Code, an appeal against the decision shall be filed within three (3) days from the day the decision was delivered.

Article 337(1) and (3)
Deciding the Appeal against the First Instance Decision

(1) Unless otherwise provided by this Code, the panel of the appellate division of higher court shall decide an appeal against the decision rendered in the first instance. An appeal against a decision rendered by the Supreme Court as trial court shall be reviewed by the panel of the Appellate Division of the Supreme Court.

(3) When deciding an appeal, the court may, in its decision, reject the appeal as late or inadmissible, may refuse an appeal as unfounded or may allow an appeal and revise a decision or reverse a decision and, if necessary, refer the case for retrial.

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 18(1) of the Constitutional Court's Rules, the Court may examine an appeal only if all effective legal remedies which are 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.

17. The Constitutional Court, however, observes that according to Article 18(2) of the Rules of the Constitutional Court, exceptionally, the Constitutional Court may examine an appeal where 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.

18. In the present case, the appeal relates to the failure of the Cantonal Court to decide on the appeal against a ruling although 45 days passed after the appeal had been filed, as alleged by the appellant. In this connection, the first issue relates to the admissibility of the appeal for the purposes of meeting the formal requirements referred to in Article 18(3) of the Rules of the Constitutional Court. Given the facts in the present case, from which it follows that the reason for which the appeal has been filed is the failure of the Cantonal Court to render a decision upon the appellant's appeal, the Constitutional Court, taking into account the fact that that decisions which could be the subject-matter of challenge have not been rendered, holds that given the specific circumstances of the case, the appeal is admissible for the purposes of Article 18(2) of the Rules of the Constitutional Court.

19. Therefore, the Constitutional Court holds that the appeal meets the requirements referred to in Article 18 (3) and (4) of the Rules of the Constitutional Court as there is no formal requirement rendering the appeal inadmissible, nor is it manifestly (*prima facie*) ill-founded. In view of the provisions of Article VI (3)(b) of the Constitution of Bosnia and Herzegovina, Article 18(2), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court has found that the present appeal meets the admissibility requirements.

VII. Merits

20. The appellant claims that his rights under Article II(3)(e), (f) and (m) of the Constitution of Bosnia and Herzegovina, and Articles 5, 6 and 13 of the European Convention and Article 2 of Protocol No. 4 to the European Convention have been violated. However, it follows from the contents of the appeal that the appellant also complains of the violation of the right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(4) of the European Convention with regard to deciding on his appeal against the ruling on the extension of detention. The appellant is of the opinion that Article 13 of the European Convention, in conjunction with Article 5(4) of the European Convention, has been violated to his detriment. The Constitutional Court will therefore examine the appeal in this context.

As to the right to liberty and security of person

21. Article II(3)(d) 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:

(...)

d) The rights to liberty and security of person.

22. Article 5 of the European Convention, so far as relevant, reads:

(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.

23. At the outset, the Constitutional Court recalls that the right to liberty and security of person is one of the most important human rights and that Article 5 of the European Convention stipulates that no one shall be arbitrarily deprived of his liberty. The arbitrariness in deprivation of liberty is examined with regard, first of all, to the compliance with the procedural requirements under the Criminal Procedure Code of the F BiH (which is applied in the present case), thus, national law which must be harmonized with the standards under the European Convention.

24. Next, the Constitutional Court recalls that Article 5(4) of the European Convention, in guaranteeing to persons arrested or detained a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (ECtHR, *Baranowski v. Poland* (Grand Chamber), no. 28358/95, ECHR 2000, *Petkov and Profirov v. Bulgaria*, nos. 50027/08 and 50781/09, paragraph 66, of 24 June 2014). The existence of the remedy

required by Article 5 § 4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see ECtHR, *Vachev v. Bulgaria*, no. 42987/98, paragraph 71, ECHR 2004-VIII and *Margaretić v. Croatia*, no. 16115/13, paragraph 113, of 5 June 2014). The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy (see *Čonka v. Belgium*, no. 51564/99, paragraphs 46 and 55, ECHR 2002-I and *Stephens v. Malta* (No. 2) 33740/06, paragraph 83, of 21 April 2009).

25. Furthermore, Article 5(4) enshrines, as does Article 6(1), a right of access to a court, which can only be subject to reasonable limitations that do not impair its very essence (see ECtHR, S*hishkov v. Bulgaria*, no. 38822/97, paragraphs 82-90,, ECHR 2003-I) and *Bochev v. Bulgaria*, no. 73481/01, paragraph 70, of 13 November 2008). Article 5(4) does not compel the Contracting States to set up a second level of jurisdiction for the examination of applications for release from detention. Nevertheless, a State which institutes such a system must in principle accord detainees the same guarantees on appeal as at first instance (see ECtHR, *Peša v. Croatia*, no. 40523/08, paragraph 126, of 8 April 2010).

26. The Constitutional Court observes that it follows from the submitted case file in the present case that the appellant raises the issue of the period within which the appeal was not decided. It started on 13 November 2020, when the appeal was filed with the Cantonal Court, and lasted 45 days until the date when the appeal was filed. This does not meet the standard of speediness for the purposes of Article 5(4) of the European Convention. In this connection, the Constitutional Court notes that it follows from the response to the appeal that the appeal/appeals was/were decided on 29 December 2020, thus, 46 days after the appellant filed the appeal with the Cantonal Court. The Constitutional Court notes that that period in itself is not insignificant and will, therefore, examine these allegations in terms of speediness in deciding on appeals in the detention cases.

27. The Constitutional Court reminds of its hitherto case law related to the similar issues. In case no. *AP-1598/08* of 4 September 2008, the Constitutional Court rejected as manifestly ill-founded an appeal in which the appellant complained that the ruling upon appeal against a ruling on the extension of detention had been issued in contravention of the standards of speediness for the purposes of Article 5(4) of the European Convention. The Constitutional Court noted in that case that the law (the Criminal Procedure Code of Bosnia and Herzegovina in that case) did not prescribe a time limit within which the Panel of the Appellate Division was to decide on the appeal against the ruling to extend detention. The Panel of the Appellate Division had rendered its decision on appeal within a time limit of ten days from the date when the appeal had been filed, which met the requirement to examine the lawfulness of detention within a "short time limit", i.e. to render decision speedily. In case no. *AP-757/04* of 29 October 2004 (available at www.ustavnisud.ba), the Constitutional Court found that the Supreme Court had decided on

the appellant's appeal within a time limit of eight days from the date of the ruling against which the appellant had filed an appeal, and that, therefore, it met the requirement of urgent examination of lawfulness of the proceedings as provided for in Article 5(4) of the European Convention. The Constitutional Court held that the same time limit of eight days for deciding on appeal met the standards under Article 5(4) of the European Convention in case no. *AP-641/03* of 30 November 2004 (available at www.ustavnisud.ba). Also, in case no. *AP-338/17* of 7 March 2017, the Constitutional Court held that the proceedings in that case had been conducted at two instances within a time limit of 15 days and that that time limit met the standard of "speediness" for the purposes of Article 5(4) of the European Convention.

28. In this connection, the Constitutional Court also refers to the case law of the European Court. In the case *Khodorkovskiy and Lebedev v. Russia* (applications no. 11082/06 and 13772/05 of 25 October 2013), the European Court examined an application of the second applicant with regard to the speediness in deciding an appeal against a ruling to extend detention (in accordance with Article 5(4) of the European Convention). In paragraph 521 of that judgment, the European Court noted as follows:

> "521. The second applicant complained that his appeals against the detention orders were not examined speedily by the court of appeal. The Court reiterates that under Article 5 § 4 a detainee is entitled to take proceedings by which the lawfulness of his detention must be decided speedily by a court (see *Rehbock v. Slovenia*, no. 29462/95, §§ 82-88, ECHR 2000XII, and *G.B. v. Switzerland*, no. 27426/95, §§ 34-39, 30 November 2000). Where domestic law provides for a system of appeal, the appellate body must also comply with the requirements of Article 5 § 4; at the same time, the standard of speediness "is less stringent when it comes to the proceedings before the court of appeal.... The Court would not be concerned, to the same extent, with the speediness of the proceedings before the court of appeal, if the detention order under review was imposed by a court and on condition that the procedure followed by that court had a judicial character and afforded to the detainee the appropriate procedural guarantees" (see *Shakurov v. Russia*, no. 55822/10, § 179, 5 June 2012). In the case of *Mamedova*, cited above, which, like the present case, concerned appeal proceedings, it found that the "speediness" requirement was not complied with where the appeal proceedings lasted thirty-six, twenty-six, thirty-six, and twenty-nine days respectively, stressing that their entire duration was attributable to the authorities (see *Mamedova*, § 96; see also, for longer delays, *Ignatov v. Russia*, no. 27193/02, §§ 112-114, 24 May 2007, and *Lamazhyk v. Russia*, no. 20571/04, §§ 104-106, 30 July 2009). By contrast, the length of appeal proceedings that lasted ten, eleven and sixteen days was found to be compatible with the "speediness" requirement of Article 5 § 4 (see *Yudayev v. Russia*, no. 40258/03, §§ 84-87, 15 January 2009, and *Khodorkovskiy (no. 1)*, § 247). Finally, the Court reiterates that the delay for which the State may be held

responsible should not include the time when the defence was preparing their brief of appeal (see *Khodorkovskiy (no. 1)*, § 247), unless the defence was prevented from finalising it through the fault of the authorities (see *Lebedev (no. 1)*, § 100).

522. Turning to the present case the Court reiterates that a similar complaint by the second applicant concerning earlier detention orders has already been addressed in *Lebedev (no. 1)*. In that case the Court held that delays of forty-four and sixty-seven days, of which twenty-seven and fortyseven were attributable to the authorities, constituted a breach of Article 5 § 4 (see §§ 98-108)."

29. The Constitutional Court also observes that that the European Court has clearly held that the time limit in such cases should run from the day of filing an appeal, meaning that the period of time the defence needs to prepare their brief of appeal is not included in it. Furthermore, when it comes to the standards of speediness in resolving the appeals referred to in Article 5(4) of the European Convention, the European Court has clearly held that the issue whether it has been decided speedily must be considered in the context of the circumstances of each individual case, including the complexity of the case, conduct of national authorities and importance of what has been decided to the applicant, just like it applies to the allegations on violation of the right under Article 5(3) of the European Convention and right under Article 6(1) of the European Convention.

30. Thus, given the aforementioned, the Constitutional Court observes that the proceedings at issue were conducted at two instances and that the appeal was decided within a period of 46 days from the date when the appellant filed the appeal against the decision to extend the detention for the next three months. The appellant filed the appeal on 13 November 2020, and the Cantonal Court rendered its decision on 29 December 2020. In this connection, the Constitutional Court notes that the provisions of Article 149(3) of the Criminal Procedure Code of the F BiH stipulate that an appeal against the ruling (to extend detention for three months) shall not stay the execution of the ruling and that the provisions of Article 335 of the Criminal Procedure Code stipulate that the general deadline for filing an appeal is "3 days from the day the decision was delivered". Given the aforementioned and provisions of the Criminal Procedure Code of the F BiH, the Constitutional Court observes that it follows from them that a legal remedy prescribed by the law (appeal) was available to the appellant, the use of which entailed judicial supervision of lawfulness of the measure imposed on him. Furthermore, the Constitutional Court will examine whether that legal remedy, thus the appeal against the ruling of 6 November 2020, made it possible for the lawfulness of detention to be speedily subject to judicial review, which could, if possible, amount to his release from detention.

31. The Constitutional Court finds it necessary to draw attention to the fact that the law stipulates a deadline for deciding on appeal, more specifically, the appeals against rulings to impose detention (48 hours from the date of receipt of the appeal, Article 148(5) of the Criminal Procedure Code of the F BiH) and deadline for deciding on the prosecutor's

appeal in the case the court terminates detention (in the course of investigation) before the expiration of detention (48 hours, Article 150 of the Criminal Procedure Code of the F BiH). Furthermore, although the law does not stipulate a deadline for deciding on an appeal against the ruling to extend detention (either at the stage of investigation or following the stage of filing an indictment), the courts must be aware of the fact that the cases related to "detention" are urgent at any stage of the proceedings and that the rulings to extend detention need to be resolved in that manner. Detention must last, at any stage of the proceedings, the shortest possible time. Therefore, even without clearly prescribed deadlines for deciding on appeals against rulings to extend detention, the courts should comply with the deadlines already prescribed and must not considerably depart from them. In addition, even in the cases the deadlines are not clearly prescribed, the courts are to comply with the standards under Article 5(4) of the European Convention. If there is a special reason for that, then the relevant court should provide, in each individual case, justified and specific reasons for delayed decision. This is all the more so since an appeal is not of suspensive nature and decision on appeal produces effects on the exercise of the right to liberty, meaning that decision can amount (as in the present case) to the release from detention. Turning to the present case, the Constitutional Court holds that it is undisputable that it is a very exhaustive one as the first-instance ruling decided on the detention of 16 persons, including the appellant, being suspected of having committed 250 acts regarded as criminal (out of which, 29 by the appellant). However, the Constitutional Court observes that both the proceedings related to detention and those related to the extension of detention were decided in the appeals and that both proceedings encompassed the same number of suspected persons and criminal acts. The relevant panel decided on them within the relatively short deadlines (as described in the introductory remarks related to the facts of this decision).

32. The Constitutional Court notes that it follows from the Municipal Court's response to the appeal that all appeals against the ruling of 6 November 2020 were received by that court on 20 November 2020. The Constitutional Court, however, observes that the Municipal Court, after it had received all appeals (on 20 November 2020), did not act with particular speediness as it did not address the case-file to the Cantonal Court for decision before 8 December 2020, and the latter court received it on 10 December 2020. As the premises of both courts are in the same building, the Constitutional Court does not understand the manner in which the case-file was delivered for two days. Also, the Constitutional Court does not find it justified the Municipal Court's information that it submitted the appeals to the Cantonal Court for decision only "after the decision of the Cantonal Court, no. 65 0 K 823957 20 Kž 3, which was delivered to that court together with the entire case-file on 4 December 2020". The Constitutional Court does not understand either how that circumstance, if existed, could have an impact to the effect that the case, which required speediness by all authorities in charge of the criminal proceedings (Article 145(4) of the Criminal Procedure Code of the F BiH), was not dealt with speedily.

33. Yet, given all the circumstances of the present case, and the hitherto case law of the Constitutional Court and European Court, which has held that a deadline of 26 days for deciding on appeal does not meet the standard of speediness referred to in Article 5(4) of the European Convention, the Constitutional Court holds that the ordinary courts, both the Municipal Court and Cantonal Court, failed to decide "with speediness". Thus, the Constitutional Court concludes that the appellant's right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(4) of the European Convention has been violated as the proceedings upon the appellant's appeal against the ruling to extent detention for three months lasted from 13 November to 29 December 2020, thus, 46 days.

34. The appellant also complains of the violation of Article 13 of the European Convention, in conjunction with Article 5(4) of the European Convention, by claiming that such a conduct did not ensure the effectiveness of the legal remedy. However, given the Constitutional Court's findings that the appellant's right under Article 5(4) of the European Convention has been violated, the Constitutional Court finds it unnecessary to consider the issue of effectiveness of the legal remedy against the excessive length of the proceedings as it found that it did not meet the standard of speediness in the given situation.

35. Finally, the Constitutional Court recalls that it took the view in its hitherto case law that, given the temporary character of the rulings to impose or extend detention, in the event it found that deprivation of liberty of the appellant upon challenged decision of the ordinary court had amounted to a violation of the right to liberty and security of person, but that deprivation of liberty upon challenged decision expired at the moment of the Constitutional Court's decision, it was sufficient for the Constitutional Court to establish a violation of the constitutional right and point to the failures – specifically, to find a correlation between the object circumstances and circumstances *in concreto* and find a solution making it possible for the conduct of proceedings to be effectively reviewed, as provided for in the Criminal Procedure Code (see, *inter alia*, Constitutional Court, Decision on Admissibility and Merits, no. *AP-4531/15* of 8 December 2015, paragraphs 68 and 59, with further references to the relevant case law of the Constitutional Court, available at www.ustavnisud.ba), which the ordinary courts should take into account in further proceedings, i.e. in the case of possible extension of the appellant's detention. Thus, in the present case, the Constitutional Court has established a declaratory violation with regard to the contested rulings as the detention imposed on the appellant expired at the moment of the Constitutional Court's decision. However, it orders the Municipal Court and Cantonal Court to comply with this decision by taking measures to effectively continue the criminal proceedings against the appellant by not jeopardizing the effectiveness of the appeal as an effective legal remedy in this type of the proceedings.

VIII. Conclusion

36. The Constitutional Court holds that the appellant's right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(4) of the European Convention has been violated. This was so as the proceedings upon the appellant's appeal against the ruling, wherein the detention imposed on the appellant and other suspected persons was extended for three months, lasted 46 days. It lasted from 13 November 2020, when the appellant filed the appeal, to 29 December 2020, when the Cantonal Court rendered the decision on the appellant's appeal. This is a period of time that does not meet the standard of "speediness" for the purposes of Article 5(4) of the European Convention.

37. Having regard to Article 59(1) and (2) of the Constitutional Court's Rules, the Constitutional Court decided as stated in the operative part of this decision.

38. Given the decision of the Constitutional Court in the present case, the Constitutional Court does not find it necessary to consider the appellant's request for interim measure.

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

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina

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RIGHT TO LIBERTY OF MOVEMENT AND RESIDENCE

Request of Mr. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina, submitted a request to the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the compatibility of Article 8, paragraphs 2, 3, 4, 5 and 6, Article 8a and Article 32, paragraph 3, subparagraph d) of the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*Official Gazette of BiH*, 32/01, 56/08 and 58/15) with Articles I (2) , II (2), II (3) (m), II (4), II (5) of the Constitution of Bosnia and Herzegovina, lines 5 and 8 of the Preamble to the Constitution of Bosnia and Herzegovina, Annex I to the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 2, paragraphs 1, 3 and 4 of Protocol No. 4 to the European Convention, Article 1 of Protocol 12 to the European Convention, Article 2, paragraph 2, Article 5, paragraph 1, Article 12 and Article 16 of the International Covenant on Civil and Political Rights; Article 2, paragraph 1, Article 4 and Article 5, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights, Articles 6 and 13 of the UN Universal Declaration of Human Rights; Article 4, paragraphs 2 and 3 of the Framework Convention for the Protection of National Minorities; Annex 7 to the General Framework Agreement for Peace in BiH

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PROHIBITION OF DISCRIMINATION

Request of Mr. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina, for review of the compatibility of Article 8, paragraphs 2, 3, 4, 5 and 6, Article 8a and Article 32, paragraph 3, subparagraph d) of the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*Official Gazette of BiH*, 32/01, 56/08 and 58/15) with Articles I (2) , II (2), II (3) (m), II (4), II (5) of the Constitution of Bosnia and Herzegovina, lines 5 and 8 of the Preamble to the Constitution of Bosnia and Herzegovina, Annex I to the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 2, paragraphs 1, 3 and 4 of Protocol No. 4 to the European Convention, Article 1 of Protocol 12 to the European

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