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FOREWORD

Dear readers,

You have before you an English version of the Bulletin of the Constitutional Court of Bosnia and Herzegovina. The Constitutional Court of Bosnia and Herzegovina has been printing its decisions in the local official languages but there has been no publication in the English language issued by the Constitutional Court. We have had several decisions published by the Council of Europe – the Venice Commission. We feel that it would be extremely useful if the international public, particularly the legal experts, is informed about the work of the Constitutional Court of Bosnia and Herzegovina, which is specific in many aspects compared to other constitutional courts.

In order to have a better understanding of the decision and circumstances surrounding the activities of the Constitutional Court of Bosnia and Herzegovina, I consider it to be useful at the very outset to provide some basic information about the Constitutional Court of Bosnia and Herzegovina.

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

The position of the Constitutional Court is prescribed by Article VI of the Constitution. The Court is composed of nine judges, of which six judges are the national judges (four from the Federation of Bosnia and Herzegovina and two from the Republika Srpska)

selected by the Entity Parliaments and three international judges appointed by the President of the European Court of Human Rights after consultations with the Presidency of Bosnia and Herzegovina. The term of office of the first composition was five years whereas the term of office of the newly appointed judges was until they reach the age of 70.

The competence of the Constitutional Court is prescribed by Articles VI.3 (a), (b) and (c). Briefly, the Constitutional Court entertains competence to review compatibility of the Entity Constitutions with the Constitution of Bosnia and Herzegovina, of the laws of the State of Bosnia and Herzegovina and those of the Entities, disputes between the Entities and the State or between the Entities, establishment of parallel relationships with the neighbouring countries, etc. Any court in Bosnia and Herzegovina may, if it questions the constitutionality of a law to be applied in the course of its procedure, stay that procedure and request the Constitutional Court of Bosnia and Herzegovina to assess the constitutionality of that law or provision(s) thereof. The Constitutional Court entertains appellate jurisdiction (similar to a constitutional complaint in some countries) over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. In addition, the Constitutional Court of Bosnia and Herzegovina entertains a specific competence prescribed by Article IV.3 (f) of the Constitution of Bosnia and Herzegovina – unblocking the work of the Parliamentary Assembly of Bosnia and Herzegovina as to the destructivity of the vital interests of one of the constituent peoples in Bosnia and Herzegovina when such issue is raised by one of the Caucuses at the House of Peoples.

The procedure, organization of work and some status issues are regulated by the Rules adopted, by virtue of a provision of the Constitution, by the majority of votes of all judges of the Constitutional Court. In view of the fact there is no law to govern the work of the Constitutional Court, the Rules are the most important legal act for the Constitutional Court second only to the Constitution and they have the force of an organic law.

Following the establishment of the Constitutional Court on 1997, the Court resolved rather a small number of cases in the first two or three years of its work. After that, the number of cases brought to the Court began to increase rapidly so that in this year we expect to receive over 3,000 cases.

Very few persons are allowed to initiate the procedure of a review of constitutionality of the Constitution or a law before the Constitutional Court. This right is reserved for Chairs

and Vice-Chairs of either of the chambers of the Parliamentary Assembly, members of the Presidency, Chair of the Council of Ministers, and one-fourth of the delegates of either chamber of the Parliamentary Assembly or of the Entity Parliaments. Hence, the citizens are not allowed to raise the issue of compatibility of a law or an Entity Constitution with the Constitution of Bosnia and Herzegovina.

In a very complex legal and political structure of Bosnia and Herzegovina, including a particular role of the international community represented by the Office of the High Representative, the Constitutional Court has faced a real challenge to resolve certain legal issues concerning, first of all, its *ratione personae* and *ratione materiae* competences. This encompasses decisions and laws taken and imposed by the High Representative in Bosnia and Herzegovina. As regards these issues, I do dare say that the Constitutional Court has not taken a final position yet. So far the Constitutional Court took a clear position in respect of the question of examination of the compatibility of the laws imposed by the High Representative, but not the question to know whether there is a constitutional basis for imposing laws by the High Representative. A particular problem represents the possibility of reviewing individual acts issued by the High Representative whereby he removes political officials from their offices, including those who were elected in democratic elections by the free will of people and in accordance with the standards of the European Convention, particularly because such decisions read that they may not be reviewed by any body, not even judicial, which means that the possibility of pursuing a legal remedy is excluded. We expect that the European Court of Human Rights shall take a position in that regard.

Insofar as the decisions of the Constitutional Court adopted so far are concerned, we would like to point to the Decision on Constituent Peoples on the whole territory of Bosnia and Herzegovina. That decision has had far-reaching effects on the establishment of equality of all peoples on the whole territory of Bosnia and Herzegovina and elimination of discrimination on various grounds and, insofar as the appellate jurisdiction is concerned, on the decision relating to the persons who went missing during the war as well as the establishment of violations of the rights guaranteed by the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This Bulletin contains decisions taken on different grounds of jurisdiction of the Constitutional Court starting from 1997 to 2005. We do hope that this first number of the Bulletin published in English will make it possible for the international legal public to

become more familiar with the work of the Constitutional Court of Bosnia and Herzegovina as well as with the particularity of its composition and jurisdiction.

The Constitutional Court will make future efforts in order to have a continuity of publishing its decisions in English in the same manner as it does in the domestic languages.

Sarajevo, October 2005

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

DECISIONS AND RULINGS
OF THE CONSTITUTIONAL COURT
OF BOSNIA AND HERZEGOVINA

Case No. U 5/98

Request of Mr. Alija Izetbegović, Chair of the Presidency of Bosnia and Herzegovina, for review of conformity of certain provisions of the Constitution of the Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina with the Constitution of Bosnia and Herzegovina

PARTIAL DECISION I of 28, 29 and 30 January 2000

PARTIAL DECISION II of 18 and 19 February 2000

PARTIAL DECISION III of 30 June and 1 July 2000

PARTIAL DECISION IV of 18 and 19 August 2000

With respect to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Articles 35, 37, 54, 57, 58, 59, and 71 of its Rules of Procedure, the Constitutional Court of Bosnia and Herzegovina, at its session held on 28, 29, and 30 January 2000, adopted the following

PARTIAL DECISION

Regarding the Constitution of the Republika Srpska:

The Constitutioal Court declares the following provisions or parts of provisions unconstitutional:

a) The word "border" in Article 2 paragraph 2;
b) The words "or extradited" in Article 6 paragraph 2;
c) Article 44 paragraph 2;
d) Article 98 and Article 76 paragraph 2 as modified by Amendment XXXVIII and
e) Article 138 as modified by Amendments LI and LXV.

The applicant's request is hereby rejected with respect to the following provisions:

a) Amendment LVII item 1, which supplements the Chapter on Human Rights and Freedoms;
b) Article 80, paragraph 1 as modified by Amendments XL and L, item 2 and
c) Article 90, as supplemented by Amendments XLI, item 1 and LXII.

Regarding the Constitution of the Federation of Bosnia and Herzegovina:

The Constitutional Court declares the following parts of provisions unconstitutional:

The words "heads of diplomatic missions" in Article IV.B.7 (a) (I) and
The words "heads of diplomatic missions" in Article IV.B.8.

The applicant's request is hereby rejected with respect to Article II.A.5 (c), as modified by Amendment VII.

The provisions or parts of provisions of the Constitutions of the Republika Srpska and the Federation of Bosnia and Herzegovina, which the Constitutional Court has found to be in contradiction with the Constitution of Bosnia and Herzegovina, cease to be valid from the date of publication of this Decision 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* **and the** *Official Gazette of the Republika Srpska*.

Reasons

I. Proceedings before the Constitutional Court

1. On 12 February 1998 Mr. Alija Izetbegović, at that time Chair of the Presidency of Bosnia and Herzegovina, instituted proceedings before the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") for an evaluation of the consistency of the Constitution of the Republika Srpska ("the Constitution of RS") and the Constitution of the Federation of BiH ("the Federation Constitution") with the Constitution of Bosnia and Herzegovina ("the Constitution of BiH"). The request was supplemented on 30 March 1998 when the applicant specified which provisions of the Entities' Constitutions he considered to be unconstitutional.

The applicant requested that the Constitutional Court review the following provisions of the Entities′ constitutions:

Regarding the Constitution of RS:

a) The Preamble to the extent that it refers to the right of the Serb people to self-determination, the respect for their struggle for freedom and State independence, and the will and determination to link their State with other States of the Serb people;

b) Article 1, which provides that the Republika Srpska is a State of the Serb people and of all its citizens;

c) Article 2, paragraph 2, to the extent that it refers to the so called border between the Republika Srpska and the Federation;

d) Article 4, which provides that the Republika Srpska may establish special parallel relationships with the Federal Republic of Yugoslavia and its Member Republics, and Article 68, paragraph 1 which, under item 16, provides that the Republika Srpska shall regulate and ensure cooperation with the Serb people outside the Republic;

e) Article 6, paragraph 2, to the extent that it provides that a citizen of the Republika Srpska cannot be extradited;

f) Article 7, to the extent that it refers to the Serbian language and Cyrillic alphabet as the official language;

g) Article 28, paragraph 4, which provides for material State support of the Orthodox Church and cooperation between the State and the Orthodox Church in all fields, in particular for the preservation, fostering, and development of cultural, traditional and other spiritual values;

h) Article 44, paragraph 2, which provides that foreign citizens and stateless persons may be granted asylum in the Republika Srpska;

i) Amendment LVII, item 1 which supplements the Chapter on Human Rights and Freedoms and provides that, in the case of differences between the provisions on rights and freedoms in the Constitution of RS and those in the Constitution of BiH, the provisions which are more favourable to the individual shall be applied;

j) Article 58, paragraph 1, Article 68, item 6 and the provisions of Articles 59 and 60 to the extent that they refer to different forms of property, the holders of property rights, and the legal system relating to the use of property;

k) Article 80, as modified by Amendment XL, item 1, which provides that the President of the Republika Srpska shall perform duties related to defence, security, and relations with other States and international organizations, and Article 106, paragraph 2, according to which the President of the Republika Srpska shall appoint, promote, and recall officers of the Army, judges of military courts, and Army prosecutors;

l) Article 80, as modified by Amendments XL and L, item 2 which confers onto the President of the Republika Srpska the power to appoint and recall heads of missions

of the Republika Srpska in foreign countries and propose ambassadors and other international representatives of Bosnia and Herzegovina from the Republika Srpska, as well as Article 90, supplemented by Amendments XLI and LXII, which confers onto the Government of the Republika Srpska the authority to establish the Republic's missions abroad;

m) Article 98, according to which the Republika Srpska shall have a National Bank, as well as Article 76 paragraph 2 as modified by Amendment XXXVIII, item 1, paragraph 2, which confers onto the National Bank the competence to propose statutes relating to monetary policy; and

n) Article 138, as modified by Amendments LI and LXV, which empowers the authorities of the Republika Srpska to adopt acts and undertake measures for the protection of the Republic's rights and interests against acts of the institutions of Bosnia and Herzegovina or the Federation of BiH.

Regarding the Federation Constitution:

a) Article I.1 (1), to the extent that it refers to Bosniacs and Croats as being the constituent peoples;

b) Article I.6 (1) to the extent that it refers to Bosnian and Croatian as the official languages of the Federation;

c) Article II.A.5. (c), as modified by Amendment VII, to the extent that it provides for dual citizenship;

d) Article III.1 (a), to the extent that it provides for the authority of the Federation to organise and conduct the defence of the Federation; and

e) Article IV.B.7 (a) and Article IV.B.8, to the extent that they entrust the President of the Federation with the task of appointing the heads of diplomatic missions and officers of the military.

2. The request was communicated to the People's Assembly of the Republika Srpska and the Parliament of the Federation of BiH. On 21 May 1998, the People's Assembly of the Republika Srpska submitted its views on the request in writing. The House of Representatives of the Parliament of the Federation of BiH submitted its reply on 9 October 1998.

3. In accordance with the Constitutional Court's decision of 5 June 1998, a public hearing before the Constitutional Court was held in Sarajevo on 15 October 1998, at which representatives and experts of the applicant and the House of Representatives of the Federation presented their views on the case. The public hearing proceeded in Banja Luka on 23 January 1999. The applicant was represented at the public hearing by: Prof. Dr Kasim Trnka and an expert, Džemil Sabrihafizović; the House of Representatives of the Federation by Enver Kreso and an expert Sead Hodžić; the House of Peoples of the Federation by Mato Zovko and an expert Ivan Bender; and the People's Assembly of the Republika Srpska by Prof. Dr Radomir Lukić and an expert Prof. Dr Petar Kunić. On that occasion, arguments were presented by the representatives and experts of the applicant, the House of Representatives, and the House of Peoples of the Federation as well as the People's Assembly of the Republika Srpska.

4. Discussions on the case took place at the following sessions of the Court: 25 and 26 February 1999, 7 and 8 June 1999, 13 and 14 August 1999, 24 and 25 September 1999, and 5 and 6 November 1999. At the session held on the 3 and 4 December 1999, the Court concluded that at the following session they would deliberate and vote on the case based on the prepared Draft Decision.

5. Deliberations proceeded at the Court's session on the 28-30 January 2000. In accordance with Article VI.2 (a) of the Constitution of BiH, which provides that a majority of all members of the Court shall constitute a quorum, and also having respect for Articles 35, 37, and 58 of its Rules of Procedure, the Constitutional Court unanimously decided to adopt a partial decision in the case.

6. In accordance therewith, deliberations were held and votes were taken on the following provisions:

A. Regarding the Constitution of RS:

a) Article 2, paragraph 2, to the extent that it refers to the border between the Republika Srpska and the Federation;

b) Article 6, paragraph 2, to the extent that it provides that a citizen of the Republika Srpska cannot be extradited;

c) Article 44, paragraph 2, which provides that foreign citizens and stateless persons may be granted asylum in the Republika Srpska;

d) Amendment LVII, item 1 which provides that, in the case of differences between the provisions on rights and freedoms of the Constitution of RS and the Constitution of BiH, the provisions that are more favourable to the individual shall be applied;

e) Article 80, as modified by Amendments XL and L, which confers onto the President of the Republika Srpska the power to appoint and recall the heads of missions of the Republika Srpska in foreign countries and to propose ambassadors and other international representatives of Bosnia and Herzegovina from Republika Srpska, as well as Article 90, supplemented by Amendments XLI and LXII, which confers onto the Government of Republika Srpska the right to decide on the establishment of the Republic's missions abroad;

f) Article 98, according to which the Republika Srpska shall have a National Bank, as well as Article 76 paragraph 2 as modified by Amendment XXXVIII, item 1, paragraph 2, which confers onto the National Bank the authority to propose statutes relating to monetary policy; and

g) Article 138, as modified by Amendments LI and LXV, which empowers the authorities of the Republika Srpska to adopt acts and undertake measures for the protection of the Republic's rights and interests against the acts of the institutions of Bosnia and Herzegovina or the Federation of BiH.

B. Regarding the Federation Constitution:

a) Article II.A.5 (c), as modified by Amendment VII, to the extent that it provides for dual citizenship;

b) Article IV.B.7 (a)(I) and Article IV.B.8, to the extent that they entrust the President of the Federation with the task of appointing heads of diplomatic missions.

7. At the session held on 28-30 January 2000, the Constitutional Court also commenced with deliberations on the complaints relating to Articles 58, paragraph 1, 59, 60 and 68, item 6 of the Constitution of RS. However, no decision was taken with respect to these Articles and they are therefore not included in this partial Decision.

II. Admissibility

8. The representatives of the RS People's Assembly and the House of Peoples of the Parliamentary Assembly of the Federation of BiH challenged the jurisdiction of

the Constitutional Court in the course of the public hearing, while contending that the applicant's request deals in principle with matters concerning the creation of a constitution, but not with matters which are subject to judicial review. The request would therefore lead not only to an amendment to the Constitution but also to a revision of the Washington and Dayton Agreements without respecting the necessary treaty-making and parliamentary procedures and the will of the legitimate representatives of the constituent peoples. Since the request concerns a great number of provisions and fundamental principles, it does not seek a judicial review of the Entities' Constitutions but rather, a direct and fundamental change of these Constitutions.

The Constitutional Court finds:

9. According to Article VI. 3 (a) of the Constitution of BiH, every member of the Presidency of BiH may refer disputes to the Constitutional Court concerning whether a provision of an Entity's constitution or law is consistent with this Constitution. The request for the review of the conformity of a number of provisions of the Constitution of RS and the Federation Constitution with the Constitution of BiH was submitted to the Court by Mr. Alija Izetbegović, then Chair of the Presidency. In that respect, according to the quoted provision of the Constitution of BiH, the request is admissible.

10. In addition, as far as the nature of judicial review is concerned, the applicant requested that the Constitutional Court declare a number of provisions of the Constitutions of the RS and the Federation null and void on grounds that they are not in conformity with the Constitution of BiH. Thus, the request refers to the competence of the Constitutional Court to review the constitutions of the Entities, which is, according to Article VI. 3 (a) second sub-paragraph, within the "exclusive jurisdiction" of the Constitutional Court. It is true that the Constitutional Court cannot create new constitutional norms. However, the Court's task in this case is not to create new constitutional norms, but to declare those norms that are not in conformity with the Constitution BiH null and void. Furthermore, according to Article XII of the Constitution of BiH, the Entities are obliged to amend their constitutions to ensure their conformity with this Constitution in accordance with Article III.3 (b). In any event, judicial review by the Constitutional Court does not depend on the number of challenged provisions, nor is there any normative difference between the provisions and "fundamental principles" of the Constitution. Accordingly, the objections raised against the competence of the Court in this case are not well-founded.

11. It thus follows from the constitutional responsibilities and obligations referred to above that the Constitutional Court has jurisdiction to decide on this dispute.

III. Merits

A. Regarding the Constitution of the Republika Srpska

a) The challenged provision of Article 2, paragraph 2, of the Constitution of RS reads as follows:

An agreement on a change of the border between the Republika Srpska and the Federation of Bosnia and Herzegovina may be subject to confirmation by way of a referendum in the Republic.

12. The applicant and his representatives stated that this provision is not in conformity with Article I.1 of the Constitution of BiH and with Annex 2 to the General Framework Agreement for Peace in Bosnia and Herzegovina ("GFA"), which is binding for BiH according to Article III. 2. (b) of the Constitution of BiH. They claim that the Republika Srpska cannot have borders since it is not a state. The meaning of the term "border" corresponds to the terminology used in the GFA.

13. The People's Assembly of the Republika Srpska and its representatives pointed out that the term "border (granica)" is also used in Article I. 4 of the Constitution of BiH and that Article V.5 (a) of the Constitution of BiH provides for a "territory" of the Entities, which cannot be imagined without borders. With respect to Annex 2 of the GFA, the People's Assembly contended that the Constitutional Court is not competent to take it as a basis for review of the provision in question.

<u>The Constitutional Court finds:</u>

14. Both terms "border" and "boundary", which are used in the English text of Article I. 1 and 4 of the Constitution of BiH, have been translated – without any distinction – as "granica" in the Bosnian ("Bosniac")*, Serbian, and Croatian languages.

15. According to Article 31 of the Vienna Convention on the Law of Treaties, it is necessary to further clarify the terms used in the Constitution BiH by interpreting them in the context of the entire GFA, i.e. including its Annexes. Article III of the GFA refers to "the boundary demarcation between the two Entities", but uses the term "border" in Article X when referring to frontiers between states. Similarly, the Agreement on Inter-Entity Boundary Line and Related Issues, which is Annex 2 to the GFA, refers to "the boundary between the Federation of BiH and the Republika Srpska (the `Inter-Entity Boundary Line´)…"

16. Consequently, there is, in these various texts, a consistent terminology, according to which "border" and "boundary" are given different meanings. Under such circumstances, the use of a different terminology in the Constitution of RS cannot be considered consistent with the Constitution of BiH.

17. The Constitutional Court therefore finds that the term "border (granica)" in Article 2, paragraph 2, of the Constitution of RS is not in conformity with the Constitution of BiH and should thus be declared unconstitutional.

b) The challenged provision of Article 6, paragraph 2, of the Constitution of RS reads as follows:

A citizen of the Republic may not be deprived of his/her citizenship, exiled or extradited.

18. The applicant pointed out that the Republika Srpska has an obligation, under Articles II.8 and III.3 (b) of the Constitution of BiH, to cooperate with the International Crime Tribunal for the Former Yugoslavia (henceforth: the ICTY) and cannot, therefore, forbid extradition of its citizens.

19. The applicant's expert added, at the public hearing of 15 October 1998, that the challenged provision violated Article III. 1 (g) of the Constitution of BiH as extradition would fall under international criminal law enforcement, which is to be regulated by the institutions of BiH.

20. The People's Assembly of the Republika Srpska contended that it flowed from the status of citizenship that extradition of citizens, under the jurisdiction of a foreign state, was prohibited, but that a trial before a domestic court was not excluded if there was a reasonable doubt that a citizen had committed a criminal act on the territory of a foreign state. Nor would the challenged provision prevent the cooperation and unlimited fulfilment of the obligation laid down in Article II.8 of the Constitution BiH.

21. The representative of the People's Assembly added at the public hearing that transfer and surrender to the ICTY was not covered by the term extradition, nor did extradition fall under the responsibility of the joint institutions of BiH.

<u>The Constitutional Court finds:</u>

22. According to Article III.1 (g) of the Constitution BiH, the institutions of Bosnia and Herzegovina are responsible for international and inter-Entity criminal law enforcement.

There is no doubt that extradition of persons against whom the authorities of other states conduct proceedings for having committed an offence, or who are wanted by the said authorities for carrying out a sentence or detention order, is covered by the term "international and inter-Entity criminal law enforcement". Article 6 of the Constitution of RS thus regulates a matter that lies within the scope of responsibility of the institutions of BiH. The Constitutional Court must therefore conclude that the words "or extradited" are unconstitutional.

23. Under these circumstances, it is not necessary for the Constitutional Court to examine whether the obligation to surrender and transfer persons to the ICTY is covered by the term "extradition". Whatever the case may be, the wording of Article II. 8 of the Constitution of BiH is quite clear and there can be no doubt that all competent authorities in Bosnia and Herzegovina, i.e. also the authorities of the Entities, have to comply with orders issued pursuant to Article 29 of the Statute of the Tribunal.

c) The challenged provision of Article 44, paragraph 2, of the Constitution of RS reads as follows:

Foreign citizens and stateless persons may be granted asylum in the Republika Srpska if prosecuted for the participation in movements for social and national liberation, for the support of democracy, human rights, and fundamental freedoms or the freedom of scientific and artistic creativity.

24. The applicant considered this provision not to be in line with Article III.1 (f) of the Constitution of BiH, which specifies that immigration, refugee, and asylum policy and regulation fall within the exclusive responsibility of the institutions of Bosnia and Herzegovina.

25. The RS People's Assembly did not respond to this part of the request in its written statement.

The Constitutional Court finds:

26. According to Article III. 1 (f) of the Constitution of BiH, asylum policy and its regulation are the responsibilities of the institutions of Bosnia and Herzegovina. Since only those governmental functions and powers which are not expressly enumerated in Article III. 1 or are otherwise assigned by the Constitution of BiH to the institutions of Bosnia and Herzegovina shall be those of the Entities in accordance with Article III. 3 of the Constitution of BiH, the Entities do not have the power to regulate asylum policy.

27. The Constitutional Court must therefore declare Article 44, paragraph 2 unconstitutional.

d) The challenged provision of Amendment LVII, item 1, which supplements the Chapter on Human Rights and Freedoms of the Constitution of RS, reads as follows:

In case there are differences between the provisions on rights and freedoms of the Constitution of the Republika Srpska and those of the Constitution of Bosnia and Herzegovina, those provisions which are more favourable to the individual shall be applied.

28. The applicant considered this provision to be out of line with Article III. 3 (b) of the Constitution of BiH, according to which the Entities shall comply fully with this Constitution, since this Article requires that no inconsistent provisions of the constitutions and law of the Entities may be in effect.

29. At the public hearing the applicant's expert added that as a violation of the supremacy clause of the Constitution of BiH, the challenged provision of the Constitution of RS would give the Constitution of RS the same rank as the Constitution of BiH.

30. The People's Assembly of the Republika Srpska, in its written statement, denied any violation of the Constitution of BiH, because the challenged provision merely introduces a supposed "positive discrimination" in favour of persons or citizens by making it clear that in the case of differences – which need not at the same time be in contradiction – the more favourable provisions of the said constitutions have to be applied.

<u>The Constitutional Court finds:</u>

31. Provisions of the Constitution of RS on rights and liberties that are more favourable to the individual are not necessarily in violation of the Constitution of BiH due to that "difference". There cannot be any doubt concerning the supremacy of the Constitution of BiH, but the question is whether the Constitution of BiH can be interpreted as prohibiting provisions in the Entity constitutions that are more favourable to the individual. Differences between the Constitution of BiH and the Entity constitutions, as far as protection of fundamental rights is concerned, may occur in two modes. First, a constitution of an Entity, or any subdivision thereof, may provide for additional rights and liberties which are not included in either the Constitution of BiH or the ECHR or in any of the other instruments referred to in Annex 1 to the Constitution of BiH. Second, the constitution of an Entity, or

any sub-division thereof, may provide for the same rights as the Constitution of BiH, but – for instance as far as limitations of the right are concerned – the provisions of the sub-national constitution may be more favourable to the holder of that right.

32. It is generally recognised in federal states that component entities enjoy "relative constitutional autonomy", granting their constitutions the right to regulate matters in such a way that they are not in contradiction to the wording of the constitution of the respective state. Otherwise, sub-national constitutions would be nothing more than a mere declarative repetition. The same principle of "relative constitutional autonomy" can be seen as an inherent principle underlying the entire structure of the Constitution of BiH if one takes into account the allocation of powers or the relative "silence" of this Constitution with respect to the governmental institutions of the Entities.

33. In addition, Article 53 (former Article 60) of the ECHR provides that the protection granted by the European Convention on Human Rights is only a minimum protection and that States are not prevented by the Convention from granting the individual more extensive or favourable rights and freedoms. The same principle must apply to the interpretation of the Constitution of BiH as it indeed makes the European Convention directly applicable in Bosnia and Herzegovina and grants it priority over all other law.

34. It follows from these statements that the Entities are free to provide for more extensive protection of human rights and fundamental freedoms than required under the European Convention and the Constitution of BiH. Amendment LVII, item 1, to the Constitution of RS is therefore not in opposition to the Constitution of BiH.

e) **The challenged provisions of Article 80, paragraph 1 of the Constitution of RS, as modified by Amendments XL and L, item 2, and Article 90 of the Constitution of RS, as modified by** Amendments XLI, item 1, and LXII, read as follows:

Article 80 of the Constitution of RS (relevant parts)

(...)

2) The President of the Republika shall, at the proposal of the Government, by decree appoint and recall heads of missions of the Republika Srpska in foreign countries, and shall propose ambassadors and other international representatives of Bosnia and Herzegovina from the Republika Srpska.

Article 90 of the Constitution of RS (relevant parts)

The Government shall decide on the establishment of the Republika's missions abroad.

35. The applicant considered these provisions to be inconsistent with the Constitution of BiH. In his opinion, appointment of heads of missions of the RS by the President of the Republika Srpska would violate Article III.1(a)., which makes foreign policy a prerogative of the institutions of Bosnia and Herzegovina. He further referred to Article III.2 (d) under which Entities may only enter into agreements with States and international organisations with the consent of the Parliamentary Assembly of Bosnia and Herzegovina, and to Article V.3 (a) through (d) under which the Presidency of Bosnia and Herzegovina shall have the responsibility of conducting foreign policy, appointing ambassadors, and other international representatives of BiH, representing BiH in international and European organisations and institutions and negotiating and ratifying treaties. Since the Entity Constitutions could not limit the responsibilities of the Presidency of BiH as provided by the Constitution of BiH, the power of the RS President to propose ambassadors would not be in conformity with the Constitution of BiH.

36. The applicant's representative further outlined at the public hearing that all missions abroad have to be missions of the State of Bosnia and Herzegovina. The Entities, in particular the RS Government, would thus have no competence to establish such missions. The same would hold true for the representatives. Since Bosnia and Herzegovina is the state, the representation of BiH, including the Entities, is the responsibility of Bosnia and Herzegovina. With the limits foreseen in the Constitution itself, all representatives have to be finally appointed by the institutions of BiH. And as far as the appointment of ambassadors is concerned, the competence of the Presidency of BiH would be unconstitutionally restricted, if it could appoint only those candidates who were proposed by another institution.

37. The expert of the House of Peoples of the Federation Parliament stated at the public hearing that the responsibility for the appointment of ambassadors is not exclusively vested in the Presidency, which appears from Article V.3 (b), according to which no more than two-thirds of the ambassadors may be selected from the territory of the Federation.

38. The People's Assembly of the Republika Srpska in its written statement contested the unconstitutionality of the challenged provisions as the missions referred to in these provisions are not those which have diplomatic or consular status but, for instance,

economic, cultural, and similar representations. The Constitution of BiH does not prevent the Entities from establishing such missions.

39. At the public hearing the representative of the People's Assembly of the Republika Srpska referred, in particular, to the legislative history of the challenged provision of Article 80 and outlined that a previous version contained the wording "diplomatic and consular missions". The words "diplomatic and consular" were specifically omitted to bring this provision in line with the Constitution of BiH. Since the Entities have the right to conclude treaties according to Article III. 2 (d) of the Constitution of BiH, they also have the right to establish economic, cultural and other missions abroad that do not have diplomatic or consular status. Finally, he stressed that the RS President has only a right to propose candidates for the appointment of ambassadors and other international representatives of BiH from the RS and, as such, that the appointment itself is left to the Presidency of BiH.

<u>The Constitutional Court finds:</u>

40. The Constitutional Court finds that foreign policy and foreign trade policy as enumerated in Article III. 1 (a) and (b) are essentially a prerogative of the institutions of Bosnia and Herzegovina. Nevertheless, the Entities are assigned residual powers in these spheres as can be seen, in particular, from Article III. 2 (a) and (d) of the Constitution of BiH, which refers to the establishment of special parallel relationships with neighbouring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina and to the conclusion of agreements with states and international organisations with the consent of the Parliamentary Assembly. The powers of the Presidency of BiH referred to under Article V. 3 must therefore be interpreted with respect to these residual powers of the Entities.

41. It thus follows that the Entities have the right to establish representations abroad as long as this right does not interfere with the authority of Bosnia and Herzegovina to be represented as a state. Furthermore, as can be seen from the given legislative history of challenged provisions, the appointment and recall of the heads of missions according to these provisions is not intended to interfere with the essential prerogative of the state of Bosnia and Herzegovina.

42. Hence, following an established principle of interpretation, whereby all legal regulations have to be read in conformity with the Constitution as long as this is possible, the Constitutional Court finds that Article 80 of the Constitution of RS, as far as the

appointment and recall of heads of missions of RS in foreign countries is concerned as well as the contested provision of Article 90 of the Constitution of RS, can be interpreted to be consistent with the Constitution of BiH.

43. With respect to the proposals for appointment of ambassadors and other international representatives of Bosnia and Herzegovina from the RS, the Constitutional Court finds that Article V. 3 (b) of the Constitution of BiH is based on the idea that ambassadors and other international representatives shall be appointed partly from the territory of the Federation of BiH and partly from the territory of the RS. Under these circumstances, a residual power is left to the Entities´ institutions to make proposals as part of the selection process regarding these representatives. However, such proposals must be regarded as nothing more than proposals and cannot restrict the right of the Presidency of BiH to appoint ambassadors and other international representatives from either the persons proposed by Entity institutions or persons who have not been proposed by them.

44. Hence, the challenged provision of Article 80 with regard to the competence of the RS President to propose ambassadors and other international representatives of BiH does not infringe the competence of the Presidency of BiH to appoint these persons and is therefore in conformity with the Constitution of BiH.

f) The challenged provisions of Article 98 of the Constitution of RS and of Article 76, paragraph 2 as modified by Amendment XXXVIII read as follows:

Article 98

The Republic shall have a National Bank.

The status, organisation, management and operation of the National Bank shall be regulated by law.

Article 76, paragraph 2

The National Bank shall also have the right to propose laws, other regulations and general enactments relating to the monetary, foreign exchange and credit system.

45. The applicant contended that the challenged provisions were not in conformity with Article VII of the Constitution of BiH. Monetary policy and foreign trade policy are the exclusive responsibility of the joint institutions of BiH. The Central Bank of Bosnia and Herzegovina is the only monetary institution responsible for the entire territory of BiH.

46. The People's Assembly of the Republika Srpska in its written statement replied that a National Bank of the Republika Srpska did not exist any more and that the applicant's assertions in relation to this institution have become obsolete.

47. The applicant's representative further outlined at the public hearing that the fact that the National Bank did not exist any longer, did not legally mean that the respective provisions of the Constitution of RS did not violate the Constitution of BiH.

The Constitutional Court finds:

48. As the People's Assembly failed to repeal the challenged provisions of the Constitution of RS, they are indeed still in force, notwithstanding the fact that there is not at present any National Bank of the Republika Srpska. The Constitutional Court therefore should examine the constitutionality of these provisions.

49. It is clear from the wording of Article VII of the Constitution of BiH that the Central Bank of Bosnia and Herzegovina is vested with the exclusive responsibility for issuing currency and monetary policy throughout Bosnia and Herzegovina and therefore there is no residual power left in this respect for the Entities under Article III. 3. of the Constitution BiH. The challenged provisions of Article 98 of the Constitution of RS, however, make it a task of the legislation of the RS to regulate the status and operations of the National Bank of the RS without due regard to the limitations imposed by Article VII of the Constitution of BiH.

50. Hence, the challenged provisions of Article 98 of the Constitution of RS cannot be read in conformity with the Constitution of BiH and must therefore be declared unconstitutional.

51. With respect to the right to propose laws, other regulations, and general enactments relating to the monetary, foreign exchange, and credit system in accordance with Article 76, paragraph 2 of the Constitution of RS, it is evident from the wording of Article VII of the Constitution of BiH that the Central Bank is the sole authority for "monetary policy" throughout Bosnia and Herzegovina. Since the word "policy" must, in this context, be considered to include legislative proposals in the respective field, the challenged provision of Article 76, paragraph 2 is not in conformity with the text of the Constitution of BiH.

52. The Constitutional Court thus finds Article 76, paragraph 2 of the Constitution of RS to be unconstitutional.

g) The challenged provision of Article 138 of the Constitution of RS, as modified by Amendments LI and LXV, reads as follows:

When acts of the institutions of Bosnia and Herzegovina or acts of the Federation of Bosnia and Herzegovina, in contradiction to the Constitution of the Republika Srpska and the Constitution of Bosnia and Herzegovina, violate the equality of the Republika Srpska, or when its rights and legal interests are otherwise endangered without its protection being secured, the organs of the Republic shall, temporarily until a decision of the Constitutional Court of Bosnia and Herzegovina is adopted and in cases when irremediable detrimental consequences might occur, pass enactments and undertake measures for the protection of the rights and interests of the Republic.

53. The applicant considered the challenged provision, to the extent that it would enable the authorities of the RS to "arbitrarily adopt enactments and undertake measures", to be contrary to paragraph 6 of the Preamble of the Constitution of BiH, which refers to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina, and also to Article I.2 of that Constitution, which provides that Bosnia and Herzegovina shall be a democratic State operating under the rule of law.

54. The applicant's representative further outlined at the public hearing that the challenged provision may endanger the entire legal system of BiH. It would be in complete contradiction to the Constitution of BiH if the Entities could unilaterally undertake measures against the decisions of the institutions of BiH. To allow the Entities any discretionary power not to implement decisions of the institutions of BiH if they deem that their interests may be violated would lead to a total blockage and the disintegration of the constitutional order of BiH.

55. The People's Assembly of the Republika Srpska in its written statement contested the unconstitutionality of the challenged provision. First and foremost, the Preamble of the Constitution of BiH was not included in the normative part of the Constitution and could not, therefore, serve as a basis for review of Amendments LI and LXV. In addition, these amendments could not violate Article I. 2 of the Constitution of BiH, as the measures to be taken were of a temporary nature and only applicable if the rights and interests of the RS could not be protected in any other way and would last only until the adoption of a final decision of the Constitutional Court of BiH.

The Constitutional Court finds:

56. According to Article VI. 3 (a) of the Constitution of BiH, the Constitutional Court shall have "exclusive jurisdiction" to decide "any dispute" that arises between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina. Furthermore, according to Article 75 of the Constitutional Court's Rules of Procedure, the Court may, until a final decision on a dispute has been taken, fully or partially suspend enforcement of decisions, laws or individual acts, if their enforcement may have detrimental consequences which cannot be overcome.

57. Since the Constitutional Court has "exclusive jurisdiction", when serving as a protection mechanism in the case of "any dispute" as referred to above, and given that Article 75 of its Rules of Procedure allows for preliminary measures to be granted by the Constitutional Court, there is no room left for unilateral measures to be taken by the institutions of the RS.

58. The Constitutional Court thus finds that Article 138 of the Constitution of RS, as modified by Amendments LI and LXV, is unconstitutional.

B. Federation Constitution

a) The challenged provision of Article II. A. 5 (c) of the Federation Constitution, as modified by Amendment VII, reads as follows:

The acquisition and termination of citizenship of the Federation of Bosnia and Herzegovina shall be regulated by a Federal Law under the following conditions:

(...)

(c) All citizens of the Federation of Bosnia and Herzegovina are, according to the Constitution of Bosnia and Herzegovina, citizens of Bosnia and Herzegovina and, depending on the citizenship requirements prescribed by the Constitution of Bosnia and Herzegovina, have the right to hold citizenship of another state.

59. The applicant's complaint is based on the following wording of Article II. A.5 (c), as modified by Amendment VII, of the Federation Constitution: "All citizens of the Federation shall be entitled to hold the citizenship of another state". He argued that this provision was not in conformity with Article I. 7 (d) of the Constitution of BiH, according to

which citizens of Bosnia and Herzegovina may hold citizenship of another State, provided that there is a bilateral agreement approved by the Parliamentary Assembly between Bosnia and Herzegovina and that State governing this matter. Since the Federation Constitution entitles a citizen also to have the citizenship of another state without any limitations, he contends that the challenged provision violated the Constitution of BiH.

60. At the public hearing the applicant's representative further argues that allowing a citizen to hold citizenship of another state is the exclusive responsibility of the state of BiH under Article I. 7 d() of the Constitution of BiH. The expert of the House of Peoples of the Federation Parliament stated that dual citizenship was allowed by the Constitution of BiH.

The Constitutional Court finds:

61. The applicant referred in his request to the wording of Article II. A. 5 as it was prior to Amendment VII. However, the challenged provision in the wording of Amendment VII no longer allows dual citizenship without limitations but refers to the citizenship requirements prescribed by the Constitution of BiH and is therefore merely a declarative repetition of the rights already granted by Article I. 7 (a) and (d) of the Constitution of BiH.

62. This challenged provision must therefore be considered to be in conformity with the Constitution of BiH.

b) The challenged provisions of Article IV. B. 7 (a) (I) and Article IV. B. 8 of the Federation Constitution, to the extent that they deal with the appointment of heads of diplomatic missions, read as follows:

Article IV. B. 7 (a) (Relevant parts):

Except as otherwise provided in this Constitution:

(a) The President of the Federation shall be responsible for:

(I) The appointment of ..., heads of diplomatic missions... in accordance with Articles IV.B.5, IV.B.8, and IV.C.6;

(...)

Article IV. B. 8 (relevant parts)

The President of the Federation, in consensus with the Vice-President, shall appoint heads of diplomatic missions upon consultation with the Prime Minister or the nominee for that position....

63. The applicant contended that the authority granted to the President of the Federation to appoint the heads of diplomatic missions was not in conformity with Article V. 3 (b) of the Constitution of BiH, which gives the Presidency of BiH the authority to appoint ambassadors.

64. At the public hearing the expert appointed by the House of Peoples of the Parliamentary Assembly of the Federation of BiH pointed out that in his request the applicant interpreted the challenged provisions and appropriate rules of the Constitution of BiH without taking into consideration their context. He did not deny the responsibilities according to the Constitution of BiH as far as appointments are concerned, but challenged that they are exclusive because such an interpretation would ignore the responsibilities of the Entities foreseen by the Constitution in this field.

The Constitutional Court finds:

65. According to Article 58 of its Rules of Procedure, the Constitutional Court deliberated only on those parts of the above-mentioned provisions that related to the power of the President of the Federation to appoint heads of diplomatic missions according to Article IV. B. 7 (a) (i) and Article IV. B. 8 of the Federation Constitution. The Constitutional Court recalls the statements made in paragraphs 40-44, in particular in paragraph 43, supra. According to Article V. 3 (b) of the Constitution of BiH, the Presidency of BiH has the power to appoint ambassadors without limits to its decision-making. As the challenged provisions of the Federation Constitution, unlike those of the Constitution of RS, vest the power to appoint in the hands of the President of the Federation, these provisions clearly stand in opposition to the Constitution of BiH.

66. The Constitutional Court thus finds the words “heads of diplomatic missions” in Article IV. B. 7 (a) (I) and the words “heads of diplomatic missions” in Article IV. B. 8 to be unconstitutional.

67. The Constitutional Court was unanimous in adopting the conclusions relating to Article 2 paragraph 2, Article 6 paragraph 2, Article 44 paragraph 2, Article 80 as modified

by Amendments XL and L, Article 90 as supplemented by Amendments XLI and LXII, Article 98 and Article 76 paragraph 2, as modified by Amendment XXXVIII, and Article 138 of the Constitution of RS, as well as Articles II.A.5, as modified by Amendment VII, Article IV.B.7 (a) (I) and Article IV.B.8 of the Federation Constitution. As regards to Amendment LVII, item 1 to the Constitution of RS, the Constitutional Court adopted its conclusion by 6 votes in favour and one separate opinion.

68. The decisions regarding the publication in the *Official Gazettes* of Bosnia and Herzegovina, the Republika Srpska and the Federation of BiH and the day when the provisions that are declared unconstitutional cease to be in effect are based on Articles 59 and 71 of the Rules of Procedure.

The Court ruled in the following composition:

Prof. Dr Kasim Begić, President of the Constitutional Court, and Judges: Hans Danelius, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Zvonko Miljko, MA, Azra Omeragić and Mirko Zovko.

With respect to Amendment LVII, item 1 to of the Constitution of RS and pursuant to Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, Judge Kasim Begić has delivered his separate opinion, the text of which is annexed to this Partial Decision.

U 5/98 I
29 and 30 January 2000
Sarajevo

Prof. Dr Kasim Begić
President
Constitutional Court of Bosnia and Herzegovina

CONSTITUTION OF THE REPUBLIKA SRPSKA

Article 2, paragraph 2

Provision of the Constitution of RS, referring to the "border" between the Republika Srpska and the Federation of BiH, is not in conformity with the Constitution of BiH (Article III of the General Framework Agreement for Peace in Bosnia and Herzegovina speaks of "boundary

lines" between the two Entities, while Article X uses the term border in the sense of borders between states).

Article 6, paragraph 2

Provisions of the Constitution of RS regulating that an RS citizen may not be extradited, are unconstitutional as this falls within the competence of institutions of BiH.

Article 44, paragraph 2

Provision of Article 44 paragraph 2 of the Constitution of RS is unconstitutional as, according to the Constitution of BiH (Article III.1 (f)), policy and regulation of asylum falls within the competence of institutions of BiH. Accordingly, Entities have no authority to regulate the asylum policy.

Articles 98 and 76, paragraph 2

Despite the fact that the National Bank no longer exists, the RS People's Assembly failed to repeal provisions relating thereto and they still remain in effect.

According to Article VII of the Constitution of BiH, the Central Bank of BiH shall be the sole authority for issuing currencies and for monetary policy throughout BiH. Entities, pursuant to Article III.3 of the Constitution of BiH, have no authority in this respect.

The Central Bank, in pursuance of Article VII of the Constitution of BiH, is the sole authority for monetary policy throughout BiH, which includes proposed bills in this respect. The challenged provision of the Constitution of RS regulating that the RS National Bank shall have the right to propose laws, other regulations and general enactments relating to monetary, foreign exchange and credit system is therefore unconstitutional.

Article 138 (as modified by Amendments LI and LXV)

Provision of Article 138 of the Constitution of RS, empowering the RS authorities to pass enactments and undertake measures for the protection of rights and interests of the RS against enactments of institutions of BiH or the Federation of BiH, is unconstitutional. The above referenced stands since the Constitutional Court of BiH shall have exclusive jurisdiction to serve as a protective mechanism in case of "any dispute of this kind" pursuant to Article VI.3 (a) of the Constitution of BiH and since Article 75 of the Constitutional Court's Rules of Procedure provides a possibility for an interim measure to be adopted.

CONSTITUTION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

Article IV.B.7 (a) (I) and Article IV.B.8

Provisions of the Constitution of the Federation of BiH which provide that the president of the Federation shall be responsible for nominating heads of diplomatic missions, are unconstitutional since the Presidency of BiH has responsibility for appointing ambassadors without restriction in its decision-making right, pursuant to Article V.3 (b) of the Constitution of BiH.

ANNEX

Separate opinion of Prof. Dr Kasim Begić on the Court's Decision regarding Amendment LVII, item 1 to the Constitution of the Republika Srpska – Chapter on Human Rights and Fundamental Freedoms –

In relation to the Court's decision on Amendment LVII, item 1 to the Constitution of the Republika Srpska, which supplements the Chapter on Human Rights and Fundamental Freedoms, it is my opinion that there are a series of arguments which put into question the essential rationale of the Court's Decision. According to this rationale, the Amendment involves the supposed "positive discrimination" and "relative constitutional autonomy" of the Constitution. Actually, the essence of the controversy regarding both Amendment LVII and the entire Chapter on Human Rights, according to my opinion, consists of an entirely different approach of the Constitution of the Republika Srpska in comparison to the Constitution of Bosnia and Herzegovina. Thus, the aforementioned Amendment, in relation to the remaining provisions, has a declaratory character and represents merely a "decoration" for the catalogue of human rights established long before the Constitution of Bosnia and Herzegovina entered into force. The arguments for this finding are as follows:

(1) In the Constitution of the Republika Srpska, the European Convention for the Protection of Human Rights and Fundamental Freedoms is mentioned only incidentally, in this Amendment, and in the context that certain constitutional articles on human rights and freedoms shall be "exercised in conformity with corresponding provisions, Articles 8 through 11, of the European Convention for the Protection of Human Rights and Fundamental Fredoms". The arguments, according to which the reference to the Constitution of Bosnia and Herzegovina and the alleged introduction of "positive discrimination", would implicitly incorporate the European Convention for the Protection of Human Rights and Fundamental Freedoms into the Constitution of the Republika Srpska, are not convincing because the European Convention is explicitly incorporated in the Constitution of Bosnia and Herzegovina (Article II Item 2) as the fundamental grounds for accomplishing international standards of protection of rights and freedoms in Bosnia and Herzegovina.

(2) Unlike the Constitution of Bosnia and Herzegovina, the Constitution of the Republika Srpska fails to contain a clear provision under which the European Convention for the

Protection of Human Rights and Fundamental Freedoms would apply directly and have priority over "all other law". This fact puts their alleged constitutional autonomy into question.

(3) Furthermore, the Constitution of the Republika Srpska fails to even implicitly include the list of rights accentuated in Article II of the Constitution of Bosnia and Herzegovina and, in particular, the provisions on the international standards of protection of rights and freedoms (including a series of conventions that are an integral part of the Constitution) and the right of refugees and displaced persons to return to their homes of origin. The supposed "positive discrimination" is thereby directly derogated.

(4) Finally, in this field the alleged balance between the Constitution of the Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina with respect to the Constitution of Bosnia and Herzegovina should be kept in mind. Namely, the Constitution of the Federation of Bosnia and Herzegovina follows the catalogue of human rights and the human rights instruments laid down in the Constitution of Bosnia and Herzegovina, including international standards and international protection mechanisms (the Human Rights Commission and other judicial organs that include international members, ombudspersons, as well as the access to "international human rights monitoring mechanisms established by any international agreement…"), while the Constitution of the Republika Srpska fails to provide any solution in this respect.

With respect to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Articles 35, 37, 54, 57, 58, 59, and 71 of its Rules of Procedure, the Constitutional Court of Bosnia and Herzegovina, at its session held on 18 and 19 February 2000, adopted the following

PARTIAL DECISION

Regarding the Constitution of the Republika Srpska:

The Constitutional Court hereby declares that Article 59, paragraphs 1, 2, and 3 is unconstitutional.

The applicant's request is hereby rejected with respect to the following provisions:

a) Article 58 paragraph 1;
b) Article 59 paragraphs 4 and 5;
c) Article 60;
d) Article 68 item 6.

The provisions of the Constitution of the Republika Srpska, which the Constitutional Court has found to be in contradiction with the Constitution of Bosnia and Herzegovina, cease to be in effect from the date of publication of this Decision 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* **and the** *Official Gazette of the Republika Srpska***.**

Reasons

I. Proceedings before the Constitutional Court

1. On 12 February 1998, Mr. Alija Izetbegović, at that time Chair of the Presidency of Bosnia and Herzegovina, instituted proceedings before the Constitutional Court for an

evaluation of consistency of the Constitution of the Republika Srpska ("Constitution of RS") and the Constitution of the Federation of Bosnia and Herzegovina ("Constitution of the Federation") with the Constitution of Bosnia and Herzegovina ("Constitution of BiH"). The request was supplemented on 30 March 1998 when the applicant specified which provisions of the Entities' Constitutions he considered to be unconstitutional.

The applicant requested that the Constitutional Court review the following provisions of the Entities' Constitutions:

Regarding the Constitution of RS:

a) The Preamble to the extent that it refers to the right of the Serb people to self-determination, the respect for their struggle for freedom and State independence, and the will and determination to link their State with other States of the Serb people;

b) Article 1 which provides that the Republika Srpska is a State of the Serb people and of all its citizens;

c) Article 2, paragraph 2 to the extent that it refers to the alleged border between the Republika Srpska and the Federation;

d) Article 4 which provides that the Republika Srpska may establish special parallel relationships with the Federal Republic of Yugoslavia and its Member Republics, and Article 68, paragraph 1 which, under item 16, provides that the Republika Srpska shall regulate and ensure cooperation with the Serb people outside the Republic;

e) Article 6, paragraph 2 to the extent that it provides that a citizen of the Republika Srpska cannot be extradited;

f) Article 7 to the extent that it refers to the Serbian language and Cyrillic alphabet as the official language;

g) Article 28, paragraph 4 which provides for material State support of the Orthodox Church and cooperation between the State and the Orthodox Church in all fields, in particular for the preservation, fostering, and development of cultural, traditional and other spiritual values;

h) Article 44, paragraph 2 which provides that foreign citizens and stateless persons may be granted asylum in the Republika Srpska;

i) Amendment LVII, item 1 which supplements the Chapter on Human Rights and Freedoms and provides that, in the case of differences between the provisions on rights and freedoms in the Constitution of RS and those of the Constitution of BiH, the provisions which are more favourable to the individual shall be applied;

j) Article 58 paragraph 1, Article 68 item 6 and the provisions of Articles 59 and 60 to the extent that they refer to different forms of property, the holders of property rights, and the legal system relating to the use of property;

k) Article 80, as modified by Amendment XL, item 1, which provides that the President of the Republika Srpska shall perform duties related to defence, security, and relations with other States and international organizations, and Article 106, paragraph 2, according to which the President of the Republika Srpska shall appoint, promote, and recall officers of the Army, judges of military courts, and Army prosecutors;

l) Article 80, as modified by Amendments XL and L, item 2 which confers onto the President of the Republika Srpska the power to appoint and recall heads of missions of the Republika Srpska in foreign countries and to propose ambassadors and other international representatives of Bosnia and Herzegovina from the Republika Srpska, as well as Article 90, supplemented by Amendments XLI and LXII, which confers onto the Government of the Republika Srpska the authority to establish the Republic's missions abroad;

m) Article 98, according to which the Republika Srpska shall have a National Bank, as well as Article 76, paragraph 2 as modified by Amendment XXXVIII, item 1, paragraph 2, which confers onto the National Bank the competence to propose statutes relating to monetary policy; and

n) Article 138, as modified by Amendments LI and LXV, which empowers the authorities of the Republika Srpska to adopt acts and undertake measures for the protection of the Republic's rights and interests against acts of the institutions of Bosnia and Herzegovina or the Federation of BiH.

Regarding the Constitution of the Federation:

a) Article I.1 (1) to the extent that it refers to Bosniacs and Croats as being the constituent peoples;

b) Article I.6 (1) to the extent that it refers to Bosnian and Croatian as the official languages of the Federation;

c) Article II.A.5 (c), as modified by Amendment VII, to the extent that it provides for dual citizenship;

d) Article III.1 (a) to the extent that it provides for the authority of the Federation to organize and conduct the defence of the Federation; and

e) Article IV.B.7 (a) and Article IV.B.8 to the extent that they entrust the President of the Federation with the task of appointing heads of diplomatic missions and military officers.

2. The request was communicated to the People's Assembly of the Republika Srpska and the Parliament of the Federation of BiH. On 21 May 1998, the People's Assembly of the Republika Srpska submitted its views on the request in writing. The House of Representatives of the Parliament of the Federation of BiH submitted its reply on 9 October 1998.

3. In accordance with the Constitutional Court's decision of 5 June 1998, a public hearing was held in Sarajevo on 15 October 1998, at which representatives and experts of the applicant and the House of Representatives of the Federation presented their views on the case. The public hearing proceeded in Banja Luka on 23 January 1999. The applicant was represented by: Prof. Dr Kasim Trnka and an expert, Džemil Sabrihafizović; the House of Representatives of the Federation by Enver Kreso and an expert, Sead Hodžić; the House of Peoples of the Federation by Mato Zovko and an expert, Ivan Bender; and the People's Assembly of the Republika Srpska by Prof. Dr Radomir Lukić and an expert, Prof. Dr Petar Kunić. On that occasion, arguments were presented by the representatives and experts of the applicant, the House of Representatives, and the House of Peoples of the Federation as well as the People's Assembly of the Republika Srpska

4. Discussions on the case took place at the following sessions of the Court: on 25 and 26 February 1999, 7 and 8 June 1999, 13 and 14 August 1999, 24 and 25 September 1999, and on 5 and 6 November 1999. At the session held on 3 and 4 December 1999, the Court concluded that at the following session they would deliberate and vote on the case based on the prepared Draft Decision.

5. At the session from 8 through 30 January 2000, the Court unanimously adopted a Partial Decision in the case (*Official Gazette of Bosnia and Herzegovina*, No. 11/00; *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 15/00 and *Official Gazette of the Republika Srpska*, No. 12/00). In this Decision, the Court declared that, with respect to the Constitution of RS, the following provisions or parts of provisions were unconstitutional: the word "border" in Article 2, paragraph 2; the words "or extradited" in Article 6, paragraph 2; Article 44, paragraph 2; Article 98 and Article 76, paragraph 2, as modified by Amendment XXXVIII and Article 138 as modified by Amendments LI and LXV.

The applicant's request was rejected with respect to the following provisions: Amendment LVII, item 1, which supplements the Chapter of the Constitution on Human Rights and Freedoms; Article 80, paragraph 1, as modified by Amendments XL and L, item 2, and Article 90, as supplemented by Amendments XLI, item 1 and LXII.

Regarding the Constitution of the Federation, the Court declared the following parts of provisions unconstitutional: in Article IV.B.7 (a) (I) the words "heads of diplomatic missions" and in Article IV.B.8 the words "heads of diplomatic missions".

The applicant's request was rejected with respect to Article II.A.5 (c), as modified by Amendment VII.

II. Admissibility

6. The Court declared the entire request admissible in its Partial Decision 29 and 30 January 2000 (*Official Gazette of Bosnia and Herzegovina*, No. 11/00; *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 15/00 and *Official Gazette of Republika Srpska*, No. 12/00).

III. Merits

7. In this Partial Decision the Court determines the constitutionality of Articles 58, paragraph 1, 59, 60, and 68, item 6 of the Constitution of the Republika Srpska, to the extent that they refer to different forms of property, the holders of property rights, and the legal system regulating the use of property.

The challenged provisions read as follows:

Article 58, paragraph 1

Property rights and obligations relating to socially-owned resources and the conditions of transforming the resources into other forms of ownership shall be regulated by law.

Article 59

Natural resources, urban construction sites, real estate and goods of particular economic, cultural and historical significance determined by law to be of general interest, shall be state-owned.

Certain goods of general interest may also be privately owned property under the conditions determined by law.

On goods of general interest as well as on urban construction sites a right to beneficial use may be acquired under the conditions provided by law.

The use and exploitation of goods of special cultural, scientific, artistic or historical significance, or significance for the protection of nature and the environment, may be restricted on the basis of law with full compensation to the owner.

The protection, use, improvement and management of goods of general interest, as well as the payment of compensation for the use of goods of general interest and urban construction sites, shall be regulated by law.

Article 60

Natural and legal persons shall, in accordance with the law, exercise their ownership rights to real estate according to its nature and purpose.

The ownership of farming land shall be guaranteed; the ownership of forests and forest land shall be guaranteed within the bounds specified by law.

Article 68, item 6 (in the wording of Amendment XXXII as modified by Amendment LVIII)

The Republic shall regulate and ensure:

(...)

b) Property and contractual relations and the protection of all forms of property, the legal status of enterprises and other organisations, their associations and chambers, economic relations with foreign countries, which have not been transferred to institutions of Bosnia and Herzegovina, the market and planning;

(...).

8. The applicant contended that these challenged provisions did not conform to Article I.4 of the Constitution of BiH and item 2 of Annex II to the Constitution of BiH. Although the Constitution of BiH does not regulate property matters, the corresponding regulations of the Republic of Bosnia and Herzegovina remain in force. He additionally noted that the Constitution of BiH guarantees the equality of all citizens of Bosnia and Herzegovina and freedom of movement for persons, goods, services and capital throughout Bosnia and Herzegovina, pursuant to Article I.4 of the Constitution of BiH. These basic principles require that property relations be regulated by the State of Bosnia and Herzegovina, thereby amending the respective laws of the Republic of Bosnia and Herzegovina. Such regulation would guarantee the equality of all citizens and legal persons of Bosnia and Herzegovina and establish a common economic space and economic system, which is one of the requirements of the constitutional order of BiH. Therefore, the legal system of the Republika Srpska cannot regulate these relations differently.

9. The applicant's expert added, during the course of the public hearing, that there could not be freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina if there are different legal systems of property relations and rights in some parts of Bosnia and Herzegovina. Moreover, such a situation does not allow all persons throughout the territory of BiH to enjoy their right to property under the same conditions, as guaranteed by the Constitution of BiH. This uniformity will be vitally important in the privatization process. Different legal regimes for the privatization of state-owned property categorize citizens unequally with respect to their participation in the privatization process. Essentially, citizens would thereby be discriminated against due to their national affiliation.

10. The People's Assembly of the Republika Srpska principally raised the objection, in its written statement, that Article I.4 of the Constitution of BiH was not related to the distribution of legislative powers between the BiH institutions and the Entities. This provision only prohibits boundary controls between the Entities. However, as apparent from the relevant provisions of Article III.1 and 4 of the Constitution of BiH, it is within

the authority of the Entities to regulate property and obligation relations, the protection of all forms of property, and the legal status of enterprises and other organizations, property rights with respect to socially owned goods, and the conditions under which property rights and obligations of socially owned goods may be transferred into other forms of property. Furthermore, Annex II to the Constitution of BiH did not represent an integral part of the Constitution of BiH and thus provides no basis of judicial review for the Constitutional Court. On the other hand, the provisions of the said Annex would only be valid according to the distribution of powers between the Entities and the BiH institutions.

The Constitutional Court finds:

11. Article 58, paragraph 1 of the Constitution of RS refers to property rights in relation to "socially-owned resources" and the conditions for transforming these resources into "other forms of ownership". The very category of "socially-owned resources" – as a negation of both privately and state owned property – must be viewed as a legacy of the communist self-management system and therefore, raises serious doubts whether such a legal category can be considered in line with the right to privately owned property under Article II.3 (k) of the Constitution of BiH and the goal of a market economy detailed under line 4 of the Preamble to the Constitution of BiH. Article 59, paragraph 1 of the Constitution of RS states that natural resources, urban construction sites, real estate, and certain goods of general interest are to be state-owned. This provision's wording, in particular if read in conjunction with paragraphs 2 and 3 of the same Article, seems to establish a rule that all listed domains are nationalized *ex constitutione*, thereby also raising doubts whether this provision conforms with the right to privately owned property as guaranteed by the Constitution of BiH. Article 60 refers to ownership rights with respect to real property, farming land, forests and forestland. Finally, Article 68 confers onto the Republika Srpska the responsibility to regulate, *inter alia*, property and contractual relations as well as protection of all forms of property, market and planning. Therefore, the question is raised whether, according to the Constitution of BiH, the regulation of all forms of property, market and planning falls under the exclusive jurisdiction of the Republika Srpska.

12. In order to review the challenged provisions of the Constitution of RS, it is necessary to elaborate the standards set forth by the Constitution of BiH. Articles III.1 and 3 of the Constitution of BiH regulate the distribution of powers, in principle, to the extent that the responsibilities of the BiH institutions are enumerated and, again in principle, all other functions and powers not specified in the Constitution of BiH rest with the Entities. However, the Constitution of BiH not only creates powers within this general distribution

system of powers in Article III. In creating the BiH State institutions, the Constitution also confers upon them relatively specific powers, as apparent in Article IV.4 regarding the Parliamentary Assembly and Article V.3 regarding the Presidency BiH, which are not necessarily repeated in the enumerated powers in Article III.1. The Presidency of BiH, for example, is vested with the power of civilian command over the Armed Forces in Article V.5 (a), although Article III.1 does not explicitly refer to military affairs within the responsibility of the BiH institutions. It must then be concluded that matters which are not expressly enumerated in Article III.1 are not necessarily under the exclusive jurisdiction of the Entities in the same way as the Entities might have residual powers with respect to the responsibilities of the BiH institutions. Such a reference can be made, for instance, to the responsibility of the BiH institutions with respect to foreign policy and foreign trade policy explicitly listed in Article III.1 (a) and (b), as the Entities also have, for instance, a right to establish special parallel relationships with neighbouring states according to Article III.2 (a).

13. In addition, the Constitution of BiH establishes basic constitutional principles and goals for the functioning of Bosnia and Herzegovina as well as a catalogue of human rights and fundamental freedoms that must be perceived as constitutional guidelines or limitations for the exercise of the responsibilities of Bosnia and Herzegovina and the Entities. According to line 4 of the Preamble of the Constitution of BiH, this Constitution was adopted in order to “promote the general welfare and economic growth through the protection of privately owned property and the promotion of a market economy”. Furthermore, Article I.4 of the Constitution provides for freedom of movement throughout Bosnia and Herzegovina and explicitly states that neither Bosnia and Herzegovina nor the Entities shall “impede full freedom of movement of persons, goods, services and capital throughout Bosnia and Herzegovina” as a necessary prerequisite for the existence of a joint market. Finally, Article II.3 (k) guarantees the right to property in connection with the obligation of the Entities under paragraph 6 of the same Article to “apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above”. Given that Article II.3 line 1 reads that “all persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms...” enumerated there, the right to property is not only a right which all authorities of BiH must respect, but there is also a positive obligation on the State to provide for the conditions which are necessary to enjoy this right. Article II.3 therefore grants a general authority to the joint institutions of BiH to regulate all matters enumerated in the catalogue of human rights, which cannot be exclusively left to the Entities because the protection must be guaranteed to “all persons within the territory of BiH”.

14. *In conclusion*, there are at least two constitutional rules imposed by the said constitutional provisions that must serve as a standard for judicial review. Demonstrated by the relationship between "the protection of privately owned property" and a market economy in the text of the Preamble and Article II of the Constitution of BiH, the right to property is not only an individual right, which requires judicial protection against any illegitimate state interference, but also an institutional safeguard of one of the prerequisites for a functional market economy. Therefore, there is a positive constitutional obligation on both Bosnia and Herzegovina and the Entities to create a legal framework necessary to fulfill this constitutional obligation.

15. Furthermore, the right to property enumerated in both the Preamble and Article I.4 of the Constitution also includes an implicit limitation on the legislature that is expressly stated in Article 1 of the First Protocol of the European Convention on Human Rights and must be applied directly, in accordance with Article II.2 of the Constitution of BiH. It follows from the case law of the European Court of Human Rights that in balancing the demands of the community's general interests, the State's interference with property rights and the requirements of the protection of individual rights, that such a fair balance presupposes the possibility of a balance, i.e. the factual existence of goods in privately owned property. If privately owned property can be reduced to next to nothing through legislation by nationalising, for instance, entire fields of industries, such legislation would fundamentally infringe on the right to property, and in particular, as it is viewed as a necessary requirement of a market economy expressly foreseen by the Constitution of BiH. Therefore, in the final analysis, the supremacy of the Constitution of BiH in accordance with Article III.3 (b), which supersedes, *inter alia*, the Constitutions of the Entities, would no longer have any reasonable meaning if it allowed the abolishment of privately owned property. This idea is expressed in the case law of Central European constitutional courts as "in no case may the essence of a basic right be encroached upon", thereby establishing an absolute restriction on the infringement of constitutionally guaranteed rights through legislation.

16. The question is now whether the challenged provisions are in conflict with these constitutional standards.

17. The challenged provision of Article 58, paragraph 1 of the Constitution of RS is worded as a legislative authorization to enable the regulation of property rights and obligations relating to socially owned resources and the conditions for transforming these resources into other forms of ownership. However, the very category of socially owned property that

is derived from the old communist self-management system can no longer be considered to conform to the constitutional requirements outlined above. The category of socially-owned property is incompatible with the "promotion of a market economy" because it creates, in theory and practice, serious obstacles for any privatization process necessary in Bosnia and Herzegovina in order to establish a properly functional market economy.

18. However, the challenged provision can be read as a mere legislative authorization or as a constitutional duty for the RS legislature to transform all socially-owned property into other forms of ownership, and privately owned property in particular. Whereas the first interpretation would violate the constitutional requirements following from the Constitution of BiH as outlined above, the second interpretation would meet these requirements.

19. Following an established constitutional doctrine that a challenged provision must be upheld as long as it can be interpreted in conformity with the Constitution, the Constitutional Court consequently finds that Article 58, paragraph 1 contains a constitutional duty to transform all socially owned property into other forms of ownership, and in particular into privately owned property, and thus conforms with the Constitution of BiH.

20. With respect to the challenged provisions of Article 59 of the Constitution of RS, the Constitutional Court finds the following: Paragraph 1 of this Article provides that natural resources, urban construction sites, real estate, and certain goods of general interest shall be state-owned as a rule. Since paragraph 2 of the same Article, as an exception, allows for privately owned property of certain goods of general interest (demonstrated by the wording "may also be privately owned"), the entire understanding of privately owned property as a rule and an exception to this rule is reversed through this legislative restriction. The same rule applies to paragraph 3 of the same Article on the use of goods of general interest and urban construction sites. The organisation of the first three paragraphs of the challenged Article therefore clearly establishes a constitutional obligation that natural resources, urban construction sites, real estate and certain goods of general interest must be state-owned. However, such a rule goes far beyond the boundaries imposed by the standards of the Constitution of BiH outlined above. To declare natural resources, urban construction sites, and real estate to be state-owned property *ex constitutione* infringes on the very "essence" of privately owned property as an individual right and an institutional safeguard.

21. In addition, the ability to expropriate on behalf of the "general interests" of the State or society was an important element of the communist constitutional doctrine and must thus be viewed as a legacy of that period. If legislation can abolish constitutionally guaranteed

rights by making reference to unspecified “general interests”, it would ridicule the basic principle of the rule of law, with the Constitution as paramount, because there is virtually nothing which could not be construed as of “general” interest. Hence, the Constitutions of the Entities must not grant such broadly construable legislative authorizations that could deprive human rights of any meaning. Such a legal technique violates the principle of efficiency.

22. The Constitutional Court thus declares paragraphs 1 through 3 of Article 59 unconstitutional.

23. Paragraph 4 of the challenged Article, however, has a specific legitimate aim as it refers to goods of special cultural, scientific, artistic or historical significance, or significance for the protection of nature and the environment, and does not exclude privately owned property as such by the legislative authorization to restrict this right. Moreover, this provision provides for full compensation to the owner. Article 59, paragraph 4 therefore conforms to the constitutional requirements of privately owned property in the framework of a market economy.

24. Paragraph 5 of the challenged Article allows the legislation to regulate the protection, use, improvement and management of goods of general interest, which does not equal expropriation, but is a limitation of privately owned property. Hence, this legislative competency does not violate the “essence” of the right or the institutional safeguard of privately owned property. Furthermore, like paragraph 4, paragraph 5 prescribes compensation. Consequently, Article 59, paragraph 5 conforms to the constitutional requirements of privately owned property in relation to the market economy.

25. With respect to the challenged provisions of Article 60 of the Constitution of RS, which refer to ownership rights with regard to real estate, farming land, forests and forest land, the Constitutional Court does not find that the interference into the constitutionally guaranteed right to privately owned property amounts to a violation of the “essence” of privately owned property through the wording of the legislative authorization. Article 60 is thus consistent with the Constitution of BiH.

26. Regarding the challenged provision of Article 68, item 6 of the Constitution of RS, the Constitutional Court notes that this provision confers onto the Republika Srpska the power to regulate, *inter alia*, property and contractual relations, protection of all forms of property, market and planning. This provision, by granting a competence to the RS legislature, does not violate the constitutional requirements elaborated above with respect

to the restrictions derived from privately owned property as an institutional safeguard and a facet of a market economy. Moreover, this provision carefully observes the interplay of the distribution of powers between the institutions of Bosnia and Herzegovina and the Entities by referring to the competencies in the field of economic relations with foreign countries "which have not been transferred to the institutions of Bosnia and Herzegovina". It should also be observed that this provision of the Constitution of RS is, in itself, ample evidence that the Constitution of RS is not based on the idea that Article III of the Constitution of BiH provides for exclusive responsibilities.

27. Article 68, item 6 falls thus within the ambit of the constitutional distribution of powers between the institutions of BiH and the Entities and is therefore in line with the Constitution of BiH.

28. Nevertheless, the Constitutional Court finds that, on 4 August 1998, a Framework Law on Privatisation of Enterprises and Banks in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, No. 14/98) ("Framework Law") entered into force. The goal of this law was to harmonise the Entities' legislation in this field and to include all persons in the privatisation process in a non-discriminatory manner (see the second line of the Preamble to the Framework Law and Article 3 of the Framework Law), while, at the same time, the legislative responsibility of the Entities was, in principle, recognized (Article 2 of the Framework Law).

29. The different legal systems of the Entities, with different types of property or regulations of property law, may indeed form an obstacle for the freedom of movement of goods and capital as provided for in Article I.4 of the Constitution of BiH. Moreover, the constitutionally guaranteed right to privately owned property, as an institutional safeguard throughout Bosnia and Herzegovina, requires framework legislation by the State of Bosnia and Herzegovina in order to specify the standards necessary to fulfil the positive obligations of the Constitution elaborated above. Hence such framework legislation should determine, at least, the various forms of property, the holders of these rights, and the general principles for the exercise of property rights in property law that usually constitutes an element of the civil law codes in democratic societies.

30. The Constitutional Court was unanimous in adopting the Decision relating to Article 59, paragraphs 4 and 5, as well as Article 60 of the Constitution of RS. Regarding Article 58 and Article 59, paragraphs 1 to 3 of the Constitution of RS, the Constitutional Court

adopted its Decision by 5 votes to 2 and regarding Article 68, item 6 of the Constitution of RS, by 6 votes to 1.

31. The decisions regarding the publication in the *Official Gazettes* of Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina and regarding the day when the provisions that are declared unconstitutional cease to be in effect are based on Articles 59 and 71 of the Court's Rules of Procedure.

The Court ruled in the following composition: Prof. Dr Kasim Begić, President of the Constitutional Court, and Judges: Hans Danelius, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Dr Zvonko Miljko, Azra Omeragić and Mirko Zovko.

With respect to Article 58, Article 59, paragraphs 1 to 3 and Article 68, item 6 of the Constitution of RS and pursuant to Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, Judge Hans Danelius has expressed his separate opinion partly dissenting and partly concurring. The text of his opinion is annexed to this Partial Decision.

U 5/98 II
18 and 19 February 2000
Sarajevo

Prof. Dr Kasim Begić
President
Constitutional Court of Bosnia and Herzegovina

CONSTITUTION OF THE REPUBLIKA SRPSKA

Article 59, paragraphs 1, 2 and 3

A designation of natural resources, city construction land, real estate and goods of public interest as state owned property *ex constitutione,* represents the violation of the very "nature" of privately owned property which is an individual right and an institutional safeguard.

Entity Constitutions must not provide a wide range of interpretation of the legislative power that might deprive human rights of any relevance. Such legal technique violates the principle of efficiency. The above referenced provisions of the Constitution of RS are therefore unconstitutional.

In particular, the Constitutional Court underlines that different legal systems of the

Entities, with different forms of property or property law regulations, may pose an obstacle to the free movement of goods and capital guaranteed by Article I.4 of the Constitution of BiH. Socially-owned property is an unconstitutional category and, as such, it constitutes a hindrance to the economic development through protection of privately owned property and promotion of market economy.

Furthermore, a constitutionally guaranteed right to privately owned property, as an institutional safeguard in the entire BiH, requires a framework legislation at the level of BiH for the purpose of identification of standards necessary to fulfil previously mentioned obligations of the Constitution. Such framework legislation should therefore provide different forms of property, holders of those rights and general principles for their enforcement in the sense of property law that normally stands for an element of civil law statutes in democratic societies.

In addition, Article III of the Constitution of BiH does not provide for exclusive division of competencies between institutions of BiH and Entities. However, it requires the implied powers of both institutions of BiH and Entities' authorities to be taken into account, as necessary for cooperation within a state.

ANNEX

Separate opinion by Judge Hans Danelius
(Regarding Articles 58, 59, 60 and 69 of the Constitution of the Republika Srpska)

Article 58, paragraph 1 of the Constitution of RS deals with property rights and obligations relating to socially-owned resources and it also refers to the transformation of such resources into other forms of ownership. In paragraph 2 of the same Article, reference is made to the »alienation« of socially-owned property which, it is stated, may as a rule only be effected according to market criteria. Article 59 of the Constitution of RS provides in paragraph 1 that natural resources, urban construction sites, real estate and property of particular economic, cultural and historic significance determined by law to be of general interest shall be State-owned but adds in paragraph 2 that certain goods of general interest may also be privately owned under the conditions determined by law. Article 60 provides that ownership rights to real estate shall be exercised according to the nature and purpose of such property. According to Article 68, the Republic shall regulate and ensure, among other matters, property and obligation relations and protection of all forms of property, legal status of enterprises and other organisations.

The question is now whether these provisions are in conflict with the Constitution of BiH. In order to answer this question, it is necessary to analyse what requirements the Constitution of BiH can be considered to impose on the Entities regarding property matters. The following provisions of the Constitution of BiH are relevant in this respect:

(a) The fourth paragraph of the Preamble which reads as follows: *Desiring to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy*;

(b) Article I, paragraph 4 which provides that there shall be freedom of movement throughout Bosnia and Herzegovina and that the Entities shall not impede full freedom of movement of persons, goods, services and capital throughout Bosnia and Herzegovina; and

(c) Article II, paragraph 2 which provides that the European Convention on Human Rights and its Protocols shall apply directly in Bosnia and Herzegovina, and Article II, paragraph 3 which refers to the right to property as one of the human rights which shall be enjoyed by all persons within the territory of Bosnia and Herzegovina.

The fourth paragraph of the Preamble is of a general character and lays down an objective or an aim rather than a concrete obligation. It imposes no precise requirement with respect to the social and economic system that should be applied in Bosnia and Herzegovina, and while an economic system which would be hostile to private property and a free economy would be difficult to reconcile with that paragraph of the Preamble, the same cannot be said when the property regime is of a mixed character.

With respect to the system in the Republika Srpska, Article 50 of the Constitution of RS provides that the economic and social order shall be based on the equality of all forms of ownership and free enterprise, the independence of enterprises and other forms of organisation on management and appropriation of profit. Article 52 - which states that free enterprise may be exceptionally restricted by law for certain purposes - is based on the idea that free enterprise shall be the rule, and Article 54 provides that all forms of property shall enjoy equal protection of the law. Article 58 refers not only to the existence of socially-owned property but also to the conditions for transforming such property into other forms of ownership. Article 59 provides that certain categories of property deemed to be of general interest shall be State-owned but adds that certain goods of general interest may also be privately owned.

When read together, these various provisions in the Constitution of RS show that the economic system and the property regime in the Republika Srpska are of a mixed character. They do not provide for a State-owned economy but refer to various forms of property and to free enterprise, and they make it possible for socially-owned and State-owned property to be transformed into private property. They cannot therefore, in my opinion, be considered to be incompatible with the general desire to protect private property and promote a market economy which is expressed in the fourth paragraph of the Preamble to the Constitution of BiH.

With respect to Article I, paragraph 4 of the Constitution of BiH, which protects the freedom of movement of persons, goods, services and capital throughout Bosnia and Herzegovina, I cannot find it established that the challenged provisions in the Constitution of RS infringe that freedom.

Finally, with respect to the provisions in Article II of the Constitution of BiH, which guarantee the right to property in the context of the general protection of human rights, I find it natural to start the analysis by referring to Article 1 of Protocol No. 1 to the European Convention on Human Rights. That Article provides, *inter alia*, that every

natural or legal person is entitled to the peaceful enjoyment of his possessions, that no one shall be deprived of his possessions except on specific enumerated conditions, and that the State shall be free to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.

It appears from the wording of Article 1 of Protocol No. 1 that it is intended to provide protection for the individual's existing property. The provision has generally been understood not to include any right to acquire property, and this interpretation has been confirmed by the European Court of Human Rights, for instance in the case of *Marckx v. Belgium* (European Court of Human Rights, Judgment of 13 June 1979, Vol. No. 31). Against this background, Article 1 cannot be considered to impose on the State an obligation to privatise State-owned property or otherwise to ensure that certain property is private and not owned by the State or other public organs.

In Article II, paragraph 3 of the Constitution of BiH, the right to property appears as one of numerous enumerated human rights, and there seems to be no reason why the protection of the right to property in this paragraph should be different from the protection provided by Article 1 of Protocol No. 1.

In other words, the right to property as a human right is an individual right. It does not impose obligations regarding the social and economic system of a country. It protects the property which an individual owns at a given moment and does not include any right for him to acquire other property in the future.

It follows that the fact that certain categories of property are, as a rule, socially or publicly owned in the Republika Srpska and cannot easily be acquired by private individuals is not a violation of the right to property as an individual, human right addressed in Article II of the Constitution of BiH.

For these reasons, I conclude that the part of request refering to Articles 58, 59, 60 and 68 of the Constitution of RS is not well-founded and that these Articles cannot be considered to be in conflict with the Constitution of BiH.

With respect to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Articles 35, 37, 54, 57, 58, 59, and 71 of its Rules of Procedure, the Constitutional Court of Bosnia and Herzegovina, at its session held on 30 June and 1 July 2000, adopted the following

PARTIAL DECISION

A. Regarding the Constitution of the Republika Srpska:

The Constitutional Court declares the following provisions or parts of provisions unconstitutional:

a) Paragraphs 1, 2, 3 and 5 of the Preamble, as amended by Amendments XXVI and LIV
b) The wording "a State of the Serb people and" of Article 1, as modified by Amendment XLIV.

B. Regarding the Constitution of the Federation of Bosnia and Herzegovina

The Constitutional Court declares the following parts of provisions unconstitutional:

a) The wording "Bosniacs and Croats as constituent peoples, along with Others, and" as well as "in the exercise of their sovereign rights" of Article I.1 (1), as modified by Amendment III.

The provisions or parts of provisions of the Constitutions of the Republika Srpska and the Federation of Bosnia and Herzegovina, which the Constitutional Court has found to be in contradiction with the Constitution of Bosnia and Herzegovina cease to be in effect as of the date of the publication of this Decision in *Official Gazette of Bosnia and Herzegovina.*

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

Reasons

I. Proceedings before the Constitutional Court

1. On 12 February 1998, Mr. Alija Izetbegović, at the time Chair of the Presidency of Bosnia and Herzegovina, instituted proceedings before the Constitutional Court for an evaluation of the conformity of the Constitution of the Republika Srpska ("Constitution of RS") and the Constitution of the Federation of Bosnia and Herzegovina ("Constitution of the Federation") with the Constitution of Bosnia and Herzegovina ("Constitution of BiH"). The request was supplemented on 30 March 1998 when the applicant specified which provisions of the Entities' Constitutions he considered to be unconstitutional.

The applicant requested that the Constitutional Court review the following provisions of the Entities' Constitutions:

A. Regarding the Constitution of RS:

a) The Preamble to the extent that it refers to the right of the Serb people to self-determination, the respect for their struggle for freedom and State independence, and the will and determination to link their State with other States of the Serb people;

b) Article 1 which provides that the Republika Srpska is a State of the Serb people and of all its citizens;

c) Article 2, paragraph 2 to the extent that it refers to the border between the Republika Srpska and the Federation;

d) Article 4,which provides that the Republika Srpska may establish special parallel relationships with the Federal Republic of Yugoslavia and its Member Republics, and Article 68, paragraph 1 which, under item 16, provides that the Republika Srpska shall regulate and ensure cooperation with the Serb people outside the Republic;

e) Article 6, paragraph 2 to the extent that it provides that a citizen of the Republika Srpska cannot be extradited;

f) Article 7 to the extent that it refers to the Serbian language and Cyrillic alphabet as the official language;

g) Article 28, paragraph 4 which provides for material State support of the Orthodox Church and cooperation between the State and the Orthodox Church in all fields, in particular for the preservation, fostering, and development of cultural, traditional and other spiritual values;

h) Article 44, paragraph 2 which provides that foreign citizens and stateless persons may be granted asylum in the Republika Srpska;

i) Amendment LVII, item 1 which supplements the Chapter of the Constitution on Human Rights and Freedoms and provides that, in the case of differences between the provisions on rights and freedoms in the Constitution of RS and those of the Constitution of BiH, the provisions which are more favourable to the individual shall be applied;

j) Article 58 paragraph 1, Article 68 item 6 and the provisions of Articles 59 and 60 to the extent that they refer to different forms of property, the holders of property rights, and the legal system relating to the use of property;

k) Article 80, as modified by Amendment XL, item 1, which provides that the President of the Republika Srpska shall perform duties related to defence, security, and relations with other States and international organizations, and Article 106, paragraph 2 according to which the President of the Republika Srpska shall appoint, promote, and recall officers of the Army, judges of military courts and Army prosecutors;

l) Article 80, as modified by Amendments XL and L, item 2 which confers onto the President of the Republika Srpska the power to appoint and recall heads of missions of the Republika Srpska in foreign countries and to propose ambassadors and other international representatives of Bosnia and Herzegovina from the Republika Srpska, as well as Article 90, supplemented by Amendments XLI and LXII, which confers onto the Government of the Republika Srpska the authority to establish the Republic's missions abroad;

m) Article 98, according to which the Republika Srpska shall have a National Bank, as well as Article 76, paragraph 2 as modified by Amendment XXXVIII, item 1, paragraph 2, which confers onto the National Bank the competence to propose statutes relating to monetary policy; and

n) Article 138, as modified by Amendments LI and LXV, which empowers the authorities of the Republika Srpska to adopt acts and undertake measures for the protection of

the rights and interests of the Republika Srpska against acts of the institutions of Bosnia and Herzegovina or the Federation of BiH.

B. Regarding the Constitution of the Federation:

a) Article I.1 (1) to the extent that it refers to Bosniacs and Croats as being the constituent peoples;

b) Article I.6 (1) to the extent that it refers to Bosnian and Croatian as the official languages of the Federation;

c) Article II.A.5 (c) as modified by Amendment VII, to the extent that it provides for dual citizenship;

d) Article III.1 (a) to the extent that it provides for the authority of the Federation to organize and conduct the defence of the Federation; and

e) Article IV.B.7 (a) and Article IV.B.8 to the extent that they entrust the President of the Federation with the task of appointing heads of diplomatic missions and officers of the military.

2. The request was communicated to the People's Assembly of the Republika Srpska and the Parliament of the Federation of BiH. On 21 May 1998, the People's Assembly of the Republika Srpska submitted its views on the request in writing. The House of Representatives of the Parliament of the Federation of BiH submitted its reply on 9 October 1998.

3. In accordance with the Constitutional Court's decision of 5 June 1998, a public hearing was held in Sarajevo on 15 October 1998, at which representatives and experts of the applicant and the House of Representatives of the Federation presented their views on the case. The public hearing proceeded in Banja Luka on 23 January 1999. The applicant was represented by: Prof. Dr Kasim Trnka and an expert, Džemil Sabrihafizović; the House of Representatives of the Federation by Enver Kreso and an expert, Sead Hodžić; the House of Peoples of the Federation by Mato Zovko and an expert, Ivan Bender; and the People's Assembly of the Republika Srpska by Prof. Dr Radomir Lukić and an expert, Prof. Dr Petar Kunić. On that occasion, arguments were presented by the representatives and experts of the applicant, the House of Representatives and the House of Peoples of the Federation, as well as the People's Assembly of the Republika Srpska

4. Discussions on the case took place at the following sessions of the Court: on 25 and 26 February 1999, 7 and 8 June 1999, 13 and 14 August 1999, 24 and 25 September 1999, and on 5 and 6 November 1999. At the session held on 3 and 4 December 1999, the Court concluded that at the following session they would deliberate and vote on the case based on the prepared Draft Decision.

5. At its session held on 29 and 30 January 2000, the Court adopted unanimously a first Partial Decision in the case (*Official Gazette of Bosnia and Herzegovina*, No. 11/00; *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 15/00 and *Official Gazette of the Republika Srpska*, No. 12/00).

6. At its session of 18 and 19 February 2000 the Court adopted a second Partial Decision in the case (*Official Gazette of Bosnia and Herzegovina*, No. 17/00; *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 26/00 and *Official Gazette of the Republika Srpska*, No. 31/00).

According to the Court's Decision of 5 May 2000, the public hearing was reopened in Sarajevo on 29 June 2000 on the remaining part of this case. Prof. Dr Kasim Trnka and an expert Džemil Sabrihafizović represented the applicant, Mr. Enver Kreso, and a legal expert, Sead Hodžić, represented the House of Representatives of the Federation, while Prof. Dr Radomir Lukić and an expert, Prof. Dr Petar Kunić, represented the People's Assembly of the Republika Srpska. The representative and the expert of the House of Peoples of the Federation, having been called to take part in accordance with the Court's Rules of Procedure, failed to appear at the public hearing.

Deliberations were continued at the session of the Court held on 30 June and 1 July 2000 and votes were cast on the following provisions:

A. Regarding the Constitution of RS

a) The Preamble, as modified by Amendments XXVI and LIV, to the extent that it refers to the right of the Serb people to self-determination, the respect for their struggle for freedom and State independence, and the will and determination to link their State with other States of the Serb people;

b) Article 1, as modified by Amendment XLIV, which provides that the Republika Srpska is a State of the Serb people and of all its citizens;

B. Regarding the Constitution of the Federation

a) Article I.1 (1), as modified by Amendment III, to the extent that it refers to Bosniacs and Croats as being the constituent peoples.

II. Admissibility

9. The Court declared the entire request admissible in its Partial Decision 29 and 30 January 2000 (*Official Gazette of Bosnia and Herzegovina*, No. 11/00; *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 15/00 and *Official Gazette of Republika Srpska*, No. 12/00).

III. Merits

A. Regarding the Constitution of RS

a) The challenged provisions of the **Preamble to the Constitution of RS**, as amended by Amendments XXVI and LIV, read as follows:

Starting from the natural, inalienable and non-transferable right of the Serb people to self-determination on the basis of which that people, as any other free and sovereign people, independently decides on its political and State status and secures its economic, social and cultural development;

Respecting the centuries-long struggle of the Serb people for freedom and State independence;

Expressing the determination of the Serb people to create its democratic State based on social justice, the rule of law, respect for human dignity, freedom and equality;

(...)

Taking the natural and democratic right, will and determination of the Serb people from the Republika Srpska into account to link its State completely and tightly with other States of the Serb people;

Taking into account the readiness of the Serb people to pledge for peace and friendly relations between peoples and States,

(...)

10. The applicant argued that the quoted provisions of the Preamble did not conform with the last paragraph of the Preamble to the Constitution of BiH, Articles II.4, II.6, and III.3 (b) of the Constitution of BiH since, according to that Constitution, there are three constituent peoples - Bosniacs, Croats and Serbs - who, along with other citizens, exercise their sovereign rights on the entire territory of Bosnia and Herzegovina without being subject to discrimination on any grounds such as, *inter alia*, a People's origin. He also referred to Article 1 of the Constitution of RS in order to support his claim that the Preamble to the Constitution of RS was not in line with the Constitution of BiH. Consequently, in his opinion, it is unjustified to call the Republika Srpska a People's State of only Serb people. In addition, the Republika Srpska could not be called a state "in its full capacity" as it is called an Entity in Article I. 3 of the Constitution of BiH.

11. The People's Assembly of the Republika Srpska principally raised the objection, in its written statement, that the Preamble was not an operative part of the Constitution of RS and had no normative character. The same would hold true for the Preamble of the Constitution of BiH because it was not made a part of the Constitution *stricto sensu* and therefore, had no normative character. In its opinion the text of a preamble could serve only as an auxiliary method of interpreting the constitution of which it is a preface. It may, therefore, not serve as a basis for review of the Constitution of RS. In the course of the public hearings, the representative and expert of the People's Assembly further invoked several scholarly opinions on the normative character of the Preamble of the US Constitution and Hans Kelsen's viewpoint that preambles "usually" fail to determine any specific norms for human conduct and therefore lack any legally relevant contents, being more of an ideological rather than legal character. In addition, it quoted from the Final Arbitration Award for Brčko that the preamble to the General Framework Agreement for Peace (GFAP) "did not itself create a binding obligation" for the parties. *In conclusio*, a preamble fails to contain any normative character as neither individual rights nor specific obligations of the state authorities follow from its text.

12. Furthermore, the Assembly responded in its written statement that there were many provisions in the Constitution of RS which prohibit discrimination and that the term "State" may well be used for a "political-territorial unit" with a constitution and is called a republic. Using the term "State" also in Article 1 of the Constitution of RS would not allude to the independence of the RS. During the course of the public hearings, the representative and expert of the People's Assembly also invoked some articles of the Constitution of BiH in order to prove that the statehood features of the Entities which were attributed by

the Constitution itself, such as Article III.3 (a) of the Constitution of BiH which refers to the "state functions" of the Entities and Article I.7 which refers to "citizenship" of the Entities. Upon questioning, the representative of the People's Assembly reaffirmed that the RS has to be seen as a state not in terms of international but rather constitutional law.

13. Finally, the expert of the People's Assembly of the Republika Srpska argued that the sovereignty of the Entities is an essential characteristic of their statehood and that the Dayton Peace Agreement acknowledged their territorial separation. Moreover, their peoples have a collective right of "self-organization" of their own state so that the Entities could act "according to the decisions taken at the level of joint institutions only if they conform to their own interests". Additionally, the expert of the People's Assembly of the Republika Srpska concluded in the public hearing: "It is evident that the Republika Srpska can be called a state as her statehood is the expression of her original, united, historical People's movement of her people which has a united ethnic basis and forms an independent system of power in order to live really independently, although an independent entity within the framework of a complex state community".

14. Contrary to these positions, the expert of the House of Representatives of the Federation Parliament outlined at the public hearing that Bosnia and Herzegovina is the only state and no part of the Constitution or any of the Annexes to the GFAP would refer to Entities as other than entities. From the point of view of international law, only BiH was a state, which continued to exist under its name and with "its internal structure modified". Thus, the principle of territorialization of sovereignty and the right to secession in particular, could not be applied in a multi-ethnic community. Unlike the wording "state functions" in the translation used by the expert of the People's Assembly of the Republika Srpska, the English text of Article III.3 (a) of the Constitution of BiH read "governmental functions". Furthermore, as there are a number of institutions, such as municipalities or notaries, which certainly do not enjoy the attribute of statehood although they exercise governmental powers, it follows that Entities could even exercise "state functions" without being states themselves.

15. The applicant's representative further argued at the public hearing that indeed different positions in constitutional theories exist concerning whether or not the preamble of a constitution has normative character. However, it is beyond dispute that a preamble forms a part of a constitution ***should it include either constitutional principles or clear regulations of certain matters or should the same institution under the same procedure adopt it***. Moreover, he invoked the Decision of the Constitutional Council of the Republic

of France of 16 June 1971, according to which the provisions of the Preamble of the French Constitution did have a normative and binding character.

16. In response to the applicant's statement, the representatives of the People's Assembly of the Republika Srpska pointed out that this example is the only exception to the general rule that a Preamble does not form part of a constitution as the French Constitution does not include provisions on human rights and freedoms in the normative part of the Constitution and the preamble thus, by referring to the French Declaration of the Rights of Man and Citizens, incorporates those provisions into the Constitution. The Preamble of the Constitution of BiH, however, would – neither in form nor substance – meet the requirements of legal norms and could thus never serve as a constitutional basis to review the Entities' Constitutions.

The Constitutional Court finds:

17. As far as the normative character of preambles of constitutions is concerned, two closely linked issues were raised by the objections of the representatives of the People's Assembly of the Republika Srpska in their conclusion that this Court fails to have the jurisdiction to review both the Preamble of the RS Constititution and other provisions of the Constitutions of the Entities in light of the text of the Preamble of the Constitution of BiH: firstly, whether a preamble, which is not included in the "normative" part of the constitution, becomes an "integral" part of the text of that constitution and secondly, whether it may have normative character at all as the language of a preamble would not determine rights or obligations.

18. As far as the scholarly opinions on the legal nature of preambles of constitutions in general are concerned (which were quoted by the representatives of the parties *in abstracto*), it is certainly not the task of this Court to decide on such scientific debates, but to restrain itself to the judicial adjudication of the dispute pending before it. Hence, the Constitutional Court must decide on the basis of the Constitution of BiH and its context within the GFAP. In this regard, the Court is not convinced by the reference of the representatives of the People's Assembly to the Brcko Arbitration Award. It is true that the reasons of the Tribunal commence at Paragraph 82 with the wording "that the language of the preamble to the GFAP, however, did not itself create a binding obligation; (...)" Nevertheless, the argument went on to state that the "parties' obligations have been brought forth in the context of the GFAP, which modified the 51:49 principle (by including a slightly different distribution) and left unresolved the territorial allocation of the Brčko

corridor area. That lack of resolution is the reason for this arbitration. In short, the GFAP has ratified neither the prolongation of the control of RS over the disputed area nor the territorial continuity for the RS".

Seen from the context of the entire argumentation, the commitment to certain pre-Dayton "Agreed Basic Principles" in the Preamble to the GFAP does not create specific obligations of the parties as this was left to the arbitration according to Annex II to the GFAP, it is therefore simply an overgeneralization by the party in this dispute before the Constitutional Court to conclude that a Preamble or even the Preamble to the GFAP has no normative force as such.

19. Contrary to the constitutions of many other countries, the Constitution of BiH in Annex 4 to the Dayton Agreement is an integral part of an international agreement. Therefore, Article 31 of the Vienna Convention of the Law on Treaties – providing for a general principle of international law which is, according to Article III.3 (b) of the Constitution of BiH, an "integral part of the legal system of Bosnia and Herzegovina and its Entities" – must be applied in the interpretation of all its provisions, including the Constitution of BiH. The relevant provisions of this Article read as follows:

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text and including its preamble and annexes:

(a) Any agreement relating to the treaty that was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument that was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

(...)

According to the wording of paragraph 2 of that Article, the text that is interpreted includes the preamble and annexes. Hence, the Preamble of the Constitution of BiH must be viewed as an integral part of the text of the Constitution.

20. The same holds true for the Preamble of the Constitution of RS but for another reason, as the text of the Preamble of the Constitution of RS was modified by Amendments XXVI and LIV (*Official Gazette of the RS*, Nos. 28/94 and No. 21/96) whereby it was *expressis verbis* stated that "these amendments form an integral part of the Constitution of the Republika Srpska..."

21. It is, by the way, also a circular reference in the argumentation of the representatives of the RS People's Assembly that the text of a preamble is not an "integral part" of the respective constitution with the underlying assumption that it has no "normative" character since it is separated from the "normative" part of the constitution. The entire issue is thus reduced to the problem of the normative character of constitutional provisions as such.

22. Previously in Partial Decision I of the case, at para. 10 (*Official Gazette of Bosnia and Herzegovina*, No. 11/00, *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 15/00 and *Official Gazette of Republika Srpska*, No. 12/00) the Constitutional Court found that its power of judicial review did not depend on the number of challenged provisions, nor that there is any normative difference between the provisions and "fundamental principles" of the Constitution.

23. What is, however, the "nature" of constitutional principles to be found both in the provisions of the preamble and the so-called "normative part" of a constitution? As the Canadian Supreme Court held in *Reference re Secession of Quebec* (1998), 2.S.C.R. at paragraphs 49 through 54, "these principles inform and sustain the constitutional text: they are the vital unsaid assumptions upon which the text is based.... Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by an oblique reference in the preamble to the Constitution Act, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood. (...) The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions". Thus, "the principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments". In addition to answering the rhetorical question what use the Supreme Court may make of these underlying principles incorporated into the Constitution by the Preamble, the Court reaffirmed its position held in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, (1997), 3.S.C.R.3, at para. 95: "As such, the Preamble is not only a key to construing the express provisions of the Constitution

Act, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law".

24. Finally, by referring to the principle of the "promotion of a market economy" according to paragraph 4 of the Preamble to the Constitution of BiH, this Constitutional Court also held in Partial Decision II of the case at hand, at para. 13 (*Official Gazette of Bosnia and Herzegovina*, No. 17/00, *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 26/00 and *Official Gazette of the Republika Srpska*, No. 31/00), that the Constitution of BiH contains "basic constitutional principles and goals for the functioning of Bosnia and Herzegovina which must be viewed as constitutional guidelines or restrictions for the exercise of the responsibilities of both Bosnia and Herzegovina and its Entities". Furthermore, previously in case U 1/98 (*Official Gazette of Bosnia and Herzegovina*, No. 22/98) the Court concluded from the first sentence of Article VI.3 of the Constitution of BiH – that the Constitutional Court shall uphold this Constitution – the principle of efficiency of the entire text of the Constitution which must therefore also apply to the Preamble. Hence, the "normative meaning" of the Preamble of the Constitution of BiH cannot be reduced to an "auxiliary method" in the interpretation of that very same Constitution.

25. *In conclusio*, it cannot be said thus in abstract terms that a preamble as such has no normative character. This argument of the parties' representatives is therefore not a sound argument to challenge the responsibility of the Constitutional Court to review the constitutions of the Entities in light of the text of the Preamble of the Constitution of BiH.

26. As any provision of an Entity's constitution must be consistent with the Constitution of BiH, including its Preamble, the provisions of the Preamble are thus a legal basis for reviewing all normative acts lower in rank in relation to the Constitution of BiH for as long as the aforesaid Preamble contains constitutional principles delineating – in the words of the Canadian Supreme Court – spheres of jurisdiction, the scope of rights or obligations, or the role of the political institutions. The provisions of the preamble are therefore not merely descriptive, but are also invested with a powerful normative force thereby serving as a sound standard of judicial review for the Constitutional Court. Hence, the Constitutional Court must establish *in substance* what specific rights or obligations follow from the constitutional principles of the Preambles of both the Constitution of BiH and the Constitution of RS.

27. The Constitutional Court notes that the Preamble of the Constitution of RS, as amended after the Dayton Agreement had been signed, refers to the "inalienable right of the Serb people to self-determination" in order to decide "independently" on its political and "State status" in paragraph 1, to "State independence" in paragraph 2, to "creation of its democratic State" in paragraph 3 and to a "democratic right, will and determination of the Serb people from the Republika Srpska to link its State completely and closely with other States of the Serb people" in paragraph 5. Speaking in explicit terms of a "right of the Serb people" and of "state status" and "independence" of the RS, the Court cannot see that the text of the Preamble of the Constitution of RS is of a merely descriptive character as these constitutional provisions, taken in conjunction with Article 1 of the Constitution of RS, evidently establish collective rights and the political status of the Republika Srpska.

28. Moreover, regarding the question of whether Entities can be called states due to their sovereignty, as the expert of the People's Assembly of the Republika Srpska has outlined, the Court finds that the existence of a constitution, the name "Republika" (Republic) or citizenship are not *per se* proof of the existence of statehood. Although it is also quite often the case in federal states that their component entities do have a constitution, and that they might even be called a republic or grant citizenship, all these institutional elements are granted or guaranteed by a federal constitution. The same holds true for Bosnia and Herzegovina.

29. Article I.1 of the Constitution of BiH undoubtedly establishes the fact that only Bosnia and Herzegovina continues "its legal existence under international law as a state, with its internal structures modified as provided herein". In consequence, Article I.3 establishes two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska as component parts of the state of Bosnia and Herzegovina. In addition, as seen from Article III.2 (a) of the Constitution of BiH for instance, the Entities are subject to the sovereignty of Bosnia and Herzegovina. Despite examples of component units of federal states, which are also called states themselves, in the case of Bosnia and Herzegovina it is thus clear that the Constitution of BiH did not recognize the Republika Srpska and the Federation of Bosnia and Herzegovina as "states" but instead refers to them as "Entities".

30. Hence, contrary to the assertions of the representatives of the People's Assembly of the Republika Srpska, the Constitution of BiH does not leave room for any "sovereignty" of the Entities or a right to "self-organization" based on the idea of "territorial separation". Citizenship of the Entities is thus granted by Article I.7 of the Constitution of BiH and is not proof of their "sovereign" statehood. In the same manner, "governmental functions",

according to Article III.3 (a) of the Constitution of BiH, are thereby allocated either to the joint institutions or to the Entities so that their powers are in no way an expression of their statehood, but are derived from this allocation of powers through the Constitution of BiH.

31. The idea of a collective right to "self-organization", so that "decisions taken at the level of the joint institutions" must be administered "only in the event they conform to the interests of the Entities", does not conform either to the legislative history nor the text of the Dayton Constitution. In addition, the claim of the expert of the People's Assembly of the Republika Srpska that the Republika Srpska could be called a state because of a "historic people's movement of its nation with a uniform ethnic basis and forming an independent system of power" must be taken as proof that the challenged provisions of the Preamble of the Constitution of RS, taken in conjunction with the wording of Article 1, do "aim at the independence of the RS". This idea is evident, in particular, also from the language of Item 8 of the "Declaration on Equality and Independence of the Republika Srpska" of the People's Assembly of the Republika Srpska on 17 November 1997 (*Official Gazette of the Republika Srpska*, No. 30/97):

8. ***The People's Assembly of the Republika Srpska stresses again its determination*** *to contribute in every way, on the basis of the Agreement on Special and Parallel Relations between the* ***FR Yugoslavia and the Republika Srpska****, to the strengthening of the relations of the Serb people from the two sides of the river Drina, and* ***to its final union****.*

The People's Assembly hereby warns about the creation of alliances of such forces in the Republika Srpska and in Yugoslavia that are in favour of the further dismembering of Yugoslavia and disintegration of the Republika Srpska, which never supported this Agreement, and which must be identified by the people. Their goal is never to see the ***Republika Srpska and Yugoslavia united into one state****, to leave the Serb people eternally disunited and divided into regions of some kind, separated from the orthodox religion and our traditional, spiritual and historic values. Their goal is to assimilate the Republika Srpska into a unitary BiH.*

(...)

(*Emphasis added*)

The quotation of this paragraph in full length reveals the obvious context of this passage of the Declaration of the People's Assembly of the Republika Srpska, namely the power play between the two fractions of the SDS at that time. Nevertheless, this is an official act of the legislative organ of the RS, which, in particular through this indirect

manner, clearly reflects the intent of the legislative body. It could be argued, of course, that this intent must be seen in light of the power play at that specific time. However, this official act of the People's Assembly of the Republika Srpska, published in the *Official Gazette of the Republika Srpsk*a, was never formally declared null and void nor renounced in any other way by the newly elected Assemblies until the decision of this Court and can therefore serve as proof for the "intent" of the legislative body of the Republika Srpska with which the text of the Preamble of the Constitution of RS must be interpreted.

32. The Constitutional Court thus finds that all the references in the provisions of the Preamble of the Constitution of RS to sovereignty, independent decision-making, state status, state independence, creation of a state, and complete and close linking of the RS with other States of the Serb people violate Article I.1 taken in conjunction with Article I.3, Article III.2 (a), and Article 5 of the Constitution of BiH which provide for the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina. Therefore, it is not necessary for the Court, in this context, to review the challenged provisions of the Preamble of the Constitution of RS in light of the text of the Preamble of the Constitution of BiH, in particular the paragraph referring to Bosniacs, Croats and Serbs as constituent peoples.

33. The Constitutional Court thus declares unconstitutional paragraphs 1, 2, 3, and 5 of the Preamble of the Constitution of RS.

b) The challenged provision of **Article 1 of the Constitution of RS** in the wording of Amendment XLIV reads as follows:

The Republika Srpska shall be the State of the Serb people and of all its citizens.

34. The applicant argued that the said provision was not in line with the last paragraph of the Preamble of the Constitution of BiH and with Article II.4 and Article II.6 of the Constitution of BiH. He contended that, according to the said provisions of the Constitution of BiH, all three peoples (namely Bosniacs, Croats and Serbs) were the constituent peoples of the entire territory of BiH. Consequently, the RS could not be established as a state of only one people - the Serb people. Moreover, today's functioning of the RS on that basis, i.e. as a "belonging-exclusively-to-one-people" power, would prevent the realization of the fundamental rights of all displaced persons to return to their homes of origin in order to restore the structure of population which had been disturbed by war and ethnic cleansing.

Arguments of the Parties concerning the question of whether Bosniacs, Croats and Serbs have to also be considered constituent peoples at the level of the Entities:

Arguments regarding the vague meaning of the term "constituent people" and historical interpretation:

35. With respect to the meaning of signing Annex IV to the Framework Agreement by the representative of the Federation of BiH "in the name of its constituent peoples and citizens", the expert of the applicant argued that the previous existence of the Washington Agreement had established the constituent status of Bosniacs and Croats on the territory of the Federation. The formula given by the declaration was a result of the wish to secure by this signature the legal continuity of the constituent peoples from the Washington to the Dayton Agreement.

36. The applicant's representative further supported, at the public hearing, the claim that all three peoples must be constituent on the entire territory of BiH with the fact that "the statehood of BiH had always been founded on the equality of peoples, religions, cultures and citizens which have been traditionally living on this territory". Throughout the entire history of BiH, ethnic criteria had never been applied to organize the state structure, nor had territories been an element of the constitutional order. According to the last census of 1991 a multi-ethnic society existed across the entire territory of BiH.

37. The expert of the House of Peoples of the Federation Parliament argued, at the public hearing, that, in the arbitration process, the international community certainly had the existence of three constituent peoples in mind and that the constituent status was determined in the way it is written in the respective constitutions. When drafting the Washington Agreement and the Constitution of BiH, there was no intention to define a third constituent people in the Federation. If someone had wanted to establish the constituent status of three peoples in the Entities, the name of the RS would have already presented an obstacle.

38. The representative of the People's Assembly of the Republika Srpska stated at the public hearing that it was useless to discuss the constituent status insofar as it was not established anywhere in the normative part of the Constitution as a legal principle or a norm. He stressed that the right to collective equality, which the applicant derived from the term "constituent people", is mentioned nowhere in the human rights documents.

39. Furthermore, he raised the objection that the last sentence of the Preamble of the Constitution of BiH did not literally state that Bosniacs, Croats and Serbs are constituent

on the entire territory of BiH. By adding the wording “on the entire territory”, the meaning of the entire sentence was significantly changed. In his opinion, the constituent status of one or two peoples in one Entity did not mean that they were not constituent in Bosnia and Herzegovina but rather the other way around: “If one people are constituent in one of the Entities, then it is constituent in Bosnia and Herzegovina also, insofar as the Entities form the territory of BiH”. However, nowhere in the Constitution could a provision be found that all peoples are constituent in the Entities.

40. Moreover, this interpretation could “never be the case” if the adoption procedure of the Constitution of BiH was taken into consideration as well as the process of creating the Entities as special territorial units within the framework of BiH. The re-establishment of joint state structures, in his opinion, occurred first between two constituent peoples, the Bosniacs and the Croats who created the Federation of BiH by the Washington Agreement of 1994 and whose Constitution explicitly mentions that only Bosniacs and Croats are constituent in this community, whereas the Republika Srpska remained apart until September 1995. The RS then took part in New York and Geneva as an equal participant when the basic principles on the future state community were determined. On that occasion, the existence of the Republika Srpska was recognized by the statement that it would continue to exist in conformity with today’s Constitution on the condition of amendment to conform to the stated principles. Finally, the Dayton Agreement was concluded by representatives of the former Bosnia and Herzegovina, the Federation of BiH, and the Republika Srpska. It was signed on behalf of the Federation by an authorized person with the formula, that “the Federation of BiH adopts the Constitution of BiH in Annex 4 to the General Agreement in the name of her constituent peoples and citizens”. It thus followed in the opinion of the expert of the People’s Assembly “beyond doubt that the Serb people was constituent only in the RS” given that they were not mentioned in the Constitution of the Federation. Therefore, the last sentence of the Preamble of the Constitution of BiH means beyond a doubt that Serbs, Bosniacs, Croats and other citizens are constituent at the level of Bosnia and Herzegovina when they decide on matters within the competence of the joint institutions which had, by consensus of the Entities, been allocated to them through the Constitution of BiH, but not when they decide on the original responsibilities of the Entities. Therefore, it is obvious that Bosniacs and Croats were not constituent in the RS, whereas Serbs were not constituent in the Federation of BiH.

Arguments relating to the institutional structures of the joint institutions of BiH

41. According to the written statement of the People’s Assembly of the Republika Srpska, the Constitution of BiH itself establishes the RS as the electoral unit for the Serb member of

the Presidency and for the five Serb delegates to the House of Peoples of the Parliamentary Assembly of BiH. These provisions guarantee the equality of Serbs in relation to the other two nations, whose representatives in the same bodies are elected from the Federation of BiH and not from the RS.

42. In response to this statement, the representatives of the applicant and the House of Representatives of the Federation Parliament contended that exactly those provisions of the Constitution of BiH guarantee the constituent status and thereby the equality of all three peoples on the entire territory of BiH since they are equally represented in those institutions whose power is exercised on the entire territory of BiH. However, the electoral mechanisms for these institutions were of a technical nature only.

Arguments relating to the interpretation of the "authentic text" of Article 1 of the Constitution of RS

43. The expert of the People's Assembly raised the objection at the public hearing that the text of Article 1 of the Constitution of RS neither defined the Serb people as constituent nor did it determine that the RS was a state of only the Serb people, but that the authentic text would read quite differently, namely "the Republika Srpska is the State of the Serb people and all other citizens". In contrast to the allegations made by the applicant, the text of the challenged provision would thus have a different meaning.

44. On the question whether the definition of Article 1 of the Constitution of RS could be viewed as a compromise formula in the conflict between individual rights and group rights, the applicant's representative replied that the term *"konstitutivnost"* was broader than individual rights of members of a people but narrower than sovereignty. Sovereignty would require exclusive power on a certain territory including the right to self-determination and secession. According to the representative's view, however, it was impossible to exercise the principle of territorialisation of sovereignty or the right to secession in a multi-ethnic community such as Bosnia, particularly with respect to the high degree of balance and mixture of the structure of peoples. Consequently, the term *"konstitutivnost"* would rather guarantee the collective rights of peoples and full equality between them.

Arguments relating to the function of the Dayton Agreement

45. The representative of the applicant argued at the public hearing that it was not a coincidence that the provision of the Constitution of BiH, which followed the provision on

the state structure of Bosnia and Herzegovina (Article I), demanded that both Bosnia and Herzegovina and its Entities "shall ensure the highest level of internationally recognized human rights and fundamental freedoms" (Article II). Long-lasting stabilization in this region was thus precisely constructed on the respect for human rights and freedoms.

46. The representative of the House of Peoples of the Federation Parliament repeated his objections regarding the admissibility of the present request also in relation to the function of the Dayton Peace Agreement. He stated that a review of the Constitutions of the Federation of BiH and the RS would lead to a total revision of the Dayton Agreement. The basic goal of the GFAP in its present form, which has been accepted both by the RS and the Federation of BiH, was in fact to secure peace in this region. Furthermore, he concluded: "The constituent status of all three peoples in both Entities would return Bosnia and Herzegovina to its position in 1991 when all of them had been constituent according to the former Constitution of BiH. It is not necessary to repeat how this ended ... The applicant seems to forget what has happened in BiH during the eight years which have passed since".

Arguments of the Parties relating to the question whether Article 1 of the Constitution of RS results in discrimination in the enjoyment of individual rights

47. During the course of the public hearing, the representatives of the applicant further argued that Article 1 distinguished members of the Serb people and citizens, thereby creating two distinct categories of persons. This distinction would lead to an "automatic exclusion" of non-Serb persons. Moreover, the resulting privileged position of the Serb people according to Article 1, the Constitution of RS would then "reserve" certain rights for members of the Serb people only, namely the right to self-determination, the cooperation with the Serb people outside the RS, the privileged position of the Orthodox Church, and the "exclusive right" to use the Serbian language officially although the equality of languages in the institutions of BiH would be a minimum standard so that everything below that standard would imply discrimination. This fact in addition to the ethnically uniform executive power of the RS – for which Article 1 would provide the legal basis – would prevent the return of displaced persons and the restoration of property as well as the restoration of a multi-ethnic society. In particular, the return of refugees is seen by the representatives of the applicant not only as an individual right, but also as an essential element of the constitutional order with the goal of re-establishing the multi-ethnic composition of the population in accordance with the 1991 census prior to the outbreak of the war.

48. The representatives of the People's Assembly of the Republika Srpska argued at the public hearing that individual equality was guaranteed by a number of provisions of the Constitution of RS such as Articles 10, 16, 19, 33, 34, 45 and 48 and, with particular regard to Article II.6 of the Constitution of BiH, that Article 1 of the Constitution of RS would certainly not prohibit the enjoyment of human rights as required by the quoted Article of the Constitution of BiH. In conclusion, no provision of the Constitution of RS would prevent any non-Serb citizen from enjoying all his rights equally nor would there be any provision preventing a non-Serb from holding a public office on the grounds of his national origin.

49. Furthermore, the representatives of the People's Assembly of the Republika Srpska reminded the parties of the text of Article 1 of the Constitution of RS, contending that precisely the compromise formula would ensure that every non-Serb was equal and also that in actual fact non-Serb persons could take part in the executive power. As far as the return of refugees is concerned, the expert of the People's Assembly argued that the entire history of the RS has to be taken into account and that the return of refugees was a much more complex problem (including the social and economic conditions) and consequently that this problem could not be reduced to a question of discrimination against citizens of non-Serb origin.

<u>The Constitutional Court finds:</u>

50. As far as the "customary meaning" (Article 31, para 1 of the Vienna Convention of the Law on Treaties) of the term "constituent people" is concerned, the Court finds that it has been established - as argued by the representatives of the People's Assembly of the Republika Srpska - that there is neither a definition for the term "constituent peoples" under the Constitution of BiH nor that the Preamble's last sentence *expressis verbis* includes the phrase "on the entire territory".

51. However, with respect to the question, previously elaborated by the Court (para 23 to 26), whether the last line of the Preamble, in particular the designation of "Bosniacs, Croats and Serbs, as constituent peoples (along with Others)" contains a constitutional principle in conjunction with other provisions, which might serve as a standard of review, the Court finds:

52. However vague the language of the Preamble of the Constitution of BiH may be due to this lack of definition of the status of Bosniacs, Croats, and Serbs as constituent peoples,

it clearly designates all of them as constituent peoples, i.e. as peoples. Furthermore, Article II.4 of the Constitution prohibits discrimination on any grounds such as, *inter alia*, association with a national minority and presupposes, thereby, the existence of groups conceived as national minorities.

53. Taken in conjunction with Article I of the Constitution, the text of the Constitution of BiH thus distinctly distinguishes constituent peoples from national minorities with the intention of affirming the continuity of Bosnia and Herzegovina as a democratic multi-ethnic state that, by the way, remained undisputed by the parties. The question thus raised, in terms of constitutional law and doctrine, is what concept of a multi-ethnic state is pursued by the Constitution of BiH in the context of the entire GFAP and, in particular, whether the Dayton Agreement with its territorial delimitation through the establishment of two Entities also recognized a territorial separation of the constituent peoples as argued by the RS representatives?

54. First and foremost, Article I.2 of the Constitution of BiH determines that Bosnia and Herzegovina shall be a democratic state, which is then further specified by the commitment in paragraph 3 of the Preamble "that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society". This constitutional commitment, legally binding on all public authorities, cannot be isolated from other elements of the Constitution, in particular the ethnic structures, and must therefore be interpreted by reference to the structure of the Constitution as a whole (see Canadian Supreme Court *Reference re Secession of Quebec* (1998), 2.S.C.R., para 50). Therefore, the elements of a democratic state and society and the underlying assumptions – pluralism, fair procedures, peaceful relations following from the text of the Constitution – must serve as a guideline to further elaborate the question concerning how BiH is structured as a democratic multi-ethnic state.

55. It is not by chance that the Canadian Supreme Court found in the case *Reference re Secession of Quebec*, (1998), 2.S.C.R., at para. 64 that the Court must be guided by the values and principles essential to a free and democratic society which embodies, *inter alia*, respect for the inherent dignity of the human being, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. Moreover, it is a generally recognized principle, derived from the list of international instruments in Annex I to the Constitution of BiH, that a government must represent the whole people belonging to the territory without distinction of any kind, thereby prohibiting – in particular

according to Article 15 of the Framework Convention on the Protection of National Minorities which is incorporated into the Constitution of BiH through Annex I – a more or less complete blockage of effective participation in decision-making processes. Since effective participation of ethnic groups is an important element of democratic institutional structures in a multi-ethnic state, democratic decision-making would be transformed into ethnic domination of one or even more groups if, for instance, absolute and/or unlimited veto-power would be granted to them, thereby enabling a numerical minority represented in governmental institutions to forever enforce its will on the majority.

56. *In conclusio*, it follows from established constitutional doctrine of democratic states that a democratic government requires – beside effective participation without any form of discrimination – a compromise. It must be concluded that under the circumstances of a multi-ethnic state that representation and participation in governmental structures – not only as a right of individuals belonging to certain ethnic groups, but also of ethnic groups as such in terms of collective rights – does not violate the underlying assumptions of a democratic state.

57. In addition, it must be concluded from the texts and underlying spirit of the International Convention on the Elimination of All Forms of Racial Discrimination, the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities that not only in the states of one majority people, but also in the context of a multi-ethnic state such as BiH, the accommodation of cultures and ethnic groups prohibits not only their assimilation but also their segregation. Thus, segregation is, in principle, an illegitimate aim in a democratic society. There is no question therefore that ethnic separation through territorial delimitation does not meet the standards of a democratic state and pluralist society as established by Article I.2 of the Constitution of BiH taken in conjunction with paragraph 3 of the Preamble. Territorial delimitation thus must not serve as an instrument of ethnic segregation, but – quite to the contrary – must provide for ethnic accommodation through preserving linguistic pluralism and peace in order to contribute to the integration of state and society as such.

58. The differentiation of collective equality as a legal notion and a minority position as a matter of fact is also reflected in the explanatory report of the European Charter for Regional or Minority Languages, which must be applied in BiH in accordance with Annex I to the Constitution of BiH. Although Article 1 of the Charter clearly distinguishes official languages from minority languages, the explanatory report under the heading of "Basic concepts and approaches" outlines at para. 18 that the term "minority" referred to situations

in which the language was spoken either by persons who were not concentrated on a specific part of the territory of a state or by a group of persons, which, though concentrated on part of the territory of the state, was numerically smaller than the population in this region which spoke the majority language of the state: “Both cases therefore refer to factual criteria and not to legal notions”.

59. Even if the constituent peoples are, in actual fact, in a majority or minority position in the Entities, the express recognition of Bosniacs, Croats, and Serbs as constituent peoples by the Constitution of BiH can only mean that none of them is constitutionally recognized as a majority or, in other words, that they enjoy equality as groups. It must therefore be concluded, in the same way that the Swiss Supreme Court derived from the recognition of the national languages an obligation of the Cantons not to suppress these language groups, that the recognition of the constituent peoples and its underlying constitutional principle of collective equality poses an obligation on the Entities not to discriminate in particular against these constituent peoples which are, in actual fact, in a minority position in the respective Entity. Hence, there is not only a clear constitutional obligation not to violate individual rights in a discriminatory manner which obviously follows from Article II.3 and 4 of the Constitution of BiH, but also a constitutional obligation of non-discrimination in terms of a group right if, for instance, one or two of the constituent peoples are given special preferential treatment through the legal system of the Entities.

60. *In conclusio*, the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenisation through segregation based on territorial separation.

61. It is beyond doubt that the Federation of Bosnia and Herzegovina and the Republika Srpska were – in the words of the Dayton Agreement on Implementing the Federation, signed in Dayton on 10 November 1995 – recognized as “constituent Entities” of Bosnia and Herzegovina by the GFAP, in particular through Article I.3 of the Constitution. But this recognition does not give them *carte blanche*! Hence, despite the territorial delimitation of Bosnia and Herzegovina by the establishment of the two Entities, this territorial delimitation cannot serve as a constitutional legitimacy for ethnic domination, national homogenisation, or a right to uphold the effects of ethnic cleansing.

62. Moreover, contrary to the arguments of the representatives of the People’s Assembly of the Republika Srpska and the House of Peoples of the Federation, the legislative history

and the text of the Dayton Constitution obviously show that the existing Constitutions of the Entities had not been accepted as such without considering the necessity of amendments. It was stated in the Agreed Basic Principles of Geneva, 8 September 1995, under paragraph 2, sub-paragraph 2 that "Each Entity will continue to exist under its present constitution", however, "as amended to accommodate these basic principles". In addition, this principle was further elaborated in the constitutional system of Dayton in the supremacy clause of Article III.3 (b) – according to which "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, (...)" – as well as the obligation of the Entities, according to Article XII paragraph 2 that "Within three months from the entry into force of this Constitution, the Entities shall amend their respective constitutions to ensure their conformity with this Constitution in accordance with Article III.3 (b)".

63. In addition, insofar as the term "constituent peoples" was inserted into the draft text of the Dayton Constitution only at a later stage of the negotiations, it must, therefore, be concluded that the adopters of the Dayton Constitution would not have designated Bosniacs, Croats, and Serbs as constituent peoples in marked contrast to the constitutional category of a national minority if they had wanted to leave them in such a minority position in the respective Entities as they had, in fact, obviously been situated at the time of the conclusion of the Dayton Agreement, as can be seen from the figures presented below. Had the adopters of the Constitution recognized this fact, they would not have inserted their designation as constituent peoples with the underlying assumption of their collective equality or they would have omitted the phrase of constituent peoples altogether, insofar as the provisions on the ethnic composition of the joint institutions of BiH refer to Bosniacs, Croats, and Serbs directly and do not need an additional designation as "constituent" peoples. Again this designation in the Preamble must thus be viewed as an overarching principle of the Constitution of BiH with which the Entities, according to Article III.3 (b) of the Constitution of BiH, must fully comply.

64. **Regarding the institutional structures of the joint institutions of BiH,** the Court does not share the views of the representatives of the People's Assembly of the Republika Srpska and the House of Peoples of the Federation that the provisions of the Constitution of BiH (concerning the composition of the two Houses of the Parliamentary Assembly of BiH, the Presidency, the Council of Ministers and the Constitutional Court as well as the respective electoral mechanisms) allow for the general conclusion that these representation mechanisms reflect the territorial separation of the constituent peoples in the Entities.

65. A strict identification of territory and certain ethnically defined members of joint institutions of BiH in order to represent certain constituent peoples is not even accurate with respect to the rules on the composition of the Presidency as laid down in Article V, first paragraph: “The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska”. It must not be forgotten that the Serb Member of the Presidency, for instance, is not only elected by voters of the Serb ethnic origin, but by all citizens of the Republika Srpska with or without a specific ethnic affiliation. He thus represents neither the Republika Srpska as an Entity nor the Serb people only, but all the citizens of the Republika Srpska electoral unit. The same also holds for the Bosniac and Croat Members to be elected from the Federation.

66. In a similar manner, but in no way identical, Article IV.1 of the Constitution of BiH provides that the House of Peoples shall consist of 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs) to be “elected” (sic!), according to sub-item (a), by the Croat and Bosniac Delegates to the House of Peoples of the Federation, whereas the Delegates from the Republika Srpska shall be elected by the People’s Assembly of the Republika Srpska. Apart from the distinction that they shall be “elected” by the respective parliamentary bodies of the Entities and not directly elected as Members of the Presidency of BiH by popular vote, the Court finds it striking that the Serb Delegates shall be elected by the People’s Assembly, as such, without any differentiation along ethnic lines. Therefore, this provision includes a constitutional guarantee that non-Serb Members of the People’s Assembly have the same right as the Serb Members to take part in the election of the five Serb Delegates to the House of Peoples of BiH. Hence, there is no strict uniform model of ethnic representation underlying these provisions of the Constitution of BiH. Had this been the intent of the framers of the Constitution, they would not have regulated these election processes differently.

67. The same conclusions may be drawn from the composition of the House of Representatives of BiH. Again two-thirds, out of 42 Members this time, shall be elected from the territory of the Federation and one-third from the territory of the Republika Srpska. However, these provisions do not prescribe the ethnicity of the candidates and there were actually some Bosniac Members who were elected from the territory of the RS and some Serb Members from the territory of the Federation in the last general election of 1998. Insofar as a certain number of Ministers shall be appointed from the territory of the Federation or the RS according to Article V.4 (b), whereas certain Members of

the Constitutional Court have to be elected by respective parliamentary bodies of the Entities according to Article VI.1 (a), all these provisions demonstrate nothing but the fact that either the territory or specific institutions of the Entities serve as the legal point of reference for the election of members of the institutions of BiH. This fact is again evident for the Ministers who are finally elected by the House of Representatives of BiH, which certainly does not represent one, two, or even all of three constituent peoples only, but all the citizens of BiH regardless of their national origin.

68. Besides, no provision of the Constitution allows for the conclusion that these special rights for the representation and participation of the constituent peoples in the institutions of BiH may be applied as well for other institutions or procedures. On the contrary, insofar as these special collective rights might violate the non-discrimination provisions, as it shall be shown below, they are legitimised solely by their constitutional rank and therefore, have to be narrowly construed. In particular, it cannot be concluded that the Constitution of BiH provides for a general institutional model, which could be transferred to the Entity level or that similar, ethnically-defined institutional structures on an Entity level, that need not meet the overall binding standard of non-discrimination in accordance with Article II.4 of the Constitution of BiH or the constitutional principle of collective equality of constituent peoples.

69. Of course, it cannot be denied, on the basis of this analysis of the institutional structures of the joint institutions of BiH, that all three constituent peoples are, in somewhat different ways, given special collective rights as far as their representation and participation in the institutions of BiH are concerned. In the final analysis, however, there is certainly no specific model of ethnic representation underlying the provisions on the composition of the institutions and respective electoral mechanisms that would allow for the general conclusion that the Constitution of BiH represents a territorial apportionment of constituent peoples on the level of Entities by regulating the composition of the joint institutions of BiH. Hence, this institutional system surely does not prove or provide a constitutional basis for upholding the territorial apportionment of the constituent peoples on an Entity level.

70. **Regarding the "authentic text" of Article 1 of the Constitution of RS**, the representative of the People's Assembly of the Republika Srpska correctly argued that this provision neither called the Serb people a "constituent people" nor did it define the RS as a "national" state of the Serb people only. The Court finds that this provision indeed contains a compromise formula calling the RS a "state" of the Serb people and of all its citizens – not "Other" (sic!) citizens as the representative had argued at the public hearing, this

lapsus linguae is sufficiently illustrative of the spirit underlying the challenged provision - thereby using a mixture of ethnic principle and non-ethnic principle for making the exercise of governmental powers and functions of the Entity legitimate. Furthermore, it is true that the Constitution of RS does not *prima facie* provide for any ethnic distinction in the composition of governmental bodies so that the compromise formula of Article 1 in connection with this institutional structure might allow for an equal representation of all citizens.

71. This conclusion, however, uses an incorrect point of comparison insofar as the equality of groups is not the same as the equality of individuals through non-discrimination. Equality of three constituent peoples requires equality of groups as such, whereas the mixture of the ethnic principle with the non-ethnic citizen principle in the compromise formula should avoid special collective rights that violate individual rights by definition. It thus follows that individual non-discrimination does not substitute for equality of groups. Quite the opposite, the regulations of Article 1 of the Constitution of RS, particularly in conjunction with other provisions such as the Rules on the official language under Article 7 of the Constitution of RS and Article 28 paragraph 3 which declares the Serb Orthodox Church to be the Church of the Serb people – thereby creating a constitutional formula of identification of the Serb "state", people and church and putting the Serb people into a privileged position which cannot be legitimised since it is neither at the level of the Republika Srpska nor at the level of Bosnia and Herzegovina in the factual position of an endangered minority which must preserve its existence. The privileged position of the Serb people under Article 1, therefore, violates the explicit designation of constituent peoples under the Constitution of BiH as already outlined above (see supra at para 52).

72. **Regarding the functional interpretation of the Constitution of BiH**, the Court does not share the views presented by the representatives of the People's Assembly and the House of Peoples that reviewing the Constitutions of the Entities, as requested by the applicant, would lead to a revision of the Dayton Peace Agreement and the *status quo* of the then existing Federation and RS "in order to preserve peace on these territories". The Court has already pointed out that the Entity Constitutions had not been accepted as such by the Parties to the Agreement (see paragraphs 61 and 62)

73. Indeed, from a functional point of view, the Dayton Constitution is part of a peace agreement as the name "General Framework Agreement on Peace in Bosnia and Herzegovina" clearly indicates. Thus, as it may already be seen from the wording of Article VII of the GFAP and paragraph 1 to 3 of the Preamble of the Constitution of BiH,

"peaceful relations" are best produced in a "pluralist society" on the basis of the enjoyment of human rights and freedoms and, in particular, through the freedom of all refugees and displaced persons to return to their homes of origin as guaranteed by Article II.5 of the Constitution of BiH. Moreover, this provision also refers explicitly to Annex 7, which in Article I *expressis verbis* states that "the early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina". It therefore follows from the context of all these provisions that it is an overall objective of the Dayton Peace Agreement to provide for the return of refugees and displaced persons to their homes of origin and thereby, to re-establish the multi-ethnic society that had existed prior to the war without any territorial separation that would bear ethnic inclination.

74. In the final analysis, based on the text of the Preamble in connection with the institutional provisions of the Dayton Constitution regarding the legislative history and taking the functions of the entire GFAP – of which the Constitution is a part – into due account, the Constitutional Court finds that Article 1 of the Republika Srpska Constitution violates the constitutional status of Bosniacs and Croats designated to them through the last line of the Preamble and the positive obligations of the RS which follow from Articles II.3 (m) and II.5 of the Constitution of BiH.

75. Accordingly, it would not be necessary for the Constitutional Court to pursue the applicant's assertion that Article 1 of the Constitution of RS was also discriminatory by providing a constitutional basis for the violation of individual rights in a discriminatory manner as prohibited by Article II.4 of the Constitution of BiH. However, insofar as the request of the applicant is not only concerned with the collective equality of the constituent peoples but also with discrimination against individuals, particularly against refugees and displaced persons regardless of their ethnic origin, the Court shall also review Article 1 of the Constitution of RS in light of this assertion made by the applicant.

76. Hence, the Court shall first elaborate the standard of review in more detail.

77. The language of Article II.4 of the Constitution of BiH evidently follows the text of Article 14 of the ECHR with an adaptation insofar as the list of rights and freedoms whose enjoyment shall be secured is concerned: "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".

78. As it ensued from this text, the list includes both the rights and freedoms provided for in Article II and those in the international agreements listed in Annex I to the Constitution. Hence, these are the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto, as follows from the reference made in paragraph 3, including the rights enumerated therein. Furthermore, paragraph 5 of Article II includes particular individual rights for all refugees and displaced persons to freely return to their homes of origin and to have restored to them property of which they had been deprived in the course of hostilities since 1991. These individual rights provided for in paragraph 5 are, however, not different or additional rights but a specific affirmation of the right to property, the right to liberty of movement and residence, and the right not to be subjected to inhuman or degrading treatment already enumerated in paragraph 2 of Article II of the Constitution of BiH.

79. Moreover, as follows from the reference in Article II.5 to Annex 7 of the General Framework Agreement, further elaboration of the criteria under this Annex of the non-discrimination rule must be justified. In particular, its Article I.3 (a) provides that the Parties, i.e. also the Entities, must repeal all "legislation and administrative practices with discriminatory intent or effect". How is it therefore possible to show discriminatory "intent or effect"? Of course, there are several ways, of which the following must certainly be pursued:

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

means used and the aim sought to be accomplished. The principle of proportionality thus presupposes four steps of consideration: whether there is a justified public aim, whether the means employed can achieve a legitimate goal, whether the means are necessary, i.e. do they have the minimum of relevance to fulfil the goal, and finally, whether the burdens imposed are proportional in comparison to the significance of the goal.

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

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

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

80. The last rule apparently demonstrates that the non-discrimination provision is not confined to strictly "negative" individual rights not to be discriminated against by the public authorities, but also includes "positive" obligations to take action. That this obligation is a particular responsibility of the Entities may already be demonstrated by Article III.2 (c) of the Constitution, which provides that "the Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as deemed appropriate". In addition, with particular intent to provide for the establishment of suitable conditions for the return of refugees and displaced persons, Article II.1 of Annex 7 imposes an obligation on the parties to undertake "to create in their territories political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without giving preference to any particular group". The list of measures, enumerated in Article I.3 (a), then specifies this general positive obligation including, not only the repeal of domestic legislation and administrative practices with discriminatory intent or effect, as already quoted above, but also "the protection of ethnic and/or minority populations" against acts of retribution by public officials as well as private individuals.

81. In the final analysis, all public authorities in BiH must refrain from any acts of discrimination in the enjoyment of individual rights and freedoms referred to (particularly

on grounds of national origin). In addition, they have a positive obligation to protect against the discriminatory acts of private individuals and, with respect to refugees and displaced persons, to create necessary political, social and economic conditions for their harmonious reintegration.

In light of these standards, the Constitutional Court finds:

82. It is true that the Constitution of RS contains a number of specific provisions which provide for the prohibition against discrimination in the enjoyment of these individual rights in the Constitution of RS quoted by the representatives of the RS People's Assembly. Although this prohibition should be considered a necessary requirement, the proclamation of non-discrimination is, in light of the criteria of review elaborated above, by no means sufficient. Moreover, these non-discrimination provisions in relation to the list of rights of the Constitution of RS cannot *per se* guarantee the effective enjoyment of the rights enumerated in the Constitution of BiH, the ECHR, or the international instruments listed in Annex 1 to the Constitution of BiH.

83. Regarding the first standard of review – that Article 1 must not discriminate *prima facie* by using national origin for a classification of different categories of persons which will then be treated differently without reasonable justification – the Court cannot follow the allegations of the applicant's representatives that the wording of Article 1 would lead to an "automatic exclusion" of persons of non-Serb origin. It is the very nature of the compromise between both the ethnic and non-ethnic principle for the legitimacy of the exercise of "state" powers that the formula of Article 1 does not create two distinct, mutually exclusive categories of persons. An interpretation contrary to this one would lead to the obviously absurd result that the members of the Serb people would *ex constitutione* not be the citizens of the Republika Srpska.

84. Nevertheless, the first element of the provision – "Republika Srpska shall be the state of the Serb people" – must trigger a strict scrutiny with regard to the other standards of review. Hence, does this provision provide the constitutional basis for discriminatory legislation, discriminatory administrative or judicial practice of the authorities? Is there other circumstantial evidence, such as the comparison of population figures or the numbers of returnees, which shows such a disparate impact as to indicate that the effects of past *de jure* discrimination (ethnic cleansing in particular) are upheld by the authorities or that they violate their obligation to provide for protection against the violence of private individuals and to create respective "political, economic, and social conditions conducive

to the voluntary return and harmonious reintegration of refugees and displaced persons, without giving preference for any particular group"?

85. Regarding the factual situation in the Republika Srpska, the Constitutional Court finds the following facts to be ascertained in accordance with Article 22 of its Rules of Procedure:

86. As far as the population figures are concerned, the number of Bosniacs, Croats, Serbs and "Others" living on the territory of the RS is as follows:

Ethnic Breakdown of the Population on the Republika Srpska territory according to the 1991 Census in comparison with the year 1997 (Source: IMG, on the basis of the 1991 census and the UNHCR estimates for 1997)

	1991	1997
Serbs	54.30 %	96.79 %
Bosniacs	28.77 %	2.19 %
Croats	9.39 %	1.02 %
Others	7.53 %	0.00 %

87. As the figures show, the ethnic composition of the population living on the territory of the RS has drastically changed since 1991. In terms of statistics, although the Serb population enjoyed a slight absolute majority in 1991 as far as the statistics for a hypothetical territory of the Republika Srpska is concerned, they did not live territorially concentrated. The territory where the Republika Srpska was established later, under the GFAP, did form an area with a "mixed population" as was the case all over the territory of the former Republic of Bosnia and Herzegovina. Due to massive ethnic cleansing during the war prior to the conclusion of the Dayton Agreement, the population figures of 1997 show that the Republika Srpska is now an almost ethnically homogeneous entity. As the figures for the regions in the eastern part of the Republika Srpska show, the attribute "almost" may be omitted. With the exception of Srpski Brod and Trebinje, all municipalities had a record of 99% or more of a Serb population in 1997.

88. The conclusion reached from these figures is supported by a comparison of the figures for the overall return of refugees and displaced persons to the Republika Srpska along with those of the so-called "minority" return. By 31 January 1999 (UNHCR, Statistics Package of 1 March 1999), a total of 97,966 refugees and displaced persons returned to the Republika Srpska. The ethnic breakdown of this figure again reveals that only 751

Croats and 9,212 Bosniacs returned, as opposed to 88,003 Serbs. Hence, the so-called "minority" return amounted to 10.17% of an already small percentage of those who had returned at all.

89. Contrary to the allegations of the representatives of the People's Assembly of the Republika Srpska that problems with the return of refugees and displaced persons could not be reduced to discriminatory patterns vis-à-vis citizens of non-Serb origin but were much more complex (including social and economic conditions), this comparison obviously demonstrates that such a tremendous discrepancy according to the ethnic origin of refugees and displaced persons cannot be explained by generally severe economic and social conditions which are the same for all persons willing to return to the Republika Srpska. Such a discrepancy can thus only be explained by the ethnic origin of refugees and displaced persons and constitutes manifest proof of differential treatment vis-à-vis refugees and displaced persons *solely* on the grounds of ethnic origin.

90. These figures thus provide sufficient evidence of a "discriminatory effect" in the sense of Article I.3 (a) of Annex 7 so that the results of past *de jure* discrimination through ethnic cleansing have been upheld in the Republika Srpska.

91. Moreover, there is also clear evidence that the discriminatory pattern demonstrated by this circumstantial evidence may be reasonably linked with the institutional structures of the authorities of the Republika Srpska and their discriminatory practices.

92. First of all, despite the fact that approximately 25% of the members of the People's Assembly of the Republika Srpska are non-Serbs, the ethnic composition of the RS Government is ethnically homogeneous: all 21 Ministers, including the Prime Minister, are of Serb origin (Source: Ministry for Civilian Affairs and Communications of BiH). The same applies to the ethnic composition of the RS police forces and the judiciary represented by judges and public prosecutors, as illustrated by the following chart (Source: IPTF with figures as of 17 January 1999 made available to the Court).

	Serbs	Bosniacs	Croats
Judges and Public Prosecutors	97.6%	1.6%	0.8%
Police forces	93.7%	5.3%	1.0%

93. As far as the number of judges and prosecutors is concerned, all nine persons comprising the number of Bosniacs and Croats out of a total of 375 were located in

Brčko and appointed only under the supervisory regime of the international community. Furthermore, as can be seen from para. 84 of the Brčko Arbitration Award of 1997, the Tribunal concluded from the RS "Basic General Principles" that the "fairly obvious purpose – and the result – (...) to keep Brčko an "ethnically pure" Serb community is in plain violation of the Dayton peace plan".

94. Finally, after many reports of OHR, the ICG, the Human Rights Ombudsperson for BiH etc. on numerous incidents in the Republika Srpska, the Human Rights Ombudsperson for BiH stated in her Special Report (No. 3275/99) titled "On Discrimination in the Effective Protection of Human Rights of Returnees in Both Entities of Bosnia and Herzegovina" of 29 September 1999 that "return-related incidents and a passive attitude of the police and other competent authorities were predicated solely on the basis of national origin of those affected". She therefore finally concluded that "returnees have been discriminated against on grounds of their national origin in the enjoyment of their rights guaranteed by Articles 3 and 8 of the Convention, by Article 1 of Protocol No. 1 thereto and the right to equality before the law and equal protection before the law as provided in Article 26 of the ICCPR" (International Covenant on Civil and Political Rights).

95. *In conclusio*, the Court finds that, following the entering into force of the Dayton Agreement, there was and still is a systematic, long-lasting, purposeful discriminatory practice of the public authorities of the Republika Srpska in order to prevent so-called "minority" returns, either through direct participation in violent incidents or by abstaining from the obligation to protect people against harassment, intimidation, or violent attacks on grounds of ethnic origin only, let alone the failure "to establish necessary political, economic and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without giving preference to any particular group", which follows from the right of all refugees and displaced persons to freely return to their homes of origin according to Article II.5 of the Constitution of BiH. In addition, an almost ethnically homogeneous executive and judicial power of the Republika Srpska is a clear indicator that this part of the provision of Article 1 with the wording "The Republika Srpska is the state of the Serb people" must be taken verbatim and provides the necessary link with a purposeful discriminatory practice of the authorities with the effect of upholding the results of past ethnic cleansing. Finally, the remark of the expert of the People's Assembly at the public hearing that "the Republika Srpska can be called a state as her statehood is the expression of her original, united, historical people's movement, of her people that has a *united ethnic basis* and forms an independent system of power" (emphasis added) provides evidence of the discriminatory intent of Article 1 of the Constitution of RS, particularly if interpreted in connection with its Preamble.

96. However, ethnic segregation can never be a "legitimate aim" with respect to the principles of "democratic societies" as required by the European Convention on Human Rights and the Constitution of BiH. Nor can ethnic segregation or, the other way round, ethnic homogeneity based on territorial separation, serve as a means to "uphold peace on these territories" – as argued by the representative of the People's Assembly – in light of the explicit wording of the text of the Constitution that "democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society".

97. It therefore also follows from the "totality of these circumstances" that the wording of Article 1 of the Constitution of RS as quoted above, violates the right to liberty of movement and residence, the right to property, and freedom of religion in a discriminatory manner on the grounds of national origin and religion as guaranteed by Article II paragraphs 3 and 4 taken in conjunction with paragraph 5 of the Constitution of BiH.

98. The Constitutional Court thus finds the wording "state of the Serb people and" in Article 1 of the Constitution of RS unconstitutional.

B. Regarding the Constitution of the Federation

a) The challenged provision of Article I.1 (1) in the wording of Amendment III to the Constitution of the Federation reads as follows:

Bosniacs and Croats as constituent peoples together with Others, and the citizens of Bosnia and Herzegovina from the territory of the Federation of Bosnia and Herzegovina, in exercising their sovereign rights, transform the internal structure of the territory of the Federation of Bosnia and Herzegovina, as defined by Annex II to the General Framework Agreement, so that the Federation of Bosnia and Herzegovina consists of federal entities with equal rights and responsibilities.

99. The applicant considers that the provision Article I.1 (1) of the Constitution of the Federation of Bosnia and Herzegovina, according to which Bosniacs and Croats are the constituent peoples of the Federation, is not in conformity with the last paragraph of the Preamble of the Constitution of BiH nor with Article II.4 and 6 insofar as, pursuant to these provisions, all three peoples (Bosniacs, Croats and Serbs) are constituent peoples on the entire territory of BiH. Therefore, the Constitution of the Federation could not designate only Bosniacs and Croats as constituent peoples. Moreover, the challenged provision would prevent the exercise of the fundamental right of all refugees and displaced persons to return to their homes of origin in order to restore the ethnic structure of the population that had been disturbed by war and ethnic cleansing.

100. The arguments of the parties with respect to the legislative history of both the Washington Agreement and the Dayton Agreement, the conclusions that could be arrived at from the institutional structures of the joint institutions of BiH and the functional interpretation of the Dayton Agreement, were already outlined above in connection with the challenged provision of Article 1 of the Constitution of RS (see paragraphs 35 to 46 supra). It remains to elaborate on the arguments with specific reference to the text of Article I.1 (1) of the Constitution of the Federation.

101. At the public hearing the applicant's representative also required the constituent status of all three peoples in the Federation of BiH and full equality of the languages and alphabets. He stressed, however, that the Constitution of the Federation contained some specific features, particularly regarding this issue. The Constitution of the Federation does, beside the constituent status of Bosniacs and Croats, guarantee equality to the category of "Others" also with the consequence that they are proportionally represented in all institutions of the Federation. This guarantee would "partly amortize the problem".

102. The expert of the House of Representatives contended at the public hearing that the Preamble of the Constitution of the Federation spoke of peoples and citizens who are equal. In his opinion, this reference includes not only Bosniacs and Croats but also all three peoples. Furthermore, according to the original text as well as the later amended text of the Constitution of the Federation, the category of "Others" did gain constituent status. In substance, the category of "Others" would mean that Serbs, as it can be seen from the institutions of the Federation, are represented under the label "Others". Hence, the *intentio constitutionalis* would be fully met if others were not the category of "Others" but the third constituent people of BiH. However, although the representation of the category of "Others" practically speaking leads principally to the representation of Serbs, this representation would not be sufficient. Therefore, even the Constitution of the Federation has this imperfection.

The Constitutional Court finds:

103. As far as the interpretation of the last paragraph of the Preamble to the Constitution of BiH with respect to Bosniacs, Croats, and Serbs as constituent peoples, the legislative history, the institutional structures of the joint institutions of BiH, and the function of the Dayton Agreement are concerned, the Court refers to its findings in conjunction with Article 1 of the Constitution of RS (paragraphs 50 to 74 above).

104. As for the compromise formula of ethnicity and citizenship, the same finding holds true for the Constitution of the Federation. However, there is a distinct difference with respect to Article 1 of the Constitution of RS insofar as Article I.1 of the Constitution of the Federation provides for the category of “Others”. However, this category is only a half-hearted substitute for the status of a constituent people and the privileges they enjoy in accordance with the Constitution of the Federation, as it will be demonstrated below.

105. Unlike the Constitution of the RS, the Constitution of the Federation does provide for the proportional representation of Bosniacs, Croats and “Others” in several governmental bodies. In some cases, however, it reserves a privilege to the Bosniac and Croat representatives to block the decision-making process. These institutional mechanisms must trigger a strict scrutiny of review, not only with respect to collective equality as far as constituent peoples are concerned, but also as to whether the individual right to vote according to Article 3 of the First Additional Protocol to the ECHR is guaranteed without discrimination on grounds of national origin. Moreover, the provision of Article 5 in the Convention on the Elimination of all Forms of Racial Discrimination must be applied in BiH in accordance with Annex I to the Constitution of BiH and therefore, imposes not only an obligation on the State of BiH, but guarantees individual rights according to paragraph (c) of that provision, namely “political rights, in particular the rights to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service”. From the definition provided in Article 1 of the Convention, it is clear that “the term `racial discrimination´ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. Paragraph 4 of Article 1 provides that “special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination (...).”

106. Hence, the basic legal problem raised in this regard is the question whether the “special rights” provided in the Constitution of the Federation for the two constituent peoples, the Bosniacs and Croats, violate the enjoyment of individual political rights to the extent that they seem to provide for “giving preference based on national or ethnic origin” as meant by Article 5 of the Convention.

107. The Constitution of the Federation contains the following "special rights" for members of the two constituent peoples so that their designation as "constituent" may be discriminatory in the sense of the Convention:

108. According to Article II.B.1, there shall be three Ombudsmen: one Bosniac, one Croat, and one representing "Others". With respect to parliamentary representation, there are no ethnic requirements for the House of Representatives, whereas the House of Peoples shall consist of 30 Bosniacs and 30 Croats as well as a proportional number of "Others". Article IV.A.8 establishes that these delegates shall be elected "by respective representatives in a legislative body", i.e. Bosniacs, Croats and Others among the Cantonal legislators. According to Article IV.A.18, only delegates of the two constituent peoples may claim that a decision of the House of Peoples concerns their "vital interest" with the effect of a "suspending veto" while the Constitutional Court of the Federation of BiH finally resolves disputes in the case of different majorities. Moreover, in accordance with Article VIII.1, a majority of Bosniac or Croat delegates in the House of Peoples may veto amendments to the Constitution. Article IV.B.3 prescribes that the Chair of a House of Legislature must come "from another constituent people", thereby reserving these offices to members of the constituent peoples.

109. With respect to the executive authorities, Article IV.B.2 of the Constitution of the Federation, provides for the election of the President and Vice-President with a caucus of Bosniac Delegates and a caucus of Croat Delegates to the House of Peoples each nominating one person. Article IV.B.5 reserves one-third of the ministerial positions for "Croats". Article IV.B.6 again confers the veto-power on the representatives of constituent peoples. Article IV.B.4, as revised by Amendment XII, prescribes that no Deputy Minister may be a member of the same constituent people as the Minister.

110. As far as the judiciary authority is concerned, Article IV.C.6 prescribes that there shall be an equal number of Bosniac and Croat judges on each court of the Federation whereas "Others" shall be proportionally represented. Accordingly, Article IV.C.18 establishes a Human Rights Court with three judges: one Bosniac, one Croat, and one from the category of Others.

111. As for the Federation structures, Article V.8 provides for a minimum representation of each constituent people in Cantonal Governments whereas Cantonal Judges shall, according to Article V.11, be nominated in such a way that the composition of the judiciary as a whole shall reflect that of the population of the Canton.

112. The provisions of the Constitution of the Federation which provide for a minimum or proportional representation and veto powers for certain groups certainly do constitute a "preference" in the sense of Article 5 of the Convention on Racial Discrimination. However, insofar as they create preferential treatment in particular for members of the two constituent peoples, they cannot be legitimised under Article 1 paragraph 4 since these "special measures" are certainly not "taken for the sole purpose of securing adequate advancement" of Bosniacs or Croats "requiring such protection" in order to ensure equal enjoyment of rights.

113. As it can be seen from the legislative history of the Constitution of the Federation, these institutional safeguards were introduced with the aim of power-sharing which is a legitimate aim for the political stabilization and democratisation through "consensus government". However, to what extent may institutional devices for the representation and participation of groups with the aim of power sharing infringe individual rights and in particular, voting rights? Can there be a "compromise" between individual rights and collective goals such as power-sharing? In trying to answer this question, two extreme positions, which mark the ends of a scale for weighing contradicting rights and goals or interests, must serve as the starting points.

114. Do, for instance, language rights, i.e. legal guarantees for the members of minority groups to use their mother tongue in proceedings before courts or administrative bodies really constitute a "privilege" that members of the "majority" do not have insofar as they have to use the "official language", which is their mother tongue by the way? Such an obviously absurd assertion takes the unsaid norm of the ethnically conceived nation-State for granted by "identifying" the language of the "majority" with the state. As opposed to the ideological underpinnings of the ethnically conceived nation-State stands the alleged necessity of "exclusion" of all elements which disturb ethnic homogeneity – such "special rights" are thus necessary in order to maintain the possibility of a pluralist society against all trends of assimilation and/or segregation which are explicitly prohibited by the respective provisions of the Convention on the Prevention of All Forms of Racial Discrimination which must be applied directly in Bosnia and Herzegovina in accordance with Annex 1 to the Constitution of BiH.

115. However, if a system of government is established which reserves all public offices only to members of certain ethnic groups, the "right to participation in elections, to take part in government as well as in the conduct of public affairs at any level and to have equal access to public service" is seriously infringed for all those persons or citizens who do not

belong to these ethnic groups insofar as they are denied the right to stand as candidates for such governmental or other public offices.

116. The question is thus raised as to the extent that the infringement of these political rights might be legitimised. Political rights, in particular voting rights including the right to stand as a candidate, are fundamental rights insofar as they reach the heart of a democratic, responsible government required by the provisions of the Preamble, paragraph 3, and Article I.2 of the Constitution of BiH and the respective provisions of the European Convention on Human Rights and other international instruments referred to in Annex I to the Constitution of BiH. A system of *total exclusion* of persons on grounds of national or ethnic origin from representation and participation *in executive and judicial bodies* gravely infringes such fundamental rights and can therefore never be upheld. Consequently, all provisions reserving a certain public office in the executive or judiciary authority exclusively for a Bosniac or Croat without the possibility for a member of "Others" to be elected *or* granting veto-power to one or the two of these peoples only is a serious breach of Article 5 of the Convention on Racial Discrimination and the constitutional principle of equality of the constituent peoples. These institutional mechanisms cannot be viewed as an "exemption" by virtue of Article 1, paragraph 4 of the Convention on Racial Discrimination as they favour two constituent peoples who form the "majority" of the population. Nor are these mechanisms necessary for these two peoples in order to achieve full or "effective" equality in the sense of Article 1, paragraph 4 of the Convention on Racial Discrimination.

117. Provisions granting a minimum or proportional representation in governmental bodies are thus not *per se* unconstitutional. The problem is to whom they give preferential treatment! Therefore, the very same mechanisms for "Others" in the Constitution of the Federation are certainly in conformity with Article 1 paragraph 4 of the Convention on Racial Discrimination under the present circumstances in the Federation of BiH.

118. Minimum or proportional representation *in the Federation legislature* must be interpreted from a different angle. To the extent that there is a bicameral parliamentary structure in the first Chamber based on universal and equal suffrage without any ethnic distinctions and that the second Chamber, the House of Peoples, also provides for the representation and participation of others, there is not *prima facie* a system of *total* exclusion from the right to stand as a candidate.

119. In the case *Mathieu-Mohin and Clairfayt vs. Belgium* (9/1985/95/143) the majority of the European Court of Human Rights ruled that Article 3 of the First Protocol to the

ECHR was not violated as the French-speaking electors in the Halle-Vilvoorde district were "in no way deprived" of the right to vote and the right to stand for election on the same legal grounds as the Dutch-speaking electors "by the sheer fact that they must vote either for candidates who will take the parliamentary oath in French and will accordingly join the French-language group in the House of Representatives or the Senate and sit on the French Community Council, or else for candidates who will take the oath in Dutch and so belong to the Dutch-language group in the House of Representatives or the Senate and sit on the Flemish Council". In the words of a dissenting opinion, "the practical consequence would be that unless they vote for Dutch-speaking candidates, the French-speaking voters in this district will not be represented in the Flemish Council". Article 3 of the First Protocol, unlike the 1964 American Voting Rights Act, thus does not guarantee a right to vote for "a candidate of one's choice".

120. It could thus be argued that there is no violation of Article 3 of the First Protocol if a Croat voter has to cast his/her vote for a Bosniac or Serb candidate etc. However, there is at least one striking difference in the electoral mechanisms of Belgium on one hand and the Federation of BiH on the other, particularly as far as the right to stand as a candidate is concerned. The Belgian system does not exclude *per se* the right to stand as a candidate *solely* on grounds of language. Every citizen can stand as a candidate, but must – upon his/her choice – decide whether he/she will take the oath in French or in Flemish. It is therefore the subjective choice of each individual candidate whether to take the oath in French or in Flemish and thereby to "represent" a specific language group, whereas provisions of the Constitution of the Federation of BiH provide for *a priori* ethnically defined Bosniac and Croat delegates, caucuses and veto powers for them.

121. Moreover, the European Court found that – although states have "a wide margin of appreciation in this area" – it rested with the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with: "It must satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate" so as to "thwart the free expression of the opinion of the people in the choice of legislature".

122. The Constitutional Court must consequently assess the constitutional provisions of the Constitution of the Federation of BiH in light of the factual and legal differences with the leading case of the ECHR and its interpretation of the First Protocol that provides that states have no (!) margin of appreciation insofar as the "essence" and "effectiveness" of the free expression of the opinion of the people in the choice of their legislature are concerned.

123. As already outlined supra, there are no ethnic presuppositions for the House of Representatives, whereas the House of Peoples shall consist of 30 Bosniacs and 30 Croats as well as a proportional number of "Others". Article IV.A.8 provides that those delegates must be elected "by respective representatives", i.e. Bosniacs, Croats and "Others" in the Cantonal legislative bodies. According to Article IV.A.18, only delegates of the two constituent peoples may claim that a decision of the House of Peoples concerns their "vital interest" with the effect of a "suspending veto" as the Constitutional Court of the Federation of BiH must finally resolve disputes in case of different majorities. Article IV.B.3 establishes that the Chair of a House of the Legislature must be "from another constituent people" thereby reserving these offices to members of the constituent peoples.

124. In light of the criteria established supra, the Court finds that the institutional structure of representation through the bicameral system, as such, does not violate the respective provisions of the First Protocol. What raises serious concerns, however, is the combination of exclusionary mechanisms in the system of representation and decision-making through veto-powers on behalf of ethnically defined "majorities" which are, nonetheless, in fact minorities and are thus able to force their will on the parliament as such. Such a combined system of ethnic representation and veto-power for one ethnic group – which is defined as a constituent people, but constitutes a parliamentary minority – not only infringes upon the collective equality of constituent peoples, but also the individual's right to vote and to stand as a candidate for all other citizens to such an extent that the very essence and effectiveness of "the free expression of the opinion of the people in the choice of legislature" is substantially impaired. In the final analysis, the designation of Bosniacs and Croats as constituent peoples in accordance with Article I.1 (1) of the Constitution of the Federation serves as the constitutional basis for constitutionally illegitimate privileges given only to these two peoples within the Federation's institutional structures.

125. There is an argument that, since the text of the Preamble of the Constitution of BiH (insofar as it refers to constituent peoples) was modelled upon Article I of the Constitution of the Federation, the latter provision cannot violate the former. However, this argument does not account for the fact that the Preamble of the Constitution of BiH designates all three peoples as constituent, whereas Article I of the Constitution of the Federation designates only two of them as constituent with the discriminatory effect outlined above.

126. Thus, although even the Preamble of the Constitution of the Federation explicitly prescribes the equality of all peoples, i.e. including the constituent peoples, their full equality as required under the Constitution of BiH is not guaranteed because they are not

given the same effective participation in the decision-making processes taking place in the Federation Parliament.

127. *In conclusio*, Bosniacs and Croats, on the basis of the challenged Article I.1 (1), enjoy a privileged position which cannot be legitimised since they are neither on the level of the Federation nor on the level of Bosnia and Herzegovina in the factual position of an endangered minority which must preserve its existence.

128. Accordingly, it would not be necessary for the Constitutional Court to pursue the applicant's allegation that Article I.1 (1) of the Constitution of the Federation is discriminatory by providing the constitutional basis for the violation of individual rights, other than the right to vote and standing as a candidate, in a discriminatory manner as prohibited by Article II.4 of the Constitution of BiH. However, as the request of the applicant is not only concerned with the collective equality of the constituent peoples but also with discrimination against individuals, in particular against refugees and displaced persons regardless of their ethnic origin, the Court will also review Article I.1 (1) of the Constitution of the Federation in light of this allegation made by the applicant.

129. The constitutional issue raised by the applicant in this respect is the question whether the challenged provision does have a discriminatory intent or effect with respect to the enjoyment of individual rights guaranteed under the Constitution of BiH. As this issue was the case with Article 1 of the Constitution of RS, the wording of this provision does not create mutually exclusive categories of persons so that it is not *prima facie* discriminatory. Nevertheless, the explicit designation of Bosniacs and Croats triggers a strict scrutiny with respect to the other standards of review elaborated in detail above (see paragraphs 79 to 81). Hence, does this provision provide the constitutional basis for discriminatory legislation, discriminatory administrative or judicial practice of the authorities? Is there other circumstantial evidence – such as the comparison of population figures or the numbers of returns – which shows such a disparate impact as to indicate that the effects of past *de jure* discrimination, in particular of ethnic cleansing, are upheld by the authorities or that they violate their obligation to provide for protection also against the violence of private individuals and to create respective "political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without giving preference to any particular group"?

130. Regarding the factual situation in the Federation of BiH, the Constitutional Court found the following facts according to Article 22 of its Rules of Procedure:

As far as population figures are concerned, the number of Bosniacs, Croats, Serbs and "Others" living on the territory of the Federation is as follows:

Ethnic Breakdown of the Population on the Federation territory according to the 1991 Census in comparison with 1997 (Source: IMG, on the basis of the 1991 census and UNHCR estimates for 1997)

	1991	1997
Bosniacs	52.09%	72.61%
Croats	22.13%	22.27%
Serbs	17.62%	2.32%
Others	8.16%	2.38%

131. As demonstrated by these figures, the proportional number of Croats living on the territory of the Federation remained almost the same. The proportional number of Bosniacs increased to more than a two-thirds majority, whereas that of Serbs dramatically decreased. Although the territory of the Federation obviously formed an area with "mixed population" of three constituent peoples and others in 1991, the population figures from 1997 clearly show that the Federation is now an "entity" of the members of only two of three constituent peoples.

132. The conclusions reached from these figures are supported again by a comparison of the figures for the overall return of refugees and displaced persons to the Federation with those of the so-called "minority" returns.

133. In order to encourage the local authorities to make minority returns possible, representatives of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the Sarajevo Canton and the international community adopted the Sarajevo Declaration on 3 February 1998. The goal of the Declaration was to allow for at least 20,000 minority returns in 1998, which is, by the way, in itself sufficient evidence of discriminatory intent. Nevertheless, the actual number of returns decreased and the overall results stayed far below the expected figures of 20,000 "minority" returns for 1998.

134. By 31 January 1999, only 19,247 Serb refugees and displaced persons had returned to the Federation of BiH in comparison to 380,165 Bosniacs and 74,849 Croats (Source: UNHCR, Statistics Package of 1 March 1999). The so-called "minority" return of Serbs amounted to 4.05% of all those who returned.

135. Again, this comparison obviously demonstrates that such a tremendous discrepancy according to the ethnic origin of refugees and displaced persons cannot be explained by the overall economic and social conditions but provides undisputable evidence of differential treatment vis-à-vis refugees and displaced persons solely on the grounds of ethnic origin.

136. Although the provisions of the Constitution of the Federation provide for a proportional representation of "Others" in the governmental bodies of the Federation and the representatives of the applicant had acknowledged in the course of the public hearing that the constitutional category of "Others" provides for access of people of Serb origin to governmental bodies, Serbs and "Others" in the sense of census figures are still underrepresented in police forces not only with regard to the 1997 population figures but much more in comparison with 1991. Accordingly, the small number of Serbs in the Federation police forces could raise doubts as to their "impartiality" with respect to ethnic origin.

Ethnic Breakdown of the Federation police forces and the judiciary composed of judges and public prosecutors (Source: IPTF with figures of 17 January 1999 made available to the Court).

	Bosniacs	Croats	Serbs	Others
Judges and Public Prosecutors	71.72%	23.26%	5.00%	no figures
Police forces	68.81%	29.89%	1.22%	0.08%

137. That these doubts are not ill founded from the outset, may again be demonstrated by numerous reports of OHR, the ICG, the Ombudsperson for BiH etc. on numerous incidents in the Federation and the discriminatory practices of the Federation authorities which help to explain the small number of the so-called "minority" returns. The Human Rights Ombudsperson for BiH stated in her Special Report (No. 3275/99) "On Discrimination in the Effective Protection of Human Rights of Returnees in Both Entities of Bosnia and Herzegovina" of 29 September 1999: "return-related incidents at issue and the passive attitude of the police and other competent authorities were predicated solely on the basis of national origin of those affected". She finally concluded that "returnees have been discriminated against on grounds of their national origin in the enjoyment of their rights guaranteed under Article 3 and 8 of the Convention, under Article 1 of Protocol No. 1 thereto and equality before the law and equal protection before the law as provided in Article 26 of the ICCPR".

138. *In conclusio*, the Court holds that following the Dayton-Agreement entering into force there was and still is a systematic, long-lasting, purposeful discriminatory practice of the public authorities of the Federation of BiH in order to prevent the so-called "minority" returns either through direct participation in violent incidents or by not fulfilling their obligation to protect people against harassment, intimidation or violent attacks solely on grounds of their ethnic origin, let alone the failure "to create the necessary political, economic and social conditions conducive to the voluntary return and harmonious reintegration" which follows from the right of all refugees and displaced persons freely to return to their homes of origin according to Article II.5 of the Constitution of BiH.

139. It follows from the "overall circumstances" that the designation of Bosniacs and Croats as constituent peoples in Article I.1 (1) of the Constitution of the Federation has a discriminatory effect and also violates the right to liberty of movement and residence and the right to property as guaranteed by Article II paragraphs 3 and 4 taken in conjunction with paragraph 5 of the Constitution of BiH. Moreover, the aforementioned provision of the Constitution of the Federation violates Article 5 (c) of the Convention on the Elimination of All Forms of Racial Discrimination and the right to collective equality following from the text of the Constitution of BiH as outlined above.

140. The Constitutional Court thus declares the wording "Bosniacs and Croats as constituent peoples, along with Others and" as well as "in the exercise of their sovereign rights" of Article I.1 (1) of the Constitution of the Federation unconstitutional.

141. The Constitutional Court adopted its Decision concerning paragraphs 1, 2, 3 and 5 of the Preamble of the Constitution of RS, as modified by Amendments XXVI and LIV, Article 1 of the Constitution of RS, as modified by Amendment XLIV, and Article I.1 (1) of the Constitution of the Federation of BiH, as modified by Amendment III, by 5 votes *pro* to 4 votes *con*.

142. The Decisions regarding the publication in the *Official Gazettes* of Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina and regarding the day when the provisions that are declared unconstitutional cease to be in effect are based on Articles 59 and 71 of the Court's Rules of Procedure.

The Court ruled in the following composition: Prof. Dr Kasim Begić, President of the Constitutional Court, and Judges: Hans Danelius, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Dr Zvonko Miljko, Azra Omeragić, Prof. Dr Vitomir Popović, Prof. Dr Snežana Savić and Mirko Zovko.

Pursuant to Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, Judge Hans Danelius expressed a concurring opinion, while Judges Zvonko Miljko, Vitomir Popović, Snežana Savić and Mirko Zovko expressed their dissenting opinions and they are annexed to this Partial Decision.

U 5/98 III
1 July 2000
Sarajevo

Prof. Dr Kasim Begić
President
Constitutional Court of Bosnia and Herzegovina

CONSTITUTION OF THE REPUBLIKA SRPSKA

Paragraphs 1, 2, 3 and 5 of the Preamble

The introduction of sovereignty, state independence, establishment of a state and versatile and close connection of the Republika Srpska with other states of the Serb people in paragraphs 1, 2, 3 and 5 of the Preamble of the Constitution of RS represents the violation of Article I.1 taken in conjunction with Articles I.3, III.2 (a) and 5 of the Constitution of BiH, which guarantee sovereignty, territorial integrity, political independence and international sovereignty of BiH.

Article 1, as supplemented by Amendment 44

Preamble of the Constitution of BiH clearly designates Bosniacs, Croats and Serbs as constituent peoples, i.e. peoples.

Elements of a democratic state and society as well as underlying assumptions – pluralism, just procedures, peaceful relations that arise out of the Constitution – must serve as a guideline for further elaboration of the issue of the structure of BiH as a multi-national state.

Territorial division (of Entities) must not serve as an instrument of ethnic segregation – on the contrary – it must accommodate ethnic

groups by preserving linguistic pluralism and peace in order to contribute to the integration of the state and society as such.

Constitutional principle of collective equality of constituent peoples, arising out of designation of Bosniacs, Croats and Serbs as constituent peoples, prohibits any special privileges for one or two constituent peoples, any domination in governmental structures and any ethnic homogenisation by segregation based on territorial separation.

Despite the territorial division of BiH by establishment of two Entities, this territorial division cannot serve as a constitutional legitimacy for ethnic domination, national homogenisation or the right to maintain results of ethnic cleansing.

Designation of Bosniacs, Croats and Serbs as constituent peoples in the Preamble of the Constitution of BiH must be understood as an all-inclusive principle of the Constitution of BiH to which the Entities must fully adhere, pursuant to Article III.3 (b) of the Constitution of BiH.

The Constitutional Court concludes that the provision of Article 1 of the Constitution of RS violates the constituent status of Bosniacs and Croats assigned by the last line of the Preamble of the Constitution of BiH, which, in addition to individual human rights and freedoms, contains positive obligations of the Entities to vouch for enjoyment of those rights and freedoms.

CONSTITUTION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

Article I.1 (1)

Designation of Bosniacs and Croats as constituent peoples in Article 1.1 (1) of the Constitution of BiH has discriminatory consequences and violates the right to freedom of movement and residence and the right to property, guaranteed by Article II paragraphs 3 and 4 taken in conjunction with paragraph 5 of the Constitution of BiH. This provision also violates Article 5 (c) of the Convention on the Elimination of All

Forms of Racial Discrimination and the right to collective equality, which arise out of the Constitution of BiH.

Moreover, in addition to clear constitutional obligation not to violate individual rights in a discriminatory manner, arising out of Article II.3 and 4 of the Constitution of BiH, there is also a constitutional obligation of non-discrimination in the sense of rights of groups if, for instance, one or two constituent peoples enjoy preferential treatment through Entity legal systems.

Furthermore, all public authorities in BiH, in addition to having to refrain from any discrimination in the enjoyment of individual rights and freedoms, primarily those based on national origin, also have a positive obligation to protect individuals from being discriminated against. In terms of refugees and displaced persons, they are additionally obligated to create necessary political, social and economic conditions for their smooth reintegration.

ANNEX

Concurring Opinion of Judge Hans Danelius On the Partial Decision of the Constitutional Court of Bosnia and Herzegovina, case No. U 5/98 of 1 July 2000

I share the majority view that the challenged paragraphs of the Preamble of the Constitution of RS as well as Article 1 of the Constitution of RS and Article I.1(1) of the Federation Constitution are not in conformity with the Constitution of BiH. However, my reasons for reaching this conclusion differ to some extent from those expressed in the majority opinion. My opinion is based on the following considerations:

I - Regarding the Preamble of the Constitution of RS

The challenged provisions of the Preamble read as follows:

Starting from the natural, inalienable and untransferable right of the Serb people to self-determination on the basis of which that people, as any other free and sovereign people, independently decides on its political and State status and secures its economic, social and cultural development;

Respecting the centuries-long struggle of the Serb people for freedom and State independence;

Expressing the determination of the Serb people to create its democratic State based on social justice, the rule of law, respect for human dignity, freedom and equality;

- - - - -

Taking the natural and democratic right, will and determination of the Serb people from Republika Srpska into account to link its State completely and tightly with other States of the Serb people;

Taking into account the readiness of the Serb people to pledge for peace and friendly relations between peoples and States;

I fully accept that the Preamble of the Constitution of RS should be regarded as part of that Constitution. The Constitutional Court is therefore entitled to examine whether this Preamble is in conformity with the Constitution of BiH.

The applicant argues that the quoted provisions of the Preamble of the Constitution of RS violate the last paragraph of the Preamble of the Constitution of BiH as well as Articles II.4, II.6 and III.3 (b) of the Constitution of BiH. He also refers to Article I.3 of the Constitution of BiH and argues that it is not justified to refer to Republika Srpska as a state.

The Constitution of BiH makes it clear that only Bosnia and Herzegovina is a state under international law. This point appears from Article I.1 of the Constitution of BiH according to which the Republic of Bosnia and Herzegovina, under the official name of Bosnia and Herzegovina, shall continue its legal existence under international law as a state with its already internationally recognised borders.

It is true that the term ”state” is sometimes used not only for states which are independent subjects of international law, but also for other entities which enjoy a limited autonomy, in particular within the structure of a federal system (cf., for example, the states constituting the United States of America). In such cases, however, the specific form of statehood of the entities is recognised by the constitutional rules of the country, and it is almost invariably the federal constitution itself which confers such statehood on the entities and defines their constitutional status.

In the present case, however, Article I.3 of the Constitution of BiH provides that Bosnia and Herzegovina shall consist of two ”entities”, namely the BiH Federation and Republika Srpska, neither of which is called a state. The BiH Federation and Republika Srpska are also referred to as ”entities” in several other articles of the Constitution of BiH, and the term ”state” is nowhere used in that Constitution in respect of these entities.

Moreover, in a complex state such as Bosnia and Herzegovina, which is characterised by intricate relations between state and entities, it is important that a consistent terminology be used in the various constitutions. In its first partial decision in the present case, the Constitutional Court found that the use of the term “border (granica)” in Article 2.2 of the Constitution of RS to describe the boundaries between the entities was not in conformity with the Constitution of BiH, since the General Framework Agreement, of which the Constitution of BiH forms a part, makes a clear terminological distinction between a “border”, which is a frontier between states, and a “boundary”, which describes the internal geographical line separating Republika Srpska and the Federation.

For similar reasons, a consistent terminology should be used to describe the entities, and there is clearly no basis in the Constitution of BiH for calling Republika Srpska a state.

In so far as the term "state" is used in the preambular provisions of the Constitution of RS in respect of Republika Srpska, they are therefore not in conformity with the Constitution of BiH.

The challenged provisions of the Preamble of the Constitution of RS also contain some other terms and expressions which cannot be considered consistent with the status of Republika Srpska as an entity within the state of Bosnia and Herzegovina. Insofar as the Preamble refers to the right of the Serb people to decide independently on its political and state status, to create its democratic state and to link that state completely and tightly with other states, the provisions are not compatible with the status of Republika Srpska as an entity. Nor can the reference in the Preamble to the struggle of the Serb people for state independence be considered to be in conformity with the legal status of Republika Srpska.

In these respects too, the challenged preambular provisions must therefore be considered to violate the Constitution of BiH.

II - Regarding Article 1 of the Constitution of RS

Article 1 of the Constitution of RS provides:

Republika Srpska shall be the State of the Serb people and of all its citizens.

There are two aspects of this Article which raise questions with respect to its conformity with the Constitution of BiH, namely, on the one hand, the fact that Republika Srpska is referred to as a "state" and, on the other hand, the fact that the Serb people – unlike the Bosniac and Croat peoples – is expressly mentioned as a people of Republika Srpska.

a) Regarding the first aspect, I have already explained, when commenting on the Preamble (see above under I), why I consider it not to be justified in the Constitution of RS to refer to Republika Srpska as a state. The same reasoning applies, *mutatis mutandis*, to Article 1 of the Constitution of RS, and on this point Article 1 of the Constitution of RS is therefore not in conformity with the Constitution of BiH.

b) Regarding the second aspect, the applicant first claims that there is an inconsistency with the last paragraph of the Preamble of the Constitution of BiH. That paragraph is an introduction to the actual text of the Constitution and reads:

Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows:

The Preamble of the Constitution of BiH must, in itself, be regarded as part of that Constitution. Accordingly, the Constitutional Court is in principle competent to examine whether the constitutions of the entities are in conformity with that Preamble. However, a precondition for finding a lack of conformity with the Preamble of the Constitution of BiH must be that the relevant provision of the Preamble is of a normative character and sets limits or imposes obligations which are binding on the entities.

The question is now whether Article 1 of the Constitution of RS, insofar as it refers to the Serb people but not to the Bosniac and Croat peoples, is in conformity with the above-mentioned provision of the Preamble of the Constitution of BiH. In this regard, I find it appropriate to take into account the contents and special character of that provision of the Preamble. As it appears from its wording, the provision does not contain any legal norm from which specific rights or obligations can be derived. The provision is no more than an introductory paragraph which identifies those who adopted and enacted the Constitution of BiH. It is in this context that Bosniacs, Croats and Serbs are referred to as constituent peoples together with others and as having, jointly with citizens of Bosnia and Herzegovina, determined the contents of the Constitution.

Thus, insofar as the said provision of the Preamble refers to the three peoples as constituent peoples, it does so in the context of the adoption and enactment of the Constitution of BiH only, and this provision cannot be considered to lay down any rule of a normative character or to create any concrete constitutional obligations.

It follows that there is no sufficient basis for finding Article 1 of the Constitution of RS to violate the last paragraph of the Preamble of the Constitution of BiH.

However, the applicant has also referred to Article II.4 and Article II.6 of the Constitution of BiH and alleged that Article 1 of the Constitution of RS is in conflict with those provisions.

Article II.4 and Article II.6 of the Constitution of BiH read 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 the 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.

6. Implementation

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

The question is therefore whether the reference to the Serb people in Article 1 of the Constitution of RS and the fact that the Bosniac and Croat peoples are not mentioned jointly with the Serb people constitutes discrimination contrary to the prohibition against discrimination in the Constitution of BiH.

A key element in the Constitution of BiH is the protection of human rights, and in this connection the prohibition against discrimination is given particular weight. According to Article II.2 of the Constitution, the European Convention on Human Rights, which in its Article 14 prohibits discrimination in respect of the rights protected in the Convention, shall apply directly in Bosnia and Herzegovina and have priority over all other law. Moreover, Article II.4 of the Constitution contains a specific prohibition against discrimination in the enjoyment of the rights provided for in Article II or in the international instruments which are protected under the Constitution.

In view of the circumstances in which the Constitution of BiH was adopted, it is easy to understand why particular attention was given to the discrimination issue. Discrimination and intolerance were causes of tragic events which had occurred in the years before the Constitution was adopted. Moreover, there can be no doubt that discrimination remained a serious problem in both entities of Bosnia and Herzegovina even after the Constitution had entered into force. Against this background it must be justified to interpret the said provisions of the Constitution in a strict manner. Consequently, special attention must be given to any constitutional or other legal provisions which could reasonably be understood as encouragement or approval of discriminatory practices or attitudes.

In connection with the war in Bosnia and Herzegovina, large numbers of people were forced to leave their homes and had to live elsewhere as refugees or displaced persons. The whole population structure in Bosnia and Herzegovina was dramatically changed. An important aim of the Dayton Peace Agreement and of subsequent efforts to secure lasting

peace and stability is the return of these refugees and displaced persons to their homes. This aim is clearly reflected in Article II.5 of the Constitution of BiH. Any discrimination on ethnic grounds could make it more difficult to achieve this aim.

Article 1 of the Constitution of RS is drafted in an unusual manner in so far as it places side by side the Serb people, on the one hand, and all citizens of Republika Srpska, on the other. In fact, these two groups of people overlap, since most Serbs in Republika Srpska are at the same time citizens of Republika Srpska. It is true that the reference to all citizens includes those Bosniacs and Croats who are citizens of Republika Srpska. However, unlike the Serbs, the Bosniacs and Croats are not referred to as peoples but as citizens, which means that from a constitutional point of view they are not placed on an equal level with the Serbs.

It could be argued that the fact that, since the Serbs are at present the majority population in the territory of Republika Srpska and that they also were the majority - although a much smaller majority - before the war in Bosnia and Herzegovina broke out, it should be permissible to mention them as a special category in Article 1 of the Constitution of RS. However, in the prevailing circumstances a central provision in the Constitution of RS which makes Republika Srpska appear primarily as an entity of the Serb people is likely to be interpreted by those Bosniacs and Croats who live in Republika Srpska or who wish to return there as an indication that they are not accepted as being equal to the Serbs but are seen to a certain degree as second-class citizens.

Consequently, there is, in this respect, in Article 1 of the Constitution of RS a discriminatory element which cannot be disregarded. The Article may also contribute to dissuading refugees and displaced persons from returning and is therefore inconsistent with an important objective of the Constitution of BiH.

For these reasons I conclude that Article 1 of the Constitution of RS is not consistent with the prohibition against discrimination in the Constitution of BiH.

III - Regarding Article I of the Federation Constitution

Article I.1(1) of the Federation Constitution provides:

Bosniacs and Croats as constituent peoples together with others, and the citizens from the territory of the Federation of Bosnia and Herzegovina, in exercising their sovereign rights, transform the internal structure of the territory of the Federation of

Bosnia and Herzegovina, defined by Annex II of the General Framework Agreement, so that the Federation of Bosnia and Herzegovina consists of federal entities with equal rights and responsibilities.

The applicant considers that this provision is not in conformity with the last paragraph of the Preamble of the Constitution of BiH or with Article II.4 and Article II.6 of that Constitution in so far as it refers only to Bosniacs and Croats as constituent peoples.

For the same reasons as indicated in regard to Article 1 of the Constitution of RS (see under II above), I consider that the last paragraph of the Preamble of the Constitution of BiH does not contain a normative rule which could lead to a finding that Article I.1(1) of the Federation Constitution is not in conformity with that paragraph.

It remains to be examined whether Article I.1(1) of the Federation Constitution is discriminatory and therefore violates Article II of the Constitution of BiH.

I note that there are certain differences between Article I.1(1) of the Federation Constitution and Article 1 of the Constitution of RS.

First, according to its wording, Article I.1(1) of the Federation Constitution was meant to describe a constitutional change which was taking place in the territory which constituted the Federation ("Bosniacs and Croats … together with others, and the citizens of Bosnia and Herzegovina from the territory of the Federation of Bosnia and Herzegovina … transform the internal structure of the territory …"). The Article does not state that the Federation is and should remain an entity of Bosniacs and Croats but only that it was the Bosniacs and Croats who, together with others, transformed the structure of the territory of the Federation.

It is true that the Federation consists of territories with a majority of Bosniac and Croat population. However, for the same reasons as in regard to the Constitution of RS (see under II above), I do not consider this to be a sufficient justification for the reference in the Constitution to only Bosniacs and Croats.

Secondly, unlike Article 1 of the Constitution of RS, Article I.1(1) of the Federation Constitution uses the term "constituent peoples", which also appears in the Preamble of the Constitution of BiH. This is a term which, in the minds of many people, has a symbolic significance and is emotionally coloured, but which can hardly be said to have a clear and precise meaning. In the Federation Constitution, the naming of Bosniacs and Croats as

constituent peoples presumably means that they were the peoples who played a special role in creating and developing the Federation, but it could also convey the idea that the Federation is primarily a territory of Bosniacs and Croats.

It is true that the Federation Constitution specifically provides that all refugees and displaced persons have the right to freely return to their homes of origin (Article II.A.3) and that all persons have the right to have property restored to them (Article II.A.4). Nevertheless, if a central provision in the Federation Constitution could reasonably make the Federation appear primarily as a territory of Bosniacs and Croats, this provision may well have a dissuasive effect on others, particularly on Serb refugees and displaced persons wishing to return to the Federation, and the emphasis placed on Bosniacs and Croats thereby contributes to preventing the realisation of an important objective of the Constitution of BiH.

For these reasons, I conclude that Article I.1(1) of the Federation Constitution is also not consistent with the prohibition against discrimination in the Constitution of BiH.

ANNEX

Separate Opinion of Judge Zvonko Miljko on the Partial Decision of the Bosnia and Herzegovina Constitutional Court, case No. U 5/98 of 1 July 2000

1. In accordance with Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, I would like to disclose and publicise the reasons behind my opinion, given the fact that I voted against the majority view.

This Partial Decision is related to the determination on the conformity of Article 1, as modified by Amendment XLIV of the Constitution of the Republika Srpska; Article I.1 (1) of the Constitution of the Federation of Bosnia and Herzegovina, as replaced by Amendment III; Paragraphs 1, 2, 3 and 5 of the Preamble of the Constitution of the Republika Srpska, as modified by Amendments XXVI and LIV with the Constitution of BiH. The issue here is a classical constitutional dispute, i.e. abstract decision-making on constitutionality. This case is related to the comparison and evaluation of the constitutional provisions of the Entities' Constitutions with respect to the Constitution of Bosnia and Herzegovina. This is why I consider it important to state all these provisions in full, and even state their formulation prior to the adoption of the amendments through which harmonisation with the Constitution of Bosnia and Herzegovina should have been achieved, in accordance with Article XII, para 2 of the Constitution of Bosnia and Herzegovina.

Article 1 of the Constitution of the Republika Srpska reads as follows: "The Republika Srpska is the State of Serb people."

In formulation of Amendment XLIV, this Article reads as follows: "The Republika Srpska is the State of Serb people and of all its citizens."

Article I.1 (1) of the Federation of Bosnia and Herzegovina provides: "Bosniacs and Croats as constituent peoples, together with other citizens in exercising their sovereign rights, are reshaping the internal structure of the territory with Bosniac and Croat majority population in the Republic of Bosnia and Herzegovina, in the Federation of Bosnia and Herzegovina comprising of federal units with equal rights and responsibilities."

In the formulation of Amendment II, the challenged provision of Article I.1 reads as follows: "Bosniacs and Croats as constituent peoples, together with others, and citizens of

Bosnia and Herzegovina from the territory of the Federation of Bosnia and Herzegovina, in exercising their sovereign rights, are reshaping the internal structure of the territory of the Bosnia and Herzegovina Federation as defined by Annex II to the General Framework Agreement in such a way that the Federation of Bosnia and Herzegovina is composed of federal units with equal rights and obligations."

Provisions of the Republika Srpska Constitution Preamble read as follows:

Arising from inalienable and non-transferable natural right of Serb people to self-determination, self-organisation and association, based on which they freely decide on their political status and provide for economic, social and cultural development.

Taking into consideration centuries-long struggle of Serb people for freedom and their readiness to establish relations of mutual respect and equality with other nations.

Taking into consideration their decision from the Second World War to constitute together with other nations, Croats and Muslims, the Republic of Bosnia and Herzegovina within the federal state of Yugoslavia.

Bearing in mind their determination to decide independently about their destiny and expressing their strong will to create a sovereign and democratic state, based on national equality, respect and guarantees of human freedoms and rights, social justice and the rule of law.

The challenged provisions of the Republika Srpska Preamble, as modified by Amendments XXVI and LIV, read as follows:

Arising from natural, taking inalienable and non-transferable right of the Serb people to self-determination allowing them, as any other free and sovereign people, to decide independently on their political and national status and to provide economic, social and cultural development: taking into consideration centuries-long struggle of the Serb people for freedom and national independence: expressing resolution of the Serb people to create a democratic state based on social justice, the rule of law, respect for human dignity, freedom and equality. Taking into consideration the natural and democratic right, willingness and resolution of the Serb people from the Republika Srpska to establish close and multiple relations between their state and other states of the Serb people: taking into consideration readiness of the Serb people to support peaceful and amicable relations among nations and states.

The applicant contended that the stated provisions of the Constitution of the Republika Srpska were not in conformity with the last paragraph of the Constitution of Bosnia and Herzegovina Preamble and Article II.4, II.6 and II.3 (b) of the Constitution of Bosnia and Herzegovina; whereas with regard to Article I.1 (1) of the Federation of Constitution of Bosnia and Herzegovina, the application argued that it was not in conformity with the last paragraph of the Preamble and Article II.4 and II.6 of the Constitution of Bosnia and Herzegovina.

The last paragraph of the Constitution of Bosnia and Herzegovina reads as follows:

Bosniacs, Croats and Serbs, as constituent peoples (together with others) and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzeovina.

Article II.4 of the Constitution of Bosnia and Herzegovina (Non-Discrimination) reads as follows: *Enjoyment of rights and freedoms stipulated in this article or in international agreements stated in Annex I of this Constitution is secured for all persons in Bosnia and Herzegovina without discrimination on any grounds such as gender, race, colour, language, religion, political or any other conviction, national or social origin, affiliation to some national minority, property, birth or other status*.

Article II.6 of the Constitution of Bosnia and Herzegovina reads as follows: *Bosnia and Herzegovina, and all courts, offices, state organs and bodies indirectly governing or operating within the entities, shall apply and respect human rights and fundamental freedoms stated in Para 2 hereof.*

Article III.3 (b) of the Constitution of Bosnia and Herzegovina reads as follows: *Entities and all their lower units shall fully abide by this Constitution which abolishes those provisions of the Bosnia and Herzegovina laws and of the Entities' constitutions and laws that are in contradiction to the Constitution and decisions taken by the institutions of Bosnia and Herzegovina. General principles of international law are an integral part of the legal system of Bosnia and Herzegovina and its Entities*.

I hold that the stated provisions of Article II.6 and II.3 (b) of the Constitution of Bosnia and Herzegovina cannot be taken as a criterion of control in this constitutional dispute since they represent a constitutional obligation for the implementation and respect of human rights and fundamental freedoms; in other words, supremacy of the Constitution of Bosnia and Herzegovina and application of general principles of international law as an integral part of the legal system of Bosnia and Herzegovina and its Entities.

I cannot accept the view implied in the Decision that the challenged provisions of both Entity Constitutions *per se* violate the constitutional provisions contained in Article II.6 and III.3 (b) of the Constitution of Bosnia and Herzegovina.

What remains are the provisions in the last paragraph of the Preamble and Article II.4 of the Constitution of Bosnia and Herzegovina. I shall resort to unique arguments regarding all the challenged provisions since, with some minor differences, this concerns the fundamental issue of the constitutionality of Bosnia and Herzegovina and its form of state organisation.

My fundamental dissension from the majority opinion is reflected in my belief that this constitutional dispute is primarily a problem of the state organisation of Bosnia and Herzegovina and not a problem within the domain of individual human rights and fundamental freedoms guaranteed by the Constitution of Bosnia and Herzegovina.

2. After the dissolution of the former Yugoslavia and gaining independence, Bosnia and Herzegovina consequently necessitated a new Constitution in order to regulate the newly established relations of a post-communist and transitory state under the newly arisen circumstances.

However, it should have resolved the crucial problem of its statehood and constitutionality- to define constitutionally its own state organisation. Unfortunately, all this did not occur in a peaceful environment but during a wartime period, while the international community had the prevailing influence on the resolution of this situation.

Some points in theory are taken as axioms. Thus, it is freely claimed that federalism does not call for multi-nationality, but that multi-national states necessarily require some form of federal government structure.

Also, *per definitionem*, there is no federation without two or more federal units. Constituent elements of a federation are citizens (unity) and federal units (particularity).

Theoretical distinction lies in the relationship between federalism and democracy. While some put an equation mark between them, others claim that federalism negates the fundamental postulate of democracy expressed in the principle “one man-one vote”.

Bosnia and Herzegovina is being federalised on special terms. As a result thereof, we have a complex state structure that is characterised by a three-degree constitutionality and great asymmetry.

The Constitution of the Federation of Bosnia and Herzegovina, preceding the Constitution of Bosnia and Herzegovina, is a result of the Washington Agreement by which Bosniac and Croat population as “constituent peoples, together with others, as well as citizens of Bosnia and Herzegovina (…) reshaped the internal structure of the territory with Bosniac and Croat majority population (...) in the Federation of Bosnia and Herzegovina composed of federal units with equal rights and responsibilities”. (Article I.1 (1))

The entire constitutional structure of the Constitution of the Federation of Bosnia and Herzegovina is precisely based on this duality of Bosniacs and Croats, and it is particularly reflected in the composition of the bodies of the state authority and decision-making methods. Article 1.2 of the Federation of Constitution of Bosnia and Herzegovina provides that the names of Cantons “shall be given exclusively after towns, centres of Cantonal authorities or by regional-geographic characteristics”, but Article V.3 mentions “Cantons with Bosniac or Croat majority population”. Amendment I to the Federation Constitution introduces “Cantons with a special regime” dominated by the principle of parity of Bosniac and Croat representatives in governmental authorities.

Article 1.2 (2) of the Constitution of the Federation of Bosnia and Herzegovina provides that “the decision on constitutional status of the territory of the Republic of Bosnia and Herzegovina with Serb majority population will be made in the course of peace negotiations and at the International Conference on the former Yugoslavia”.

Instead of “dividing the entire Bosnia and Herzegovina in Cantons in Dayton” (thus, in addition to the Croat Republic of Herceg-Bosna, the Republika Srpska would have been abolished as well as the (title) Republic of Bosnia and Herzegovina; thereby the entire country could have been named the Federation of Bosnia and Herzegovina!), the Republika Srpska was recognised as the second Entity and the name of the Republic of Bosnia and Herzegovina deleted “to be officially renamed into Bosnia and Herzegovina”(Article I.1 of the Constitution of BiH).

3. Even though I agree that it is not the task of the Constitutional Court to participate in scientific debates, stated theoretical aspects (seen through the prism of historical events) cast more light on this problem.

However, I would like to revert to legal arguments. I underlined that an analysis can be done by a comparison of the challenged provisions of the Constitutions of both Entities

with the last paragraph of the Constitution of Bosnia and Herzegovina and Article II.4 of the Constitution of Bosnia and Herzegovina.

At the Court's session and during a public debate, much has been said about the issue of the legal character and effects of the Preamble and the notion of constituent status.

If we accept that the Preamble is an integral part of the Constitution, a more significant question is whether it has a normative character. A Preamble may have that character in rare cases, but it is quite clear that it must contain norms in that event. Five Judges were inclined to the viewpoint that the last paragraph of the Constitution of Bosnia and Herzegovina Preamble did not have normative character nor did it set any limitation or impose obligations on the Entities.

In this sense, the notion of constitutionality (variously interpreted in theory) must be understood as a constitutionally determined fact that Bosnia and Herzegovina is a multi-ethnic state, and that the three constituent peoples (together with other citizens of Bosnia and Herzegovina) in this provision of the Preamble are put in the context of adoption and enactment of the Constitution of Bosnia and Herzegovina. If the three peoples of Bosnia and Herzegovina are an expression of the particularity of its specific federalism, whereas citizens are an expression of collectiveness, the category "others" can only refer to representatives of other peoples living in Bosnia and Herzegovina. Provisions of the Framework Convention on Protection of National Minorities could possibly refer to them. To put it in simple terms, not a single representative of the three constituent peoples in Bosnia and Herzegovina can be treated in any regard as a representative of a national minority in his/her own state.

It remains to be seen whether the challenged provisions are in contradiction to Article II.4 of the Constitution of Bosnia and Herzegovina that is identical to Article 14 of the European Convention on Human Rights and Fundamental Freedoms.

This Article *ex plicite* provides that the "enjoyment of rights and freedoms (…) is ensured for all persons in Bosnia and Herzegovina without discrimination on any grounds…"

Evidently this provision concerns the rights of an individual character, protecting the rights of individuals and not groups as such, particularly not of (mega) groups of the type of nations (peoples) in a multi-ethnic state. The convention itself fails to provide *actio popularis*, and even when it concerns "group" applications, every individual within a group must prove to be a victim of a violation of his/her rights. This requirement has

been confirmed by the case law of the European Court of Human Rights and we have to act accordingly. The acceptance of arguments in the application would consequently lead to a conclusion that the representatives of all peoples in the entire territory of Bosnia and Herzegovina are being deprived.

I feel the need to emphasise that thus far the Constitutional Court of Bosnia and Herzegovina has been extremely scrupulous regarding the protection of human rights and freedoms. Its up-to-date case law has undoubtedly proven that. However, the matter in question obviously pertains to the constitutional determination of governmental system of a complex multi-ethnic state. The Dayton's construction of the state of Bosnia and Herzegovina aimed to resolve the national issue, which was the crucial constitutional problem given the form of its governmental system.

Such complex and asymmetric construction has led to compromise solutions regarding the constitutional determination of national (singularity) and civil (unity). In this sense, I cannot accept the arguments behind the adopted Decision in the part related to institutional structures of Bosnia and Herzegovina.

According to the opinion of the majority of Judges of this court, "in an ultimate analysis surely there is no specific model of ethnic representation to constitute a basis for the provision on composition of Bosnia and Herzegovina institutions and corresponding electoral mechanisms, which would in regulation of the composition of Bosnia and Herzegovina institutions allow for a generalised conclusion that the Constitution of Bosnia and Herzegovina represents a territorial division of constituent peoples at the level of Entities."

I have already elaborated on a certain "structural" constituent discrepancy and asymmetry between the Washington and Dayton documents. I am inclined to the assertion that Article VII of the Constitution of Bosnia and Herzegovina is a paradigm to this situation, but these constitutional solutions and attempts to secure equality of peoples of Bosnia and Herzegovina through institutional structures of authority, by application of the principle of parity and consensual decision-making, cannot be treated as "special rights" or "a privileged position" of these peoples, which are supposed to protect them.

In this respect, references to the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, the European Chapter for Regional Languages or Languages of Minorities and the Framework Convention for the Protection of

National Minorities are totally beside the point and cannot be applied in this constitutional dispute to the situation in Bosnia and Herzegovina.

Also, I also disagree with the examples of Canada, Switzerland and Belgium, which are stated in the Decision. These examples could be used as an argument during a discussion, but by no means as deciding arguments in the reasons adduced for the judgment. Moreover, they all represent specific situations, often incomparable.

This is also related to the use of the Vienna Convention in contractual law. Most Judges see arguments for its application in the fact that "contrary to the constitutions of many other countries, the Constitution of Bosnia and Herzegovina is in Annex IV to the Dayton Agreement, which is an integral part an international agreement". It is true that after Dayton a question was raised in Bosnia and Herzegovina as to what was the Constitution in a material sense, and in which sources of constitutional law, norms of a constitutional character could be found. The question was also raised about a mutual relationship between the Constitution (Annex IV) and other Annexes (Annex X in particular), and if any of them has supra-constitutional character!? This issue raises yet another much more complex problem of the relationship between Bosnia and Herzegovina and the international community. I have no intention to go into that at this point. I shall conclude by saying that the Constitution of Bosnia and Herzegovina, regardless of all untypical features related to its adoption, "has begun its course" as the highest legal and political act of this country once it was promulgated. This is how I perceive it. Acceptance of the applicant's request would lead to a radical revision of the overall constitutional structure, not only of the Constitutions of the Entities but also of Bosnia and Herzegovina itself.

4. In addition, I would like to point to a situation related to a part of the Decision dealing with the facts of the case.

At a public hearing held in Banja Luka on 23 January 1999 the Court adopted a Conclusion to dismiss the request by the applicant's proxy to grant his proposal on hearing new witnesses and taking into consideration some statistical data. The prevailing opinion was that it concerned an evaluation (of discrimination) *de jure* and not *de facto*.

This Conclusion was adopted with seven votes in favour and two against.

At a public hearing held in Sarajevo on 30 June 2000 regarding the same issue, a contradictory conclusion was adopted, i.e. five votes to four. Reasons therein stated

that the judge-rapporteur acted rightfully when he referred to Article 22 of the Rules of Procedure of the Bosnia and Herzegovina Constitutional Court, of which Paras. 5 And 6 read that a Report contains "ascertained factual and legal situation, i.e. disputed issues; and "a conclusion derived from ascertained factual and legal situation and based on the former determination on the merits of the application".

I hold that the provisions of this Article of the Rules of Procedure are of a general nature, and that the facts related to this type of constitutional dispute cannot be equated with, for example, the facts of the case in an appeal.

I also believe that, by stating of Annex VII taken in conjunction with Article II. 3 and 5 of the Constitution of Bosnia and Herzegovina with reference to acquirement of the rights to freedom of movement and abode, property and religion, fall outside the scope of the request.

Otherwise, the reasons offered by the majority imply that the challenged provisions, *per se*, contain discriminatory elements that could discourage refugees and displaced persons from returning to their original homes and therefore they are not in conformity with this important objective of the Constitution of Bosnia and Herzegovina.

5. In regard to the character of the sovereignty of the Entities, an extensive explanation is given in the reasons adduced for this Decision. Important argumentation is also provided in the separate opinions. I would like to make special reference here to the provisions of the Preamble of the Constitution of the Republika Srpska regarding this problem, as well as part of the provision of Article I.1 (1) of the Constitution of the Federation of Bosnia and Herzegovina "in exercising their sovereign rights".

The judgment that the provisions of the Constitutions of the Entities, in part related to statehood and sovereignty, are unconstitutional could not be made by comparison with the provisions of the last paragraph of the Bosnia and Herzegovina Preamble and Article II.4, as well as Article II.6 and III.3 (b) of the Constitution of Bosnia and Herzegovina.

Such a conclusion could perhaps be drawn in relation to paragraph 6 and Articles I.1 and I.3 of the Constitution of Bosnia and Herzegovina. On one side, however, that would be outside the scope of application and on the other, it would contradict the fact that the Constitutional Court of Bosnia and Herzegovina does not act *ex officio*.

A N N E X

Separate Opinion of Judge Snežana Savić on the Partial Decision of the Constitutional Court of Bosnia and Herzegovina, case No. U 5/98 of 1 July 2000

Mr. Alija Izetbegović, at the time Chair of the Bosnia and Herzegovina Presidency (by his request of 6 February 1998), instituted proceedings before the Constitutional Court of Bosnia and Herzegovina on the conformity of the Constitutions of the Republika Srpska and the Federation of BiH with the Constitution of Bosnia and Herzegovina, failing to state therein which articles of the Constitutions of the Entities he found disputable and which articles of the Constitution of Bosnia and Herzegovina, in his opinion, were violated by these Constitutions.

On 31 May of the same year Mr. Izetbegović submitted a new request, requesting that the Constitutional Court of Bosnia and Herzegovina examine the following provisions of the Constitutions of the Entities:

A) Regarding the Constitution of the Republika Srpska

a) Preamble in the part where the right of the Serb people to self-determination, respect of their struggle for freedom and state independence, and will and determination to establish links between their state and other states of the Serb people;

b) Article 1 – which defines the Republika Srpska as a state of the Serb people and of all its citizens;

c) Article 1 para 2 referring to the boundary line between the Republika Srpska and the Federation of BiH;

d) Article 4 stipulating that the Republika Srpska may establish special parallel relations with the Federal Republic of Yugoslavia and its Member Republics, as well as Article 68, para 1, item 16 stating that the Republika Srpska shall regulate and secures cooperation with the Serb people outside the Republic;

e) Article 6, para 2 stating that a citizen of the Republika Srpska cannot be extradited;

f) Article 7 in the part related to the official use of the Serbian language and Cyrillic alphabet.

g) Article 28, para 4 stipulating that the state should provide for financial support to the Orthodox Church and establish cooperation with the Church in all fields, especially in preservation, fostering and development of cultural, traditional and other spiritual values;

h) Article 44, para 2 providing that foreign citizens and stateless persons may be granted asylum in the Republika Srpska.

i) Amendment LVII, item 1, supplementing the chapter of the Constitution on Human Rights and Freedoms, according to which, in case of discrepancies in the provisions on rights and freedoms of the Republika Srpska Constitution and the corresponding provisions of the Bosnia and Herzegovina Constitution, those provisions that are more favourable for individuals shall be applied;

j) Article 58, para 2, Article 68, item 6 and provisions of Article 59 and 60 referring to various forms of property, holders of property rights and the legal system regulating the use of property.

k) Article 80, as modified by Amendment XL, item 1 stipulating that the President of the Republika Srpska carries out his/her work in the domain of defence, security and relations with other states and international organisations, Article 106, para 2 stipulating that the President of the Republika Srpska appoints, promotes and dismisses army officers, military court judges and prosecutors;

l) Article 80, as modified by Amendments XL and L, item 2 stipulating that the President of the Republika Srpska is authorised to appoint and dismiss heads of representative offices of the Republika Srpska abroad and to propose ambassadors and other Bosnia and Herzegovina representatives abroad from the Republika Srpska, as well as Article 90, as supplemented by Amendments XLI and LXII, empowering the Government of the Republika Srpska to decide on establishment of representative offices of the Republika Srpska abroad;

m) Article 98 stipulating that the Republika Srpska shall have a National Bank, as well as Article 76, para 2, as modified by Amendment XXXVIII, Item 1, para 2 assigning the National Bank competencies to propose laws in the domain of monetary politics and

n) Article 148, as modified by Amendments LI and LXV, empowering the authorities of the Republika Srpska to adopt acts and undertake measures for the protection of rights and interests of the Republika Srpska against acts of Bosnia and Herzegovina or institutions of Federation of BiH.

B) Regarding the Constitution of Federation of BiH

a) Article I.1 (1) which refers to Bosniacs and Croats as constitutive peoples and of their sovereign rights.

b) Article 1.6 (1) which states that Bosnian and Croatian are the official languages in the Federation of Bosnia and Herzegovina.

c) Article II. A.5 (c), as modified by Amendment VII, in the part referring to dual citizenship.

d) Article II. (a) stipulating the competence of the Federation of BiH to organise and conduct the military defence of the Federation and

e) Article IV B.7 (a) as well as IV.B.8 stipulating that the President of the Federation of BiH is authorised to appoint heads of diplomatic missions and army officers.

2. The application was submitted to the People's Assembly of RS and the Federation of BiH Parliament on 21 May 1998. The People's Assembly of RS submitted its reply in a written form, whereas the House of Representatives of the Parliament of Federation of BiH submitted its reply on 9 October 1998.

3. At the session of the Constitutional Court held on 28 and 30 January 2000, the Constitutional Court, without the participation of the judges from the Republika Srpska, adopted the first Partial Decision in this case (*Official Gazette of Bosnia and Herzegovina*, No. 11/00; *Official Gazette of the Federation of BiH,* No. 15/00 and *Official Gazette of RS*, No. 12/00).

4. At the session of the Constitutional Court held on 18 and 19 February 2000, without the participation of the judges from the Republika Srpska, the Constitutional Court adopted the second Partial Decision on the subject in question (*Official Gazette of Bosnia and Herzegovina*, No.17/00, *Official Gazette of the Federation of BiH*, No. 26/00).

5. Having conducted a public hearing in tfis case on 29 June 2000, deliberations and voting were proceeded with at the Court's session of 30 June and 1 July 2000, with specific reference to the following provisions of the Constitutions of the Entities:

A) Regarding the Constitution of the Republika Srpska

1. The Preamble, as supplemented by Amendments XXVI and LIV, in the part referring to the right of the Serb people to self-determination, respect for their struggle for freedom and state independence, and their will and determination to establish ties between their state and other states of the Serb people (Paragraphs 1, 2, 3 and 5).

2. Article 1, as supplemented by Amendment XLIV, stipulating that the Republika Srpska is a state of the Serb people and of all its citizens.

B) Regarding the Constitution of the Federation of BiH

1. Article I (1), as replaced by Amendment III, referring to Bosniacs and Croats as constituent peoples and exercising of their sovereign rights.

At the same session, the Constitutional Court of BiH by a majority of votes (5:4) decided that the stated provisions of the Constitutions of the Entities, as well as Paragraphs 1, 2, 3 and 5 of the Preamble of the Constitution of the Republika Srpska were unconstitutional and cease to be in effect on the date of publication of this Decision in the *Official Gazette of BiH*.

Based on the above and in accordance with Article 36 of the Rules and Procedures of the Constitutional Court (*Official Gazette of BiH*, Nos. 2/97, 16/99 and 20/99), i.e. in view of my voting against the said Decision, I hereby give my separate opinion.

A) Regarding the admissibility of the application:

1. The Constitutional Court of BiH and the judge-rapporteur, in response to an application in the case U 5/98, acted contrary to the following provisions of the Rules of Procedure of the Constitutional Court: Articles 13, 14 and 19.

Namely, Article 13 of the Rules of Procedure of the Constitutional Court, paragraph 2 provides: "A submission referred to in the preceding paragraph is considered to be received on the date of receipt by the Court; that is, on the day of registered mail posting". The

case U 5/98, the decision draft and already adopted and publicised Partial Decisions on the case, state that the application was submitted on 12 February 1998 and supplemented on 30 March 1998. This statement is untrue since it is evident from the case documents that one application was submitted on 6 February 1998 and the other on 31 May 1998. Also, from the application submitted on 31 May 1998, it is not apparent that it concerned a supplement to the initial application, as stated in the Draft Decision and accepted by the Court in the course of ruling. Instead, the text of the application must lead to the conclusion that it is an entirely new application.

2. If the view taken by the Court that it was a supplement to the application was to be accepted, it would raise the question whether the supplement was made in accordance with Article 19 of the Court's Rules of Procedure, which provides as follows: "When a request, i.e. an appeal addressed to the Court is incomplete or fails to contain information necessary for conductance of proceedings, the judge-rapporteur shall request the applicant to remove the deficiencies within a certain time limit that will not exceed a period of one month. If the applicant fails to do so, the application in question, i.e. the appeal shall be rejected", i.e. whether the judge-rapporteur requested the complaint to be supplemented or it was done on the complainant's own initiative. The case documentation does not indicate whether the judge-rapporteur requested supplementation of the complaint. This leads to the conclusion that it was done through self-initiative. However, the text of the complaint does not lead to the conclusion that it concerns a supplementation of the complaint but, on the contrary, that it concerns an entirely new request. Even in the case of accepting the supplementation of the application of 6 February 1998, the question is whether the supplementation was carried out in a timely manner. This question further implies another question whether the stated articles the Rules of Procedure of the Constitutional Court were violated given the time limits. I hold that in this instance Article 13 and 19 of the Rules of Procedure of the Constitutional Court were violated.

3. According to Article 14, para 1 of the Constitutional Court's Rules of Procedure, a request for institution of proceedings under Article VI.3 (a) of the Bosnia and Herzegovina Constitution should, *inter alia*, contain "… provisions of the Constitution which are deemed to have been violated, signature of an authorised person verified by the seal of the applicant". The signature of the submitter in both applications (of 6 February and 31 May 1998), at that time the Chair of BiH Presidency, was not verified by a seal, which was in contradiction to the said Article of the Rules of Procedure of the Constitutional Court.

In addition to this, according to Article I.6 of the Constitution of BiH Article 9, item 4 of the Law on BiH Coat-of-Arms (*Official Gazette of BiH*, No. 8 of 25 May 1998), it is provided that the BiH Coat of Arms shall be officially displaced and used in the following manner: "…In official correspondence, invitations, business cards and similar documents used by the members of the BiH Presidency, the Council of Ministers..." and the same Article under Item 2 provides: "in all cases referred to in the preceding paragraph, any other coat of arms shall not be used along with the BiH Coat of Arms".

The application of 31 May 1998, when the said Law entered into force, was not submitted in accordance with the stated provisions of the Constitution of BiH and the Law on BiH Coat-of-Arms, but was instead accompanied by a memorandum not symbolising BiH (as well as the application of 6 February 1998). I hold that there are two formal deficiencies in regard to the application: 1) Use of a non-existant BiH Coat of Arms, i.e. a coat-of-arms not symbolising BiH, the use of which is explicitly forbidden by the Constitution of BiH and the Law on the BiH Coat-of-Arms; and 2) Non-existing seal, prescribed as obligatory by the given provisions of the Rules of Procedure of the Constitutional Court. This lack of correct formalities raises the question whether Mr. Izetbegović submitted his application as a member of the Presidency of BiH or as a BiH citizen, which is not permitted by the Constitution of BiH in disputes of this kind. (Article VI.3. (a)). Given the aforementioned, the present case may be concluded to concern a lack of right of action for the institution of such proceedings and that the application, as such, should have been rejected.

4. The application under Item 1 states that the provision of Article 1 of the Constitution of the Republika Srpska (as defined by Amendment XLIV) is not in conformity with the Constitution of BiH (a general assertion, non-existent according to the Court's Rules of Procedure), only later to ascertain the following: "the last paragraph of the Preamble, Article II.4, II.6, 3 (b) etc". It is evident from the stated assertions that the application, in this particular part, is not composed in conformity with Article 14, para 1, item 2 of the Rules of Procedures of the Constitutional Court. In other words, reference is made to a violation of Article 3 (b) and the abbreviation "etc.", which is non-existent in the Constitution of BiH. These points raise the question on what is the reference made to – namely, what is the basis for the examination of the conformity of the stated provisions of the Constitution of the Republika Srpska with the Constitution of BiH by the Constitutional Court of BiH.

5. Moreover, in reference to the Constitution of Federation of BiH, Item 2 of the application states that Article 1.6 (1) is not in conformity with the last paragraph, failing to indicate of what - (Preamble, Article, Paragraph?) and by extension with Article II.4 of the Constitution of BiH, unlike Item 1 of the application where it is precisely stated "with the last paragraph of the Preamble". However, every point of the application, since it can be taken as a separate application (the Constitutional Court confirmed that by its partial decisions with regard to certain points), must be viewed as part of the whole and individually and must contain all relevant information laid down by the Rules of Procedure of the Constitutional Court (Article 14).

As the Constitutional Court, in accordance with Article 26 of its Rules of Procedure, examines only instances of violations disclosed in an application, it is evident that if the court were to act by thus formulated points of the application it would be in the situation of formulating an application by itself. In other words, it would establish its foundation, assuming what the applicant had requested, i.e. which norms of the Constitution of BiH needed to be examined in terms of conformity.

6. In addition, Item 1 of the application, with reference to the harmonisation of the Constitution of the Republika Srpska with the Constitution of BiH, states that the following parts of the Preamble of the Constitution of the Republika Srpska (as determined by Amendments XXVI and LIV to the Constitution of the Republika Srpska) are not in conformity with the stated provisions of the Constitution of BiH… In this case, the question raised is with which provisions. If we take the generally accepted view that a preamble does not have a normative character and therefore is not a norm – thus, in a formal sense, it is not a provision even though it may be a constituent part of a constitution in general. This is not disputable because it concerns the constitution which is at the same time both a legal and political act. We can arrive at the conclusion that in this case the Preamble of the Constitution of the Republika Srpska is challenged solely in regard to Articles II.4 and II.6, but not in relation to the Preamble of the Constitution of BiH since it is not explicitly stated anywhere. Furthermore, Article 3 (b) of the Constitution of BiH, formulated as such, does not exist in the Constitution of BiH.

In this sense, the arguments disclosed in the application regarding this point and with reference to the Preamble of the Constitution of BiH cannot be accepted as grounds for a decision, i.e. a judgment on the constitutionality, since the Preamble cannot be assigned the character of a norm in legal terms.

7. In addition, under Item 12, paragraph 2 of the application regarding the harmonisation of the Constitution of the Republika Srpska with the Constitution of BiH, Amendment LXI to the Constitution of the Republika Srpska in relation to the Constitution of BiH is challenged, without stating a concrete Article of the Constitution of BiH as the grounds for determining its constitutionality. This challenge is also in contradiction to the provisions of Article 14 of the Constitutional Court's Rules of Procedure.

8. The obligation of the Entities to amend their Constitutions in order to ensure their harmonisation with the Constitution of BiH, as provided for by Article XII of the Constitution of BiH, is an issue of a constitutional character and the submitter of the application cannot refer to this competence of the Constitutional Court, as presented by the judge-rapporteur in the Draft Decision. It is an issue of the implementation of the Dayton Peace Agreement and authorities and institutions in charge of its implementation. The Constitutional Court of BiH does not act *ex officio* and is authorised to act only in those cases set forth in Article VI of the Constitution of BiH. However, upon an application by an authorised proposer, the Constitutional Court may examine the conformity of some paragraphs of the Constitutions of the Entities in relation to some provisions of the Constitution of BiH, pursuant to its Article VI. The Court should refer to this type of competence in the process of adopting a decision. Therefore, there is no doubt that the Constitutional Court is competent to decide this dispute, but not in the stated terms and not in terms laid out in the application, neither formally nor substantially.

9. Irrespective of the fact that in its actions upon this application the Constitutional Court of BiH has conducted a number of activities, including a public hearing and adoption of two Partial Decisions, I was of the opinion and felt the need, given the open public hearing and my participation in the decision-making process in this case, to warn the Court of these deficiencies. And I did so at the Court's session. Despite the fact that the Court refused to accept my arguments with the explanation that deliberation was in progress, I believe that the judge-rapporteur, in accordance with Article 19 of the Rules of Procedure of the Constitutional Court, should have warned the submitter of the application of certain deficiencies, which in accordance with the said Article of the Rules of Procedure should have been amended in accordance with those Rules of Procedures – within a month at the latest. Otherwise, I hold that the provided reasons constituted sufficient grounds to reject the application. But since the judge-rapporteur failed to act according to Article 19 of the Rules of Procedure, I have reached the conclusion that the Court was obliged, taking this fact in consideration (should it decide not to reject the said application), to request its supplementation, i.e. removal of deficiencies and irregularities. However, this failed to occur.

10. In regard to the statements made in the application for the institution of proceedings that would annul all the consequences thus far produced by the challenged provisions of the Constitutions of the Entities (this is often not possible with a majority of general legal acts), I consider that one should have insisted on a precise application, and since it was not done, this should have been underlined and correctly interpreted in the Court's Decision. Namely, the application does not ask for provisions of the Constitutions of the Entities to be declared null and void, but to be declared ineffective or annulled. The application is irregular in this respect. It is a generally known fact that general legal acts, as a rule, cannot be annulled (there is no *ex tunc* effect), but can only be declared unconstitutional and automatically cease to be in effect, which results in an *ex tunc* effect.

B) Decision on the merits of the application

1. Regarding the evaluation of the conformity of Article 1 of the Constitution of the Republika Srpska and Article I.1 (1) of the Constitution of the Federation of BiH with the last paragraph of the Preamble of the Constitution of BiH and Articles II.4 and II.6 of the Constitution of BiH, in regard to the Constitution of the Republika Srpska and Article II.4 of the Constitution of BiH, in regard to the Constitution of the Federation of BiH.

2. In regard to the evaluation of the compliance of paragraphs 1, 2, 3 and 5 of the Preamble of the Constitution of the Republika Srpska with the last paragraph of the Preamble of the Constitution of BiH and Articles II.4 and II.6 thereof.

I am of the opinion that the application should be REJECTED as ill-founded for following reasons:

1. In adopting a judgement on the above points of the application in the case U 5/95, an issue of the legal nature of a constitutional preamble in general was raised at the very outset. This issue is extremely complex and it was important that the Court should take a view on it.

Having this fact in mind, I would like to point out that the constitution of any state, as the highest legal act and the foundation of a legal system as a whole constitutes a political and legal act. This is the only legal act in the entire legal system that contains political features in addition to legal ones. The main reason for this added feature lies in the fact that a constitution creates the foundation for a specific normative system – the legal system. In this sense, the constitution has the role of the basic norm of a legal system. Therefore, as an initial and primary legal act, it represents an act of creation and not an

act of application of law. (See H. Kelzen, *Opća teorija prava i države*, [General Theory of State and Law], Belgrade, 1998, p. 320, as well as *Čista teorija prava* [Pure Theory of Law], Belgrade, 1998.)

In the formal sense of the word, a constitution "contains very much different elements besides norms, which represent constitutional norms in the material sense" and which are consequently binding. Namely, it is generally believed that "the traditional part of the instrument called constitution is a solemn introduction, the "preamble", which expresses political, moral and religious ideas that the Constitution intends to fulfil. Such introduction usually does not proscribe any norms of human conduct and thus it lacks legally relevant contents. It is more of ideological rather than legal character. Should it be discarded, the actual contents of the constitution would not change in the very least". (*Ibid.* pp. 322-3.)

Given the above, I think that it is significant to state the etymological meaning; that is, the origin of the word. Namely, according to the *Dictionary of Foreign Words and Expressions* (M. Vujaklija, *Leksikon stranih riječi i izraza* [Book of Foreign Words and Expressions], entry: Preamble, Belgrade, 1976, p. 756.), entry: Preamble, Belgrade, 1976, page 756, word *Preambulum* (lat.) means preface, introduction, for example in speech, figuratively – foreplay, hesitation, verbosity. On the other hand, the expression *Preambulare* (lat.) means making of an introduction, prepare, hesitate.

In the formal-legal sense, according to the term in the Encyclopaedia of Legal Terms: "Preamble is part of a legal act stating its objective basic principles, preceding concrete regulations contained therein. Preambles are most frequently formulated in the form of a long sentence with several separate paragraphs. It is also considered that the legal status of preamble is not quite clear –some hold that it is a political declaration and not a legal regulation and, as such, not legally binding; whereas others believe that preamble is a legal regulation, only with lesser legal force than other concrete regulations". (*Pravna enciklopedija,* odrednica *Preambula,* Beograd, 1979, str. 1070 [*Encyclopaedia of Legal Terms,* entry *Preamble,* Belgrade, 1979, p. 1070])

Whichever of the stated views we are inclined to agree with, it is generally accepted (from the theoretical-legal point of view) that a preamble is not a normative statement, a statement of necessity in the legal sense of the word, and it cannot be binding in that sense. Viewed both theoretically and legally as well as from the position of the science on constitutional law, a preamble could be a link between being and needing (Sein and Sollen), between the world of normative (legal) and factual (political), the moment when

conditions have been created for the transformation of a political will into a nation-building system, but also the moment when it has not risen to become the law and thus not binding.

In view of the above, it is deemed that an "introduction serves to provide more dignity to the constitution and enhance its efficiency. Appeals to God and the statement on protection of justice, freedom, equality and public welfare are typical for introductions. Accordingly, depending whether the constitution is more of democratic or autocratic character, it is represented in introduction as the will of people, or a ruler appointed by God's mercy. Thus, the USA Constitution reads: *We, the people of the United States, in order to establish... (etc) we order and promulgate this Constitution for the USA*". (H. Kelzen, op. cit., p. 323)

2. In lieu of the aforesaid, it may be noted that the situation with the Preamble of the Constitution of Bosnia and Herzegovina is, to a great extent, specific and similar. To be exact, the Bosnia and Herzegovina Preamble contains starting (basic) principles, objectives and aspirations of its creators, and especially their designation. Thus it reads as follows:

"Based on respect of human dignity, freedom and equality.

Dedicated to peace, justice, tolerance and reconciliation.

Assured that democratic organs of authority and just procedures best contribute to the creation of peaceful relations within a pluralistic society.

Aspiring to support general prosperity and economic development through protection of private property and enhancement of market economy,

Lead by objectives and principles of the United Nations Charter,

Dedicated to sovereignty, territorial integrity and political independence of Bosnia and Herzegovina in conformity with the international law.

Determined to secure full observance of the international humanitarian law,

Inspired by the Universal Declaration on Human Rights, the International Pact on Civil and Political Rights the International Pact on Economic, Social and Cultural Rights and the Declaration on the Rights of Members of National, Ethnic, Religious or Language Minorities, as well as by other human rights instruments.

Referring to basic principles agreed upon in Geneva on 8 September 1995 and New York on 26 September 1995

Bosniacs, Croats and Serbs, as constitutive peoples (in community with Others) and the citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina".

Having analysed this preamble, one may find that it contains the usual contents of a political character (expressing political will), whereas the last emphasised formulation (paragraph, as stated in the application) refers to the designation of subjects who took part in the promulgation of the Constitution of Bosnia and Herzegovina and who are also, through the representatives of the Entities, signatories to the Dayton Peace Agreement. In addition to Bosnia and Herzegovina, these signatories were its Entities on behalf of their constitutive peoples: the Republika Srpska on behalf of the Serb people and of all its citizens and the Federation of BiH on behalf of Bosniacs and Croats and other citizens of the Federation of BiH. Formulations from the stated preamble acquire legal dimensions only in constitutional provisions that formulate initiating principles and objectives and ensure their implementation in a legal sense in view of the normative needs, meaning norms as normative statements which are binding given the character of the legal system.

In this respect, referring to the constituent status of peoples in BiH based on the last paragraph of the Constitution of BiH, without reference to the concrete provisions of the Constitution of BiH prescribing how such constituent status is realised, is neither logical nor legally founded, particularly bearing in mind the scientific view that "people –for whom it is claimed that the constitution derives its origin from – become people in the legal sense only through the constitution. Hence people can be the source of a constitution only in the political and not in the legal sense". (*Ibid*, p. 323.)

3. Its peoples did not originally enact the Constitution of BiH separately: Serbs, Bosniacs and Croats, but the Entities in which its people originally obtained their constituent status and whose representatives are enactors (signatories) to the Constitution of BiH. There is no Bosnia and Herzegovina outside the Entities; that is, it does not exist outside them in any segment of state authority. Therefore, there is no doubt that the constituent status of peoples in BiH is exercised through the Constitution of BiH, i.e. through its legal norms.

Namely, the mere fact that in the process of enacting the Constitution of BiH, besides the BiH representatives, two contracting parties – the Republika Srpska and

the Federation of BiH took part (given the way in which Bosnia and Herzegovina as such was established) speaks enough of how constituent status is being exercised in it. The signatories to the Dayton Peace Agreement or, more precisely, the enactors of the Constitution of BiH, are not individual peoples of Bosnia and Herzegovina but Entities (peoples representatives in their organs) who, by enacting the Constitution of BiH and by the commitment formulated in Article 1 of the Constitution of BiH stipulating that BiH consists of two entities: the Republika Srpska and the Federation of BiH, guarantees that the constituent status of peoples is being exercised in them indirectly as well at the level of Bosnia and Herzegovina, in accordance with its Constitution. In any case, this is not disputable.

4. In these terms, the Preamble of the Constitution of BiH speaks of its peoples (citizens) and others, while the signatures of the Dayton Peace Agreement (and thereby the Constitution of BiH) are the Entities composing Bosnia and Herzegovina and in which their people exercise their original constitutionality. Based on the aforesaid, one may draw the conclusion that the constituent status of peoples at the level of Bosnia and Herzegovina is derived and not original, which is collaborated by its complex and to a great degree unique form of a system of government.

5. In addition, if we take into consideration the linguistic interpretation – lexical and grammatical analysis of the last paragraph of the Preamble of the Constitution of BiH which reads as follows: “Bosniacs, Croats and Serbs as constitutive peoples (in community with Others) and the citizens of BiH …”, we shall arrive at the following conclusion:

Next to the terms Bosniacs, Croats and Serbs, two attributes (features) are used – constitutive peoples and the citizens of BiH, while we read in brackets “in community with Others”. That means that in the last paragraph of the Preamble Bosniacs, Croats and Serbs are concurrently designated as constitutive peoples and citizens of Bosnia and Herzegovina. The question is why? Linguistic interpretations will lead us to a conclusion that Bosniacs, Croats and Serbs, as stated in the last paragraph of the Constitution of BiH Preamble, are concurrently constitutive peoples and citizens. This formulation is not accidental; it is necessary given the governmental system of Bosnia and Herzegovina because in the territories where they are not constitutional they are citizens and vice versa. This is why there is a statement in brackets (in community with Others); otherwise, there would be a question: why else would it be stated – (in community with Others) – to whom refers this term of reference of the Preamble. The reason for such terms of reference in the Preamble of the Constitution of BiH does exist and is reflected in the fact that all

peoples are constitutive at the level of BiH, but not concurrently in both Entities. Thus, the same subjects in one Entity, in accordance with their respective constitutions, are constitutive peoples while in another one they are citizens and visa versa, whereas all of them are constituent at the level of Bosnia and Herzegovina. However, in any case it does not suffice that this is asserted in the Preamble of the Constitution, but it is important to see how these principles are further elaborated through the constitutional norms of the Constitution of BiH.

6. Only that which is of legal character is binding in law. Accordingly, in every judgment on the harmonisation of the Entity Constitutions with the Constitution of BiH only the relationship between legal norms, i.e. constitutional provisions, would be competent to examine, and not its relationship with the Preamble which, in the present case, fails to have normative character (in the legal sense of the word) and any legal norm of the Constitutions of the Entities. As an issue of legal character cannot be compared and harmonised with an issue that is manifestly not of that character, it is not possible to compare directly the provisions of the Constitution of the Republika Srpska or of the Federation of BiH with the Preamble of the Constitution of BiH and evaluate their harmonisation since it would concern heterogeneous notions (elements). This distinction is particularly important since the legal theory and practice largely accept the view that constitutional preamble fails to entail legal character even though it is an integral part of constitution in general.

To this effect, I consider that it might be possible to request an evaluation of the harmonisation of the concrete provisions of the Constitution of the Republika Srpska and the Federation of BiH in relation to the concrete provisions of the Constitution of BiH, which prescribe (determine) how the constituent status of peoples is accomplished in BiH; i.e. that it is possible only to evaluate harmonisation of legal system elements (higher and lower legal norms). After all, that is the essence of the principle of law - in this case, constitutionality.

In support of the perception of the present situation stated in the application on the evaluation of constitutionality (in addition to presented scientific views), I would like to quote a relevant example from practice. Namely, the Arbitration Award of the Court of Arbitration on the dispute about an inter-entity boundary line in the area of Brcko of 14 January 1997, an unofficial translation by the OHR (See in *Brčko - makaze nad pupčanikom* [Brčko - scissors over the umbilical cord], Belgrade, 1997, p. 82.), in response to a request to accept the normative character of the Preamble, provides that "the Tribunal disagrees with that. First of all, it is true that the OOCM Preamble confirms commitments made by

the parties to certain Agreed Basic Principles adopted prior to Dayton, one of those being that the ratio of 51:49% of territorial proposal by the Contact Group represents the basis for the agreement, subject to change upon mutual consent. Despite that, **the text of the Preamble is not by itself binding for the parties, their obligations are contained in the text of the OOCM…"**

7. Based on the abovementioned and with reference to Point 1 of the application (evaluation of the harmonisation of Article 1 of the Constitution of the Republika Srpska and Article I.1 (1) of the Federation of BiH with the last paragraph of the Preamble of the Constitution of BiH), it must be concluded that it does not derive from the constitution and, according to the presented views from legal science and practice, the application in that part does not provide for a basis of evaluation of the constituent status of the challenged Articles of the Constitutions of the Entities by the Constitutional Court of BiH.

Namely, Article VI.3 (a) paragraph 2 of the Constitution of BiH provides for the possibility that the Constitutional Court of BiH may evaluate the harmonisation of the legal elements of the Constitution valid in this complex legal system, i.e. the harmonisation of the concrete legal norms of the Entity Constitutions with the Constitution of BiH. This possibility is why Article 14 para 1 of the Court's Rules of Procedure stipulates precisely that an applicant must state the provisions of the Constitution of BiH deemed to have been violated.

8. The Preamble of the Constitution of BiH must be used for the interpretation of the normative text of the Constitution, that being its role and purpose. In another words, it should be interpreted as a means for the systematic, targeted and logical interpretation of constitutional norms instead of proceeding from its normative meaning, which does not exist in this case. Such an interpretation of the Constitution of BiH, in light of its Preamble, implies that it is necessary to establish the constitutionality of the three peoples at the level of BiH, but not in each of the Entities individually since all three peoples, in their Entities and at the level of BiH, exercise constitutionality without hindrance. If it were to be done differently, the basis for the existence of the Entities and the entire state structure and organisation of BiH, as a complex state community with elements of federal and confederate forms of governmental systems and with some (minor) elements of a joint state structure which may be designated as a union, would be brought into question.

If Bosniacs, Croats and Serbs were to be constituent peoples individually in both Entities, Bosnia and Herzegovina would not be a complex state union as stipulated by the

Dayton Peace Agreement (and under the Constitution of BiH), i.e. the *raison d'être* for the Entities would cease to exist.

BiH continues to exist as a recognised state community but with a different state structure, as defined by the Peace Agreement itself, precisely the Constitution of BiH under Article I.1. This is why the constitutionality of peoples in Bosnia and Herzegovina is exercised in a specific way as determined by the Constitution of BiH and its legal norms and not by its Preamble. A general statement about constitutionality, derived from the last paragraph of the Preamble of the Constitution of BiH and reference to it without having a foundation in concrete norms that prescribe the form of BiH's governmental structure, says nothing of the exercise of such constitutionality.

9. The notion of constitutionality, known to science and explicable both from theoretical and practical aspects, must have contents that always depend on norms by which constitutionality is being exercised. Therefore, only an analysis of the legal norms of the Constitution of BiH can determine what kind of constitutionality exists, as well as the way in which these three peoples exercise it in Bosnia and Herzegovina and the Entities, and at the same time, determine any possible violation of that constitutionality by the Entities' Constitutions by an evaluation of the relations between the legal norms of the Entities and the Constitution of BiH.

10. The constitutionality of the peoples in any state cannot be exercised abstractly without legal norms, i.e. by disregarding them. Therefore, it is necessary to first see how the Constitution of BiH envisages the exercise of the constitutionality of its peoples in BiH, and then to claim whether it is threatened or not.

Firstly, by the provision stipulating that BiH consists of two Entities: the Republika Srpska and the Federation of BiH, as provided for under Article I, Point 3 of the Constitution of BiH. Then, the signatories of this Constitution are the Entities on behalf of their constituent peoples (power to promulgate a constitution). Furthermore, in the process of electing the members of the institutions of BiH, as well as in the process of their decision making, the parity principle of the peoples and Entities has been introduced, somewhere one and somewhere the other or both at the same time, in regard to the Federation of BiH – parity of Bosniacs and Croats, and in regard to the Republika Srpska – parity of Serbs in relation to the other Entity and the peoples in it at the level of BiH as a whole (for example, Articles IV, V, VI, VII of the Constitution of BiH). Also there are a series of provisions stipulating that BiH is a complex state union, particularly those provisions

determining the competencies of BiH institutions – Article III.1 of the Constitution of BiH, but also the competencies of the Entities in it – Article III.2(3).

11. I hold that in order to illustrate the stated standpoint it is necessary to quote some views from a report by my respected colleague, Judge Zvonko Miljko. Namely, in his paper of 12 May 1998 in regard to this issue, on page 1, he stated that the constituent elements of a unitary state are its citizens; of a federation – federal units and citizens; of a confederation – independent and autonomous state members, and that in BiH, as stated on page 3 of the report, there is an ultra compound governmental system characterised by a hybrid nature, asymmetry, three-degree constitutionality etc.

Given the above, one may conclude with certainty that at the level of BiH all three peoples – Bosniacs, Serbs and Croats – are constituent through the Entities, which means that the constitutionality of peoples in BiH is being exercised in a specific way, permitted and established by the Constitution of BiH itself (Entity Constitutions must be harmonised with it). By signing the Dayton Peace Agreement, and thereby Annex IV to the Constitution of BiH, by agreeing to statement of the will of both Entities, i.e. their representatives on behalf of their peoples and Entities (and their constitutionality), constitutionality of those peoples at the level of Bosnia and Herzegovina was determined, indeed in a specific way, which is reflected in the form of its governmental system. Hence, the constitutionality of Serbs, Croats and Bosniacs. These peoples acquired constitutionality at the level of BiH through their Entities (where they already had it) by signing the Dayton Peace Agreement; that is, by enactment of the Constitution of BiH and agreement to such a form of a governmental system.

12. Because of the above, there is not a single BiH institution nor a function to which a BiH citizen, a representative of any of the three constituent peoples or of the category of Others – as defined by the Constitution of BiH – could be elected if he/she is not previously elected/delegated by the peoples of the Entities or their authorities on behalf of their peoples. It speaks for itself. All members of the BiH institutions are elected or appointed by the peoples of the Entities, or organs of those Entities, on behalf of the Entities or peoples in them. The same applies to the Judges of the Constitutional Court of BiH.

The Constitution of BiH, as well as the Constitutions of the Entities, contain a number of provisions which put other citizens of Bosnia and Herzegovina, through the protection of fundamental rights and freedoms, in an equal position, except in some segments of political capability (concretely: passive electoral right where, for example, the Constitution

of BiH envisages that a candidate for a certain function at the level of BiH, on behalf on the Entities or their peoples, must be a representative of certain people), which is a result of the complex state structure of BiH .

13. If the intent is **to alter the Constitution of BiH**, i.e. to alter the form of its system of government which is, in my opinion, the essence of the application, it must then be done following the envisaged procedure and not through a decision of the Constitutional Court of BiH which under the Constitution of BiH (Article VI) is neither competent nor authorised to do so.

With respect to the statement on the continuity of BiH, it must be emphasised here that the peoples of BiH continued to be constituent in BiH but through a different formula, a different form of governmental system in relation to the former internationally recognised BiH, a formula not unknown to legal science and practice. In this case, a point must be made to the effect that, from the aspect of legal science, the constitutionality of peoples is not exclusively linked to a territory in terms of its realisation but to a rule. This is why the Constitution of BiH does not read: "in the entire territory", as requested and interpreted in the application. As to state powers, it must be concluded that in BiH it is being exercised in a specific way. The Entities of BiH hold powers, only in different domains. The Constitution of BiH, Article III stipulates a division of competencies between BiH and the Entities. Other Articles of the Constitution stipulate that the institutions of BiH shall be established through a specific procedure, and that power is exercised through these institutions.

Due to this fact, the Entities are not only electoral bases or electoral units, as intended to be presented by the Court's Decision. Members of the institutions of BiH, on behalf of their Entities or peoples, depending on the type of institution or concurrently on behalf of an Entity and peoples since, in some of them, parity of Entity and people are represented, exercise powers on their behalf but to the benefit of BiH as a synthesis of Entities in certain competencies, but definitely not in all. The mentioned provisions of the Constitution of BiH secure this through a method of appointment and decision-making in the institutions of BiH, particularly through the clause on the protection of the vital interests of a people. Otherwise, the Entities would not have to exist at all.

In lieu of aforesaid, I deem that it is inappropriate to link constitutionality with the territory on which it is supposed to be exercised, failing to precisely define a way (model) of accomplishment. I also believe that it demonstrates very well the objective of this application.

Namely, in response to the application that instituted the proceedings before the Constitutional Court of BiH on 5 October 1998, and upon its insistence in accordance with the Court's Rules of Procedure, the House of Representatives of the Federation of BiH pointed out: "… that it supported the idea in the Declaration on the Human Right to a Political and People's Equality, Constitutionality of the Bosniac, Serb and Croat peoples in the entire territory of BiH". Accordingly, it appears that the request for constitutionality of all three peoples in the entire BiH territory is emphasised with a special reason. I take it that there is no need to prove that, in particular since the Constitution of BiH does not contain such formulation. The formulation contained in the Constitution of BiH, that Bosniacs, Croats and Serbs as constituent peoples (together with Others) and citizens promulgated the Constitution of BiH in its Preamble whose status I explained above, must be connected to constitutional provisions. This will demonstrate that the constitutionality of peoples in BiH is being exercised in a specific way, regulated by the quoted provisions of the Constitution of BiH and characteristic of all compound state organisations. The applicant knows this fact and it is why he does not ask for an investigation to be carried out in relation to the stated provisions of the Constitution of BiH, but instead insists in the application that: the establishment of constitutionality in the entire territory of BiH, failing to state in which way constitutionality is being threatened and precisely which provisions of the Constitution of BiH have been violated. Why? Because, according to the Constitution of BiH, that constitutionality, pronounced as a principle in the Preamble of the Constitution of BiH, exists but not as constitutionality of all peoples in the entire territory of BiH but at the level of BiH and through the Entities, in accordance with the Constitution.

However, if the constitutionality of all three people were to be exercised in the entire territory of BiH, as the applicant claims, it would essentially mean something else. This is why I would like to quote further statements from a reply of the House of Representatives of the Federation of BiH: "On that occasion, the House of Representatives forwarded a message recommendation to proposes the applicants authorised under the Constitution of BiH: the Presidency, the Council of Ministers and the Parliamentary Assembly of BiH, to review the issue of the establishment of full equality and constitutionality of the Bosniac, Croat and Serb peoples in BiH and its both Entities".

Given the fact that the constitutionality of peoples as such exists in BiH as a whole, but not concurrently in both Entities (in an identical way), the objective of the said application is evidently the establishment of something that is non-existent and what is

clearly stated in the response to the institution of proceedings before the Constitutional Court. Something that already exists cannot be established, as it was intended in the application for institution of proceedings: constitutionality of peoples in BiH envisaged by its Constitution. Therefore, the objective is to establish the constitutionality of all peoples in both Entities, i.e. throughout the entire BiH territory, and the Constitution of BiH **does not stipulate** this. An appropriate way to do so is described in a reply to the application, at the same time being the only possible one and which could be followed given there is a political will in both Entities, i.e. of constituent peoples in these Entities: "the President and Vice President of the Federation of BiH and the Government of the Federation of BiH are tasked, in cooperation with the competent institutions of BiH and the Republika Srpska, and with active participation of OHR, countries who are signatories to the General Framework Peace Agreement for BiH and other representatives of the international community, to institute a constitutional decision-making and harmonisation of essential issues on constitutionality of the Bosniac, Croat and Serb peoples in the entire territory of BiH and in both Entities".

The above-mentioned makes clear the intentions and objectives of the institution of proceedings before the Constitutional Court of BiH. This clarity can be further collaborated by the statement of a theoretician from the Federation of BiH, which reads as follows: "However, it appears that the frame of reference in the Preamble related to constitutionality of peoples in the entire territory of BiH **has not been consistently derived in the normative part of the Constitution**, in part regulating organisation of the state powers (BiH Institutions)"; "The formula on constituent peoples, particularly since constitutionality, **according to the normative part of the Constitution,** is territorialized, does not correspond to the historical being of BiH which was a multi-ethnic society without internal ethnic borders", "The formula on constituent peoples divided the citizens of BiH to those who belong to these peoples and to those who do not; thus the citizens who did not belong to constituent peoples were excluded, under the **Constitution**, from entitlement to some political rights (they do not have passive electoral rights to be elected to the BiH Presidency and the House of Peoples of the Parliamentary Assembly)", and that he finally expects that "**the Constitutional Court of BiH adopts decisions of special relevance to the BiH constitutional system**" (N. Pobrić, *Ustavno pravo* [Constitutional Law], Mostar, 2000, pp. 45, 322, 500.). Inevitably, one must pose a question here whether the Constitutional Court has competence (authority) to **harmonise the provisions of the Constitution of BiH with its Preamble - that is, to alter the constitutional system of BiH or to protect that Constitution**.

In political terms, the constitutionality of peoples has already been established by the very act of promulgation of the Constitution; in legal terms, it is being established by this constitution as a result of certain political will (power), **and not by the decision of the Constitutional Court empowered to safeguard the Constitution of BiH, and not to create or alter it**, as stated in the aforementioned quotation, i.e. to harmonise its normative part with its Preamble (this is questionable since I am of the opinion that there is no discrepancy). It is why it may be concluded that the Constitutional Court of BiH is asked to do something that falls outside of its competence (powers) and is not in compliance with the Constitution of BiH.

14. Irrespective of the fact that all the above-said makes any further discussion unnecessary, I hold that, in this case, it is necessary to clarify that constitutionality is always linked to people and authorities, i.e. the power to promulgate constitution and to exercise power. (H. Kelzen, op. cit., p. 321, emphasises that “the original constitution of a state is an act of the founders of the state. If a state was created democratically, the first constitution originates from the constitutional assembly, which is called *constituante* in French, which is what the term constitutionality of peoples is derived from, with the term constituent originating from Latin *constitutivus, meaning: determined, basic, essential, objectively valid, constituent*”.) It is a well known fact that all three peoples in BiH, through their Entities where they have original constitutionality, promulgated the Constitution of BiH and that they represent the authorities as such. Therefore, again through the Entities and in accordance with the Constitution of BiH, they exercise power; in other words, all three peoples are constitutional, even though unique, as a result of a complex form of state organisation that is generally characteristic for all compound state communities.

Based on the above and provided assertions regarding the legal nature of preambles of any constitution in general, it must be concluded that the Entities’ Constitutions may violate (threaten, jeopardise, prevent implementation of) the constitutionality of peoples in BiH only by a violation of certain norms of the Constitution of BiH, but not of the Preamble of the Constitution of BiH since it does not say anything in the legal sense, i.e. it does not prescribe the way in which constitutionality is achieved. The application did not mention that any of those provisions of the Constitution of BiH were violated.

Therefore, how can we know that something (in this case constitutionality) is being violated or jeopardised if we do not take as a starting point the provisions that define how (constitutionality) should be realised. The Preamble does not state anything about it; it is the starting point while the Constitution of BiH, i.e. its legal norms, prescribes

mechanisms to achieve constitutionality. The application does not state that any of provisions of the Constitution of BiH is being jeopardised by the Entities' Constitutions. Can constitutionality be jeopardised by non-jeopardising mechanisms by which it is being achieved (realised)? Or is it possible to claim that it is being jeopardised, threatened and violated without saying concretely in which way and how it is being done? The application does not contain any indication of the Articles of the Constitution of BiH determining a method of achieving constitutionality, and which are being violated through the Entities' Constitutions in exercising constitutionality, but only a simple statement that the last paragraph of the Preamble of the Constitution of BiH is violated.

15. What are the Entities? Certainly not the electoral bases or electoral units, as it has been the intention to prove. Electoral units, formulated as such, do not have any power, i.e. do not exercise power since, except in the domain of election of their representatives and organs of authority, they have no competencies, particularly not those powers that have been assigned to the Entities under the Constitution of BiH. The Entities are much more than that.

Only the Preamble of the Constitution of BiH, stating that Bosniacs, Croats and Serbs as constitutive peoples and the citizens of BiH promulgated the Constitution of BiH, represents a (starting) basis, a principle for Article 1 of the Constitution of BiH that provides that BiH consists of two Entities. Therefore it is important that the constitutionality of peoples in BiH is exercised at the level of BiH in a manner that is in conformity with the Constitution of BiH and concurrently in the entities, which comprise BiH in accordance with the state organisation of Bosnia and Herzegovina. It is therefore logical that the Constitution does not have a provision on the Entities and constitutionality in them. This has been common knowledge and it was accepted by signing the Dayton Agreement, i.e. by the adoption of the Constitution of BiH. The Entities have undertaken to harmonise their Constitutions with the Constitution of BiH and this harmonisation is not the issue in dispute. However, they have undertaken to do so as the Entities in which people were already constitutional, and not as electoral units or anything similar. This is a framework of the competencies provided for the Entities under the Dayton Peace Agreement.

1. Opinion on the harmonisation of the Preamble of the Constitution of the Republika Srpska with the Preamble and Article II.4, II.3 (b) of the Constitution of BiH

Concerning the part of the application referring to the claim that "the following parts" of the Preamble of the Constitution of the Republika Srpska, as defined by Amendments

XXVI and LIV thereto, "are not in conformity with the Constitution of BiH"; it may be concluded that two evaluations are requested by the application.

A) Evaluation of the conformity of the Preamble of the Constitution of the Republika Srpska with the Preamble of the Constitution of BiH.

B) Evaluation of the conformity of the Preamble of the Constitution of the Republika Srpska with Article II.4, II.6, II.3.(b) of the Constitution of BiH, even though the application is imprecise since reference is made to Article 3.(b) which does not exist in the Constitution of BiH.

Concerning the application regarding the admissibility of the stated points, the following conclusions may be reached:

1) In this case, it requests the provision of an evaluation of the conformity of a non-legal (political) element of an Entity Constitution with a non-legal element of the Constitution of BiH. If the character of the preamble of any constitution is as determined above, the application is not legally founded in this respect; more precisely, in light of the aforesaid, the application is not founded on the essence of legal system as such, i.e. on the principle of constitutionality (legality).

The Preambles of both Constitutions, as their political basis, are elaborate and acquire legal form through the concrete provisions of the constitution, which in a material sense, constitute its contents. Thus, given the aforementioned, which is also the view of legal science and practice, one may draw a conclusion that the Constitutional Court cannot evaluate the conformity between the preambles of two different legal acts. As there is no possibility to determine the harmonisation of the provisions of the Entities' Constitutions with the Preamble of the Constitution of BiH, which we have proved, there is even less possibility to evaluate the conformity between the Preamble of the Entity Constitution and the Preamble of the Constitution of BiH.

2. Is it possible to evaluate the conformity of the Preamble of an Entity Constitution with the said Articles of the Constitution of BiH?

Here we have a similar situation. Namely, it is a request to evaluate something that is not of a legal character (preamble) as opposed to something that has a legal character – the stated constitutional provisions of the Constitution of BiH. If every legal norm is derived from a higher legal norm, which is not disputable (i.e. it is generally accepted) and it is

basically the very essence of the principle of legality (constitutionality), it is logical that the Preamble of the Constitution of the Republika Srpska cannot be evaluated in relation to the constitutional provisions of the Constitution of BiH. It would be possible to evaluate only the conformity of the concrete provisions of the Constitution of the Republika Srpska with the particular provisions of the Constitution of BiH deemed to have been violated.

3. In regard to the part of the application related to the evaluation of the conformity of Article 1 of the Constitution of the Republika Srpska and Article I.1 (1) of the Constitution of the Federation of BiH with the stated Articles of the Constitution of BiH, the concrete disharmony of these Articles with the said provisions of the Constitution of BiH is not evident.

Namely, not a single formulation in the Entities' Constitutions brings the stated Articles of the Constitution of BiH into question, i.e. it does not bring into question their implementation given that all citizens in both Entities are equalised in all rights with the constituent peoples.

The said Articles of the Constitution of BiH are binding and discrepancies may exist in case when that the Entities' Constitutions act otherwise, i.e. contain contradictory formulations. Namely, in legal theory there is an understanding (mostly accepted) that a constitution in general contains "certain regulations, not only in regard to authorities and procedures for adoption of laws-to-be but also in regard to the contents therein (in this case, laws and constitution). These provisions may be either positive or negative. One example of a negative provision is the First Amendment to the Constitution of the United States of America: – The Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peacefully to assemble and to petition the Government for a redress of grievances".

The Constitution may also "determine that laws must have certain positive contents: thus it may be requested that certain issues, if regulated by the law, to be regulated in the way stipulated in constitution". For example, the Constitution of German Reich of 1919 (the Weimar Constitution) contains provisions related to the contents of future laws. Thus, Article 121 reads as follows: – "Legislation is to provide conditions for physical, mental and social up-bringing of illegitimate children which shall be equal to the up-bringing of legitimate children", – or Article 151: "The organisation of economic life must correspond to the principle of justice, aiming to secure to all human beings a life of dignity".

It is believed that there is a substantial technical difference between the provisions of a constitution that prohibit and those that lay down certain contents of laws-to-be; in this case, the Constitutions of the Entities. Namely, “as a rule, the first ones elicit legal character unlike the latter ones. If a legislative body issues a law whose content is prohibited by the constitution, all the consequences entailed in an unconstitutional law occur. If, however, a legislative body fails to enact a law prescribed by the constitution, it is difficult to anticipate legal sanctions for this omission”. (*Ibid*, p. 324)

If we apply this scientific understanding to the present situation, we cannot see in what way the stated Articles of the Entities’ Constitutions violate or contradict the stated provisions (Articles) of the Constitution of BiH.

As to the Republika Srpska, in support of the above we should quote the provisions of Articles 5 and 10 of the Constitution of the Republika Srpska, which stipulate that “the constitutional organisation of the Republika Srpska is based on: guarantees and protection of human rights and freedoms in accordance with international standards” and that “the citizens of the Republika Srpska are equal before the law and that they enjoy the same legal protection regardless of race, gender, language, national origin, birth, education, financial status, political and other convictions, social status or any other property”.

The assertions that challenge the provision designating the Republika Srpska to be a state cannot be evaluated against the said Articles of the Constitution of BiH since the Articles in question are, in terms of their contents, incompatible with the challenged Article of the Constitution of the Republika Srpska. In regard to this Article, perhaps the formulation “state” could be challenged in relation to Article 1, Item 3 of the Constitution of BiH. However, in this case it is necessary to outline that the state organisation of BiH is complex and unique with elements of confederate and federal forms of state organisation. This complexity is why an answer to this question may vary depending on the various theoretical approaches and interpretations existing in this domain. Thus, in that case the Constitutional Court would find itself in a situation, having analysed and interpreted certain provisions of the Constitution of BiH stipulating its state organisation, to take a stand in regard to the state organisation of BiH and to find whether other Articles of the Entities’ Constitutions bring into question the state organisation of BiH. In my opinion, this is not the case.

Lastly, the claim that the Preamble of the Constitution of the Republika Srpska has acquired normative character through amendment, which is determined as an integral

part of the constitution, cannot be accepted. Namely, generally speaking, an amendment represents an improvement, correction, and supplement. By analogy, to amend something is to improve, correct, supplement. Amendment – modification in the form of a challenged act is implied by all means.

However, amendments to the Preamble of the Constitution of the Republika Srpska stipulate that they are an integral part of the Constitution, but they do not assign to the Preamble of the Constitution (which is an integral part of the Constitution as well) normative character, nor do they alone have that character. Therefore, the conclusion – "claim that these amendments make an integral part of the Constitution of the Republika Srpska automatically produce normative character of the Preamble" cannot be accepted as a basis for evaluation. The theory of state and law does not challenge the fact that a preamble is an integral part of a constitution in general and, in this case, amendments to it. The fact that the preamble does not constitute a normative part of the constitution is not challenged in terms of the preamble being obligatory – it is therefore not a norm unless strictly stipulated by the constitutional norm itself.

The same arguments may be used in reference to the Vienna Convention on the Law on Treaties, which ordinarily determines the character of a preamble and its role in the interpretation of a legal act, i.e. its normative part. In this case, however, it is being incorrectly interpreted and applied. Namely, this particular case does not concern the interpretation of the provisions of the Constitution where the Preamble could be of assistance in terms of the Vienna Convention, but rather, it concerns the evaluation of the conformity between the Preamble of the Constitution of the Republika Srpska and the Preamble of the Constitution of BiH. Thus, the provisions of the Vienna Convention cannot be applied in this case. These provisions practically stipulate that legal acts, agreements in this case (which the Dayton Peace Agreement, apart from its specific features, is), should be interpreted through the provisions of this Agreement but in light of its subject and objective. This can be applied in the following manner: provisions of the Constitution of BiH must be interpreted in light of its Preamble and that is not disputable. However, it is disputable when, in the legal sense of the word, the Preamble is being interpreted in light of constitutional provisions. That is simply impossible. Consequently, we must conclude that, in this case, the situation is being reversed. If the case in question were to concern a violation of some Articles of the Constitution of BiH, such an interpretation of the Vienna Convention on the Law on Treaties would be acceptable since that is its purpose. On the contrary, it is even proof that the Preamble does not have normative

character. The Preamble, therefore, may and should be used only as an instrument for the interpretation of the provisions of a certain act, but it cannot be interpreted by itself, isolated for constitutional norms. This is exactly what would happen if this Article of the Vienna Convention on the Law on Treaties were to be interpreted in this way and implemented.

4. In regard to the final text of the third Partial Decision based on the majority opinion of judges, I hereby state **my dissension and reserve**:

The application for the institution of the proceedings in regard to the evaluation of the conformity of the Preamble of the Constitution of the Republika Srpska and Article 1 of the Constitution of the Republika Srpska and Article I.1 (1) of the Constitution of the Federation of BiH referred to two aspects of unconstitutionality of these Articles:

A) Regarding the last paragraph of the Preamble of the Constitution of Bosnia and Herzegovina

B) Regarding Article II.4, II.6, III.3 (b) of the Constitution of Bosnia and Herzegovina

In the process of evaluation of the Court (deliberation and voting), despite the fact that I, as a Judge, suggested that a separation should have been made in terms of the reasons for challenging the said Articles, this was not done. Instead, prior to the adoption of the Decision and following a proposal by the judge-rapporteur, it was decided to vote on the Decision's operative part and subsequently, depending on the merits of the Decision, to decide on the arguments. Due to this fact, the Court and the Editorial Board, at the session held on 3 August 2000, found themselves in a situation that it was impossible to determine the final text of the Decision on the basis of a proposed final Draft Decision by the judge-rapporteur and a separate opinion by Judge Hans Danelius. Accordingly, the Draft Decision, as provided for by Article 67 of the Court's Rules of Procedure, was returned to the Court's session.

The Court, at the session held on 19 and 19 August 2000, did not accept the arguments presented by the Editorial Board, nor did it accept mine as a Judge. This is why I hold it necessary to disclose them in my Separate Opinion.

Namely, the Draft Decision on the evaluation of the constitutionality of Articles 1 of the Entity Constitutions does not contain the Decision reached in terms of argumentation

but the argumentation agreed upon by four Judges only. Since they do not constitute a majority, that argumentation cannot be accepted as that of the Court. Namely, in the domain of the evaluation on the constitutionality of the stated provisions of the Entities' Constitutions, as pointed out by Prof. Dr Kasim Begic, President of the Court, when pronouncing the Decision of the Court, two evaluations (set of arguments) were used: "There are two types of arguments in regard to constitutionality of peoples; therefore, they have two aspects. One aspect is from the point of the Preamble of the Constitution of BiH and to this related organisation of BiH institutions, and the second aspect relates to collective and individual rights, implying that the status of representatives of one of constituent peoples cannot be the basis for discrimination at the Entity level, nor it can be the basis for discrimination in the enjoyment of an extensive scope of rights and freedoms guaranteed by the Constitution of BiH. Let me remind you that every constitutional court has its tasks, and so does the Constitutional Court of BiH. One of these tasks is to safeguard the Constitution, this being a prerequisite for a legal state; and another one that every constitutional court should be a special institutional guarantor of the protection of human rights and freedoms, this being a prerequisite for a democratic political system. I can claim that with these decisions the Constitutional Court of BiH has fulfilled both of its fundamental tasks". (*Dani* (weekly papers), edition of 7 July 2000, p. 19.)

The reasons adduced for the Decision (the arguments) are elaborated on the founding basis that the majority of the Judges (5:4) votes in favour of the Decision that both Articles of the Entities' Constitutions are not in conformity with the last paragraph of the Preamble of the Constitution of BiH, nor with the said Articles of the Constitution of BiH. However, the separate opinion of Judge Hans Danelius indicates that he is not inclined to this Decision, particularly in terms of the arguments. Namely, Judge Danelius in his Separate Opinion pointed out the following: "There are two aspects of this Article that bring into question its conformity with the Constitution of BiH. On the one hand, it is the fact that the Republika Srpska is referred to as a "state"; and on the other hand, the fact that the Serb people are explicitly referred to as the people of the Republika Srpska – whereas this is not the case with the Bosniac and Croat peoples.

a) As to the first aspect, I explained in my commentary on the Preamble why I hold that it is not justified to refer to the Republika Srpska as a state. The same explanation applies, *mutatis mutandis*, to Article 1 of the Constitution of the Republika Srpska. Therefore, Article 1 of the Constitution of the RS does not conform to the Constitution of BiH in this regard.

b) As to the second aspect, the complainant first claims that a contradiction exists with the last paragraph of the Preamble of the Constitution of BiH. The said paragraph is an

introduction to the text of the Constitution and reads as follows: “Bosniacs, Croats and Serbs, as constituent peoples (in community with Others) and the citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina”.

The Preamble of the Constitution of BiH, *per se*, must be considered as part of that constitution. Concurrently, the Constitutional Court is empowered, in principle, to examine whether the Entities’ Constitutions are in conformity with the Preamble. However, the prerequisite for the evaluation of non-conformity with the Preamble of the Constitution of BiH must be that a relevant provision of the Preamble has normative character, stipulating restrictions or imposing obligations on the Entities.

The question arising here is whether Article 1 of the Constitution of the Republika Srpska, stating Serb and not Bosniac and Croat peoples, is in conformity with the said provision of the Preamble of the Constitution of BiH. In this respect, I hold it appropriate to take into consideration the contents and special character of the stated provision of the Preamble. As it appears from its formulation, the provision fails to contain any legal norm that would imply rights or obligations. The provision is not more than an introductory paragraph identifying those that adopted and promulgated the Constitution of BiH. That is the context in which Bosniacs, Croats and Serbs are designated as constituent peoples in community with Others, and who have, together with all citizens of Bosnia and Herzegovina, defined the contents of the Constitution.

Therefore, inasmuch as the stated provision designates the three peoples as constituent, it does so only in a context of adoption and promulgation of the Constitution of BiH. Thus, it cannot be considered that the stated provision lays down any regulation of normative character or that it establishes any constitutional obligations.

It follows that there are no sufficient grounds to conclude that Article 1 of the Constitution of the Republika Srpska is in breach of the last paragraph of the Preamble of the Constitution of BiH.

“For the same reasons already provided in regard to Article 1 of the Constitution of the Republika Srpska (see under II above), I hold that the last paragraph of the Preamble of the Constitution of BiH does not contain a normative rule that would lead to a conclusion that Article I.1 (1) of the Constitution of the Federation of BiH is not in conformity with this paragraph”.

Given the aforementioned, there is the situation in which only four Judges have decided, as proposed in this part of the reasons (arguments) of the final Draft Decision, whereas five Judges decided differently, i.e. they have taken the view that the last paragraph of the Preamble of the Constitution of BiH does not have a normative character to which the applicant refers in terms of the constitutionality of peoples, but also the judge-rapporteur in the Decision itself. This distinction is relevant as it implies different consequences in terms of the implementation of the Court's Decision, given that its reasons may be based only on the majority arguments in the course of decision-making.

In addition, the arguments in the final Draft Decision differ to a large extent from the ones presented at the Court's session and based on which it was decided, this is impermissible. For instance, the mention of the practice of the Supreme Court of Canada, the Declaration on Equality and Independence of the Republika Srpska of 19 November 1997, the practice of the Supreme Court of Switzerland etc., which were not discussed at the session of the Court held on 30 June and 1 July 2000.

Concerning the Declaration of the National Assembly of the RS of 19 November 1997, it is necessary to emphasise that it was only quoted by its name in an earlier Draft Decision, whereas in the final Draft Decision it is quoted. Since this failed to be done previously, it could not have been viewed to concern the Declaration adopted by the dissolved National Assembly of the RS and that consequently any decision by that Assembly could not have been valid and used in the Court's arguments. The final Draft Decision states that it concerns an official act, even though it evidently concerns an act which cannot be used as proof for two reasons: it is a political act, which in terms of the evaluation of constitutionality cannot be used as a relevant argument for the Decision, and since it is an act having no legal power as it was adopted by the Parliament which was dissolved by the President of RS several months earlier. The act was published in *Official Gazette* on 19 November 1997, whereas emergency parliamentary elections were held on 21 November 1997, which sufficiently speaks for itself. I believe that the Constitutional Court of Bosnia and Herzegovina, as an important institution in BiH, should not use such arguments in the process of adopting decisions, and in this regard I express my dissension with the Decision.

Additionally, I consider it necessary to point out that the Court, having acted upon the application, applied provisions of Article 26 and 64 of the Rules of Procedure of the Constitutional Court and thus acted outside the scope of application, i.e. the nature of the instituted dispute. Namely, Article 26 of the Rules of Procedure prescribes that

in the process of evaluation the Court deliberates solely on the violations stated in the application, i.e., that an explanation should contain ascertained factual situation and legal reasons for the decision; based on that, it was decided to take into consideration the proofs collected by the judge-rapporteur (contrary to an earlier Decision of the Court) which was confirmed by a new conclusion of the Court adopted at the session held on 1 June 2000. Given the nature of the dispute, the question raised here is whether the evaluation of constitutionality of any act in relation to a higher legal act – in this case the Entities' Constitutions in relation to the Constitution of BiH – can be based on factual conditions; that is, on anticipation and suppositions, or the evaluation on the harmonisation of normative elements of the legal system, higher with lower, as this is the essence of the principle of legality, i.e. constitutionality in this type of disputes before the Constitutional Court of BiH, is being performed. I hold that Article 64 of the Rules of Procedure takes into account all types of disputes that may be conducted before the Constitutional Court, whereas in this type, in agreement with the nature of constitutionality that is generally known (it is an abstract legal issue – dispute), a decision cannot be based on a factual situation or anticipation and suppositions, and that, in this case, Article 64 of the Rules of Procedure of the Constitutional Court was wrongly interpreted and applied.

Furthermore, I hold that the Decision adopted by the Constitutional Court at the sessions held on 30 June and 31 July 2000, particularly the part related to the concrete Articles of the Entities' Constitutions, which have been evaluated so as to be in non-compliance with certain Articles of the Constitution of BiH, should have stated the provisions of the Constitution of BiH deemed to have been violated, i.e. with which provisions the Entity Constitutions are not in conformity. According to Article 14 of the Rules of Procedure of the Constitutional Court, by analogy and according to Article VI.3 (a) of the Constitution of BiH, the Decision has to contain these provisions.

Lastly, I opine that such a Decision by the Constitutional Court of BiH, proclaiming the disputed provisions of the Entities' Constitutions as unconstitutional, has produced very dangerous and inappropriate effects. The Constitutional Court of BiH is empowered to safeguard the Constitution of BiH. However, it has failed to fulfil its duty having adopted such a Decision. This Decision, as was the objective of the application, has a direct impact on the state organisation of BiH. This is not a task of the Constitutional Court of BiH. The Dayton Peace Agreement, more precisely by Annex IV thereto, sets forth the state organisation of BiH – by the Constitution of BiH, and the Constitutional Court of BiH must protect it pursuant to Article VI of the Constitution of BiH.

The effects of this Decision may be clearly seen from the statement made to the public given on the occasion of the Court's Decision by the President of the Court: "There are two types of arguments in regard to constitutionality of peoples; therefore, arguments have two aspects. One is from the point of the Preamble of the Constitution of BiH and to this related the organisation of BiH institutions…"

The Constitutional Court of BiH is not empowered to alter the Constitution of BiH, and consequently its Decisions should not affect "the organisation of BiH institutions"; that is, the state organisation and the Constitution of BiH. However, this is not the case here. Having adopted this Decision, the Constitutional Court made a precedent which paved the way for everything which cannot be achieved through other BiH institutions due to an ever-present clause on the protection of vital interests of a people implying a consensus, the very foundation of Bosnia and Herzegovina, to be done by its Decisions since Decisions are made by a simple majority only in this Court. Thus, instead of being the guardian of the Constitution of BiH, the Constitutional Court of BiH, in contradiction to the Constitution, has become a framer of the Constitution, a mechanism for the simplest method to alter the Constitution of BiH. I am of the opinion that this role is not good either for the Constitutional Court which strives to be and which is, according to the Constitution of BiH, a serious and important institution of BiH or for BiH itself, its Entities and its peoples.

This is also particularly relevant due to the fact that such a Decision of the Constitutional Court of BiH is not founded in law, in the nature of legal system, in the principle of constitutionality and in the legal arguments, but rather on violations of the Rules of Procedure of the Constitutional Court, "facts", statistics, predictions, assumptions, global aims, voluntary estimates etc. This statement having been made, the Decision is not founded in the Constitution of BiH.

By voting against this Decision of the Constitutional Court and not accepting its role of this nature, I am guarding the Constitution of BiH, which I believe is the task of all the other Judges of the Constitutional Court, irrespective of to which people they belong or from which Entity they were elected.

A N N E X

Dissenting Opinion of Judge Vitomir Popović with reference to the Partial Decision of the Constitutional Court of Bosnia and Herzegovina case No. U 5/98 dated 1 July 2000

On 12 February 1998 Mr. Alija Izetbegović, in his capacity as the Chair of the Presidency of BiH, initiated proceedings for the evaluation of the conformity of the Constitution of the Republika Srpska and the Constitution of the Federation of BiH with the Constitution of BiH. On 30 March 1998 this request was supplemented by a new submission where the applicant stated the provisions from the Entity Constitutions that he deemed unconstitutional. He requested that the Constitutional Court assess the following constitutional provisions:

A – In the Constitution of the Republika Srpska

a) Preamble in the part referring to:

- The right of the Serb people to self-determination, on the basis of which the Serb people may decide on its political and state status,
- Respect for the struggle of the Serb people for freedom and state independence,
- Determination of the Serb people to build a democratic state,
- Respect for the natural and democratic rights, will and determination of the Serb people of the Republika Srpska to establish links between its state and other states of the Serb people, and
- Readiness of the Serb people to commit themselves to peace and friendly relations;

b) Article 1 stipulating that the Republika Srpska is the state of the Serb people and of all its citizens;

c) 19 other provisions of the Republika Srpska Constitution.

B – In the Constitution of the Federation of BiH

a) Article I.1 (1) stipulating that Bosniacs and Croats are constituent peoples;

b) Five other provisions of the Constitution of the Federation of BiH.

At its session held on 30 June and 1 July 2000, the Constitutional Court of Bosnia and Herzegovina adopted the third Partial Decision with 5:4 votes by which the Court decided to proclaim the following provisions or parts of provisions unconstitutional:

A – With reference to the Constitution of the Republika Srpska:

a) Paragraphs 1, 2, 3 and 5 of the Preamble, as supplemented by Amendments XXVI and LIV;

b) The wording "the state of the Serb people" in Article 1, as supplemented by Amendment XLIV.

B – With reference to the Constitution of the Federation of BiH

The wording "Bosniacs and Croats as constituent peoples along with Others and" as well as "in the exercise of their sovereign rights" in Article III.1 (1), as replaced by Amendment III.

At the same time, the Court decided that the "said provisions" would cease to be in effect on the day of publication of this Decision in the *Official Gazette of BiH*. Judges from amongst the Bosniac people and foreign Judges voted in favour of this Decision, while the Judges from amongst the Serb and the Croat peoples voted against this it. (The following judges voted "For" this Decision: Prof. Dr Kasim Begić and Azra Omeragić, Prof. Dr Joseph Marko, Prof. Dr Louis Favoreu and Hans Danelius, while the following judges voted "Against" this Decision: Prof. Dr Vitomir Popović, Prof. Dr Snežana Savić, Dr Zvonko Miljko and Mirko Zovko. Judge Hans Danelius dissented in his opinion on agreement taking the position that the Preamble in the Constitution of BiH does not have a regulatory binding character but that it is an introductory paragraph saying that Serbs, Croats and Bosniacs, as constituent peoples along with Others, determined the contents of the Constitution.)

Having accounted for the fact that I voted *against* the said Decision in pursuance of Article 36 of the Rules of Procedure of the Constitutional Court of BiH, I hereby present my dissenting opinion:

a) <u>"The problem related to the Constitution Preamble"</u>

1) The Constitutional Court has taken the view that "contrary to the constitutions of many other countries, the Preamble of the Constitution of BiH, as Annex IV to the

Dayton Agreement and applying interpretation of the Vienna Treaty Convention, might be considered as an integral part of the Constitution".

Namely, I will commence my expose by stating that a Judge of this Court, Hans Danelius, as one of the Judges who voted FOR the Decision dissented in his opinion on agreement with the adopted Decision and has taken the clear position that "the Preamble of the Constitution of BiH does not contain any legal norm resulting in any specific right or obligation, so that this provision is nothing but an introductory paragraph which identifies those who adopted and enacted the Constitution of BiH. This is the context within which Bosniacs, Croats and Serbs have been identified as the constituent peoples along with Others and as those who, along with all the citizens of BiH, determined the contents of the Constitution. Accordingly, the said provision identifies three peoples as the constituent peoples only within the context of adoption and proclamation of the Constitution of BiH, so that this provision cannot be construed so as to establish any rule of normative character or to create any constitutional obligation. According to the opinion of this Judge, it follows that there are no sufficient grounds which would lead to the conclusion that Article 1 of the Constitution of the Republika Srpska violates the last paragraph of the Preamble of the Constitution of BiH". (See dissenting opinion of Judge Hans Danelius, page 4, paragraphs 1, 2 and 3.)

Therefore, in order to have such a conclusion of the Court on the legal nature and character of the Preamble of the Constitution of BiH incorporated in the final part of the Decision, it was necessary to have five out of the nine Judges voting in favour of the conclusion, and not Four judges, as was the case. (Judges from amongst the Serb and Croat peoples voted against this conclusion and Judge Hans Danelius joined them with his dissenting opinion.)

Given these reasons, I consider that such a conclusion of the Court in fact represents the opinion of the judge-rapporteur and not the position of the Court so that it should have been deleted from the final text of the Decision, as the Editorial Board properly noted. (See the Minutes of the Court Editorial Board dated 3 August 2000, page 1.)

My personal position on this legal issue is identical to the position of my remaining four colleagues whose opinion is that the Preamble of the Constitution of BiH does not contain any legal rule of a normative binding character, but only "states" that Serbs, Croats and Bosniacs, as constituent peoples along with Others, are determining the contents of the Constitution, while legal norms in terms of their binding character are laid down in the normative part of the Constitution.

Regarding the remaining considerations on this legal matter, I fully share the opinion and take the position presented at the public hearings held in Banja Luka on 23 January 1999 and in Sarajevo on 29 June 2000 by the legal representatives and experts of the RS People's Assembly, Prof. Dr Radomir Lukić and Prof. Dr Petar Kunić. I also share the dissenting opinion of Prof. Dr Snežana Savić in the part in which she analyzes this legal issue.

2) The Court has taken the wrong position "that, aimed at interpreting the legal nature and character of the Preamble, provisions of Article 31 of the Vienna Treaty Convention may be used – the Convention which established the general principle of international law and which is, in terms of Article III.3 (5) of the Constitution of BiH, an integral part of the legal system in BiH".

However, in order that the application of the Vienna Treaty Convention dated March 26 1996 could be discussed at all, it would be necessary to have this Convention integrated in the BiH legal system by ratification or in some other way. This necessity is also expressly provided for in Article 11 of the Convention, which reads:

The consent by a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or by any other means if so agreed.

Thus, none of the envisaged manners for consent to be bound by a treaty exist in this particular case. Annex I to the Constitution of BiH provides for only supplemental human rights agreements which will be applied in BiH, while the Vienna Treaty Convention, in terms of Article III.3 (b), cannot be deemed a "General principle of international law or an integral part of BiH and Entity legislation".

Regarding the legal nature and character of the Constitution of the Republika Srpska, it is beyond dispute that the text of this Preamble, as modified by Amendments XXVI and LIV (*Official Gazette of the Republika Srpska*, Nos. 28/94 and 21/96), is an integral part of the Constitution of the Republika Srpska, but it does not have a normative binding character. It is not a legal norm that the constitutionality of which could be evaluated at all. Assessment of constitutionality of a non-normative Preamble comparing it with other superior Preamble that is also non-normative is absurd in itself.

b) <u>Constitutionality of peoples</u>

In order to commence the discussion on this issue, it is necessary to first determine the meaning of the term “constitutionality of peoples” in legal theory and practice, in particular in terms of constitutional law. There can be no doubt that this term is also widely used beyond the law. Nevertheless, most legal theoreticians assume that it is “the power of people” to adopt a constitution and thus the power of people to “build a state”. However, if we consider this term in light of the Preamble of the Constitution of BiH, we will reach the conclusion that the word “constitutionality” is derived here from the word *constitutio* which denotes constitution as the supreme legal act which regulates the foundations of the governmental and social system of a state. Legal science and rhetoric use the terms “constituent and constitutive” having the equal meaning.

Constitutionality of peoples in a state cannot be abstractly exercised without legal rules, i.e. without them. Therefore, it is necessary to see what the Constitution of BiH provides for the exercise of the constitutionality of peoples in BiH and only then determine if it is endangered or not. (See details in dissenting opinion of Prof. Dr Snežana Savić, page 13)

First, by the provision stating that BiH consists of two Entities: the Republika Srpska and the Federation of BiH, provided for in Article I.3 of the Constitution of BiH, and then by the fact that its signatories are the Entities on behalf of their constituent peoples (the power to adopt the constitution). Furthermore, by the fact that parity of peoples and parity of the Entities (somewhere one, somewhere the other and somewhere both) are represented in the election of members to the institutions of BiH as well as in the manner of their decision-making; with respect to the Federation of BiH, this is the parity of Bosniacs and Croats; with respect to the Republika Srpska, this is the parity of Serbs in relation to the other Entity and peoples in it at the level of BiH as a whole (e.g. Articles IV, V, VI, VII of the Constitution of BiH). Then we have a series of provisions stipulating that BiH is a complex state, in particular those provisions which regulate the responsibilities of the BiH institutions – Article III.1 of the Constitution of BiH, but responsibilities of its Entities as well – Article III.2 and 3. (*Ditto* as in 1.)

Within this context I also fully accept the opinion that was presented by a Judge of this Court, Dr Zvonko Miljko, in his report dated 12 May 1998. Namely, on page 1 of his report, he said that the constituent elements of a unitary state are its citizens; of a federation – federal units and citizens; of a confederation – autonomous and independent member-states, and that in BiH, as it is underlined on page 3 of the report, we have an

extremely complex system of government characterized by hybridism, asymmetry, three-instance constitutionality and so on. (For details, consult the report by Dr Zvonko Miljko of 12 May 1998, pages 1 and 3.)

Such a thesis is fully in line with the provisions of the Agreement on Implementing the Federation of BiH that was signed in Dayton on 10 November 1995. The general principles, i.e. already the first and second sentences therein, *inter alia*, regulate: "The complete establishment of the Federation of BiH is an essential prerequisite for peace in BiH. Without a strong and fully functioning Federation, as one of the two constitutive Entities of BiH, the proximity talks in Dayton cannot result in a lasting peaceful settlement". (Agreement on Implementing the Federation of BiH signed in Dayton on 10 November 1995.)

If we add here the fact that the Constitution of BiH, as Annex IV to the GFAP in BiH, was approved by the Federation of BiH "on behalf of its constituent peoples and citizens" and on behalf of the Republika Srpska, we will arrive at a conclusion that all three peoples – Serbs, Croats and Bosniacs are constituent at the level of BiH, but through the Entities. This conclusion exactly proves the thesis that there are no institutions and functions in BiH to which a citizen of BiH, as a member of any of the three constituent peoples or the Others, could be elected (as it is stipulated in the Constitution of BiH) without being prior elected and delegated by Entity peoples or Entity authorities on behalf of their peoples. All members of elected institutions in BiH are elected or appointed by people in the Entities or Entity authorities on behalf of the Entities or on behalf of their peoples. Besides, the six judges of the Constitutional Court of BiH were elected in that manner.

Apart from guaranteeing to all the citizens of BiH through the Constitution the highest level of internationally recognized human rights and freedoms provided for in the European Convention on Human Rights and Freedoms and Protocols thereto and other instruments for protection of human rights and freedoms precisely enumerated in Annex I to the Constitution of BiH, the Dayton Peace Agreement also contains some other agreements on the protection of human rights and freedoms, e.g. the Agreement on Human Rights as Annex VI to the GFAP, the Agreement on Refugees and Displaced Persons as Annex VII to the GFAP etc.

Namely, Article 1 of the Agreement on Human Rights provides, *inter alia*, that the parties-signatories to the Agreement shall secure for all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection

of Human Rights and Fundamental Freedoms and Protocols thereto and the other international agreements listed in the Appendix to this Annex. (See the Agreement on Human Rights as Annex 6 to the GFAP and the Agreement on Refugees and Displaced Persons as Annex 7 thereto)

However, when analyzing the issue of the constitutionality of peoples at the level of the Entities, we have to recall some recent events. Namely, the “dissolution” of former Yugoslavia inevitably caused the dissolution of the Republic of BiH with all the consequences followed by the war between its constituent peoples. The Republika Srpska separated first and defined itself as “an independent state of the Serb people” and continued existing as such even following the international recognition of the Republic of BiH in April 1992; after that, the Republic of Herceg-Bosna separated as an independent state of the Croat people. These states functioned as real states given that they had “their” territories and “their” population and organized government in their territories. They were not internationally recognized but they had full so-called “internal sovereignty”. Although internationally recognized within the borders of the former SFRY federal unit, the Republic of BiH could not establish any internal sovereignty in the territories of these two real states and its “external sovereignty” in relation to these territories was sterile and continued to be sterile until signing of the so-called “Dayton agreements”. It can be clearly seen that the state “dissolution” of the Republic of BiH was in fact (in this respect) the “dissolution” of its constituent peoples. The reverse process – the process of the state reconstitution of BiH took place in absolutely the same “course”.

Bosniacs and Croats first concluded the so-called “Washington agreements” and formed the Federation of BiH. Not only the Federation Constitution but also the constitutions of cantons comprising the Federation recognize only Bosniacs and Croats as constituent peoples.

There is no place (?) here for Serbs as constituent people and everything absolutely corresponds with the essence of the historical process that I refer to. Then, we had “negotiations on basic principles”, first in Geneva on 8 September 1995 and then in New York on 26 September 1995 given that the Republika Srpska took part in these negotiations. One of the Agreed Principles in Geneva (Item 2.2) reads: “Each Entity (the Federation of BiH and the Republika Srpska) shall continue to exist under their respective Constitutions...”, with the obligation that their Constitutions are amended to accommodate these principles. (For details, see the report by Mr. Marko Arsović, a former Judge of this Court.)

Nobody can challenge the fact that the Dayton Peace Agreement is based on the Geneva and New York Principles. The penultimate paragraph of the Preamble of the Constitution of BiH reads: "Recalling the Principles agreed in Geneva on 8 September 1995 and in New York on 26 September 1995…".

The Republic of BiH, the Federation of BiH and the Republika Srpska also participated equally in the conclusion of the Dayton Peace Agreement. Hence, peoples were represented by "states" and in that context the above mentioned declarations speak of an endorsement of the Constitution of BiH by the Entities.

Pursuant to all the above mentioned facts, it may be concluded that Serbs, Bosniacs and Croats are constituent peoples in accordance with the Constitution of BiH at the level of the state of BiH but that they are not constituent peoples according to the Constitution of the Republika Srpska at the level of the Republika Srpska or according to the Constitution of the Federation at the level of the Federation of BiH. Any other approach in consideration would lead to a negation of the existence of the Republika Srpska and the Federation of BiH and the transformation of BiH from a very specific complex *sui generis* state to a unitarian state which would not reflect what was envisaged by the Dayton Peace Agreement as an international agreement and thus the will of the Entities and its peoples. If the Republika Srpska is not the state of Serb people, as the request claims, why then does the Constitution of BiH (Article 1, Paragraph 3) recognize the name "the Republika Srpska" and what could be the meaning of the word "srpska" if not that it is the state of the Serb people; if in the Republika Srpska, Bosniacs and Croats would also be constituent peoples then certainly it could not have this name recognized by the Constitution. In that event, by analogy, it could be named "Serb- Croat –Bosniac Republic" and it could find the *gatio* of its existence. Why does the Republika Srpska have to be an "exclusive electoral unit" for five Serbs in the House of Peoples, one Serb to the Presidency of BiH etc., which is strictly prescribed by the Constitution of BiH?

c) The State of the Republika Srpska…. – a form of governmental system in BiH

As a state, Bosnia and Herzegovina is a highly unique or, better put, a model of a system of government unknown to the world. Many legal theoreticians think that it is one specific construction of a complex state consisted of one federation (the Federation of BiH) and one unitarian state (the Republika Srpska). The Constitution of BiH simply names this state as "Bosnia and Herzegovina", speaks of its sovereignty and territorial integrity, and assigns it a lot of functions and competencies of the state authorities. It would be very

difficult to defend the position that this complex state is a federation or a confederation although it has both federal and con-federal elements that I do not want to discuss in this report. However, the majority of legal experts and theoreticians will agree that it is a *sui generis* state. Its Entities are, if viewed either from the federal or con-federal point of view, very decentralized. In particular, one cannot disregard the fact that its' Entities, which on behalf of its constituent peoples, together with the Republic of BiH, participated equally in the Dayton Peace process and "approved" the Constitution of BiH, are also organized as states even according to the Constitution of BiH itself. Consequently, these Entities have their own population, territory and they exercise power on the entire territory, they have their own army, police etc. True, they are not recognized internationally, Bosnia and Herzegovina is. But, isn't this international recognition more of a political than a legal act? The doctrine of international public law has taken the identical position on this issue. International recognition may be given to a state that is only politically but not legally legitimate. However, this principle position on the »value« of international recognition is not crucial to the issue of the statehood of the Entities of BiH. I have no dilemma with respect to the fact that the Entities are states, not independent states, but members of a complex state. Analysis of Article 1, paragraph 3 of the Constitution of BiH will lead us to the conclusion that the Constitution of BiH itself starts from the Entities as member states. According to this Article, BiH shall consist of two Entities, the Federation of BiH and the Republika Srpska ("Entities"). The term "entities" originates from the Latin word *ens* which means "being", "relevance", and "essence". This term means that the sense of this provision is that BiH is composed of two state-legal beings: one Federation and one Republic. There is no doubt that the constitutional-legal terminology refers to the "Republic" and the "Federation" as states. A republic represents a form of governance in one state and a federation a form of a system of government. Article 1, paragraph 7 of the Constitution of BiH stipulates: "there shall be …. and citizenship of each Entity". There is a justifiable question: Who, in addition to the state, can establish or grant citizenship? The answer is – no one. Article III, paragraph 3, item a) of the Constitution of BiH provides 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. It is beyond doubt that the reference here is made to state functions and powers in general and not only functions and powers of the "government" *stricto sensu*; that is, the government as the holder of executive powers only. The Entities are assigned not only executive but also judicial and legislative powers; I suppose this is not an issue at dispute. Then, how valid is the argument that the BiH Entities are not states since the Constitution of BiH does not expressly refer to them as states? If this Paragraph is analyzed carefully, it can

be easily seen that, except for mere formalism, it also stands on tautological "footing". According to it, an Entity is not a state, it is simply an Entity. So, as Moliere had said it, "a dream is explained by virtue of sleeping". But we must pose a logical question to the advocates of such attitude: if it is actually not known what an entity means in public law, how is it possible to know that it is not a state? The term entity cannot be transformed into some kind of enigmatic "hide-and seek game" created for uninformed naïve persons or for informed manipulators. (For details, see the report by Judge M. Arsović)

In addition to the above, one cannot disregard the fact that the Agreement on the Inter-Entity Boundary Line and issues related thereto as Annex II to the GFAP provides for full territorial integrity to the Entities. The boundary lines between the Entities have been precisely drawn on maps and, by virtue of Article 7 of this Agreement, they are an integral part of this Agreement and it is not possible to alter them without the consent of the Entities. There are many cases in practice where boundary lines between entities were changed with their consent.

The fact that the Entities are entitled to a high level of the right to "self-organization" is not disputable. Adoption of its own constitution and laws represents the highest level of this right. And "where we have a constitution", as my esteemed colleague Arsović says, "there must be a state".

Based on the above, it can be concluded that both the Republika Srpska and the Federation of BiH are states with limited sovereignty; in other words, they are not independent and internationally recognized but they are member states of one complex state.

d) <u>The Non-discrimination Principle</u>

The Court has taken the wrong view that Article 1 of the Constitution of the Republika Srpska violated the principle of non-discrimination contained in the provisions of Article II, paragraphs 4 and 5 and Article III, paragraph 3 (b) of the Constitution of BiH. In other words, Article 1 of the Constitution of the Republika Srpska defines the Republika Srpska as the state of the Serb people and of all its citizens, which means it defines it both on ethnic and non-ethnic civic principle. Hence, the term constitutionality, as I stated in my introduction, implies the right of Serbs, as the majority people in the Republika Srpska, to adopt a Constitution and to define their own state by that Constitution, must be separated from human rights that are in the broadest possible terms guaranteed to all citizens. Article 10 of the Constitution of the Republika Srpska explicitly provides that "citizens of the Republika Srpska shall have equal freedoms, rights and responsibilities; they shall be

equal before the law and enjoy the same legal protection regardless of race, sex, language, national affiliation, religion, social origin, birth, education, property status, political and other beliefs, social status and some other personal characteristic". (For details, see the report by Judge M. Arsović)

Not only does the Constitution of BiH provide, through the application of the European Convention on Human Rights and Freedoms and Protocols thereto and other instruments listed in Annex I of the Constitution of BiH, for the highest level of human rights and freedoms but Annex VI, and even Annex VII, to the GFAP exclusively stipulate the methods and procedures for the protection of human rights.

Article 1 of the Agreement on Human Rights provides: "The Parties-Signatories (the Republic of BiH, the Federation of BiH and the Republika Srpska) shall secure to all persons within their jurisdiction the highest level of internationally recognized rights and fundamental freedoms including the rights and freedoms provided in the European Convention on Protection of Human Rights and Fundamental Freedoms and Protocols thereto and in the other international agreements listed in the Appendix to this Annex". In this respect, the Commission on Human Rights was established at the level of BiH and it consists of the Human Rights Chamber and the Office of the Ombudsman. The decisions of this Commission or the Human Rights Chamber as well as the Commission under Annex VII are final and binding. It is also an indisputable fact that, in accordance with the election results implemented based on the Agreement on Elections and Annex III to the GFAP, other minority peoples, Bosniacs, and Croats participate in the political and other authorities of the Republika Srpska in proportion to their election results. Thus, for example, the Law on Ombudsman of the Republika Srpska explicitly stipulates that the Office of the Ombudsman shall consist of one Serb, one Croat and one Bosniac, delegates of the People's Assembly of the Republika Srpska shall have the same rights and they take part in the work of the People's Assembly of the Republika Srpska, Deputy Speaker of the People's Assembly of the Republika Srpska shall be a Bosniac. Other peoples of the Republika Srpska, based on the same principle, participate in the work of the local authorities of the Republika Srpska and the election results, according to the PEC Rules and Regulations, are fully implemented.

By analogy, the Court arrived at the wrong conclusion that such constitutional provisions of the Constitution of the Republika Srpska could be discriminatory and could deprive refugees and displaced persons of the rights to return and to participate in authorities. This Court should fully reject this request as ill-founded.

e) <u>Method of the presentation of evidence during the course of the proceedings</u>

When deciding this case, the Court made use of statistical and other data to establish facts. In this context it used the UNHCR estimates on the 1991 and 1997 censuses. At the session of the Court held in Banja Luka on 23 January 1999, the Court with a 5:4 vote decided that this evidence should not be presented and that it had no relevance, considering that these issues are clearly legal issues aimed at answering the question whether some of the provisions of the Entity Constitutions are harmonized with the Constitution of BiH in formal legal terms. However, at the session held on 30 June and 1 July 2000, the Court with a 5:4 vote altered its previous conclusion, taking the position that that the Court should deal with facts. Nevertheless, there is no doubt that the establishment of the facts absolutely led to the wrong conclusion, which was contrary to the principles which define the legal position of the Constitutional Court as the guardian of this Constitution. Item 87, *inter alia*, stipulates: "as it can be seen from these figures, the ethnic composition of population in the territory of the Republika Srpska has dramatically changed since 1991. Although the Serb population, in statistical terms, had small absolute majority in 1991…."

Hence, the final report on the decision proceeds from the fact that nothing has happened in these areas since 1991, as if there was no long bloody conflict between the former constituent peoples and the dissolution of the former Republic of BiH. This conflict resulted in the signing of the Dayton peace agreements that would recognize the status of this former Yugoslav republic, now with the changed name of Bosnia and Herzegovina and recognized only as a subject of international law but with modified internal structure consisting of two Entities, the Republika Srpska and the Federation of BiH. In other words, it follows that the Republika Srpska existed in 1991, which is not correct.

f) <u>Decision-making process</u>

We cannot disregard the fact that this Decision was adopted in a manner that the Judges from amongst Bosniacs and foreign Judges voted *for* the Decision and that the Judges from amongst Serbs and Croats voted *against* it.

We cannot also disregard the fact, which as a judge (although reluctantly) I must mention, that one of the three Judges and the judge-rapporteur, Prof. Dr Joseph Marko, a Venice Commission member who participated in its work, gave a positive opinion on the harmonization of the Constitutions of the Entities with the Constitution of BiH.

The Commission in Strasbourg on 27 June 2000 upon the request of the then High Representative, Mr. Carl Bildt, presented this opinion. The following persons presented this opinion:

Joseph Marko (Austria)

Jean Claude Scholsem (Belgium)

Jacques Rober (France)

Sergin Bartole (Italy)

Jan Helgesen (Norway)

Andreas Auer (Switzerland)

Ergun Ozbudun (Turkey)

On 24 July 1996, this opinion was forwarded through the Office of the High Representative to Mr. Alija Izetbegović, the then Chair of the BiH Presidency; Mr. Mariofil Ljubić, Chair of the Constituent Assembly of the Federation and to Mr. Momčilo Krajišnik, Speaker of the People's Assembly of the Republika Srpska.

As a judge who participated in these proceedings, I sincerely hoped that Judge Joseph Marko would exempt himself from decision-making in this case since his opinion was given in the work of the Venice Commission and his proposal of the Decision on constitutionality of peoples are diametrically opposed to one another. I started from the fact that he could not take the position again in his capacity of a judge who has already presented his opinion relating to this issue. There is no doubt that this questions his objectivity in the work on this case and in any case, according to the Rules of Procedure and positive legislation, it represents a valid reason for his exemption from this case. Here, I do not want to mention the manner of voting on the request for exemption but I must say that the judges whose exemption was requested also were deciding on that exemption, which could be seen from the Minutes of the Court's session when the decision on this request was adopted.

According to the Rules of Procedure of the Court, decisions are adopted by the majority of votes and this procedure is beyond dispute, but we cannot ignore the fact that the representatives of only one people (namely Bosniac) took part in the adoption of the Decision out of three peoples whose constituent status is requested, while the Judges from amongst Serbs and Croats voted against this Decision. For these reasons it is not clear why the final text of this Decision under Item 144, paragraph 2 includes the following text: "This Decision was adopted by the Constitutional Court in the following composition:

Prof. Dr Kasim Begić, President of the Court, and Judges: Hans Danelius, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Mag. iur. Zvonko Miljko, Azra Omeragić, Prof. Dr Vitomir Popović, Prof. Dr Snježana Savić and Mirko Zovko" when it does not reflect the facts. The Decision, in accordance with the Court's Rules of Procedure and the case law, must indicate those Judges who voted in favour and those who voted against. In this way, an attempt was made to deceive the public and create a wrong image on the adoption of this Decision so as to imply that all Judges of the Court voted in favour of this Decision.

The facts that under all legal rules Judge Joseph Marco should have been excused in this case due to his participation in the work of the Venice Commission related to the same legal issue, that Judge Hans Danelius dissented his opinion on the harmonization and did not accept the Preamble of the Constitution of BiH as binding in the normative sense, as well as the huge pressure by the media in the Federation of BiH prior to and during each session of the Court at which this Decision was discussed, more than clearly shows that the Decision had primarily a political and not a legal character.

There is no doubt that this Decision, in the manner stated in the final text, severely violated the provisions of the Constitution of BiH and the Dayton Agreement as a whole.

Having in mind the above-mentioned, I am of the opinion that the Court only could have and should have rejected the request of the applicant, Mr. Alija Izetbegović, as entirely ill-founded.

Method of the Decision's enforcement

Article 58 of the Rules of Procedure of the Constitutional Court defines: In adopting a decision, the Court decides on its legal effect (*ex tunc*, *ex nunc*).

A decision that identifies an inconsistency as referred to in Article VI.3 (a) and (c) may set the deadline to the request's applicant for harmonization, which cannot extend a three-month period.

If the identified inconsistency has not been removed within the prescribed time period, the Court shall adopt a decision and find that the inconsistent provision shall cease to be in effect.

The inconsistent provisions shall cease to be in effect on the day of publishing the Court's decision referred to in the previous paragraph in the *Official Gazette of BiH*.

However, by its Decision, the Court failed, as it is a customary practice in this kind of cases, to set a deadline for bringing the Entity Constitutions into conformity with the Constitution of BiH. It should have applied Article 59, paragraph 4 of the Rules of Procedure only after a failure to act within the envisaged period.

CONCLUSION

1. Given the aforesaid, I think that this Decision of the Constitutional Court was not adopted in accordance with the Constitution of BiH and the Rules of Procedure of the Constitutional Court of BiH, and that it violates the provisions of this Constitution and the entire Dayton Agreement in the rudest possible way.

2. By acting in this manner, the Constitutional Court of BiH transformed its constitutional role of "the guardian of the Constitution" into a legislative body, and even the framer of the Constitution, which under my sincere judgment might cause incomprehensible consequences both to the Court, the Dayton Agreement and Bosnia and Herzegovina – that is, its Entities: the Republika Srpska and the Federation of BiH.

3. The only possible decision that the Court should have adopted was to reject the applicant's request as ill-founded.

In the remaining part I fully support the dissenting opinions of the Judges of this Court: Snežana Savić, Zvonko Miljko, and Mirko Zovko, as well as that of Judge Hans Danelius in the part in which he did not consider the Preamble of the Constitution of BiH as an integral part of the Constitution in the normative binding sense.

This opinion of mine shall be valid in regard to the challenged provision of the Constitution of the Federation of BiH.

ANNEX

Dissenting Opinion of Judge Mirko Zovko On the Partial Decision of the Constitutional Court of Bosnia and Herzegovina, case No. U 5/98 of 1 July 2000

Pursuant to Article 36, paragraph 2 of Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, I hereby submit my Separate Opinion.

This is the third Partial Decision on the stated case.

However, in the opinion of the BiH public, this is the most important part of the Decision, as will become evident upon further elaboration.

This decision was a solution to the challenged issue whether all three constituent peoples in BiH, Bosniacs, Serbs and Croats, are constituent in the ENTIRE TERRITORY OF BIH, i.e. in both Entities, the Federation of BiH and the Republika Srpska, OR NOT, i.e. that until now Bosniacs and Croats have been constituent in the Federation of BiH, and Serbs were constituent in the Republika Srpska.

This challenged issue was resolved as pronounced in the quoted Partial Decision, in such a way whereby five Judges voted IN FAVOUR of the application, while four Judges, I being one of them, voted AGAINST.

This decision was adopted in accordance with the Rules of Procedure of the Constitutional Court of BiH by a majority vote of all judges.

In relation to the procedural, primarily “formal”, Decision, I have no objections.

It is noticeable that I emphasized the word “formal”. I will elaborate this in further text.

By elaborating my Separate Opinion, I have considered ways of presenting the reasons for my legal position, which is an obligation of a Judge of the Constitutional Court, in such a way as to avoid thoughts and explanations of EVENTS related to this case. In other words, I considered ways to move within the limits of SELF-RESTRAINT of a Constitutional Court Judge.

However, even within the limits of self-restraint, I cannot avoid speaking of the different pressures and most serious insults which grew into most grave threats, not only

to me but also to my colleagues, but which have primarily affected and still do, as they continue to occur, the independence of the Constitutional Court of BiH.

When the application was first filed, a campaign IN FAVOUR of honouring the application regarding the constituent status began its course in the Sarajevo-based media.

In this campaign, particularly prominent were non-governmental organisations headed by the SGV. These organisations lobbied everywhere, starting from ambassadors of large states to the former and current High Representative.

This is their right and for as long as it does not exceed the limits of what may be affecting the independence of this Court, I do have an understanding.

This was joined by a number of journalists from different public media.

This campaign was intensified prior to each session and each public hearing.

In this campaign, NOBODY EVER ONCE tried to publish, analyse or explain the legal aspects of this case.

Only the political aspect was presented and even that in a way as seen by those advocating IN FAVOUR.

I cannot believe that some journalists who dealt with this issue in particular did not know and did not try to explain the legal aspects. If they did know, then I must say that they did not dare expose it. Such a campaign was totally one-sided and to an ordinary citizen in the territory of this region it created an image of this case in a politically programmed way. One may say: THOSE IN FAVOUR are friends of BiH and those AGAINST are its enemies. I do not say this unfoundedly as I experienced it, unfortunately even from lawyers for whom I cannot say with certainty whether they had seen the Constitution, and I mean the Constitution of BiH.

It would be far too extensive to analyse all the publications which were one-sided and which, in my opinion, represented “single-mindedness”.

Approximately ten days prior to the adoption of this Decision, non-governmental organisations organised a gathering attended by representatives and experts in this case who were IN FAVOUR. This gathering was given prominence in newspapers, TV and radio.

At this gathering, the President of a non-governmental organisation, a wartime co-opted member of the Presidency from the Croat people, stated publicly that the Judges of the Constitutional Court who failed to adopt a positive decision would stand trial (as that was the only possible decision) and not only that; he also “promised that they would stand trial”. However, here he was referring only to Judges representing the Croat and the Serb people. This was the voice of a man who holds a doctorate and who has changed a number of parties. I once responded in the media, calling this statement “Bolshevik”, and said that I was not surprised as the gentleman had held senior “communist functions” prior to the war.

This offensive-like campaign by the above had been reaching its culmination before the decision was adopted.

However, on 1 July 2000 the Decision was passed IN FAVOUR, and I thought that I and the colleagues who voted against it would be left at peace.

The Decision adopted was “extremely incautiously” but correctly predicted by the applicant in late 1998 in an interview given to “Avaz” daily newspapers, when he said: “We need five votes for the Decision, three foreign Judges will probably vote for us, which means that in the worst case we will have five votes”.

In January this year, precisely on 14 January 2000, in “AS” weekly, there was a bold type headline “*Judges Angered Izetbegović*”.

While discussing improvements of the work of the Constitutional Court and allocations of more funds for the coming year, the text said that Mr. Izetbegović, angry at the (lack of) work of this institution, snapped at those who proposed it - I quote: “Those people do nothing, they just cackle. And hens like that do not lay eggs”.

Hence, the first statement is “extremely incautious” and the second one is “extremely insulting”.

And then, on 1 July 2000, “hens did lay an egg, a GOLDEN one”, since the request was granted.

After that, I/we personally expected that I/we would be left at peace, but No.

On 7 July 2000, on an entire editorial page, a weekly paper, “BH Dani”, printed its editor’s comment titled “The Seventh Day” and, while glorifying other participants to the proceedings, ruthlessly insulted me and Dr Zvonko Miljko in particular. Judges from the

Republika Srpska were "signed off" by the editor, saying that he was not even surprised by their vote, but for the two of us he said that "I cannot free my mind from the names of Judges representing the Croat people" (presumably in BiH) which should be remembered well: so, MIRKO ZOVKO, ZVONKO MILJKO! History of crime and dishonesty against this country is familiar with examples of greater criminals and shameless men, but names of Zovko and Miljko deserve a special place. They symbolise the bare farcical end to criminal politics of the "Protection of the Interests of the Croat People in BiH" of the Croatian leader until recently, implemented with the slyness of a lieutenant of the Yugoslav People's Army, by the grand traitor in the, oh, sorrow, Presidency of BiH, Ante Jelavić".

In that same paper, on four pages with the headline "Bosnia Returns to Itself", another journalist (just like his editor) used the worst lies and constructions to attack and insult "relentlessly" primarily the two of us, Judges from the Croat people. Others were heroes worthy of medals.

Is the quoted not horrific, which is how I feel, since of the three Judges in question, I have been living in Sarajevo the longest, namely 48 years.

This relentless campaign continues to persist.

All this speaks of an incredible attack against the independence of the Court.

We shall mention one, "Sarajevo is not entire Bosnia and Herzegovina", and people in Bosnia and Herzegovina do not all have the same opinion as some listed above.

That is why I will ask, first of all, people of good will, colleagues, to try and think objectively about this Separate Opinion and then, if they can, to think about me as a Judge. As I write this and plead, I feel sad and resigned since an entire propaganda mechanism tried to influence my consciousness in a most ruthless way by using all means, including threats against my freedom and the integrity of a judge, attacking at the same time my other colleagues (such as Judge Zvonko Miljko).

So, when discussing this later, I will ask the readers to eliminate "thinking under the influence of propaganda" and to think as free individuals, of their own free will, and not as programmed.

I would certainly be happy if the High Representative would take a position on this.

Let me move to a rationally disputed issue, where my position is clear.

Ever since the adoption of the Decision, I have never publicly implied who voted how and, in that part, I hold it against my colleagues from the Republika Srpska that they did so the very day after the voting. This objection is not particularly relevant, as information has been leaking from the Court for some time, with the over-used phrase "we learnt it from sources close to the Court".

My position is that the decision of the Court on the issue of constituent status is a most blatant REVISION of the General Framework Agreement for Peace in Bosnia and Herzegovina, the "Dayton Peace Agreement". First of all, in relation to Annex IV of the said Agreement titled the Constitution (referring to the Constitution of BiH), which provides a thorough revision of the organisation of government and the judiciary in the Entities but, "unfortunately", puts into question the Constitution of BiH itself.

A revision of the organisation of government and the judiciary in the Entities would not be a revision if the Constitutions of the Entities regarding the disputed matter were really not in conformity with the Constitution of BiH.

However, it will be evident from the elaboration of my position that by adopting the said decision WE BROUGHT our own Constitution of BiH INTO NON-CONFORMITY.

Namely, if we revised the Constitutions of the Entities and the organisation of the government and the judiciary in them, by deciding on the basis of Article XII, paragraph 2 of the Constitution of BiH, WE COULD NOT REVISE the organisation of the government and the other institutions at the level of the State of BiH, since pursuant to the Constitution this can only be done by the Parliamentary Assembly of BiH in an amendment procedure in accordance with the provision of Article X, paragraph 1 of the Constitution of BiH.

Therefore, the Constitutional Court and its Judges are merely guardians of the Constitution as it is and NOT constitutional legislators.

Thus, constitution legislators are only the representatives of the people (constitutional or any other) who can, in a parliamentary state, alter the Constitution of BiH at the level of the Parliament through the said amendment procedure.

On the contrary, by resolving and having resolved this case in a way that the Decision before the Constitutional Court was adopted, an issue of the most sensitive nature was raised in relation to the peoples of BiH, those who feel it best and approach it differently, and that is why this Decision may have far-reaching, though in my opinion, unfortunately negative consequences which I shall mention in further elaboration.

In any event, it is obvious that our Decision "overlooked" the BiH Parliament, which could have resolved this issue only by consensus.

I have presented my position so far.

However, a judge's position is a formulation of his final opinion, and in order to make it authoritative, one needs to indicate decisive reasons. I shall give those reasons with no intention to elaborate them in a "highly theoretical-academic vocabulary". Therefore, I will try to express myself in simple terms, understandable to any reasonably well-educated citizen of BiH. This in particular since I know that my colleagues who have also given their Separate Opinions will also have a theoretical approach to their reasons.

Speaking about it at the session when this Decision was adopted after a number of sessions and public hearings, one Judge said that this was "the most complicated case" but he also said that this was "the case of all cases".

I agreed with the latter opinion, which is evident from my elaboration so far. However, I do not agree with the former one, as I said that this was »a simple case« and that it could have been resolved immediately with a partial decision, provided we had followed the maxim *de scribere de mundo* - what is written, exists. Therefore, there are doubtful provisions of the Entity Constitutions and the Constitution of BiH regarding supremacy (primacy) pursuant to Article XII, paragraph 2 of the Constitution of BiH.

If I were right, this case would have been simple and, in my opinion, should have been resolved with a consensus of all the Judges in a uniform way, and with no intention to be pretentious, this would be as follows:

1. In relation to the Constitution of the Federation of BiH, Article I.1 (1), as replaced by Amendment III, that it is IN CONFORMITY with the Constitution of BiH.

Therefore, the applicant's request should have been DISMISSED.

2. In relation to the Constitution of the Republika Srpska, I voted against since the request was already voted as accepted by the Decision, and my opinion is (and that was my proposal) that the challenged provisions of the Constitution of the Republika Srpska are in conformity with the Constitution of BiH save one which speaks of "sovereignty".

Here, the reader of this Separate Opinion should study carefully the terminological and content differences between the provisions of both Constitutions, since there are considerable differences which I do not wish to comment here, as the wording of the said provisions is given in the decision of the Court.

In order to explain the deciding reasons for my final position, as a *questio iuris* issue, I should say that I as a Judge – a guardian of the Constitution – hold that the most important issue is the interpretation of the Constitution of BiH itself.

I consider that for this interpretation to be properly conducted one should, first of all, draw conclusions of what the legislator had in mind when adopting the Dayton Peace Agreement.

One could arrive at such a conclusion from the interpretation of the Constitution of BiH as Annex IV to the Agreement, as I shall expound later on.

However, as the claims of the parties to the proceedings, especially those of the applicant, initiated different approaches to this interpretation, my obligation was *ex legge* to give answers as a Judge. Therefore I will not elaborate my stand in relation to the Constitution of BiH only but rather more extensively.

I will present the reasons for my position in light of the events related to this constitutional dispute in three phases, with the following headings:

1. What preceded the adoption of the Dayton Peace Agreement and the Agreement?

2. What occurred from the adoption of the Dayton Peace Agreement until the institution of the proceedings on this constitutional issue?

3. Proceedings and decision-making on this constitutional issue

1. WHAT PRECEDED THE ADOPTION OF THE DAYTON PEACE AGREEMENT AND THE AGREEMENT

Since I stated that I wanted to "simplify" the case in order to bring it closer and make it more understandable for any citizen of BiH, I chose the methodology of interpretation of positive law in linguistic, logical and systematic sense.

This first phase that preceded the adoption of the Dayton Peace Agreement was characterised by a tragic war in BiH. As a judge, I avoid any political connotations in the sense of "who is to blame for the war".

The fact remains that the war underwent transformations and that in the spring of 1993 all three constituent peoples were at war ALL AGAINST ALL following a well-known definition *bellum omnium contra omnes*. Paramilitary states were also established in this war.

Of the three constituent peoples, two (the Bosniac and the Croat) were reconciled through the Washington Agreement and they established the Federation of BiH. Not only that they created it, they also adopted a Constitution.

According to that Constitution, the two peoples who had been at war in the territory of the Federation thus became constituent in the territory of the Federation of BiH, as they had been constituent before and they had the power to enact a Constitution.

It should be said here that the very word constitutionality is derived from the word *constitutio* – which means constitution, and we know that in terms of supremacy this is the highest legal act organising the foundations of the governmental and social system of a state.

However, to avoid any misunderstandings, a constitution does not determine its constituent peoples; on the contrary, constituent peoples as "constituent or constitutional" reflect the power of the people to enact a constitution and create a state.

This Constitution also organised the Federation of BiH into Cantons and Cantonal constitutions were adopted; according to these constitutions, Bosniacs and Croats remain the constituent peoples in the Federation of BiH.

The war continued and in the unrecognised Republika Srpska, which had been created by Serbs, they were the constituent people. It would have been "ridiculous and absurd", as it is well known, if Bosniacs and Croats had taken part in the creation of the Republika Srpska.

A series of negotiations followed, but specific ones were those that lead to the ultimate establishment of peace through the Dayton Peace Agreement.

Specific to this historical process is the "Agreement on the Basic Principles", first in Geneva on 8 September 1995 and later in New York on 26 September 1995. Most specific is the fact that the Republika Srpska took part in these talks.

Under Item 2.2, one of the principles agreed in Geneva reads: "Each of the Entities (the Federation of BiH and the Republika Srpska) will continue to exist in accordance with its current Constitution", with an obligation to reconcile their Constitutions with these principles.

Therefore, the agreed principle cannot be ignored in relation to the interpretation of the Constitution of BiH, i.e. in relation to the disputed issue. This in particular since the

last sentence of the Constitution of BiH reads - I quote "RECALLING the Basic Principles agreed in Geneva on 8 September 8 1995 and in New York on 26 September 1995".

From this one may conclude that THERE WAS NEVER ANY mention of the fact that the structure of the Entities will be altered with the final peace agreement, in relation to the constituent status of the peoples.

This is also where the challenged part of the Preamble that the applicant based his request on is mentioned.

We shall see that in further text. The General Framework Agreement for Peace in Bosnia and Herzegovina, along with Annex IV, (Constitution of BiH) certainly and beyond doubt represents an international treaty known to constitutional law practice.

The Dayton Peace Agreement was adopted in Dayton, Ohio, USA, between 1 and 21 November 1995.

It is clear from the above that, through their representatives, states created in a historical moment of war did take part in the negotiations and the conclusion of the Peace Agreement. They also, *inter alia*, accepted the Constitution of BiH on behalf of their constituent peoples. This is evident in Annex II under Interim Provisions from the statements made on behalf of the Republic of Bosnia and Herzegovina, on behalf of the Federation of Bosnia and Herzegovina and on behalf of the Republika Srpska.

I will quote the statement on behalf of the Federation of BiH, which reads: "Federation of Bosnia and Herzegovina, on behalf of its constituent peoples and citizens, approves the Constitution of Bosnia and Herzegovina contained in Annex IV to the General Framework Agreement".

It is clear and well known that the constituent peoples in Bosnia and Herzegovina are Bosniacs and Croats. There are no indications as to any change in relation to the issue of constituent status vis-à-vis the Washington Agreement.

In the interpretation of the Dayton Peace Agreement, Annex IV in particular, it is evident that the denominations of the newly created Entities were preserved, namely the Federation of BiH and the Republika Srpska. Moreover, it is specific for the Federation of BiH that it preserved part of the name of the state of BiH, i.e. "BiH".

It is also obvious that the Federation was founded through the powers of two constituent peoples, Bosniacs and Croats, as it is obvious who it was that established the Republika Srpska.

The Decision of the Court that I voted against would not have been a problem if the Dayton Agreement had established a "unitary state".

It is clear that this is not so, and I will therefore avoid theorizing from the viewpoint of theories of state and law.

It is manifest that the Federation was not established by Serbs and that the Republika Srpska was not established by Croats and Bosniacs.

But what remains UNCLEAR to me, after the Decision on constituent status of peoples on the entire territory of BiH, how can there still be an Entity named "Republika Srpska". Following our decision, it can only be called, for example, A Republic of Serbs, Bosniacs and Croats.

And would this not be a revision of the Dayton Agreement or even an "abolishment of the Entities". Be that as it may, it suffices to follow the comments of the media, non-governmental organisations and political parties, primarily those seated in Sarajevo, after the adoption of the Decision to know that they all think alike and conclude that this Decision will lead to the ABOLISHMENT OF THE ENTITIES. Among them, there are many who attack the Judges who voted against it, although their wish was probably fulfilled. I do not hold them to be naive and not to know that this would be a revision of the Dayton Agreement.

If so, then we have a proverb that says that "they are making plans without consulting the concerned party". Have we, with the above decision, assumed the powers of the people to alter the Constitution and revise our own Constitution. Time will tell have we brought it INTO CONTRADICTION or not.

It is my duty to safeguard the Constitution and to interpret it at the same time.

In order to disperse any doubts as to the Dayton Peace Agreement NOT ALTERING the issue of the constitutionality of peoples but rather that it remained the same, I include in my Separate Opinion the "Agreement on Implementation of the Federation of BiH", adopted in Dayton on 10 November 1995.

This protocol is beyond any doubt an integral part of the General Framework Agreement for Peace.

Item 1 of the General Principles reads – I quote: "Full implementation of the Federation of BiH is an important precondition for peace in BiH. Without a strong, fully functioning Federation, as one of the two constituent Entities of BiH, the Dayton close talks cannot

result in a lasting peace solution. Twenty months following the adoption of the Constitution of the Federation, the process of strengthening the Federation and building confidence between ITS CONSTITUENT peoples has not yet yielded satisfactory results".

There follows a recommendation as to what the constituent peoples in the Federation should have done but had failed to so.

However, what is important is that THERE IS NO mention of a third constituent people in the Federation.

This Agreement is detailed and it was signed in the presence of international witnesses. This Agreement, Section II (Decisions) under a) Item 8, states: "Ministers, Deputy Ministers and staff of the Ministries must not perform duties in both Governments (referring to the Government of BiH). Ministries must be adequately staffed. Within one month from the date these legal proposals are adopted, relevant Ministers and their Deputies will appoint their staff anew. Composition of the staff MUST REFLECT THE COMPOSITION OF THE PEOPLE".

Again there is NO MENTION of a third people. Not only that, but there is a clear requirement that it "must reflect the composition of the people".

A corresponding action followed afterwards and the said Ministries do reflect the composition of the people, but in the way as provided for in the Dayton Agreement. Messrs. Alija Izetbegović and Krešimir Zubak signed this Agreement, with a closing statement that reads: "President of the Republic of Croatia supports the provisions of this Agreement and will assist in its full implementation".

This last quote is a sufficient illustration as to who are the constituent peoples in the Federation, for if Serbs were constituent as well, then somebody from their side should have also "support the provisions of this Agreement".

An integral part of this Protocol is the Annex to the Agreement on the Implementation of the Federation of Bosnia and Herzegovina, adopted in Dayton under the title "Agreed Principles on the Interim Statute of the City of Mostar".

Item 8 of this Statute lists the composition of the City Council, which was to manage six City Municipalities. Based on the principle of parity, the same number of seats was envisaged for Croats and Bosniacs, and one part for "Others".

The Decision of the Court I voted against violates this principle as well, but I do not mention this for the sake of this particular problem alone, but rather to indicate that analysed legal and factual materials demonstrate beyond any doubt that constituent peoples in the Federation of BiH are Bosniacs and Croats.

However, all that I have presented and substantiated indicates undoubtedly that the applicant before the Court, whose application was granted, knew quite well what he was signing and what the meaning of the Dayton Agreement was in relation to the constituent status of peoples.

This illustrates the fact that his application, which has been ruled upon, was his personal, REVISED POSITION. This is in short all vis-à-vis the heading "What preceded the adoption of the Dayton Peace Agreement and the Agreement".

TO SUM UP, I may conclude that this is "MORE THAN ENOUGH" as argumentation of the disputed issue and that it is sufficient for the interpretation of my personal position, as a lawyer and Judge of the Constitutional Court.

I may be even "impolite" and say that after the elaboration which I have presented and which is authentic, I should not continue elaborating the reasons for voting the way I did.

But as I said that I would present my arguments in three phases, I shall proceed with the second one:

2. WHAT OCCURRED FROM THE ADOPTION OF THE DAYTON PEACE AGREEMENT UNTIL THE INSTITUTION OF THE PROCEEDINGS ON THIS CONSTITUTIONAL ISSUE

The final Article of the Constitution, namely Article XII titled Entering into Force, Item 2, provides that essentially the Entities are obliged to conduct an amendment procedure and alter their Constitutions in order to ensure conformity with the Constitution of BiH, no later that three months from the date on which the Dayton Agreement enters into force.

For the sake of the lack of knowledge of the subject matter both by general public and some experts, I would like to mention here a gathering held by non-governmental organisations on 20 June 20 2000, attended by the applicant's counsel and experts and others, where only one decision was advocated and it was, with no dilemma, a positive one; that is, *in favour*.

It is also characteristic that the President of the Club of Bosniac Intellectuals stated explicitly that the "Constitutions have never been reconciled from Dayton until today".

I do not respond to that gentleman's assertion, I just give an example that most people, particularly those who follow the Sarajevo media, DO NOT EVEN KNOW that the Constitutions of both Entities were reconciled in 1996.

How would they know if the above mentioned professor did not know? In any event, the rule of manipulative propaganda is to avoid whatever may be damaging to the programmed propaganda.

Those who are interested will bear to read this.

Pursuant to provisions of Article XII, Item 2 of the Constitution of BiH, in both Parliaments, the Entities reconciled their Constitutions with the Constitution of BiH.

Whether they reconciled them well or not is another question.

The Constitution of the Federation of BiH was reconciled on the basis of a proposal by the Constitutional-Legislative Commission, presented to the Parliament by Prof. Dr Kasim Begić on 5 June 1996. The proposal contained 36 Amendments.

Regarding the challenged issue of constitutionality of the peoples in the Federation, the proposal was that Bosniacs and Croats were constituent peoples in the Federation of BiH.

Results of the vote were as follows:

ALL *in favour*, none abstained, NO ONE *against*.

Should it not be considered what this means. Absolutely yes, if the truth is seen benevolently.

The truth is that all voted *in favour*; the truth is that most of the members of the Parliament were from the two leading parties, SDA and HDZ; the truth is that there were Serbs and members of other parties among the members of the Parliament and that they all voted UNANIMOUSLY that the constituent peoples of the Federation were Bosniacs and Croats.

Again, NO MENTION of a third constituent people.

However, further logical deduction inevitably leads to the following conclusions:

a) That this truth was logical since there was no doubt in the interpretation of the Dayton Peace Agreement which had been in place approximately six months earlier. Therefore, the MEMORY WAS FRESH AND FOUNDED.

b) That the applicant knew all this quite well since members of his party, SDA, of which he is the president and who were the majority in the Parliament, all voted *in favour* unanimously.

c) There are further truths and those are that most of the representatives and expert counsel in this case took part in the interpretation of the Dayton Agreement in different ways: as counsels, experts or at other public forums at the time, and that at that time their OPINION was DIAMETRICALLY OPPOSED to the one they presented at public hearings before this Court.

Since there cannot be TWO TRUTHS about one single fact, the question arises as to what is the real truth for there can only be one – be it the first one, fresh in time and memory, or the latter one, accepted in this Court's Decision.

I would like to note here that some of the counsel and experts who CHANGED THEIR OPINION had also been experts in Dayton and in the applicant's team. I should not and wish not to offend anyone, but in the interest of truth I must define the conduct of the above mentioned individuals as a classic revision of personal, political and legal positions.

These are CONVERTS. This notion is recognised in politics and it bears a deep content. However, I dislike it in lawyers. Both I and my colleagues who voted against this Decision are being mercilessly attacked, insulted and threatened. They themselves are a disgrace.

I will also say this: converts do not like consistent people, as they remind them of their own conscience. I will also say and, unfortunately, later illustrate that there have been converts in the Court as well. Certain things need to be uncovered in order to protect the integrity of the Court and my own.

Once the first elaborated heading on the interpretation of the Dayton agreement is seen as a logical whole, does all the above not indicate what the real truth is. In 1996, no one questioned the unanimous decision of the Parliament since it was BEYOND QUESTIONING.

That is why a question arises as to what had changed so that it was later possible “for one truth to be replaced by another”. For me, this is impossible.

The above are positions and actions of official participants to the events related to the obligation of reconciling the Entity Constitutions, primarily in the Federation of BiH, with the Constitution of BiH in relation to *ius cogens* provision of Article XII, paragraph 2 of the Constitution of BiH.

These events were CAREFULLY monitored by the international community, in particular through the Office of the High Representative, at the time Mr. Carl Bildt.

And in relation to this very issue of the CONSTITUTIONALITY OF THE PEOPLES in BiH, THE INTERNATIONAL COMMUNITY TOOK A POSITION. At the time, the position was UNDISPUTED and it was as follows: BOSNIACS AND CROATS ARE CONSTITUENT in the Federation of BiH and SERBS are constituent in the Republika Srpska.

The above is evident from the following:

a) On 24 July 24 1996, Office of the High Representative addressed a letter to Messrs. Alija Izetbegović, President of BiH, Krešimir Zubak, Mariofil Ljubić, Speaker of the Constitutive Assembly of the Federation, and Momčilo Krajišnik, Speaker of the Assembly of the Republika Srpska.

The letter read - I quote: “I have the pleasure of forwarding to you the opinion of the Venice Working Group in reference to the compatibility of the Constitutions of the Federation of Bosnia and Herzegovina and the Republika Srpska with the Constitution of Bosnia and Herzegovina. Translation of the opinion will soon follow.

Although the Commission confirms that both the Federation and the Republika Srpska have invested considerable efforts to bring their Constitutions into conformity with the Dayton Agreement, detailed analyses of these provisions demonstrate that such conformity has not yet been achieved.

Accordingly, I expect the legislature of both Entities to adopt the next set of Amendments to their Constitutions before elections in September. I would like to be informed no later than 12 August on the steps you intend to take in light of the report by the Council of Europe.

In order to speed up the process of adoption of the necessary amendments, I have suggested to the Council of Europe that members of the Working Group of the Venice Commission should come to Bosnia and Herzegovina and assist both Entities in drafting their amendments.

Sincerely,
Carl Bildt"

Therefore, the High Representative admitted the fact that considerable efforts had been made in the process of reconciling the Constitutions, but that certain provisions of the Entity Constitutions had not yet been reconciled.

It is clear from the above that the "opinion of the Venice Working Group" was binding. Also, members of the Venice Commission Working Group were to come to BiH to assist in finalising the amendment procedure on the said reconciliation, and that they were to submit the said opinion once the translation had been completed.

b) I hereby quote in full the opinion of the European Commission for Democracy through Law called "The Venice Commission« in the introductory part:

"Strasbourg, 5 July 1996

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINION ON COMPATIBILITY OF CONSTITUTIONS OF THE FEDERATION OF BOSNIA AND HERZEGOVINA AND THE REPUBLIKA SRPSKA WITH THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

Approved by the Working Group on the basis of contributions made by

Mr. Joseph MARKO (Austria)

Mr. Jean-Claude SCHOLSEN (Belgium)

Mr. Jacques ROBERT (France)

Mr. Sergin BAROTLE (Italy)

Mr. Jan HELGESEN (Norway)

Mr. Andreas AUER (Switzerland)

Mr. Ergun OZBUDUN (Turkey)

And following a discussion at the meeting of 27 July 1996 held with representatives of the Office of the High Representative, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina".

Furthermore, the introductory part of the report shows what duties were placed before the Commission by the High Representative, in order to say "the following particular documents were used as basis for the opinion:

- The Dayton Accords, particularly Annex IV containing the Constitution of BiH,

- Constitution of the Federation of BiH as part of the Washington Agreements (Document CDL(94)28,

- Amendments to the Constitution of the Federation of BiH, adopted on 5 June 1996 (CDL(96)50) as well as some amendments annexed to the document CDL(96)50 over which no agreement has yet been reached,

- Constitution of the RS, as amended (document CDL(96)48)".

The introduction quoted above, which I have not quoted in full for that would have been redundant, makes it clear who were the members of the Working Group, that they had a meeting on 27 June 1996 with representatives of the Office of the High Representative, Bosnia and Herzegovina and the Federation of BiH, and that this opinion was binding etc.

It ensues from the composition of the Working Group that it was comprised of seven members and that it was headed by Mr. Joseph Marko from Austria, also a Judge of the Constitutional Court and the judge-rapporteur in this case.

I wish to note that I learnt this "by accident" in the spring 1999 from a newspaper headline.

As I was holding the office of the President of the Court at the time, it was my duty to inform the Court of this, more so since this was followed by a request from the People's Assembly of the Republika Srpska as a party to the proceedings, that Judge Joseph Marko be excluded from the proceedings.

However, I shall return to this later, as I need first to elaborate the position of the Venice Commission.

Following the introduction, the Venice Commission continues with the following heading: MAIN OBJECTIONS and provides in a very analytical, systematic and logical way a synthesis and crucial answers to the following questions:

1) In the amendment procedure that had already taken place in the Parliament, what was BROUGHT INTO CONCURRENCE with the Constitution of BiH CORRECTLY, and

2) WHAT WAS NOT?

What I found interesting, and other Judges certainly should have also (although I do not know if the public will be interested AS WELL), is what is the position regarding the issue of the CONSTITUTIONALITY OF THE PEOPLES IN BiH.

This position is clear and undisputed and, as I stated in the introduction to this analysis and I repeat once again, resolved in such a way that the constituent peoples in the Federation of BiH are BOSNIACS AND CROATS, and SERBS in the Republika Srpska.

This is why: Before I move to Item I.1, as modified by Amendment III, the report said that the Constitution of BiH and the Constitution of the Federation of BiH as part of the Washington Agreement are "more of an international law than a constitutional text" and that in its nature it is "more contractual than normative". That the Constitution of BiH, without explicitly noting it, envisages a federal state for it defines two Entities as constituent parts of BiH etc. The sub-heading, which reads as follows: Item I.1, having been modified by Amendment III, *inter alia*, provides that an allusion to Bosniacs and Croats as "constituent peoples in community with Others" is realistic and IS NOT IN CONTRAVENTION to the Dayton Agreement.

It then proceeds to say that this should be observed from a historical point of view in light of the 1974 Constitution, and even the 1910 Constitution, "that it is quite correct that the FEDERATION IS DEFINED AS THE ENTITY OF BOSNIACS AND CROATS AND THE REPUBLIKA SRPSKA A NATION STATE OF THE SERB PEOPLE".

With this, I would like to end my elaboration and say that my position as a Judge is absolutely IDENTICAL to: the position taken by the international community, as well as the position UNANIMOUSLY ADOPTED by the Parliaments of the Federation of BiH and the Republika Srpska in an earlier amendment procedure.

It is obvious that the Venice Commission conducted an analysis of the Dayton Agreement and the procedure and decisions on the amendment procedure in reconciling the Entities' Constitutions with the Constitution of BiH and the Constitution of BiH itself.

There is indeed no dilemma here that I took the right position that the Decision of this Court is a "revision of the Dayton Agreement" in a most evident and most delicate form, since it deals with the most sensitive issue of constitutionality of peoples of BiH, and it is in contravention to the position of the international community.

This is also a revision of the position of the international community. That is why I await the opinion of the international community once this Decision is published along with the Separate Opinions attached to it in the *Official Gazette*, since the media have reported that the High Representative would take a position on the issue once the Decision and Separate Opinions have been published.

I also expect that the media, particularly those based in Sarajevo, and other people of good will, will either make statements or "think carefully" about this judicial Decision.

The second phase I would like to elaborate covers a long period of time, as its »evolution« commenced with the institution of the proceedings, with a notable activity of a non-governmental organisation, namely the SGV.

In a public address (the only one since my function as the President of the Court ended), I was forced to respond to the insults and threats that were directed particularly towards the Judges of non-Bosniac nationality, and I said – and I maintain this position – that I support and approve any political struggle of any organisation in a multi-parliament system, but in a way that does not go beyond the limits of good will.

Most of all, a struggle must be in compliance with the constitutional system of BiH.

By this I wish to say that I fully respect the ideas of the SGV, later joined by other non-governmental organisations as well as numerous political parties.

SGV held a round table titled "Declaration on the Human Right to Political and National Equality" on 14 June 1997 in Vogošća. A number of distinguished citizens took part in this meeting, and when I read the proceedings published in November 1997 in Sarajevo, I noted that Mr. MICHAEL STEINER gave a speech on the last page.

Mr. Steiner, who was an assistant to the High Representative at the time and who is currently an advisor to the Chancellor Schroeder in FR Germany, needs no special introduction. In his address, Mr. Steiner welcomed the ideas of the Declaration, but he said: "According to its Constitution, this State is organised <u>on the principle of consensus</u>. After the war, this is probably the only way to organise a common state".

I further quote the crucial part of Mr. Steiner's presentation, as follows:

"An integral part of Dayton is what was agreed upon, and I believe that this was in September 1995. And it was quite clear then that BiH would comprise of the Federation and the Republika Srpska. I must say that the vision at the time was that the Republika Srpska was seen as an Entity that would organise the Serbs, and the Federation would organise Bosniacs and Croats. Strategically, it was a high price for peace. That was a kind of middle step, which led to Dayton later. We have just left Sintra behind us. In my opinion, the most important part of Sintra is a short sentence at the very beginning of the Declaration, mentioning two multi-ethnic Entities as components of Bosnia and Herzegovina. This Declaration, in reality, OFFERS SOMETHING THAT IS <u>A CONSTITUTIONAL NUCLEAR BOMB</u>, for if we look at the development of events and if the Entity Constitutions were brought into harmony with the Constitution of Bosnia and Herzegovina and if there is mention of three peoples plus Others, I do not see WHY SHOULD YOU CALL IT AN ENTITY, EVEN THE REPUBLIKA SRPSKA".

I am convinced that Mr. Steiner was undoubtedly very familiar with the Dayton Agreement and thus the Constitution of BiH etc., so that his words have a particular RELEVANCE.

Not only that I am convinced of the truthfulness of Mr. Steiner's thinking, I am also CONCERNED by such thinking, particularly the idea that WHAT IS OFFERED IS A CONSTITUTIONAL NUCLEAR BOMB.

I wonder what our Decision represents. I hope that Mr. Steiner will be proven wrong, but dilemmas remain. If this significant statement by such an eminent individual is true, which I do not doubt, and when I establish logical links with everything I have discussed here, I conclude again that my vote was founded and that the Decision does represent, as repeated so many times, a REVISION of the Dayton Agreement.

I would thus like to end my presentation on the "second phase" on events in the time period from the Dayton Peace Agreement to the institution of proceedings on this constitutional issue.

The third phase is titled:

3. PROCEEDINGS AND DECISION-MAKING UPON THE CONSTITUTIONAL DISPUTE INSTITUTED

In relation to the proceedings, I will generally say that, as stated in the Decision, it was initiated in February 1998, regarding this Partial Decision (the third one in this case), and it was ended on 1 July this year.

Pursuant to Article VI Item 3 (a) taken in conjunction with Article XII Item 2 of the Constitution of BiH, the applicant (Chair of the BiH Presidency) had the right of action to institute proceedings.

The proceedings progressed through a number of sessions and three public hearings of the Court, as provided in the Decision.

At the end of this presentation I will produce certain objections that I believe should have been elaborated in the Decision, precisely because of the principle of contradiction of proceedings in relation to the parties to it, and which should not have been evaded.

This means that I will *a priori* speak of my substantive-legal view and the reasons for my position on the merits of the case that resulted in my already known vote.

As this Separate Opinion has already been extensive, but so is the nature of this matter, one may note that I do not present the claims of the parties to the proceedings since they were presented in the Decision, but rather my position allows one to conclude which claims I hold to be founded or not.

The applicant's claim certainly "tried" to prove, in relation to the issue pertaining to Articles 1 of both Constitutions, that what arises from the Constitution of BiH is that the Entities' Constitutions are not in concurrence with the Constitution of BiH in this part.

The applicant founded his claim primarily on the last line of the Preamble to the Constitution and, through his actions at hearings, he was trying to use »events taking place in the field« to prove discrimination and substantiate his claim by using statistical indicators.

I have no intention of providing a detailed elaboration of the claims and counter-claims of the parties to the proceedings, as my main task is to give decisive reasons and indicate that my vote in this matter was founded through the interpretation of the Constitution of

BiH and certainly with the assistance of other decisive arguments. I will now move to specific analysis of the Constitution of BiH.

I would like to note here that, for the sake of the CHRONOLOY of the events as they occurred, at the very first phase of elaboration of the key reasons I indicated the clear and undisputed sense of the Dayton Agreement, supported by factual-legal arguments. Therefore, this is an explicit citation of the arguments indicating what is the CORRECT INTEPRETATION of the Dayton Agreement and thus of Annex IV – Constitution of BiH in relation to the issue of constitutionality of peoples. Moreover, in that part I said that I could have finished with an elaboration which indicates that my position is founded.

The second phase demonstrated yet again the CORRECTNESS of my interpretation. This is so for IT WAS BEYOND DOUBT, as the Parliament of the Federation and the People's Assembly of the Republika Srpska had already resolved this issue. I do not know precisely if the Parliament of the Republika Srpska resolved this issue unanimously or not. But I do know that on 5 June 1996, at the Federation Parliament, this issue was resolved UNANIMOUSLY. Most significantly, this issue of the constitutionality WAS RESOLVED by the international community in the method that I have already elaborated upon.

I could have certainly ended there since I have supplied plenty of crucial reasons for my position. I will nevertheless provide an analysis of the Constitution of BiH, which could ITSELF have provided all the answers and key reasons that would again found the correctness of my vote.

In the methodology of the elaboration of my Separate Opinion, I could have followed a reverse order, i.e. I could have started from the Constitution, which would have been enough, and then elaborated the two phases.

The Constitution of BiH bears the title: the Constitution of Bosnia and Herzegovina. The title is followed by a Preamble, and the normative part of the Constitution follows further. The Preamble has nine indented lines. The said lines start with words: "pursuant to, committed to, convinced that, desiring to, guided by, determined to, firm, inspired by and recalling".

I would like to suggest to the reader of this Separate Opinion to read this Preamble and the said lines carefully.

One reading will be sufficient to see that the Preamble itself has a "political-declarative" character.

In short, if it has a political-declarative character, it does not have a normative one.

The question whether the Preamble is an integral part of the Constitution of BiH or not was constantly discussed at the sessions of the Constitutional Court on this case, and "swords were crossed" on the level of sophisticated theoretical-academic analyses. You will certainly find that in both the Decision and in the Separate Opinions by my colleagues.

I have already said that I would and I continue to simplify the answers to this question. Thus, the last line of the Preamble in the ORIGINAL reads: "RECALLING the Basic Principles agreed in Geneva on 8 September 1995 and in New York on 26 September 1995; Bosniacs, Croats, and Serbs, as constituent peoples (in community with Others), and the citizens of Bosnia and Herzegovina hereby determine that this Constitution of Bosnia and Herzegovina is as follows:"

Why did I note "in the ORIGINAL"?

I must confess that throughout this consideration, I as well as most other Judges SEPARATED THIS LINE INTO TWO. Namely, if you look above, you will see that it contains two paragraphs (one starting with RECALLING, and the other with Bosniacs).

However, the original of the Constitution is the first original that the Court received from the OHR, and it is quite clear in it that the first word of each line starts with BLOCK LETTERS. Thus the last line contains two paragraphs, which is even more apparent when the first paragraph ends with punctuation marks – full stop and semi-colon.

On the contrary, other printed constitutions also FAILED to provide a correct interpretation of the original.

You will see in the presentations of Judges that my "observations" are absolutely correct. For instance, Judge Hans Danelius, who voted *in favour*, submitted his Separate Opinion on his dissent regarding the opinion that this Preamble has a normative character. Therein, he analysed the challenged part of the Preamble in such a way so as to treat it only through the SECOND PARAGRAPH (sub-heading II: IN RELATION TO ARTICLE 1 OF THE CONSTITUTION OF RS). This is evident under (b).

It is absolutely clear that this second part of the Preamble (second paragraph) DOES NOT HAVE A NORMATIVE CHARACTER. It would be unnecessary to talk about what a norm is as lawyers know that very well, but for something to be a norm, it must first have

a legal-normative expression which lays down a "rule of conduct". For a norm in its nature must determine, impose or restrict certain obligations.

ON THE CONTRARY, I would like to ask you again to read the second paragraph of the Preamble and you will draw from it the conclusion that it merely determines THOSE who adopted and proclaimed the Constitution of BiH. Bosniacs, Croats and Serbs are designated as constituent peoples in community with Others, but it determines that all of them passed the Constitution of BiH.

BUT it is neither evident nor indicated WHERE they are constituent. This means that there is definitely nothing else, save that it may be accepted that it was so written and that it is evident in Annex 2 to the Constitution "who the parties to the proceedings are". So, this is merely a repetition of what was regulated at the end by Annex 2 – reference to parties to the proceedings.

Therefore, such wording of the said provision DOES NOT CONTAIN any legal norm that specific rights or obligations may arise from.

I have spoken of how the Court and I, however erroneously, focused on the second paragraph of the said indented line 9. (It has already been said that some constitutions gave an erroneous interpretation of the said line, and NOT as in the original supplied by the OHR.)

When I noted that the said part of the Preamble contained two paragraphs and that it was a single unit, I could have presented a different thesis. Namely, I could say that when RECALLING the General Principles agreed in Geneva on 8 September 1995, and in New York on 26 September 1995, one may say that the term "recalling" in fact means that the peoples listed in the second paragraph are reminded and it is RECOMMENDED to them that they should follow the said principles, which I have already discussed in this Separate Opinion.

If this is so, then one may discuss a "deeper meaning of this line" and say that it also indicates who is constituent where, for I used this in that part of the Opinion as an argument for my vote, linking events and General Principles from Geneva and New York with the adoption of the Dayton Agreement.

I would thus conclude that this "recommendation" and a "reminder" support even further my claim that there is NO DOUBT that the disputed issues of constitutionality are not in concurrence with the Decision. ON THE CONTRARY, one may conclude from

the Preamble, provided both paragraphs are accepted, that it does precisely determine the same as determined by the Entities' Constitutions in relation to the constitutionality of peoples.

Analysis conducted so far has covered THE FIRST aspect of interpretation of the Preamble, which is also the most important one. THE SECOND aspect of this deliberation for any reasonably well educated lawyer is the issue *IN DUBIO* (disputability) of this part of the Preamble.

Can such a "decision of life-affecting importance" for the constituent peoples in BiH be adopted on the basis of such a "disputable" Preamble?

Such a Preamble, *in dubio* at the very least, should be considered in relation to the second paragraph when giving a proper interpretation based on the arguments I have elaborated upon in the "three phases" of events, and then the case would be, as I have already said, VERY SIMPLE. A logical interpretation of the Preamble, with all the above, should have linked it with the normative part of the Constitution, which has 12 Articles and 2 Annexes, and then see that what arises from the normative part of the Constitution of BiH is:

1) That the Constitution, which sets forth the government, judiciary and institutions at the level of BiH undoubtedly speaks of a TRIAD – a tripartite representation in the said authorities.

2) That the Federation of BiH PARTICIPATES with 2/3 of the power in this tripartite division, and the Republika Srpska PARTICIPATES with 1/3 of the power, or to put it better, representation (for one and the other).

3) This tripartite division stated under 2) is not a tripartite division by the Entities but on the national – and thus the CONSTITUENT character of government and representation.

This is evident from the following:

a) Article 4 of the Constitution of BiH, titled Parliamentary Assembly (the first Article that in sequence regulates the organisation of government).

Therein, under HOUSE OF PEOPLES, Item 1 states – I quote:

The House of Peoples shall have 15 delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).

It is therefore absolutely clear and beyond any doubt that this provision determines not only the tripartite division in the national, but also in the TERRITORIAL sense.

Furthermore, this means that only the members of the constituent peoples may be elected for this highest parliamentary body following a national key. The most important is that they may be elected from the "territory where they represent a CONSTITUENT NATIONAL CORPS".

The House of Representatives under 2), which comprises 42 members, follows the principle of 2/3 versus 1/3. There is a possibility for electing members of other peoples for this body.

b) Article V, titled Presidency. I quote the said provision: *The Presidency of Bosnia and Herzegovina shall consist of three members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.*

To avoid repetition, "the same formula" is evident here as in elections for the HOUSE OF PEOPLES.

c) Article V, Item 4 titled Council of Ministers

This is what the said provisions sets forth under b), after elaborating the way of electing members to the Council of Ministers – I quote:

NO MORE THAN TWO-THIRDS OF ALL MINISTERS MAY BE APPOINTED from the territory of the Federation. The Chair shall also nominate Deputy Ministers (who shall not be of the same constituent people as their Ministers) who shall take office upon the approval of the House of Representatives.

Analysis of the said provision on one hand leads us to a conclusion that the same formula or the same key was used in relation to representation (2/3 vs. 1/3).

However, on the other hand, the CONSTUTENT PEOPLES are referred to for THE FIRST TIME with the election of Deputy Ministers, and it is obvious, when linked with the participation of power ratio, that these constituent peoples are Bosniacs and Croats from the Federation and Serbs from the Republika Srpska. I shall remind you here that during the implementation of the Court's Decision on the Council of Ministers some tried to deny the parity, among them the applicant in this case, despite the fact that this parity is undisputed in this provision.

d) Article VI, Item 1 titled CONSTITUTIONAL COURT:

Ratio-parity of Judges is the same as in the institutions I analysed earlier. Of domestic Judges, four are elected by the Parliament of the Federation of BiH and two by the Republika Srpska. Therefore, the formula is again 2/3 vs. 1/3.

There is indeed no mention here of national origin, but when one looks at Article IX, Item 13 titled General Provisions, it reads and I quote: *Officials appointed to positions in the institutions of Bosnia and Herzegovina shall generally reflect the composition of the peoples of Bosnia and Herzegovina*. So, again "the same story" and this was the way the Judges were elected.

e) Article VII, Item 2, titled Central Bank, states: The way of electing the Governing Board of the Central Bank, consisting of a Governor (foreign) and three members elected in the following way – I quote: *three members appointed by the Presidency, two from the Federation (one Bosniac and one Croat who shall share one vote) and one from the Republika Srpska*.

Hence, ONCE AGAIN the same formula of representation on a national key on one hand and territorial key on the other are being applied.

I think that it would be far too long to comment on this, for it is so evident and clear that I sometimes wonder why I had to give such long and extensive comments.

I have already said that the normative part of the Constitution of BiH and its analysis would explain the "unclear Preamble, paragraph 2 in particular", as that is the only possible option, since this is the part that sets forth obligations and rights. I have also said that a state's constitution is determined by "the power of the people". In this case it is the power, first of all, of the constituent peoples who determined the Constitution in its essence in Dayton, Ohio, USA, November 1-21, 1995, in a way as I have quoted and analysed. It is clear from the Constitution who the constituent peoples of BiH are and in what territory, as the Constitution of BiH clearly determined this "by reference".

These provisions are straightforward and undoubtedly indicate that there are three constituent peoples at the State level, and they are represented from the territory of two Entities since they are constituent peoples there. The parity of representation at the level of the State based on the 2/3 vs. 1/3 formula also arises from their constituent status.

I believe that once this Separate Opinion is linked to a whole through analytical, systematic and logical interpretation, I had no reason to dwell on how I should cast my vote.

So, I did not or we did not, as we are attacked by the media, and individuals, replace law with politics; on the contrary, such a campaign is a “switch of concepts”.

During our proceedings, there were also considerations of “events taking place in the field”.

There were suggestions to examine the situation on the ground, to examine discrimination on the ground, but most of all it was mentioned that “if all three peoples are not constituent in all of BiH”, that prevents the return of refugees. This is an outline.

However, the right of each citizen – holder of citizenship of BiH – is the SAME RIGHT irrespective of nationality. Article II of the Constitution of BiH under the heading HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS prescribes very strictly a catalogue of these rights and obligations.

On the other hand, the right of refugees to return is also regulated in detail in Annex 7 to the Dayton Peace Agreement.

Therefore, the Dayton Peace Agreement, and the Constitution of BiH in particular, safeguards all rights – individual and other – of each citizen of BiH, irrespective of nationality.

I am not unfamiliar with the fact that these rights are often violated in everyday life and are not, unfortunately (at least for the time being), implemented as prescribed by the highest legal act – the Constitution of BiH.

However, as a Judge, I CANNOT alter the Constitution because of that, primarily as I am not a constitutional legislator; the main task of a Judge is to interpret the Constitution, laws and regulations, and thus to control them in accordance with the powers of this Constitutional Court.

Within his/her work, a Judge of the Constitutional Court does not have the power to be, for instance, an operative on the ground, a police officer or something similar.

I would like to offer a thought here, known in the history of many countries, that the Constitution, laws and regulations are ENFORCED BY THE GOVERNMENT, meaning that they are not enforced by the Constitutional Court. History of states illustrates that “good laws protected by constitutions” were often not well enforced by the governments on the ground.

To sum up, this cannot be the reason for the Constitution to be altered in the domain of this disputed issue. Another thing, I am not in favour of the "glorification of the rights of a citizen who is constituent versus a citizen who is not constituent", for the rights and freedoms of each citizen of BiH, as listed in the catalogue of rights, are protected IN AN IDENTICAL WAY.

Since the Decision does not contain two important aspects of procedure during sessions and public hearings, although the Editorial Board has been alerted to this, as a Judge I feel an obligation to elaborate on it as well. These issues must have been answered by the Decision.

1) The first public hearing was held in September 1998, and some of the parties to the proceedings failed to appear. Counsel and experts in support of the application, however, did appear. The applicant's counsel presented written and oral evidence on the proposals of the application.

In brief: the proposals were primarily directed toward examining the situation on the ground and statistical indicators.

In the presence of all the parties to the proceedings, at a public hearing in Banja Luka held on 23 January 1999, the counsel repeated these proposals and the Court dismissed them. As this was published, and it was I who did it while acting as the Chair of the Hearing, and since the position on this issue CHANGED (changed again) later and the Decision does not refer to that, it is my obligation to rationalise it.

Even after the end of the public hearing, where all the tendered evidence and proposals were dismissed together with the proposed evidence in writing by Judge Kasim Begić with a vote 7:2, the applicant's counsel proceeded with forwarding written proposals and statistical records of the same content as the dismissed proposed evidence.

Despite this, in his submissions (there were several) until the final pre-draft that followed as late as the end of December 1999 and the final Draft Decision, the judge-rapporteur proceeded with the elaboration of the dismissed evidence.

I warned that an action contrary to the decision of the Court on the dismissal of the said evidence was a "contempt of the Court". However, this continued, and at the last session on deliberation and voting, there was a proposal to REPEAT the voting "on the same issue".

Interestingly enough, the position of the Court was “changed” – Judges voted 5:4 in favour of this evidence to be taken into consideration. This specific ratio of votes is interesting inasmuch as was used for manipulation by those who persist in insulting, attacking and threatening us relentlessly ever since the adoption of the Decision.

2) The Editorial Board requested that this Decision should note that the People’s Assembly of the Republika Srpska had requested the exclusion of two Judges and that the requests were denied. Since the suggestions of the Editorial Board were not accepted, again I have an obligation to elaborate, for the same reason as before.

In our positive law, as it is known to any lawyer working either as a judge or a representative in legal matters, a request for the exclusion of a judge and a decision on such a request need to be elaborated upon, either in a separate document or in a final decision.

I am forced to elaborate upon this, so I will say the following:

a) In the spring of 1998, a request was submitted for the exclusion of Judge Joseph Marko, the judge-rapporteur in this case, the reason being that he had taken part in the work of the Venice Commission, whose opinion I have already elaborated upon. The request was filed by the People’s Assembly of the Republika Srpska in the capacity of a party to the proceedings.

b) Immediately prior to the session scheduled for 18 and 19 February 2000, a request was filed again for the exclusion of Judge Joseph Marko, and it was dismissed again (perhaps the party was unaware that the first request had been dismissed).

However, a request was received for the exclusion of the President of the Court, Prof. Dr Kasim Begić, who participated as an expert in Dayton in the adoption of the Dayton Peace Agreement and who took part in the amendment procedure of the Constitutional Assembly of the Federation of BiH in the process of reconciling the Constitution of the Federation of BiH with the Constitution of BiH.

This request was dismissed as well.

It is interesting that the requests were for the exclusion of two Judges who had PREVIOUSLY had a position identical to that of the People’s Assembly of the Republika Srpska as party to the proceedings.

This is not only interesting, but also “paradoxical”. The reader may draw his/her own conclusions.

As I have said, since the parties to the proceedings received no reply and there was no explanation as to why the requests had been dismissed, they could do nothing but "think" about this issue. More so since I insisted on the obligation of entering this into the Decision, and when that was rejected, I said I would add this in a Separate Opinion.

It is beyond dispute that Mr. Joseph Marko did take part in the work of the Venice Commission as a member of the Expert Group, and that that group – the Venice Commission – elaborated the constitutionality in a way which is CONTRARY to the final vote of this Judge.

However, a more relevant question is can a person who took part in the interpretation of the Constitution of BiH in relation to the constitutionality decide later on the same issue as a Judge?

On the other hand, Prof. Dr Kasim Begić had two aspects of his work concerning the Constitution of BiH, as follows:

a) He was an expert in the applicant's team in Dayton, and

b) He was Chair of the Constitutional-Legal Commission that suggested, in relation to the disputed issue, that Bosniacs and Croats were constituent in the Federation of BiH, meaning that Serbs are constituent in the Republika Srpska.

I have already elaborated on how this issue was resolved, i.e. the proposal of the said Commission was accepted unanimously.

So, there are two reasons. In our positive law, participation in the drafting of a contract DOES NOT LEAVE AN OPTION for such a person to be a judge in the same case, only a potential witness. That is all as far as Dayton is concerned.

I will not analyse the second reason, active participation in the amendment procedure at the BiH Assembly on 5 June 1996, as I have already dealt with that.

He was, at the same time, a member of Parliament, i.e. a person sworn to his duty, just like he is now, in the function he currently performs.

However, I will say that the issue is exactly the same, and as a person sworn in, he VOTED DIFFERENTLY on that issue.

This indeed needs no further comment save one: In the introduction I said, and I quote: "in relation to the procedural, first of all 'formal' decision, I have no objections".

I said I would elaborate later, so I am doing that now: What I have analysed so far vis-à-vis the exclusion will or may leave a "shadow" hanging over the Decision of this Court.

This dilemma PUTS INTO QUESTION THE VALIDITY OF THIS DECISION.

As I have already said and elaborated upon, I would like to issue a reminder that the counsel and experts have CHANGED their position on the same issue. I offered an enigma of the impossibility of "two truths", for there can only be one.

Unfortunately, this has also happened within the Court.

This Separate Opinion leads one to conclude that not only that I voted AGAINST the application, but I also qualified it as a REVISION of the Constitution of BiH, and thus of the Dayton Agreement.

I am aware of this qualification and, speaking in conditionals, »if I am right«, and I think I have provided sufficient arguments for that, I will say something on the conceivable consequences.

1) If all the three peoples are constituent in the territory of BiH, as the Decision reads, a "very difficult" question is then posed here. Is it possible that the Republika Srpska participates in power with only 1/3 at the level of the state of BiH?

If so, that would represent DISCRIMINATION of that Entity from the point of view of equality of the two Entities.

2) Or, to word it differently, a question arises if this could be called the creation of TWO Bosnias and Herzegovinas.

3) In further analogy, what follows is that this "prognosticates" the annulment of the Entities, which was also Mr. Michael Steiner's "prophecy".

In any event, this is what all the media and representatives of political parties have been taking about following the adoption of the Decision.

I do not want to dwell any more on the possible "evil consequences" in this part.

There is another important aspect I must point at.

I said in the introduction that the Decision brought the Constitution of BiH INTO NON-CONCURRENCE. It would be easy to adopt such a Decision if we were the

legislators and if we were able to alter the normative part of the Constitution that I analysed and which dealt with the organisation of the state of BiH.

The Decision on the constitutionality of all three peoples in the territory of BiH places INTO CONTRADICTION the normative part of the Constitution of BiH. It is no longer logical and it becomes absurd, starting from the House of Peoples and onwards.

Will a Decision such as this one create “pressure” to alter the normative part of the Constitution?

I have already said that such a Decision AS AN EXPRESSION OF THE WILL OF THE PEOPLE may be taken only by the Parliament of the State of BiH, pursuant to the envisaged amendment procedure as referred to in Article X of the Constitution of BiH. This is a matter of vital national interest and that is why it required a consensus of the constituent peoples of BiH, however at the level of State Parliament.

I would thus like to end my elaboration of the factual and legal aspects of the Decision and of my personal position, with a note:

I voted as a Judge and not as a member of one people.

Having regard to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Articles 35, 37, 54, 57, 58, 59 and 71 of the Court's Rules of Procedure, the Constitutional Court, at its session held on 18 and 19 August 2000, adopted the following

PARTIAL DECISION

A. Regarding the Constitution of the Republika Srpska:

The Constitutional Court declares the following provisions unconstitutional:

a) Article 68 item 16, as modified by Amendment XXXII,
b) Article 7 paragraph 1,
c) Article 28 paragraph 4.

The applicant's request is rejected with regard to the following provisions:

a) Article 4, as modified by Amendment LVI item 2,
b) Article 80 paragraph 1, as modified by Amendment XL item 1, and Article 106 item 2.

B. Regarding the Constitution of the Federation of Bosnia and Herzegovina:

The Constitutional Court declares the following parts of provisions unconstitutional:

a) Article I.6 (1).

The applicant's request is rejected with regard to the following provisions:

a) Article III.1 (a) as modified by Amendment VIII,
b) Article IV.B.7 (a) (I) through (III) and Article IV.B.8

The provisions or parts of provisions of the Constitutions of Republika Srpska and the Federation of Bosnia and Herzegovina that the Constitutional Court has found to be in contradiction with the Constitution of Bosnia and Herzegovina cease to be in effect from the date of the publication in the *Official Gazette of Bosnia and Herzegovina*.

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

Reasons

I. Proceedings before the Constitutional Court

1. On 12 February 1998, Mr. Alija Izetbegović, at the time Chair of the Presidency of Bosnia and Herzegovina, instituted proceedings before the Constitutional Court for the purpose of the evaluation of the consistency of the Constitution of the Republika Srpska ("Constitution of the RS") and the Constitution of the Federation of Bosnia and Herzegovina ("Constitution of the Federation") with the Constitution of Bosnia and Herzegovina ("Constitution of BiH"). The request was supplemented on 30 March 1998 when the applicant specified which provisions of the Entities' Constitutions he considered to be unconstitutional. The applicant requested that the Constitutional Court review the following provisions of the Entities' Constitutions:

A. Regarding the Constitution of the RS:

a) The Preamble to the extent that it refers to the right of the Serb people to self-determination, the respect for their struggle for freedom and State independence, and the will and determination to link their State with other States of the Serb people;

b) Article 1 which provides that the Republika Srpska is a State of the Serb people and of all its citizens;

c) Article 2, paragraph 2 to the extent that it refers to the "boundary line" between the Republika Srpska and the Federation;

d) Article 4 which provides that the Republika Srpska may establish special parallel relationships with the Federal Republic of Yugoslavia and its Member Republics, as well as Article 68, paragraph 1 which, under item 16, provides that the Republika Srpska shall regulate and ensure cooperation with the Serb people outside the Republic;

e) Article 6, paragraph 2 to the extent that it provides that a citizen of the Republika Srpska cannot be extradited;

f) Article 7 to the extent that it refers to the Serbian language and Cyrillic alphabet as in the official language;

g) Article 28, paragraph 4 which provides for material State support of the Orthodox Church and the cooperation of the State and the Orthodox Church in all fields, in particular for the preservation, fostering and development of cultural, traditional and other spiritual values;

h) Article 44, paragraph 2 which provides that foreign citizens and stateless persons may be granted asylum in the Republika Srpska;

i) Amendment LVII item 1, which supplements the Chapter on Human Rights and Freedoms and provides that, in the case of differences between the provisions on rights and freedoms of the Constitution of the RS and those of the Constitution of BiH, the provisions which are more favorable to the individual shall be applied;

j) Article 58 paragraph 1, Article 68 item 6, and the provisions of Articles 59 and 60 to the extent that they refer to different forms of property, the holders of property rights and the legal system relating to the use of property;

k) Article 80, as modified by Amendment XL, item 1 which provides that the President of the Republika Srpska shall perform tasks related to defense, security and relations with other States and international organizations, and Article 106, paragraph 2 according to which the President of the Republika Srpska shall appoint, promote and recall officers of the Army, judges of military courts and Army prosecutors;

l) Article 80, as modified by Amendments XL and L, item 2 which confers onto the President of Republika Srpska the power to appoint and recall heads of missions of the Republika Srpska in foreign countries and propose ambassadors and other international representatives of Bosnia and Herzegovina from the Republika Srpska,

as well as Article 90, supplemented by Amendments XLI and LXII, which confers on the Government of the Republika Srpska the right to decide on the establishment of the Republic's missions abroad;

m) Article 98, according to which the Republika Srpska shall have a National Bank, as well as Article 76, paragraph 2, as modified by Amendment XXXVIII, item 1, paragraph 2 which confers onto the National Bank the competence to propose statutes related to monetary policy; and

n) Article 138, as modified by Amendments LI and LXV, which empowers the authorities of the Republika Srpska to adopt acts and undertake measures for the protection of the Republic's rights and interests against acts of the institutions of Bosnia and Herzegovina or the Federation of Bosnia and Herzegovina.

B. Regarding the Constitution of the Federation

a) Article I.1 (1) to the extent that it refers to Bosniacs and Croats as being the constituent peoples.

b) Article I.6 (1) to the extent that it refers to Bosnian and Croatian as the official languages of the Federation;

c) Article II.A.5 (c), as modified by Amendment VII, to the extent that it provides for dual citizenship;

d) Article III.1 (a) to the extent that it provides for the authority of the Federation to organize and conduct the defense of the Federation;

e) Article IV.B.7 (a) and Article IV.B.8 to the extent that they entrust the President of the Federation with the task of appointing the heads of diplomatic missions and officers of the military.

2. The request was communicated to the People's Assembly of the Republika Srpska and the Parliament of the Federation of BiH. On 21 May 1998, the People's Assembly of the Republika Srpska submitted its position on the request in writing. The House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina submitted its reply on 9 October 1998.

3. In accordance with the Constitutional Court's Decision of 5 June 1998, a public hearing before the Constitutional Court was held in Sarajevo on 15 October 1998, at

which representatives and experts of the applicant and of the House of Representatives of the Federation presented their views on the case. The public hearing was proceeded with in Banja Luka on 23 January 1999. The applicant was represented at the public hearing by Prof. Dr Kasim Trnka and an expert Džemil Sabrihafizović, the House of Representatives of the Federation by Enver Kreso and an expert Sead Hodžić, the House of Peoples of the Federation by Mato Zovko and an expert Ivan Bender, and the People's Assembly of the Republika Srpska by Prof. Dr Radomir Lukić and an expert, Prof. Dr Petar Kunić. On that occasion, representatives and experts of the applicant, of the House of Representatives and the House of Peoples of the Federation as well as of the People's Assembly of the Republika Srpska, presented their respective arguments.

4. The case was examined at the following sessions of the Court: on 25 and 26 February 1999, 7 and 8 June 1999, 13 and 14 August 1999, 24 and 25 September 1999, and on 5 and 6 November 1999. At its session held on 3 and 4 December 1999, the Court concluded to commence with the deliberation and voting in the present case at the following session, on the basis of a prepared Draft Decision.

5. At the session held between 28 and 30 January 2000, the Court unanimously adopted the first Partial Decision in the case (*Official Gazette of Bosnia and Herzegovina*, No. 11/00; *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 15/00 and *Official Gazette of the Republika Srpska*, No. 12/00).

6. At the session held on 18 and 19 February 2000, the Court adopted the second Partial Decision in the case (*Official Gazette of Bosnia and Herzegovina*, No. 17/00; *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 26/00 and *Official Gazette of Republika Srpska*, No. 31/00).

7. Pursuant to the Court's Decision of 5 May 2000, the public hearing was reopened in Sarajevo on 29 June 2000 on the remainder of the case. Prof. Dr Kasim Trnka and expert Džemil Sabrihafizović represented the applicant; Enver Kreso and expert Sead Hodžić represented the House of Representatives of the Federation, while Prof. Dr Radomir Lukić and expert Prof. Dr Petar Kunić represented the People's Assembly of the Republika Srpska. The representative and the expert of the House of Peoples of the Federation, having been invited to participate according to the Court's Rules of Procedure**,** failed to appear. After the public hearing, the Court reconvened for a session to deliberate, vote and adopt the third Partial Decision in the case on 30 June and 1 July 2000 (*Official Gazette of Bosnia and Herzegovina*, No. 23/00; *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 39/00 and *Official Gazette of Republika Srpska*, No. 23/00).

8. Deliberations proceeded at the Court session held on 18 and 19 August 2000 and votes were taken on the following remaining provisions of the request:

A. Regarding the Constitution of the RS:

a) Article 4, as modified by Amendment LVI, item 2 which provides that the Republika Srpska may establish special parallel relationships with the Federal Republic of Yugoslavia and its member republics, as well as Article 68, which under item 16, as modified by Amendment XXXII, provides that the Republika Srpska shall regulate and ensure cooperation with the Serb people outside the Republic;

b) Article 7 to the extent that it refers to the Serbian language and Cyrillic alphabet as being the official language;

c) Article 28, paragraph 4 which provides for material State support of the Orthodox Church and the cooperation of the State and the Orthodox Church in all fields, in particular for the preservation, fostering and development of cultural, traditional and other spiritual values;

d) Article 80, as modified by Amendment XL, item 1 which provides that the President of the Republika Srpska shall perform tasks related to defense, security and relations with other States and international organizations, and Article 106, paragraph 2 according to which the President of the Republika Srpska shall appoint, promote and recall officers of the Army, judges of military courts and Army prosecutors;

B. Regarding the Constitution of the Federation

a) Article I.6 (1) to the extent that it refers to Bosnian and Croatian as the official languages of the Federation;

b) Article III.1 (a), as modified by Amendment VIII, to the extent that it provides for the competence of the Federation to organize and conduct the defense of the Federation;

c) Article IV.B.7 (a) (I) through (III) and Article IV.B.8 of the Constitution of the Federation to the extent that they relate to the civilian command authority of the Presidency of Bosnia and Herzegovina.

II. Admissibility

9. The Court declared the entire request admissible in its Partial Decision on the case of 29 and 30 January 2000 (*Official Gazette of Bosnia and Herzegovina*, No. 11/00; *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 15/00 and *Official Gazette of Republika Srpska*, No. 12/00).

III. Merits

A. Regarding the Constitution of the Republika Srpska

a.) The challenged provisions of Article 4, as modified by Amendment LVI, item 2 and Article 68 item 16, as modified by Amendment XXXII, of the Constitution of the RS read as follows:

Article 4

The Republic may, according to the Constitution of Bosnia and Herzegovina, establish special parallel relations with the Federal Republic of Yugoslavia and its Member Republics.

Article 68 item 16

The Republic shall regulate and ensure:

(...)

16. Cooperation with the Serb people outside the Republic;

(...).

10. The applicant asserts that Article 4 as stated is not in conformity with Article III.2 (a) of the Constitution of BiH. This provision lays down the right of the Entities to establish special parallel relationships with neighboring States consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina. The applicant argues that the Entities are thus not allowed to establish such relationships with component units of neighboring States. Moreover, Article 68, item 16 would have a discriminatory character since this provision would allow for cooperation only with the Serb people, but not with other peoples outside the Republic.

11. At the public hearing held on 15 October 1998 the applicant's representative supplemented this argument with the assertion that the Constitution of BiH allowed for special parallel relationships with all neighboring States whereas the Constitution of the RS – in contradiction to that rule – restricted such relationships to the Federal Republic of Yugoslavia (henceforth: the FRY). Moreover, the said provision of the Constitution of the RS violated the territorial integrity of BiH since it did not include the respective constitutional limitation of Article III.2 (a) of the Constitution of BiH. Even if the said provision of the Constitution of the RS could be seen as a mere declaratory repetition of the text of the Constitution of BiH, its incomplete quotation would alter the legal meaning of the text and would, therefore, be in contradiction with the Constitution of BiH.

12. With regard to the cooperation with the Serb people outside the Republic, the representative of the applicant further outlined that members of peoples other than the Serb people of the RS could cooperate solely with the Serb people, but not with others. Moreover, Article III.2 (a) of the Constitution of BiH grants the right to establish special parallel relationships with the neighboring States, but there would be no right of the Entities to likewise establish such relationships with peoples.

13. The People's Assembly of RS, in its written reply, challenged the lack of conformity with the Constitution of BiH since Article 4 of the Constitution of the RS, with its reference to the FRY, would simply specify that right under the Constitution of BiH to freely choose with which of the neighboring States the RS could establish special parallel relationships. Moreover, the wording »neighboring States« would not exclude the possibility of establishing special parallel relationships with component units if the Constitutions of the neighboring States provide for such a possibility. In fact, this possibility would depend on their constitutional structures. Finally, the People's Assembly asserted that the provisions on cooperation with the Serb people outside the Republic neither have any discriminatory character nor deny the territorial integrity of BiH. The challenged provisions would accordingly be in conformity with Article III.2 (a) of the Constitution of BiH since this provision does not prohibit cultural, artistic and scientific cooperation with its own people wherever they may live.

14. At the public hearing of 23 January 1999, the representative of the RS People's Assembly reasserted the argument that the right to establish special parallel relationships is a right and not an obligation and therefore the adopters of the Constitution of the RS decided to establish such relationships exclusively with the FRY. In addition, there is no discrimination since the cooperation of non-Serb people with their co-nationals is not prohibited.

The Constitutional Court finds:

15. Article III.2 (a) of the Constitution of BiH indeed grants its Entities the right to establish special parallel relationships with the neighboring States of Bosnia and Herzegovina such as the FRY. The constitutional problem raised thus is not this specification with regard to the FRY, but whether the wording of the provision excludes special parallel relationships with other neighboring States. However, as can be seen from the text of Article 4 that the RS "*may*, according to the Constitution of BiH, establish special parallel relationships [...]", the Constitution of the RS does neither establish such relationships with the FRY and its Member Republics *ex constitutione*, nor explicitly exclude the possibility to establish special parallel relationships with other neighboring States. As far as the component units of neighboring States are concerned, the establishment of special parallel relationships with such units thus depends on their rights within their States and the rights granted under the Constitutions of these States. The Constitution of BiH, under the constitutional limitation of its sovereignty and territorial integrity, does not prohibit such a possibility either. As for this restriction, it is true that the text of Article 4 does not specifically mention the sovereignty and territorial integrity of Bosnia and Herzegovina. But the more general reference to the Constitution of BiH must be read in line with this constitutional restriction so that the Constitution of the RS complies with the restrictions of the Constitution of BiH.

16. Hence, following the established principle of interpretation that all legal regulations must be read in conformity with the Constitution as long as it is possible, the Constitutional Court finds that Article 4 may be interpreted in a way to be consistent with Article III.2 (a) of the Constitution of BiH and with the principle of non-discrimination according to Article II.4 of the Constitution of BiH. Therefore, Article 4 of the Constitution of the RS does not violate the Constitution of BiH.

17. Regarding the cooperation with the Serb people outside the Republic, according to Article 68 item 16 of the Constitution of the RS, the Constitutional Court stresses the striking difference in the text of this provision. Unlike Article 4, the language of Article 68, first paragraph creates a constitutional obligation on the governmental authorities of RS as can be seen from the terms "*shall* regulate *and ensure"*. Although this provision may again be interpreted in conformity with the Constitution of BiH so as to neither exclude cooperation, in particular of members of other peoples, with their co-nationals outside the Republic, nor pose an obligation on them to cooperate with the Serb people outside the Republic, it must be concluded from the constitutional obligation that these rules should

have the effect of creating a specific preference for the Serb population of the Republika Srpska. The intent to create such a preference may also be concluded from the argument of the representative of the People's Assembly of RS that the "majority of citizens of the Republika Srpska are Serbs" so that the adopters of the Constitution of the RS did decide on the creation of this rule for that "very practical matter". Nevertheless, contrary to the understanding of one of the parties, not only does exclusion but also preferences constitute discrimination as seen from the definition of Article 1, paragraph 1 of the International Convention on the Elimination of All Forms of Racial Discrimination which must, according to Annex I to the Constitution of BiH, be applied directly. Paragraph 4 thereof allows preferences "for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals' equal enjoyment or exercise of human rights and fundamental freedoms". An adequate advancement of the Serb people in the RS is, however, on the basis of their factual majority position certainly not "necessary" in order to ensure them equal treatment.

18. It follows that item 16 of Article 68 of the Constitution of the RS, by creating a preference which cannot be legitimized according to Article 1, paragraph 4 of the Convention on the Elimination of All Forms of Racial Discrimination, violates the obligations set forth in Article 2, paragraph 1 item (c) thereof, which reads as follows: "Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists". The same obligation ensues from Article I, paragraph 3, sub-paragraph (a) and Article II, paragraph 1 of Annex 7 taken in conjunction with Article II, paragraph 5 and Article III, paragraph 2, item (c) of the Constitution of BiH.

19. Item 16 of Article 68 of the Constitution of the RS is therefore unconstitutional.

b.) The challenged provision of **Article 7** of the Constitution of the RS reads as follows:

The Serbian language of iekavian and ekavian dialect and the Cyrillic alphabet shall be in official use in the Republic, while the Latin alphabet shall be used as specified by law.

In regions inhabited by groups speaking other languages, their languages and alphabet shall also be in official use, as specified by law.

20. The applicant considers this provision to be in conflict with Articles I.2, II.1, II.3 (h) and II.4 of the Constitution of BiH. He contends that the challenged provision constitutes discrimination on ethnic grounds having, in particular, in mind the multi-ethnic composition of the population living on the territory of today's Republika Srpska prior to the war and the right of people to return to their homes of origin according to Article II.3 and 5 of the Constitution of BiH as well as Annex 7 to the General Framework Agreement. It is stressed that the returnees must be treated as equal citizens.

21. The applicant's representatives outlined at the public hearing before the Court that the challenged provision would create a special right only for Serbs against the necessity to assure full equality of languages and alphabets of the constituent peoples. Anything below this standard would thus constitute discrimination since this is one of the conditions for their political, legal, and cultural equality. Furthermore, individuals must have the same rights as the groups to which they belong, i.e. a right to officially communicate in their language. It was also pointed out that the restrictions on the use of the Bosnian and Croatian languages following from the challenged provision would also violate other individual rights and freedoms as guaranteed by Article II.3 of the Constitution of BiH, such as freedom of expression and the right to education. In addition, this restriction would be one of the main reasons why expelled persons did not return to their pre-war homes in the Republika Srpska.

22. The People's Assembly of RS raised in its written statement the objection that Article 7 did not violate the provisions of the Constitution of BiH as stated in the request. The challenged provision, paragraph 1 in particular, would regulate the official use of the Serbian language in both forms and the Cyrillic alphabet with a legislative authorization to regulate the use of the Latin alphabet, whereas paragraph 2 would provide for the official use of the languages of other language groups in areas where they live. The Constitution of the RS would thus not interfere with the private use of languages and alphabets that is, in addition, explicitly guaranteed by Article 34 of the Constitution of the RS.

23. At the public hearing held on 23 January 1999, the representative of the People's Assembly of RS underlined the distinction that had to be drawn between the official and private use of languages and alphabets with the latter being guaranteed as a fundamental right by Article 34 of the Constitution of the RS. Additionally, he referred to the case of Quebec as an example where the official use of English was entirely prohibited and the ruling of the International Court of Justice that there would be no violation of the right to use one's language, if, at least, in private schools the use of the minority language was allowed. None of these possibilities were excluded in the RS.

24. The expert for the House of Peoples of the Federation Parliament raised, at the public hearing, the problem of whether the Entities did have the responsibility to regulate the official use of languages and answered this problem in the affirmative since the Entities have the power to regulate all matters which are not expressly assigned to the institutions of Bosnia and Herzegovina.

The Constitutional Court finds:

25. With regard to the basic distinction between the official use of the Serbian language and the right to use one's language, i.e. "in private affairs", the Court must clarify the scope of the meaning which might be attributed to the phrase "official use" from Article 7 of the Constitution of the RS.

26. It is necessary therefore to take the "Law on the Official Use of Languages and Alphabets" (*Official Gazette of the RS*, No. 15/96) into consideration. The provisions of this Law regulate all fields where the Serbian language and the Cyrillic alphabet must be used, i.e. as the language of instruction and for textbooks in the entire educational system, in print and electronic media, by all public authorities in their internal and external communication. Moreover, corporate names and all commercial signs as well as road signs and topographical designations must be written in Cyrillic letters. The only exceptions to be found are established for the use of the Latin alphabet. Thus, according to Article 3, this alphabet must be used in the second, third and fourth year of elementary education one day per week and according to Article 5, paragraph 3, religious communities and national-cultural associations of other peoples and national minorities in the RS may use both forms of the Serbian language, i.e. the ekavian and ijekavian form, and both alphabets. Moreover, the Constitutional Court of the Republika Srpska had all provisions of this Law prescribing the use of only the ekavian form declared unconstitutional (*Official Gazette of the RS*, No. 7/98).

27. As it can be seen from this Law, the meaning of the phrase "official use" is thus given a very broad scope of application, not only in relation to governmental powers but also in the sphere of media and economics. Even if these language provisions were not strictly followed in the Republika Srpska, it cannot be concluded from such illegal practice that these rules were not in force or did not need to be observed.

28. As far as the legally allowed official use of other languages under Article 7 of the Constitution of the RS is concerned, only the Laws on Elementary and Secondary School Education (*Official Gazette of the RS*, No. 4/93), as opposed to the Law on the Official

Use of Languages and Alphabets (see supra), provide for the possibility that in classes with more than twenty or thirty pupils whose mother tongue is not Serbian, their language must be taught, whereas in schools where all pupils belong to another ethnic group, their language is even the language of instruction. The teaching of the Serbian language is obligatory in any case.

29. However, these legal specifications for the learning of languages other than the Serbian language as such are of interest for the interpretation of the challenged constitutional provisions, but its territorial restriction to regions inhabited by other language groups. Article II.5 of the Constitution of BiH "in accordance with Annex 7 to the General Framework Agreement" – as the explicit text of that constitutional provision reads – poses the constitutional obligation to provide for the right of all refugees and displaced persons to freely return to their homes of origin and for the right to have restored to them property of which they were deprived in the course of hostilities since 1991. It is necessary thus to take the situation of 1991 into due account, as was done by the Constitutional Court in its third Partial Decision in this case (*Official Gazette of Bosnia and Herzegovina*, No 23/00) at its paragraphs 85 to 87. As confirmed by the facts ascertained by the Court, the territory where the Republika Srpska was established later on did form an area with the so-called "mixed population" as was the case all over the territory of the former Republic of Bosnia and Herzegovina. Hence, due to the fact of a territorially integrated population structure, territorially separated "regions inhabited by groups speaking other languages", as it is often the case in Western Europe, did not exist, nor is this – "due to the hostilities since 1991" – the case now. The respective language provisions of the Laws on Elementary and Secondary School Education are further arguments in favor in this respect since they are valid on the entire territory of the Republika Srpska and do not have territorial restriction.

30. *In conclusio*, the Court finds it established that the scope of the term "official use" of the Serbian language and Cyrillic alphabet reaches far beyond the relationships vis-à-vis governmental powers into the spheres of media and economics which are usually seen as "private affairs" in democratic societies. Moreover, "regions inhabited by groups speaking other languages" in the wording of paragraph 2 of Article 7 do not exist. Such regions could only be created through the territorial segregation in the course of the return of refugees and displaced persons so that this provision is of an inherently discriminatory character.

31. However, Article II.3 (m) of the Constitution of BiH does provide for the right to liberty of movement and residence that must be seen in connection with the specific right

of all refugees and displaced persons freely to return to their homes of origin. These rights cannot be read only in a negative sense as the protection against any intrusion by public authorities, but also contain a positive obligation to protect these rights and freedoms. This obligation may be attested to already from the text of Article I.4 of the Constitution of BiH that, *inter alia*, "(...) the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina". Moreover, Article II.1 of Annex 7 to the GFA – which is referred to by Article II.5 of the Constitution of BiH – explicitly states that the Parties, i.e. also the Republika Srpska, must »create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group«. In the final analysis, thus, individual rights must be regarded as effective rights to be actually exercised in a non-discriminatory manner.

32. The wide range of the meaning of "official use" of the Serbian language and Cyrillic alphabet and the territorial restriction for the official use of other languages in Article 7 of the Constitution of the RS, however, go far beyond the *per se* legitimate aim to regulate the use of languages insofar as these provisions have the effect of hindering the enjoyment of rights under Article II.3 (m) and 5 of the Constitution of BiH. Moreover, they are also in contradiction with Article I.4 of the Constitution of BiH. The Constitutional Court thus declares Article 7 paragraph 1 of the Constitution of the RS unconstitutional.

33. It is not necessary for the Constitutional Court to examine the applicant's assertion that the Constitution of BiH would require the full equality of languages and alphabets of the constituent peoples or the alleged violation of freedom of expression and the right to education. The same holds with regard to the example of the Quebecois Language Act which allows for the use of French only and was invoked by the representative of the People's Assembly of RS to support the claim that Article 7 of the Constitution of the RS did not violate the Constitution of BiH, particularly the individual rights guaranteed thereby. Contrary to the conclusions of the party to the proceedings, the Canadian Supreme Court declared provisions of Quebec's Charter of the French Language unconstitutional due to a violation of the Canadian Charter of Rights (cf. *Attorney General of Quebec v. Association of Quebec Protestant School Board* 1984 and *Quebec v. Ford* 1988).

34. The regulation of languages by the Entities is *per se* a legitimate aim, but it might encroach upon individual rights and the positive obligations quoted above which serve as an institutional safeguard for a "pluralist society" and the "market economy" according to the Preamble of the Constitution of BiH. Given the clear and present danger which

unrestricted regulations of official languages through the Entities create with regard to these basic normative principles and institutional safeguards of the Constitution of BiH, there is an implicit but necessary responsibility of the State of BiH to provide for minimum standards for the use of languages through the framework legislation. In doing so, the legislation of BiH must account for the effective possibility of the equal use of the Bosnian, Croatian and Serbian languages, not only before the institutions of Bosnia and Herzegovina but also at the level of the Entities and any subdivisions thereof with regard to the legislative, executive and judicial powers and in public life. The highest standards of Articles 8 through 13 of the European Charter for Regional and Minority Languages should thus serve as a guideline for the three languages mentioned, so that the establishment of private schools, as invoked, for instance, by the representative of the People's Assembly of RS, would not meet this standard. Lower standards mentioned in the European Charter might – taking the appropriate conditions into consideration – thus be sufficient only for other languages.

c.) The challenged provision of **Article 28, paragraph 4** of the Constitution of the RS reads as follows:

> *The State shall materially support the Orthodox Church and it shall cooperate with it in all fields and, in particular, in preserving, cherishing and developing cultural, traditional and other spiritual values.*

35. The applicant argues in his request that the said provision constitutes *prima facie* discrimination on religious grounds and thus violates Articles I.2, II.1, II.3 (g) and Article II.4 of the Constitution of BiH as well as the international conventions and human rights protection instruments which form an integral part of the Constitution of BiH.

36. At the public hearing held in October 1998, the applicant's representative reasserted the request to the extent that the challenged provision would put the Orthodox Church into a privileged position so that all other religions and religious communities were discriminated against thereby. The challenged provision would not only violate the non-discrimination provision of Article II.4 of the Constitution of BiH, but also the freedom of religion of other religious groups in accordance with Article II.3 (g). That this assertion was not hypothetical could be verified by the ongoing discriminatory conduct of the authorities of the Republika Srpska of preventing the reconstruction of the mosques that had been destroyed during the war. He further claims that this mode of conduct was one of the reasons that prevented the return of refugees and displaced persons.

37. In its written statement, the People's Assembly of RS opposed the assertion that the provision of paragraph 4 of Article 28 violated freedom of religion or discriminated on religious grounds if seen in connection with paragraphs 1 and 2 of thereof since these provisions guarantee the freedom of religion and the equality of religious communities. Moreover, paragraph 4 would be of declarative character only and similar to Article 3 of the Greek Constitution or to Article 16, paragraph 3 of the Spanish Constitution. In any case, these provisions neither constituted discrimination nor violated the freedom of religion by introducing a "state religion".

The Constitutional Court finds:

38. All the claims of the applicant pose two issues of constitutional concern. Firstly, is there a discrimination against other churches and religious denominations and secondly, is there a violation of freedom of religion in connection with discrimination on ethnic grounds?

39. Regarding the alleged "privileged position of the Orthodox Church" in relation to other churches and religions, the Constitutional Court, however, cannot follow the request. Unlike Article 28, paragraph 2 of the Constitution of the RS, which provides for a collective right of equality of religious communities, there is no such provision included in the Constitution of BiH or in any of the international instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, the European Commission of Human Rights has held that even a "State Church" system cannot in itself be considered to present a violation of Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, under condition that it includes specific safeguards for the individual's freedom of religion (See *Darby v. Sweden*, Report of the European Commission of Human Rights of 9 May 1989, Series A No. 187, at para. 45). Neither at the level of international law nor in the Constitution of BiH can an explicit rule of separation of church and state or the equality of different denominations or religious communities be found. Nor is the Constitution of the Republika Srpska itself a standard of review! The Constitutional Court of Bosnia and Herzegovina here carefully observes the sphere of competences of the Constitutional Court of the Republika Srpska. The request of the applicant is in this respect therefore unfounded from the very outset.

40. However, it follows from the above stated case law that the Constitutional Court will attach particular importance to the question whether there are specific safeguards for the individual's freedom of religion that must also be guaranteed according to Article 9 of the

European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights, with respect to the general principles enshrined in Article 9, stressed in the *Kokkinakis v. Greece* case (Series A, vol. 260-A, 1993) that "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism, inseparable from a democratic society for which has been dearly fought over the centuries, depends on it" (at para. 31). The very same relationship of these basic values as institutional prerequisites of democracy may also be recognized in paragraph 3 of the Preamble of the Constitution of BiH.

41. Although "states" may have "a wide margin of appreciation" in their relationship with churches as can be seen from the examples of Great Britain or Greece, freedom of religion must therefore be effectively guaranteed. It is for the Constitutional Court thus to determine whether the requirements have been complied with. Or, in the words of the European Court expressed in another context: "It must satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness" (*Mathieu-Mohin* and *Clairfayt v. Belgium*, 9/1985/95/143, at para. 52). In conclusion, the provisions of paragraphs 1 and 2 of Article 28 of the Constitution of the RS, as the representative of the People's Assembly of RS invoked them, are a necessary requirement, but are not sufficient for the judgment that the essence and effectiveness of freedom of religion in the RS could not be infringed.

42. Accordingly, in addition to the positive obligations which are regulated by the Constitution of BiH, as already outlined above in connection with the challenged Article 7 of the Constitution of the RS, the European Court of Human Rights concluded in the case of *Kokkinakis* (supra) and *Otto-Preminger Institut v. Austria* (Series A, vol. 295, 1994) that freedom of thought, consciousness and religion understands an obligation of the authorities not only to abstain from an infringement of this freedom, but also to create all necessary requirements for every person to be able to freely manifest her religion. In practice, this means that "the authorities are not allowed to create a public atmosphere that prevents the free manifestation of religion" (*Otto-Preminger-Institut*, at para. 47).

43. However, the very language of Article 28, paragraph 4 creates serious doubts as to whether there can be such a "public atmosphere" to the extent that this provision establishes a special link between the Republika Srpska and the Orthodox Church in order

to act jointly for "preserving, fostering and developing cultural, traditional and other spiritual values". This provision is therefore not only of a simple "declarative" character, but its clearly established aim is a constitutionally guaranteed influence of the Orthodox Church on the "public atmosphere" as far as values and belief-systems are concerned. The practice will show whether it amounts to a prevention of the free manifestation of religion in combination with discrimination on ethnic or religious grounds.

44. With regard to such a practice, the Court ascertained the following factual situation: religions and churches other than the Orthodox Church, like the Catholic religion or Islam, have always been part of the multi-religious life in Bosnia and Herzegovina in the sense of the pluralism which is required both by the European Convention and the Constitution of BiH as a necessary precondition for a democratic society until the time when most of the mosques and other religious buildings have been destroyed, due to the hostilities since 1992.

45. In Case No.(B) 842/00 on the Violation of Property Rights of the Catholic Church and Violation of the Freedom of Religion of Catholic Believers in Diocese of Banja Luka, addressed to Mr. Milorad Dodik, Prime Minister of the Republika Srpska Government, the Ombudsperson for BiH concluded in her Special Report that the bodies of the Catholic Church, their clergy and the Catholic believers themselves, are prevented from returning to church premises, which are currently occupied by third persons, due to the failure of the competent authorities of the Republika Srpska to undertake effective and appropriate measures to restore the property to them. She therefore considered that they were prevented from practicing their religious ceremonies and freely manifesting their religious beliefs using their full existing capacities in violation of Article 9 of the European Convention on Human Rights.

46. Furthermore, none of the mosques in the entire territory of the RS, destroyed during the war have been reconstructed so far. It can be viewed as circumstantial evidence for a pattern of ongoing discrimination, particularly against the Islamic Community, as the Human Rights Chamber has recently ruled in *The Islamic Community of Bosnia and Herzegovina* vs. *The Republika Srpska case* (No. CH/96/29). The Chamber refrained from reviewing the provision challenged in this case, but raised serious concern "whether the privileged treatment afforded to the Serbian Orthodox Church, represents, in itself, a discriminatory treatment of institutions or individuals who do not form part of that Church". It concluded that "the less favorable conditions to which the respondent Party's Constitution subject the applicant's members, is a further element to be borne in mind in

the examination of whether their treatment as a whole represents discrimination" (at para. 157). There are numerous incidents reported which give proof of a "public atmosphere preventing the free manifestation of religion" in the Republika Srpska since the Human Rights Chamber found it established in the said case that Muslim believers have been subject to assault and provocation both at public funeral processions and during worship without any intervention by the local police (at para. 167). The Human Rights Chamber thus concluded that this attitude of the authorities has hampered – and continues to hamper – the local Muslim believers' enjoyment of their right to freedom of religion for reasons and to an extent which, "seen as a whole, are clearly discriminatory" (at para. 173). However, as seen from the joint OHR, OSCE and UNMBiH Press Release of 5 May 2000, the authorities of the Republika Srpska violated their obligations under Annex 6 to the General Framework Agreement to implement this decision of the Human Rights Chamber.

47. *In conclusio*, the Court finds that the authorities of the Republika Srpska failed to fulfill their positive obligation to create all the necessary requirements for every person to be able to freely manifest his or her religion. The challenged provision of Article 28, paragraph 4 which gives the Orthodox Church an important influence on the creation of value and belief-systems must be thus considered as the constitutional basis which allows the authorities "to create a public atmosphere which prevents the free manifestation of religion".

48. As far as the material support of the Orthodox Church is concerned, the Orthodox Church is clearly given a privilege by this constitutional provision, which cannot be legitimized in constitutional terms and is therefore inherently discriminatory.

49. Article 28, paragraph 4 of the Constitution of the RS is therefore unconstitutional.

d) The challenged provisions of **Article 80, paragraph 1** of the Constitution of the RS, as supplemented by Amendment XL, item 1 and **Article 106, paragraph 2** of the Constitution of the RS read as follows:

Article 80 paragraph 1 (relevant parts)

The President of the Republic shall:

1) Exercise, in accordance with the Constitution and law, tasks related to defense, security and relations of the Republic with other states and international organizations.

Article 106, paragraph 2 of the Constitution of the RS

The President of the Republic shall appoint, promote and recall officers of the army of Republika Srpska in accordance with law, and shall appoint and recall the presidents, judges and lay-judges of the military courts as well as the army prosecutors.

50. The applicant argues that these provisions violate Article V.5 (a) of the Constitution of BiH, under which each member of the Presidency of Bosnia and Herzegovina shall have civilian command authority over the armed forces. The President of the Republika Srpska could thus not exercise defense related responsibilities in the field of civilian command over the armed forces.

51. At the public hearing held on 5 October 1998, an expert appointed by the applicant further outlined that it clearly follows from Article V.5 (a) as a constitutional concept that all the armed forces must operate consistently with the sovereignty and territorial integrity of Bosnia and Herzegovina.

52. At the public hearing of 29 and 30 June 2000, the applicant's representative pointed out that the non-conformity of the provisions of the Entities' Constitutions with Article V.5 (a) of the Constitution of BiH, which provides for the civilian command authority of the members of the Presidency over the armed forces, was obvious. The notion of civilian command authority would undoubtedly understand, *inter alia*, the matter of appointment and dismissal of the highest officers of the armed forces.

53. The People's Assembly of the Republika Srpska in its written statement denied the inconsistency of the challenged provisions with Article V.5 (a) of the Constitution of BiH on grounds that civil command and supreme command were not identical concepts. It maintained that the armed forces are instruments of the Entities so that supreme military command, as a matter of fact, had to be exercised by the institutions of the Entities whereas the activities for the coordination of armed forces in Bosnia and Herzegovina had to be exercised through the Standing Committee on Military Matters. For the same reasons, the People's Assembly also denied the alleged inconsistency of Article 106, paragraph 2 of the Constitution of the RS.

54. At the public hearing, the representative of the People's Assembly of RS further argued that, according to Article III.1 of the Constitution of BiH, the responsibility to regulate military matters was not within the responsibility of the institutions of Bosnia and

Herzegovina. The Entities would thus be allowed to regulate matters of defense. Moreover, the Constitution of BiH did not provide for a definition of the term “civilian command” so that it was “meaningless”. Accordingly, supreme command during peace and war would be something different, neither being under the responsibility of the Standing Committee on Military Matters nor in that of any other institution of Bosnia and Herzegovina, leaving room for the Entities to exercise legislative power in this field. Finally, in his opinion, it was not necessary to stress the big differences in the organization of defense and armed forces in the Republika Srpska and the Federation of Bosnia and Herzegovina since these were “natural” and the Entities would thus exercise their right to “self-organization”.

The Constitutional Court finds:

55. The status of the armed forces in Bosnia and Herzegovina is of a unique nature. Bosnia and Herzegovina does not have unified armed forces at the State level. The Constitution of Bosnia and Herzegovina does not provide for the existence of the armed forces of Bosnia and Herzegovina as a unified organizational structure of Bosnia and Herzegovina, i.e. it does not define the formation, the organization or the command over unified armed forces to be a responsibility of Bosnia and Herzegovina.

56. According to the Constitution, there shall be armed forces of the Entities, and, in accordance with the aforementioned, their position and competence must be viewed in light of the provisions of Articles III.1, V.3 and 5 of the Constitution of Bosnia and Herzegovina. Namely, Article V.5 of the Constitution of Bosnia and Herzegovina refers to the armed forces of the Entities as the Armed Forces in Bosnia and Herzegovina, and not the armed forces of Bosnia and Herzegovina. Those two are entirely different notions. Article V.5 of the Constitution of Bosnia and Herzegovina reads: *(a) Each member of the Presidency shall, by virtue of the office, have civilian command authority over Armed Forces. Neither Entity shall threaten or use force against the other Entity, and under no circumstances shall any armed forces of either Entity enter into or stay within the territory of the other Entity without the consent of the government of the latter and of the Presidency of Bosnia and Herzegovina. All armed forces in Bosnia and Herzegovina shall operate consistently with the sovereignty and territorial integrity of Bosnia and Herzegovina.* The nature of those armed forces and their possible use can be seen clearly, as well as the nature of the command itself in a concrete situation. Therefore, all the armed forces in Bosnia and Herzegovina are obliged to act in accordance with the sovereignty and territorial integrity of Bosnia and Herzegovina, which necessarily implies their function in that respect, but also a certain degree of coordination between them is necessary for the

realization of this function. However, in this case, it is most important to correctly interpret the provision, Article III.1 of the Constitution of Bosnia and Herzegovina, where among the responsibilities of Bosnia and Herzegovina, joint armed forces are not mentioned anywhere. Besides, in Article V.3 of the Constitution of Bosnia and Herzegovina, which provides for the responsibilities of the Presidency of Bosnia and Herzegovina and the manner of decision-making within it, the responsibility of civilian command over the armed forces in Bosnia and Herzegovina is not mentioned anywhere. Therefore, the provision of Article V.5 of the Constitution of Bosnia and Herzegovina dealing with the Standing Committee on Military Matters (that is also the title of this chapter of the Constitution of Bosnia and Herzegovina, which is a part of the section of the Constitution relating to the Presidency of BiH), which is not an institution of Bosnia and Herzegovina, but a body of a coordination character, must be interpreted systematically, i.e. brought in connection with the provisions of Article III.1 and Article V.3. This virtually means that it must be established how the armed forces in Bosnia and Herzegovina could fulfill their function under Article V.5 (a) – to function in accordance with the sovereignty and territorial integrity of Bosnia and Herzegovina – although they are not organized in a unified way at the level of Bosnia and Herzegovina.

57. The Constitution of BiH explicitly provides that in Bosnia and Herzegovina there shall be the armed forces of the Entities. The Constitution also provides that they may not enter the territory of the other Entity without the consent of its government and a decision of the Presidency of Bosnia and Herzegovina. The Constitutions of the Entities regulate the status and the responsibility for the armed forces as well as command over them. However, the question that arises is what is the responsibility of the members of the Presidency of Bosnia and Herzegovina as provided by Article V.5 (a) which reads – *each member of the Presidency shall, by virtue of the office, have civilian command authority over armed forces*. In the interpretation of this Article, the following must be concluded:

Firstly, this Article does not regulate over which armed forces, nor does it expressly define the meaning of the notion of civilian command authority.

Secondly, although the Presidency of Bosnia and Herzegovina is a collective body (institution), there is a reference here to the responsibility of each of the members of the Presidency.

Third, the same Article provides that the armed forces of one Entity shall not enter the territory of the other Entity without the consent of the government of that Entity, and – in this case the solution is different – the Presidency of Bosnia and Herzegovina. The

question that arises is: why is this responsibility of the Presidency unlike the previous provision according to which a member of the Presidency has civilian command authority over the armed forces in Bosnia and Herzegovina.

For the correct interpretation of this Article, i.e. of the status of armed forces in Bosnia and Herzegovina and the command over them, a distinction should be drawn between the function (use) of the armed forces in the Entities and possibly at the level of Bosnia and Herzegovina in accordance with Article V.5 (a), when the coordination, i.e. the responsibility of the members of the Presidency, under Article V.5 should come into play. Namely, if it would be a matter of the joint activities of the armed forces in Bosnia and Herzegovina, the civilian command of the members of the Presidency would be accounted for, but not that of the Presidency as a collegial body (a joint organ). Precisely for that reason, the question arises as to why does the Constitution of Bosnia and Herzegovina provides for the civilian command of each member of the Presidency and not of the Presidency as an institution, what does it mean and over which the armed forces is it being exercised? If it were necessary to jointly use the armed forces in Bosnia and Herzegovina due to an external threat, for instance, a certain degree of coordination in the command over them would be necessary and that would practically mean the decision-making on the manner of employment of the armed forces in Bosnia and Herzegovina. If the members of the Presidency are the only ones to have this command, it is logical for the decision on the use of the armed forces of the Entities to be taken by the member of the Presidency from the respective Entity, apparently with the consent of Entity authorities, i.e. in coordination with them, which is the essence of this provision.

Nevertheless, what is decisive in this case is the fact that these provisions are not situated among the provisions on the responsibilities of the Presidency of Bosnia and Herzegovina, but among the provisions on the Standing Committee, Article V.5 (a), which imposes the conclusion that such command would be used only in a situation referred to in that Article – in case of a threat to the sovereignty and territorial integrity of Bosnia and Herzegovina, and in case of the competence of the Standing Committee – coordination, in favor of which is the fact that the members of the Presidency are also members of the Standing Committee. Coordination at the level of Bosnia and Herzegovina could only be ensured in this way, considering the fact that Bosnia and Herzegovina does not have unified armed forces and a unified command by the Presidency of Bosnia and Herzegovina as a collective body (institution) cannot accordingly exist here. It speaks precisely to the character of the armed forces in Bosnia and Herzegovina. It is for exactly this reason that in Bosnia and Herzegovina there is no civilian command authority of the Presidency of

Bosnia and Herzegovina, but a civilian command of the members of the Presidency over the armed forces of the respective Entity from which they were elected, but only in the case referred to in Article V.5 (a) of the Constitution of Bosnia and Herzegovina. That, however, does not mean that the armed forces are not still the armed forces of the Entities and that supreme command over them is not ensured within the Entities, pursuant to their respective Constitutions.

58. Therefore, the Constitutional Court concludes that the challenged provisions of Article 80, paragraph 1 of the Constitution of the Republika Srpska, as modified by Amendment XL, item 1 and Article 106, paragraph 2 of the Constitution of the Republika Srpska are not in contravention of the Constitution of Bosnia and Herzegovina.

B. Regarding the Constitution of the Federation

a.) The challenged provision of **Article I.6 (1)** of the Constitution of the Federation reads as follows:

The official languages of the Federation shall be the Bosnian language and the Croatian language. The official script will be the Latin alphabet.

59. The applicant considers the challenged provision a violation of the last paragraph of the Preamble of the Constitution of BiH, which refers to Bosniacs, Croats, and Serbs as constituent peoples, and a violation of the non-discrimination provision of Article II.4 of the Constitution of BiH. The challenged provision hindered the enjoyment of the constitutional rights of all expelled persons to return to their homes of origin and the re-establishment of the national population structure that had been destroyed by the war and ethnic cleansing.

60. At the public hearing, the applicant's representative further outlined that the equality of three peoples would include the full equality of their languages and that all arguments presented against the Serbian language as the official language of the RS would also hold true for the Federation of BiH.

61. The representative of the House of Peoples of the Federation Parliament denied the unconstitutionality of the challenged provision in the course of the public hearing. He stressed the competence of the Federation to regulate all affairs that did not fall within the responsibility of the institutions of Bosnia and Herzegovina, such as languages. Moreover, the regulation of an official language would not be discrimination at the same time since the Constitution of the Federation would guarantee fundamental rights and freedoms such

as the right to use one's language as could be seen from Article II.2 (d) of this Constitution. He furthermore doubted the intent of the framers of the Constitution to introduce the equal use of the languages of the three constituent peoples when they used this term and pointed out that the text of the Constitution of the Federation was adopted and published in the *Official Gazette* in the Croatian and the Bosnian language. Meanwhile, however, a new »official text« was published where the two official languages are called Croatian and Bosnian. The use of the term Bosnian, in his opinion, must be seen as an attempt to discriminate even between the two official languages at the level of the Federation so that there must be some reservations as to the good will to introduce the third language into the Constitution must be doubted.

The Constitutional Court finds:

62. As the Constitutional Court has already stated above (see paragraph 33), it is not necessary to deal with the applicant's assertion that the Constitution of BiH requires the full equality of the languages and alphabets of the constituent peoples due to their status. Moreover, it was stressed by the Constitutional Court that Article II.3 (m) taken in conjunction with paragraph 5 of the said provision of the Constitution of BiH also contains a positive obligation to safeguard those rights and freedoms. Although the regulation of languages by the Entities is *per se* a legitimate aim, though it might encroach upon the individual rights and positive obligations quoted above, the Constitutional Court concluded that it is in the responsibility of the State of Bosnia and Herzegovina to provide for minimum standards for the use of languages through the framework legislation. The criteria for these standards – elaborated in paragraph 34 supra – must thus serve here as a standard for review of the challenged provisions of the Constitution of the Federation.

63. When deciding on the constitutionality of the challenged provision, the Court must account for the context of the regulation and therefore interpret paragraph 1 as a systematic connection with paragraphs 2 and 3.

The second and third paragraph of Article I.6 of the Constitution of the Federation read as follows:

(2) Other languages may be used as means of communication and instruction.

(3) Additional languages may be designated as official by a majority vote of each House of the Legislature, including in the House of Peoples a majority of the Bosniac Delegates and a majority of the Croat Delegates.

Paragraph 2 clearly demonstrates that other languages may be used as a means of communication in private and public and as language of instruction at all levels of the public school system, including universities. This provision grants a constitutionally guaranteed individual right that does not need further legislative specification for application.

Paragraph 3 allows for additional languages as official languages, however only by consent of a majority of the Bosniac or a majority of the Croat Delegates in the House of Peoples of the Federation Parliament. A rather small, ethnically defined minority of approximately 8% of the members of the Federation Parliament could thus effectively veto any legislation to introduce, for instance, the Serbian language as an official language. This system of a veto only for Bosniac and Croat Delegates excludes all others from participation in the legislative process, although it might particularly be in their interest to introduce an additional official language.

By excluding all others from effective participation in the legislative process in this field – which is a constitutional requirement following from Article 15 of the Framework Convention of the Protection of National Minorities, that must be applied directly in accordance with Annex I to the Constitution of BiH – the Bosniac and Croat delegates are given a privilege which could never be legitimized under Article 1, paragraph 4 of the Convention on the Elimination of All Forms of Racial Discrimination which has to be applied directly in Bosnia and Herzegovina according to Annex I to the Constitution of BiH. Moreover, paragraph 3 of Article I.6 does not grant a legislative authorization for the official use of other scripts as paragraph 1 stipulates the Latin alphabet to be in official use in addition to the Croatian and Bosnian languages and thereby distinguishing languages and scripts.

64. Thus interpreting paragraph 1 in conjunction with paragraph 3 of Article I.6 of the Constitution of the Federation, paragraph 1 must be regarded as a serious obstacle for the enjoyment of the rights guaranteed under Article II.3 (m) and II.5 of the Constitution of BiH and it thereby violates the positive obligations outlined above and Article II.4 of this Constitution.

65. The Constitutional Court thus declares Article I.6, paragraph 1 of the Constitution of the Federation unconstitutional.

b.) The challenged provision of **Article III.1 (a)** of the Constitution of the Federation, as modified by Amendment VIII, in those parts which concern the civilian command authority of the Presidency of BiH reads as follows:

The Federation shall have exclusive responsibility for:

(a) The organization and conduct of the defense of the Federation and protection of its territory, including the establishment of a joint command of all military forces in the Federation, the control of military production, the conclusion of military agreements according to the Constitution of Bosnia and Herzegovina, and the cooperation with the Standing Committee on Military Matters and the Council of Ministers in the defense of Bosnia and Herzegovina,

(...)

66. The applicant considers this provision not to be in conformity with Article V.5 of the Constitution of BiH, under which each member of the Presidency of Bosnia and Herzegovina shall have civilian command authority over the armed forces.

67. At the public hearing, the applicant's expert further pointed out that the transfer of competencies in the field of the civil command over the armed forces from the State of Bosnia and Herzegovina to the Entities would endanger the sovereignty and territorial integrity of BiH.

68. The expert of the House of Peoples of the Parliament of the Federation of BiH denied at the public hearing the unconstitutionality of the challenged provision. Since Article V.5 (a) of the Constitution of BiH regulates the civilian command, the hierarchy of military command would rest with the Entities and thus regulated by their constitutions and laws. The applicant entirely disregarded the responsibilities of the Entities in this field and made an attempt to homogenize the armed forces. The request aimed at a complete revision of the military organization, the dissolution of the existing military formations and all legal provisions on the hierarchical order of the military segment. The Constitutions and laws of the Federation of BiH and the RS regulated the organization of the armed forces and they were observed when the Dayton Agreement was drafted. It would be totally absurd to think that the Dayton Agreement would have been adopted without respecting the existing allocation of powers, particularly with regard to military matters.

<u>The Constitutional Court finds:</u>

69. According to the interpretation of Article V.5 (a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court finds in this case that the challenged provision of Article III.1 (a) of the Constitution of the Federation of Bosnia and Herzegovina does not contravene the Constitution of Bosnia and Herzegovina.

c) After the Constitutional Court has declared some parts of the challenged provisions of **Article IV.B.7 (a) (I) through (III)** and **Article IV.B.8** of the Constitution of the Federation unconstitutional so that they remain no longer in force (*Official Gazette of Bosnia and Herzegovina*, No. 11/00), the challenged provisions in their relevant parts read as follows:

Article IV.B.7 (a) (relevant parts):

Except as specifically provided in this Constitution:

a) The President shall be responsible for:

(i) The appointment of the Government, military personnel and judges of Federation courts, in accordance with Articles IV.B.5, IV.B.8, and IV.C.6;

(ii) Serving as commander-in-chief of the military of the Federation;

(iii) Conducting consultations concerning the appointment of Ombudsmen and Judges in accordance with Article II.B.1 (2) and IV.C.6 (b);

(...)

Article IV.B.8

The President of the Federation, in consensus with the Vice-President shall appoint ... officers of armed forces. Appointments shall require the approval of a majority of each House of the Federation Parliament, provided that the approval of appointments for the members of the Joint Command of Military Forces shall require a majority of the Bosniac and of the Croat Delegates in the House of Peoples.

70. The applicant asserts that the responsibility of the President of the Federation for the appointment of officers to the armed forces is not in conformity with Article V.5 of the Constitution of BiH, which vests the civilian command authority in the members of the Presidency of BiH.

71. At the public hearing, the applicant's representatives further maintained that the arguments presented with regard to Articles 80 and 106 of the Constitution of the RS (supra at paragraph 50) also hold for the Constitution of the Federation of BiH.

72. The expert appointed by the House of Peoples of the Parliamentary Assembly of the Federation of Bosnia and Herzegovina pointed out at the public hearing that the applicant

interpreted the challenged provisions and relevant provisions of the Constitution of BiH without accounting for the context. He did not deny their responsibilities according to the Constitution of BiH as far as the appointments are concerned, but that they are exclusive since such an interpretation would ignore the Entities' responsibilities foreseen by the Constitution in this field.

The Constitutional Court finds:

73. The Court has already decided on the constitutionality of parts of Articles IV.B.7 a) (I) through (III) and IV.B.8 of the Constitution of the Federation which relate to the appointment of the "heads of diplomatic missions" and found that these parts of the aforesaid provisions were unconstitutional (*Decision of the Constitutional Court of BiH,* No. U 5/98 of 29 and 30 January 2000, *Official Gazette of BiH*, No. 11/00, paragraphs 63, 64, 65 and 66).

74. With respect to the remainder of the provisions which relate to the civilian command authority of the members of the Presidency of BiH and their conformity with the Constitution of BiH, the Constitutional Court elaborated on what has been stated previously regarding the Constitution of the RS with the following reasons (see para. 55 thru 58 supra).

75. The Constitutional Court thus declares the challenged provisions to be in conformity with Constitution of BiH.

Members of the Constitutional Court were unanimous in adopting the Decisions relating to Article 4, as modified by Amendment LVI, item 2 of the Constitution of the RS. As regards to Article 7, Article 28, paragraph 4, Article 68 item 16, as modified by Amendment XXXII, Article 80, as modified by Amendment XL, item 1 and Article 106, item 2 of the Constitution of the RS as well as Article I.6 (1), Article III.1 (a), as modified by Amendment VIII, Article IV.B.7 (a) (I) through (III) and Article IV.B.8 of the Constitution of the Federation of BiH, as modified by Amendment III, the Constitutional Court adopted its Decision by 5 votes *pro* to 4 votes *con*.

76. The Decisions regarding the publication in the *Official Gazettes* of Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina and regarding the date when the provisions that are declared unconstitutional cease to be in effect are based on Articles 59 and 71 of the Court's Rules of Procedure.

The Court ruled in the following composition:

President of the Court: Prof. Dr Kasim Begić,

Judges: Hans Danelius, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Dr Zvonko Miljko, Azra Omeragić, Prof. Dr Vitomir Popović, Prof. Dr Snežana Savić and Mirko Zovko.

Pursuant to Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, a concurring opinion was expressed by Judge Hans Danelius, while the following Judges expressed their dissenting opinions: Judges Kasim Begić and Joseph Marko with respect to the provisions of Article 80, paragraph 1, as modified by Amendment XL, item 1 and Article 106, paragraph 2 of the Constitution of the Republika Srpska, and Article III.1 (a), as modified by Amendment VIII, Article IV.B.7 (a) (I) through (III) and Article IV.B.8 of the Constitution of the Federation of BiH, and Judges Vitomir Popović and Snežana Savić with respect to the provisions of Article 68, item 16, as modified by Amendment XXXII, Article 7, paragraph 1 and Article 28, paragraph 4 of the Constitution of the Republika Srpska, and Article I.6 (1) of the Constitution of the Federation of Bosnia and Herzegovina. The texts of these separate opinions are annexed to this Partial Decision.

U 5/98-IV
19 August 2000
Neum

Prof. Dr Kasim Begić
President
Constitutional Court of Bosnia and Herzegovina

CONSTITUTION OF THE REPUBLIKA SRPSKA

Article 68, item 16

Item 16 of Article 68 of the Constitution of the RS, according to which “the RS regulates and ensures cooperation with the Serb people outside of the Republic”, creates a preference that cannot be legitimatised pursuant to Article I paragraph 4 of the Convention on the Elimination of All Forms of Racial Discrimination. It also violates obligations imposed by Article 2 paragraph 1 item (c) of the Convention on

the Elimination of All Forms of Racial Discrimination. The same obligation follows from Article 1 paragraph 3 sub-paragraph (a) and Article II paragraph 1 of Annex VII, taken in conjunction with Article II paragraph 2 and Article III paragraph 2 sub-paragraph (c) of the Constitution of BiH.

Article 7, paragraph 1

A wide range of meaning of "official use" of the Serbian language and Cyrillic alphabet and territorial restriction of official use of other languages under Article 7 of the Constitution of the RS, however, reach far beyond per se legitimate goal of regulation of official language use in so far as these provisions have the effect of prevention of enjoyment of rights under Article II.3 (m) and 5 of the Constitution of BiH. They are also in contravention to Article I.4 of the Constitution of BiH.

Regulation of languages by Entities is a legitimate goal per se, but it might pose a violation of the rights of individuals and positive obligations provided for by the Constitution that serve as an institutional safeguard of "a pluralist society" and "market economy" according to the

Preamble of Constitution of BiH. There is an implicit and yet necessary responsibility of the State of BiH to ensure minimum standards for language use through a framework legislation, given the clear presence of danger created by use of official language regulations without restrictions in Entities concerning these fundamental normative principles and institutional safeguards of the Constitution of BiH. In doing so, the legislation of BiH must account for an efficient possibility of equal use of Bosnian, Croatian and Serbian languages, not only in institutions of BiH but also at the level of Entities and their administrative authorities, in legislative, executive and judicial authorities as well as in public. The highest standards of Articles 8 through 13 of the European Charter for Regional or Minority Languages should be used as guidelines for the three languages. Lower standards provided in the European Charter might – taking into account appropriate conditions – be sufficient for other languages only.

Article 28, paragraph 4

Provision of Article 28 paragraph 4 of the Constitution of the RS gives the Orthodox Church an important influence over creation of a system of values and belief, and it

must be considered as a constitutional norm that allows the authorities to "create a public atmosphere that prevents free exercise of religion".

In view of the material support to the Orthodox Church, it acquired a privilege by this provision that cannot be legitimatised in constitutional terms and is therefore of an inherent discriminatory character.

CONSTITUTION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

Article I.6 (1)

Challenged provision presents a serious obstacle to the enjoyment of rights guaranteed under Article II.3 (n) and II.5 of the Constitution of BiH, and it violates positive obligations arising out of the Framework Convention for the Protection of National Minorities, the Convention on the Elimination of All Forms of Racial Discrimination, and Article II.4 of the Constitution of BiH. Accordingly, the Constitutional Court declared this provision unconstitutional, and it reads as follows: "The official languages of the Federation shall be the Bosnian and the Croatian language. The official script will be the Latin alphabet".

ANNEX

Concurring Opinion of Judge Hans Danelius On the Partial Decision of the Constitutional Court of Bosnia and Herzegovina, case U No. 5/98 of 18 and 19 August 2000

I have voted with the majority on all matters dealt with in this Decision, but my reasons for doing so differ in some respects from those which appear in the Decision. My views are as follows:

1. Special parallel relations (Article 4 of the Constitution of the RS)

Article 4 of the Constitution of the RS provides that the Republika Srpska may establish special parallel relations with the Federal Republic of Yugoslavia and its member republics. The Article makes it clear that the establishment of such relations shall be effected "according to the Constitution of Bosnia and Herzegovina". The provision in the Constitution of BiH which is of particular interest in this regard is Article III.2 (a), which provides that the Entities shall have the right to establish special parallel relationships with neighbouring states and adds that such relationships must be "consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina".

It therefore appears that Article 4 of the Constitution of the RS has direct support in Article III.2 (a) of the Constitution of BiH, which permits the Entities to establish special relationships with neighbouring states. Moreover, if such relations are to be established between the Republika Srpska and the Federal Republic of Yugoslavia or its member republics, the Constitution of the RS expressly requires that this establishment be done in accordance with the Constitution of BiH, which means, in particular, that the sovereignty and territorial integrity of Bosnia and Herzegovina shall be respected. Consequently, Article 4 of the Constitution of the RS cannot be considered to violate the Constitution of BiH.

2. Languages and alphabets (Article 7 of the Constitution of the RS and Article I.6 (1) of the Constitution of Federation of BiH), relations with the Orthodox Church (Article 28, fourth paragraph, of the Constitution of the RS) and cooperation with the Serb people outside Republika Srpska (Article 68, item 16, of the Constitution of the RS)

In its third Partial Decision of 1 July 2000, the Constitutional Court found that Article 1 of the Constitution of the RS, insofar as it referred to the Republika Srpska as a State of the Serb people, and Article 1 of the Constitution of Federation of BiH, insofar as it referred only to Bosniacs and Croats as constituent peoples in the Federation, were unconstitutional. In my own concurring opinion attached to that Decision, I agreed with the conclusion, because I found in these provisions a discriminatory element which was not compatible with the non-discrimination principle in the Constitution of BiH. In my opinion, these introductory Articles in the two Constitutions could well be read as meaning that the Serbs in Republika Srpska and the Bosniacs and Croats in the Federation have a privileged constitutional status and that persons of a different ethnic origin are not in an equal position as citizens of the Entities. I also considered that, by not ensuring the equality of all citizens in an unambiguous manner, the Constitutions could make it unattractive for refugees and displaced persons to return to their previous homes, which would be inconsistent with an important objective of the Constitution of BiH, expressed in particular in Article II.5 of that Constitution.

I consider that these objections, which were formulated in regard to Article 1 of each of the Entity Constitutions, are also valid in relation to some other provisions of these Constitutions, which give, or can reasonably be interpreted as giving, one people or two peoples, as the case may be, a favoured position in comparison with other groups of citizens.

(a) Article 7 of the Constitution of the RS provides that the Serbian language and the Cyrillic alphabet shall be in official use in the Republika Srpska, while the Latin alphabet shall be used as specified by the law. It is added in the second paragraph that in certain regions there may be special rules about languages and alphabets.

Article 7 must be considered to give the Serb population a special constitutional protection of their language and alphabet. The protection extends to the whole territory of Republika Srpska and does not depend on the population structure in each community or region. For reasons similar to those formulated in regard to Article 1 of the Constitution of the RS, I therefore find that Article 7 places the Serb inhabitants of the Republika Srpska in a favoured position and therefore discriminates against other citizens.

The same reasoning applies, *mutatis mutandis*, to Article I.6 (1) of the Constitution of Federation of BiH, which provides that the official languages of the Federation shall be the Bosniac and Croatian languages and that the official alphabet in the Federation shall be

the Latin alphabet. It is added in Article I.6 (2) that other languages may be used as means of communication and instruction and in Article I.6 (3) that additional languages may be designated as official by decisions of the Federation Legislature.

It follows from these provisions that the Bosniac and Croatian languages are official languages in the whole territory of the Federation, whereas other languages can only obtain such status after a decision by the Legislature. This is likely to create among citizens who are neither Bosniacs nor Croats the impression that they are not accepted as equal to the Bosniacs and Croats, which may affect their willingness to reside in, or return to, their homes in the territory of the Federation. A discriminatory element is therefore present in Article I.6 of the Constitution of Federation of BiH as well.

(b) According to Article 28, fourth paragraph, of the Constitution of the RS, the State shall materially support the Orthodox Church and cooperate with it in all fields and, in particular, in preserving, cherishing and developing cultural, traditional and other spiritual values. Although special links between state and church are not unknown in other European countries and must not necessarily be seen as discriminatory, such links become particularly sensitive in a multi-ethnic society where the church of one ethnic group is given governmental support. Such is the situation in Republika Srpska where the Orthodox Church is mainly the church of the Serb population and where the constitutional obligation to support and cooperate with that church may therefore be seen by others as an expression of the privileged position of the Serbs within Republika Srpska. There is thus a discriminatory aspect of Article 28, fourth paragraph, of the Constitution of the RS, which cannot be considered to have been entirely removed by the general provision in the second paragraph of the same Article, according to which all religious communities shall be equal before the law and enjoy freedom to perform religious affairs and services.

(c) Article 68, item 16 of the Constitution of the RS provides that Republika Srpska shall regulate and ensure cooperation with the Serb people outside the Republic. Such constitutional obligation of cooperation with other Serbs reinforces the impression created by other parts of the Constitution of the RS that Republika Srpska is primarily a territory of the Serbs and that their interests enjoy special protection in the Constitution of the RS.

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It follows from these considerations that the constitutional provisions regarding (a) language and alphabet in both Entities, (b) the obligation of the Republika Srpska to support and cooperate with the Orthodox Church and (c) the obligation of the Republika

Srpska to cooperate with Serbs outside the Republika Srpska must be considered to grant privileges to some citizens on ethnic grounds and to place inhabitants or former inhabitants who do not belong to the privileged group or groups in a less favoured position. Such discriminatory elements are particularly serious in territories where – as is the case in both Entities – large numbers of people have been forced to leave their homes on ethnic grounds and discrimination on such grounds has been, and remains, a frequent occurrence. An important aim according to the Constitution of BiH, which is reflected in Article II.5 of that Constitution, is the return of refugees and displaced persons to their homes. The realisation of that aim may be thwarted or rendered more problematic, if those who may envisage returning feel that they are not even in the Constitution treated as equal to the predominant ethnic group or groups.

For these reasons I conclude that the said provisions of the Entities' Constitutions violate the Constitution of BiH, since they are inconsistent with the prohibition against discrimination laid down in Article II.4 of the Constitution of BiH.

3. The armed forces (Article 80, para. 1, as modified by Amendment XL, item 1, and Article 106, para. 2 of the Constitution of the RS, and Article III.1 (a), as modified by Amendment VIII, Article IV.B.7 (a) and Article IV.B.8 of the Constitution of Federation of BiH)

The provisions in the Constitution of BiH which deal with the armed forces do not give clear information on how the competence in military matters is to be divided between the State and the Entities. However, it is possible to conclude from the text of Article V.5 of the Constitution of BiH that each Entity shall have its own armed forces but that the Entities shall not have exclusive and unlimited authority over these forces. The limitations of the authority of the Entities resulting from Article V.5 are twofold. First, each member of the Presidency shall have civilian command authority over the armed forces. Secondly, there shall be a Standing Committee on Military Matters whose task shall be to co-ordinate the activities of all the armed forces in Bosnia and Herzegovina. A joint top organisation at the State level has thus been created for the armed forces of the Entities, an important purpose being to ensure that in times of crisis neither of the Entities should be permitted to act independently in a manner which could involve a danger to the other Entity or to a neighbouring country. The desire to prevent the armed forces of the Entities from being used against each other is also reflected in the further obligations laid down in Article V.5, i.e. that neither Entity shall threaten or use force against the other Entity, that the armed forces of one Entity shall under no circumstances enter into or stay

within the territory of the other Entity without the consent of the government of the latter and of the Presidency of Bosnia and Herzegovina, and that all the armed forces in Bosnia and Herzegovina shall operate consistently with the sovereignty and territorial integrity of Bosnia and Herzegovina.

The question is now whether the contested provisions in Articles 80 and 106 of the Constitution of the RS and in Articles III.1 (a), IV.B.7 (a) and IV.B.8 of the Constitution of Federation of BiH are in conformity with Article V.5 of the Constitution of BiH.

Regarding the Constitution of the RS, Article 80, para. 1 authorises the President of the Republika Srpska to exercise tasks related to defence and security. The text makes no reservation or exception for the responsibilities of the members of the Presidency and the Standing Committee on Military Matters under the Constitution of BiH. On the other hand, the wording of Article 80 is of a general character and does not exclude that some functions relating to defence and security fall outside the competence of the President of the Republika Srpska.

Article 106, para. 2 of the Constitution of the RS provides that the President of the Republika Srpska shall appoint, promote and recall officers of the army of the Republika Srpska and have similar functions with respect to judges of the military courts and army prosecutors. If this competence was considered to be general and without exception, it would not be consistent with the Constitution of BiH, since there are situations where the members of the Presidency of BiH, in the exercise of their civilian command authority, are entitled to take decisions on matters regarding the personnel of the armed forces of the Entities. However, although the wording of Article 106 contains no explicit reservation or exception to uphold the prerogatives of the members of the Presidency of BiH and the Standing Committee on Military Matters under the Constitution of BiH, the Article can be interpreted as only regulating where the competence lies within the institutional structure of the Republika Srpska and as not dealing with situations where decisions have to be taken by a BiH institution.

It follows that the two provisions in Articles 80 and 106 of the Constitution of the RS can be considered not to violate the Constitution of BiH. However, they are in conformity with the Constitution of BiH only if the civilian command authority of the members of the Presidency of BiH and the co-ordinating functions of the Standing Committee on Military Matters provided for in Article V.5 of the Constitution of BiH are upheld and respected. I therefore consider that Articles 80 and 106 of the Constitution of the RS do not violate

the Constitution of BiH, provided that the two Articles are read as in no way interfering with the prerogatives of the members of the Presidency and the Standing Committee on Military Matters and as conferring authority and competence only insofar as under the constitutional system of Bosnia and Herzegovina military matters may be dealt with at the Entity level.

Regarding the Constitution of Federation of BiH, Article III.1 (a) deals with the competence of the Federation in matters of defence. No specific reference to the Constitution of BiH is made in that Article, and the fact that, according to the text of the Article, the Federation shall have ”exclusive responsibility” for the organisation and conduct of the defence of the Federation could create some doubt as to its conformity with Article V.5 of the Constitution of BiH. However, Article III.1 (a) must be read as a whole and in another part of the text there are references to military functions performed at State level. In fact, the Article refers to the conclusion of military agreements “according to the Constitution of Bosnia and Herzegovina” and makes the Federation responsible for ”the cooperation with the Standing Committee on Military Matters and the Council of Ministers in the defence of Bosnia and Herzegovina”. I find these references sufficient to show that the supreme authority of the joint institutions in matters of defence according to the Constitution of BiH can be considered to be recognised in the Constitution of Federation of BiH.

Regarding the responsibility of the President of the Federation for the appointment of officers of the armed forces and other military personnel according to Articles IV.B.7 (a) and IV.B.8 of the Constitution of Federation of BiH, it is true that the text of these provisions does not refer to the competence of the members of the Presidency of BiH to take decisions, in the exercise of their civilian command authority, on matters relating to the personnel of the armed forces. However, in the same way as with regard to the corresponding provision in the Constitution of the RS, I find it possible to read these provisions in the Constitution of Federation of BiH as only regulating the competence at Entity level and as being, on this basis, in conformity with the Constitution of BiH.

In Article IV.B.7 (a) of the Constitution of Federation of BiH, there is also a provision, according to which the President of the Federation shall serve as commander-in-chief of the military of the Federation. This provision cannot be considered to be incompatible with the Constitution of BiH, provided that the civilian command authority of the members of the Presidency of BiH with respect to the armed forces of the Federation is respected.

In summary, I consider that the provisions of the two Entities' Constitutions regarding military matters can be read as referring to the internal situation within each Entity, in which case the competence of the members of the Presidency of BiH and the Standing Committee on Military Matters is not affected by these provisions. Basing myself on such an interpretation, I find that the said provisions are not unconstitutional. However, it is important that this reading of the two Entities' Constitutions is accepted and that the prerogatives of the institutions of BiH according to Article V.5 of the Constitution of BiH are fully recognised and respected.

ANNEX

Separate opinion of Prof. Dr Kasim Begić in the Fourth Partial Decision in the case U 5/98

With regard to Article 80, paragraph 1 of the Constitution of the Republika Srpska, as modified by Amendment XL, item 1 and Article 106, paragraph 2 of the Constitution of the Republika Srpska, and Article III.1 (a) of the Constitution of the Federation of Bosnia and Herzegovina, as modified by Amendment VIII.

With respect to the majority opinion of the Court on these challenged provisions, not only do I consider that there are several arguments for which these provisions should have been declared unconstitutional, but also that this Decision has not followed the doctrine of the Court established in the first Three Partial Decisions in the case U 5/98.

1. According to Article V.5 of the Constitution of Bosnia and Herzegovina, three facts are beyond contestation: a) each member of the Presidency has civilian command authority over the armed forces; b) there are armed forces of the Entities; c) the armed forces operate consistently with the sovereignty and territorial integrity of Bosnia and Herzegovina. The evaluation of the conformity of the respective provisions of the Entities' Constitutions with the Constitution of Bosnia and Herzegovina must be carried out from the perspective of whether they include a clear integrated chain of command with the civilian command authority of the members of the Presidency of Bosnia and Herzegovina at the top, and whether these provisions ensure the functioning of the armed forces in accordance with the sovereignty and territorial integrity of Bosnia and Herzegovina.

2. It clearly appears from Article V.5 of the Constitution of Bosnia and Herzegovina that the Entities have powers to maintain the armed forces, but this provision also defines the limits of this maintenance, including the fact that the extent of the "self-organizing of the Entities" is generally established by the Constitution of Bosnia and Herzegovina (Third Partial Decision case No. U 5/98, *Official Gazette of Bosnia and Herzegovina* No. 23/00). This limitation means that this sphere represents a joint competence of Bosnia and Herzegovina and its Entities, and it is therefore necessary for the functioning of these constitutional provisions that the Parliamentary Assembly, starting from the supremacy of the Constitution of Bosnia and Herzegovina over acts or decisions of any authority, legislates norms on the extent of the powers of the Entities in maintaining the armed forces vis-à-vis the civilian command authority, including the specification of powers which the latter comprises in view of the principle of a democratic State and the understanding, *inter alia*, that the armed forces act

under civilian command. In this context, the reference in the majority opinion to Article III.1, referring to the lack of mention of joint armed forces, is entirely irrelevant in view of the other constitutional provisions and constitutional principles. Likewise, there are no grounds in this Decision for reducing the civilian command authority, and generally activating the members of the Presidency and the Standing Committee, for "coordination" and in the case of a "threat to the sovereignty and territorial integrity of Bosnia and Herzegovina".

3. The notion of civilian command comprises several aspects of command – the question of when and how the armed forces are used, the power of control of the organization of armed forces and appointment of officers, and ensuring a hierarchical integrated command. Therefore, the civilian command authority in the function of joint command (and joint defence policy and doctrine) is not inconsistent with the existence of Entity armed forces and with certain powers, in defined frameworks, of the Entities in this sphere. In this respect, it is possible that the civilian command authority fulfils this twofold task, i.e. to be the manifestation of the principle of a democratic State and to be in the function of the preservation of the sovereignty and territorial integrity of Bosnia and Herzegovina. In this context, it should be mentioned that neither Entity Constitution uses the term "civilian command", either within the original text or in a reference to the Constitution of Bosnia and Herzegovina.

4. The unconstitutionality of the aforementioned provisions of the Entities' Constitutions is further substantiated with a historical interpretation. Namely, in the challenged provisions of the Constitution of the Republika Srpska and other provisions there is no reference to the Constitution of Bosnia and Herzegovina in this sphere, or to the civilian command authority of the members of the Presidency, or even to the Standing Committee. It undoubtedly follows from this fact that the challenged provisions date back from the time when this Entity was being designed as a State in full capacity, and that the fact that meanwhile the Constitution of Bosnia and Herzegovina has been adopted is, from the point of view of this Constitution, actually irrelevant.

As for the Constitution of the Federation of Bosnia and Herzegovina, it accepts in Amendment VIII, the Constitution of Bosnia and Herzegovina and cooperation with the Standing Committee and the Council of Ministers in this sphere, but it should be noted that this provision commences with the words that this sphere is "in the exclusive competence of the Federation…", which is in direct conflict with the position of the Court in the Third Partial Decision in the case U 5/98, that there is no legislative power which is not provided by the Constitution of Bosnia and Herzegovina and that the extent of joint engagement of the Entity and State structures are reduced to "cooperation".

ANNEX

Dissenting opinion of Prof. Dr Joseph Marko in the Partial Decision in the case U 5/98 of 18 and 19 August 2000

With regard to Article 80, paragraph 1, as modified by Amendment XL, item 1, Article 106, paragraph 2 of the Constitution of RS, and Article III.1 (a), as modified by Amendment VIII, Article IV.B.7 (a) (I) through (III) and Article IV.B.8 of the Constitution of Federation of BiH

To my regret, I am unable to share the opinion of the majority of the Court, since it appears to me that neither the civilian command authority of the members of the Presidency of BiH according to Article V.5 (a) of the Constitution of BiH has been appropriately interpreted, nor is it possible to interpret the challenged provisions of the Entity Constitutions in conformity with the Constitution of Bosnia and Herzegovina.

While it is true that the respective provisions of the Constitution of BiH do not contain any legal definition of the notion of civilian command authority and, what is rather strange, insofar as each member of the Presidency shall have civilian command authority over the armed forces, these uncertainties and inconsistencies may not be dissolved by making reference to the speculative "nature" of these armed forces or whether the Presidency of BiH is a colective body or not. It must not be forgotten that the question addressed in the request was whether the competence of an Entity or its President to appoint military staff is in accordance with the civilian command authority of the Presidency of Bosnia and Herzegovina. Hence, the problem posed by the request was not the question of civilian command over the armed forces as such, but the question of "civilian" command.

Accordingly, it is the technique of legal control rather than the nature of the armed forces that requires interpretation of the character of "civilian" command in terms of substance. It is therefore necessary to introduce a firm constitutional principle that would be based on the text of the Constitution of Bosnia and Herzegovina, so that valid legal grounds are established for the constitutional concept of civilian command.

It follows from the principles of a democratic state, as laid down in Article I.2 of the Constitution of BiH, that all the armed forces must operate under civilian authority, i.e. subject to their management and political control. This fundamental principle is

further specified through Article V.5 of the Constitution of BiH insofar as such civilian command authority over all the armed forces in Bosnia and Herzegovina, i.e. command authority of the armed forces of both the Federation of BiH and the Republika Srpska, is vested in each member of the Presidency. Moreover, the Standing Committee on Military Matters, selected by the members of the Presidency, must coordinate the activities of these armed forces. It is thus clear from these provisions of the Constitution with regard to the efficiency of the function of civilian control over the armed forces that there must be a clearly integrated hierarchy and chain of command with the civilian command authority of the members of the Presidency on top.

Furthermore, civilian command authority includes several aspects of command authority that must be distinguished. First of all, a question arises as to when and how to use the armed forces as such. A supreme command authority in this sense must remain entirely in the hands of the members of the Presidency since any other regulation would present a clear and present danger to the sovereignty and territorial integrity of BiH, which is, according to Article V.5 (a), an absolute constitutional obligation. The majority of the Judges were of the opinion that the decision on the employment of the armed forces should be taken by a member of the Presidency, with the consent of the authorities of one Entity, presents such an obvious and imminent danger to the sovereignty and territorial integrity of Bosnia and Herzegovina that it cannot be considered in conformity with specific constitutional assumptions.

Secondly, civil command authority as a democratic control of the armed forces must also include a supervisory power with regard to the organization of the armed forces. Hence, the appointment, promotion, demotion, suspension or removal of all military personnel in the armed forces must remain under the ultimate control of the members of the Presidency. How this control should be organized remains to the framework-legislation of the State of Bosnia and Herzegovina and the residual powers of the Entities in this field. However, as a last resort, the possibility to veto the appointment or removal of any personnel of the armed forces must remain in the hands of the members of the Presidency.

Thirdly, the Standing Committee on Military Matters according to Article V. 5 of the Constitution of BiH serves as some sort of "supreme command". This meaning may be derived from the composition and selection procedures of this body – insofar as the members of the Presidency are *ex constitutione* also members of that body and select the other members – as well as from its power to coordinate the activities of the armed forces of the Entities. These constitutional provisions obviously have the function of providing

for an integrated chain of command from top and down the ranks of the military, which is necessary to preserve the sovereignty and territorial integrity of BiH. Unlike the majority opinion, I cannot see any constitutional or legal reason to assert that this Committee is not an institution of Bosnia and Herzegovina. Quite the opposite! Given the context of Article V of the Constitution of Bosnia and Herzegovina, whose paragraphs 1 through 3 relate to the Presidency of Bosnia and Herzegovina, paragraph 4 to the Council of Ministers and paragraph 5 to the Standing Committee, it evidently follows that this is an institution of Bosnia and Herzegovina as equally as the Presidency or the Council of Ministers.

Being the most important instrument of democratic control, civilian command power under Article V. 5 of the Constitution of BiH is ultimately supreme and overrules any act or decision taken by an Entity organ that is in conflict with the Constitution, pursuant to Article III. 3 (b) of the Constitution of BiH. Since every member of the Presidency is vested with civilian command authority over all the armed forces, it is thus necessary that they act jointly when exercising this power without, however, having the possibility to block each other.

Finally, due to the principle of separation of powers inherent in the Constitution of BiH, it must rest with the Parliamentary Assembly of BiH to specify the constitutional principles outlined above through its power of adopting necessary framework legislation in this field and thus also to provide for respective procedures of joint actions of the Presidency, which has already been decided by the Court in the second Partial Decision in this case (*Official Gazette of Bosnia and Herzegovina*, No. 17/00).

As already indicated above, it is my opinion that the challenged provisions of the Entities' Constitutions cannot be interpreted in conformity with the Constitution of BiH.

According to Article V. 5 of the Constitution of BiH, the Entities do have the authority to maintain the armed forces, but only within the limits set forth by the Constitution. This limitation means that this right can only be seen within this context, that the Entities do not act as states and if provisions on the civilian command authority over the armed forces do not pose a threat to the sovereignty and territorial integrity of Bosnia and Herzegovina. Consequently, the interpretation of the texts of the Entity Constitutions cannot be reduced to the regulation of the internal composition of Entity military issues. In addition to the legislative interpretation of the provisions and legal provisions that define the disputed constitutional provisions, for which both the challenged provisions and the entire legal framework must be particularly accounted.

The challenged provision of Article 80, paragraph 1 of the Constitution of RS, as supplemented by Amendment XL, item 1 is worded in a very general manner insofar as it refers to "tasks related to defence and security". The Law on Defence of the Republika Srpska (*Official Gazette of RS*, No. 21/96) then moves to defines these tasks. The responsibilities of institutions of the Republika Srpska include, *inter alia*, that the People's Assembly of the Republika Srpska may proclaim the state of war (Article 5 of the Law on Defence), that the President of the Republika Srpska or the Government may take a decision on the mobilisation of the Army in case of war threat (Articles 6 and 8 of the Law on Defence). These competencies of the institutions of the Republika Srpska clearly interfere with the "mobilisation competence" which lies at the very heart of the civilian command authority of the Presidency of Bosnia and Herzegovina. In light of this legislation, Article 80, paragraph 1 of the Constitution of RS is too broadly construed so that there is no possibility to interpret this provision in conformity with the constitutional principles of the civilian command authority provided by the Constitution of BiH. This would imply that the provisions of Article 80, paragraph 1, as supplemented by Amendment XL, item 1 and Article 106, paragraph 2 of the Constitution of RS must be regarded in the light of legislative history of the entire Constitution of RS. While Article 106, paragraph 2 is still the original text when the Constitution of RS was adopted in 1992, Amendment XL to Article 80 was adopted in 1994 (*Official Gazette of RS*, No. 28/94). Hence, the text of these provisions was adopted when the RS did consider itself as an independent state. However, taking into consideration the legal provisions that have been adopted following the entry into force of the Dayton Peace Agreement (!) and the legislative interpretation of provisions, they can not be viewed any longer simply as an internal affair of the Entities. As there is a constitutional obligation under Article XII, paragraph 2 of the Constitution of BiH, it is obvious that the RS did not make an attempt to bring these constitutional provisions of the Constitution of RS, obviously intended for the institutional framework of an independent state, into conformity with the constitutional requirements that follow from the Constitution of Bosnia and Herzegovina.

In light of the aforementioned, Article 80, paragraph 1, as supplemented by Amendment XL, item 1 and Article 106, paragraph 2 of the Constitution of RS are, on the one hand, too broad, and on the other hand, too narrowly constructed, so I do not see a possibility of interpreting these provisions in conformity with the civilian command authority according to Article V.5 (a) of the Constitution of BiH.

The same holds, more or less, for the challenged provisions of the Constitution of Federation of BiH.

Article III. 1 (a) of the Constitution of Federation of BiH, as modified by Amendment VIII, which concerns defence of the Federation, the establishment of a joint command over all military forces in the Federation and the control of military production is worded in a manner which does not take the civil command authority of the members of the BiH Presidency appropriately into account. Reference to the Constitution of BiH is too specific with regard to the conclusion of military agreements. Additionally, the regulation of cooperation with the Standing Committee on Military Matters is not exclusive responsibility of the Federation of BiH but as follows from Article V. 5 (a) of the Constitution of BiH, in the power of the State to regulate the basic principles through framework legislation which will then be further specified by Entity legislation.

The challenged provisions concerning the appointment of military personnel and officers of the armed forces of the Federation as well as the determination of the President of the Federation to serve as commander-in-chief of the armed forces of the Federation must be examined thus in light of aforesaid.

As seen from the wording of Amendment XXIII to the Constitution of the Federation of BiH, the appointment of military officers was already implied as an element of the civilian command authority and this power was then vested in the President of the Presidency of the Republic of BiH and the President or Vice-President of the Federation for a limited time-period until the establishment of the BiH Presidency. However, this transitional period has expired so that this provision of Amendment XXIII can no longer be understood as a reservation to bring the Constitution of Federation of BiH in line with the Constitution of BiH. Even if Amendment XXIII was interpreted in a way that after the expiration of the "transitional period" the power to appoint officers has been transferred to the members of the BiH Presidency, the challenged provision would nevertheless be contradictory in so far as it would relate to the responsibility of the President of the Federation to appoint officers to armed forces without any limitation and would therefore disregard the power of civilian command authority of members of the members of the BiH Presidency. Accordingly, Article III. 1 (a), Article IV.B.7 (a) (I) and Article IV.B.8 of the Constitution of the Federation of BiH cannot therefore be interpreted in a manner consistent with the Constitution of BiH.

As far as the position of the President of the Federation to serve as commander-in-chief of the military of the Federation in accordance with Article IV. B. 7 (a) (ii) is concerned, there is again no reference to the ultimate control under the civilian command authority of the members of the BiH Presidency. This is even more important since the decision when

and how to employ the armed forces, i.e. the mobilisation competence, rests exclusively with the members of the BiH Presidency. Although Article 22 of the Law on Defence of the BiH Federation (*Official Gazette of the Federation of BiH*, No. 15/1996) contains a similar provision as Amendment XXIII of the Constitution of Federation of BiH in this respect, the same arguments as outlined supra hold true for the said Article 22. The challenged constitutional provision can not be read in conformity with the Constitution of BiH. Moreover, in relation to Article IV.B.8 of the Constitution of the Federation of BiH, the last sentence thereof constitutes a suspending veto that is not in conformity with the Decision on unconstitutionality of Article I.1 (1) of the Constitution of the Federation of Bosnia and Herzegovina from the third Partial Decision in this case (*Official Gazette of BiH*, No. 23/00).

With due respect to the arguments of the majority opinions, I find the challenged provisions of the Entities' Constitutions in violation of the requirements that follow from the Constitution of BiH.

ANNEX

Separate opinion of Prof. Dr Snežana Savić and Prof. Dr Vitomir Popović with regard to the Fourth Partial Decision of the Constitutional Court of Bosnia and Herzegovina in the case No. U 5/98 of 18 and 19 August 2000

The Fourth Partial Decision in the Case No. U 5/98 was adopted at the session of the Constitutional Court of Bosnia and Herzegovina held on 18 and 19 August 2000. In accordance with Article 36 of the Rules of Procedure of the Constitutional Court – Amended Text (*Official Gazette of Bosnia and Herzegovina*, No. 24/99), we chose to deliver a separate opinion with regard to the following items:

As to the Constitution of the Republika Srpska:

a) Article 68, item 16 (as replaced by Amendment XXXII);

Article 7, paragraph 1 and

Article 28, paragraph 4

As to the Constitution of the Federation of Bosnia and Herzegovina:

a) Article I.6. (1)

A) Admissibility

As to the admissibility of the request in its entirety, we support the same reasons that were provided in the Separate Opinion to the Third Partial Decision of the Court in this case.

B) Merits of the case

1. As to the review of the constitutionality of Article 68, item 16 (as replaced by Amendment XXXII), Article 7, paragraph 1 and Article 28, paragraph 4 of the Constitution of the Republika Srpska, we consider the request not to be in accordance with the Constitution of Bosnia and Herzegovina and find that it should have been dismissed as being ill-founded in accordance with the Constitution of Bosnia and Herzegovina and the Rules of Procedure of the Constitutional Court.

2. As to the review of the constitutionality of Article I.6. (1) of the Constitution of the Federation of Bosnia and Herzegovina, we consider the request not to be in accordance with the Constitution of Bosnia and Herzegovina and find that it should have been dismissed as ill-founded in accordance with the Constitution and Rules of Procedure of the Constitutional Court.

* * * *

1. As to the review of the constitutionality of Article 68, item 16 of the Constitution of the Republika Srpska (as replaced by Amendment XXXII), we consider the request not to be in accordance with the Constitution of Bosnia and Herzegovina, since it is not the question of the establishment of special parallel relationships which are exclusively provided for in the Constitution of Bosnia and Herzegovina, but of cooperation with the Serb people outside the Republika Srpska, wherever those people are. This cooperation could be realized in different forms that do not exclusively include agreements on special parallel relations. None of the provisions of the Constitution of Bosnia and Herzegovina exclusively prohibit this cooperation, nor do they normatively regulate it. In this sense, the aforesaid provision of the Constitution of the Republika Srpska includes all forms of cooperation that do not infringe the sovereignty and territorial integrity of Bosnia and Herzegovina, its competencies provided for in Article III.1 of the Constitution of Bosnia and Herzegovina or the human rights and fundamental freedoms guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. As this case does not pertain to the question of cooperation between states or to any other form of institutionalised cooperation at the state level but to cooperation with the Serb people outside the Republika Srpska, as expressly formulated by the challenged provision of the Constitution of the Republika Srpska, it may be concluded that the very formulation of that provision of the Constitution of the Republika Srpska excludes such an intention.

Moreover, the interpretation itself of the aforesaid provisions of the Constitution of the Republika Srpska leads to the conclusion according to which the aforesaid provision does not include only the Serb people in the Federal Republic of Yugoslavia but also the Serb people outside the Republika Srpska, which is surely a broader meaning. The aforesaid provision of the Constitution of the Republika Srpska offers the possibility for such cooperation (that cooperation is regulated and guaranteed), while the manner of its realization is not regulated. Should the aforesaid manner, which is to be found by acts of lesser legal force (such as laws), be inconsistent with the Constitution of Bosnia and Herzegovina, the unconstitutionality of such an act could be declared. This is not the

case with Article 68, item 16 of the Constitution of Republika since it does not endanger the Constitution of Bosnia and Herzegovina. Taking into consideration that the aforesaid provision does not exclude either cooperation with other peoples outside the Republika Srpska or cooperation of other citizens of the Republika Srpska with their compatriots outside the Republika Srpska, the aforesaid provision of the Constitution of the Republika Srpska does not have a discriminatory character.

The majority opinion in this Decision correctly concludes: "Despite the fact that this provision can be interpreted in a manner consistent with the Constitution of Bosnia and Herzegovina so as not to exclude cooperation of other peoples with their compatriots outside the Republika Srpska, or to oblige other peoples to cooperate with the Serb people outside the Republika Srpska". However, it incorrectly concludes that these "rules might have an effect of creating a direct preference for the Serb people of the Republika Srpska". Since the Serb people are the constituent (and majority) people in the Republika Srpska, it is logical that cooperation with the Serb people outside the Republika Srpska is supposed to be regulated by the Constitution. It does not mean that such cooperation violates the human rights and freedoms of other citizens of the Republika Srpska.

Moreover, in order to interpret the aforesaid provision of the Constitution of the Republika Srpska, it is necessary to consider the institution of special parallel relationships as provided for in the Constitution of Bosnia and Herzegovina. Special parallel relations of the Republika Srpska with the Federal Republic of Yugoslavia are essentially more powerful than cooperation with the Serb people outside the Republika Srpska. Firstly, this is a type of institutionalised cooperation; secondly, cooperation with the Federal Republic of Yugoslavia and its Member Republics is specified and thirdly, that establishment can include all competencies provided for in Article III of the Constitution of Bosnia and Herzegovina, i.e. all those competencies which do not fall within the competencies of Bosnia and Herzegovina and which, according to the Constitution of Bosnia and Herzegovina, do not endanger its sovereignty or territorial integrity. Similarly, it can be concluded: "If the Constitution of Bosnia and Herzegovina provides for the Republika Srpska the conclusion of an agreement on special parallel relationships, while the Constitution of the Republika Srpska concretises it (with the Federal Republic of Yugoslavia and its Member Republics), which is found to be consistent with the Constitution of Bosnia and Herzegovina, it is logical that cooperation with the Serb people outside the Republika Srpska, which is regulated and provided for in Article 68, item 16 of the Constitution of the Republika Srpska, must lead to such a logical conclusion. Therefore, if the provision

of the Constitution of the Republika Srpska that regulates special parallel relations with the Federal Republic of Yugoslavia and its Member Republics (which includes a large scope of rights) is not discriminatory, then the same conclusion must be drawn as to this provision of the Constitution of the Republika Srpska.

Therefore, the majority opinion cannot conclude that item 16 of Article 68 of the Constitution of the Republika Srpska cannot be legitimatised by Article 1, paragraph 4 of the Convention on the Elimination of All Forms of Racial Discrimination nor can it conclude that it violates the obligation provided for in Article 2, paragraph 2, item (c) thereof, Article 3, paragraph 3 item (a) or Article II, paragraph 2 of Annex 7, taken in conjunction with Article III.2 (c) of the Constitution of Bosnia and Herzegovina.

2. The applicant asserted that the provision of Article 7 of the Constitution of the Republika Srpska, according to which the Serbian language and the Cyrillic alphabet shall be in official use in the Republika Srpska, was not in conformity with Articles I.2, III.3 and II.4 of the Constitution of Bosnia and Herzegovina. He also asserted that Article I.6 (1) of the Constitution of the Federation of Bosnia and Herzegovina, according to which the Bosnian and Croatian languages shall be in official use, was not in conformity with the Constitution of Bosnia and Herzegovina.

The provision of Article 7 of the Constitution of the Republika Srpska does not constitute discrimination on the basis of national origin since the Serb people, according to the Constitution of Bosnia and Herzegovina and its complex state structure, (reasons elaborated in the Separate Opinion to the Third Partial Decision in this case) are the constituent people of the Republika Srpska, while the other constituent peoples in Bosnia and Herzegovina (Croats and Bosniacs) are constituent in the Federation of Bosnia and Herzegovina, have that right established in the Federation of Bosnia and Herzegovina and conjointly with Serbs at the level of Bosnia and Herzegovina. The rights and freedoms of other citizens (and minorities), the right to differences in particular, are guaranteed in the Republika Srpska, Federation of Bosnia and Herzegovina, in the Entities but also in Bosnia and Herzegovina. Articles 7, 10, 21 and 28 of the Constitution of the Republika Srpska must be mentioned as proof of the aforesaid assertions, particularly if we take into consideration the fact that it is the question of a positive norm and not a ban, which cannot violate the rights and freedoms of the citizens.

The same applies to the provision of Article I.6 (1) of the Constitution of the Federation of Bosnia and Herzegovina.

Furthermore, it is necessary to distinguish in this case the language and the alphabet in official use from the ban on discrimination on linguistic grounds. The Constitution of Bosnia and Herzegovina does not make any provision for the languages in official use due to the complex State structure of Bosnia and Herzegovina and because of the manner of its creation. It falls therefore within the competence of the Entities. By analogy, the Entities' Constitutions contain provisions in this respect. Taking into consideration that the constituent people in the Republika Srpska are the Serb people and that of all its citizens have guaranteed human rights and freedoms, this Article observes the aforesaid principle. It is the same for Croat and Bosniac peoples as far as the Federation of Bosnia and Herzegovina is concerned and this may be attested by Article 10 of the Constitution of the Republika Srpska, which provides: "Citizens of the Republika Srpska shall be equal in their freedoms, rights and duties; they shall be equal before the law and they shall enjoy equal legal protection irrespective of their race, sex, language, national origin, religion, social origin, birth, education, property status, political and other beliefs, social status and other personal attributes".

With regard to the part of the request that relates to the protection of the Human Rights and Freedoms under Article 14 of the European Convention for the Protection of Human Right and Fundamental Freedoms, I hold that it relates to the protection of the rights of individuals and not groups. Such rights, among which is the right to language and alphabet, are protected and provided for in those provisions of the Constitution of the Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina which relate to the protection of rights and freedoms.

3. As to Article 28, paragraph 4 of the Constitution of the Republika Srpska, I hold that the aforesaid provision of the Constitution of the Republika Srpska is not inconsistent with the provisions of the Constitution of Bosnia and Herzegovina, particularly not if we take into consideration the provisions of the first and second paragraphs of the same Article. Such a status of churches in states is not (generally) a "specific feature" of the Republika Srpska but it appears in some other countries as well. In favour of the aforesaid assertions, the fact could be pointed out that the Constitution of Bosnia and Herzegovina does not contain any provision that provides for the obligatory separation of church from the State, nor a status of such organizations in Bosnia and Herzegovina or in the Entities. If the challenged Article sets forth the Serbian Orthodox Church as the church of the Serb people and other peoples of the Orthodox religion in the Republika Srpska and if the same Article stipulates that the Republika Srpska shall materially support the Orthodox Church and cooperate

with it, it does not prohibit the existence of other religious communities, especially if they account for the first and second Paragraphs of the challenged Article which read as follows: “freedom of religion is guaranteed”, “religious communities shall be equal before the law and shall be free to perform religious affairs and ceremonies. They may open religious schools and perform religious education in all schools at all levels of education; they may engage in economic and other activities, receive gifts, establish legacies and manage them, in conformity with the law”. Therefore, the provision of paragraph 4 of Article 28 of the Constitution of the Republika Srpska cannot be interpreted separately from other paragraphs of that Article or separately from Article 10 of the Constitution of the Republika Srpska. A correct interpretation cannot lead to the conclusion that paragraph 4 of Article 28 has a discriminatory character.

The arguments of the applicant who asserted in the reasons of the decision: “This statement is not hypothetical, which proves the permanent discriminating acting of the authorities of the Republika Srpska which prevent the reconstruction of mosques which had been destroyed during the war”, cannot be accepted as a consequence of the constitutional solution for the Constitution of the Republika Srpska but as a consequence of the recent political situation (atmosphere) which, in comparison with information brought forth in the majority opinion, has been improved. Moreover, in this type of dispute – abstract legal dispute (review of constitutionality), what is relevant is the character of the legal norm, i.e. its contents and not the factual situation that is very often different. Therefore, paragraph 4 of Article 28 of the Constitution of the Republika Srpska cannot be analysed in an isolated manner, i.e. it must be analysed in connection with other the Articles of the Constitution of the Republika Srpska, particularly with Article 10 of the Constitution of the Republika Srpska, which shall inevitably lead to its legal meaning consistent with the nature of the governmental structure of Bosnia and Herzegovina and the nature of its Entities, i.e. status of the peoples in the Entities and at the level of Bosnia and Herzegovina.

Case No. U 9/00

Request of eleven members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina for review of conformity of the Law on State Border Service (Official Gazette of Bosnia and Herzegovina, No. 2/2000) with the Constitution of Bosnia and Herzegovina

DECISION of 3 November 2000

Having regard to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Articles 54 and 56 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, Nos. 2/97, 16/99 and 20/99), at its session held on 3 November 2000, the Constitutional Court of Bosnia and Herzegovina adopted the following

DECISION

The Law on State Border Service is hereby declared to be in conformity with the Constitution of Bosnia and Herzegovina.

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

Reasons

I The Proceedings

1. On 13 January 2000, the High Representative for Bosnia and Herzegovina ("High Representative") enacted the Law on State Border Service of Bosnia and Herzegovina, published in the *Official Gazette* on 26 January 2000 (*Official Gazette of Bosnia and Herzegovina*, No. 2/2000). On 7 February 2000, eleven members of the House of Representatives of the Parliamentary Assembly initiated proceedings before the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") according to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina for the evaluation of the constitutionality of the Law on State Border Service.

2. The applicants contend, on the one hand, that the High Representative does not have the normative powers to impose a law in the absence of a vote by the Parliamentary Assembly, since neither Annex 10 of the General Framework Agreement nor Chapter XI.b.2 of the Bonn Declaration confers such powers upon him; on the other hand, the

applicants also contest the constitutionality of the procedure followed by the Presidency of Bosnia and Herzegovina prior to the adoption of the Law on State Border Service, particularly with regard to Articles III.4, III.5 (a) and V.3 as well as the conformity of the Law on State Border Service with Articles III.2 (c) and III.3 (a) of the Constitution of Bosnia and Herzegovina.

3. In a letter of 21 February 2000, the Constitutional Court communicated the request to the High Representative and gave him the opportunity to respond to it. By a memorandum dated 2 May 2000, the Office of the High Representative submitted comments on the request.

II Admissibility

4. According to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court has the "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". Article VI.3 (a) adds that "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".

5. The Law on State Border Service was enacted by the High Representative on 13 January 2000 following the failure of the Parliamentary Assembly to adopt a draft law proposed by the Presidency of Bosnia and Herzegovina on 24 November 1999. Taking into account the prevailing situation in Bosnia and Herzegovina, the legal role of the High Representative, as agent of the international community, is not unprecedented, but similar functions are known from other countries in special political circumstances. Pertinent examples are the mandates under the regime of the League of Nations and, in some respect, Germany and Austria after the Second World War. Though recognized as sovereign, the States concerned were placed under international supervision, and foreign authorities acted in these States, on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under supervision.

Such a situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual. The same

holds true for the High Representative: he has been vested with special powers by the international community and his mandate is of an international character. In the present case, the High Representative - whose powers under Annex 10 to the General Framework Agreement, the relevant resolutions of the Security Council and the Bonn Declaration as well as his exercise of those powers are not subject to review by the Constitutional Court - intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina.

6. Thus, irrespective of the nature of the powers vested in the High Representative by Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina, the fact that the Law on State Border Service was enacted by the High Representative and not by the Parliamentary Assembly does not change its legal status, either in form - since the Law was published as such in the *Official Gazette of Bosnia and Herzegovina* on 26 January 2000 (*Official Gazette of Bosnia and Herzegovina* No. 2/2000) - or in substance, since, whether or not it is in conformity with the Constitution of Bosnia and Herzegovina, it relates to the field falling within the legislative competence of the Parliamentary Assembly according to Article IV.4 (a) of the Constitution of Bosnia and Herzegovina. The Parliamentary Assembly is free to modify in the future the whole text or part of the text of the Law, provided that the appropriate procedure is followed.

7. The competence given to the Constitutional Court to "uphold the Constitution" according to the first paragraph of Article VI.3 of the Constitution of Bosnia and Herzegovina, as further specified by subparagraphs (a), (b) and (c) and as read in conjunction with Article I.2 of the Constitution of Bosnia and Herzegovina, which provides that "Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections", confers on the Constitutional Court the control of the conformity with the Constitution of Bosnia and Herzegovina of all acts, regardless of the author, as long as this control is based on one of the competences enumerated in Article VI.3 of the Constitution of Bosnia and Herzegovina.

8. The constitutionality of the Law on State Border Service of 13 January 2000 has been challenged by eleven members of the House of Representatives of the Parliamentary Assembly or one quarter of the latter, on the basis of Article VI.3 (a) of the Constitution of Bosnia and Herzegovina.

9. The competence of the Constitutional Court to examine conformity with the Constitution of Bosnia and Herzegovina of the Law on State Border Service enacted by the High Representative, acting as an institution of Bosnia and Herzegovina, is thus based on Article VI.3 (a) of the Constitution of Bosnia and Herzegovina. Consequently, the request is admissible.

III Merits

10. The applicants contest the conformity with the Constitution of Bosnia and Herzegovina of the Law on State Border Service in regard to Article III.5 (a) of the Constitution of Bosnia and Herzegovina, which provides:

Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

The applicants are not justified in claiming that, according to Article III.5 (a), the Presidency of Bosnia and Herzegovina required the prior consent of the National Assembly of Republika Srpska to submit a proposal for the Law on State Border Service to the Parliamentary Assembly of Bosnia and Herzegovina. Indeed, the aforementioned Article distinguishes between three mutually independent hypotheses: Bosnia and Herzegovina shall assume responsibility for such other matters as (1) are agreed by the Entities; (2) are provided for in Annexes 5 through 8 to the General Framework Agreement; or (3) are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina according to the provision of Articles III.3 and III.5 of the Constitution of Bosnia and Herzegovina. It is in application of the last of these three cases that the Law on State Border Service was proposed by the Presidency of Bosnia and Herzegovina to the Parliamentary Assembly. In this context, only Article IV.4 (a) which provides that the Parliamentary Assembly shall enact legislation as necessary to implement decisions of the Presidency must be considered. As this Article does not require the consent of the Entities, the procedure followed by the Presidency of Bosnia and Herzegovina prior to the adoption of the Law on State Border Service is not in conflict with the Constitution of Bosnia and Herzegovina.

11. The applicants also contest the conformity of the Law on State Border Service with the provisions of Article III.2 (c) of the Constitution of Bosnia and Herzegovina, which sets out responsibilities of the Entities. Article III.2 (c) provides that "the Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for the internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as appropriate". Article III.2 (c) cannot be interpreted as establishing an exclusive responsibility of the Entities for control of the international State borders, but it authorizes the Entities to assume tasks of law enforcement "in their respective jurisdictions". Moreover, the Law on State Border Service, in its Articles 2, 4 and 5, upholds this responsibility of the Entities and provides for a policy of cooperation and assistance between the State Border Service and the Entities' police forces, which should improve the guarantee of public order in jurisdiction of the Entities.

12. The Constitution of Bosnia and Herzegovina enumerates, *inter alia* in Article III.1, the exclusive responsibilities of the institutions of Bosnia and Herzegovina. This Article entrusts the latter with all external activities of Bosnia and Herzegovina, e.g. foreign policy, foreign trade policy, customs policy, monetary policy, establishment and operation of common and international communications facilities and air traffic control. More specifically, Article III.1 (f) and (g) provide that immigration, refugee and asylum policy and regulation, as well as international and inter-Entity criminal law enforcement, including relations with Interpol, fall within the responsibilities of the institutions of Bosnia and Herzegovina.

13. Furthermore, the fundamental right of a State to self-protection, inherent in the notion of State sovereignty, includes the right of a State to take all necessary actions for the protection of its territorial integrity, its political independence and its international personality, while respecting other general principles of international law. In the context of Bosnia and Herzegovina, the establishment of a State border service contributes to the guarantee of this fundamental principle. The Law on State Border Service, which ensures the right of the institutions of Bosnia and Herzegovina to carry out their responsibilities, is thus not in contradiction to Article III.2 of the Constitution of Bosnia and Herzegovina and is in conformity with the responsibilities laid down in Article III.1 of the Constitution of Bosnia and Herzegovina and supplemented in Article III.5 of the Constitution of Bosnia and Herzegovina.

14. The Constitutional Court concludes that the Law on State Border Service is consistent with the Constitution of Bosnia and Herzegovina.

The Constitutional Court ruled in the following composition:

President of the Constitutional Court: Prof. Dr Kasim Begić,

Judges: Hans Danelius, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Dr Zvonko Miljko, Azra Omeragić, Prof. Dr Vitomir Popović, Prof. Dr Snežana Savić, Mirko Zovko.

The present decision was adopted by seven votes to two.

The two dissenting judges, Prof. D. Vitomitr Popović and Prof. Dr Snežana Savić, will set out their reasoning in a separate opinion.

U 9/00
3 November 2000
Banja Luka

Prof. Dr. Kasim Begić
President
Constitutional Court of Bosnia and Herzegovina

ANNEX

Separate dissenting Opinion of Judge Snežana Savić against the majority Decision of the Constitutional Court of Bosnia and Herzegovina in case No. U 9/00

Having regard to Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina - Amended text (*Official Gazette of Bosnia and Herzegovina*, No. 24/99), I hereby dissent in my opinion against the majority decision of the Constitutional Court in case No. U 9/00.

The majority decision of the Constitutional Court in case No. U 9/00 found that the Law on the State Border Service, enacted by the High Representative was in conformity with the Constitution of Bosnia and Herzegovina.

1. In view of the admissibility of the request

Pursuant to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, elected in Republika Srpska, submitted to the Constitutional Court on 7 February 2000, a request for the review of constitutionality of the Law on State Border Service enacted by the High Representative on 13 January 2000.

The applicants contend that the High Representative does not have normative powers to impose a law in the absence of a vote by the Parliamentary Assembly, since neither Annex 10 of the General Framework Agreement nor Chapter XI.b.2 of the Bonn Declaration confers such powers upon him. Therefore, the applicants contest the formal and legal aspect of this law and its constitutionality from the substantive aspect.

The applicants, furthermore, contest the constitutionality of the procedure before the Presidency of Bosnia and Herzegovina preceding the enactment of this Law, particularly with regard to Articles III.4, III.5 (a) and V.3 as well as with Articles III.2 (c) and III.1 (a) of the Constitution of Bosnia and Herzegovina.

I find that the first part of the request is in conformity with the Constitution of Bosnia and Herzegovina. However, I am of the opinion that the examination of the constitutionality of the procedure before the Presidency of Bosnia and Herzegovina cannot be viewed separately since this case does not involve a law, but an act which is the basis for the

adoption of the law, an act being merely an action in the adoption of the law before the Parliamentary Assembly of Bosnia and Herzegovina, or a proposal of the law. A proposal of the law is not yet a legal act with legal force, and therefore cannot be examined by the Constitutional Court. It can be examined only as one of the phases in the procedure of the review of constitutionality of a law from a formal aspect.

2. In view of the substance of the request

The decision of the Constitutional Court holds that the law enacted by the High Representative should not be examined from a formal aspect since his mandate is of an international character, but it also finds that it is a law of Bosnia and Herzegovina, or, in other words, that a law of the High Representative who acted as an authority of Bosnia and Herzegovina, and, therefore, that it can be examined from the substantive aspect since it deals with a substance set forth in the Constitution of Bosnia and Herzegovina.

The Constitutional Court did not decide on the formal aspect of the constitutionality of the contested act, i.e. the principle of constitutionality, which it was obliged to do when it proclaimed itself competent. The Constitutional Court rendered its decision but took into consideration only one of the elements of the form of the act - its acquisition of substantive features, publication in the *Official Gazette of Bosnia and Herzegovina*, acknowledging legal force to this act by invoking "pertinent examples... the mandates under the regime of the League Nations and, in some respect, Germany and Austria after the Second World War. Though recognized as sovereign, the States concerned were placed under international supervision, and foreign authorities acted in these States, on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under supervision".

The Constitutional Court continued to conclude: "Such situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual. The same holds true for the High Representative: he has been vested with special powers by the international community and his mandate is of an international character. In the present case, the High Representative - whose powers under Annex 10 to the General Framework Agreement, the relevant resolutions of the Security Council and the Bonn Declaration as well as his exercise of those powers are not subject to review by the Constitutional Court - intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the

nature of a national law and must be regarded as a law of Bosnia and Herzegovina".... "irrespective of the nature of the powers vested in the High Representative.... the fact that the Law on State Border Service was enacted by the High Representative and not by the Parliamentary Assembly does not change its legal status, either in form - since the Law was published as such in the *Official Gazette of Bosnia and Herzegovina*"…."

To my mind, the standpoint taken by the Constitutional Court is not in conformity with the notion of law in general, nor does it offer sufficient arguments for the determination of the character of the act and consequently its constitutionality.

For these reasons I find that several basic preliminary questions should have been presented before this Court or what is the nature of the act of the High Representative for Bosnia and Herzegovina, in other words, is the Constitutional Court competent to examine its constitutionality or not. Is the Constitutional Court competent to examine all or merely some of the acts enacted by the High Representative, and does this mean that the Constitutional Court shall be competent to examine an act, when in the future the High Representative renders one not bearing the title of a law, but which, according to the Constitution of Bosnia and Herzegovina, regulates the law or does this mean that the legal contents of an act, regardless of its form, bestow the character of the law on that act?

The applicants requested a review of the constitutionality of the legal act both from the formal and substantive aspects. The formal and legal aspect deals with the review of competence of the High Representative to enact laws in general, this one included, together with the issue of the procedure of adoption of a law and its acquirement of substantive features. In regard to the substantive and legal aspect, only the contents of the law are contested in view of the provisions of the Constitution of Bosnia and Herzegovina, which render them to be in contravention with Article III of the Constitution of Bosnia and Herzegovina. This is not unusual, since the principle of constitutionality that is legality understands conformity, or in other words, the evaluation of both of these principles. However, the Law on State Border Service was enacted by the High Representative, an institution established by Annex 10 of the Dayton Peace Agreement. His competencies are also determined by Annex 10. The Constitution of Bosnia and Herzegovina does not discuss the High Representative and his competencies.

This act was enacted by the High Representative and it does not present an act in the true sense of the word in the formal aspect, since it was not enacted by a legislative body of Bosnia and Herzegovina, nor was it enacted in legislative proceedings as provided for by the Constitution of Bosnia and Herzegovina, in its universally accepted meaning in

the theory of law. It was, however, published under the regulations on the publication of laws (acquirement of substantive features as the third element of the form of a legal act in general). Consequently, a question arises as to whether the Constitutional Court is, from the formal and legal aspect, competent to examine the constitutionality of the act in that sense, as requested by the applicants to these proceedings. Is this examination the most important issue in the present case? Could the constitutionality in the substantive aspect be examined without it being examined from the formal and legal aspect, although that was explicitly requested by the applicants?

Although this act has legal, even constitutional contents as taken from the substantive aspect, it is not a law in the formal aspect, but a specific act enacted by the institution of the High Representative which is outside the legal system set forth in the Constitution of Bosnia and Herzegovina, and over which the Constitutional Court does not have any competencies at all. The institution of the High Representative is an institution *sui generis,* it is an institution which deals with the character of Bosnia and Herzegovina, and which was foreseen by Annex 10 of the Dayton Peace Agreement. The institution of the High Representative was not however foreseen by the Constitution of Bosnia and Herzegovina as well, which is Annex 4 of the same Agreement, and which must, as every other Constitution, contain basic provisions on the legal order of the State concerned. The Constitution of Bosnia and Herzegovina does not provide for acts enacted by the High Representative. In view of the fact that the competencies of the Constitutional Court are to protect the Constitution of Bosnia and Herzegovina, the potential competencies of the Constitutional Court for the review of constitutionality of acts enacted by the High Representative are not even foreseen in the Constitution of Bosnia and Herzegovina.

In regard to the substantive aspect of this act, it can be noted that it does not only encompass the legal, but moreover, to a certain degree, it also encompasses the constitutional contents. The act establishes organs in Bosnia and Herzegovina which are not foreseen as such in its Constitution. The Constitution of Bosnia and Herzegovina does not contain provisions on the State Border Service, neither within the competencies of Bosnia and Herzegovina, nor in the respect of existence of such institutions on the level of Bosnia and Herzegovina. If statements pertaining to Article III.5 (a) of the Constitution of Bosnia and Herzegovina were to be considered - additional responsibilities and institutions could result from the provisions pertaining to perseverance of territorial integrity, sovereignty, political independence and international personality of Bosnia and Herzegovina. These institutions and responsibilities, however, could be regulated (established) by law only in the case the Parliamentary Assembly of Bosnia and Herzegovina enacts such a law,

whereupon it would serve as a constitutional basis for its enactment. However, this is not so in the present case.

The decisions enacted by the High Representative resulting from the authorizations set forth in Annex 10 of the Dayton Peace Agreement pertain to the civil implementation of the Agreement and have the character of temporary decisions enacted in specific situations. They are not laws in the formal sense, and therefore cannot be examined by the Constitutional Court. The fact that they are entitled as laws is not exemplary to their nature, according to Annex 10 of the Dayton Peace Agreement, although they have, in fact, the contents of a law. It is a general standpoint in the law theory that acts which are laws in the substantive aspect and not in their formal aspect, are not denominated as such since the denomination results from their formal aspect. Therefore, although they contain general legal norms and encompass legal contents, established by the Constitution of the State concerned, they are not denominated as such.

This case cannot be referred to as being a classic concept of substitution, the notion on which the Constitutional Court's decision rests, given that the office of the High Representative is not an institution of the internal constitutional system, but a specific international institution which does not derive its authorizations from the Constitution of Bosnia and Herzegovina but from the Dayton Peace Agreement - a wider concept (act) than the concept of the Constitution of Bosnia and Herzegovina - merely one of the Dayton Peace Agreement Annexes. The provision stated in the preamble of the Law on State Border Service of Bosnia and Herzegovina provides that the Parliamentary Assembly of Bosnia and Herzegovina is obliged to adopt this Law in due form, without amendments and no conditions attached, speaks in favor of the above. Consequently, the part of the decision which invokes the possibility that the Parliamentary Assembly "is free to modify in the future the whole text or part of the text of the Law, provided that the appropriate procedure is followed" is totally incorrect. The Law on State Border Service explicitly provides the very contrary; that the Parliamentary Assembly of Bosnia and Herzegovina is obliged to adopt the Law in due form, without amendments and no conditions attached.

These acts are in fact legal acts when observed from the substantive aspect and in view of their contents. However, if the Constitutional Court does not discuss whether there are grounds in terms of authorization for the enactment of this act reasoning that "it need not be done", and simultaneously endorses the examination of the substantive aspect of the act, the question arises as to how it can be determined that this case is about a Law, which generally understands both of these aspects. The assessment based on the

title of the act and its publication in the *Official Gazette of Bosnia and Herzegovina* is by all means not sufficient. From the formal aspect, the characteristic of a law, as a legal act, is determined, by the authorization of its adoption, the procedure of its adoption and its materialization, and not only by the last element which served as the basis for the Constitutional Court's decision.

It can be concluded by analogy that the crucial issue in this case is the issue of the character of the institution of the High Representative and the nature of his acts, and the competence of the Constitutional Court to examine their constitutionality - what the Constitutional Court did not do even though it was necessary if a valid decision was sought. This is the reason why my opinion was opposed to the majority vote.

Case No. U 26/01

Request of twenty-five representatives of the National Assembly of the Republika Srpska for review of conformity of The Law on the Court of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 29/00) with the Constitution of Bosnia and Herzegovina

DECISION of 28 September 2001

Having regard to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Articles 54 and 57 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 24/99 and 26/01), the Constitutional Court of Bosnia and Herzegovina, at its session held on 28 September 2001, adopted the following

DECISION

The Law on the Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 29/00) is hereby declared to be in conformity with the Constitution of Bosnia and Herzegovina.

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

Reasons

I Facts of the Case

1. On 12 November 2000, the High Representative for Bosnia and Herzegovina ("High Representative") enacted the Law on the Court of Bosnia and Herzegovina. The Law was published in the *Official Gazette of Bosnia and Herzegovina* No. 29/00 of 30 November 2000. On 23 March 2001, twenty-five representatives of the National Assembly of the Republika Srpska, having regard to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, submitted a request to the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") for the evaluation of the constitutionality of the Law on the Court of Bosnia and Herzegovina.

2. The applicants claim that the Law on the Court of Bosnia and Herzegovina "flagrantly violates" Article III of the Constitution of Bosnia and Herzegovina which regulates the responsibilities of and the relations between the institutions of Bosnia and Herzegovina and the Entities. They point out that paragraph 1 of that Article does not provide that the judicial system is the responsibility of Bosnia and Herzegovina and states that it rather

follows from paragraph 3 (a) of the same Article that organisation of the judicial system is the responsibility of the Entities and that there was no constitutional basis for issuing the Law on the Court, since, apart from the Constitutional Court, the Constitution does not envisage the existence of any other court at State level. It is further stated in the request that the implementation of the Law on the Court of Bosnia and Herzegovina requires the adoption of a number of laws of substantive and procedural nature for which there is no legal basis in the Constitution of Bosnia and Herzegovina.

3. In their request, the applicants also propose that, in order to avoid and prevent detrimental consequences, the Constitutional Court should adopt a temporary measure which would deprive the contested law of legal effect until the Constitutional Court has decided on its constitutionality.

4. On 30 March 2001, the Constitutional Court communicated the request to the High Representative and gave him the opportunity to respond to it. The Office of the High Representative ("OHR"), in its Memorandum of 11 April 2001, presented its views regarding the request, pointing out that they were doing so without any admission – explicit or implicit – of the jurisdiction of the Constitutional Court over decisions of the High Representative.

5. As to the substance of the case itself, the OHR explained the background and the purpose of the Law on the Court of Bosnia and Herzegovina. The OHR stated:

- that the Law corresponds not only to the constitutional obligation, expressed in the opinion of the Venice Commission of the Council of Europe, to establish a Court at the State level in Bosnia and Herzegovina, but also to a request of the Peace Implementation Council,

- that the Law on the Court of Bosnia and Herzegovina is not in contravention of the Constitution of Bosnia and Herzegovina and

- that it follows that the laws which are necessary for its implementation must, in principle, also be in conformity with the Constitution of Bosnia and Herzegovina.

6. As to the requested temporary measure which would put the Law temporarily out of effect, the OHR claimed, *inter alia*, that this would further endanger the establishment of the rule of law in Bosnia and Herzegovina and be detrimental to the respect for the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").

7. On 13 April 2001, the Constitutional Court communicated the OHR Memorandum of 11 April 2001 to the applicants.

8. On 28 September 2001, the Constitutional Court held a public session on this case. Prof. Dr Radomir Lukić, the attorney of the appellant, was present at the session.

9. Prof. Dr Radomir Lukić gave short statement explaining the appellant's views and arguments. He also answered to the questions posed by the judges of the Constitutional Court.

10. On 20 September 2001, OHR, on behalf of the High Representative, replied that it already communicated its comments on the matter and that it has no intention on giving further explanations.

II Admissibility

11. According to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court has the exclusive jurisdiction to decide disputes that arise under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina. 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 Law on the Court of Bosnia and Herzegovina was enacted by the High Representative in his capacity as representative of the international community for Bosnia and Herzegovina. In his Decision to adopt the Law, he pointed out that a working group, chaired by the Ministry for Civil Affairs and Communications, and composed of members of this Ministry, the Ministries of Justice of the Federation of Bosnia and Herzegovina and the Republika Srpska, and the Office of the High Representative, had agreed, on 5 October 2000, on a draft law on a Court of Bosnia and Herzegovina, and he expressed his regret that despite this agreement, the Law had not been adopted through the regular procedure. He also referred to the urgency and the need to establish a Court of Bosnia and Herzegovina for various reasons, including the need to protect the interests of the citizens of Bosnia and Herzegovina. The High Representative further proclaimed that the Decision to enact the Law should enter into force with immediate effect on an interim basis, until such time as the Parliamentary Assembly of Bosnia and Herzegovina would adopt the

Law in due form, without amendments and with no conditions attached. The Law was to be published without delay in the *Official Gazette of Bosnia and Herzegovina* and in the *Official Gazettes of the Federation of Bosnia and Herzegovina and of the Republika Srpska* and would enter into force eight days after its publication in the *Official Gazette of Bosnia and Herzegovina*.

13. In regard to the mandate of the High Representative to adopt laws, and the jurisdiction of the Constitutional Court to decide on the conformity of such laws with the Constitution of Bosnia and Herzegovina, the Constitutional Court has previously, in *Decisions No. U 9/00, U 16/00 and U 25/00*, taken the position that the mandate of the High Representative derives from Annex 10 of the General Framework Agreement for Peace, the relevant resolutions of the United Nations Security Council and the Bonn Declaration and that the mandate and the exercise of the mandate are not subject to the control of the Constitutional Court. However, in so far as the High Representative intervenes into the legal system of Bosnia and Herzegovina, substituting the domestic authorities, he acts as an authority of Bosnia and Herzegovina, and the laws enacted by him are, by their nature, domestic laws of Bosnia and Herzegovina, whose conformity with the Constitution of Bosnia and Herzegovina can be examined by the Constitutional Court.

14. There is no doubt that the High Representative, when issuing the Law on the Court of Bosnia and Herzegovina, substituted the Parliamentary Assembly of Bosnia and Herzegovina. Consequently, the present request falls within the scope of Article VI.3 (a) of the Constitution of Bosnia and Herzegovina. The Constitutional Court refers in this regard to its previous decision in Case No. *U 1/99* (published in the *Official Gazette of Bosnia and Herzegovina* No. 16/99 of 28 September 1999), in which the Constitutional Court decided that the Law on the Council of Ministers of Bosnia and Herzegovina could be the subject of a dispute under Article VI.3 (a) of the Constitution of Bosnia and Herzegovina.

15. The National Assembly of the Republika Srpska consists of eighty-three representatives (Article 71 of the Constitution of the Republika Srpska), and the request was submitted by twenty-five representatives. The requirement in Article VI.3 (a) that a request must be submitted by one-fourth of the members of a legislative assembly of an Entity has therefore been respected.

16. It follows that the present request by twenty-five members of the legislative body of the Republika Srpska is admissible.

III Merits

17. The question which the Constitutional Court is called upon to answer in the present case is whether the Law on the Court of Bosnia and Herzegovina, enacted by the High Representative as a substitute for the Parliamentary Assembly of Bosnia and Herzegovina, violates Article III.3 (a) of the Constitution of Bosnia and Herzegovina which reads: “All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.”

18. This question should be examined, first of all, in the context of Article I.2 of the Constitution of Bosnia and Herzegovina, which reads: “Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.” Based on this fundamental principle of democracy, but also on its internal structure established pursuant to item 3 of the same Article, the Constitution of Bosnia and Herzegovina gives to Bosnia and Herzegovina responsibilities and jurisdiction in order to ensure its sovereignty, territorial integrity, political independence and international personality (see, *inter alia*, Articles I.1, II.7, III.1 (a), III.5 (a), V.3 (a)), the highest level of internationally recognized human rights and fundamental freedoms (see, *inter alia*, Article II.1 of the Constitution of Bosnia and Herzegovina, cf. Annexes 5-8 of the General Framework Agreement for Peace) and free and democratic elections (see Articles IV.2 and V.1 of the Constitution of Bosnia and Herzegovina).

19. Article III.1 of the Constitution of Bosnia and Herzegovina provides that the following matters are the responsibility of the institutions of Bosnia and Herzegovina: foreign policy, foreign trade policy, customs policy, monetary policy as provided in Article VII, finances of the institutions and for the international obligations of Bosnia and Herzegovina, immigration, refugee, and asylum policy and regulation, international and inter-Entity criminal law enforcement, including relations with Interpol, establishment and operation of common and international communications facilities, regulation of inter-Entity transportation and air traffic control.

20. Other responsibilities of Bosnia and Herzegovina are as follows: the matter of the citizenship of Bosnia and Herzegovina, which is, according to Article I.7 of the Constitution of Bosnia and Herzegovina, regulated by the Parliamentary Assembly; the responsibility for ensuring the highest level possible of the internationally recognized human rights and fundamental freedoms as provided for in Article II of the Constitution of Bosnia and Herzegovina; the adoption of the Law on Elections as provided in Articles IV.2 and V.1 of the Constitution of Bosnia and Herzegovina.

21. According to Article III.5 (a) of the Constitution of Bosnia and Herzegovina ("Additional Responsibilities"), the Constitutional Court refers to the decision in the Case No. *U 9/00* (published in the *Official Gazette of Bosnia and Herzegovina* No. 1/01 of 19 January 2001). In this decision the Constitutional Court expressed its opinion that the aforementioned Article distinguishes three independent hypothesis: Bosnia and Herzegovina shall assume responsibility for (1) such other matters as are agreed by the Entities; (2) matters that are provided for in Annexes 5 through 8 to the General Framework Agreement; and (3) matters that are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina according to Articles III.3 and III.5 of the Constitution of Bosnia and Herzegovina. The Constiutional Court also expressed its opinion that, in this context, only Article IV.4 (a) which provides that the Parliamentary Assembly shall enact legislations as necessary to implement decisions of the Presidency (or for the implementing of the responsibilities of the Assembly as per this Constitution) needs to be considered. In addition, the Constitutional Court stated that this Article does not require the consent of the Entities.

22. Furthermore, the Constitutional Court expressed the following opinion in the Second Partial Decision in the Case No. *U 5/98*: "The Constitution of Bosnia and Herzegovina creates powers not only within this general system of distribution of powers in Article III. In creating institutions of the State of Bosnia and Herzegovina, the Constitution also confers upon them more or less specific powers, as can be seen from Article IV.4 as regards the Parliamentary Assembly and Article V.3 as regards the Bosnia and Herzegovina Presidency, which are not necessarily repeated in the enumeration in Article III.1 The Presidency of Bosnia and Herzegovina, for instance, is vested with the power of civilian command over Armed Forces in Article V.5 (a), although Article III.1 does not explicitly refer to military affairs as being within the responsibility of the institutions of Bosnia and Herzegovina. It must then be concluded that matters which are not expressly enumerated in Article III.1 are not necessarily under exclusive competence of the Entities in the same way as the Entities might have residual powers with regard to the responsibilities of the institutions of Bosnia and Herzegovina."

23. The Constitutional Court points out that according to Article II.1 of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms, and, in accordance with Article II.2, the rights and freedoms as set forth in the European Convention are to be applied directly in Bosnia and Herzegovina and have priority over all

other law. In the present case, the Constitutional Court has particular regard to the general principle of the rule of law, which is inherent in the European Convention, and, more particularly, to the principles of a fair court hearing and an effective legal remedy which are protected under Articles 6 and 13 of the European Convention. In so far as relevant to this case, these Articles read as follows:

Article 6

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.

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

24. The establishment of the Court of Bosnia and Herzegovina can be expected to be an important element in ensuring that the institutions of Bosnia and Herzegovina act in conformity with the rule of law and in satisfying the requirements of the European Convention in regard to fair hearings before a court and effective legal remedies. The Constitutional Court also notes that, according to Article VI.3 of the Constitution of Bosnia and Herzegovina, the decisions of the Court of Bosnia and Herzegovina will be subject the review by the Constitutional Court as to their constitutionality.

25. The Constitutional Court observes that, until the Court of Bosnia and Herzegovina starts functioning, there has been no possibility in the legal system of Bosnia and Herzegovina to challenge decisions by the institutions of Bosnia and Herzegovina before an organ which fulfilled the requirements of an independent and impartial tribunal.

26. In these circumstances, Bosnia and Herzegovina, functioning as a democratic state, was authorized to establish, in the areas under its responsibility, other mechanisms, besides those provided in the Constitution of Bosnia and Herzegovina, and additional institutions that were necessary for the exercise of its responsibilities, including the setting up of a court to strengthen the legal protection of its citizens and to ensure respect for the principles of the European Convention. The Constitutional Court refers in this respect to Article IV.4 (a) of the Constitution of Bosnia and Herzegovina which provides that the Parliamentary Assembly shall have responsibility for enacting legislation as

necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under the Constitution of Bosnia and Herzegovina. Although it is not the task of the Constitutional Court to express an opinion on whether it is appropriate to enact a certain law, the Constitutional Court observes that in the context of Bosnia and Herzegovina, the establishment of the Court of Bosnia and Herzegovina can be expected to strengthen the rule of law which is one of the fundamental principles of any well-functioning democracy.

IV Conclusion

27. The Constitutional Court concludes that the Law on the Court of Bosnia and Herzegovina is not in contravention with the Constitution of Bosnia and Herzegovina.

28. Considering that the Constitutional Court has decided on the main issue in the present case, there is no basis for the adoption of a temporary measure in accordance with Article 75 of the Rules of Procedure of the Constitutional Court.

29. Pursuant to Article VI.4 of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court are final and binding.

The Constitutional Court adopted this decision by majority vote (5 to 4).

The Constitutional Court ruled in the following composition: President of the Constitutional Court, Prof. Dr Snežana Savić. Judges: Prof. Dr Kasim Begić, Hans Danelius, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Dr Zvonko Miljko, Azra Omeragić, Prof. Dr Vitomir Popović and Mirko Zovko.

Pursuant to Article 36 of the Rules of Procedure of the Constitutional Court, the judges Dr Zvonko Miljko, Prof. Dr Vitomir Popović, Prof. Dr Snežana Savić, and Mirko Zovko gave their separate opinions.

U 26/01
28 September 2001
Sarajevo

Prof. Dr Snežana Savić
President
Constitutional Court of Bosnia and Herzegovina

ANNEX

Separate Dissenting opinion of Judge Zvonko Miljko with reference to the Decision of the Constitutional Court of Bosnia and Herzegovina, case No. U 26/01

I voted in opposition to the majority vote Decision, stating my disagreement with it. My view is as follows:

I am of the opinion that there was no constitutional basis to enact the Law on the Court of Bosnia and Herzegovina. Consequently, this Law is not in conformity with the Constitution of Bosnia and Herzegovina.

It is impossible to interpret this Law with respect to the Constitution of Bosnia and Herzegovina, especially in respect to the responsibilities and relations between the institutions of Bosnia and Herzegovina and the Entities. The Constitution of Bosnia and Herzegovina provides for constitutional authorities as supreme governmental agencies. The existence, status and competences of those agencies have been enumerated and immediately constituted therein.

There can be no Court of Bosnia and Herzegovina if it does not exist in the Constitution of Bosnia and Herzegovina.

This Law could not have even been adopted either by the Parliamentary Assembly of Bosnia and Herzegovina or the High Representative who, in the present case, *substituted the Parliamentary Assembly of Bosnia and Herzegovina*, as the Constitutional Court's Decision reads.

The only possible way to establish a state court would be through a constitutional revision, pursuant to Article X.1 of the Constitution of Bosnia and Herzegovina.

Here, I would like to point out once more the Constitutional Court's inconsistency in regard to its jurisprudence.

I refer to the Decisions of this Court (respectively, *U 9/00* dated 3 November 2000 and *U 40/00* dated 2 February 2001).

The following reads in Reasons adduced for the *Decision U 9/00* that pertained to the review of the constitutionality of the Law on State Border Service (also imposed by

the High Representative) with the Constitution of Bosnia and Herzegovina: *Taking into account the prevailing situation in Bosnia and Herzegovina, the legal role of the High Representative, as agent of the international community, is not unprecedented, but similar functions are known from other countries in special political circumstances. Pertinent examples are the mandates under the regime of the League of Nations and, in some respect, Germany and Austria after the Second World War. Though recognised as sovereign, the States concerned were placed under international supervision, and foreign authorities acted in these States, on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under supervision.*

Such situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its function dual. The same holds true for the High Representative: he has been vested with special powers by the international community and his mandate is of an international character."

Likewise, the Constitutional Court took a unanimous view in this Decision (as well as in some previous ones) that it was not competent to review, in any way, the General Framework Agreement for Peace in Bosnia and Herzegovina, resulting in the fact that it could not review the powers of the High Representative that arise under Annex 10 thereto.

However, when the Constitutional Court adopted Decision No. *U 9/00*, it said beyond doubt that the High Representative could not violate the Constitution of Bosnia and Herzegovina in certain cases and that the task of the Constitutional Court of Bosnia and Herzegovina was to safeguard the Constitution of Bosnia and Herzegovina in such cases. *This situation exists whenever the High Representative intervenes into the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina.* (An extract from Reasoning adduced for the Decision No. *U 9/00*).

Each law of this nature must be consistent with the Constitution of Bosnia and Herzegovina.

As a judge of the Constitutional Court of Bosnia and Herzegovina and a Professor of Constitutional Law, I was obliged to vote against this Decision and write and reason my dissenting opinion.

ANNEX

Separate Dissenting opinion of Judge Snežana Savić with reference to the Decision of the Constitutional Court of Bosnia and Herzegovina, case No. U 26/01

Pursuant to Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court's Rules of Procedure") (*Official Gazette of Bosnia and Herzegovina*, No. 24/99) and with respect to the majority Decision, I hereby dissent my opinion on following grounds:

On 23 March 2001, twenty-five representatives of the National Assembly of the Republika Srpska submitted a request to the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") for the evaluation of the constitutionality of the Law on the Court of Bosnia and Herzegovina, which was adopted by the High Representative for Bosnia and Herzegovina. They requested that the Constitutional Court examines whether there were constitutional basis for issuing the Law. Also, they requested that the Constitutional Court evaluate whether there was a constitutional basis for the establishment of the Court of Bosnia and Herzegovina, since, apart from the Constitutional Court, the Constitution of Bosnia and Herzegovina does not envisage the existence of any other court at State level. The applicants claim that the Law on the Court of Bosnia and Herzegovina violates Article III.3 (a) of the Constitution of Bosnia and Herzegovina which reads: "All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities", taken in conjunction with Article III.1 and 2 of the Constitution of Bosnia and Herzegovina.

The majority vote of the Constitutional Court (five to four) was founded on the evaluation that this issue was considered within the context of Article I.2 of the Constitution of Bosnia and Herzegovina, reading as follows: "Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections", and Articles III.1, I.7, II and III.5 (a), as well as on the Decision of the Constitutional Court in Case No. *U 9/00*. Furthermore, the Constitutional Court points out that "the establishment of the Court of Bosnia and Herzegovina can be expected to be an important element in ensuring that the institutions of Bosnia and Herzegovina act in conformity with the rule of law and in satisfying the requirements of the European Convention in regard to fair hearings before a court and effective legal remedies." Also, "the Constitutional Court observes that, until the Court of Bosnia and Herzegovina starts

functioning, there has been no possibility in the legal system of Bosnia and Herzegovina to challenge decisions by the institutions of Bosnia and Herzegovina before an organ which fulfilled the requirements of an independent and impartial tribunal. In these circumstances, Bosnia and Herzegovina, functioning as a democratic state, was authorized to establish, in the areas under its responsibility, other mechanisms, besides those provided in the Constitution of Bosnia and Herzegovina, and additional institutions that were necessary for the exercise of its responsibilities, including the establishment of a court to strengthen the legal protection of its citizens and to ensure respect for the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms. **The Constitutional Court refers in this respect to Article IV.4 (a) of the Constitution of Bosnia and Herzegovina which provides that the Parliamentary Assembly shall have responsibility for enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under the Constitution of Bosnia and Herzegovina. Although it is not the task of the Constitutional Court to express an opinion on whether it is appropriate to enact a certain law, the Constitutional Court observes that in the context of Bosnia and Herzegovina, the establishment of the Court of Bosnia and Herzegovina can be expected to strengthen the rule of law which is one of the fundamental principles of any well-functioning democracy.**"

It can be noted, from both the request of the applicants and Reasons from the Constitutional Court's majority vote Decision, that the subject matter of evaluation of the constitutionality in the present case was the constitutional basis for enactment of the Law in the substantive aspect, while the formal aspect, specifically the fact that this Law was enacted by the High Representative for Bosnia and Herzegovina (in view of previously adopted decisions of the Constitutional Court in cases when the enactor of a challenged act was the High Representative), was not a subject of adjudication.

The crucial question in this case is the existence of a constitutional basis for the enactment of this Law. It is necessary to establish whether the Law has any grounds given the nature of the Constitution of Bosnia and Herzegovina as the highest legal act. It is common in legal theory and practice to regard the notion of constitution in substantive terms as a set of norms that establishes the organization and competence of supreme governmental authorities and sets out the principles of the state organization and the overall legal system. This also implies the establishment of judicial systems in each state. When speaking of the Constitution of Bosnia and Herzegovina, this has a particular relevance regarding the complex structure of the State of Bosnia and Herzegovina. For instance, Article III

of the Constitution of Bosnia and Herzegovina regulates the competencies and relations between the institutions of Bosnia and Herzegovina and the Entities. Article III.1 explicitly enumerates the competencies of the institutions of Bosnia and Herzegovina, while Article III.3 provides for the competencies of the Entities and, under item a), expressly provides 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. Admittedly, Article III.5 prescribes that a) Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities. However, formation of the first competencies requires the consent of the Entities, while others pertain to a possibility that implies institutions that already exist. The provision that additional institutions may be established as necessary to carry out such responsibilities, in view of the nature of Bosnia and Herzegovina, by all means implies/requires the consent of the Entities or at least a decision of peoples' representatives of the institutions of Bosnia and Herzegovina, which is not the case here.

Consequently, by following the substantive nature of constitution in general and by analyzing the Constitution of Bosnia and Herzegovina, it may be ascertained that none of its norms provide for the existence of such an institution of Bosnia and Herzegovina. This is particularly underlined when one takes into consideration the preamble of the Decision of the High Representative, of which the Law on the Court of Bosnia and Herzegovina is an integral part (which is yet another inconsistence of the legislation of Bosnia and Herzegovina). When enacting this law, the High Representative referred to the powers under Article 5 of Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina, items 11.2 of the Conclusions of the Peace Implementation Council adopted in Bonn on 9 and 10 October 1997, item 12.1 of the Declaration of the Peace Implementation Council (Madrid, 15-16 December 1998), item 3 of Annex 2 of the said Declaration, Declaration of the Peace Implementation Council (Brussels, 23-24 May 2000) etc. In the aforementioned Decision there is no reference to the Constitution of Bosnia and Herzegovina unlike in other laws that were also enacted by the High Representative, except the general remark "that a Court of Bosnia and Herzegovina providing for judicial remedies in matters which lie within the competence of the State of Bosnia and Herzegovina under the Constitution of Bosnia and Herzegovina is a pre-condition for the establishment of the rule of law in the State of Bosnia and Herzegovina". Does this mean that the High

Representative found that the Constitution Bosnia and Herzegovina, in purely legal terms, did not contain the grounds for adoption of this law, as there is no reference to it? There seems to be no doubt about this, as the preamble of the decision at issue further reads: "**Considering further that the said agreed text was itself based on a Council of Europe Venice Commission draft law on a State Court of Bosnia and Herzegovina, of 16 June 2000, adapted as appropriate by the said working group to the legal framework (and not to the Constitution of Bosnia and Herzegovina –** ***author's note*****) and requirements peculiar to Bosnia and Herzegovina…",** which clearly cannot constitute sufficient legal grounds to adopt this law.

By analogy, it may be noted from Reasons adduced for its Decision that the Constitution of Bosnia and Herzegovina did not (expressly and precisely) decide on the conformity of the Law in question with Article III.3 (a) of the Constitution of Bosnia and Herzegovina, which was explicitly demanded by the applicants, and the Constitutional Court was obliged to act accordingly pursuant to the Constitutional Court's Rules of Procedure and the Constitution of Bosnia and Herzegovina. On the contrary, the Constitutional Court took into account other articles when it decided on the review of constitutionality, while the Decision's Conclusion generally stated "that the Law on the Court of Bosnia and Herzegovina is not in contravention with the Constitution of Bosnia and Herzegovina". A question arises: to which provisions of the Constitution of Bosnia and Herzegovina the Law on the Court of Bosnia and Herzegovina is not in contravention? When adjudicating on the review of constitutionality (in general), arguments presented in this Decision are inadmissible if one accounts for the nature of these adjudications and legislation, i.e. a hierarchical relation between higher-instance and lower-instance legal acts.

Furthermore, the arguments presented in the Decision of the Constitutional Court of Bosnia and Herzegovina (the majority vote Decision) that represents an invocation of Article IV.4 (a) of the Constitution of Bosnia and Herzegovina (which reads that "the Parliamentary Assembly shall have responsibility for enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution") cannot be accepted since this case is not referring to decisions of the Presidency or functions of the Assembly. The purpose of this Law is not to implement decisions of the Presidency or to ensure carrying out the responsibilities of the Assembly, but rather to establish a new judicial institution at the level of Bosnia and Herzegovina, although its Constitution only recognizes the Constitutional Court of Bosnia and Herzegovina as an institution of this type.

Additionally, the assertions expounded in the Reasons adduced for the Decision that "the establishment of the Court of Bosnia and Herzegovina can be expected to be an important element in ensuring that the institutions of Bosnia and Herzegovina act in conformity with the rule of law" and that, "although it is not the task of the Constitutional Court to express an opinion on whether it is appropriate to enact a certain law, the Constitutional Court observes that in the context of Bosnia and Herzegovina, the establishment of the Court of Bosnia and Herzegovina can be expected to strengthen the rule of law which is one of the fundamental principles of any well-functioning democracy", cannot be taken as the basis for reaching a decision. They cannot be accepted as such because this falls within the scope of valuation. Even the majority vote concludes that this is not the task of the Constitutional Court. Nevertheless, it expresses such opinion. The establishment of the rule of law, of course, is one of the fundamental principles of any modern state. However, the task of each constitutional court, the Constitutional Court included, is to safeguard constitution and fundamental principles of legislation contained therein and not to determine what institutions will the state need, as this is the competence of the constitutional-maker (i.e. a legislative authority), and particularly not to evaluate the nature and role of these institutions.

Without dwelling on the issue whether the Court of Bosnia and Herzegovina is necessary or not, and what its establishment would contribute to, this is an issue to which the Constitutional Court (by its nature and competence) cannot and should not answer, but it should determine whether the Law at issue is consistent with the Constitution of Bosnia and Herzegovina, I am of the opinion there were no constitutional basis to enact this Law (in substantive terms). In other words, the Constitution of Bosnia and Herzegovina does neither recognize nor provide for the existence of such an institution and the Law concerned is not in compliance with the Constitution of Bosnia and Herzegovina.

ANNEX

Separate Dissenting opinion of judge Vitomir Popović with reference to the Decision of the Constitutional Court of Bosnia and Herzegovina, case No. U 26/01

Given my vote that was opposed to the majority vote Decision and pursuant to Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, No. 24/99), I hereby dissent my opinion regarding the Case No. *U 26/01*. As for my arguments for doing so, I fully support those presented by Judge Snežana Savić.

Case No. U 41/01

Request of Mr. Živko Radišić, a member of the Presidency of Bosnia and Herzegovina, at the time of submission of the request, for deciding the dispute between the Republika Srpska and the Federation of Bosnia and Herzegovina concerning the Inter-Entity Boundary Line between Dobrinja I and Dobrinja IV and for review of the constitutionality of the Decision of the High Representative which ties both the Republika Srpska and the Federation of Bosnia and Herzegovina into final and binding arbitration on the Inter-Entity Boundary Line in the Sarajevo suburbs of Dobrinja I and IV, No. 84/01 of 5 February 2001 (Official Gazette of Bosnia and Herzegovina, No. 5/01) and the Arbitration Award by an independent Arbitrator for Dobrinja I and IV of 17 April 2001 (Official Gazette of Bosnia and Herzegovina, No. 11/01)

DECISION ON ADMISSIBILITY of 30 January 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, Article 16 para 2 (1) and Article 59 para 2 (1) of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary, composed of the following judges: Mr Mato Tadić, President, Prof. Dr Ćazim Sadiković, Mr Tudor Pantiru, Prof. Dr Miodrag Simović, Vice-Presidents and Ms. Hatidža Hadžiosmanović, Mr. David Feldman, Ms Valerija Galić and Mr Jovo Rosić, having considered the Request of **Mr. Živko Radišić**, in **case No**. **U 41/01,** at its session held on 30 January 2004, adopted the following

DECISION ON ADMISSIBILITY

Request of Mr. Živko Radišić, a member of the Presidency of Bosnia and Herzegovina, at the time of submission of the request, for deciding the dispute between the Republika Srpska and the Federation of Bosnia and Herzegovina concerning the Inter-Entity Boundary Line between Dobrinja I and Dobrinja IV and for review of the constitutionality of the Decision of the High Representative which ties both the Republika Srpska and the Federation of Bosnia and Herzegovina into final and binding arbitration on the Inter-Entity Boundary Line in the Sarajevo suburbs of Dobrinja I and IV, No. 84/01 of 5 February 2001 (*Official Gazette of Bosnia and Herzegovina*, No. 5/01) and the Arbitration Award by an independent Arbitrator for Dobrinja I and IV of 17 April 2001 (*Official Gazette of Bosnia and Herzegovina*, No. 11/01), is rejected as inadmissible, as the Constitutional Court of Bosnia and Herzegovina is not competent to adopt a decision.

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

Reasons

I. Introduction

1. On 29 June 2001, Mr. Živko Radišić ("applicant"), a member of the Presidency of Bosnia and Herzegovina, at the time of the submission of the Request, filed a request with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court"), on the grounds of the Conclusion of the Peoples' Assembly of the Republika Srpska of 2 May 2001, for deciding the dispute between the Republika Srpska and Federation of Bosnia and Herzegovina on the Inter-Entity Boundary Line between Dobrinja I and Dobrinja IV and for review of the constitutionality of the Decision of the High Representative which ties both the Republika Srpska and the Federation of Bosnia and Herzegovina into final and binding arbitration on the Inter-Entity Boundary Line in the Sarajevo suburbs of Dobrinja I and IV, No. 84/01 of 5 February 2001 (*Official Gazette of Bosnia and Herzegovina*, No. 5/01) ("Decision of the High Representative") and the Arbitration Award by an independent Arbitrator for Dobrinja I and IV (*Official Gazette of Bosnia and Herzegovina*, No. 11/01) ("Arbitration Award").

At the same time, the applicant proposed to the Constitutional Court to hold a public hearing in this case and issue an interim measure by which it would suspend the execution of the above referenced decisions until a final decision is taken.

II. Request

2. The applicant pointed out that the Republic of Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina reached an agreement on the Agreed Basic Principles for the Achievement of the Final Peace Agreement for Bosnia and Herzegovina in Geneva on 8 September 1995 and in New York on 26 September 1995. Among other things, it was agreed therein that the territories of the Federation of Bosnia and Herzegovina and the Republika Srpska would be divided so the Federation of Bosnia and Herzegovina would encompass 51% of the territory of Bosnia and Herzegovina whereas the Republika Srpska would encompass 49% of the territory. As the applicant stated, this principle of territorial delineation and marking acquired the force of a constitutional norm since the Agreed Basic Principles have been incorporated in the Preamble of the Constitution of Bosnia and Herzegovina, which in accordance with the Decision of the Constitutional Court No. *U 5/98 I* (*Official Gazette of Bosnia and Herzegovina*, No. 11/00), No. *U 5/98 II* (*Official Gazette of Bosnia and Herzegovina* No.

17/00), No. *U 5/98 III* (*Official Gazette of Bosnia and Herzegovina*, No. 23/00), and No. *U 5/98 IV* (*Official Gazette of Bosnia and Herzegovina*, No. 36/00), has normative effect.

3. As it is further stated in the request, the delineations and markings, as well as designations of the location of an Inter-Entity boundary line were made as part of the peace talks in Dayton. Furthermore, in accordance with Appendix to Annex 2, two maps, one made in the scale of 1: 600,000 and the other in 1: 50,000, were also made. The map in the scale of 1: 50,000 prepared by the Department of Defense of USA, contains an Inter-Entity boundary line in the Sarajevo region, including the settlements of Dobrinja I and Dobrinja IV. The Inter-Entity boundary line in this area presented on the map goes through housing blocks and divides large residential buildings leaving one part of them in the Republika Srpska and the other in the Federation of Bosnia and Herzegovina, even dividing the apartments themselves.

4. In the course of drawing up an expert document with a precise delineation of the Inter-Entity boundary line in which the representatives of the Entities and the IFOR took part, a dispute arose between the Federation of Bosnia and Herzegovina and the Republika Srpska concerning settlements (Dobrinja I and Dobrinja IV) at certain locations on the Inter-Entity boundary line. The Republika Srpska claimed that it was agreed in the course of the negotiations in Dayton that the Inter-Entity boundary line and the agreed line of ceasefire overlap and that both settlements belong to the Republika Srpska, whereas the Federation of Bosnia and Herzegovina claimed that the Inter-Entity boundary line on that particular spot was agreed as presented on the 1: 50,000 scale map. This was the situation until 5 February 2001 when the Decision of the High Representative was adopted. On 17 April 2001, the High Representative appointed the Arbitrator, Justice Diarmuid P. Sheridan, who adopted the Arbitration Award which fixed the new location of the Inter-Entity line, moving it back even further into the territory of the Republika Srpska, far behind the line on the 1:50,000 scale map.

5. The applicant invokes Articles I.1, I.3, V.5 (a) and VI.3 (a), para 1 of the Constitution of Bosnia and Herzegovina arguing that the above referenced provisions of the Constitution of Bosnia and Herzegovina give the Constitutional Court the exclusive right to decide any dispute that arises under this Constitution between the Entities. He argues that those provisions exclude the possibility to have the dispute decided by some other body, including the Office of the High Representative.

6. The applicant requested the Constitutional Court to adopt a decision which would establish: that the Decision of the High representative is null and void due to the violation

of the constitutional norms on the exclusive jurisdiction of the Constitutional Court; and that the Arbitration Award is null and void, as it refers to a dispute within the exclusive jurisdiction of the Constitutional Court and that both settlements, Dobrinja I and Dobrinja IV belong to the territory of the Republika Srpska given the fact that the parties to the dispute agreed in Dayton that the agreed line of ceasefire and the Inter-Entity boundary line overlap.

The applicant requested the Constitutional Court to hold a public hearing and adopt an interim measure.

III. Relevant regulations: Decision of the High Representative and Arbitration Award

7. The High Representative for Bosnia and Herzegovina, Wolfgang Petritsch ("High Representative"), concluded that the Federation of Bosnia and Herzegovina and the Republika Srpska have failed to solve the long-standing problem of the Inter-Entity Boundary Line between Dobrinja I and Dobrinja IV within the ambit of Annex 2 of the General Framework Agreement ("General Framework Agreement"), and that a dispute exists in relation thereto. The High Representative reached this conclusion in the exercise of the powers vested in him by Article V of Annex 10 (Agreement on Civilian Implementation of the Peace Settlement) to the General Framework Agreement, according to which the High Representative is the final authority in theatre regarding interpretation of the said Agreement on the Civilian Implementation of the Peace Settlement; and considering in particular Article II.1 (d) of the above referenced Agreement, according to which the High Representative shall facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation, recalling paragraph XI.2 of the Conclusions of the Peace Implementation Conference held in Bonn on 9 and 10 December 1997, in which the Peace Implementation Council welcomed the High Representative's intention to use his final authority in theatre, regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement, in order to facilitate the resolution of any difficulties as aforesaid "by making binding decisions, as he judges necessary" on certain issues including "measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities". Considering the difficulties faced by those wishing to return to their homes in Dobrinja and the letters he addressed to the Federation of Bosnia and Herzegovina and the Republika Srpska (on 8 September and 13 November 2000, respectively) ordering them to start the binding arbitration process as laid down in Annex 5 (Agreement on Arbitration) of the General Framework Agreement and the fact that this order was not respected, the High

Representative adopted the Decision No. 84/01 of 5 February 2001, which ties both the Republika Srpska and the Federation of Bosnia and Herzegovina into final and binding arbitration on the Inter-Entity Boundary Line in the Sarajevo suburbs of Dobrinja I and IV and appointed Justice Diarmuid P. Sheridan as the Arbitrator.

8. According to paragraph 3 of the Decision of the High Representative, the issue for the Arbitrator to decide is the appropriate and precise delineation of the Inter-Entity Boundary Line between Dobrinja I and Dobrinja IV in the consultation with and notification to the IFOR (SFOR) Commander and a delineation shall be deemed to have been reached by "mutual consent" for the purposes of an "agreed adjustment". The Arbitrator is to provide a fair and impartial adjudication between the parties in the matter under dispute and to take account of the following: the line as described on the map identified in Annex 2 to the General Framework Agreement; the *de facto* line operated since the signing of the General Framework Agreement; the views of residents and displaced persons and refugees wishing to return to their pre war homes; any decisions or judgments of courts or judicial bodies relating to the issues in dispute; all relevant legal and equitable principles.

According to paragraph 10 of the Decision of the High Representative, the Arbitration Award adopted by the Arbitrator shall be final and binding on the state of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska and shall be deemed for all purposes in connection with Article II of Annex 2 of the General Framework Agreement to be the "mutual consent" and "agreed adjustment" referred to in Article II and paragraph 3 hereof.

9. Justice Diarmuid P. Sheridan adopted the Arbitration Award for Dobrinja I and IV as an independent Arbitrator on 17 April 2001 (*Official Gazette of Bosnia and Herzegovina*, No. 11/01), according to which he fixed a new Inter-Entity line, moving it back even further into the territory of the Republika Srpska, leaving the residential buildings and the school in the Federation of Bosnia and Herzegovina.

IV. Admissibility

10. **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 16, para 2(1) of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure") reads as follows:

A request or appeal is not admissible in any of the following cases:

1. The Court is not competent to make a decision.

11. Invoking the above mentioned provision of the Constitution of Bosnia and Herzegovina, it is undisputable that the applicant is an authorized party to refer disputes before the Constitutional Court in accordance with Article VI.3 (a) of the Constitution of Bosnia and Herzegovina. However, the preliminary issues to be answered in the present case are as follows: whether the dispute in question arises under the Constitution of Bosnia and Herzegovina and whether the Constitutional Court is competent to review constitutionality of the Decision of the High Representative as well as the Arbitration Award.

12. In relation to the issue whether the dispute in question arises under the Constitution of Bosnia and Herzegovina, the Constitutional Court finds that it is necessary to point to the relevant provisions of three Annexes to the General Framework Agreement: Annex 2 (the Agreement on the Inter-Entity Boundary Line); Annex 5 (the Agreement on Arbitration); and Annex 10 (the Agreement on Civil implementation of the Peace Agreement).

Preamble and Article I of **Annex 2** (**Agreement on the Inter-Entity Boundary Line**) reads as follows:

The Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska (the Parties) have agreed as follows:

The boundary between the Federation of Bosnia and Herzegovina and the Republika Srpska (the Inter-Entity Boundary Line) shall be as delineated on the map at the Appendix.

13. Article II of **Annex 2** reads as follows:

The Parties may adjust the Inter-Entity Boundary Line only by mutual consent. During the period in which the multinational military Implementation Force ("IFOR") is deployed pursuant to Annex 1-A to the General Framework Agreement for Peace in Bosnia and Herzegovina, the Parties shall consult with the IFOR Commander prior to making any agreed adjustment and shall provide notification of such adjustment to the IFOR Commander.

Article IV, paragraph 1 of **Annex 2** provides for delineation and marking as follows:

1. The line on the 1:50,000 scale map to be provided for the Appendix delineating the Inter-Entity Boundary Line, and the lines on the 1:50,000 scale map to be provided for Appendix A to Annex 1-A delineating the Inter-Entity Zone of Separation and the Agreed Cease-Fire Line and its Zone of Separation, which are accepted by the Parties as controlling and definitive, are accurate to within approximately 50 meters. During the period in which the IFOR is deployed, the IFOR Commander shall have the right to determine, after consultation with the Parties, the exact delineation of such Lines and Zones, provided that with respect to Sarajevo the IFOR Commander shall have the right to adjust the Zone of Separation as necessary.

Article IV, paragraph 3 of **Annex 2** provides as follows:

3. Following entry into force of this Agreement, the Parties shall form a joint commission, comprised of an equal number of representatives from each Party, to prepare an agreed technical document containing a precise description of the Inter-Entity Boundary Line. Any such document prepared during the period in which the IFOR is deployed shall be subject to the approval of the IFOR Commander.

Article VI of **Annex 2** provides as follows:

In those areas transferring from one Entity to the other in accordance with the demarcation described herein, there shall be a transitional period to provide for the orderly transfer of authority. The transition shall be completed forty-five (45) days after the Transfer of Authority from the UNPROFOR Commander to the IFOR Commander, as described in Annex 1-A.

Article VII of **Annex 2** provides the Status of Appendix insofar as:

The Appendix shall constitute an integral part of this Agreement.

14. **Annex 5** (**Agreement on Arbitration**) reads as follows:

The two entities will enter into reciprocal commitments. . .(c) to engage in binding arbitration to resolve disputes between them.

15. Article II.1 (a) and (d) of **Annex 10** (**Agreement on the Civilian Implementation**) provides, *inter alia*, as follows:

1. The High Representative shall:

(a) Monitor the implementation of the peace settlement

...

(d) Facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation.

Article V of this Agreement provides as follows:

The High Representative is the final authority in theatre regarding interpretation of this Agreement on the civilian implementation of the peace settlement.

16. The Constitutional Court notes that according to the aforementioned provisions of Annex 2, Annex 5 and Annex 10 to the General Framework Agreement, it was decided that the internal borders between the Federation of Bosnia and Herzegovina and the Republika Srpska were to be delineated as on the map in the Appendix; adjustment of the Parties, preparation of technical documents and involvement of both Entities in the binding arbitration to settle mutual disputes were also determined. The High Representative is vested with general competence for implementation of civilian aspects of the Peace Agreement. He is authorized to oversee its implementation, to facilitate it and to judge whether any difficulties arising out of the civilian implementation of the Peace Agreement need to be resolved. He is also the final authority in theatre to interpret the said agreement.

17. In order to determine the character of the above mentioned Annexes with respect to the Constitution of Bosnia and Herzegovina (Annex 4), the Constitutional Court notes that Annex 4 forms an integral part of the General Framework Agreement. In case No. *U 21/01* (*Official Gazette of Bosnia and Herzegovina*, No. 25/01), the Constitutional Court concluded the following: *Therefore, it follows from the structure itself of the General Framework Agreement that the Annexes have the same character and that the intention of the authors of the Annexes was not the creation of a conflict or incompatibility between the Annexes or the institutions established in accordance with the Annexes. Therefore, it can be concluded that they supplement each other and should co-exist side by side.*

Moreover, in case No. *U 7/97* (*Official Gazette of Bosnia and Herzegovina*, No. 7/98), where a request for a review of constitutionality of the General Framework Agreement was submitted, the Constitutional Court concluded the following:

Regarding the request to review the constitutionality of the General Framework Agreement for Peace in Bosnia and Herzegovina, the Constitutional Court notes that the Constitution of Bosnia and Herzegovina forms Annex IV of the General Framework Agreement. The Constitutional Court finds that the General Framework Agreement cannot, therefore, possibly contradict the Constitution of Bosnia and Herzegovina.

Invoking the jurisprudence of the Constitutional Court with respect to the review of the constitutionality of the General Framework Agreement and its Annexes, the Constitutional Court finds that it lacks competence to resolve possible issues arising under other Annexes of the General Framework Agreement. In the present case, the issues arise under Annex 2.

18. With regard to the issue whether the Constitutional Court has competence to review the constitutionality of the Decision of the High Representative and the Arbitration Award, in case No. *U 9/00* (*Official Gazette of Bosnia and Herzegovina*, No. 1/01) the Constitutional Court concluded the following:... *that, if the High Representative, by adopting a law or laws, intervened in the domain falling within the legislative competence of the Parliamentary Assembly of Bosnia and Herzegovina under Article IV.4 (a) of the Constitution, the Constitutional Court believes it has jurisdiction to review the substance of the adopted legal provisions and their conformity with the Constitution.*

19. In the present case, the Constitutional Court notes that the Decision of the High Representative and the Arbitration Award did not interfere with the legislative prerogatives assigned to the domestic legislation of Bosnia and Herzegovina by the Constitution of Bosnia and Herzegovina. As the dispute arises under the framework of Annex 2 of the General Framework Agreement, the challenged decisions were adopted according to the specific powers of the High Representative regarding the interpretation of the Agreement on the Civilian Implementation of the Peace Agreement.

20. The High Representative used the powers vested in him by Articles II.1 (d) and Article V of Annex 10 (Agreement on the Civilian Implementation of the Peace Agreement) invoking the paragraph XI.2 of the Conclusions of the Peace Implementation Conference that were adopted in Bonn on 9 and 10 December 1997.

The Constitutional Court holds that the High Representative, in the exercise of his powers regarding the civilian implementation of the Peace Agreement in the present

case, did not act as a substitute of the legislative authority of Bosnia and Herzegovina. Considering that the challenged decisions do not have the characteristics of a law, the Constitutional Court is not competent to review their constitutionality.

The Arbitration Award was based on a Decision of the High Representative in which the High Representative specified the arbitration terms. According to the International Law, a review of an Arbitration Award by another court or a judicial authority is not anticipated in cases in which the resolution of the disputes is entrusted to the international arbitrations.

According to the Hague Convention on Peaceful Settlement of Disputes from 1907, an arbitration award puts an end to the dispute definitively and without appeal, unless the parties reserved in the arbitration agreement the right to demand a review of the award by some other authority (but this occurs rarely and only in exceptional cases). However, the Decision of the High Representative did not give possibility of review of the Arbitration Award by any other authority in Bosnia and Herzegovina. Thus, the Arbitration Award decided on the dispute and excluded review by any court Bosnia and Herzegovina, including the Constitutional Court.

Under the given circumstances, the examination of the challenged decisions and the review of their conformity with the Constitution of Bosnia and Herzegovina are beyond the competence of the Constitutional Court. Therefore, the request is inadmissible

V. Conclusion

21. For the aforementioned reasons, invoking Article 16, para 2 (1) of the Constitutional Court's Rules of Procedure, the Constitutional Court decided as stated in the enacting clause of this Decision.

22. Given the Decision in the present case, the Constitutional Court concludes that there are no grounds for holding public hearing or for considering the proposal for the issuance of an interim measure.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 42/01

Request of Mr. Beriz Belkić, Member of the Presidency of Bosnia and Herzegovina for review of conformity of the Agreement on the Establishment of Special Parallel Relationships between the Federal Republic of Yugoslavia and the Republika Srpska (Official Gazette of the Republika Srpska, No. 26/01) with the Constitution of Bosnia and Herzegovina

DECISION ON MERITS of 26 March 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (2) and Article 61 paras 1 and 3 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Ćazim Sadiković, Vice-President,

Mr. Tudor Pantiru, Vice-President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Having deliberated on the request of **Mr. Beriz Belkić** in Case No. **U 42/01,**

Adopted at the session of 26 March 2004 the following

DECISION ON MERITS

It is hereby established as follows:

- The Agreement on the Establishment of Special Parallel Relationships between the Federal Republic of Yugoslavia and the Republika Srpska of 5 March 2001 (*Official Gazette of the Republika Srpska* No. 26/01) was concluded in accordance with Article III.2 (a) of the Constitution of Bosnia and Herzegovina.

- Article 2, lines 1, 2, 4, 11 and 12 of the Agreement on the Establishment of Special Parallel Relationships between the Federal Republic of Yugoslavia

and the Republika Srpska is consistent with the Constitution of Bosnia and Herzegovina.

- The Agreement on the Establishment of Special Parallel Relationships between the Federal Republic of Yugoslavia and the Republika Srpska was not published in the official languages of the Republika Srpska.

The Government of the Republika Srpska is hereby ordered to provide publication of the Agreement on the Establishment of Special Parallel Relationships between the Federal Republic of Yugoslavia and the Republika Srpska in the Bosnian and Croat languages and in the Latin alphabet, within a period of 30 days as from the date of publication of the present Decision in the *Official Gazette of the Republika Srpska*.

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

Reasoning

I. Introduction

1. On 2 July 2001 Mr. Beriz Belkić, Member of the Presidency of Bosnia and Herzegovina at that time ("the applicant"), filed with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") a request for review of conformity of the Agreement on the Establishment of Special Parallel Relationships between the Federal Republic of Yugoslavia and the Republika Srpska ("the Agreement") (*Official Gazette of the Republika Srpska* No. 26/01) with the Constitution of Bosnia and Herzegovina.

II. Procedure before the Constitutional Court

Pursuant to Article 21 para 1 of the Rules of Procedure of the Constitutional Court, the National Assembly of the Republika Srpska was requested on 7 August 2001 to submit a reply to the request within a period of 30 days after receipt of the letter of the Constitutional Court.

2. On 3 September 2001 the National Assembly of the Republika Srpska transmitted to the Constitutional Court an authorization for Prof. Dr Radomir Lukić to represent the National Assembly of the Republika Srpska in the case of review of conformity of the Agreement with the Constitution of Bosnia and Herzegovina.

3. On 7 January 2002 the Constitutional Court addressed a letter to Prof. Dr Radomir Lukić, the representative of the National Assembly of the Republika Srpska, to submit relevant documents and notices as to whether any Annexes to the Agreement were concluded in the meantime.

4. On 22 May 2002 the Constitutional Court addressed a letter to Mr. Mirko Šarović, President of the Republika Srpska and the signatory to the Agreement, to submit his reply to the statements made in the request.

5. On 20 May 2002 a new letter was addressed to the National Assembly of the Republika Srpska to submit its reply to the request.

6. The National Assembly of the Republika Srpska did not submit a reply to the request.

III. Request

7. The applicant submitted that the Agreement was not consistent with the Constitution of Bosnia and Herzegovina for the following reasons:

- Article III.2 (d) of the Constitution of Bosnia and Herzegovina provides that 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.

The Parliamentary Assembly of Bosnia and Herzegovina did not enact a law providing that the Agreement or any other agreements of this type did not require such consent. According to the Decree on Promulgation of the Law on Ratification of the Agreement, it is evident that no consent was given by the Parliamentary Assembly of Bosnia and Herzegovina in that respect.

8. The applicant maintained that the consent of the Parliamentary Assembly should have been requested prior to the ratification of the Agreement as this is also provided in the Constitution of the Republika Srpska. According to Article 70 of the Constitution of

the Republika Srpska, as amended by Amendment LIX, "the National Assembly shall: 2. ratify the agreements concluded between the Republika Srpska and the states and international organizations with the consent of the Parliamentary Assembly of Bosnia and Herzegovina".

An explicit constitutional obligation to obtain the consent of the Parliamentary Assembly has a special justification in the present case, particularly for the following reasons: the constitutional practice of "special parallel relationships" implies that the relations between Bosnia and Herzegovina and a neighbouring state have already been established and that they are operating successfully. Unfortunately, this is not the case here.

Bosnia and Herzegovina and the Federal Republic of Yugoslavia established diplomatic relations as late as five years after the General Framework Agreement for Peace in Bosnia and Herzegovina ("the Peace Agreement") was signed. Neither at the time of conclusion of the Agreement nor at the moment of filing of the request with the Constitutional Court were the ambassadors of these two states appointed. Furthermore, from that time onwards Bosnia and Herzegovina and the Federal Republic of Yugoslavia have not concluded a single contract for establishment of inter-state relations. Taking into account such circumstances, the requirements necessary for the establishment of special parallel relationships have not been met since the elementary inter-state relations between these two countries have not been established.

Only the representatives of the Serb people participated in the preparations for the conclusion of the Agreement, which took place without any transparency. This occurred after the Constitutional Court adopted the Decision on the Constituent Status of the Serb, Croat and Bosniac peoples which read that the said three peoples were constituent at the level of the Entities as well.

Article 2 of the Agreement provides that "the Parties to the Agreement shall particularly foster operation in the following spheres: (...) curbing all forms of crime, and defence in a completely transparent manner".

The Constitution of Bosnia and Herzegovina sets forth the responsibilities of the institutions of Bosnia and Herzegovina. Such responsibilities cannot be the subject of special relationships of the Entities with the neighbouring states. Article III.1 of the Constitution of Bosnia and Herzegovina provides as follows: "The following matters

are the responsibility of the institutions of Bosnia and Herzegovina: g) International and inter-Entity criminal law enforcement, including relations with Interpol." It is obvious that the Agreement's provision on "curbing all forms of crime", which has a general wording, is in contravention with the quoted provision of the Constitution of Bosnia and Herzegovina for it interferes with the exclusive responsibility of the institutions of Bosnia and Herzegovina.

Furthermore, cooperation in the field of defence is prescribed in general terms and can surely affect the principle of sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, which is guaranteed by the Constitution of Bosnia and Herzegovina and the Peace Agreement. In addition, Article III.5 of the Constitution of Bosnia and Herzegovina explicitly provides that Bosnia and Herzegovina shall assume responsibility for such other matters necessary to preserve sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina. The same principle is enunciated in respect of defence in Article V.5 (a) of the Constitution of Bosnia and Herzegovina, which, in its relevant part, reads as follows: "… All armed forces in Bosnia and Herzegovina shall operate consistently with the sovereignty and territorial integrity of Bosnia and Herzegovina."

A non-selective provision relating to cooperation in the field of defence does not provide guarantees that the aforementioned fundamental constitutional principles and the responsibilities of the institutions of Bosnia and Herzegovina would not be affected. That provision of the Agreement is in contravention with the quoted provisions of the Constitution of Bosnia and Herzegovina.

Article 2 line 1 of the Agreement provides for cooperation in the field of "economy and utilisation of natural resources". The Constitution of Bosnia and Herzegovina provides that within six months of the entry into force of the Constitution of Bosnia and Herzegovina, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects (Article III.5 (b) of the Constitution of Bosnia and Herzegovina). Instead of fulfilling its constitutional obligation, the Republika Srpska undertook to exercise such cooperation with a neighbouring state. That cooperation is with prejudice and limitations to fulfilment of the obligations under the Constitution of Bosnia and Herzegovina. The quoted provision is therefore inconsistent with the provision of Article III.5 (b) of the Constitution of Bosnia and Herzegovina.

The provisions of Article 2 of the Agreement in respect of “privatization and denationalization” as well as “planning” are not consistent with the principles of the Constitution of Bosnia and Herzegovina relating to a single economic space, protection of private property, promotion of a market economy and full-scale freedom of movement of persons, goods, services and capital (fourth line of Preamble, Article I line 4 and Article II para 3(k) of the Constitution of Bosnia and Herzegovina). Cooperation of an Entity with a neighbouring state in the field of planning, privatization and denationalization could create a situation which discriminates against the citizens and legal persons on the territory of the other Entity. The quoted provisions of the Agreement are therefore inconsistent with the quoted provisions of the Constitution of Bosnia and Herzegovina.

Article 11 para 2 of the Agreement provides that the Agreement is “drawn up in the official languages of the Federal Republic of Yugoslavia and of the Republika Srpska”. In view of the fact that the provision of the Constitution of Republika Srpska concerning the languages and alphabets in official use was no longer in force according to a Decision of the Constitutional Court and no new provision has yet been enacted, there is no constitutional arrangement which the Agreement could invoke. However, the Agreement was published in the Serb language of ekavian dialect and in the Cyrillic alphabet in the *Official Gazette of the Republika Srpska*. This is inconsistent with the Decision of the Constitutional Court of Bosnia and Herzegovina, which also guarantees the constituent status of all the three peoples at the level of the Entities in the manner so as to include the equality of the Bosnian, Croat and Serb languages as well as the equality of the Cyrillic and Latin alphabets.

9. The applicant therefore requested that the Constitutional Court should establish that the contested Agreement is not consistent with the Constitution of Bosnia and Herzegovina. Alternatively, the Constitutional Court should adopt a decision according to which the provisions of Article 2 lines 1, 2, 4, 11 and 12 of the Agreement were not consistent with the Constitution of Bosnia and Herzegovina.

IV. The Agreement

The Law on Ratification of the Agreement and the text of the Agreement itself were published in the *Official Gazette of the Republika Srpska* No. 26/01 in the Serb language and the Cyrillic alphabet.

1. The contested Agreement reads as follows:

Pursuant to Amendment XL, sub-paragraph 2 to the Constitution of the Republika Srpska (Official Gazette of the Republika Srpska No. 28/94), I hereby pass a

DECREE

on Promulgation of the Law on the Ratification of the Agreement on the Establishment of Special Parallel Relationships between the Federal Republic of Yugoslavia and the Republika Srpska

I hereby promulgate the Law on Ratification of the Agreement on the Establishment of Special Relationships between the Federal Republic of Yugoslavia and Republika Srpska, which was enacted by the National Assembly of the Republika Srpska at its session held on 6 and 7 July 2001.

No. 01-560/01
Banja Luka
13 June 2001

Mirko Šarović
President of the Republika Srpska

Law on Ratification of the Agreement on the Establishment of Special Parallel Relationships between the Federal Republic of Yugoslavia and the Republika Srpska

Article 1

The Agreement on the Establishment of Special Parallel Relationships between the Federal Republic of Yugoslavia and the Republika Srpska signed in Banja Luka on 5 March 2001 is hereby ratified in the original in the official languages of the Federal Republic of Yugoslavia and of the Republika Srpska.

Article 2

The text of the Agreement in the original in the Serb language reads as follows:

AGREEMENT

on the Establishment of Special Parallel Relationships between the Federal Republic of Yugoslavia and the Republika Srpska

The Federal Republic Yugoslavia and the Republika Srpska ("the Parties") shall establish special parallel relationships on the basis of:

Conviction that consistent, comprehensive and accelerated implementation of the General Framework Agreement for Peace in Bosnia and Herzegovina and its Annexes ("the Peace Agreement") is the basis for creating conditions for permanent coexistence of peoples and citizens in the Republika Srpska and Bosnia and Herzegovina as a whole,

That establishment of such special parallel relationships is fully in accordance with the Peace Agreement signed in Paris on 14 December 1995,

Conviction that the establishment of a durable peace and stability in this part of Europe is in the mutual interest,

Respect for sovereignty, territorial integrity and political independence of Bosnia and Herzegovina,

Acknowledgement of distribution of competencies between Bosnia and Herzegovina as a State and its Entities as defined by the Constitution of Bosnia and Herzegovina,

Respect for the powers and responsibilities of the States Signatories to the Peace Agreement, and

Conviction that thereby they would contribute to the social, democratic and economic development of the Federal Republic of Yugoslavia, the Republika Srpska, Bosnia and Herzegovina as a whole and this region.

AIMS

Article 1

By establishing special parallel relationships between the Parties, the Parties, pursuant to the Peace Agreement, wish to secure:

Development of institutional and all other forms of cooperation within the framework of general political and economic conditions, with respect to special interests, and

Development of a transparent cooperation between executive, legislative and other institutions.

Article 2

The Parties shall particularly foster cooperation in the following spheres:

- *economy and utilisation of natural resources,*
- *marketing*[1]*,*
- *legislation*
- *privatisation and denationalisation,*
- *science and technology,*
- *education, culture and sport,*
- *health care and social policy,*
- *tourism and environmental protection,*
- *information,*
- *protection of freedoms and rights of the citizens in line with the highest internationally recognized standards,*
- *curbing of crime, and*
- *defence, in a fully transparent manner.*

IMPLEMENTATION OF THE AGREEMENT

Article 3

For the purpose of implementation of the Agreement, the Parties shall establish a Council for Cooperation between the Federal Republic of Yugoslavia and the Republika Srpska ("the Council").

The Council shall comprise the President of the Federal Republic of Yugoslavia, the President of the Republika Srpska and Vice-President of the Republika Srpska.

1 The term "planning" was used instead of the term "marketing" in the text of the Agreement published in the *Official Gazette of the FRY* No. 1/01, International Agreements (see www.propisi.com)

Article 4

The work of the Council shall be governed by its Rules of Procedure.

The Council shall, as a rule, meet once in three months alternately in the Federal Republic of Yugoslavia and the Republika Srpska.

Article 5

The Council shall appoint a six-member Permanent Committee.
Members of the Permanent Committee shall be:

- *The Prime Minister of the Federal Republic of Yugoslavia,*
- *The Deputy Prime Minister of the Federal Republic of Yugoslavia,*
- *The competent Minister of the Federal Government of the Federal Republic of Yugoslavia (rotating member),*
- *The Prime Minister of the Republika Srpska,*
- *The Deputy Prime Minister of the Republika Srpska, and*
- *The competent Minister of the Government of the Republika Srpska (rotating member).*

Article 6

The Council and the Permanent Committee shall make proposals and recommendations to the competent bodies and institutions of the Parties by consensus.

Article 7

The Council shall appoint two Secretaries of the Council, one from the Federal Republic of Yugoslavia and the other from the Republika Srpska.

The scope of activities of the Secretaries of the Council includes the following:

- *Coordination of preparations for the Council's sessions,*
- *Monitoring of implementation of recommendations and proposals,*
- *Preparation of activities from the Council's scope of work,*
- *Other related activities.*

Article 8

With a view to establishing cooperation in the field of legislation, regular contacts shall be maintained between the Federal Assembly of the Federal Republic of Yugoslavia and the National Assembly of the Republika Srpska at the level of Speakers and working bodies.

Article 9

The OHR shall be consulted regarding preparation of Annexes to this Agreement and it shall oversee their implementation.

Article 10

Annexes to be endorsed by the Parties for the purpose of implementation of this Agreement shall be deemed integral parts thereof.

FINAL PROVISIONS

Article 11

The Agreement and Annexes referred to in Article 10 hereof shall enter into force on the date of the second notice whereby the Parties inform one other that conditions for their entry into force stipulated by their respective internal legislations have been met.

The Agreement is drawn up in Banja Luka on 5 March 2001 in two original copies in the official languages of the Federal Republic of Yugoslavia and of the Republika Srpska.

For the Federal Republic of Yugoslavia
Dr Vojislav Koštunica
President

For the Republika Srpska
Mirko Šarović
President

Article 3

This Law shall enter into force on the eighth day after its publication in the Official Gazette of the Republika Srpska.

No. 01-718/01
Banja Luka
7 June 2001

Dr Dragan Kalinić
Speaker of the National Assembly of the Republika Srpska

V. Admissibility

10. The Constitutional Court invoked the provisions of Article VI.3 (a) of the Constitution of Bosnia and Herzegovina in the examination of the admissibility of the present request.

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

The Constitutional Court shall uphold this Constitution.

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

- Whether an Entity's decision to establish a special parallel relationship with a 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.

11. The applicant sought review of conformity of the Agreement with the Constitution of Bosnia and Herzegovina.

12. At the time of filing of the instant request, the applicant was a Member of the Presidency of Bosnia and Herzegovina.

13. It follows from the aforementioned constitutional competencies and responsibilities that the Constitutional Court is competent to adjudicate this dispute.

14. In view of the provision of Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Article 16 para 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court finds that the request at issue was filed by an authorized person and that the formal requirements referred to in Article 16 para 2 of the Constitutional Court's Rules of Procedure have been met.

VI. Merits

15. According to the applicant's request, the following constitutional and legal questions arise:

- Whether the consent of the Parliamentary Assembly of Bosnia and Herzegovina should have been sought prior to the ratification of the Agreement;

- Whether the conditions for establishment of special parallel relationships were met since inter-state relations were not established at the time of the ratification of the Agreement (ambassadors to the two states were not appointed) and that only the representatives of the Serb people participated in the preparations for the conclusion of the Agreement;

- Whether the provisions of Article 2 of the Agreement stipulating that the Parties shall particularly foster cooperation in the sphere of economy and utilization of natural resources are consistent with Article II.5 (b) of the Constitution of Bosnia and Herzegovina; whether the provision on cooperation in the sphere of privatization and denationalisation is consistent with the fourth line of the Preamble to the Constitution of Bosnia and Herzegovina, Article I.4 and Article II.3 (k) of the Constitution of Bosnia and Herzegovina; whether the provision on curbing of crime is consistent with Article III.1 of the Constitution of Bosnia and Herzegovina and whether the provision on cooperation in the sphere of defence in a fully transparent manner is consistent with the sixth sub-paragraph of the Preamble to the Constitution of Bosnia and Herzegovina, Article III.5 and Article V.5 (a) of the Constitution of Bosnia and Herzegovina;

- Whether Article 11 para 2 of the Agreement in terms of the wording that it was drawn up in the official language of the Republika Srpska, namely the Serb language, was consistent with the Constitution of Bosnia and Herzegovina.

16. The responsibilities of the Entities in respect of establishment of special parallel relationships with the neighbouring states and entering into agreements with other states and international organizations are based on Article III.2 of the Constitution of Bosnia and Herzegovina, which, in its relevant section, reads as follows:

2. Responsibilities of the Entities

(a) The Entities shall have the right to establish special parallel relationships with neighbouring states consistent with the sovereignty and territorial integrity 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 thaw that certain types of agreements do not require such consent.

In pursuance of the aforementioned provisions of the Constitution of Bosnia and Herzegovina, an Agreement on Special Parallel Relationships has a constitutional restriction with respect to the sovereignty and territorial integrity whereas agreements with states and international organizations may be entered into (exclusively) with the consent of the Parliamentary Assembly of Bosnia and Herzegovina. Therefore, an Agreement on Special Parallel Relationships succumbs to the control of the Constitutional Court whereas agreements with states and international organizations require the consent of the Parliamentary Assembly.

17. The Constitutional Court, in view of the aforementioned provisions of the Constitution of Bosnia and Herzegovina and its constitutional competence in respect of an Entity's decision to establish a special parallel relationship with the neighbouring countries, concludes that the consent of the Parliamentary Assembly is not required for the establishment of special parallel relationships with the neighbouring countries. The Agreement was, therefore, concluded in the manner consistent with the Constitution of Bosnia and Herzegovina.

18. Regarding the statements made in the request that the basic inter-state relationships were not established at the time of conclusion and ratification of the Agreement as the basis for the establishment of "special parallel relationships", the Constitutional Court recalls that the diplomatic relations between Bosnia and Herzegovina and the Federal Republic of Yugoslavia were established on 15 December 2000 at which date a Protocol on the Establishment of Diplomatic Relations between Bosnia and Herzegovina and the Federal Republic of Yugoslavia was signed. The ambassadors to both states were appointed in December 2001. Thereafter, other agreements were concluded with the Federal Republic of Yugoslavia: on social insurance, on establishment of an Inter-State Council for Cooperation, on international transport of persons and goods in road traffic, etc.

Regarding the issues that relate to the successful functioning of the relationships between Bosnia and Herzegovina and a neighbouring state, as well as to the preparations for the conclusion of the Agreement, the Constitutional Court concludes that these issues are not within its competence.

19. A special exercise of cooperation between the Parties (Article 2) is a constitutional matter given the fact that Article III of the Constitution of Bosnia and Herzegovina reads as follows:

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

(a) Foreign policy.

(b) Foreign trade policy.

(c) Customs policy.

(d) Monetary policy as provided in Article VII.

(e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina.

(f) Immigration, refugee, and asylum policy and regulation.

(g) International and inter-Entity criminal law enforcement, including relations with Interpol.

(h) Establishment and operation of common and international communications facilities.

(i) Regulation of inter-Entity transportation.

(j) Air traffic control.

...

5. Additional Responsibilities

(a) Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

(b) Within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects.

20. Having examined the text of the contested Agreement, the Constitutional Court observes that the provisions of Article 2 of the Agreement referred to by the applicant are given in general terms and, according to the Constitutional Court, their implementation required drawing up Annexes to the Agreement that shall form an integral part thereof as anticipated by Articles 10 and 11 of the Agreement. The Constitutional Court, knowing that the OHR was directly involved in the "negotiations" for the conclusion of this Agreement, observes that it was envisaged in the Agreement itself that the OHR shall be consulted regarding the preparation of the Annexes to this Agreement and that it shall oversee its implementation (Article 9). As regards the question of responsibilities of the institutions of Bosnia and Herzegovina and of the Entities, the Constitutional Court points to its view taken in its Second Partial Decision No. *U 5/98/II* of 18 and 19 February 2000.

Articles III.1 and III.3 of the Constitution of Bosnia and Herzegovina regulate the distribution of powers in principle in so far as responsibilities of the institutions of Bosnia and Herzegovina are enumerated whereas, again in principle, all other functions and powers not specified in the Constitution of Bosnia and Herzegovina rest with the Entities. However, the Constitution of Bosnia and Herzegovina creates powers not only within this general system of distribution of powers in Article III. In creating institutions of the State of Bosnia and Herzegovina, the Constitution of Bosnia and Herzegovina also confers upon them more or less specific powers, as can be seen from Article IV.4 as regards the Parliamentary Assembly of Bosnia and Herzegovina and Article V.3 as regards the Presidency of Bosnia and Herzegovina, which are not necessarily repeated in the enumeration in Article III.1. The Presidency of Bosnia and Herzegovina, for instance, is vested with the power of civilian command over Armed Forces in Article V.5 (a), although Article III.1 does not explicitly refer to military affairs as being within the responsibility of the institutions of Bosnia and Herzegovina. It must then be concluded that matters which are not expressly enumerated in Article III.1 are not necessarily under exclusive competence of the Entities in the same way as the Entities might have residual powers with regard to the responsibilities of the institutions of Bosnia and Herzegovina. Reference can be made, for instance, to the responsibility of the institutions of Bosnia and Herzegovina with regard to foreign policy and foreign trade policy explicitly mentioned in Article III.1 (a) and (b), since the Entities also have, for instance, a right to establish special parallel relationships with the neighbouring states according to Article III.2 (a).

13. In addition, the Constitution of Bosnia and Herzegovina also establishes basic constitutional principles and goals for the functioning of Bosnia and Herzegovina as well as a catalogue of human rights and fundamental freedoms that must be perceived as constitutional guidelines or limitations for the exercise of the responsibilities of Bosnia and Herzegovina and the Entities. According to sub-paragraph 4 of the Preamble of the Constitution of BiH, this Constitution was adopted in order to "promote the general welfare and economic growth through the protection of privately owned property and the promotion of a market economy". Furthermore, Article I.4 of the Constitution provides for freedom of movement throughout Bosnia and Herzegovina and explicitly states that neither Bosnia and Herzegovina nor the Entities shall "impede full freedom of movement of persons, goods, services and capital throughout Bosnia and Herzegovina" as a necessary prerequisite for the existence of a joint market. And finally, Article II.3 (k) guarantees the right to property in connection with the obligation of the Entities under para 6 of the said Article to "apply and conform to the human rights and fundamental freedoms referred to in para 2 above". Since Article II.3 sub-paragraph 1 reads that "all persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms..." enumerated there, the right to property is not only a right which all authorities of BiH have to respect, but there is also a positive obligation of the State to provide for conditions which are necessary for the enjoyment of this right. Article II.3 therefore gives a general competence to the joint institutions of Bosnia and Herzegovina to regulate all matters enumerated in the catalogue of human rights, which cannot exclusively be left to the Entities since the protection has to be guaranteed to "all persons within the territory of Bosnia and Herzegovina".

22. Consequently and with a view to the constitutional principle providing that all regulations must be interpreted in line with the Constitution to the extent possible, the Constitutional Court finds that the contested provisions insofar as they relate to cooperation in the areas of economy and utilisation of natural resources, planning, privatization and denationalization and crime curbing, can be interpreted in the manner that is consistent with the Constitution of Bosnia and Herzegovina. Given the fact that the aforementioned provisions are of general nature and are not directly applicable, the Constitutional Court particularly points out that their application requires drawing up of Annexes to the Agreement subject to review of constitutionality and conformity with the Constitution of Bosnia and Herzegovina.

23. As regards the issue that relates to the provision of the Agreement on cooperation in the field of "defence, in a fully transparent manner", the Constitutional Court observes that

a Law on Defence in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 43/03) was enacted in the meantime pursuant to Article III.5 (a) of the Constitution of Bosnia and Herzegovina (Additional Responsibilities).

This Law regulates a single defence system of Bosnia and Herzegovina; it establishes and defines the chain of command and the role of all elements in order for Bosnia and Herzegovina to have a full capacity in the civilian supervision and protection of the sovereignty and territorial integrity of Bosnia and Herzegovina, it establishes the rights, obligations and the actions of the institutions of Bosnia and Herzegovina, the Entity bodies and the Armed Forces of Bosnia and Herzegovina for the protection of the sovereignty and territorial integrity, political independence and international personality of Bosnia and Herzegovina, as well as giving support to the civilian authorities (Article 1).

The Constitutional Court, with the remark that the Law on Defence of Bosnia and Herzegovina was enacted and with the aforementioned reasoning of the Constitutional Court's view with respect to the other provisions of Article 2 of the Agreement, concludes that this provision of the Agreement may be interpreted in the manner consistent with the Constitution of Bosnia and Herzegovina.

24. However, the applicant argues that the Agreement is inconsistent with the decision of the Constitutional Court which guarantees constituent status of all three peoples at the level of the Entities, including the equality of the Bosnian, Croatian and Serbian languages and the Cyrillic and Latin alphabets, as it was made in the "official languages of the Federal Republic of Yugoslavia and the Republika Srpska" and published in the *Official Gazette of the Republika Srpska*, in the Serbian language, the ekavian dialect and the Cyrillic script.

Namely, the Constitutional Court recalls its position taken in Decision No. *U 5/98-IV* of 18 and 19 August 2000 when reviewing the conformity with the Constitution of Bosnia and Herzegovina of Article 7 of the Constitution of the Republika Srpska, which reads: "the Serbian language of iekavian and ekavian dialect and the Cyrillic alphabet shall be in official use in the Republic, while the Latin alphabet shall be used as stipulated by the law"*,* when it established as follows: "32. A wide range of meaning of "official use" of the Serb language and the Cyrillic alphabet and the territorial restriction for the official use of other languages in Article 7 of the Constitution of the Republika Srpska, however, go far beyond *per se* legitimate aim to regulate the use of languages insofar as these provisions have the effect of hindering the enjoyment of the rights under Article II.3 (m) and Article 5 of the Constitution of Bosnia and Herzegovina. Moreover, they are

also in contradiction with Article I.4 of the Constitution of Bosnia and Herzegovina. The Constitutional Court thus declares Article 7 para 1 of the Constitution of the Republika Srpska unconstitutional".

According to this decision adopted by the Constitutional Court, "provisions or segments of provisions of the Constitution of the Republika Srpska which the Constitutional Court found to be in contravention with the Constitution of Bosnia and Herzegovina shall cease to be in effect as of the date of the publication of this decision in the *Official Gazette of Bosnia and Herzegovina*". Pursuant to Article VI.4 of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

By the decision of the High Representative on Constitutional Amendments in the Republika Srpska of 19 April 2002, the Amendment LXIII reads as follows: "the official languages of the Republika Srpska are: the language of the Serb people, the language of the Bosniac people and the language of the Croat people. The official scripts are Cyrillic and Latin".

25. The text of the Agreement reads that it was made in "the official languages – the Serb language and the Cyrillic script".

26. With a remark that the Agreement was signed on 5 March 2001, thus upon the adoption of the decision by the Constitutional Court and prior to the publication of Amendment LXXI to the Constitution of the Republika Srpska in the *Official Gazette of the Republika Srpska*, the Constitutional Court concludes that, apart from the legal gap in the Constitution of the Republika Srpska that ensued upon the adoption of the decision of the Constitutional Court, the fact that it was not acted in accordance with the decision and the reasoning of the decision of the Constitutional Court No. *U 5/98* is unjustifiable.

In view of the fact that the Amendment referring to official languages in the Republika Srpska was enacted in the meantime, the Constitutional Court considers that the Agreement should be published in the Croat and Bosniac languages and in the Latin script.

27. For these reasons, the Constitutional Court orders the Government of the Republika Srpska to provide publication of the contested Agreement in the *Official Gazette of the Republika Srpska* in the Bosnian and Croatian languages and in the Latin script as required by Amendment LXXI to the Constitution of Republika Srpska, within a period of 30 days as from the date of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*.

VII. Conclusion

28. Pursuant to Article 61 paras 1 and 3 of the Constitutional Court's Rules of Procedure, the Constitutional Court decided by the majority of votes as set out in the enacting clause above.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 44/01

Request of Mr. Sejfudin Tokić, Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for a review of constitutionality of Articles 11 and 11(a) of the Law on Territorial Organization and Local Self-Government (Official Gazette of the Republika Srpska, Nos. 11/94, 6/95, 26/95, 15/96, 17/96, 19/96 and 6/97) and the title itself of the Law on the Town of Srpsko Sarajevo as well as its Articles 1 and 2 (Official Gazette of the Republika Srpska, Nos. 25/93, 8/96, 27/96 and 33/97)

DECISION ON MERITS of 27 February 2004

DECISION
(on non-enforcement of the decision of the Constitutional Court within the given time limit) of 22 September 2004

DECISION
(temporary replacement of the names of the towns)
of 22 September 2004

RULING of 22 July 2005

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (2), Article 61 para 2 and Article 63 para 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Ćazim Sadiković, Vice-President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Having deliberated on the request of **Mr. Sejfudin Tokić**, Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing of the present request, in Case No. **U 44/01**,

Adopted at the session of 27 February 2004 the following

DECISION ON MERITS

It is hereby established that a part of Article 11 of the Law on Territorial Organization and Local Self-Government (*Official Gazette of the Republika Srpska* Nos. 11/94, 6/95, 26/95, 15/96, 17/96, 19/96, and 6/97) and the title itself of the Law on the Town of Srpsko Sarajevo as well as its Articles 1 and 2 (*Official Gazette of the Republika Srpska* Nos. 25/93, 8/96, 27/96, and 33/97) with respect to the names: Town of Srpsko Sarajevo, Srpski Drvar, Srpski Sanski Most, Srpski Mostar, Srpsko Goražde, Srbinje, Srpski Ključ, Srpska Kostajnica, Srpski Brod, Srpska Ilidža, Srpsko Novo Sarajevo, Srpski Stari Grad and Srpsko Orašje are not consistent with Article II.4 in conjunction with Articles II.3 and II.5 of the Constitution of Bosnia and Herzegovina.

The National Assembly of the Republika Srpska is ordered, pursuant to Article 63 para 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, to harmonize Article 11 of the Law on Territorial Organization and Local Self-Government and the title itself of the Law on the Town of Srpsko Sarajevo as well as its Articles 1 and 2 with the Constitution of Bosnia and Herzegovina, within a period of three months after the date of publication of the present Decision in the *Official Gazette of Bosnia and Herzegovina*.

It is hereby established that Article 11 (a) of the Law on the Territorial Organization and Local Self-Government is consistent with the Constitution of Bosnia and Herzegovina.

The remainder of the request relating to Article 11 of the Law on Territorial Organization and Local Self-Government is hereby dismissed.

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

Reasoning

I. Introduction

1. On 30 July 2001 Mr. Sejfudin Tokić, Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of its filing request ("the applicant"), filed with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") a request for a review of constitutionality of Articles 11 and 11(a) of the Law on Territorial Organization and Local Self-Government (*Official Gazette of the Republika Srpska* Nos. 11/94, 6/95, 26/95, 15/96, 17/96, 19/96, and 6/97) and the title itself of the Law on the Town of Srpsko Sarajevo as well as its Articles 1 and 2 (*Official Gazette of the Republika Srpska* Nos. 25/93, 8/96, 27/96 and 33/97).

II. Procedure before the Constitutional Court

2. Having regard to Article 21 para 1 (previously Article 16 para 1) of the Rules of Procedure of the Constitutional Court, the Speaker of the National Assembly of the

Republika Srpska was requested by a letter of 13 August 2001 to submit his reply to the request, within 14 days after the date of receipt of the letter.

3. By the letter No. 01-927/01 of 3 September 2001, the National Assembly of the Republika Srpska submitted to the Constitutional Court a decision (No. 01-925/01 of 3 September 2001) authorizing Prof. Dr Radomir Lukić ("the representative") to represent the National Assembly of the Republika Srpska in this case before the Constitutional Court. Based on this decision, the representative "was authorized to take all procedural actions pending termination of the proceedings".

4. Thereupon, on 25 October 2001, the Constitutional Court requested that the representative submit his reply to the request at issue, within 21 days after the receipt of the letter.

5. Furthermore, in view of the fact that the representative failed to submit his reply to the aforementioned request, the Constitutional Court requested on 3 December 2001 that the representative acts accordingly within a subsequent period of eight days.

6. In view of the fact that no reply was received after expiration of the extended period, the Constitutional Court communicated to the National Assembly of the Republika Srpska a letter of urgency on 5 December 2001 requesting therein submittal of a reply in this case.

7. On 7 February 2002, the Constitutional Court informed the representative that a session of the Constitutional Court was scheduled to take place on 25 and 26 February 2002 and that the request for a review of constitutionality would be discussed on that occasion. The Constitutional Court requested once again that a reply to the request be submitted by no later than 12 February 2002.

8. The representative sent a fax to the Constitutional Court on 22 February 2002 in which he requested that a public hearing be held. He also expressed his willingness to answer all disputable issues that may arise in the course of discussion of the case. In this fax, the representative informed the Constitutional Court that the applicant had also instituted proceedings before the Constitutional Court of the Republika Srpska "in respect of the same norms and acts as those which he already challenged in this case". The representative submitted that it was "necessary that the Constitutional Court obtain information on the matter as this could affect its work and decision in this case".

9. At the session of the Constitutional Court of 25 and 26 February 2002, it was decided that examination of the case be postponed for the next session. In the meantime, it was agreed that information would be obtained from the Constitutional Court of the Republika Srpska regarding whether the applicant had instituted proceedings for a review of constitutionality of the same norms and acts before the Constitutional Court of the Republika Srpska. It was also decided that the same information should be requested from the applicant.

10. On 12 March 2002 the Constitutional Court sent letters to the applicant and the Constitutional Court of the Republika Srpska requested therein information on the case to be submitted together with the information on the proceedings before the Constitutional Court of the Republika Srpska.

11. On 14 March 2002, the Constitutional Court of the Republika Srpska informed the Constitutional Court that the proceedings for a review of constitutionality of Articles 1 and 2 of the Law on Amendments of the Law on the Town of Srpsko Sarajevo during the State of War or Imminent Danger of War (*Official Gazette of the Republika Srpska* No. 8/96) were pending before the Constitutional Court of the Republika Srpska and that an initiative for this review was launched by Mr. Sejfudin Tokić and Mr. Dragi Stanimirović, representatives in the Parliamentary Assembly of Bosnia and Herzegovina. This initiative is registered with the Constitutional Court of the Republika Srpska under case No. *U-67/01* of 2 August 2001.

12. By a letter of 19 March 2002, the applicant informed the Constitutional Court that his initiative launched to the Constitutional Court of the Republika Srpska related to a different law and legal question from the request filed with the Constitutional Court and that "possible proceedings before the Constitutional Court of the Republika Srpska could not affect the proceedings pending before the Constitutional Court of Bosnia and Herzegovina".

13. Following the discussion on the proposal of the Judge Rapporteur at the session of the Constitutional Court held on 10 and 11 May 2002, it was concluded that the adjudication of the case should be postponed for the next session of the Constitutional Court because the majority of judges voted against the proposal.

III. Request

14. In his request, the applicant submitted that the provisions of Articles 11 and 11 (a) of the Law on Territorial Organization and Local Self-Government and title itself of the Law

on the Town of Srpsko Sarajevo as well as its Articles 1 and 2 were not consistent with Articles II.3, II.4 and II.5 of the Constitution of Bosnia and Herzegovina.

15. The applicant pointed out that Annex 2 (Agreement on Inter-Entity Boundary Line and Related Issues) to the General Framework Agreement for Peace in Bosnia and Herzegovina explicitly provided that the boundary between the Federation of Bosnia and Herzegovina and the Republika Srpska (the Inter-Entity Boundary Line) shall be as delineated on the map at the Appendix (Article I). According to Annex 7 (Agreement on Refugees and Displaced Persons) the Parties undertake to create in their territories the political, economic and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group (item 1).

16. The applicant invoked Article I of the Constitution of Bosnia and Herzegovina, which reads that Bosnia and Herzegovina, as a democratic state, shall continue its legal existence under international law as a state, with its internal structure modified as provided in the Constitution; Article II of the Constitution of Bosnia and Herzegovina, which reads that Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms anticipated in the European Convention on Protection of the Human Rights and Fundamental Freedoms ("the European Convention") or in the international agreements listed in Annex I to the Constitution and that the enjoyment of these rights 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. According to Article II.5, all refugees and displaced persons shall have the right to return freely to their homes of origin. The applicant also pointed out that all courts, institutions, authorities and instrumentalities operated by or within the Entities shall apply and conform to human rights and fundamental freedoms. The applicant also invoked Article III.2 (c), which reads that the Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for the internationally recognized human rights and fundamental freedoms, and by taking such other measures as appropriate.

17. The applicant listed the former names of the cities and municipalities which were altered by the contested Article 11 of the Law on Territorial Organization and Local Self-Government in the course of and following the war in Bosnia and Herzegovina in the following manner:

Srpski Drvar – previously Drvar (part of it)
Srpski Sanski Most – previously Sanski Most (part of it)
Srpski Mostar – previously Mostar (part of it)
Srpsko Goražde – previously Goražde
Srbinje – previously Foča
Srpski Ključ – previously Ključ
Srpska Kostajnica – previously Bosanska Kostajnica
Srpski Brod – previously Bosanski Brod
Srpska Ilidža – previously Ilidža (part of it)
Srpsko Novo Sarajevo – previously Novo Sarajevo (part of it)
Srpski Stari Grad – previously Stari Grad (part of it)
Town of Srpsko Sarajevo – previously Sarajevo
Srpsko Orašje - previously Orašje (part of it)

18. Based on the aforesaid, the applicant concluded that the adjective "bosanski" (Bosnian) was deleted in the names of the towns that previously contained that word (e.g. Bosanski Brod), and that the adjective "srpski" (Serb) was added to the names of a certain number of towns. Furthermore, the name of the town of Foča was changed to Srbinje, which is associated with the prefix "srpski".

19. In the applicant's opinion, the contested provisions of the Law on Territorial Organization and Local Self-Government and the Law on the Town of Srpsko Sarajevo were inconsistent with the Constitution of the Bosnia and Herzegovina, particularly with the provisions of Articles II.3, II.4 and II.5 thereof.

20. As to the Law on the Town of Srpsko Sarajevo, the applicant argued that ever since its foundation up until April 1992, the City of Sarajevo represented a historical entity in which persons belonging to different peoples and practising different religions lived together. Throughout its history, the ethnic structure of its population changed but an ethnic prefix designating it as a city of one people or one religious group was never added to the name of Sarajevo. Indeed, Sarajevo had always been a city of its citizens.

21. Such prefix would, in the applicant's view, mean that the Town of Srpsko Sarajevo would be a city of only one people. In that way, members of other constituent peoples and other citizens are put on an unequal and discriminatory footing.

22. The applicant pointed out that the legislator's intention to privilege the Serb people also appears from the Statute of the Town of Srpsko Sarajevo (*Official Gazette of the Town of Srpsko Sarajevo* No. 10/00 of 13 October 2000) as well as from the symbols and attributes of the town, which exclusively represent the Serb history and tradition. According to Article 5 of the said Statute, the symbol of the town shall be the coat-of-arms that symbolizes the historical and cultural values of Srpsko Sarajevo. According to Article 7 of the same Statute, the Patron Saint of the town is the Saint Petar Zimonjić of Sarajevo.

23. On the other hand, before the war, a great number of citizens of non-Serb origin lived in the area that covered the town of Srpsko Sarajevo. Such citizens even constituted the majority in some municipalities such as Rogatica and Trnovo whereas today their number is negligible. It was therefore evident that the citizens of Srpsko Sarajevo of non-Serb origin were not only discriminated against as individuals but also as members of their constituent peoples.

24. The applicant argued that the fact that even nowadays more Serb people live in the area of Sarajevo than in the area of "Srpsko Sarajevo" proves the extent to which the contested provisions are against any rational criteria.

25. The applicant referred to the Constitutional Court's Decision No. *U 5/98* (*Official Gazette of Bosnia and Herzegovina* No. 23/00), in which the position was taken that "the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any privilege for one or two of these three peoples, any domination in governmental structures or any ethnic homogenization through segregation based on territorial separation. Despite the territorial delimitation of Bosnia and Herzegovina by the establishment of the two Entities, this territorial delimitation could not provide constitutional legitimacy for ethnic domination, national homogenization or a right to uphold the effects of ethnic cleansing".

26. The applicant took the view that although the constituent peoples were in reality in a majority or minority position in the Entities, the explicit recognition of the Bosniac, Croat and Serb peoples as constituent peoples in the Constitution of Bosnia and Herzegovina can only mean that none of them is recognized as a majority, i.e. they enjoy equality as groups. Therefore, it is a constitutional obligation not to discriminate in particular against those constituent peoples that are in reality in a minority position in the respective Entity. It is not only a clear constitutional obligation not to discriminate constituent people that is in reality in a minority position in the respective Entity and it is not only a clear

constitutional obligation not to violate, in a discriminatory manner, the individual rights provided for in Article II.3 and II.4 of the Constitution of Bosnia and Herzegovina, but also a constitutional obligation of non-discrimination in respect of the rights of groups. For instance, there would be discrimination if one or two constituent peoples had a privileged treatment through the legal systems of the Entities.

27. The applicant pointed out that Article II,5 of the Constitution of Bosnia and Herzegovina referred explicitly to Annex VII, which reads in Article I as follows: “The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina”. It follows from the context of these provisions that it was an overall objective of the Dayton Peace Agreement to ensure the return of refugees and displaced persons to their homes of origin and thereby re-establish a multi-ethnic society which had existed before the war without any territorial separation on ethnic grounds.

28. Therefore, the prohibition of discrimination represents, in the applicant’s view, a starting-point and a fundamental principle in both international and national law. The prohibition of discrimination is provided for in Articles 2 and 7 of the Universal Declaration on Human Rights, Articles 2 and 26 of the International Covenant on Civil and Political Rights and Article 14 of the European Convention.

29. Regarding the part of Article 11 of the Law on Amendments to the Law on Territorial Organization and Local Self-Government stipulating that the status of some municipalities belonging to the Federation of Bosnia and Herzegovina shall be determined by a decision of the National Assembly and Article 11 (a) para 1 stipulating that certain municipalities transferred to the Federation shall temporarily stop functioning, the applicant contended that the issue of the Inter-Entity Boundary Line was regulated in Annex 2 to the General Framework Agreement and that an usurpation of powers with respect to municipalities that belonged to the territory of the Federation of Bosnia and Herzegovina undoubtedly followed from the contested provision. In the appellant’s opinion, this was in contravention with the Constitution of Bosnia and Herzegovina.

30. The applicant also pointed out that the changes of names by adding the prefix “srpski” (Serb) after the signing of the Dayton Agreement at the time when it was necessary to ensure that all refugees and displaced persons return freely to their homes of origin (Article II.5 of the Constitution of Bosnia and Herzegovina) created an atmosphere of “fear and distrust among the refugees who were forced to abandon their homes for being prosecuted on ethnic grounds”.

31. Therefore, in the applicant's view, the contested provisions were discriminatory and inconsistent with Articles II.3, II.4 and II.5 of the Constitution of Bosnia and Herzegovina.

32. Given the importance of the issues raised, the applicant suggested that the Constitutional Court should decide the case after holding a public hearing.

IV. Relevant law

33. **Law on Territorial Organization and Local Self-Government** (*Official Gazette of the Republika Srpska* No. 11/94):

Article 11

The Republika Srpska shall have the following municipalities: Banja Luka, Bijeljina, Bileća, Bihać, Bratunac, Brod, Brčko, Višegrad, Vlasenica, Vogošća, Gacko, Glamoč, Goražde, Gradačac, Gradiška, Grahovo, Derventa, Doboj, Srbobran, Drvar, Zavidovići, Zvornik, Ilijaš, Ilidža, Jajce, Kalesija, Kalinovik, Ključ, Kneževo, Kozarska Dubica, Konjic, Kotor Varoš, Krupa na Uni, Kupres, Laktaši, Lopare, Lukavac, Ljubinje, Maglaj, Milići, Modriča, Mostar, Mrkonjić Grad, Nevesinje, Novi Grad, Novo Sarajevo, Olovo, Orašje, Odžak, Pale, Pelagićevo, Petrovac, Petrovo, Prijedor, Prnjavor, Rajlovac, Rogatica, Rudo, Sanski Most, Skelani, Sokolac, Srbac, Srbinje, Srebrenik, Srpska Kostajnica, Stari Grad, Stolac, Teslić, Trebinje, Trnovo, Tuzla, Ugljevik, Han Pijesak, Hadžići, Centar Sarajevo, Čajniče, Čelinac, Šamac, Šekovići and Šipovo.

On obtaining an opinion of the Municipal Assembly concerned, the Government shall be authorized to identify the settlements composing the area of the Municipality and/or the cadastral municipalities included in that municipality.

Law on Amendments to the Law on Territorial Organization and Local Self-Government (*Official Gazette of the Republika Srpska* No. 6/95):

Article 1

In Article 11 of the Law of Territorial Organization and Local Self-Government (Official Gazette of the Republika Srpska No. 11/94), the words "Brod" and "Odžak" shall be replaced with, respectively, "Srpski Brod" and "Vukosavlje".

Law on Amendments to the Law on Territorial Organization and Local Self-Government (*Official Gazette of Republika Srpska* No. 15/96):

Article 2

Article 11 is amended and shall read as follows:

The Republika Srpska shall have the following municipalities: Banja Luka, Bijeljina, Bileća, Berkovići, Bratunac, Brčko, Višegrad, Vlasenica, Vukosavlje, Gacko, Gradiška, Derventa, Doboj, Zvornik, Jezero, Kalinovik, Kneževo, Kozarska Dubica, Kotor Varoš, Krupa na Uni, Kupres, Laktaši, Lopare, Ljubinje, Milići, Modriča, Mrkonjić Grad, Nevesinje, Novi Grad, Osmaci, Pale, Pelagićevo, Petrovo, Prijedor, Prnjavor, Rogatica, Rudo, Skelani, Srpski Drvar, Srpska Sana, Srebrenica, Sokolac, Srpski Mostar , Srpsko Goražde, Srbac, Srbinje, Srpski Ključ, Srpska Kostajnica, Srpski Brod, Srpska Ilidža, Srpsko Novo Sarajevo, Srpski Stari Grad, Teslić, Trebinje, Trnovo, Ugljevik, Han Pijesak, Čajniče, Čelinac, Šamac, Šekovići and Šipovo.

The areas of the municipalities Srpska Ilidža, Srpsko Novo Sarajevo, Pale, Sokolac, Srpski Stari Grad and Trnovo shall constitute the Town of Srpsko Sarajevo.

The status of municipalities or territories of municipalities which become part of the Federation of Bosnia and Herzegovina in accordance with the General Framework Agreement for Peace in Bosnia and Herzegovina shall be determined by a decision of the National Assembly of the Republika Srpska.

Article 3

Article 11(a) shall be added after Article 11, reading as follows:

Article 11 (a)

The following municipalities of the Republika Srpska shall temporarily stop functioning: Bihać, Vogošća, Glamoč, Gradačac, Grahovo, Drvar, Zavidovići, Ilijaš, Jajce, Konjic, Lukavac, Maglaj, Olovo, Orašje, Petrovac, Rajlovac, Srebrenik, Srbobran, Tuzla, Hadžići and Centar Sarajevo.

Those parts within the municipalities which have temporarily stopped functioning shall be included in the territories of the following municipalities: part of the Glamoč Municipality shall be included in the territory of the Šipovo Municipality, parts of the

Gradačac Municipality shall be included in the territories of the Modriča and Pelagićevo Municipalities, part of the Ilijaš Municipality shall be included in the territory of the Sokolac Municipality, parts of the Konjic Municipality shall be included in the territory of the Nevesinje Municipality, parts of the Kladanj Municipality shall be included in the territory of the Šekovići Municipality, parts of the Lukavac Municipality shall be included in the territory of the Petrovo Municipality, parts of the Maglaj Municipality shall be included in the territory of the Doboj Municipality, parts of the Olovo Municipality shall be included in the territory of the Sokolac Municipality, parts of the Orašje Municipality shall be included in the territory of the Brčko Municipality, parts of the Petrovac Municipality shall be included in the territory of the Ključ Municipality, parts of the Srbobran Municipality shall be included in the territory of the Šipovo Municipality, parts of the Tuzla Municipality shall be included in the territory of the Lopare Municipality.

Article 2 para 2 of the Law on Amendments of the Law on Territorial Organization and Local Self-Government (*Official Gazette of the Republika Srpska* No. 15/96) is rectified as follows:

- The wording "Srpski Sanski Most" shall be used instead of "Srpska Sana". "Srpsko Orašje" shall be inserted after the wording "Srpski Stari Grad". In Article 3 para 1 the words "Drvar, Jajce, Orašje and Petrovac" shall be deleted. In Article 3 para 2 the words "parts of the Orašje Municipality shall be included in the territory of the Brčko Municipality, parts of the Petrovac Municipality shall be included in the territory of the Ključ Municipality" after the word "Sokolac" shall be deleted.

34. **Law on the Srpski grad Sarajevo (Serb Town of Sarajevo) during the State of War and Imminent Threat of War** (*Official Gazette of the Republika Srpska* No. 25/93):

Article 1

This Law shall establish the area of the Srpski Grad Sarajevo ("Town"), its bodies and their respective competences, finances and the constitution of the Town Assembly.

During the state of war or imminent threat of war, the Town shall exercise all those functions relating to the local self-government in its area except those assigned to the municipal bodies by the Town Assembly.

Article 2

The area of the Town shall consist of areas of the following municipalities of the Republika Srpska: Centar, Hadžići, Ilidža, Ilijaš, Novo Sarajevo, Stari Grad, Rajlovac, Vogošća and Trnovo.

Law on Amendments of the Law on the Srpski grad Sarajevo (Serb Town of Sarajevo) during the State of War or Imminent Threat of War (*Official Gazette of the Republika Srpska* No. 8/96):

Article 1

*In the Law on the Srpski Grad Sarajevo during the State of War or Imminent Threat of War (*Official Gazette of the Republika Srpska *No. 25/93), the name of the Law shall be changed to read Law on the Town of Srpsko Sarajevo.*

Article 2

In Article 1, para 1 the wording: "Srpski Grad Sarajevo" shall be replaced with the wording "Town of Srpsko Sarajevo".

The words "during the state of war or imminent threat of war" shall be deleted from Article 1 para 2.

Article 3

Article 2 shall be amended to read as follows:

The area of the Town shall be composed of the areas of the following municipalities of the Republika Srpska: Srpska Ilidža, Srpsko Novo Sarajevo, Pale, Sokolac, Stari Grad and Trnovo.

Para 2 shall be added after para 1 of Article 2, reading as follows: The statute of the municipalities Centar Sarajevo, Hadžići, Rajlovac and Vogošća, i.e. the areas which belonged to the Federation of Bosnia and Herzegovina in accordance with the General Framework Agreement, shall be determined by a statute of the Town of Srpsko Sarajevo.

35. **Law on Replacement of the Name of the Municipality of Foča and of the Name of the Town of Foča with the Name Srbinje** (*Official Gazette of the Republika Srpska* No. 25/93):

Article 1

The name of the Municipality of Foča shall be replaced with the name Srbinje.

Article 2

The name of the Town of Foča shall be replaced with the name Srbinje.

V. Admissibility

36. The Constitutional Court invoked Article VI.3 (a) of the Constitution of Bosnia and Herzegovina in examining the admissibility of the present appeal.

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

The Constitutional Court shall uphold this Constitution.

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

- Whether an Entity's decision to establish a special parallel relationship with a 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.

37. The applicant requested a review of conformity with the Constitution of Bosnia and Herzegovina of Articles 11 and 11 (a) of the Law on Territorial Organization and Local Self-Government and Articles 1 and 2 of the Law on the Town of Srpsko Sarajevo.

38. At the time of filing of the instant request, the applicant was the Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

39. In view of Article VI.3 (a) and Article 16 para 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court established that the request was filed by an authorized person and that the requirements set out in Article 16 para 2 of Constitutional Court's Rules of Procedure have been met in the case concerned.

40. Consequently, the present request is admissible.

VI. Merits

41. The Constitutional Court is called upon to examine whether Article 11 of the Law on Territorial Organization and Local Self-Government and the title itself of the Law on the Town of Srpsko Sarajevo as well as its Articles 1 and 2 of are consistent with Article II.4 in conjunction with II.3 and II.5 of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention.

42. The Constitutional Court is also called upon to examine whether para 2 of Article 11(a) of the Law on Territorial Organization and Local Self-Government insofar as it provides temporary termination of functioning of certain municipalities which are now part of the Federation of Bosnia and Herzegovina is consistent with the Constitution of Bosnia and Herzegovina.

43. Articles II.4 and II.5 of the Constitution of Bosnia and Herzegovina read 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.

5. Refugees and Displaced Persons

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

44. Article II.2 of the Constitution of Bosnia and Herzegovina provides that the rights and freedoms guaranteed under the European Convention and its Protocols thereto shall apply directly in Bosnia and Herzegovina and have priority over all other law.

Article 14 of the European Convention provides 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.

45. According to the case-law of the European Court for Human Rights, Article 14 of the European Convention cannot be applied autonomously. It follows from the wording of Article 14 of the European Convention that it only prohibits discrimination with respect to the rights and freedoms protected by the European Convention. The Constitutional Court refers to the practice of application of Article 14 expressed, *inter alia,* in the *Belgian Linguistic case* (European Court for Human Rights, Judgment of 23 July 1968, Series A, vol. 6), insofar as it sets out the criteria for the concept of discrimination.

The Constitutional Court recalls that it has been using the criteria of non-discrimination established by the European Court for Human Rights, which includes the constitutional rights and rights set forth in the European Convention coupled with the rights under international human rights agreements listed in Annex I to the Constitution of Bosnia and Herzegovina. It follows from the aforementioned case-law of the Constitutional Court that Article II.4 of the Constitution of Bosnia and Herzegovina provides a more extensive protection from discrimination than Article 14 of the European Convention.

46. In the present case, the Constitutional Court considers that a question of discrimination arises with regard to the right to return guaranteed by Article II.5 of the Constitution of Bosnia and Herzegovina and the prohibition of discrimination based on ethnic origin as well as ensuring equal treatment with regard to freedom of movement within the state borders.

47. The Constitutional Court also refers to its third Partial Decision in case No. U 5/98 in which it pointed out that the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures or any ethnic homogenization through segregation based on

territorial separation (Third Partial Decision No. U 5/98 III of 1 July 2000 – Bulletin of the Constitutional Court of Bosnia and Herzegovina Sarajevo 2001, para 60).

48. According to the aforementioned case-law of the European Court of Human Rights, an act or regulation is discriminatory if it makes a distinction between individuals or groups who are in a similar situation and if this distinction lacks objective and reasonable justification, or if there is no reasonable proportionality between the means used and the aim sought to be realized.

49. The groups which are to be compared are in this case the Bosniac, Croat and Serb citizens of Bosnia and Herzegovina who should, according to a basic constitutional principle, be granted equal treatment throughout the territory of Bosnia and Herzegovina. However, the change of names by adding the adjective "srpski" before the names of certain towns or municipalities, by replacing a previous name with a new name indicating a Serb affiliation, or by eliminating in some cases the prefix "bosanski" demonstrates a clear intention and a wish to make it clear that the towns and municipalities concerned are to be regarded as exclusively Serb. In this regard, a question therefore arises whether this unequal treatment can be considered to have an objective and reasonable justification within the meaning of Article II.4 of the Constitution of Bosnia and Herzegovina.

50. Although the instant request was filed with the Constitutional Court on 30 July 2001, the National Assembly of the Republika Srpska, except for appointing a representative in the proceedings who then proposed holding a public hearing regarding the subject matter in question, has so far failed to advance any arguments that there existed an objective and reasonable justification for the change of the names of the aforementioned cities and municipalities. However, this fact does not prevent the Constitutional Court from examining whether there might have been reasons whereby the contested legal provisions contained such justification.

51. The Constitutional Court therefore interprets the reasons that lead to the change of the names as being primarily a wish to emphasize the fact that the towns and municipalities at issue are located within the territory of the Republika Srpska and that they have at present a majority of inhabitants of the Serb origin. However, such reasons cannot be accepted as being objective and reasonable as they stand against the basic constitutional principle of the equality of the constituent peoples throughout the territory of Bosnia and Herzegovina.

52. It is also evident that placing an emphasis on the "Serb" character of certain towns and municipalities would be in disregard of the fact that in many cases the present population

structure is the result of the war and migration caused by the war and it did not correspond to the situation before the war. The provision of Article II.5 of the Constitution of Bosnia and Herzegovina was aimed at enabling "the annulment of consequences caused by the war and creating the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group. Furthermore, it is necessary to provide all possible assistance to refugees and displaced persons and work to facilitate their voluntary return in a peaceful, orderly and phased manner" (Article II of Annex 7 to the Dayton Peace Agreement – Agreement on Refugees and Displaced Persons). To choose names on the basis of the present population structure cannot therefore be consistent with one of the fundamental aims of the Constitution of Bosnia and Herzegovina and Annex 7 to the Peace Agreement enunciated in Article II.5 of the Constitution of Bosnia and Herzegovina and Article II of Annex 7 to the Peace Agreement – facilitating and encouraging of the return of refugees and displaced persons to their homes of origin.

53. Another reason for renaming of the towns and municipalities could in some cases be viewed as an attempt to distinguish their names from similar names of towns or municipalities located within the territory of the Federation of Bosnia and Herzegovina. However, the Constitutional Court notes that this aim could easily be achieved by choosing prefixes or names which are ethnically neutral. In any case, the constitutional arguments against the choice of names indicating a specific Serb affiliation are so strong that in this case no reasonable proportionality exists between the means used and the aim sought to be realized.

54. It is beyond dispute that some of the changes of names were made already in place before the present Constitution of Bosnia and Herzegovina entered into force. Nevertheless, the fact that these names are not consistent with the principles set out in the Constitution of Bosnia and Herzegovina and the fact that they were confirmed by subsequent laws are, in themselves, in contravention with the Constitution of Bosnia and Herzegovina.

55. The Constitutional Court therefore concludes that the contested legal provisions are not consistent with the constitutional principle of the equality of the constituent peoples in Bosnia and Herzegovina. Moreover, they constitute discrimination contrary to Article II.4 in conjunction with Article II.5 of the Constitution of Bosnia and Herzegovina. In view of the fact that the provision of Article II.5 is an integral part of certain rights under Article II.3 of the Constitution of Bosnia and Herzegovina, the Constitutional Court concludes that this Article was also violated in the present case.

Article 11 (a) of the Law on Territorial Organization and Local Self-Government

56. As regards para 3 of Article 11 and para 1 of Article 11(a) of the Law on Territorial Organization and Local Self-Government, which provide that the status of certain municipalities belonging to the Federation of Bosnia and Herzegovina shall be determined by the National Assembly of the Republika Srpska and that certain municipalities which, wholly or partly, have been transferred to the Federation of Bosnia and Herzegovina shall temporarily stop functioning, the Constitutional Court finds that these provisions should be interpreted within the context of para 2 of Article 11(a).

57. Although the meaning of the contested provisions is not sufficiently clear, the Constitutional Court assumes that they anticipate that the National Assembly of the Republika Srpska may decide that the municipalities concerned have no longer any status within the Republika Srpska and that the previous organization of these municipalities shall no longer exist, it being left to the Federation of Bosnia and Herzegovina to decide on the future administration of those municipalities and parts of municipalities which were transferred to the Federation of Bosnia and Herzegovina. While there may be argument-supported reasons to conclude that the wording of these provisions, including the use of the word "temporarily" in Article 11(a), to be inadequate in this provision, the Constitutional Court considers that a conclusion on its unconstitutionality does not follow from the meaning of the contested provision.

VII. Conclusion

58. Pursuant to Article 61 para 2 and Article 63 para 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court adopted a unanimous decision as set out in the enacting clause above.

59. The Constitutional Court did not find it necessary to examine the issues of importance for the adoption of this decision directly at a public hearing. The Constitutional Court took this view proceeding from the provision of Article 46 para 1 of its Rules of Procedure.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (3), Article 63 paras 3 and 4 and Article 75 para 6 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Ćazim Sadiković, Vice-President,

Mr. Tudor Pantiru, Vice- President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Having deliberated in Case No. **U 44/01,**

Adopted at the session of 22 September 2004 the following

DECISION

It is hereby established that the Decision of the Constitutional Court of Bosnia and Herzegovina No. U-44/01 of 27 February 2004 was not enforced within the given time-limit of three months after the date of its publication in the *Official Gazette of Bosnia and Herzegovina*.

It is hereby established that part of Article 11 of the Law on Territorial Organization and Local Self-Government (*Official Gazette of the Republika Srpska* Nos. 11/94, 6/95, 26/95, 15/96, 17/96, 19/96, and 6/97) and title itself of the Law on the Town of Srpsko Sarajevo as well as its Articles 1 and 2 (*Official Gazette of the Republika Srpska* Nos. 25/93, 8/96, 27/96, 33/97) in relation to the names of: Town of Srpsko Sarajevo, Srpski Drvar, Srpski

Sanski Most, Srpski Mostar, Srpsko Goražde, Srbinje, Srpski Ključ, Srpska Kostajnica, Srpski Brod, Srpska Ilidža, Srpsko Novo Sarajevo, Srpski Stari Grad and Srpsko Orašje shall no longer be in force.

The said provisions of the Law shall cease to be in force after the date of publication of the present Decision in the *Official Gazette of Bosnia and Herzegovina.*

This Decision shall be referred to the National Assembly of the Republika Srpska, the Council of Peoples of the Republika Srpska and the Chief Prosecutor of Bosnia and Herzegovina in accordance with Article 75 para 6 of the Rules of Procedure 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* and the *Official Gazette of the Republika Srpska*.

Reasoning

1. The Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") established by its Decision No. U-44/01 of 27 February 2004 that part of Article 11 of the Law on Territorial Organization and Local Self-Government (*Official Gazette of the Republika Srpska* Nos. 11/94, 6/95, 26/95, 15/96, 17/96, 19/96, and 6/97) and title itself of the Law on the Town of Srpsko Sarajevo and its Articles 1 and 2 (*Official Gazette of the Republika Srpska* Nos. 25/93, 8/96, 27/96, 33/97) in relation to the names of: Town of Srpsko Sarajevo, Srpski Drvar, Srpski Sanski Most, Srpski Mostar, Srpsko Goražde, Srbinje, Srpski Ključ, Srpska Kostajnica, Srpski Brod, Srpska Ilidža, Srpsko Novo Sarajevo, Srpski Stari Grad and Srpsko Orašje, were not consistent with Article II.4 in conjunction with Articles II.3 and II.5 of the Constitution of Bosnia and Herzegovina.

2. The National Assembly of the Republika Srpska was ordered, pursuant to Article 63 para 2 of the Constitutional Court's Rules of Procedure, to harmonize Article 11 of the Law on Territorial Organization and Local Self-Government and the title of the Law on the Town of Srpsko Sarajevo and its Articles 1 and 2 of with the Constitution of Bosnia

and Herzegovina, within a time-limit of three months after the date of publication of the said decision in the *Official Gazette of Bosnia and Herzegovina*.

3. The said decision was published in the *Official Gazette of Bosnia and Herzegovina* No. 18/04 of 11 May 2004. The three-month time-limit for harmonization of the said provisions with the Constitution of Bosnia and Herzegovina started running from that date.

4. The Constitutional Court may, by virtue of Article 63 paras 2 through 4 of its Rules of Procedure, determine in a decision establishing the incompatibility of provisions a time-limit for achieving compatibility to the adopter of the act that shall not exceed three months from the date of publication of the decision in the *Official Gazette of Bosnia and Herzegovina* and it may determine by its decision, in case the established incompatibility is not removed within the given time-limit, that the provisions which are not compatible shall cease to be in force on the first day following the date of publication of that decision in the *Official Gazette of Bosnia and Herzegovina*.

5. The National Assembly of the Republika Srpska, pursuant to Article 75 para 5 of the Constitutional Court's Rules of Procedure, informed the Constitutional Court by act No. 02-1450/04 of 6 August 2004 that it enacted a Law on Amendments to the Law on Territorial Organization and Local Self-Government and a Law on Amendments to the Law on the Town of Srpsko Sarajevo at its 19th session held on 28 July 2004. The National Assembly of the Republika Srpska also informed the Constitutional Court, by letter No. 02-1473/04 of 18 August 2004, that it referred the said laws to the Council of Peoples of the Republika Srpska, in accordance with Article 70 of the Constitution of the Republika Srpska, as amended by amendment LXXXII. On 5 August 2004 the Council of Peoples of the Republika Srpska informed the National Assembly that the said laws fell within the scope of issues of violation of the vital national interests of the constituent peoples and that these laws would be considered, at the request of Chair or Deputy Chair of the Council of Peoples, at the session of this Council as an issue of the vital national interest.

6. Article 69 para 2, as supplemented by item 1 of Amendment LXXXVI of the Constitution of the Republika Srpska, reads as follows: "The legislative authority in the RS shall be performed by the National Assembly and the Council of Peoples. The laws and other regulations approved by the National Assembly concerning the vital national interest issues of any of the constituent peoples shall come into force only after their adoption in the Council of Peoples".

7. According to Article 70 as amended by Amendment LXXXII of the Republika Srpska, "laws or other regulations or acts passed by the National Assembly shall be referred to and considered by the Council of Peoples if they concern the vital interest defined in Amendment LXXVII. In the event more than one Chair or Deputy Chair of the Council of Peoples considers that the law falls within the scope of issues of the vital interest defined in Amendment LXXVII the law shall be included on the agenda of the Council of Peoples as the issue of a vital interest […] In the event the majority of each caucus which has delegates in the Council of Peoples votes for such laws or other regulations or acts, they shall be considered to be adopted. (…) If no agreement is reached, the law shall not be adopted and it shall be referred back to the proponent to undergo a new procedure. In that case the proponent cannot submit the same text of the law, regulation or other act".

8. According to Article 109 of the Constitution of the Republika Srpska, "laws, other regulations and general enactments shall enter into force not earlier than on the eighth day after the day of their publication, unless, for particularly justified reasons, it is stipulated that they enter into force at an earlier date. Before entering into effect, laws, other regulations and general enactments of State agencies shall be published in an appropriate official gazette".

9. The Constitutional Court is aware of the fact that the procedure of enacting laws is partially performed before the National Assembly of the Republika Srpska as the legislative authority and that, in the instant case, the procedure was to be continued before the Council of Peoples of the Republika Srpska as the other part of the legislative authority of the Republika Srpska. However, it is not the task of the Constitutional Court to enter the procedure of enactment of a law but to establish whether the law entered into force.

10. The Constitutional Court found that the incompatible provisions were not harmonized with the Constitution of Bosnia and Herzegovina within the given three-month period, which expired on 12 August 2004.

11. Acting in accordance with the said provisions of the Constitutional Court's Rules of Procedure, the Constitutional Court specified, within the bounds of the applicant's request and in accordance with its Decision No. *U 44/01* of 27 February 2004 and the legal position expressed in the reasoning of that decision, the provisions which are not consistent with the Constitution of Bosnia and Herzegovina and that they ceased to be in force.

12. According to Article 75 para 6 of the Constitutional Court's Rules of Procedure, in the event of failure to enforce or a delay in enforcement, the Constitutional Court shall render a ruling in which it shall establish that the decision of the Constitutional Court has not been enforced. This ruling shall be transmitted to the competent prosecutor.

13. Pursuant to Article 63 paras 3 and 4 and Article 75 para 6 of the Rules of Procedure of the Constitutional Court, the Constitutional Court decided unanimously as set out in the enacting clause above.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (3) and Article 80 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Ćazim Sadiković, Vice-President,

Mr. Tudor Pantiru, Vice- President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Having deliberated in Case No. **U 44/01,**

Adopted at the session of 22 September 2004 the following

DECISION

The names which ceased to be in force shall, until the inconsistencies established in Decision No. U 44/01 of 27 February 2004 have been removed, be temporary replaced with the following names:

- **The name "Town of Srpsko Sarajevo" shall be replaced with the name "Town of Istočno Sarajevo",**
- **the name "Srpski Drvar" shall be replaced with the name "Istočni Drvar",**
- **the name "Srpski Sanski Most" shall be replaced with the name "Oštra Luka",**
- **the name "Srpski Mostar" shall be replaced with the name "Istočni Mostar",**

- the name "Srpsko Goražde" shall be replaced with the name "Ustiprača",
- the name "Srbinje", shall be replaced with the name "Foča",
- the name "Srpski Ključ" shall be replaced with the name "Ribnik",
- the name "Srpska Kostajnica" shall be replaced by the name "Bosanska Kostajnica"
- the name "Srpski Brod" shall be replaced with the name "Bosanski Brod";
- the name "Srpska Ilidža" shall be replaced with the name "Kasindo",
- the name "Srpsko Novo Sarajevo" shall be replaced with the name "Lukavica",
- the name "Srpski Stari Grad" shall be replaced with "Istočni Stari Grad",
- the name "Srpsko Orašje" shall be replaced with the name "Donji Žabar".

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

Reasoning

1. The Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") established by its Decision No. *U 44/01* of 27 February 2004 that part of Article 11 of the Law on Territorial Organization and Local Self-Government (*Official Gazette of the Republika Srpska* Nos. 11/94, 6/95, 26/95, 15/96, 17/96, 19/96, and 6/97) and title itself of the Law on the Town of Srpsko Sarajevo as well as its Articles 1 and 2 (*Official Gazette of the Republika Srpska* Nos. 25/93, 8/96, 27/96, 33/97) in relation to the names of: Town of Srpsko Sarajevo, Srpski Drvar, Srpski Sanski Most, Srpski Mostar, Srpsko Goražde, Srbinje, Srpski Ključ, Srpska Kostajnica, Srpski Brod, Srpska Ilidža, Srpsko Novo Sarajevo, Srpski Stari Grad and Srpsko Orašje, were not consistent with Article II.4 in conjunction with Articles II.3 and II.5 of the Constitution of Bosnia and Herzegovina.

2. The National Assembly of the Republika Srpska was ordered, in pursuant to Article 63 para 2 of the Constitutional Court's Rules of Procedure, to harmonize Article 11 of the

Law on Territorial Organization and Local Self-Government and the title itself the Law on the Town of Srpsko Sarajevo as well as its Articles 1 and 2 of with the Constitution of Bosnia and Herzegovina, within a period of three months after the date of publication of the aforesaid decision in the *Official Gazette of Bosnia and Herzegovina*.

3. The said decision was published in the *Official Gazette of Bosnia and Herzegovina* No. 18/04 of 11 May 2004. The three-month period for harmonization of the aforementioned provisions with the Constitution of Bosnia and Herzegovina started running from that date.

4. Pursuant to Article 75 para 5 of the Constitutional Court's Rules of Procedure, the National Assembly of the Republika Srpska informed the Constitutional Court, act No. 02-1450/04 of 6 August 2004, that it enacted a Law on Amendments to the Law on Territorial Organization and Local Self-Government and a Law on Amendments to the Law on the Town of Srpsko Sarajevo at its 19th session held on 28 July 2004. The National Assembly of the Republika Srpska also informed the Constitutional Court, letter No. 02-1473/04 of 18 August 2004, that it referred the aforesaid laws to the Council of Peoples of the Republika Srpska, in pursuance of Article 70 of the Constitution of the Republika Srpska as amended by Amendment LXXXII. On 5 August 2004 the Council of Peoples of the Republika Srpska informed the National Assembly of the Republika Srpska that the said laws fell within the scope of issues of violation of vital national interests of the constituent peoples and that these laws would be considered, at the request of Chair or Deputy Chair of the Council of Peoples, at the session of this Council as an issue of the vital national interest.

5. Article 69 para 2, as supplemented by sub-paragraph 1 of Amendment LXXXVI of the Constitution of the Republika Srpska, reads as follows: "The legislative authority in the Republika Srpska shall be performed by the National Assembly and the Council of Peoples. The laws and other regulations approved by the National Assembly concerning the vital national interest issues of any of the constituent peoples shall come into force only after their adoption in the Council of Peoples".

6. According to Article 70 as amended by Amendment LXXXII of the Republika Srpska, "laws or other regulations or acts passed by the National Assembly shall be referred to and considered by the Council of Peoples if they concern the vital interest defined in Amendment LXXVII. In the event more than one Chair or Deputy Chair of the Council of Peoples considers that the law falls within the scope of issues of the vital interest defined in

Amendment LXXVII, that law shall be included on the agenda of the Council of Peoples as an issue of the vital interest (…) In the event the majority of each caucus which has delegates in the Council of Peoples votes for such laws or other regulations or acts, they shall be considered to be adopted. (…) If no agreement is reached, the law shall not be adopted and it shall be referred back to the proponent to undergo a new procedure. In that case, the proponent cannot submit the same text of the law, regulation or other act".

7. According to Article 109 of the Constitution of the Republika Srpska, "laws, other regulations and general enactments shall enter into force not earlier than on the eighth day after the day of their publication, unless, for particularly justified reasons, it is stipulated that they enter into force at an earlier date. Before entering into effect, laws, other regulations and general enactments of State agencies shall be published in an appropriate official gazette".

8. Having regard to Articles 70 and 109 of the Constitution of the Republika Srpska and the quoted acts of the National Assembly of the Republika Srpska, the Constitutional Court has found that the National Assembly of the Republika Srpska failed to remove the established inconsistencies within the three-month period anticipated for the harmonization, which expired on 12 August 2004.

9. Acting in accordance with the aforesaid provisions of its Rules of Procedure, the Constitutional Court specified, within the bounds of the applicant's request and in accordance with its Decision No. *U 44/01* of 27 February 2004 and the legal position expressed in the reasoning of that decision, in the enacting clause of the decision on cessation of application of the provisions inconsistent with the Constitution of Bosnia and Herzegovina No. *U 44/01* of 22 September 2004 the provisions which are not consistent with the Constitution of Bosnia and Herzegovina and which, as such, ceased to be in force.

10. When deciding to adopt this Decision, the Constitutional Court took account of an undisputed fact of occurrence of a legal gap when the contested provisions ceased to be in force, the need for an undisturbed functioning of the town and the municipalities whose names have been determined by the provisions of the laws that ceased to be in force, the need for respect of the General Framework Agreement for Peace in Bosnia and Herzegovina and the inter-Entity municipal demarcations, the need for distinguishing the names of towns and municipalities from similar names of towns and municipalities in the territory of the Federation of Bosnia and Herzegovina and the inability of application of former

laws in respect of all names. Consequently, the Constitutional Court determined, until the National Assembly of the Republika Srpska removes the established inconsistencies in accordance with the Constitutional Court's Decision No. *U 44/01* of 27 February 2004, temporary names set out in the enacting clause above taking into consideration the names of the largest inhabited settlement in the area of the municipalities whose names ceased to be in force according to the statistical data of the 1991 census, the geographic location and the ethnically neutral names.

11. Given the temporary character of this Decision and with the aim of avoiding legal chaos on the territory of the Republika Srpska pending adoption of an appropriate law by the legislative bodies of the Republika Srpska in accordance with Decision of the Constitutional Court No. *U 44/01* of 27 February 2004, and taking into account the fact that the contested provisions ceased to be valid, the Constitutional Court points out that, in the view of its overall constitutional role as a guardian of the Constitution of Bosnia and Herzegovina, it did not assume the role of a legislator in the present case.

12. Pursuant to Article 80 of the Rules of Procedure of the Constitutional Court, the Constitutional Court decided by the majority of votes as set out in the enacting clause above.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, Article 59 para 3 and Article 71 of the Rules of Procedure of the Constitutional Court – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges: Mr. Mato Tadić, President, Mr. Tudor Pantiru, Mr. Miodrag Simović and Ms. Hatidža Hadžiosmanović, Vice-Presidents, Mr. David Feldman, Ms. Valerija Galić, Mr. Jovo Rosić and Ms. Constance Grewe, having deliberated on the request of **Mr. Drago Bundalo** in Case No. **U 44/01**, at the session held on 22 July 2005 rendered the following:

RULING

The request filed by Mr. Drago Bundalo, Head of the Municipality of Bosanska Kostajnica, for revision of the Decision of the Constitutional Court of Bosnia and Herzegovina No. U 44/01 of 22 September 2004 is rejected as being inadmissible.

Reasoning

1. On 29 March 2005 Mr. Drago Bundalo, Head of the Municipality of Bosanska Kostajnica (“the applicant”), filed a request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for revision of its Decision No. *U 44/01* of 22 September 2004.

2. The Constitutional Court, having deliberated on the request of Mr. Sejfudin Tokić, Deputy Speaker of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing of the said request, adopted the Decision No. *U 44/01* on 27 February 2004, whereby it established that a part of Article 11 of the Law on Territorial Organization and Local Self-Management (*Official Gazette of the Republika Srpska* Nos. 11/94, 6/95, 26/95, 15/96, 17/96, 19/96 and 6/97) and the title itself of the Law on the Town of Srpsko Sarajevo as well as its Articles 1 and 2 of (*Official Gazette of the Republika Srpska* Nos. 25/93, 8/96, 27/96 and 33/97) with regard to the names:

Town of Srpsko Sarajevo, Srpski Drvar, Srpski Sanski Most, Srpski Mostar, Srpsko Goražde, Srbinje, Srpski Ključ, Srpska Kostajnica, Srpski Brod, Srpska Ilidža, Srpsko Novo Sarajevo, Srpski Stari Grad and Srpsko Orašje were not consistent with Article II(4) in conjunction with Articles II.3 and II.5 of the Constitution of Bosnia and Herzegovina. The National Assembly of the Republika Srpska was ordered, pursuant to Article 63 para 2 of the Rules of Procedures of the Constitutional Court, to harmonize Article 11 of the Law on Territorial Organization and Local Self-Management and the title itself of the Law on the Town of Srpsko Sarajevo and its Articles 1 and 2 with the Constitution of Bosnia and Herzegovina, within the time-limit of three months after the date of publication of the said decision in the *Official Gazette of Bosnia and Herzegovina*.

3. The Constitutional Court, in its Ruling No. *U 44/01* of 22 September 2004, established that the National Assembly of the Republika Srpska failed to enforce the Decision of the Constitutional Court, No *U 44/01* of 27 February 2004 within the given time-limit of three months after the date of publication of the said decision in the *Official Gazette of Bosnia and Herzegovina.*

4. The Constitutional Court, in its Decision No.*U 44/01* of 22 September 2004, established that a part of Article 11 of the Law on Territorial Organization and Local Self-Management (*Official Gazette of the Republika Srpska* Nos. 11/94, 6/95, 26/95, 15/96, 17/96, 19/96 and 6/97) and the title itself of the Law on the Town of Srpsko Sarajevo and its Articles 1 and 2 (*Official Gazette of the Republika Srpska* Nos. 25/93, 8/96, 27/96 and 33/97) with regard to the names: Town of Srpsko Sarajevo, Srpski Drvar, Srpski Sanski Most, Srpski Mostar, Srpsko Goražde, Srbinje, Srpski Ključ, Srpska Kostajnica, Srpski Brod, Srpska Ilidža, Srpsko Novo Sarajevo, Srpski Stari Grad and Srpsko Orašje ceased to be in effect, pursuant to Article 63 para 3 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina. Temporarily and pending removal of the determined incompatibilities by the National Assembly of the Republika Srpska to be in compliance with the Decision of the Constitutional Court case No. *U 44/01* of 27 February 2004, the names of the towns that ceased to be in effect were replaced by other names: among others, the name “Srpska Kostajnica” was replaced with the name “Bosanska Kostajnica”.

5. The applicant requested an alteration of the decision in part in which the name “Bosanska Kostajnica” provisionally replaced the name “Srpska Kostajnica” and suggested that the new provisional name should be “Kostajnica”. The applicant reasoned his suggestion by claiming that that the Provisional Election Commission of Bosnia and Herzegovina, by adopting a decision on 15 March 1999, allegedly established the new

name “Kostajnica”, thereby repealing the contested Article 11 of the Law on Territorial Organization and Local Self-Management in respect of the said name. This occurred prior to the adoption of the Decision *U 44/01* of 27 February 2004. The applicant further maintained that there were numerous historical and political reasons to establish the name “Kostajnica” such as the need to distinguish it from “Hrvatska Kostajnica” in the Republic of Croatia, as well as to avoid the unnecessary costs being imposed on the citizens.

6. In examining the admissibility of the present request for revision of its Decision No. *U 44/01* of 22 September 2004, the Constitutional Court invoked the provisions of Article 71 of the Rules of Procedure of the Constitutional Court, which, in its relevant part, read as follows:

Article 71

(1) A party may, in the event of the discovery of a fact which might by its nature have a decisive influence on the outcome of the dispute concerned and which, when a decision was taken, was unknown to the Constitutional Court and could not reasonably have been known to the party, request the Constitutional Court, within a period of six months after that party acquired knowledge of the fact, to revise that decision.

(2) The request referred to in paragraph 1 of this Article shall mention the decision of which revision is requested and shall contain the information necessary to show that the conditions laid down in paragraph 1 of this Article have been complied with. It shall be accompanied by all supporting documents. The request and supporting documents shall be filed with the Secretariat of the Court.

(...)

(4) A request for revision of a decision shall first be examined by the Chamber, which shall forward the proposal to the plenary Court.

(6) The revision of a decision of the Constitutional Court shall not be possible if more than one year elapsed as from the date on which the decision was taken.

7. It follows from the quoted article of the Rules of Procedure of the Constitutional Court that the conditions for granting a request for revision of a decision of the Constitutional Court include existence of facts which might by their nature have a decisive influence

on the outcome of the dispute concerned and which, when a decision was taken, were unknown to the Constitutional Court and could not reasonably have been known to the party. Furthermore, the request must be filed within a time-limit of six months after the party acquired knowledge of the facts but not later than one year as from the date on which the decision whose revision is requested was taken.

8. In the present case, the decision whose revision is requested does not represent a decision that decided a constitutional dispute and that could be a subject of revision. Namely, the said decision, following the adoption of a decision that decided a concrete constitutional dispute No. *U 44/01* of 27 February 2004, established that the contested legal provision ceased to be in effect and the new names of towns and municipalities were established on an interim basis pending further actions to be taken by the competent body. In addition, it should be pointed out that the parties to the procedure of a review of constitutionality, by virtue of Article 15 para 1 (a) of the Rules of Procedure of the Constitutional Court, were the persons who could raise a dispute under Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and the enactors of acts that are the subject of dispute. The submitter of the request for revision is not one of those parties.

9. In view of the aforesaid, the present request for revision of the Decision of the Constitutional Court No. *U 44/01* of 22 September 2004 is not admissible.

10. For the reasons outlined above, at the proposal of the Chamber of the Constitutional Court and referring to the provisions of Article 71 of the Rules of Procedure of the Constitutional Court, the Constitutional Court decided unanimously as set out in the enacting clause of this Ruling.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 68/02

Request of Mr. Sejfudin Tokić, Deputy Speaker of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, for a review of conformity of the provisions of Articles 7, 41 and 48 of the Law on Excise Tax and Turnover Tax (Official Gazette of the Republika Srpska, No. 25/02), the provisions of Articles 2, 6, 7 and 8 of the Law on the Amendments to the Law on Special Tax on Beer (Official Gazette of the Federation of Bosnia and Herzegovina, No. 52/01) and the provisions of Articles 2, 7, 8 and 9 of the Law on the Amendments to the Law on Special Tax on Non-Alcoholic Drinks (Official Gazette of the Federation of Bosnia and Herzegovina, No. 52/01) with the Constitution of Bosnia and Herzegovina

DECISION ON MERITS of 25 June 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (2), Article 61 paras 1 and 2 and Article 65 para 1 (2) of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Ćazim Sadiković, Vice-President,

Mr. Tudor Pantiru, Vice-President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Having deliberated on the request of Mr. **Sejfudin Tokić**, Deputy Speaker of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing of this request, in Case No. **U 68/02**,

At the session held on 25 June 2004 adopted the following

DECISION ON MERITS

It is hereby established that the provisions of Articles 41 and 48 of the Law on Excise Tax and Turnover Tax (*Official Gazette of the Republika Srpska* Nos. 25/02, 60/03 and 96/03) are not consistent with Article I(4) of the Constitution of Bosnia and Herzegovina.

Pursuant to Article 63 para 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of the Republika Srpska is ordered to harmonize the provisions of Articles 41

and 48 of the Law on Excise Tax and Turnover Tax with the Constitution of Bosnia and Herzegovina, within a time-limit of three months after the date of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina.*

The National Assembly of the Republika Srpska is ordered, pursuant to Article 75 para 5 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, to inform the Constitutional Court of Bosnia and Herzegovina about the taken measures, within a time-limit of three months after the date of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina.*

The procedure of review of constitutionality with the Constitution of Bosnia and Herzegovina of the provision of Article 7 of the Law on Excise Tax and Turnover Tax (*Official Gazette of the Republika Srpska* No. 25/02), the provisions of Articles 2, 6, 7, and 8 of the Law on the Amendments to the Law on Special Tax on Beer (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 52/01) and the provisions of Articles 2, 7, 8 and 9 of the Law on the Amendments to the Law on Special Tax on Non-Alcoholic Drinks (*Official Gazette of the Federation of Bosnia and Herzegovina*, No. 52/01) is terminated as the contested provisions ceased to be in effect.

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

Reasoning

I. Introduction

1. On 4 October 2002 Mr. Sejfudin Tokić, Deputy Speaker of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing of the present request ("the applicant"), filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for a review of conformity of the provisions of Articles 7, 41 and 48 of the Law on Excise Tax and Turnover Tax (*Official Gazette of the Republika Srpska* No. 25/02), the provisions of Articles 2, 6, 7 and 8 of the Law on

the Amendments to the Law on Special Tax on Beer (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 52/01) and the provisions of Articles 2, 7, 8 and 9 of the Law on the Amendments to the Law on Special Tax on Non-Alcoholic Drinks (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 52/01) with the Constitution of Bosnia and Herzegovina.

II. Procedure before the Constitutional Court

2. Pursuant to Article 21 para 1 of the Constitutional Court's Rules of Procedure, the National Assembly of the Republika Srpska, the House of Peoples and the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina were requested on, respectively, 3 and 5 April 2003 to submit their replies to the request within a period of 30 days. The submission of replies to the request was again requested on, respectively, 3 and 17 February 2004.

3. Replies to the request were not submitted within the set time-limit.

4. Pursuant to Article 33 of the Constitutional Court's Rules of Procedure, the Tax Authority of the Republika Srpska was requested on 4 March 2004 to submit data and information on the application of the Law on Excise Tax and Turnover Tax. The requested data and information were submitted on 11 March 2004.

III. Request

5. The applicant maintained that the provision of Article 7 of the Law on Excise Tax and Turnover Tax conditioned carrying out of inter-Entity trade in goods subject to payment of excise tax by possession of a licence issued by the Tax Authority, thereby preventing a free flow of goods and interfering with a free trade between economic subjects seated in different Entities and in the Brčko District of Bosnia and Herzegovina ("the Brčko District"). Such situation creates a privileged group of traders and promotes bribery and corruption and it does not guarantee suppression of tax and customs frauds.

6. The provision of Article 41 para 3 of the said Law, as claimed by the applicant, discouraged trade between the Entities and the Brčko District as it put a foreign importer of goods subject to payment of excise tax in a more favourable position relation to a supplier of the same goods from the Entity or the Brčko District. Namely, an importer is obliged to effect payment of excise tax within the time-limits and in the manner envisaged for payment of customs duties and other import fees, whereas a supplier of goods procured in

the Federation of Bosnia and Herzegovina ("the FBiH") and the Brčko District is obliged to effect payment of excise tax prior to taking over of the products. Such legal arrangement leads to creation of three separate economic areas in Bosnia and Herzegovina.

7. Furthermore, the applicant contended that the provision of Article 48 para 1(2) of the said Law interfered with a free turnover of goods subject to payment of excise tax between the Entities and the Brčko District since payment of excise tax according to the seat of a purchaser from the Republika Srpska for products subject to payment of excise tax that were purchased in the Federation and in the Brčko District enables double taxation, which results in expensive goods.

8. The applicant adduced the same arguments in respect of the provisions of Articles 2, 6, 7 and 8 of the Law on the Amendments to the Law on Special Tax on Beer and Articles 2, 7, 8 and 9 of the Law on the Amendments to the Law on Special Tax on Non-Alcoholic Drinks considering that they imposed the same obstacles in the Federation for Inter-Entity trade in goods subject to payment of excise tax as they condition the trade by possession of a licence issued by the competent body.

9. For reasons set out above, the applicant considered that Articles 7, 41 and 48 of the Law on Excise Tax and Turnover Tax, Articles 2, 6, 7 and 8 of the Law on the Amendments to the Law on Special Tax on Beer and Articles 2, 7, 8 and 9 of the Law on the Amendments to the Law on Special Tax on Non-Alcoholic Drinks were not consistent with Article I(4) of the Constitution of Bosnia and Herzegovina.

IV. Relevant Law

10. **Article I.4 of the Constitution of Bosnia and Herzegovina** reads as follows:

Article I.4

There shall be a 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.

11. Relevant provisions of the **Law on Excise Tax ad Turnover Tax** (*Official Gazette of the Republika Srpska* No. 25/02) read as follows:

Article 41

(1) The person/subject obliged to effect payment of excise tax – producer shall do so on the following day from the date of the first sale of the product(s) concerned.

(2) The person/subject obliged to effect payment of excise tax – importer is obliged to effect payment of excise tax within time-limits and in the manner otherwise envisaged or payment of custom duties and other import fees.

(3) The person/subject obliged to effect payment of excise tax on products procured in the Federation of Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina is obliged to effect payment of excise tax prior to taking over of products.

(4) In the cases referred to in Article 3 para 2 of this Law, the person/subject obliged to effect payment of excise tax shall be obliged to do so within the time limit specified in paragraph 1 hereof.

Article 48

(1) Excise tax shall be paid according to the seat:

1) of the producer or importer in the Republika Srpska

2) of the purchaser from the Republika Srpska for products subject to payment of excise tax purchased in the Federation of Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina.

3) of a business unit in the Republika Srpska whose founder is from the Federation of Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina.

12. Relevant provisions of the **Law on the Amendments to the Law on Excise Tax and Turnover Tax** (*Official Gazette of the Republika Srpska* No. 60/03) read as follows:

Article 9

The wording "and turnover tax on products subject to payment of excise tax" shall be inserted in Article 48 after the wording "excise tax".

Article 16

This Law shall enter into force on the eighth day following its publication in the Official Gazette of the Republika Srpska *and it shall be applied on the day following the date of signing of an Agreement on the distribution of turnover tax on products subject to payment of excise tax between the Government of the Republika Srpska, the Federation of Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina. The Agreement shall be published in the official gazettes of the Republika Srpska, the Federation of Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina*

13. **Memorandum of Understanding on the implementation of the laws and by-laws relating to the change of place of collection of turnover tax** (*Official Gazette of the Republika Srpska* No. 60/03) reads as follows:

The Council of Ministers, represented by Mr. Adnan Terzic, Chair,

The Government of the Federation of Bosnia and Herzegovina, represented by Dr Ahmed Hadzipasic, Prime Minister

The Government of the Republika Srpska, represented by Dr Dragan Mikerevic, Prime Minister

The Government of the Brčko District of Bosnia and Herzegovina, represented by Mr. Sinisa Kisic, Mayor ("Parties")

Aimed at strengthening of a single economic space through the process of harmonization of tax laws on eh entire territory of Bosnia and Herzegovina, including repeal of all administrative obstacles (approvals, licences) for a free exchange of goods and services, the Parties hereby undertake:

1. To ensure enactment of relevant amendments to the laws on turnover tax on goods and services and by-laws relating to the implementation of the said laws, both within the framework of government competencies and in parliamentary procedure, with the purpose of change in the collection of turnover tax on all products subject to payment of excise tax.

Pursuant to the regulations from the preceding paragraph, the change of place of collection of turnover tax on all products subject to payment of excise tax shall be applied as of 1 August 2003.

2. This Memorandum shall be published in 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.

Sarajevo, 9 July 2003.

V. Admissibility

14. Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads as follows:

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

(...)

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

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

15. The Constitutional Court notes that the applicant was Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing of the instant request. The request relates to the adoption of a decision on whether certain provisions of an Entity law were consistent with the Constitution of Bosnia and Herzegovina. Finally, the request contains all the necessary allegations and facts on which it is based.

16. In view of the provisions of Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Article 16 para 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court established that the request in question was filed by an authorized

person and that all formal requirements laid down in Article 16 para 2 of the Constitutional Court's Rules of Procedure have been met.

17. It follows that the present request is admissible.

VI. Merits

18. First of all, the Constitutional Court points out that the fact that the legislative bodies of both Entities failed to submit their respective replies to the request and explain the *ratio* behind enactment of the regulations at issue, shall not prevent the Constitutional Court to examine the contested provisions of the aforementioned laws and the reasons for their enactment.

19. The applicant argued that Articles 7, 41 and 48 of the Law on Excise Tax and Turnover Tax (*Official Gazette of the Republika Srpska* No. 25/02), Articles 2, 6, 7 and 8 of the Law on the Amendments to the Law on Special Tax on Beer (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 52/01) and Articles 2, 7, 8 and 9 of the Law on the Amendments to the Law on Special Tax on Non-Alcoholic Drinks (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 52/01) were not consistent with Article I(4) of the Constitution of Bosnia and Herzegovina.

20. The Constitutional Court notes that the National Assembly of the Republika Srpska enacted a Law on the Amendments to the Law on Excise Tax and Turnover Tax during the procedure before the Constitutional Court and this Law was published in the *Official Gazette of the Republika Srpska* No. 60/03 of 23 July 2003. Article 1 of this Law deleted the contested Article 7 of the Law on Excise Tax and Turnover Tax, whereas Article 9 of the Law supplemented the contested Article 48 of the Law on Excise Tax and Turnover Tax by adding the wording "and turnover tax on goods subject to payment of excise tax" after the wording "excise tax". According to Article 16 of this Law, it entered into force on the eighth day after the date of its publication, i.e. on 31 July 2003 and it was to be applied as of the day following the day of signing of an Agreement on the distribution of turnover tax on goods subject to payment of excise tax between the Government of the Republika Srpska, the Government of the Federation of Bosnia and Herzegovina and the Government of the Brčko District of Bosnia and Herzegovina. On the basis of a Memorandum of Understanding on the implementation of laws and by-laws pertaining to the change of place of collection of turnover tax on good subject to payment of excise tax, this Law was to be applied as of 1 August 2003. The National Assembly of the Republika Srpska enacted a Law on the Amendments to the Law on Excise Tax and Turnover Tax

(*Official Gazette of the Republika Srpska* No. 96/03) whose provisions did not relate to issues relevant for the examination of the request concerned.

21. During the procedure before the Constitutional Court, the FBiH Parliament (the House of Peoples and the House of Representatives) enacted a Law on the Amendments to the Law on Special Tax on Beer, which was published in the *Official Gazette of the Federation of Bosnia and Herzegovina* No. 37/03 of 31 July 2003 and entered into force on the following day, hence on 1 August 2003. Articles 1, 3, 4, 5, 6 and 7 of this Law deleted the disputable part of the text, which was replaced with another text (Article 8), from the contested Articles 2, 6, 7 and 8 of the Law on the Amendments to the Law on Special Tax on Beer.

22. The FBiH Parliament enacted a Law on the Amendments to the Law on Special Tax on Non-Alcoholic Drinks, which was published in the *Official Gazette of the Federation of Bosnia and Herzegovina* No. 37/03 of 31 July 2003 and entered into force on the following day, hence on 1 August 2003. Articles 1, 3, 4, 5, 6 and 7 of this Law deleted the disputable part of the text and replaced with another text (Article 8), from the contested Articles 2, 7, 8 and 9 of the Law on the Amendments to the Law on Special Tax on Non-Alcoholic Drinks.

23. This having been said, the Constitutional Court finds that the contested provisions of Article 7 of the Law on Excise Tax and Turnover Tax, Articles 2, 6, 7 and 8 of the Law on the Amendments to the Law on Special Tax on Beer and Articles 2, 7, 8 and 9 of the Law on the Amendments to the Law on Special Tax on Non-Alcoholic Drinks ceased to be in effect.

24. The relevant provision in the new legal circumstances is that of Article 65 para 1 (2) of the Constitutional Court's Rules of Procedure stipulating that the Constitutional Court shall adopt a decision on terminating the proceedings when the contested act ceased to be in force during the proceedings. The Constitutional Court may continue the proceedings if there is a manifest violation of Article II of the Constitution of Bosnia and Herzegovina. In the present case, the Constitutional Court has no grounds to continue the proceedings.

25. As the contested provisions ceased to be in effect and the Constitutional Court does not hold that proceedings should be continued given the circumstances of the case, the requirements to terminate the proceedings with respect to this part of the request have been met.

26. The Constitutional Court must now examine whether the provisions of Articles 41 and 48 of the Law on Excise Tax and Turnover Tax (*Official Gazette of the Republika Srpska* Nos. 25/02, 60/03 and 96/03) are consistent with Article I.4 of the Constitution of Bosnia and Herzegovina.

27. Pursuant to Article III of the Constitution of Bosnia and Herzegovina, the regulation of payment of excise tax and turnover tax on products subject to payment of excise tax is the competence of the Entities in Bosnia and Herzegovina.

28. In the Republika Srpska, the turnover within the Entities as well as inter-Entity turnover of products subject to payment of excise tax is regulated by the Law on Excise Tax and Turnover Tax, the Book of Rules on the Application of the Law on Excise Tax and Turnover Tax (*Official Gazette of the Republika Srpska* Nos. 65/02 and 62/03) and the Book of Rules on the Manner of Calculation and Payment of Excise Tax and Turnover Tax on Goods Subject to Payment of Excise Tax and Contents of a Bill in Turnover with Purchasers from the Federation of Bosnia and Herzegovina and the Brčko District *(Official Gazette of the Republika Srpska* No. 69/03).

29. In the FBiH, the turnover of products subject to payment of products is regulated by the Law on Turnover Tax on Goods and Services (*Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 49/02 and 37/03), the Law on Special Tax on Petroleum Derivates (*Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 6/95, 27/98, 41/98, 51/99, 29/02 and 37/03), the Law on Special Tax on Beer *(Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 6/95, 51/99, 52/01 and 37/03), the Law on Special Tax on Coffee (*Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 6/95, 51/99, 52/01 and 37/03), the Law on Special Tax on Non-Alcoholic Drinks (*Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 6/95, 51/99, 52/01 and 37/03), the Law on Special Tax on Tobacco Products (*Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 6/95, 13/00 and 52/01) and the Law on Special Tax on Alcohol (*Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 6/95, 51/99, 52/01 and 37/03).

30. Pursuant to Article 2 of the Decision on the manner of application of Entity regulations and establishment of rates in the field of taxes and contributions (*Official Gazette of the Brčko District* No. 5/00) the Law on Excise Tax that is in force in the Republika Srpska is applied in the Brčko District.

31. Having analyzed the said regulations, the Constitutional Court notes that imposition of obligation of payment of excise tax and turnover tax on products subject to payment of excise tax represents a measure of administrative protectionism of fiscal nature and it serves for additional collection of budget revenues from turnover of luxury goods less necessary for living such as petroleum and petroleum derivates, tobacco and tobacco products, coffee, alcoholic drinks, beer and non-alcoholic drinks. Obligation to effect payment of excise tax ad turnover tax on goods subject to payment of excise tax exists in both Entities and in the Brčko District and it includes the overall turnover of these goods regardless of whether they are imported from abroad, produced locally or exchanged between the Entities.

32. The Constitutional Court concludes that there are three categories of persons/subjects obliged to effect payment of excise tax in both Entities and in the Brčko District: 1) legal persons or entrepreneurs-producers of products subject to payment of excise tax; 2) legal persons or entrepreneurs-importers of products subject to payment of excise tax; 3) legal persons or entrepreneurs who procures products subject to payment of excise tax from a supplier from the other Entity or the Brčko District.

33. Obligation on the basis of excise tax on tobacco arises with the taking over of revenue stamps, obligation on the basis of alcoholic drinks arises with the taking over of control numbers and obligation on the basis of excise tax on petroleum, drinks and coffee arises: 1) upon delivery of products, i.e. making out of a bill of sale; 2) import; 3) procurement from the other Entity or the Brčko District.

34. Payment of excise tax on tobacco is carried out prior to taking over of control numbers, payment of excise tax on alcoholic drinks within 90 days from the date of taking over of revenue stamps (it is the same in the Federation as with all other products subject to payment of excise tax). Persons obliged to effect payment of excise tax/producers effect payment on the following day from the day on which the product(s) concerned were put on sale (within 5 days upon the expiration of one week in the FBiH; within 15 days upon the expiration of one month for natural persons), importers within time limits and in the manner envisaged for payment of custom duties and other import fees, persons obliged to effect payment of excise tax on products procured from the other Entity or the Brčko District prior to taking over of products (Article 41 of the Law on Excise Tax and Turnover Tax; Article 27 of the Law on Turnover Tax on Goods and Services).

35. The place of payment of excise tax and turnover tax on products subject to payment of excise tax is the seat of the producer or the importer, i.e. the seat of the purchaser for

products procured in the other Entity or the Brčko District, the seat of a business unit in an Entity whose founder is from the other Entity or the Brčko District (the contested Article 48 of the Law on Excise Tax and Turnover Tax; Article 34 of the FBiH Law on Turnover Tax on Goods and Services).

36. The Constitutional Court notes that the third category of persons obliged to effect payment of excise tax, in addition to legal persons or entrepreneurs-producers of products subject to payment of excise tax and legal person or entrepreneur importer of products subject to payment of excise tax, are legal persons or entrepreneurs who procure products subject to payment of excise tax from supplier from the other Entity or the Brčko District was introduced, respectively, in the Republika Srpska through the Law on Excise Tax and Turnover Tax, which entered into force on 28 May 2002, and in the FBiH through regulations on special taxes that entered into force on 7 December 2001.

37. The Constitutional Court concludes that the enactment of the Entity regulations introducing the category of legal persons or entrepreneurs who procure products subject to payment of excise tax from a supplier from another Entity or the Brčko District was preceded by the conclusion of the Agreement on the manner of allocation of special taxes between the Federation and the Republika Srpska. This Agreement was signed on 28 December 2000.

38. The aim of the aforesaid Agreement and the Entity regulations referred to in the preceding paragraph, the latter being adopted in the implementation of the Agreement, was to avoid double taxation in inter-Entity turnover of products subject to payment of excise tax and giving incentives for domestic trade in Bosnia and Herzegovina. Namely, a special tax – excise tax is paid in inter-Entity turnover in the Entity of final consumption. However, the very manner of allocation of excise tax toward the Entity of final consumption involves payment of excise tax by the seller and the purchaser, the seller refunding the special tax – excise tax on products sold in the other Entity. In this way, the basis for harmonization of tax system in the part of allocation of excise tax toward the Entity of final consumption should have been created, which would be the basis for the removal of obstacles for a free trade in Bosnia and Herzegovina and an encouragement for establishment and operation of a single market in Bosnia and Herzegovina.

39. In view of the aforesaid, the Constitutional Court should examine whether the described legal situation is inherent to the Constitution of Bosnia and Herzegovina and does it correspond to the principle of a single market under Article I.4 of the Constitution of Bosnia and Herzegovina.

40. A single market is a necessary element of the economic system of Bosnia and Herzegovina. As is the case with most of the constitutions, the Constitution of Bosnia and Herzegovina does not contain and it does not give a complete image of the State's economic system. Nonetheless, sub-paragraph 4 of the Preamble to the Constitution of Bosnia and Herzegovina obliges the State to "promote general welfare and economic growth through the protection of private property and the promotion of a market economy", whereas Article II.3 (k) in conjunction with Article II.6 of the Constitution of Bosnia and Herzegovina obliges Bosnia and Herzegovina and its Entities to protect the right to property. On the other hand, the principle of a "single market" in Bosnia and Herzegovina does not exist freely. It is limited by other constitutional principles such as the principle of democracy, the rule of law and other democratic principles (Article I.2 of the Constitution of Bosnia and Herzegovina). It follows that the State is obliged to establish an operational economic system and economic balance in Bosnia and Herzegovina that would observe other constitutional principles (see Constitutional Court, Partial Decision No. *U 5/98* of 19 February 2000, para 14, published in the *Official Gazette of Bosnia and Herzegovina* No. 11/98).

41. Accomplishment of the constitutional principle of a "single market" imposes an obligation on the State to implement its goals: "full freedom of movement of persons, goods, services and capital throughout Bosnia and Herzegovina". It is clear from the linguistic meaning of this provision that the Entities are obliged not to prevent accomplishment of this principle (second sentence, Article I.4) although this does not prevent the State to act positively so as to fulfil its goal (first sentence, Article I.4). The Constitutional Court notes that the substantive contents of a single market were clearly defined by the European Court of Justice, which provided guidelines to the European countries on the constitutional development of this important aspect. Accordingly, reference to the case-law of the European Court of Justice is of exceptional importance. In line with the aforesaid case-law, the notion of a "single market" implies that the internal market of Bosnia and Herzegovina should be created by repealing all technical, administrative and other measures (see Decision of the European Court of Justice, *Schul*, Case No. 15/81, Vol. 1982, p. 1431, para. 33).

42. Full freedom of movement of goods presupposes a free exchange of goods on the entire and single customs territory of the State. This means that not only measures from the domain of custom policy are repealed, but also other fiscal measures that would impede the turnover of any goods on the entire territory of the State without a reasonable

justification. This would include all taxes, particularly those from the area of indirect taxes (Article I.4 in conjunction with Article III.1 (c) of the Constitution of Bosnia and Herzegovina).

43. In order to guarantee efficiently the constitutional principle of single market, it would be necessary to link it with Article II.4 of the Constitution of Bosnia and Herzegovina, which prohibits discrimination. On one hand, the notion of prohibition of discrimination includes not only technical measures but also positive legislation and a positive obligation of the State to guarantee institutional protection of prohibition of discrimination (see Constitutional Court, Decision No. *U 18/00* of 5 October 2002, para 14, published in the *Official Gazette of Bosnia and Herzegovina* No. 30/02). On the other hand, the prohibition of discrimination involves both formal and substantive discrimination.

44. The facts that the State must secure an efficient single market (Article I.4 of the Constitution of Bosnia and Herzegovina) and that the Entities regulate certain areas does not automatically mean that the principle of common market has been compromised. To that end, the State enjoys a wide margin of appreciation in the sense of organization of a single market within its borders in the most adequate way. Although the constitutional distribution of competences under Article III of the Constitution of Bosnia and Herzegovina allocated certain competences to the Entities that may influence the creation of a single market as the State's obligation, the autonomous status of the Entities is conditioned by hierarchically superior competences of the State, which includes protection of the Constitution of Bosnia and Herzegovina and its principles. In the present case, the first reference is extended to the principle of single market and exercise of its freedoms as well as the principle of state sovereignty. In this regard, the supremacy of the State over the Entities and the Brčko District, which follows from Article III.3 (b) of the Constitution of Bosnia and Herzegovina, allows it to take appropriate measures to secure enjoyment of constitutional rights to all persons.

45. In the instant case, the application of the Law on the Amendments to the Law on Excise Tax and Turnover Tax as of 23 July 2003 was conditioned by signing of the Agreement on the distribution of turnover tax on products subject to payment of excise tax between the Entities and the Brčko District. This means that the rights and responsibilities of citizens, which are linked with the principle of a single market under Article I.4 of the Constitution of Bosnia and Herzegovina, are conditioned by an act of will of the Entities (Memorandum of Understanding), i.e. the FBiH, the Republika Srpska and the Brčko District. Such situation, given the position of the State, provokes a sentiment of

legal uncertainty with citizens (Article I.2 of the Constitution of Bosnia and Herzegovina) for there is no legal guarantee that the State, as the legal guardian of the constitutional principle under Article I.4 of the Constitution of Bosnia and Herzegovina, may ensure this principle efficiently. It would suffice for one of the Entities or the Brčko District to stop respecting this Memorandum or annul it unilaterally to compromise the principle of a single market.

46. In addition to this aspect, the Constitutional Court observes that the treatment of "inter-Entity purchaser and seller" of goods subject to payment of excise tax lacks affirmation. Namely, special tax – excise tax is paid in inter-Entity trade in the Entity of final consumption. However, the very manner of allocation of excise tax toward the Entity of final consumption includes payment of excise tax by the seller and the purchaser, the seller refunding special tax – excise tax for products sold in the other Entity. In this way, turnover of goods is complicated at one point with two payments of excise tax with two procedures of collection. In addition, the possibility of refund of payment of excise tax is complicated with submission of evidence on the purchaser's subsequent payment in another territorial unit. In this way, the State is exempted in one part from an obligation to organize an effective excise tax collection system and leaving it to the seller's concern. If the case is reverse, the seller cannot refund money. Finally, the goods intended for consumption are not treated in the same way as the goods to be sold in the form of further purchase-sale relations although the principle of final consumption should be applied to both categories. In this way, the turnover chain receives a different treatment in some of its parts. The cause of such different relation is the existence of the category of legal persons or entrepreneurs obliged to pay excise tax and who procure products subject to payment of excise tax from a supplier from the other Entity or the Brčko District and effect payment of liabilities in the manner and within time-limits that are different from those prescribed for other categories of persons obliged to effect payment of excise tax, according to the contested Articles 41 and 48 of the Law on Excise Tax and Turnover Tax.

47. Such system represents an administrative obstacle that impedes access to the market of Bosnia and Herzegovina because it does not create equal conditions for all those who appear on the market, which represents one of important conditions of a single market and it is not in line with Article I.4 of the Constitution of Bosnia and Herzegovina.

48. For reasons set out above, the Constitutional Court concluded that the contested provisions of Articles 41 and 48 of the of the Law on Excise Tax and Turnover Tax were not consistent with the Constitution of Bosnia and Herzegovina and that they should be

harmonized with Constitution within the set time-limit. In respect to the contested provisions from other contested laws of the Republika Srpska and the FBiH, the Constitutional Court decided to terminate the proceedings as the challenged provisions and laws ceased to be in effect.

VII. Conclusion

49. Pursuant to Article 61 paras 1 and 2 and Article 65 para 1 (2) of the Constitutional Court's Rules of Procedure, the Constitutional Court decided unanimously as set out in the enacting clause above.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U-24/03

Request of nine Delegates of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for a review of constitutionality of the provisions of Article 6 para 2, Article 7 para 2 and Article 8 of the Law on Immunity of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 32/02) and Article 6 para 3, Article 7 para 2 and Article 8 of the Law on Immunity of the Federation of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 19/03)

DECISION ON ADMISSIBILITY AND MERITS
of 22 September 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (2) and Article 61 paras 1 and 3 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Ćazim Sadiković, Vice-President,

Mr. Tudor Pantiru, Vice-President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Having deliberated on the **request of nine Delegates of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina and the request of the Chair of the Council of Ministers of Bosnia and Herzegovina** in Case No. **U 24/03**,

At the session held on 22 September 2004 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

It is established that Article 6 para 2, Article 7 para 2 and Article 8 of the Law on Immunity of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 37/03) and Article 6 para 3, Article 7 para 2 and Article 8 of the Law on Immunity of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 19/03) are consistent with the Constitution of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 19 June 2003 nine Delegates of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina: Mr. Velimir Jukić, Mr. Anto Spajić, Mr. Branko Zrno, Mr. Tomislav Limov, Mr. Ilija Filipović, Mr. Hilmo Neimarlija, Mr. Halid Genjac, Mr. Nade Radović and Mr. Boško Šiljegović ("the applicants") filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for a review of constitutionality of the provisions of Article 6 para 2, Article 7 para 2 and Article 8 of the Law on Immunity of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 32/02) and Article 6 para 3, Article 7 para 2 and Article 8 of the Law on Immunity of the Federation of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 19/03).

2. On 17 December 2003, Mr. Adnan Terzić, Chair of the Council of Ministers of Bosnia and Herzegovina ("the applicant") filed a request with the Constitutional Court for a review of constitutionality of Article 8 of the Law on Immunity of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 52/02 and 19/03). The applicant also filed a request for the adoption of an interim measure whereby the Constitutional Court would suspend the application of the contested Article pending adoption of a decision on the request filed.

II. Procedure before the Constitutional Court

3. In view of the fact that the present requests concern a review conformity of the laws promulgated by the High Representative for Bosnia and Herzegovina ("the High Representative") in his decisions and subsequently adopted by, respectively, the Parliamentary Assembly of Bosnia and Herzegovina and the Parliament of the Federation of Bosnia and Herzegovina in the identical texts with the Constitution of Bosnia and Herzegovina, the Constitutional Court, having regard to Article 21 para 1 of its Rules of Procedure, requested the High Representative on 23 July 2003 to submit a reply to the request.

4. On 13 February 2004, the Parliamentary Assembly of Bosnia and Herzegovina – the House of Peoples and the House of Representatives as well as the Parliament of the Federation of Bosnia and Herzegovina – the House of Peoples and the House of Representatives were requested to submit their respective replies.

5. The High Representative submitted his reply to the request on 21 August 2003.

6. The Constitutional-Legal Commission of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina submitted a reply to the requests on 26 February 2004.

7. The Parliament of the Federation of Bosnia and Herzegovina failed to submit its reply to the requests.

8. Pursuant to Article 25 para 2 of the Constitutional Court's Rules of Procedure, the replies of the High Representative and of the Constitutional-Legal Commission of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina were transmitted to the applicants on, respectively, 24 September 2003 and 17 July 2004.

9. Pursuant to Article 30 of its Rules of Procedure, the Constitutional Court decided, given the fact that the requests concern the same issue under the competence of the Constitutional Court, to conduct one set of proceedings and to issue one decision No. U 24/03. The following requests were joined: U 24/03 (the applicants: nine Delegates of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina) and U 150/03 (applicant: Mr. Adnan Terzić, Chair of the Council of Ministers of Bosnia and Herzegovina).

10. In view of the fact that the requests relate to a review of conformity with the Constitution of Bosnia and Herzegovina of the laws promulgated by the High Representative in his decisions and subsequently adopted in the identical texts by the Parliamentary Assembly of Bosnia and Herzegovina and the Parliament of the Federation of Bosnia and Herzegovina, respectively, the Constitutional Court shall assess the conformity of the contested laws that were adopted by the domestic legislative authorities with the Constitution of Bosnia and Herzegovina.

III. Facts of the Case

11. On 6 October 2002, the High Representative issued a Decision No. 38/02 enacting the Law on Immunity of Bosnia and Herzegovina. An integral part of the said Decision was the Law on Immunity of Bosnia and Herzegovina, which was to come into effect on, as provided for in Article 9 thereof, an interim basis (entry into force and publication), until such time as the Parliamentary Assembly adopts the same in due form, without amendment and with no conditions attached. The Decision and the attached Law on Immunity of Bosnia and Herzegovina were published in the *Official Gazette of Bosnia*

and Herzegovina No. 32/02 and in the respective *Official Gazettes of the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District of Bosnia and Herzegovina*. The Parliamentary Assembly of Bosnia and Herzegovina, at the sessions of the House of Peoples and the House of Representatives, adopted the Law on Immunity of Bosnia and Herzegovina, which was published in the *Official Gazette of Bosnia and Herzegovina* No. 37/03 of 22 November 2003.

12. On 6 October 2002 the High Representative issued a Decision No. 39/02 enacting the Law on Immunity of the Federation of Bosnia and Herzegovina which was to come into effect as provided for in Article 9 thereof on an interim basis (Entry into force and publication), until such time as Parliament of the Federation of Bosnia and Herzegovina adopts the same in due form, without amendment and with no conditions attached. The Decision and the Law on Immunity of the Federation of Bosnia and Herzegovina were published in the *Official Gazette of the Federation of Bosnia and Herzegovina* No. 52/02. The Parliament of the Federation of Bosnia and Herzegovina, at the respective sessions of the House of Peoples and the House of Representatives, adopted the Law on Immunity of the Federation of Bosnia and Herzegovina, which was published in the *Official Gazette of the Federation of Bosnia and Herzegovina* No. 19/03 of 13 May 2003.

IV. Requests

a) Statements from the requests

13. The applicants maintained that the provisions of Articles 6 para 2 and Article 7 para 2 of the Law on Immunity of Bosnia and Herzegovina ("the BiH Immunity Law") as well as provisions of Article 6 para 3 and Article 7 para 2 of the Law on Immunity of the Federation of Bosnia and Herzegovina ("the FBiH Immunity Law ") were not consistent with Articles II.1 and II.2 of the Constitution of Bosnia and Herzegovina. Reference to Article II.2 of the Constitution of Bosnia and Herzegovina is essentially a reference to the rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), Article 13 thereof in particular. Furthermore, the applicants argued that the said provisions of the BiH Immunity Law, in part pertaining to lodging an appeal with the Constitutional Court of Bosnia and Herzegovina, were not consistent with provisions of Article VI.3 of the Constitution of Bosnia and Herzegovina.

14. The applicants further claimed that the provisions of Article 6 para 3 and Article 7 para 2 of the BiH Immunity Law failed to provide a possibility of exhaustion of ordinary and extraordinary legal remedies in criminal and civil proceedings, and that therefore the

said provisions were in contravention with Article 13 of the European Convention and, consequently, Articles II.2 and III.3 (b) of the Constitution of Bosnia and Herzegovina.

15. The applicants further considered that part of the provisions of Article 8 of the BiH Immunity Law and Article 8 of the FBiH Immunity Law, in the part related to the repeal of previous procedural bars to criminal prosecution of those otherwise entitled to immunity, was in contravention with Article 7 of the European Convention and the general legal principles of international law on non-retroactivity and acquired rights that are, by virtue of Article III.3 (b) of the Constitution of Bosnia and Herzegovina, an integral part of the legal system of Bosnia and Herzegovina. With regard to the BiH Immunity Law, the applicants were of the opinion that the prohibition of retroactivity is laid down in Article IV.3 (h) of the Constitution of Bosnia and Herzegovina.

16. The applicant (Chair of the Council of Ministers of Bosnia and Herzegovina) alleged in his request that the provisions of Article IV.B.4 (10) of the Constitution of the Federation of Bosnia and Herzegovina stipulating that the holders of executive power in the Federation of Bosnia and Herzegovina shall not be held criminally or civilly liable for any acts carried out within the scope of their respective authority were *de iure* eliminated with the prescription in the BiH Immunity Law that the previous procedural bars to criminal prosecution or civil proceedings against those otherwise entitled to immunity are repealed as of the date when this law entered into force. The provision of Article 8 of the FBiH Immunity Law, notwithstanding the explicit constitutional prohibition, introduced a retroactive application of a law in the criminal legislation. The applicant further argued that the provision of Article IV.A.20 (d) of the Constitution of the Federation of Bosnia and Herzegovina stipulated that "the laws shall take effect as specified therein but no sooner than when promulgated in the Official Journal". The applicant considered that according to the said provision, no laws of the Federation of Bosnia and Herzegovina or individual provisions thereof may have a retroactive effect when applied. On the contrary, its effect is directed only to the time period as of the day designated by its transitional provisions, but not before the day of its publication. For these reasons, the applicant considered that the contested Article 8 of the FBiH Immunity Law was in contravention with the provisions of Article II.2 and II.3 (e) of the Constitution of Bosnia and Herzegovina.

17. Considering that the application of the contested provision of Article 8 of the FBiH Immunity Law may result in severe and irremediable consequences affecting the fundamental human rights, the applicant filed a request for the adoption of an interim

measure whereby the Constitutional Court would suspend the application of the contested provision pending adoption of a decision on the request filed.

b) Replies to the requests

18. The goal of development of a legislation reform strategy regarding immunity in Bosnia and Herzegovina was emphasized in the reply of the High Representative. Namely, according to the previous legislation, the immunity granted to members of the Parliament and many holders of executive power was too extensive and it protected persons who held office against responsibility for criminal and other offences that could not be associated with their official duties.

19. The High Representative submitted that, for these reasons, he issued on 6 October 2002 a set of immunity laws at the level of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska regulating the procedure according to which the members of the Parliament may claim immunity from criminal and civil liability, while the holders of executive power may claim immunity from civil liability.

20. The High Representative submitted that the public liability of officials and persons carrying out an electoral duty was ensured by the manner stipulated by the contested laws, ensuring at the same time that such persons enjoy those forms of immunity that correspond to the proper performance of their duties and offices. In concrete terms, introduction of a judicial control as to whether a certain act falls within the duty of a holder of a public office represents a step forward in reducing political implications being given to the practice of immunity.

21. With respect to harmonization of the provisions of Article 6 para 2 and Article 7 para 2 of the BiH Immunity Law and Article 6 para 3 and Article 7 para 2 of the FBiH Immunity Law with Articles II.1 and II.2 of the Constitution of Bosnia and Herzegovina and Article 13 of the European Convention, the High Representative submitted that the contested provisions were harmonized with Article 13 of the European Convention and, accordingly, with Articles II.1 and II.2 of the Constitution of Bosnia and Herzegovina; in other words, the FBiH Immunity Law was not inconsistent with Article III.3 (b) of the Constitution of Bosnia and Herzegovina.

22. With respect to harmonization of Article 6 para 2 and Article 7 para 2 of the BiH Immunity Law with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, the High Representative pointed out that on the basis of Article VI.3 (b) of the Constitutional

Court of Bosnia and Herzegovina, the Constitutional Court may examine appeals against final and binding judgments issued by any competent court in Bosnia and Herzegovina in cases concerning the matter whether the conduct of the members of the Parliament of Bosnia and Herzegovina or the holders of executive power, namely the members of the Presidency of Bosnia and Herzegovina or the Council of Ministers of Bosnia and Herzegovina, was carried out within the scope of their respective authority as laid down in the BiH Immunity Law.

23. As the Constitution of Bosnia and Herzegovina itself established the said functions and basic duties associated therewith, the High Representative submitted that the issue as to whether a certain act was carried out within the scope of one's authority may be viewed as an issue arising "out of the Constitution".

24. With respect to the applicant's assertion that all other remedies must be exhausted prior to the examination of a case by the Constitutional Court, the High Representative submitted that the said assertion is ill-founded because the contested provisions clearly stipulate that the Constitutional Court may examine appeals "against final and binding" judgments of competent courts.

25. With respect to harmonization of Article 8 of the BiH Immunity Law and Article 8 of the FBiH Immunity Law, the High Representative submitted that these provisions eliminated all procedural obstacles for institution of proceedings against Members of the Parliament and holders of executive power that existed in the previous legislation. In other words, as of the date of entry into force of the contested laws, Members of the Parliament and holders of executive power will no longer be able to claim procedural protection in order to protect themselves from all court proceedings as holders of public offices.

26. The High Representative concluded that the contested laws were neither in opposition to the general principle of non-retroactive application nor Article 7 of the European Convention as the said law did not eliminate the possibility of substantive defense in criminal proceedings for acts carried out according to the previous legislation, which anticipated such defense.

27. In its reply, the Constitutional - Legal Commission of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina considered the initiative justified and it supported the legal arguments advanced by the applicants.

V. Relevant law

28. Constitution of Bosnia and Herzegovina

Article I.2

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

Article II.1 (relevant part)

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

Article II.2 (relevant part)

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. (...)

Article II.3 (e) (relevant part)

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 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.3 (h) and (j)

(h) Decisions of the Parliamentary Assembly shall not take effect before publication.

(j) Delegates and Members shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the Parliamentary Assembly.

29. **Constitution of the Federation of Bosnia and Herzegovina**

Amendment LXV (Official Gazette of the Federation of Bosnia and Herzegovina, No. 52 of 28 October 2002) deleted Article IV.B.4 (10), which read as follows:

Neither the President, Vice-President, the Prime Minister, the Deputy Prime Minister, nor the remaining members of the Government shall be held criminally or civilly liable for any acts carried out within the scope of his respective authority.

Amendment LXVI added new text to Article IV.C.10, which reads as follows:

The Constitutional Court shall decide questions, which arise under legislation regulating immunity in the Federation.

Article IV.A.20 (d)

(1) In addition to other powers specified in the Constitution, the Legislature shall have responsibility for:

(...)

d) enacting laws to exercise responsibilities allocated to the Federation Government, which shall take effect as specified therein but no sooner than when promulgated in the Official Journal.

30. **Law on Immunity of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* No. 32/02)

Article 3
(Persons entitled to immunity (non-liability))

Delegates to the House of Peoples and Members of the House of Representatives shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the Parliamentary Assembly of Bosnia and Herzegovina.

Members of the Presidency of Bosnia and Herzegovina and members of the Council of Ministers of Bosnia and Herzegovina shall not be held civilly liable for any acts

carried out within the scope of their duties in the Presidency or Council of Ministers, respectively.

Article 6
(Procedure in Criminal Proceedings)

If, in the course of criminal proceedings, an individual listed in paragraph 1 of Article 3 of this Law claims that the act which is the basis of the criminal proceedings was carried out within the scope of his or her duties as defined in Article 4 hereof, this issue shall be heard and decided by a judgment of a competent court. Model procedural rules governing the hearing of such issues, including the identification of the competent court for the hearing of the same, shall be drawn up by the competent ministry.

Such judgment shall be final and binding, subject to appeal to the Constitutional Court of Bosnia and Herzegovina.

Article 7

(Procedure in Civil Proceedings)

If, in the course of civil proceedings, an individual listed in Article 3 of this Law claims that the act which is the basis of the criminal proceedings was carried out within the scope of his or her duties as defined in Article 4 hereof, this issue shall be heard and decided by a judgment of a competent court. Model procedural rules governing the hearing of such issues, including the identification of the competent court for the hearing of the same, shall be drawn up by the competent ministry.

Such judgment shall be final and binding, subject to appeal to the Constitutional Court of Bosnia and Herzegovina.

Article 8

As of the date of entry into force of this Law, the Law on Immunity of Bosnia and Herzegovina (BiH O.G. 1/97, 3/99) shall be repealed and previous procedural bars to prosecution of or civil proceedings against those otherwise entitled to immunity are hereby repealed. Such repeal shall be without prejudice to substantive defenses in criminal and civil proceedings previously provided for by law.

31. **Law on Immunity** (*Official Gazette of Bosnia and Herzegovina* Nos. 1/97 and 3/99), which ceased to be in effect as of the date of entry into force of the Law on Immunity of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 32/02)

Article 3

The following persons shall be entitled to immunity:

1. *Members of the Presidency of Bosnia and Herzegovina,*
2. *Delegates to the House of Peoples and Members of the House of Representatives*
3. *Co-Chair and Vice-Chair of the Council of Ministers of Bosnia and Herzegovina, Ministers and Deputy Ministers,*
4. *Judges of the Constitutional Court of Bosnia and Herzegovina,*
5. *Governor and members of the Governing Board of the Central Bank.*

Article 4

Criminal and civil proceedings shall not be instituted against persons referred to in Article 3 of this Law. If such proceedings have been instituted, they shall be terminated. The said persons shall not be arrested or detained if they claim immunity until a competent authority decides to strip of immunity in each particular case.

Article 6

The persons referred to in Article 3 of this Law shall have the right to immunity during the performance of their offices in bodies and institutions referred to in the said Article.

32. **Law on Immunity of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 19/03)

Article 3
(Persons entitled to immunity (non-liability))

Members of the House of Representatives and Delegates to the House of Peoples, as well as the members of Cantonal Legislatures shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the Parliament of the Federation, or the Cantonal Legislatures.

The President and Vice-President of the Federation, members of the Federation Government as well as the members of the Cantonal Governments shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the executive authority of the Federation, or the executive authority of the respective Canton.

Article 6

If, in the course of criminal proceedings, an individual listed in paragraph 1 of Article 3 of this Law claims that the act which is the basis of the criminal proceedings was carried out within the scope of his or her duties as defined in Article 4 hereof, this issue shall be heard and decided by a judgment of a competent court.

Model procedural rules governing the hearing of such issues, including the identification of the competent court for the hearing of the same, shall be drawn up by the competent ministry.

Such judgment shall be final and binding, subject to appeal to the Constitutional Court of the Federation.

Article 7

(Procedure in Civil Proceedings)

If, in the course of civil proceedings, an individual listed in Article 3 of this Law claims that the act which is the basis of the criminal proceedings was carried out within the scope of his or her duties as defined in Article 4 hereof, this issue shall be heard and decided by a judgment of a competent court. Model procedural rules governing the hearing of such issues, including the identification of the competent court for the hearing of the same, shall be drawn up by the competent ministry.

Such judgment shall be final and binding, subject to appeal to the Constitutional Court of the Federation.

Article 8

(Repeal)

As of the date of entry into force of this Law, previous procedural bars to prosecution of or civil proceedings against those otherwise entitled to immunity are hereby repealed.

Such repeal shall be without prejudice to substantive defenses in criminal and civil proceedings provided for by law.

VI. Admissibility

33. According to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall have exclusive jurisdiction to decide, *inter alia*, whether any provision of an Entity's constitution or law is consistent with this Constitution. These disputes may be initiated 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 legislative body of an Entity.

34. The request of nine Delegates of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina falls under Article VI.3 (a) of the Constitution of Bosnia and Herzegovina. According to Article IV.1 of the Constitution of Bosnia and Herzegovina, the House of Peoples shall comprise fifteen Delegates. The request was filed by nine delegates, which makes more than one fourth of members of the House of Peoples.

35. The request of the Chair of the Council of Ministers of Bosnia and Herzegovina also falls under Article VI.3 (a) of the Constitution of Bosnia and Herzegovina. According to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, the Chair of the Council of Ministers is authorized to initiate a dispute before the Constitutional Court.

36. In view of the said provision of Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Article 16 para 2 of the Constitutional Court's Rules of Procedure, it follows that the present requests are admissible.

VII. Merits

37. First of all, the Constitutional Court recalls that immunity is a public privilege assigned to the holder of a public office in his/her capacity as holder of a public-legal office and not as a private person – not for the protection of his/her personal interests but for the interests of the institution concerned. Immunity has two forms: immunity from liability and immunity from violability. Immunity from liability protects a person from legal liability for acts within the scope of immunity. Immunity from violability protects people against being arrested or detained in connection with acts within the scope of immunity. Immunity from liability operates automatically whereas immunity from violability operates only if claimed by the immunity holder. Immunity from liability covers actions of the immunity holder in performing his /her duties. In substance, immunity from liability is a material immunity preventing any judicial prosecution for actions carried out within the scope

of office – that is, actions through which the work of the institution concerned is carried out. Insofar as it applies to a person who is actually in office, it can be regarded as status immunity or *ratione personae* immunity. When the person leaves his/her office, immunity operates *ratione materiae* in relation to the actions performed earlier in the exercise of his or her official functions in order to prevent the institution or office which he or she occupied being indirectly attacked through a legal action against a previous office-holder when the current office-holder would enjoy immunity. Immunity from violability is a procedural immunity**,** which prevents application of the general right to the holder of a public office who cannot be deprived of freedom without an approval of the competent authority. The purpose of this immunity is to guarantee freedom from arrest (broader than immunity from liability). Immunity from liability concerns only criminal offences within the scope of one's office but not criminal offences committed by other actions.

38. The contested laws, in addition to status immunity or *ratione personae* immunity during the term of public office, also stipulate immunity from civil and criminal liability *ratione materiae* with regard to the actions performed within the scope of official duties as delegates and members of the Parliamentary Assembly of Bosnia and Herzegovina, delegates and members of the Parliament of the Federation, and members of Cantonal Assemblies, even after cessation of terms of office. The said laws also stipulate a similar immunity from civil and, in some cases, criminal liability for some members of executive authorities.

39. The Constitutional Court concludes that the *ratio* for the adoption of the contested laws was to strike a balance between a need to protect the integrity of legislative and executive institutions and a need to anticipate any abuse of powers by individuals in those institutions, while ensuring at the same time, that such persons enjoy those forms of immunity that correspond to the proper performance of their respective offices.

40. The applicants alleged that the provisions of Article 6 para 2 and Article 7 para 2 of the BiH Immunity Law as well as provisions of Article 6 para 3 and Article 7 para 2 of the FBiH Immunity Law were not consistent with the provisions of Articles II.1 and II.2 of the Constitution of Bosnia and Herzegovina. Furthermore, the applicants alleged that the provisions of Article 6 para 3 and Article 7 para 2 of the BiH Immunity Law were contrary to Article 13 of the European Convention and, in the same line, Articles II.2 and III.3 (b) of the Constitution of Bosnia and Herzegovina. Moreover, the applicants considered that the stated provisions of the BiH Immunity Law were not in accordance with the provisions of Article VI.3 of the Constitution of Bosnia and Herzegovina as to the part related to lodging

an appeal with the Constitutional Court of Bosnia and Herzegovina. Also, the applicants were of the opinion that provisions of Article 8 of the BiH Immunity Law and Article 8 of the FBiH Immunity Law were contrary to Article 7 of the European Convention and the general principles of international law on non-retroactivity and acquired rights and provisions of Articles II.2 and II.3 (e) of the Constitution of Bosnia and Herzegovina.

Conformity of the BiH Immunity Law and the FBiH Immunity Law the with Articles II.1 and II.2 of the Constitution of Bosnia and Herzegovina and Article 13 of the European Convention

41. The applicants alleged that the provisions of Article 6 para 2 and Article 7 para 2 of the BiH Immunity Law as well as the provisions of Article 6 para 3 and Article 7 para 2 of the FBiH Immunity Law were not consistent with Article II.1 of the Constitution of Bosnia and Herzegovina, which provides that "Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms (…)*"* and Article II.2 of the Constitution of Bosnia and Herzegovina, which provides that the European Convention and its Protocols shall apply directly in Bosnia and Herzegovina. The applicants claimed that these provisions were also in opposition to Article 13 of the European Convention, which reads that *"*everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity" and, namely, contrary to Article III.3 (b) of the Constitution of Bosnia and Herzegovina, according to which the Entities "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 (…). The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities".

42. It is evident that the applicants' arguments related to inconsistence of the stated provisions of the contested laws with Article 13 of the European Convention.

43. The Constitutional Court points out that the goal of Article 13 of the European Convention is that states should ensure effective remedies in their legal systems against violation of the rights guaranteed under the European Convention. Article 13 of the European Convention does not require that a remedy must contain any specific form. Instead, it ensures the existence of effective remedies in whatever form they may happen under the domestic legal order, while the nature of those remedies shall be determined

by each individual system. Accordingly, the goal of Article 13 of the European Convention is to ensure an effective exercise of rights guaranteed under the European Convention in domestic legislation. Hence, the goal of this Article is to require the existence of a domestic remedy that allows the competent domestic authority to examine the substance of a relevant appeal against violation of the rights under the European Convention, as well as to ensure an effective assistance to the injured party (see European Court of Human Rights, the *Lithgow et al* judgment of 8 July 1986, Series A No. 102, p. 74, para. 205 and the *Pine Valley Developments Ltd. v. Ireland* judgment of 29 November 1991, Series A No. 202).

44. According to the BiH Immunity Law and the FBiH Immunity Law, criminal charges or actions in the civil proceedings brought against immunity holders shall be decided in ordinary court proceedings, which include a possibility of an appeal in accordance with relevant criminal and civil legislation. Moreover, both laws provide that individuals may claim immunity before a competent court. An appeal with the Constitutional Court of Bosnia and Herzegovina or a complaint to the Constitutional Court of the Federation of Bosnia and Herzegovina may be lodged against court's decisions on immunity. The Constitutional Court holds that the provisions of the stated laws render it possible for the Constitutional Court of Bosnia and Herzegovina and the Constitutional Court of the Federation of Bosnia and Herzegovina to examine the substance of relevant appeal against decisions on immunity.

45. For these reasons, the Constitutional Court assessed that the contested provisions of Article 6 para 2 and Article 7 para 2 of the BiH Immunity Law and Article 6 para 3 and Article 7 para 2 of the FBiH Immunity Law are consistent with the Constitution of Bosnia and Herzegovina.

Conformity of the BiH Immunity Law with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina

46. The applicants alleged that the provisions of Article 6 para 2 and Article 7 para 2 of the BiH Immunity Law were not consistent with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, which reads that the Constitutional Court "shall have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina".

47. When examining the present issue, due regard should be given to Article I.2 of the Constitution of Bosnia and Herzegovina, which reads: "Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and

democratic elections". The principle of effective protection of the Constitution of Bosnia and Herzegovina follows from the said constitutional provision.

48. The Constitutional Court may examine appeals filed against final and binding judgments delivered by any competent court in Bosnia and Herzegovina, including the cases relating to the fact whether the conduct of immunity holders was within the scope of their respective authority. As the Constitution of Bosnia and Herzegovina itself established the functions to which immunity relates and basic duties associated therewith, the issue as to whether some action was carried out within the scope of one's authority may be viewed as an issue arising "out of the Constitution".

49. The Constitutional Court notes that the contested provisions, which were practically taken over from the Constitution of Bosnia and Herzegovina, are contained in the already quoted provision of Article VI.3 (b) of the Constitution of Bosnia and Herzegovina. Such manner of prescription of competence of the Constitutional Court by a law is impermissible and the Constitutional Court takes the position that only the Constitution of Bosnia and Herzegovina may prescribe the competence of the Constitutional Court. Any other conduct would be in disregard of the Constitution of Bosnia and Herzegovina, i.e. the functioning of Bosnia and Herzegovina as a democratic state in accordance with the law.

50. The Constitutional Court, however, holds that the contested provisions should be interpreted in quite a different light, i.e. the goal of the stated provisions is to ensure (in procedural terms) a possibility of protection of rights when immunity is claimed before a competent court and subsequently, to have an opportunity to lodge an appeal before the Constitutional Court within the meaning of Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Article 15 para 3 of the Constitutional Court's Rules of Procedure should the appellant raise an issue within the Constitution of Bosnia and Herzegovina which is within the jurisdiction of the Constitutional Court under Article VI.3 (b) of the Constitution of Bosnia and Herzegovina.

51. The applicants also claimed that the contested provisions of the BiH Immunity Law violated the Constitution of Bosnia and Herzegovina, since one of the preconditions for examination of a case by the Constitutional Court is that all other remedies must be exhausted. The applicants claimed that it was not possible to exhaust all remedies in the present case.

52. The Constitutional Court considers the aforesaid assertion ill-founded since the contested provisions clearly stipulate that the proceedings before the Constitutional Court may be instituted only against a "final and binding" judgment of competent courts.

53. For these reasons, the Constitutional Court has assessed that the contested provisions of Article 6 para 2 and Article 7 para 2 of the BiH Immunity Law are consistent with the Constitution of Bosnia and Herzegovina.

Conformity of the BiH Immunity Law and the FBiH Immunity Law with Articles I.2, II.2, II.3 (e), III.3 (b) and IV.3 (h) of the Constitution of Bosnia and Herzegovina, Article 7 of the European Convention and the general legal principle of non-retroactivity

54. The applicants asserted that Article 8 of the BiH Immunity Law and Article 8 of the FBiH Immunity Law were not consistent with Article III.3 (b) of the Constitution of Bosnia and Herzegovina, according to which "the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities". They further claimed that the provisions of Article 8 of the BiH Immunity Law were not consistent with Article IV.3 (h) of the Constitution of Bosnia and Herzegovina, according to which "decisions of the Parliamentary Assembly shall not take effect before publication". The applicants claimed that the stated provisions were not consistent with Article 7 of the European Convention according to which "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".

55. The applicant (Chair of the Council of Ministers of Bosnia and Herzegovina) claimed that the provisions of Article 8 of the FBiH Immunity Law were not consistent with the provisions of Article II.2 of the Constitution of Bosnia and Herzegovina, according to which "the rights and freedoms set forth in the European Convention and its Protocols shall apply directly in Bosnia and Herzegovina", and Article II.3 (e) of the Constitution of Bosnia and Herzegovina, according to which "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".

56. The Constitutional Court shall first examine whether the right to immunity imposes a disproportionate limitation on the right to have access to court as laid down in Article II.3.(e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of the European Convention. The position of the European Court of Human Rights is that, in principle,

the right to immunity, which is in accordance with and reflects the generally recognized principles of Member States of the Council of Europe and of the European Union, is not necessarily a disproportionate limitation of the right to have access to court provided for in Article 6 para 1 of the European Convention (see for instance European Court of Human Rights, *A. v. United Kingdom*, Application No. 35373/97, Judgment of 17 December 2002, Reports of Judgments 2002-X). It is evident that the right to immunity from civil liability does not fall under the scope of civil rights, and therefore, as a right of legally public relevance, it is excluded from the scope of the rights protected by Article 6 of the European Convention. If a defendant claims immunity and the relevant law does not allow that claim to be fairly decided, this may compromise the fairness of the criminal proceedings. However, the contested laws do not prevent a claim to immunity being fairly decided. Instead, they provide for such a claim to be fairly decided by ordinary courts, fully in accordance with the principles of Article 6 para 1 of the European Convention.

57. When it comes to the relation between the immunity and Article 7 of the European Convention, this Article is not applicable for the following reasons: the European Court takes as a starting point, within the formulation of Article 7 of the European Convention, that “a measure must be imposed after the conviction of a criminal offence”. Article 7 sets off from two principles:

(1) A criminal conviction may be based only on a norm that existed at the time of the incriminating act or inaction (*nullum crimen sine lege*);

(2) As regards the violation of that norm, there can be no imposition of a heavier penalty than the one that was applicable at the time the criminal offence was committed (*nulla poena sine lege*).

58. The purpose of Article 7 is to offer essential guarantees against arbitrary prosecution, adjudication and punishment and it is not applicable on immunity. The contested laws create no new criminal offences. It is clear that immunity from criminal prosecution for a criminal offence does not mean that a certain act is not a criminal offence. If the act was not a criminal offence, it would not be possible for competent authorities to start prosecution of a liable person by repealing his/her immunity. Moreover, the contested laws do not provide a more severe penalty to be imposed for an offence than could have been imposed under the law in force at the time the offence was committed. It follows that the issue under Article 7 of the European Convention was not raised.

Conformity of the contested laws with the general constitutional principles of the Constitution of Bosnia and Herzegovina

59. It has been argued that a general principle can be found in the Constitution of Bosnia and Herzegovina according to which legislatures are not competent to enact retroactive legislation, and that the contested laws amount to retroactive legislation affecting the availability of immunity which potential defendants thought they had when in office. It is not necessary for the Constitutional Court to decide whether the Constitution of Bosnia and Herzegovina contains such principle of non-retroactivity or to determine its extent if it exists, because the Constitutional Court does not consider that the contested laws are retroactive in such a way as to raise an issue of such principle.

60. It is provided under Article IV.3 (j) of the Constitution of Bosnia and Herzegovina that delegates and members shall not be held criminally or civilly liable for any acts carried out within the scope of respective authority in the Parliamentary Assembly of Bosnia and Herzegovina.

61. The Law on Immunity (*Official Gazette of Bosnia and Herzegovina* Nos. 1/97 and 3/99) additionally regulated the institution of immunity for members of the Parliamentary Assembly of Bosnia and Herzegovina as well as for other officials, including the holders of executive power in Bosnia and Herzegovina. The law also provided a definition of immunity, its duration, the authorities competent to repeal the immunity and other issues pertinent to immunity.

62. Pending the adoption of the FBiH Immunity Law, the right to immunity from criminal prosecution and civil liability of holders of legislative and executive power in the Federation of Bosnia and Herzegovina was regulated by the Constitution of the Federation of Bosnia and Herzegovina and the cantonal constitutions. Article IV.A.3 (13) of the Constitution of the Federation of Bosnia and Herzegovina reads that "members of either House of the Legislature shall not be criminally or civilly liable for any acts carried out within the scope of their respective authority. No members of either House shall be detained or arrested by any authority in the Federation without the approval of that House".

63. According to Article IV.B.4 (10) of the Constitution of the Federation of Bosnia and Herzegovina, the President of the Federation, the Vice-President of the Federation, the Prime Minister, the Deputy Minister and Ministers shall not be held criminally or civilly liable for any acts carried out within the scope of his respective authority.

64. According to Article V.2.7 (4) of the Constitution of the Federation of Bosnia and Herzegovina, it was provided that representatives of the Cantonal Legislators may not be called to account criminally or civilly, detained or otherwise punished for an opinion expressed, or a vote cast, in the Legislature.

65. On 6 October 2002, the High Representative for Bosnia and Herzegovina issued Decisions enacting the BiH Immunity Law and the FBiH Immunity Law, which came into effect on the day of their promulgation. The Parliamentary Assembly and the Federation Parliament adopted the said laws in the identical texts as promulgated by the High Representative.

66. The next question is whether the contested provisions of Article 8 of the BiH Immunity Law and Article 8 of the FBiH Immunity Law have a retroactive effect.

67. No express retroactivity clause was inserted in the text of either law. The Constitutional Court recalls that, as a general rule, laws and other regulations are valid as of the date of their entry into force and are applicable to the relations occurring thereafter. One of the basic legal principles with regard to the validity of legal provisions is that a provision cannot be valid prior to its entry into force. Otherwise, there would be a complete uncertainty with regard to legal validity of acquired rights, fulfillment of obligations, legality of particular actions and establishment of certain relations. This would cause a legal uncertainty and various deviations in the society. Therefore, the prohibition of retroactivity, i.e. prohibition of retroactive effect of legal provisions, is an undisputable principle in the international law. The main purpose of prohibition of retroactivity is to exclude elimination or restriction of the right which were legally acquired prior to issuance of a new provision (law) and to avoid possible consequences, although there is a possibility for allowing a legal provision to have a retroactive effect if a new right is established or the existing one expanded, provided that it does not disturb already established relations. The principle of prohibition of retroactivity indisputably relates to compliance with valid and final court decisions and other particular decisions, i.e. retroactivity cannot include the relations settled by a valid decision, i.e. which were finally resolved by competent bodies. In other words, the principle of legal and social certainty requires compliance with the rights determined by valid individual acts during the period of applicability of the previous law.

68. However, as noted above, the contested laws do not retroactively deprive people of any right. In the context of criminal proceedings, they merely provide for a procedure whereby a court is to decide whether a person who asserts immunity has acted within the

scope of that immunity when he/she is alleged to have carried out the actions of which he/she is accused, where immunity has not been waived or withdrawn by a competent person or body. The Constitutional Court knows of no international or comparative law authority for saying that procedures cannot be changed in relation to past alleged offences. Normally when a person is charged with an offence the applicable substantive criminal laws and law of sentencing are those which applied at the time of the offence, but the procedural rules are those in operation at the time of the trial. According to the view taken by the Constitutional Court, the contested laws merely prescribe a new procedure for deciding whether a person was acting within the scope of legal immunity at the time of the alleged crime. As long as it is a fair procedure (and the Constitutional Court has already indicated that the procedure is fair in principle), the contested laws will not give rise to anything that can be characterized as retroactive legislation or as being incompatible with the principles of the Constitution of Bosnia and Herzegovina.

69. For these reasons, the Constitutional Court holds that the contested provisions of Article 8 of the BiH Immunity Law and Article 8 of the FBiH Immunity Law are consistent with the Constitution of Bosnia and Herzegovina.

VIII. Conclusion

70. In view of the aforesaid and having regard to Article 61 paras 1 and 3 of the Constitutional Court's Rules of Procedure, the Constitutional Court decided by a majority of votes as set out in the enacting clause above.

71. Given the decision of the Constitutional Court in the present case, it would be superfluous to dwell separately on the applicant's proposal for the adoption of an interim measure.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 83/03

Request of Mr. Nikola Špirić, First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina for a review of constitutionality of Article 3a of the Law on the Cessation of Application of the Law on Abandoned Apartments (Official Gazette of the Federation of Bosnia and Herzegovina, Nos. 11/98, 38/98, 12/99, 31/01, 56/01, 15/02, 24/03 and 29/03)

DECISION ON ADMISSIBILITY AND MERITS
of 22 September 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (2) and Article 61 paras 1 and 3 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Ćazim Sadiković, Vice-President,

Mr. Tudor Pantiru, Vice- President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Having deliberated on the request of Mr. **Nikola Špirić** in Case No. **U 83/03**,

Adopted at the session of 22 September 2004 the following

DECISION ON ADMISSIBILITY AND MERITS

It is established that Article 3a of the Law on the Cessation of Application of the Law on Abandoned Apartments (*Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 11/98, 38/98, 12/99, 27/99, 43/99, 31/01, 56/01, 15/02 and 29/03) is consistent with the Constitution of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 17 July 2003, Mr. Nikola Špirić ("the applicant"), First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for a review of constitutionality of Article 3a of the Law on the Cessation of Application of the Law on Abandoned Apartments ("the Law") (*Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 11/98, 38/98, 12/99, 31/01, 56/01, 15/02, 24/03 and 29/03).

II. Procedure before the Constitutional Court

2. On 9 October 2003 the applicant urged in his letter that proceedings before the Constitutional Court be concluded.

3. Pursuant to Article 21 para 1 of the Constitutional Court's Rules of Procedure, the Parliament of the Federation of Bosnia and Herzegovina was requested on 14 October 2003 to submit its reply to the request.

4. On 5 November 2003 the Federation of Bosnia and Herzegovina Parliament, through its Legislative-Legal Commission, submitted its reply.

5. Pursuant to Article 25 para 2 of the Constitutional Court's Rules of Procedure, the reply of the Federation of Bosnia and Herzegovina Parliament was communicated to the applicant on 7 November 2003.

6. At its session of 28 April 2004, the Constitutional Court decided to hold a public hearing in accordance with Article 46 of its Rules of Procedure. According to Article 47 para 2 of its Rules of Procedure, the Constitutional Court called the following participants: the applicant, the representatives of the Federation of Bosnia and Herzegovina Parliament, the representatives of the Federation of Bosnia and Herzegovina Government, the Ombudsman of Bosnia and Herzegovina, the Ombudsman of the Federation of Bosnia and Herzegovina and the OSCE.

7. On 29 May 2004 the Constitutional Court held a public hearing.

8. On 2 June 2004 the applicant supplemented his request so as to include Articles 39a-39d of the Law.

9. At its session of 28 June 2004, the Constitutional Court decided to regard the applicant's supplementary request as a separate case.

III. Request

a) Statements from the request

10. The applicant filed a request according to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina. Referring to Articles II.2, II.4, II.6 and II.3 (k) of the Constitution of Bosnia and Herzegovina, the applicant contested Article 3a of the Law. The applicant was of the opinion that Article 3a violated the right to property.

11. The applicant maintained that "in the Federation of Bosnia and Herzegovina, the bodies responsible for the implementation of the property laws rejected on several grounds the requests of the officers of the former Yugoslav People's Army ("JNA") by applying the contested Law (Article 3a): a continuing service in the JNA; the property granted outside the territory of Bosnia and Herzegovina; non-nationals of Bosnia and Herzegovina". The applicant further maintained that the aforementioned provision was "the only exception to the rule which stipulates that displaced persons and refugees have the right to repossess their property". According to the applicant, this provision discriminated against the former JNA officers and the Federation of Bosnia and Herzegovina is alleged to have allocated these apartments to "very important persons, privileged members of the political establishment (VIPs)".

12. The applicant further referred to some of the decisions of the Human Rights Chamber for Bosnia and Herzegovina ("Chamber"), according to which this institution allegedly found a violation of Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") and ordered the Federation of Bosnia and Herzegovina ("FBiH") to amend the Law within a period of six months and no later than 7 June 2002. The applicant claimed that the F BiH failed to comply with this obligation until 24 April 2003. The applicant argued that due to this fact, the Chamber received 1,300 cases and the Commission for Real Property Claims of Displaced Persons and Refugees of Annex 7 of the Dayton Peace Agreement ("CRPC") was forced to resolve claims in many cases.

13. Finally, the applicant pointed out that when the F BiH amended the Law on, respectively, 24 April 2003 and 28 May 2003, "the amendments to Article 3a, paras 1 and 2 increased the number of persons who did not have the right to property repossession. In that way, the FBiH failed to act in accordance with the Chamber's decision, and continued to flagrantly violate the European Convention and Protocols thereto".

b) Reply to the request

14. In its reply of 5 November 2003, the Parliament of F BiH stressed that its Legislative-Legal Commission, after a deliberation in the Parliament on the Amendments to the Law concerned, concluded that the Amendments were in accordance with both the Constitution of F BiH and the Chamber's relevant decisions. The Parliament of F BiH did not further comment on the applicant's request. It submitted part of the Transcript of the Parliament's session at which the aforesaid amendments were adopted to the Constitutional Court.

15. During the deliberation, the FBiH Government representative submitted that the "second" Chamber's decision of March 2003 required the FBiH Government to amend the Law. The representative further submitted that the aims of the amendments were as follows: (a) protection of the property of Bosnia and Herzegovina belonging to the housing funds; and (b) prevention of persons who continued to serve in the JNA outside the territory of Bosnia and Herzegovina or who acquired an occupancy right from the JNA's Housing Fund or a housing fund of the armed forces of one of the other countries established on the territory of the former SFRY to repossess the apartments concerned. The representative also pointed out that the Amendments to the Law had no effect in respect of owners of apartments privatized before 1992.

c) Oral statements made at the public hearing

16. The applicant pointed out that the present case related to the effects of the restrictions imposed by Article 3a on the possibility of former occupancy right holders to claim apartments that they occupied before the JNA's withdrawal from Bosnia and Herzegovina. The applicant underlined that restrictions provided for by Article 3a were in contravention with the 1951 Convention on the Status of Refugees and the 1966 Protocol thereto and Article 1 of Protocol No. 1 to the European Convention. The applicant stressed that Article 3a imposed a restriction on the owners of the pre-war apartments to repossess them.

In relation to the first condition (excluding the right of people who continued to serve in the JNA in a civilian or military capacity after 19 May 1992 outside the territory of

Bosnia and Herzegovina and who were not accepted as having the status of or equivalent to that of a refugee in a country outside the territory of the former SFRY before 14 December 1995), the applicant contended that the restriction did not pursue a legitimate national aim because the Parliament did not demonstrate that the apartments were in fact being used by the FBiH Ministry of Defence for the public benefit (it was advanced by the applicant that the real purpose was different and that a large number of the apartments at issue were allocated to VIPs rather than to armed forces personnel with a real housing need). The applicant argued at the public hearing that he was in possession of documents relating to 50 such cases and that this did not strike a fair balance between the rights of the occupancy right holders and the general public interest because the apartments have not been shown to be used for the public benefit and because the category of people affected by the restriction, including those with the civilian roles in the JNA and the families of serving members of the JNA, is broader than can be justified. Furthermore, the applicant submitted that this amounted to discrimination against the occupancy right holders and their families on the ground of service in the JNA, which was an illegitimate basis for making a distinction between them.

In relation to the second condition (excluding the right of persons who acquired another occupancy right or similar right from the JNA's Housing Fund, or from an equivalent housing fund of a state established on the territory of the former SFRY), the applicant contended that the restriction discriminated against the occupancy right holders and their families on the ground of a false assumption that they probably acquired occupancy right over another apartment elsewhere in the territory of the former SFRY.

17. The F BiH Parliament representative submitted that the contested Law was not in violation of the Constitution of Bosnia and Herzegovina. He referred to the Chamber's decisions in cases *Miholić and others* (CH/97/60 and others) and *MP and others* (CH/02/8202 and others). The representative further stressed that the persons concerned could not be treated as refugees and displaced persons and he adduced reasons in that respect. He pointed out that no one could be the occupancy right holder over two apartments. Finally, he underlined that the Law pursued economic, security and social aims.

18. The FBiH Government representative stressed that the provision of Article 3a related to the occupancy right holders and not to the owners of the apartments because the ownership over these apartments and purchased apartments was the subject of a different law. It was also pointed out that the Law on Housing Relations was anticipated for the household members and presupposed that their rights stemmed from the right of the

occupancy right holder. Furthermore, it was argued that the contested Article 3a was in accordance with the relevant Chamber's decisions. In addition, the FBiH Government representative submitted that Article 3a affected 720 apartments. Regarding the structure of the apartments allocated, it was pointed out that 99% of the apartments during the war were allocated to the families of the killed and wounded members of the armed forces. However, this structure changed after the war and this percentage of apartments that were supposed to be allocated to the war victims amounted to 40%. The FBiH Government representative further informed the Constitutional Court that currently between 60 to 70% of apartments have been allocated by the FBiH Ministry of Defence to the persons who suffered during the war. On the other hand, the FBiH Government representative denied that the Law had extended the circle of people affected by the Law. Regarding the second condition, the FBiH Government representative argued that pursuant to the principle of random choice, five out of thirteen persons have met their housing needs outside Bosnia and Herzegovina. The FBiH Government representative pointed out that an aim of the public interest may be legitimate in the context of Article 3a of the Law: allowing the FBiH to properly manage the available apartments to be allocated to homeless persons from among former soldiers of the Army of the Republic of Bosnia and Herzegovina who are currently in the FBiH.

19. The OSCE representative, as *amicus curiae*, submitted that the scope of Article 3a was not clear. He argued that the scope of the contested Article is *ratione personae* and *ratione temporis* broader than the scope of the same Article prior to the amendments. On the other hand, the contested Article 3a could not be proportionate to a legitimate aim in the light of the requirement of Article 6 of Annex G to the Agreement on Succession Issues, which entered into force in respect of the successor states to the former SFRY on 24 March 2004 and which equally applies domestic legislation regarding occupancy rights equally to former citizens of the SFRY without discrimination. Furthermore, in relation to the proportionality issue, the OSCE representative supported the applicant's allegation that the apartments have been allocated to the VIPs although no concrete evidence could be supplied in this respect. With regard to the second condition, the OSCE representative submitted that the assumption that the occupancy right holders who left the JNA apartments received equal rights over other apartments remained unsubstantiated. Finally, *amicus curiae* pointed out that Article 39a-e of the Law on Sale of Apartments with Occupancy Right violated the same constitutional provisions if interpreted in conjunction with Article 3a of the Law.

d) Additional information obtained after the public hearing

20. On 2 June 2004 the applicant submitted further materials on which he had based its oral statement made at the public hearing.

21. On 8 June 2004 the FBiH Ministry of Defence submitted Rules on allocation of apartments and provided further information establishing the precise scheme on allocation of the JNA apartments:

- 252 families of killed soldiers (32%);
- 181 disabled war veterans (23%);
- 30 demobilized soldiers (3.9%);
- 267 members of the Army of the Federation of Bosnia and Herzegovina (35%);
- 24 employees of the Federal Ministry of Defence (3.1%);
- 13 destroyed apartments with no users (1.6%);
- **Total 767 apartments (100%).**

IV. Legal Background and Relevant Law

Relevant Legislation of the Socialist Federal Republic of Yugoslavia

22. The JNA officers could enter into contracts on purchase of their apartments under the Law on Securing Housing for the JNA (*Official Gazette of the SFRY* No. 84/90). This Law came into force on 6 January 1991. It essentially regulated the housing needs for military and civilian members of the JNA. Article 20 of this Law stipulated that an occupancy right holder residing in an apartment of the JNA's Housing Fund may purchase the apartment on the basis of a contract concluded with the apartment owner. Article 21 laid out a formula for calculating the price payable for apartments purchased in that manner. The price was based on evaluation of the apartment, subject to a number of deductions. In particular, provisions were made for deductions in the purchase price based on the amount of contributions made by a particular purchaser to the JNA's Housing Fund. Article 23 of the Law placed an obligation on the purchaser of an apartment to submit, within a period of 30 days after the conclusion of the purchase contract, a request to the Land Registry to register the ownership of the apartment. Article 33 of the Law on Basic Ownership-Legal Relations provided that ownership over real property was acquired when it was registered

in a registry book (*Official Gazette of the SFRY* Nos. 6/80 and 36/90). This Law was in force in the FBiH until 17 March 1998.

Relevant Legislation of the Socialist Republic of Bosnia and Herzegovina after 11 April 1992, following the independence of the Republic of Bosnia and Herzegovina

23. On 15 February 1992 the Government of the Socialist Republic of Bosnia and Herzegovina issued a Decree imposing a temporary prohibition on the sale of apartments previously characterized as social property (*Official Gazette of the SR BiH* No. 4/92). Article 1 of this Decree temporarily prohibited the sale of socially owned apartments located in the territory of the Republic of Bosnia and Herzegovina to holders of occupancy rights over them, where sales were concluded in accordance with the Law on Securing Housing for the JNA. Article 3 of the Decree declared null and void any purchase contract or other contract relating to a property right in such an apartment where that contract was inconsistent with the provisions of the Decree. Article 4 of the Decree prohibited courts and other state bodies from notarizing such contracts and from registering them either in property registers or in court registers. Article 5 of the Decree provided that the temporary prohibition on sale was to remain in force until the entry into force of a law regulating, *inter alia*, the sale of apartments under the JNA's control, and not later than one year after the date of issuance of the Decree (15 February 1993). However, this Decree was not subsequently adopted as law of the Republic of Bosnia and Herzegovina.

24. On 11 April 1992 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree declaring that Bosnia and Herzegovina was not bound by any purchase contract that an individual had entered into for the purchase of real property from the JNA. This Decree was subsequently adopted as law by the Assembly of Bosnia and Herzegovina on 1 June 1994 (*Official Gazette of the RBiH* No. 13/94).

25. On 15 June 1992 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree which provided that all property belonging to the JNA and other state bodies of the Socialist Federal Republic of Yugoslavia located on the territory of Bosnia and Herzegovina was to be considered as belonging to the Republic of Bosnia and Herzegovina (*Official Gazette of the RBiH* No. 6/92). This Decree established that the Republic of Bosnia and Herzegovina was the *de jure* owner of the apartments that had previously been alienated by the Socialist Federal Republic of Yugoslavia. This, too, was adopted as law in the Republic of Bosnia and Herzegovina on 1 June 1994.

26. The Law on Abandoned Apartments, issued on 15 June 1992 as a Decree Law, was also adopted as law on 1 June 1994 and amended on several occasions (*Official Gazette of the RBiH* Nos. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95). It governed the reallocation of occupancy rights over socially owned apartments that had been abandoned. According to the Law, an occupancy right expired if the holder of the right and the members of his/her household had abandoned the apartment after 30 April 1991 (Article 1). An apartment was considered abandoned if, even temporarily, it was not used by the occupancy right holder or members of the household (Article 2). There were, however, certain exceptions to this definition. For example, an apartment was not to be considered abandoned if it was destroyed, burnt or in direct jeopardy as a result of war actions (Article 3 para 2). An apartment declared abandoned could be allocated for temporary use to an active participant in the struggle against the aggressor of the Republic of Bosnia and Herzegovina or to a person who had lost his/her apartment due to hostilities (Article 7). Such temporary use could last up to one year after the date of the cessation of the imminent threat of war. A temporary user was obliged to vacate the apartment at the end of that period and to place it at the disposal of the authority that had allocated it (Article 8). The occupancy right holder was to be regarded as having abandoned the apartment permanently if he or she failed to resume using it either within seven days (if he/she had been staying within the territory of the Republic of Bosnia and Herzegovina) or within fifteen days (if he/she had been staying outside that territory) from the publication of the Decision on the Cessation of the State of War (*Official Gazette of the RBiH* No. 50/95). The resultant loss of the occupancy right was to be recorded in a decision by the competent authority (Article 10 in conjunction with Article 3 para 3).

27. On 13 March 1993 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree Law on the Resources and Financing of the Army of Bosnia and Herzegovina, which was adopted as law by the Assembly of Bosnia and Herzegovina on 1 June 1994. The Decree provided that the social resources of the former Socialist Federal Republic of Yugoslavia which had been used by the JNA were placed under the temporary use and management of the Army of the Republic of Bosnia and Herzegovina (*Official Gazette of the RBiH* Nos. 6/93 and 17/93).

28. On 12 July 1994 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree Law Amending the Law on Real Property Transactions (*Official Gazette of the RBiH* No. 18/94). Article 1 of this Decree stipulated that contracts relating to real property transactions must be drawn up in writing and that the signatures of the contracting parties must be notarized with the competent court. It further stipulated that any contract relating

to property transactions that had been concluded in the manner inconsistent with the provisions of para 1 of this Article shall elicit no legal effect. Article 3 of the Decree provided that written contracts concluded prior to the entry into force of the Decree were valid, if the parties had fulfilled all obligations arising from the contracts completely or substantially. It further provided that contracts concluded prior to the entry into force of the Decree would be considered valid provided the parties had their signatures notarized with the competent court, within a period of six months after entry into force of the Decree.

29. On 7 November 1994 the Assembly of the Republic of Bosnia and Herzegovina introduced a Law on the Transformation of Social Property (*Official Gazette of BiH* No. 33/94). The purpose of this Law was to transform all property that had formerly been denoted as socially owned property into state owned property. This Law entered into force on 25 November 1994 and was applied as of 1 January 1995.

30. On 3 February 1995 the Presidency of the Republic issued a Decree Law Amending the Law on the Resources and Financing of the Army (*Official Gazette of the RBiH* No. 5/95). This Decree provided that courts and other state bodies shall, with a view to protecting the Army's Housing Fund, adjourn proceedings relating to the purchase of apartments and other properties under the Law on Securing Housing for the JNA for the protection of the housing fund of the army, until the issuing of the Law on Housing in the Republic pending enactment of a housing law in the Republic.

31. On 22 December 1995 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree Law Amending the Law on the Transfer of Resources of the Socialist Federal Republic of Yugoslavia into the property of the Republic. This Decree provided that contracts on sale of apartments and other property concluded on the basis of, *inter alia*, the Law on Securing Housing for the JNA were null and void. This Decree also provided that issues related to the purchase of real estate, which was the subject of annulled contracts, would be resolved under a law to be adopted in the period to come. This Decree came into force on 22 December 1995. It was adopted as law by the Assembly of the Republic of Bosnia and Herzegovina on 18 January 1996 (*Official Gazette of the RBiH* No. 2/96).

32. **Agreement on Refugees and Displaced Persons of Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina**

Article I para 1 reads as follows:

All refugees and displaced refugees persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which

they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.

33. **Constitution of Bosnia and Herzegovina**

Articles II.4 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.

Article II.5 reads as follows:

5. Refugees and Displaced Persons.

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

Article II.3 (k) 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;

34. **Law on Cessation of the Application of the Law on Abandoned Apartments (***Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01, 15/02, 24/03 and 29/03)

Article 3 paras 1 and 2 read as follows:

The occupancy right holder of an apartment declared abandoned or a member of his/her household as defined in Article 6 of the Law on Housing Relations shall have the right to return in accordance with Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina.

Paragraph 1 of this Article shall be applied only to those occupancy right holders who have the right to return to their homes of origin under Article I of Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina. Persons who have left their apartments between 30 April 1991 and 4 April 1998 shall be considered to be refugees and displaced persons under Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina.

Before the Amendments of 24 April 2003 (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 29/03) Article 3a read as follows:

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, at the disposal of the Federation Ministry of Defence, the occupancy right holder shall not be considered a refugee if on 30 April 1991 he/she was in active service in the SSNO (Federal Secretariat for National Defence)- JNA (i.e. not retired) and was not a citizen of the Socialist Republic of Bosnia and Herzegovina according to the citizenship records, unless he/she had residence approved to him/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 from paragraph 1 of this Article will not be considered a refugee if he/she remained in the active military service of any armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995, or if s/he has acquired another occupancy right outside the territory of Bosnia and Herzegovina.

In two of its decisions, the Chamber held that in certain circumstances this violated the right of persons who had purchased their apartments to peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the European Convention, whereas para 1 of Article 3a violated the rights of occupancy right holders to respect for their homes under Article 8 of the European Convention and to peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the European Convention.

As a result, Article 3a was amended, and presently reads as follows:

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, at the disposal of the Federation Ministry of Defence, the occupancy right holder shall not be considered a refugee and shall not have a right to repossession of the apartment in Bosnia and Herzegovina if after 19 May 1992 he/she remained as a civil or military person in active military service outside the territory of Bosnia and Herzegovina, unless he/she had residence approved to him/her in the capacity of a refugee, or other equivalent protective status, in a country outside the former Yugoslavia before 14 December 1995.

A holder of an occupancy right from paragraph 1 of this Article shall not be considered a refugee and shall not have a right to repossession of the apartment in Bosnia and Herzegovina if he/she has acquired another occupancy right or a similar right which substantially represents such a right from the Yugoslav People's Army - Housing Fund or from a different newly created housing fund of the armed forces of a state which has been established on the territory of the former SFRY.

35. **Law on Sale of Apartments with an Occupancy Right** (*Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 27/97, 11/98, 22/99, 27/99, 7/00, 25/01, 32/01, 61/01 and 15/02).

Articles 39a-39e read as follows:

Article 39a

If the occupancy right holder of an apartment at the disposal of the Federation Ministry of Defence uses the apartment legally and he/she entered into a legally binding contract on purchase of the apartment with the Federal Secretariat for National Defence (SSNO) before 6 April 1992 in accordance with the laws referred to in Article 39 of this Law, the Federation Ministry of Defence shall issue an order for the registration of the occupancy right holder as the owner of the apartment with the responsible court.

Article 39b

(...)

The provisions of Article 39a of this Law (...) shall also be applied to contracts on the purchase of apartments concluded before 6 April 1992, in cases where the verification of signatures has not been done before the responsible court.

(...)

Article 39c

The provisions of Articles 39a and 39b shall also be applicable to an occupancy right holder who has exercised the right to repossess the apartment pursuant to the provisions of the Law on the Cessation of Application of the Law on Abandoned Apartments (Official Gazette of the FBiH Nos. 11/98 and 18/99).

Article 39d

A person who does not realize his/her right under this Law with Federation Ministry of Defence, may initiate proceedings before the responsible court.

Article 39e

The occupancy right holder who is not entitled to the repossession of the apartment or does not submit a claim for the repossession of the apartment in accordance with the provisions of Articles 3 and 3a of the Law on the Cessation of Application of the Law on Abandoned Apartments and who entered into a legally binding contract on the purchase of apartment with the Federal Secretariat for National Defence (SSNO) before 6 April 1992, shall have the right to submit a request to the Federation Ministry of Defence for compensation of the funds paid on that basis, unless it is proved that these funds were acknowledged for purchase of an apartment outside the territory of Bosnia and Herzegovina.

36. **Law on Housing Relations** (*Official Gazette of the Socialist Republic of Bosnia and Herzegovina* Nos. 14/84, 12/87 and 36/89; *Official Gazette of the Republic of Bosnia and Herzegovina* No. 2/93; *Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 11/98, 38/98, 12/99 and 19/99).

Article 12 reads as follows:

The citizen may have an occupancy right to one apartment only.

A member of the family of the occupancy-right holder as well as the person who ceased to be a member of that family although remaining to live in that household (Article 6 para 1) may not be a sole occupancy-right holder to another apartment.

It is prohibited to be an occupancy-right holder simultaneously to more than one apartment.

Article 83a reads:

The occupancy right holder may not be given a notice on the termination of the contract on use of apartment under this Law if the circumstances, which are the basis for the termination of the contract, occurred within the period while the occupancy right holder was absent from the apartment in the capacity of a refugee or a displaced person under Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina.

All legally binding court decisions issued in the proceedings referred to in paragraph 1 of this Article, under which the occupancy right holder was given a notice on the termination of the contract on use of apartment from 30 April 1991 until the day when this law enters into force, shall be null and void.

Proceedings for the termination of the contract on use of apartment for the reasons determined by the Law, which were initiated prior to the entering into force of this Law and in which a binding decision was not issued until its entering into force, are terminated.

The return of an apartment into the possession of the occupancy right holder referred to in paragraph 2 of this Article shall be carried out in accordance with the Law on the Cessation of the Application of the Law on Abandoned Apartments.

VI. Admissibility

37. According to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, "the Constitutional Court shall have exclusive jurisdiction to decide any dispute (…) whether any provision of an Entity's constitution or law is consistent with this Constitution. Disputes may be referred only by (…) the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly (…)".

38. The applicant is the First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina. Furthermore, the applicant alleged the unconstitutionality of the provisions of an FBiH law. The contested Amendments to the Law were adopted after 14 December 1994 when the Constitution of Bosnia and Herzegovina entered into force. Thus, the Constitutional Court entertains *ratione temporis* jurisdiction (see Constitutional Court, Decision No. *U 55/02* of 26 September 2003; published in the *Official Gazette of Bosnia and Herzegovina* No. 3/04). The request for a review of conformity of Article 3a of the Law refers to a very important question under Article II.3 (k) of the Constitution of Bosnia and Herzegovina and Article 1 of the Protocol

No. 1 to the European Convention. The appellant adduced detailed reasons for the review, particularly referring to the relevant jurisdiction of the Chamber.

39. In view of the provisions of Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Article 16 para 2 of its Rules of Procedure, the Constitutional Court established that the present request was filed by an authorized person and that the requirements set out in Article 16 para 2 of the Rules of Procedure of the Constitutional Court have been met in this case.

40. It follows that the instant request is admissible.

VII. Merits

41. The applicant alleged that Article 3a of the Law is not consistent with Article II.3 (k) of the Constitution of Bosnia and Herzegovina and Article 1 of the Protocol No. 1 to the European Convention.

42. Given that the rights and freedoms provided for in Article II of the Constitution of Bosnia and Herzegovina and in the European Convention have the same substantial and legal effect (see Constitutional Court, Decision No. U 17/02 of 4 May 2001, published in the *Official Gazette of Bosnia and Herzegovina* No. 17/01) and taking account of the fact that Article 1 of the Protocol No. 1 to the European Convention regulates in more detail the right to property, the Constitutional Court will focus only on Article 1 of Protocol No. 1 to the European Convention.

43. Article 1 of the 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.

44. In order to be able to examine the contested Article 3a, the Constitutional Court must first define the scope of the provisions at issue. It is clear from the wording of Article 3 paras 1 and 2 and Article 3a that the contested provisions concern only "occupancy right

holders". Article 3a is an exception to Article 3 of the Law, which enables the "occupancy right holder of an apartment declared abandoned or a member of his/her household" to return "to their homes of origin" provided that they "have left their apartments between 30 April 1991 and 4 April 1998". If this condition is met, they have to be automatically considered "to be refugees and displaced persons under Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina", and therefore they have the right to return.

45. As an exception to this general rule, Article 3a imposes special restrictions on the right of the occupancy right holder over the so-called 'JNA apartments' (i.e. apartments at the disposal of the FBiH Ministry of Defence) to repossess their apartments. In the first place, the person affected shall not be considered a refugee if "after 19 May 1992 (the occupancy right holder) remained (…) in active military service outside the territory of Bosnia and Herzegovina unless he/she 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". Additionally, the occupancy right holder cannot have another occupancy right acquired or a similar right "from a different newly created housing fund of the armed forces of a states which has been established on the territory of the former SFRY".

46. It follows that the Constitutional Court is obliged to answer the following three questions. Firstly, do the occupancy rights in respect of the JNA's apartments constitute 'possessions' within the meaning of Article 1 of Protocol No. 1 to the European Convention? Secondly, if they are possessions, does the contested Article 3a interfere with them so as to engage Article 1 of Protocol No. 1 to the European Convention? Thirdly, if Article 1 of Protocol No. 1 to the European Convention is engaged, is the interference justified under that Article?

a) Is the occupancy right a possession within the meaning of Article 1 of Protocol No. 1 to the European Convention?

47. The Constitutional Court recalls its jurisprudence regarding the occupancy right. The term 'possession' includes a wide range of proprietary interests intended to be protected (see former European Commission for Human Rights, the *Wiggins v. the United Kingdom* judgment, No. 7456/76, Decisions and Reports (DR) 13, paras 40-46, (1978)) representing an economic value. The notion of 'possession' has an autonomous approach and the demonstration of an established economic interest by an appellant may be sufficient to

establish a right protected by the European Convention whereby the question whether this proprietary interest is acknowledged as a legal right in the national legal system is not of importance (see European Court of Human Rights, the *Tre Traktörer Aktiebolag v. Sweden* judgment of 7 July 1989, Series A No. 159, para. 53). The Constitutional Court has established on several occasions in its present case law that the occupancy right might be considered as 'possession' within the meaning of Article 1 of Protocol No. 1 to the European Convention due to the fact that "an occupancy right entails, inter alia, the right to use an apartment undisturbed and permanently, the possibility for cohabiting members of the holder's household to obtain the occupancy right after the holder's death or after the termination of the latter's occupancy right on other grounds and automatic obtaining by the holder's cohabiting spouse of a joint occupancy right. The Constitutional Court therefore finds that the appellant's occupancy right over his apartment constitutes a `possession' in the sense of Article 1 of Protocol No. 1 to the Convention" (see Constitutional Court, Decision No. *U 6/98* of 24 September 1999, published in the *Official Gazette of Bosnia and Herzegovina* No. 20/99).

b) Does Article 3a of the contested Law interfere with the right to peaceful enjoyment of possessions?

48. The effect of Article 3a is to prevent the occupancy right holders who do not meet the conditions laid down in this Article from being reinstated to their pre-war apartments. Therefore, this Article continuously deprives the occupancy right holders who are affected by the Law of their right to enjoy their possessions. It is accordingly necessary for the Constitutional Court to consider whether these deprivations are justified under Article 1 of Protocol No. 1 of the European Convention as being provided for by law and in the public interest.

c) Is the interference justified?

49. According to the jurisprudence of the European Court of Human Rights, Article 1 of Protocol No. 1 to the European Convention comprises three distinct rules. "The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose" (see, *inter alia*, European Court of

Human Rights the *Sporrong and Lönnroth v. Sweden* judgment of 23 September 1982, Series A No. 52, para. 61; the *Scollo v. Italy* judgment of 28 September 1995, Series A No. 315-C, para. 26 with further references). Any interference with the right pursuant to either the second or third rules must be provided for by law, it must pursue a legitimate aim and it must strike a fair balance between the right of the right holder and the public and general interest. In other words, to be justified, interference must not only be imposed by a legal provision which meets the requirements of the rule of law and serves a legitimate aim in the public interest but must also maintain a reasonable relationship of proportionality between the means employed and the aim sought to be realized. In particular, the interference with the right must not go beyond than necessary to achieve the legitimate aim, and occupancy right holders must not be subject to arbitrary treatment, or required to bear an excessive burden in pursuit of the legitimate aim.

c) 1. Interference provided for by law

50. Interference is lawful only if the law, which is the basis of the interference, is: (a) adequately accessible to the citizens; (b) precise so as to enable the citizen to regulate his conduct, (c) in accordance with the rule of law so that the legal discretion granted to the executive is not expressed in terms of an unfettered power, *i.e.* the law must give to the individual adequate protection against arbitrary interference (see European Court of Human Rights, the *Sunday Times* judgment of 26 April 1979, Series A No. 30, para 49; the *Malone* judgment of 2 August 1984, Series A No. 82, paras. 67-68).

51. The Constitutional Court concludes that the Law on Cessation of the Application of the Law on Abandoned Apartments meets the standards in terms of the European Convention (see also the decision of the Human Rights Chamber, *M.P. and others*, CH/02/8202, paras 144 ff).

c) 2. Interference in the public interest

52. The European Court of Human Rights has acknowledged that because of their direct knowledge of the society and its needs, the national authorities in principle enjoy a certain margin of appreciation in warranting measures of deprivation of property. The decision to expropriate property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonable differ widely. The national legislature's judgment will be respected unless that judgment be manifestly without reasonable foundation (see European Court of Human Rights, the *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A No. 98, para. 46).

53. With respect to the Law, the FBiH submitted transcripts from the discussion of the contested Amendments in which it is stated that there were two aims behind these Amendments. Firstly, the Law is aimed at correcting inequalities that existed between the occupancy right holders over the JNA apartments and all other occupancy right holders. In other words, the FBiH followed the principle which had existed in the former SFRY according to which a person "may have an occupancy right over one apartment only" (Article 12 of the Law on Housing Relations). Secondly, the aim is to free scarce housing space for former soldiers of the Army of the Republic of Bosnia and Herzegovina and their families or persons who were forced to leave their homes due to the war hostilities (see the Chamber's decision, *M.P. and others*, CH/02/8202, para 150).

54. The first aim of the authorities to preserve the housing resources and give priority in the allocation of apartments to members of its own army, war veterans and other persons in housing need, could in some circumstances advance a strong public interest. Although an aim which is in the public interest may cease to be legitimate if it is pursued in a way that discriminates unjustifiably between classes of people, this is a matter which primarily relates to the manner in which the aim is pursued rather than the inherent legitimacy of the aim. This will be considered in relation to proportionality in para 58 below. The second aim of the authorities, putting all holders of occupancy rights on an equal footing as regards their occupancy rights, might be regarded as a legitimate one (see also the Chamber's decision *Medan and others*, CH/96/3, para 36). It encompasses the constitutional principle of equality under Article II.4 of the Constitution of Bosnia and Herzegovina and the principle of general welfare under sub-paragraph 4 of the Preamble to the Constitution of Bosnia and Herzegovina.

55. The question that remains to be examined is whether Article 3a of the contested Law pursues these aims. The first paragraph of Article 3a serves the first of those aims (allowing housing resources to be applied for the benefit of those with a priority need in Bosnia and Herzegovina) by increasing the number of apartments which are available for that purpose. The second paragraph of Article 3a pursues both that aim and the second aim – equality of treatment of occupancy right holders.

56. The Constitutional Court therefore concludes that both paragraphs of Article 3a of the Law must be regarded as serving legitimate aims.

c) 3. Striking a fair balance between the rights of the right holders and the public interest (proportionality)

57. When deciding whether Article 3a of the Law strikes a fair balance, or a reasonable relationship of proportionality, between the rights of the occupancy right holders and the public interest, the Constitutional Court must particularly consider two questions. Firstly, does the interference with the rights go beyond than necessary to achieve a legitimate aim? Secondly, does the first paragraph of Article 3a subject any of the occupancy right holders to arbitrarily unfavourable treatment compared to others, so that they are required to bear an excessive burden in pursuit of the legitimate aim concerned?

c) 3. I) Necessary scope of interference with rights

58. In view of the severity of the housing shortage and economic constraints in Bosnia and Herzegovina, as well as difficulties in deciding how to allocate housing resources to a large number of people who need it, including those who currently occupy apartments in accordance with the contested Law, the Constitutional Court requires firm evidence to rest assured that the position of the legislator has exceeded its limits of discretionary powers in deciding what is necessary in order to address a very serious social problem. The Constitutional Court is particularly cautious in determining that an institution has exceeded its limits of discretionary powers with regard to the necessity for a measure (which is in some ways analogous in national law to the "margin of appreciation" which is sometimes allowed to the states in public international law under the jurisprudence of the European Court of Human Rights) where, as in this case, the issue is one with significant economic ramifications, the rights of the current occupants of the apartments as well as those of former occupants are affected, the solution being attained by a democratic legislation after a full-scale debate that included examination of the law by the Legislative-Legal Commission of the Parliament.

59. Bearing these factors in mind, the Constitutional Court concludes that it has not been established that the legislator interfered with the rights more than can be reasonably considered to be necessary in pursuance of a legitimate aim.

c) 3. II. Arbitrary treatment and the imposition of excessive burden

60. When the Chamber decided that Article 3a of the Law in its original form violated (*inter alia*) the right of occupancy right holders to peaceful enjoyment of their possessions, it reached that conclusion primarily on the ground that the Article concerned was arbitrary and imposed excessive burdens on particular groups of people without objective and reasonable justification. The first paragraph of Article 3a discriminated against people

who had been members of the JNA at the time (from 30 April 1991) when Bosnia and Herzegovina was still a part of the unified state of the SFRY. Discrimination was also based on the ground of citizenship. The Chamber decided that it was not justifiable to treat people "unfavourably" on those grounds. The Chamber also considered that in some cases it was not justifiable to allocate apartments to people who were not in the affected categories of people (see the Human Rights Chamber, cases Nos. CH/02/8202, CH/02/9980 and CH/02/11011, *M. P. and others v. the Federation of Bosnia and Herzegovina*, Decision of 4 April 2003, paras 154-158, 176 and 191-192.) The second paragraph of Article 3a, preventing people from holding occupancy rights over more than one apartment in the territory of the former Yugoslavia, was considered to be justifiable (ibid, paras 160-163, 178 and 193-194.)

61. The Constitutional Court is faced with the question whether the new version of Article 3a, amended following the Chamber's decision, is consistent with the Constitution of Bosnia and Herzegovina. The question has to be addressed abstractly, regardless of the possibility that even a law which is essentially constitutional may be implemented or applied in certain cases and under specific circumstances in an unconstitutional manner. The Court must decide whether the amended form of Article 3a is arbitrary with regard to the treatment of certain "categories" of persons or whether it imposes an excessive burden on some of them and whether the interference with the constitutional rights is unjustified. Since the two paragraphs of Article 3a affect different groups of persons and interfere with their rights on various grounds, it is necessary to examine each paragraph separately.

c 3. II. a) Proportionality of paragraph 1 of the contested Article 3a of the Law

62. The first paragraph of the amended version of Article 3a avoids confrontation with several problems which led the Chamber to take the view that the earlier version violated rights under the European Convention. For instance, the amended version does not discriminate on the ground of a person's citizenship records. It does, of course, discriminate on the ground of armed forces in which the person served after 19 May 1992. According to the Constitutional Court, that is a ground which may be an objective justification for differential treatment. On 19 May 1992 the JNA withdrew from the territory of Bosnia and Herzegovina pursuant to a UN Security Council Resolution (UN Doc. S/RES/752 (1992) of 15 May 1992) and the Government of the Republic of Bosnia and Herzegovina assumed control over the territory of Bosnia and Herzegovina. From that date, a person serving in the armed forces of another country could be regarded as having no duty of loyalty towards the Republic of Bosnia and Herzegovina. If the armed forces belonged

to a country on territory within the area of the former SFRY and that country and the Republic of Bosnia and Herzegovina came to be in a state of war with each other, it could be concluded that the Republic of Bosnia and Herzegovina no longer had any duty of protection towards that person. Although the FBiH did not explain why such military service should result in the loss of a person's occupancy right, the Constitutional Court considers that the cessation of the obligations of a resident's loyalty to the state in which he or she resides and the state's obligation to protect and advance the welfare of its residents, can provide a rational and objective justification for adoption of a measure which treats people differently on that ground.

63. However, Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina affords the right to return to their homes of origin to all refugees and displaced persons. According to Article I para 1 of Annex 7, "all refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries". According to Article II.5 of the Constitution of Bosnia and Herzegovina in conjunction with Article VI of Annex VII, "any returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law as defined in the Statute of the International Tribunal for the Former Yugoslavia since January 1, 1991 or a common crime unrelated to the conflict, shall upon return enjoy an amnesty. In no case shall charges for crimes be imposed for political or other inappropriate reasons or to circumvent the application of the amnesty".

64. Furthermore, the Constitutional Court concluded in many of its decisions that the repossession of property was a primary objective of the General Framework Agreement for Peace in Bosnia and Herzegovina and the Constitution of Bosnia and Herzegovina and that the restoration of previously existing rights to houses and apartments should in this perspective be seen as a predominating objective (see Constitutional Court, Decision No. *U 14/00* of 4 May 2001, para 34, published in the *Official Gazette of Bosnia and Herzegovina* No. 33/01). These reasons were so compelling that the Constitutional Court concluded that even persons who had not concluded a contract on use of the apartment with the competent housing authority (having only a ruling on allocation of apartment) and therefore had not formally acquired the occupancy right, had the right to return (*Ibid*,

U 14/00, para 5, 35). The Chamber acknowledged in the *M.P.* case (*loc. cit*, para 158) that "the Federation of BiH has had a difficult task in reconciling the rights of the pre-war occupants to repossess the two disputed apartments and of the current occupants to have their housing needs met". However, "when weighing the opposing interests of those individuals, preference should be given to the right of the applicants to return".

65. Nevertheless, the Constitutional Court points out that the Chamber in its jurisprudence of the *M.P.* case (*loc. cit*, para 162) made an exception with regard to the pre-war occupants of the JNA apartments. The Chamber stated:

"(…) The Chamber further notes that occupancy rights had an important social role in the pre-war Bosnia and Herzegovina, as anywhere else in the former SFRY. Service members of the then JNA were thus allocated apartments in Bosnia and Herzegovina because the former JNA stationed them there and had to accommodate them. The allocation right holder over such apartments was the former JNA. After the dissolution of the former SFRY, the allocation right holder over such apartments located in the FBiH became the FBiH Ministry of Defence. The purpose of those apartments remained the same – to satisfy the housing needs of the military personnel. The FBiH follows that reasoning when it deprives Mr. Štrbac, a service member of the former JNA who left Bosnia and Herzegovina and continues to serve in a foreign army, of his apartment in Bosnia and Herzegovina. The Chamber thus holds that it was proportionate to deprive Mr. Štrbac and the applicant of their pre-war home in order to meet the housing needs of a war veteran and his family. The applicant Štrbac was not made to bear an excessive burden, considering all of her circumstances."

The Constitutional Court accepts this conclusion of the Chamber. As the Chamber concluded, it was a well-known fact that the JNA accommodated its military personnel according to the place of their deployment. Therefore, transfer of the occupancy right should be understood as a new permanent place of residence. People in this position should not be regarded as refugees or displaced persons within the meaning of Article 1 of Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina.

66. When considering whether the amended version of Article 3a interferes in an arbitrary or excessive manner with the rights of occupancy right holders, the Constitutional Court considers that the following factors also bear relevance. Firstly, the amended form of Article 3a does not affect those people who had already purchased the apartments. Secondly, it does not affect people who were recognized by a country outside the territory

of the former SFRY as having the protected status of, or equivalent to, refugees or displaced persons. Thirdly, other people now occupy the apartments and would claim occupancy rights over them. From the point of view of legal certainty, under Article I.2 of the Constitution of Bosnia and Herzegovina, repossession of the apartments would cause many legal uncertainties and clear and practical difficulties.

67. The Constitutional Court therefore considers that Article 3a para 1 of the Law strikes a fair balance between the rights of occupancy right holders and the public interest.

c 3. II. b) Proportionality of para 2 of the contested Article 3a

68. The Constitutional Court must now consider whether it is justifiable to treat the acquisition of another occupancy right or a similar right "from a different newly created housing fund of the armed forces of a state which has been established on the territory of the former SFRY" as a reason for denying the right to repossess an apartment. Does this strike a fair balance between those two rights and interests?

69. In the former SFRY there was a principle that a person "may have an occupancy right to one apartment only". That was necessary in order to meet the social needs and provide the population with the necessary housing requirements. An occupancy right over an apartment automatically means permanent residence of the person concerned. Even in the process of privatization of apartments, Bosnia and Herzegovina has maintained this principle to the present day so that no one could privatize more than one apartment.

70. Moreover, the General Framework Agreement for Peace in Bosnia and Herzegovina covers not only Bosnia and Herzegovina and its competent authorities but also the neighbouring states – the Republic of Croatia and the State Community of Serbia and Montenegro. That was necessary in order to encompass various aspects of the aftermath of the war. For that reason, these countries were obliged to establish progressive measures for regional stability (Annex 1B) and to comply with the implementation of the civilian aspects of the Agreement (Annex 10). The Constitutional Court considers that some problems, such as the return of refugees to their homes and the repossession of property, have a regional dimension since the movement of persons over the border have a direct influence on, *inter alia*, property relations in Bosnia and Herzegovina.

71. In the light of all those factors, the Constitutional Court concludes that taking account of certain circumstances relating a person's situation in another country on the territory of the former SFRY, such as the fact that the person has an occupancy right in that country,

can be regarded not merely as being proportionate to the aim of protecting scarce housing resources and advancing equality but (in current economic circumstances) as being essential if the housing needs of all those who are particularly vulnerable and needy are to be adequately addressed within a reasonable time.

72. The Constitutional Court therefore concludes that the interference with the right to peaceful enjoyment of possessions as established by the second paragraph of the contested Article 3a, is not necessarily disproportionate to its legitimate aims.

c).4 The result of the Constitutional Court's assessment

73. In the light of the factors considered above, the Constitutional Court reached the conclusion that both paragraphs of the contested Article 3a, evaluated abstractly, can be said to pursue a legitimate aim and do not interfere with rights in the manner which is arbitrary or which imposes an excessive burden on individuals having regard to the rights and interests of other individuals and the general public interest. Article 3a interferes with the right of certain groups of people to peaceful enjoyment of their possessions, namely occupancy rights over apartments in Bosnia and Herzegovina, but the interference can be justified by the circumstances currently prevailing in Bosnia and Herzegovina and is in accordance with the law and proportionate to the strong and legitimate public interests.

74. The Constitutional Court therefore concludes that the contested Article 3a of the Law is consistent with Article II.3 (k) of the Constitution of Bosnia and Herzegovina and Article No. 1 to the European Convention.

VIII. Conclusion

75. Pursuant to Article 61 paras 1 and 3 of the Rules of Procedure of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause above.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

ANNEX

Separate opinion of Judge David Feldman in case No. U 83/03

1. I agree with the majority of the Court that the application is admissible, and that the second paragraph of Article 3a of the Law on Cessation of the Application of the Law on Abandoned Apartments is in conformity with Article II.3 (k) of the Constitution of Bosnia and Herzegovina and Article 1 of the Protocol No. 1 to the European Convention.

2. Regrettably, I have the misfortune to disagree with the majority as to the compatibility of the first paragraph of Article 3a with the Constitution. My reasons are as follows.

3. I agree with the Court that occupancy rights in respect of JNA-apartments constitute 'possessions' within the meaning of Article 1 of Protocol No. 1 to the European Convention, that and that both paragraphs of the challenged Article 3a interferes with them so as to engage the protection of Article II.3 (k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. I also agree that the interference serves legitimate aims, and is a response to a pressing social need. However, in relation to paragraph 1 of Article 3a I do not agree that the interference is justified. In my view, the paragraph fails to strike a fair balance between the rights of occupancy right holders and the general interest, and is disproportionate to its legitimate aim.

4. The legislation offers no opportunity for former members of the JNA to obtain compensation for loss of the occupancy right over a former JNA apartment, even where it would inflict an excessive burden on the occupancy right holder to deprive him or her of the right without compensation. Furthermore, there is no procedure for deciding whether, in individual cases, an occupancy right holder should receive compensation for losing his or her rights over an apartment.

5. I agree with the Court that it is necessary to deprive the occupancy right holders of their rights in respect of former JNA apartments in order to achieve the legitimate objective of the legislation. However, unlike the Court, I consider that the absence of compensation in any circumstances, and of any means of assessing the need for compensation, may in some cases force particular individuals to bear an excessive burden in pursuit of the legitimate aim.

6. The first paragraph of Article 3a deprives the occupancy right holders of their possessions (in this case the right to occupy an apartment). It does not merely impose a control on their use of that possession. While there is a procedure for compensating some people for loss of an occupancy right under Article 39e of the Law on Sale of Apartments with an Occupancy Right (see paragraph 35 of the Court's decision), it applies only if the claimant satisfies the requirements of Article 3a of the Law on Cessation of the Application of the Law on Abandoned Apartments. If a claimant does not satisfy the requirements of Article 3a, there is no legal right to any compensation.

7. Only in exceptional circumstances does the case-law of the European Court of Human Rights on Article 1 of Protocol No. 1 to the European Convention regard it as fair and proprtionate to deprive people of property without any compensation. That being so, it is necessary to consider whether there are exceptional circumstances which justify a refusal to compensate in the circumstances. The challenged legislation allows no possibility of obtaining compensation even in cases of special hardship, or of adjusting the level of compensation to the circumstances of individual claimants, for example to take account of the fact that one person may have obtained an occupancy right elsewhere while another person may not have had that opportunity. That lack of sensitivity to individuals' circumstances is relevant when deciding whether the denial of compensation for interference with the right is proportionate to the legitimate aim: see e.g., *mutatis mutandis*, the judgments of the European Court of Human Rights in *Lithgow v. United Kingdom*, above, at §§ 122-122 of the judgment, and *Papachelas v. Greece*, App. No. 31423/96, judgment of 25 March 1999.

8. Taking these matters into account, I consider that the provision of paragraph 1 of Article 3a of the Law is disproportionate to the legitimate aim which it serves because there are no exceptional reasons for preventing a person from having his or her particular circumstances considered when deciding whether to provide compensation, or what level compensation should be provided. To that extent, I take the view that the first paragraph of Article 3a of the Law on Cessation of the Application of the Law on Abandoned Apartments does not strike a fair balance between the rights of occupancy right holders and the public interest, and is 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.

9. By contrast, the second paragraph of Article 3a does seem to me to strike a fair balance between the competing rights and interests. The second paragraph of Article

3a, unlike the first paragraph, applies only to people who have an occupancy right in respect of another apartment elsewhere on the territory of the former SFRY. In my view, it is not disproportionate to deprive such people of their occupancy rights over former JNA apartments in Bosnia and Herzegovina without providing compensation, because their loss is significantly less than would be that of people adversely affected by the first paragraph of Article 3a who do not have an occupancy right elsewhere.

10. I would therefore have held that the first paragraph of Article 3a is unconstitutional, and that it would remain unconstitutional unless and until amended to create a procedure for assessing whether people adversely affected by it thereby suffering excessive hardship which needs to be alleviated by payment of compensation. Such compensation might be needed only in rare cases, and if required it might amount only to a relatively small amount, taking account of the restricted nature of occupancy rights and the obligation on a person who has suffered a wrong to take reasonable steps to mitigate his or her loss. Nevertheless, I consider that the absence from paragraph 1 of Article 3a of any requirement to make such an assessment renders that paragraph incompatible with Article II.3 (k) of the Constitution of Bosnia and Herzegovina and with Article 1 of Protocol No. 1 to the European Convention.

11. To that limited extent, I respectfully dissent.

Case No. U 14/04

Request of Mr. Adnan Terzić, the Chair of the Council of Ministers of Bosnia and Herzegovina for a review of conformity with the Constitution of Bosnia and Herzegovina of the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Sales Tax on Goods and Services and the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Special tax on Non-Alcoholic Drinks (Official Gazette of the Federation of Bosnia and Herzegovina, No. 39/04)

DECISION ON INTERIM MEASURE
of 5 August 2004

DECISION ON ADMISSIBILITY AND MERITS
of 29 October 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article 59 para 2 (5) and Article 78 para 1 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina*, No. 2/04), as a Chamber, composed of the following judges: Mato Tadić, President, Prof Dr Ćazim Sadiković and Prof. Dr Miodrag Simović, Vice-Presidents, having considered the request of **Mr. Adnan Terzić**, case No. **U 14/04,** at its session held on 5 August 2004, adopted the following

DECISION ON INTERIM MEASURE

The request of Mr. Adnan Terzić, Chair of the Council of Ministers, for an interim measure is hereby granted.

An application of the Law on Amendments to the Law on Sales Tax on Goods and Services (*Official Gazette of the Federation of Bosnia and Herzegovina,* No. 39/04) and the Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks (*Official Gazette of the Federation of Bosnia and Herzegovina*, No. 39/04) is hereby deferred until adoption of a final decision on the request for review of constitutionality of these Laws with the Constitution of Bosnia and Herzegovina. The deferral enters into force on the date of adoption of the decision on interim measure.

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

Reasons

1. On 3 August 2004, Mr. Adnan Terzić, the Chair of the Council of Ministers of Bosnia and Herzegovina ("applicant"), filed a request with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") concerning a review of conformity with the Constitution of Bosnia and Herzegovina of the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Sales Tax on Goods and Services and the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Special Tax on Non-Alcoholic

Drinks. Both Laws were enacted by the Parliament of the Federation of Bosnia and Herzegovina and they were published in the *Official Gazette of the Federation of Bosnia and Herzegovina* No. 39/04. The said Laws entered into force on 25 July 2004. The applicant also filed a motion to issue an interim measure whereby the Constitutional Court would suspend the enforcement of Law on Amendments to the Law on Sales Tax on Goods and Services and the Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks pending the adoption of a final decision on request for review of conformity of these Laws with the Constitution of Bosnia and Herzegovina.

2. The applicant maintained that the Parliament of the Federation of Bosnia and Herzegovina failed to obtain a mandatory consent of the Governing Board of the Indirect Taxation Administration prior to enacting the Law on Amendments to the Law on Sales Tax on Goods and Services and the Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks. The Parliament of the Federation of Bosnia and Herzegovina was obliged to obtain the said consent according to Article 25 para 4 of the Law on Indirect Taxation System in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, No. 44/03), which provides that as of the date of entry into force of this Law, the introduction of any additional indirect taxes in Bosnia and Herzegovina, as well as the promulgation or amendment of legislation on indirect taxation must be approved by the Governing Board of the Indirect Taxation Administration. Moreover, Article 1 para 2 of the said Law reads that the term “indirect tax” shall refer to import and export duties, excise taxes, value added tax and all other taxes levied on goods and services, including sales taxes and road tolls. Accordingly, in the applicant’s view, the Parliament of the Federation of Bosnia and Herzegovina enacted amendments to the law that regulated the field of indirect taxation without obtaining the consent of the Governing Board of the Indirect Taxation Administration, which was obliged to do so by virtue of the provision quoted above.

3. Furthermore, the applicant attached a copy of a letter addressed to the Chairman of the Governing Board of the Indirect Taxation Administration on 2 August 2004 seeking therein institution of proceedings before the Constitutional Court in view of the fact that the challenged laws were enacted contrary to the envisaged procedure, thereby violating provisions of the Constitution of Bosnia and Herzegovina. In addition, the applicant attached a letter of the Federation Ministry of Finance dated 2 August 2004, which reads that the said Ministry and the Government of the Federation of Bosnia and Herzegovina did not give a positive opinion prior to the enactment of the challenged laws and that the application of the said laws would damage substantially the budgets of, respectively, the Federation of Bosnia and Herzegovina and the Cantons.

4. The applicant recalls that the Law on Indirect Taxation System in Bosnia and Herzegovina was enacted after the Federation of Bosnia and Herzegovina and the Republika Srpska concluded an Agreement on the Competences in the Field of Indirect Taxation whereby the field of indirect taxation within the tax policy system was transferred to the State of Bosnia and Herzegovina. The conclusion of the said Agreement was preceded by respective decisions of the Entity Parliaments on giving consent thereto. The Parliament of the Federation of Bosnia and Herzegovina adopted a decision on giving its consent to the said Agreement on 3 December 2003 (*Official Gazette of the Federation of Bosnia and Herzegovina*, No. 64/03) whereby the field of indirect taxation within the tax policy system was transferred into the sole competence of the State of Bosnia and Herzegovina within the meaning of Article III.5 (a) of the Constitution of Bosnia and Herzegovina.

5. The applicant pointed out that Article III.3 (b) of the Constitution of Bosnia and Herzegovina obliged the Entities to comply fully with decisions of the common institutions of Bosnia and Herzegovina. One of such decisions would indubitably be the Law on Indirect Taxation System in Bosnia and Herzegovina enacted by the Parliamentary Assembly of Bosnia and Herzegovina. The challenged laws were enacted by the Parliament of the Federation of Bosnia and Herzegovina without the consent of the Governing Board of the Indirect Taxation Administration, which was mandatory under Article 25 para 4 of the Law on Indirect Taxation System of Bosnia and Herzegovina and this, according to the applicant, constituted a violation of Articles III.3 (b) and III.5 (a) of the Constitution of Bosnia and Herzegovina. Finally, the applicant considered that the application of the challenged laws prevented an undisturbed functioning of a single economic space as guaranteed under Article I.4 of the Constitution of Bosnia and Herzegovina.

6. As grounds for adoption of an interim measure, the applicant gives the future damage prevention, which would occur by application of the challenged laws. The applicant sees the future damage in the fact that, according to the information of the Federal Ministry of Finances in 2003 in the Federation of Bosnia and Herzegovina, on the basis of the tax on turnover of building material and building services, the amount of KM 65.647,806 was collected, while on the same basis in the period January – June 2004, the amount of KM 32.331,753 was collected. The estimates of that Ministry are that by the application of the challenged Law on Amendments to the Law on Turnover Tax on Goods and Services until the end of the year, the loss in the amount of around 30,000,000KM will be stated in the cantonal budgets. In addition, it is stated that prior to adoption of the challenged laws, the solutions in the field of Law on Turnover Tax on Goods and Services in the Entities and Brčko District of Bosnia and Herzegovina were harmonized with respect to the basic elements of taxation and tax treatment of the construction industry. The application of the

challenged laws and tax treatment of the building as production, instead as service activities, may cause negative impact on the budget of the Republika Srpska and Brčko District of Bosnia and Herzegovina being that the building material has not been so far taxed in the Federation of Bosnia and Herzegovina. The legal entities that deal with building activities and have seats in the Republika Srpska and Brčko District of Bosnia and Herzegovina will be able to buy such material in the Federation of Bosnia and Herzegovina without paying tax on turnover. Also, according to the data from 2003, on the basis of excise tax on non-alcoholic drinks and fruit drinks, the following incomes were realized in the budget of the Federation of Bosnia and Herzegovina: from imported non-alcoholic drinks, the excise tax was collected in the amount of KM 5,915,587 and on non-alcoholic drinks produced in the Federation of Bosnia and Herzegovina the excise tax was collected in the amount of KM 6,773,258. In the period of January – June 2004 excise tax on non-alcoholic drinks was collected in the amount of KM 2,901,131 in the budget of the Federation of Bosnia and Herzegovina while the amount of the collected excise tax from the non-alcoholic drinks produced in the Federation of Bosnia and Herzegovina was KM 2,683,359. It is estimated that until the end of the year, the application of the challenged law may cause the loss in the amount of KM 2.2 million, in the budget of the Federation of Bosnia and Herzegovina. Further unfavorable effects can be reflected on the budget of both the Republika Srpska and Brčko District of Bosnia and Herzegovina, as it is to be expected that the buyers in Bosnia and Herzegovina shall prefer places where some non-alcoholic drinks are exempted from obligation of payment of special tax – excise.

7. In examining whether the request for an interim measure is well-founded, the Constitutional Court invoked provisions of Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Article 78, para 1 of the Constitutional Court's Rules of Procedure.

Article VI.3 (a) of the Constitution of Bosnia and Herzegovina in its relevant part 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

Article 78, para 1 of the Constitutional Court's Rules of Procedure:

The Chamber may, until the adoption of a final decision, upon a request of a party, issue any interim measure it deems necessary in the interest of the parties or the correct conductance of the proceedings before the Court.

8. First, the Constitutional Court concludes that the request for review of the constitutionality of the challenged laws was filed by an authorized person, Mr. Adnan Terzić, holding the office of the Chair of the Council of Ministers of Bosnia and Herzegovina, who is authorized to file request in accordance with Article VI 3 (a) of the Constitution of Bosnia and Herzegovina. The request is sufficiently explained and contains the reasons on which it is based. Therefore, the request for review of the constitutionality of the alleged legal provisions meets formal request for admissibility as provided for by Article VI. 3 (a) of the Constitution of Bosnia and Herzegovina and Article 18, para 1 of the Constitutional Court's Rules of Procedure.

9. The Constitutional Court points out that the adoption of the interim measure makes sense and finds its justification only in the situation when future damage the occurrence of which is undoubtedly stated in the request for its adoption can be prevented or limited by adoption of interim measures. The Constitutional Court also reminds that Article 78 of the Constitutional Court's Rules of Procedure is applicable in the situations in which Constitutional Court finds that irreparable damaging consequences could occur, the occurrence of which the Constitutional Court may, in principle, only evaluate based on reasons and evidence on justification, submitted with the request for an interim measure i.e. along with the request for review of the constitutionality. The Constitutional Court took the above-mentioned position in a number of its decisions and as the most recent example it invokes the rulings in cases *AP 312/04* of 19 April 2004 and *AP 476/04* of 30 June 2004.

10. The Constitutional Court also points out that Article 78 of the Constitutional Court's Rules of Procedure does not refer only to specific type of proceedings before the Constitutional Court but that it is applicable to all proceedings before the Constitutional Court. In terms of requests for review of constitutionality, that includes request for an interim measure, which would order temporary stay of the application of certain laws that are in force, the Constitutional Court must act with maximum caution. Therefore, as far as the aforementioned requests are concerned, the Constitutional Court will take into account the consequences that may arise if an interim measure is not issued. The request for the review of constitutionality would be well-founded in course of taking a decision on merits with consequences that may arise if an interim measure is issued and the request for the review of constitutionality would have no success in course of adopting the decision on merits. Such methodological approach is typical for the constitutional courts which represent the last instance in the legal hierarchy, see, for example, the decision of the Federal Constitutional Court of the Federal Republic of Germany, *BverfGE 34*, 341.

11. It is obvious in the present case, that the circumstances of this case instigate several issues of vital interest for the functioning of Bosnia and Herzegovina as a democratic state based on the rule of law, as provided for by Article I. 2 of the Constitution of Bosnia and Herzegovina as well as the issue whether the challenged Law on Sales Tax on Goods and Services and the Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks were adopted contrary to the provisions of Articles III.3 (b) and III.5 (a) of the Constitution of Bosnia and Herzegovina and whether they violated the principle of free movement of persons, goods, services and capital under Article I.4 of the Constitution of Bosnia and Herzegovina, considering that, as it is stated in the request, the Parliament of the Federation of Bosnia and Herzegovina adopted these laws without previous consent obtained from the Governing Board of the Indirect Taxation Administration although it was obliged to do so according to Article 25, para 4 of the Law on the System of Indirect Taxation in Bosnia and Herzegovina. The Constitutional Court shall discuss these issues during deliberation on the constitutionality of the aforementioned laws.

12. The Constitutional Court must decide whether the request for an interim measure is well-founded. The request seeks the suspension of application of the Law on Amendments of the Law on Sales Tax of Non-Alcoholic Drinks until the adoption of a final decision on the request for review of constitutionality. As a reason for issuing interim measure the applicant stated that, by the end of 2004, the application of the challenged laws had caused the damage to the Cantonal budget and the budget of the Federation of BiH in the amount of more than KM 32.2 million.

13. First of all, the Constitutional Court notes that the challenged laws became effective on 25 July 2004. Therefore, it is evident that they were in use for a relatively short period of time, which means that an interim measure could prevent future damage.

14. The Constitutional Court points out that it is evident that the Parliament of the Federation of Bosnia and Herzegovina, by adopting the challenged laws, made intervention in its tax legislation. This intervention was aimed at exemption of certain services and procurement of certain products from payment of sales tax and exemption of certain products from payment of a special tax – excise tax.

15. The challenged Law on Amendments to the Law on Sales Tax on Goods and Services provides that construction and construction-handicraft enterprises are no longer obliged to pay sales tax when procuring production materials. Furthermore, the said amendments provide that sales tax will no longer be paid on performed construction services. The aforesaid is understandable when the former provisions of Article 11 para 2 of the Law on Sales Tax on Goods and Services – Amended Text (*Official Gazette of the Federation*

of Bosnia and Herzegovina, No. 49/02) are compared to Article 1 of the challenged Law on Amendments to the Law on Sales tax on Goods and Services. Namely, prior to the adoption of the challenged law, construction and construction-handicraft legal entities that were performing production activities were not exempted from payment of sales tax on procurement of production materials. Also, when the former provision of Article 23 para 3 (8) of the Law on Sales Tax on Goods and Services is compared to Article 2 of the challenged Law on Amendments to the Law on Sales Tax on Goods and Services, it is evident that the tax basis used for calculation of sales tax for performed construction services was annulled after the amendments.

16. Moreover, Article 1 of the challenged Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks provides that fruit juice, fruit-based juice and vegetable juice will not anymore be considered non-alcoholic drinks on which a special tax is paid. In addition, Article 2 of the said Law provides that natural, mineral, carbonated and non-carbonated waters, 100% natural juices free of sugar and preservatives and fruit juices and fruit syrups free of preservatives that were made and sold or exported in accordance with the Book of Rules on the Quality of Products Made of Fruit, Vegetables, Mushrooms and Pectin Preparations (*Official Gazette of the SFRY*, Nos. 1/79, 20/82 and 74/90) are not considered non-alcoholic drinks. Prior to entering into force of the challenged law, there was an obligation to pay a special tax – excise tax – on the said products that were classified as non-alcoholic drinks, which is confirmed by the former Article 3 of the Law on Special Tax on Non-Alcoholic Drinks (*Official Gazette of the Federation of Bosnia and Herzegovina*, Nos. 6/95, 51/99, 52/01 and 37/03).

17. The Constitutional Court notes that the challenged laws, by which an intervention into the tax legislation of the Federation of Bosnia and Herzegovina was made, are aimed at reducing the number of tax obligations, i.e. the reduction of total tax contributions by legal persons in the territory of the Federation of Bosnia and Herzegovina, which deal with the specific branch of business. Any reduction of tax obligations and tax contributions unavoidably leads to the reduction of influx of budget funds. However, the Constitutional Court considers that, depending on other economic indicators, this should not necessarily represent a negative consequence for the economic situation in the Federation of Bosnia and Herzegovina given the prospective positive effects in regards to the protection of domestic production. Moreover, the Constitutional Court considers that, regardless of the aforementioned, by application of the challenged laws, the companies that have their seat in the Republika Srpska and Brčko District of Bosnia and Herzegovina and which deal with the same branch of business, could be put in a less favourable position than the companies with the main seat in the Federation of Bosnia and Herzegovina because,

according to the provisions of the challenged laws, the Federation construction companies are not obliged to pay sales taxes when purchasing the production construction material or providing construction services unlike the companies in the Republika Srpska and Brčko District of Bosnia and Herzegovina that are dealing with the same business. Also, by application of the challenged laws, the manufacturers and traders of non-alcoholic drinks in the Federation of Bosnia and Herzegovina could be put in a more favourable position than other manufacturers and traders of non-alcoholic drinks from the Republika Srpska and Brčko District of Bosnia and Herzegovina since there is no obligation to pay a special tax-excise for certain non-alcoholic drinks in the Federation of Bosnia and Herzegovina.

18. Taking into consideration the aforementioned, the Constitutional Court considers that application of the challenged legal provisions shall have an effect on the entire tax system in Bosnia and Herzegovina. The Constitutional Court reminds that the condition for starting the implementation of the constitutional principle of single market as well as its harmonisation is a legal regulation of tax system in Bosnia and Herzegovina in order to avoid all administrative, technical and other barriers. In this context, the Law on the System of Indirect Taxation was adopted (*Official Gazette of Bosnia and Herzegovina,* No. 44/03), which became effective on the eighth date of its publication, i.e. on 31 December 2003. This Law establishes a single system and organisational basis for indirect taxes. However, the applicant indicates the possibility of very serious inconsistencies when it comes to respecting this law and principles which have been established in course of adopting the challenged laws. This fact could have adverse effects on the entire tax system in Bosnia and Herzegovina and thus, cause irretrievable damage to the state of Bosnia and Herzegovina.

19. Furthermore, with reference to the reasoning from the previous paragraphs of this decision, the Constitutional Court also considered the consequences that might arise if an interim measure is not issued, and the request for a review of constitutionality is declared well-founded in course of adopting the decision on merits. In that case, the tax funds that could not be collected due to the application of the challenged laws, would become irreclaimable, because the Constitutional Court does not see an efficient way in which those funds could be recovered after the adoption of the request for the review of constitutionality. On the other hand, the Constitutional Court has also taken into consideration the consequences that may arise if an interim measure is issued and the request for a review of constitutionality is dismissed. In that case the Constitutional Court considers that the damaging consequences could not arise, because the application of the challenged laws is only "temporarily" suspended by an interim measure, and the Constitutional Court will take a decision on the merits concerning the constitutionality of the challenged legal provisions. Therefore, in case such a request is not adopted, the

interim measure will cease to be in effect and some tax payers in the Federation of Bosnia and Herzegovina will freely enjoy the benefits to them by the challenged laws.

20. In the given circumstances, the Constitutional Court considers that the application of Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks, whose review of constitutionality is still pending, may cause irreperable damages reflected in the possibility of adverse effects on the entire tax system in Bosnia and Herzegovina, possible violation of the principle of single market and, the most importantly non-compliance with the procedure of adopting the laws on entity level, which was transferred to the state level by the agreement. In this way, the entity would take over the authority which was previously transferred to the state level whereby the functioning of Bosnia and Herzegovina in line with *the rule of law* would be brought into question. The Constitutional Court concludes that sufficent number of reasons were given for issuance of an interim measure and therefore the Constitutional Court maintains the conditions for the temporary deferral of application of the challenged laws have been fulfilled. Moreover, the Constitutional Court reminds that the application of the challenged provisions in the proceedings that have been already instituted in accordance with the mentioned laws and in the given situation where the request for an interim measure was filed, could cause the irreperable damages due to which the Constitutional Court considers that the aforementioned procedure should be viewed in light of this decision.

21. Pursuant to the provisions of Article 78, para 1 of the Constitutional Court's Rules of Procedure, the Constitutional Court decided to grant the request for issuing an interim measure.

22. On the basis of the aforementioned, it was decided unanimously as stated in the enacting clause of this Decision.

23. The Constitutional Court reminds that the decision on interim measure shall in no way have an effect on either the decision on admissibility or the decision on merits concerning the case at hand.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (2), Article 61 paras 1 and 2 and Article 63 paras 1 and 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Ćazim Sadiković, Vice-President,

Mr. Tudor Pantiru, Vice-President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Having deliberated on the request of **Mr. Adnan Terzić, Chair of the Council of Ministers of Bosnia and Herzegovina,** in Case No. **U 14/04,**

At the session held on 29 October 2004 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

It is established that the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Turnover Tax on Goods and Services (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 39/04) and the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 39/04) are not consistent with Articles I.4, III.3 (b) and III.5 (a) of the Constitution of Bosnia and Herzegovina.

The Parliament of the Federation of Bosnia and Herzegovina is ordered, pursuant to Article 63 para 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, to harmonize the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Turnover Tax on Goods and Services and the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks, with the Constitution of Bosnia and Herzegovina, within a time-limit of three months after the date of publication of the present Decision in the *Official Gazette of Bosnia and Herzegovina*.

The Parliament of the Federation of Bosnia and Herzegovina is also ordered to inform the Constitutional Court of Bosnia and Herzegovina on the measures taken within a time-limit of three months, pursuant to Article 75 para 5 of the Rules of Procedure 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* and the *Official Gazette of the Republika Srpska*.

Reasoning

I. Introduction

1. On 3 August 2004 Mr. Adnan Terzić, Chair of the Council of Ministers of Bosnia and Herzegovina ("the applicant"), filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for a review of conformity of the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Turnover Tax on Goods and Services and the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks with the Constitution of Bosnia and Herzegovina. Both laws were enacted by the Parliament of the Federation of Bosnia and Herzegovina and published in the *Official Gazette of the Federation of Bosnia and Herzegovina* No. 39/04. The said laws entered into force on 25 July 2004. The applicant also filed a motion for an interim measure whereby the Constitutional Court would deferr enforcement of the contested laws pending adoption of a final decision on the request filed.

II. Procedure before the Constitutional Court

2. The Constitutional Court adopted the Decision No. *U 14/04* of 5 August 2004 whereby it granted the applicant's motion for an interim measure and issued an interim measure for deferring the enforcement of the contested laws pending adoption of a final decision on the request filed.

3. Pursuant to Article 21 para 1 of the Rules of Procedure 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 4 August 2004 to submit their respective replies to the request within a period of twenty days.

4. The replies to the request were not submitted.

III. Request

5. The applicant maintained that the Parliament of the Federation of Bosnia and Herzegovina failed to obtain a mandatory consent of the Governing Board of the Indirect Taxation Administration prior to enacting the Law on Amendments to the Law on Turnover Tax on Goods and Services and the Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks. The Parliament of the Federation of Bosnia and Herzegovina was obliged to obtain the said consent according to Article 25 para 4 of the Law on Indirect Taxation System in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 44/03), which provides that as of the date of entry into force of this law, the introduction of any additional indirect taxes in Bosnia and Herzegovina, as well as the promulgation or amendment of legislation on indirect taxation by the Federation of Bosnia and Herzegovina, the Republika Srpska or the Brčko District of Bosnia and Herzegovina, must be approved by the Governing Board of the Indirect Taxation Administration. Moreover, Article 1 para 2 of the said law reads that the term "indirect tax" shall refer to import and export duties, excise taxes, value added tax and all other taxes levied on goods and services, including turnover taxes and road tolls. Accordingly, in the applicant's view, the Parliament of the Federation of Bosnia and Herzegovina enacted amendments to the law that regulated the field of indirect taxation without obtaining the consent of the Governing Board of the Indirect Taxation Administration, which was obliged to do so by virtue of the legal provision quoted above.

6. Furthermore, the applicant attached to his request a copy of a letter addressed to the Chairman of the Governing Board of the Indirect Taxation Administration on 2 August

2004 seeking therein institution of proceedings before the Constitutional Court in view of the fact that the contested laws were enacted contrary to the prescribed procedure, thereby violating provisions of the Constitution of Bosnia and Herzegovina. In addition, the applicant attached to his request a letter of the Ministry of Finance of the Federation of Bosnia and Herzegovina dated 2 August 2004, which read that the said Ministry and the Government of the Federation of Bosnia and Herzegovina did not give a positive opinion prior to the enactment of the contested laws and that the application of the said laws would damage substantially the budgets of, respectively, the Federation of Bosnia and Herzegovina and its Cantons.

7. The applicant recalled that the Law on Indirect Taxation System in Bosnia and Herzegovina was enacted after the Federation of Bosnia and Herzegovina and the Republika Srpska concluded an Agreement on the Competences in the Field of Indirect Taxation whereby the field of indirect taxation within the tax policy system was transferred to the State of Bosnia and Herzegovina. The conclusion of the said Agreement was preceded by the respective decisions of the Entity parliaments on giving consent thereto. The Parliament of the Federation of Bosnia and Herzegovina adopted a decision on giving its consent to the said Agreement on 3 December 2003 (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 64/03) whereby the field of indirect taxation within the tax policy system was transferred into the sole competence of the State of Bosnia and Herzegovina within the meaning of Article III.5 (a) of the Constitution of Bosnia and Herzegovina.

8. The applicant pointed out that Article III.3 (b) of the Constitution of Bosnia and Herzegovina obliged the Entities to comply fully with the decisions of the joint institutions of Bosnia and Herzegovina. One of such decisions would indubitably be the Law on Indirect Taxation System in Bosnia and Herzegovina enacted by the Parliamentary Assembly of Bosnia and Herzegovina. The contested laws were enacted by the Parliament of the Federation of Bosnia and Herzegovina without the consent of the Governing Board of the Indirect Taxation Administration, which was mandatory under Article 25 para 4 of the Law on Indirect Taxation System of Bosnia and Herzegovina. This, according to the applicant, constituted a violation of Articles III.3 (b) and III.5 (a) of the Constitution of Bosnia and Herzegovina. Finally, the applicant considered that the application of the contested laws hindered an undisturbed functioning of a single economic space as guaranteed under Article I.4 of the Constitution of Bosnia and Herzegovina.

IV. Relevant law

9. Constitution of Bosnia and Herzegovina

Article I.2

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

Article I.4

There shall be freedom of movement throughout Bosnia and Herzegovina. Bosnia and Herzegovina and the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. Neither Entity shall establish controls at the boundary between the Entities.

Article III.3 (b)

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

III.5 (a)

Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

10. **Law on Indirect Taxation System in Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* No. 44/03)

Article 1 para 2

For the purpose of this Law, the term "indirect tax" shall refer to import and export duties, excise taxes, value added tax and all other taxes levied on goods and services, including turnover taxes and road tolls.

Article 25 para 4

As of the date of entry into force of this Law, the introduction of any additional indirect taxes in Bosnia and Herzegovina, as well as the promulgation or amendment of legislation on indirect taxation by the Federation, the Republika Srpska or the District must be approved by the Board. The Board must approve all discretionary decisions concerning exemptions from and/or changes to indirect tax rates and structures, which are made pursuant to legislation of the Federation, the Republika Srpska or the District.

11. **Decision on giving consent to the Agreement on the Competences in the Field of Indirect Taxation** (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 64/03)

I

The consent to the Agreement on the Competencies in the Field of Indirect Taxation between the Federation of Bosnia and Herzegovina and the Republika Srpska, which transferred the field of indirect taxation within the tax policy system to the State of Bosnia and Herzegovina, is hereby given.

12. **Law on Turnover Tax on Goods and Services – Amended Text** (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 49/02), in its relevant part, reads as follows:

Article 11

Production materials exempted from payment of turnover tax may be procured by legal persons that perform a production activity.

Production activity referred to in the preceding paragraph shall mean an activity performed by industrial, mining, agricultural, forestry, water resources, fishing, transportation, artisan legal persons, cooperatives (except construction and artisan cooperatives), production units as part of non-production legal persons, registered

for performing of one or more production activities, and scientific research and development institutes, laboratories, experimental workshops and plants for production improvements.

Article 23 para 3 (8)

The tax basis of the turnover tax on construction services shall be the value of the service that does not contain in it the value of the used building material and the turnover tax on products paid for the building material concerned.

13. **Law on Amendments to the Law on Turnover Tax on Goods and Services** (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 39/04), in its relevant part, reads as follows:

Article 1

*The new wording "construction, construction-artisan" shall be added in Article 11 paragraph 2 of the Law on Turnover Tax on Goods and Services (*Official Gazette of the Federation of Bosnia and Herzegovina *No. 49/02 – Amended Text) after the word "transportation" whereas the wording "except constriction-artisan cooperatives" shall be deleted.*

Article 2

The semi-colon in Article 23 para 3 (7) shall be replaced by a full stop and sub-paragraph 8 shall be deleted.

14. **Law on Special Tax on Non-Alcoholic Drinks** (*Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 6/95, 51/99, 52/01 and 37/03), in its relevant part, reads as follows:

Article 3

The subject of taxation shall be the turnover of non-alcoholic drinks.

Non-alcoholic drinks referred to in the preceding paragraph shall mean refreshing non-alcoholic drinks made of fruit juice, fruit-based juice, vegetable juice, herbal essences,

cereals or whey, artificial refreshing non-alcoholic drinks and low-energy refreshing non-alcoholic drinks and syrups intended for production or processing of refreshing drinks.

Non-alcoholic drinks shall also include powders intended for preparation of refreshing non-alcoholic drinks, which, when melted in water, turn into refreshing non-alcoholic drinks.

For the purpose of this Law, natural mineral carbonated and non-carbonated waters and 100% sugar free natural juices and drinking water shall not be considered as non-alcoholic drinks.

15. **Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks** (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 39/04)

Article 1

The wording "fruit juice, fruit-based juice, vegetable juice" shall be deleted from Article 3 paragraph 2 of the Law on Special Tax on Non-Alcoholic Drinks (Official Gazette of the Federation of Bosnia and Herzegovina Nos. 6/95, 51/99, 52/01 and 37/03).

Article 2

Paragraph 4 of Article 3 shall be deleted.

*The new paragraph 4 of Article 3 shall read as follows: "For the purpose of this Law, natural, mineral, carbonated and non-carbonated waters, 100% natural juices free of sugar and preservatives and fruit juices and fruit syrups free of preservatives that were made and sold or exported in accordance with the Book of Rules on the Quality of Products Made of Fruit, Vegetables, Mushrooms and Pectin Preparations (*Official Gazette of the SFRY*, Nos. 1/79, 20/82 and 74/90) shall not be considered as non-alcoholic drinks".*

V. Admissibility

16. Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads as follows:

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

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

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

17. The Constitutional Court notes that the applicant is the Chair of the Council of Ministers of Bosnia and Herzegovina. The request relates to a decision as to whether certain provisions of the Entity law are consistent with the Constitution of Bosnia and Herzegovina. Finally, the request contains the necessary facts and assertions on which it is based.

18. In view of the provisions of Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Article 16 para 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court has found that the present request was initiated by an authorized person and that it meets the formal requirements laid down in Article 16 para 2 of the Constitutional Court's Rules of Procedure.

VI. Merits

19. In the first place, the Constitutional Court points out that the fact that both Houses of the Federation Parliament failed to submit their respective replies to the request and explain the *ratio* for the adoption of the said regulations, does not prevent the Constitutional Court to consider the reasons for their adoption. Besides, the Constitutional Court stressed in its Decision *U 1/98* (*Official Gazette of Bosnia and Herzegovina* No. 22/98) that the principle of effective protection of the Constitution of Bosnia and Herzegovina by the Constitutional Court arises out of Article I (2) of the Constitution of Bosnia and Herzegovina.

20. The applicant argued that the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Turnover Tax on Goods and Services and the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks were not consistent with the provisions of Articles III.3 (b) and III.5 (a) of the Constitution of Bosnia and Herzegovina and considered that the said provisions of the contested laws violated the principle of a free movement of persons, goods, services and capital under Article I.4 of the Constitution of Bosnia and Herzegovina.

21. Therefore, the Constitutional Court should examine whether the said legal provisions are consistent with the provisions of Articles III.3 (b) and III.5 (a) of the Constitution of Bosnia and Herzegovina. Moreover, the Constitutional Court will examine whether the said legal provisions violate the principle of a single market; in other words, free movement of persons, goods, services and capital under Article I.4 of the Constitution of Bosnia and Herzegovina.

22. The Constitutional Court points out that it is evident that the Parliament of the Federation of Bosnia and Herzegovina, by adopting the contested laws, intervened into the tax legislation. This intervention was aimed at exemption of certain services and procurement of certain products from payment of turnover tax and exemption of certain products from payment of a special tax – excise tax.

23. The contested Law on Amendments to the Law on Turnover Tax on Goods and Services provides that construction and construction-artisan enterprises are no longer obliged to pay turnover tax when procuring production materials. Furthermore, the said amendments provide that turnover tax will no longer be paid on performed construction services. The aforesaid is understandable when the former provisions of Article 11 para 2 of the Law on Turnover Tax on Goods and Services – Amended Text (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 49/02) are compared to Article 1 of the contested Law on Amendments to the Law on Turnover Tax on Goods and Services. Namely, prior to the entry into force of the contested law, construction and construction-artisan legal persons that were performing production activities were not exempted from payment of turnover tax during the procurement of production materials. Also, when the former provision of Article 23 para 3(8) of the Law on Turnover Tax on Goods and Services is compared to Article 2 of the contested Law on Amendments to the Law on Turnover tax on Goods and Services, it is evident that the tax basis that was used for calculation of turnover tax for perf ormed construction services was annulled after the amendments.

24. Moreover, Article 1 of the contested Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks provides that fruit juice, fruit-based juice and vegetable juice shall not be considered as non-alcoholic drinks on which a special tax is paid. In addition, Article 2 of the said Law provides that natural, mineral, carbonated and non-carbonated waters, 100% natural juices free of sugar and preservatives and fruit juices and fruit syrups free of preservatives that were made and sold or exported in accordance with the Book of Rules on the Quality of Products Made of Fruit, Vegetables, Mushrooms and Pectin Preparations (*Official Gazette of the SFRY* Nos. 1/79, 20/82 and 74/90) shall not be considered as non-alcoholic drinks. Prior to the entry into force of the contested law,

there was an obligation to pay a special tax – excise tax – on the said products that were classified as non-alcoholic drinks, which is confirmed by the former Article 3 of the Law on Special Tax on Non-Alcoholic Drinks (*Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 6/95, 51/99, 52/01 and 37/03).

25. In view of the aforesaid, an issue arises as to whether the Parliament of the Federation of Bosnia and Herzegovina was competent to adopt the abovementioned laws introducing changes in the tax legislation and as to whether the procedure anticipated in the Law on Indirect Taxation System for their adoption was observed.

26. The Constitutional Court refers to the Agreement on the Competences in the Field of Indirect Taxation, which was signed by the Prime Minister of the Federation of Bosnia and Herzegovina and the Prime Minister of the Republika Srpska on 5 December 2003. The conclusion of the said Agreement was preceded by the Decision on Giving Consent to the Agreement on the Competences in the Field of Indirect Taxation (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 64/03). According to the said Agreement, the competencies of the Entities in the field of indirect taxation within the tax policy system were to be transferred to the State of Bosnia and Herzegovina. Thereafter, the Parliamentary Assembly of Bosnia and Herzegovina enacted a Law on Indirect Taxation System in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 44/03, which entered into force on the eighth day following the date of its publication, i.e. 31 December 2003). A single system and an organizational basis for indirect taxes at the level of State of Bosnia and Herzegovina were established by the enactment of the Law on Indirect Taxation System. Relevant section of Article 25 para 4 of thereof provides that "as of the date of entry into force of this Law, the introduction of any additional indirect taxes in Bosnia and Herzegovina, as well as the promulgation or amendment of legislation on indirect taxation by the Federation, the Republika Srpska or the District must be approved by the Board".

27. In view of the aforesaid and in view of the fact that the laws in the field of "indirect taxes" were amended in the instant case by virtue of Article 1 para 2 of the Law on Indirect Taxation System, the Constitutional Court concludes that the Parliament of the Federation of Bosnia and Herzegovina should have previously obtained the consent of the Governing Board of the Indirect Taxation Administration. It is beyond dispute that the Parliament of the Federation of Bosnia and Herzegovina did not obtain the said consent in the instant case.

28. Therefore, the Constitutional Court points out that the Parliament of the Federation of Bosnia and Herzegovina, by adopting the contested laws, failed to observe the procedure

laid down in Article 25 para 4 of the Law on Indirect Taxation System. By doing so, the Federation of Bosnia and Herzegovina *de facto* assumed competences that it, according to the Agreement of 5 December 2003, transferred to the State of Bosnia and Herzegovina. The Constitutional Court holds that such course of action questioned the functioning of Bosnia and Herzegovina on the principle of the "rule of law". In particular, it violated the provision of Article III.3 (b) of the Constitution of Bosnia and Herzegovina since the Parliament of the Federation of Bosnia and Herzegovina failed to comply with the procedure laid down in the Law on Indirect Taxation System. This law was adopted by the Parliamentary Assembly of Bosnia and Herzegovina and it indubitably represented "a decision of the joint institutions of Bosnia and Herzegovina". Furthermore, by adopting the contested laws without the consent of the Governing Board of the Indirect Taxation Administration, the Parliament of the Federation of Bosnia and Herzegovina violated the provision of Article III.5 (a) of the Constitution of Bosnia and Herzegovina by entering the scope of competences transferred to Bosnia and Herzegovina by the Federation of Bosnia and Herzegovina by means of an agreement.

29. Given the aforesaid, the Constitutional Court concludes that the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Turnover Tax on Goods and Services (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 39/04) and the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 39/04) are not consistent with the provisions of Articles III.3 (b) and III.5 (a) of the Constitution of Bosnia and Herzegovina.

30. Finally, the Constitutional Court needs to examine whether the adoption of the contested laws impeded a free movement of persons, goods, services and capital under Article I.4 of the Constitution of Bosnia and Herzegovina. The Constitutional Court reiterates that the goal of adoption of the Law on Indirect Taxation System was to harmonize the tax system in Bosnia and Herzegovina. The harmonization of the tax system would be used to commence with the exercise of the constitutional principle of a single market and to avoid all administrative, technical and other obstacles to the operation of the market. By adopting the contested laws, the Parliament of the Federation of Bosnia and Herzegovina made amendments in the field of taxes that fall within "indirect taxes". Amendments to the laws concerned that were adopted by the Parliament of the Federation of Bosnia and Herzegovina were not adopted in the Republika Srpska, particularly in the field of taxation of services relating to construction activities. Accordingly, it is evident in the present situation that there are different tax bases in the Federation of Bosnia and

Herzegovina and the Republika Srpska in relation to the taxation of construction activity. By adopting the law concerned in the field of excise tax, the Parliament of the Federation of BiH reduced the number of non-alcoholic drinks subject to special tax – excise tax while such situation already existed in the Republika Srpska (see Law on Excise Tax and Turnover Tax; *Official Gazette of the Republika Srpska* Nos. 25/02, 30/02 and 60/03). In view of the aforesaid, the Constitutional Court points out that the introduction of different tax bases on the territory of Bosnia and Herzegovina hinders an undisturbed functioning of a single economic space, thereby violating Article I.4 of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

31. In view of the aforesaid, the Constitutional Court concludes that the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Turnover Tax on Goods and Services and the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks are not consistent with the provisions of Articles I.4, III.3 (b) and III.5 (a) of the Constitution of Bosnia and Herzegovina.

32. Pursuant to Article 61 paras 1 and 2 and Articles 63, paras 1 and 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court decided unanimously as set out in the enacting clause above.

33. Pursuant to Article 78 para 6 of the Constitutional Court's Rules of Procedure, the interim measure issued by the Constitutional Court in the instant case shall remain in force until the Parliament of the Federation of Bosnia and Herzegovina eliminates the established inconsistencies.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 4/05

Request of Prof. Dr Nikola Špirić, First Deputy Chair of the Parliamentary Assembly of Bosnia and Herzegovina for a review of constitutionality of Article 21 of the Statute of the City of Sarajevo (Official Gazette of Sarajevo Canton, Nos. 12/98 and 14/98) and the following Decisions on the Selection of the Councilors to the City Council of the City of Sarajevo: the Decision on the Selection of the Councilors Delegated to the City Council of Sarajevo City from amongst the Councilors of the Municipal Council of the Municipality of Stari Grad Sarajevo, No. 02-49-137/05 of 3 March 2005, the Decision on the Selection of the Councilors to the City Council of the City of Sarajevo of the Municipal Council of the Municipality of Centar Sarajevo, No. 01-49-429/05 of 24 February 2005, the Decision on the Selection of the Councilors delegated to the City Council of the City of Sarajevo from amongst the Councilors of the Municipality of Novo Sarajevo, No. 01-02-183/05 of 2 March 2005 and the Decision on the Selection of the Councilors to the City Council of the City of Sarajevo from amongst the Councilors of the Municipal Council of the Municipality of Novi Grad Sarajevo, No. 01-02-1755/1 of 28 February 2005

DECISION ON ADMISSIBILITY AND MERITS
of 22 April 2005

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, Article 59 para 2(2), Article 61 paras 1 and 2 and Article 63 para 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović, Vice-President,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Having considered the request of **Prof. Dr Nikola Špirić**, First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, in Case **No. U 4/05,**

Adopted at the session held on 22 April 2005 the following

DECISION ON ADMISSIBILITY AND MERITS

It is established that the provision of Article 21 para 3 of the Statute of the City of Sarajevo (*Official Gazette of Sarajevo Canton* Nos. 12/98 and 14/98) is not consistent with, respectively, Article I.2 and Article II.4 of the Constitution of Bosnia and Herzegovina in conjunction with Article 5 para 1 (c) of the Convention on the Elimination of All Forms of Racial Discrimination.

It is established that constituting of the City Council of the City of Sarajevo on the basis of the following decisions: the Decision on the Selection of the Councilors delegated to the City Council of the City of Sarajevo from amongst the Councilors of the Municipal Council of the

Municipality of Stari Grad Sarajevo No. 02-49-137/05 of 3 March 2005, the Decision on the Selection of the Councilors to the City Council of the City of Sarajevo of the Municipal Council of the Municipality of Centar Sarajevo No. 01-49-429/05 of 24 February 2005, the Decision on the Selection of the Councilors Delegated to City Council of the City of Sarajevo from amongst the Councilors of the Municipality of Novo Sarajevo No. 01-02-183/05 of 2 March 2005 and the Decision on the Selection of the Councilors to the City Council of the City of Sarajevo from amongst the Councilors of the Municipal Council of the Municipality of Novi Grad Sarajevo No. 01-02-1755/1 of 28 February 2005 is not consistent with, respectively, Article I.2 and Article II.4 of the Constitution of Bosnia and Herzegovina in conjunction with Article 5 para 1 (c) of the Convention on the Elimination of All Forms of Racial Discrimination.

The Municipal Councils of the following Municipalities: Stari Grad Sarajevo, Centar Sarajevo, Novo Sarajevo and Novi Grad Sarajevo are ordered to select councilors to be delegated to the City Council of the City of Sarajevo in accordance with the Constitution of Bosnia and Herzegovina, within a time-limit of 30 days after the date of service of the present Decision.

The City Council of the City of Sarajevo is ordered, pursuant to Article 63 para 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, to harmonize the provision of Article 21 para 3 of the Statute of the City of Sarajevo with the Constitution of Bosnia and Herzegovina, within a time-limit of three months after the date of publication of the present Decision in the *Official Gazette of Bosnia and Herzegovina*.

The City Council of the City of Sarajevo and the Municipal Councils of the Municipalities: Stari Grad Sarajevo, Centar Sarajevo, Novo Sarajevo and Novi Grad Sarajevo are ordered to inform the Constitutional Court of Bosnia and Herzegovina of the measures taken, within a time-limit of three months as laid down in Article 75 para 5 of the Rules of Procedure 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* and the *Official Gazette of the Republika Srpska*.

Reasoning

I. Introduction

1. On 15 March 2005, Prof. Dr Nikola Špirić, First Deputy Chair of the Parliamentary Assembly of Bosnia and Herzegovina ("the applicant") filed with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") a request for a review of constitutionality of Article 21 of the Statute of the City of Sarajevo (*Official Gazette of Sarajevo Canton* Nos. 12/98 and 14/98) and the following Decisions on the Selection of the Councilors to the City Council of the City of Sarajevo: the Decision on the Selection of the Councilors Delegated to the City Council of Sarajevo City from amongst the Councilors of the Municipal Council of the Municipality of Stari Grad Sarajevo No. 02-49-137/05 of 3 March 2005, the Decision on the Selection of the Councilors to the City Council of the City of Sarajevo of the Municipal Council of the Municipality of Centar Sarajevo No. 01-49-429/05 of 24 February 2005, the Decision on the Selection of the Councilors delegated to the City Council of the City of Sarajevo from amongst the Councilors of the Municipality of Novo Sarajevo No. 01-02-183/05 of 2 March 2005 and the Decision on the Selection of the Councilors to the City Council of the City of Sarajevo from amongst the Councilors of the Municipal Council of the Municipality of Novi Grad Sarajevo No. 01-02-1755/1 of 28 February 2005.

II. Procedure before the Constitutional Court

2. Pursuant to Article 21 para 1 of the Rules of Procedure of the Constitutional Court, the City Council of the City of Sarajevo and the Municipal Councils of the following Municipalities: Stari Grad Sarajevo, Centar Sarajevo, Novo Sarajevo and Novi Grad Sarajevo were requested on 23 March 2005 to submit their respective replies to the request concerned.

3. The Municipal Councils of the following Municipalities: Novi Grad Sarajevo, Novo Sarajevo and Stari Grad Sarajevo submitted their replies to the request for a review of constitutionality on 6 and 7 April 2005 whereas the Municipal Council of the Municipality of Centar and the City Council of the City of Sarajevo submitted their replies to the said request on, respectively, on 11 April 2005 and 21 April 2005.

4. Pursuant to Article 25 para 2 of the Rules of Procedure of the Constitutional Court, all replies save that of the City Council of the City of Sarajevo were communicated to

the applicant on 8 April 2005. The reply of the City Council of the City of Sarajevo was communicated to the applicant on 21 April 2005.

III. Request

a) Statements from the request

5. The applicant referred to application of international standards for protection of human rights under Article II.2 of the Constitution of Bosnia and Herzegovina and to the enumeration of rights provided for in Article II.3 of the Constitution of Bosnia and Herzegovina. Furthermore, the applicant referred to the prohibition of discrimination under Article II.4 of the Constitution of Bosnia and Herzegovina and to the respect for human rights under Article II.6 of the Constitution of Bosnia and Herzegovina. The applicant pointed out that the Decision of the Constitutional Court of Bosnia and Herzegovina No. *U 5/98* (constituent status of peoples) guaranteed the status of all three constituent peoples on the entire territory of Bosnia and Herzegovina. Moreover, paragraph 1 of Article 11 (a) of Amendment LII to the Constitution of the Federation of BiH provided that "*the constituent peoples and 'Others' shall be proportionally represented in public institutions of the Federation of Bosnia and Herzegovina*". In view of the aforesaid, it was beyond dispute, according to the applicant, that Article 21 of the Statute of the City of Sarajevo ("the Statute") was not consistent with the Decision of the Constitutional Court on the constituent status of peoples and Article 11 (a) of Amendment LII to the Constitution of the Federation of Bosnia and Herzegovina because the said article of the Statute did not make any reference to Serbs as a constituent people. The aforementioned provision of the Statute resulted in the following: Of six Councilors delegated to the City Council of the City of Sarajevo by the Municipal Council of the Municipality of Stari Grad, five were Bosniacs and one was Croat. Of three Councilors delegated to the City Council of the City of Sarajevo by the Municipal Council of the Municipality of Centar, two were Bosniacs and one belonged to "Others". Of seven Councilors delegated to the City Council of the City of Sarajevo by the Municipal Council of the Municipality of Novo Sarajevo, three were Bosniacs, three were Croats and one belonged to "Others". It followed that the provisions of the applicable Statute, which is not harmonized with the Constitution of Bosnia and Herzegovina, have not been respected since only twenty-three Councilors were selected without selecting the guaranteed minimum of Croat Councilors and those belonging to "Others".

6. The applicant maintained that the representatives of the Serb people were not selected at all to the City Council of the City of Sarajevo. This fact constituted an absolute denial

of Serbs as the constituent people and discrimination against them and it was a clear evidence of the Bosniac domination, particularly if we take into account the fact that, according to the 1991 census, the Serb population in Sarajevo amounted to 156,000 or approx. 30% of the overall population of Sarajevo, which ranked them as the second most numerous people. Furthermore, the applicant alleged that a detailed analysis of the selection of the Councilors to the City Council of the City of Sarajevo would offer even worse results because the selected "Bosnian"/"Muslim" was chosen as the representatives of "Others", which has become the "usual way of getting around the Constitution of Bosnia and Herzegovina".

7. The applicant suggested that the Constitutional Court should, after conducting a relevant procedure, declare Article 21 of the Statute to be unconstitutional and order the City Council of the City of Sarajevo to harmonize the contested article with Amendment LII to the Constitution of the Federation of Bosnia and Herzegovina, within a time-limit of 30 days. In the event that the City Council of the City of Sarajevo fails to comply with the order of the Constitutional Court within the set time-limit, the applicant suggested that the Constitutional Court should harmonize the said provision as an interim measure. Moreover, the applicant suggested that the Municipal Councils' Decisions on the Selection of the Councilors to the City Council should be annulled as being unconstitutional and that the Municipal Councils should be ordered to issue, within a time-limit of 30 days, new decisions that would be harmonized with the Constitution of Bosnia and Herzegovina, the Constitution of the Federation of Bosnia and Herzegovina and the Decision of the Constitutional Court in Case No. *U 5/98* (constituent status of peoples). Should the Municipal Councils fail to comply with the order of the Constitutional Court, the applicant suggested that the Constitutional Court should issue an interim measure whereby it would recognize the election results and national affiliation from the candidates' lists for the selection of members of municipal councils/municipal assemblies.

b) Reply to the request

8. In their replies to the request, the Municipal Councils of the Municipalities of Novi Grad Sarajevo, Stari Grad Sarajevo, Novo Sarajevo and Centar Sarajevo maintained that the Decisions on the Selection of the Municipal Councilors to the City Council of the City of Sarajevo were issued on the basis of applicable regulations and that the full composition of the City Council of Sarajevo City was not feasible on the ground of refusal of one political party to put up its candidates. In addition, they contested the competence of the Constitutional Court to review constitutionality of the said Decisions of the Municipal Councils. According to Article VI.3 (a), the Constitutional Court may

only review constitutionality of general legal acts and, since the contested Decisions of the Municipal Councils are individual legal acts, the Constitutional Court is not competent to review them. The City Council of the City of Sarajevo argued that the Draft Decision on Amendments to the Statute of the City of Sarajevo was adopted in order to harmonize the Statute with the Decision on the Constituent Peoples of the Constitutional Court of Bosna and Herzegovina. However, the procedure of harmonization of the Statute was to commence upon completion of the verification of the mandate of all twenty-eight Councilors in the City Council of the City of Sarajevo. Therefore, the City Council of the City of Sarajevo suggested dismissal of the request for a review of constitutionality as being ill-founded and that the City Council should be given a time-limit for completion of the procedure of adopting amendments to the Statute of the City of Sarajevo.

IV. Relevant law

9. **Constitution of Bosnia and Herzegovina**

Preamble of the Constitution of Bosnia and Herzegovina

Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows:

Article II.4 The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

10. **Annex I to the Constitution of Bosnia and Herzegovina - Additional Human Rights Agreements to be applied in Bosnia and Herzegovina**

Annex I para 6

1965 International Convention on the Elimination of All Forms of Racial Discrimination

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

Article 2 para 1 (c)

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

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

Article 5 para 1 (c)

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

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

12. **Statute of the City of Sarajevo** (*Official Gazette of Sarajevo Canton* Nos. 12/98 and 14/98)

Article 21

The City Council shall be composed of 28 councilors ("the City Councilors").

Each Municipal Council of the Municipalities forming the City of Sarajevo shall select 7 delegates into the City Council from among the municipal mayors.

Bosniacs, Croats and Others shall have guaranteed individually a minimum of 20% of places in the City Council regardless of the election results.

If the minimum of the guaranteed places referred to in paragraph 3 of this Article has not been reached upon the selection of City Councilors, the City Councilors shall be selected from among candidates enumerated on the lists of the political parties represented in municipal councils according to the election results.

V. Admissibility

13. Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads as follows:

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

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

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

14. The Constitutional Court shall first examine whether it is competent to decide the admissibility of the request at hand within the competences vested in it by Article VI.3 (a) of the Constitution of Bosnia and Herzegovina. In this respect, it is stressed that the wording of Article VI.3 (a) ends with "*including but not limited to*". Consequently, the framer of the Constitution envisaged a certain structure to the Constitutional Court, which is in a way fixed by the provisions of the Constitution of Bosnia and Herzegovina constituting legal grounds for existence and functioning of the Constitutional Court. The framer of the Constitution could not predict the scope of all the functions of the Constitutional Court at the time when the Constitution of Bosnia and Herzegovina was being adopted. This failure is often associated with the issue of jurisdiction of the Constitutional Court. If the framer of the Constitution was to prescribe in detail the requirements for adoption of decisions by the Constitutional Court, the question as to whether this would impose restrictions on the actions of the Constitutional Court would arise. Hence, the wording "*including but not limited to*" under Article VI.3 (a) of the Constitution. The Constitutional Court is one of the most responsible institutions of the system, which represents an additional protection mechanism and ensures a consistent respect of the human rights pursuant to the international conventions and other international agreements. The Constitutional Court must be a just and reliable guardian of the Constitution of Bosnia and Herzegovina, its values and human rights. There are many issues under the Constitution of Bosnia and Herzegovina that need to be clarified and, in this respect, the Constitutional Court is the only body competent and qualified to provide interpretations.

15. The Constitutional Court interpreted its jurisdiction in several decisions. The following decisions, *inter alia*, reflect the position of the Constitutional Court with regard to its competence: (a) the Constitutional Court is competent to review whether a judgment (decision) of an Entity Constitutional Court is consistent with the Constitution of Bosnia and Herzegovina (Constitutional Court, *U 5/99*, Decision of 3 December 1999; *Official Gazette of Bosnia and Herzegovina* No. 3/00); (b) the Constitutional Court is competent to review constitutionality of laws passed by the High Representative when substituting himself for the national authorities (Constitutional Court, *U 9/00*, Decision of 3 November 2000; *Official Gazette of Bosnia and Herzegovina* No. 1/01); (c) the Constitutional Court shall have appellate jurisdiction over issues under this Constitution "*arising out of a judgment of any other court in Bosnia and Herzegovina*" not only in case of a judgment but also in case when a court decision was not issued within a reasonable time (Constitutional Court, *U 23/00*, Decision of 2 February 2001; *Official Gazette of Bosnia and Herzegovina* No. 10/01); (d) the Constitution of Bosnia and Herzegovina is to be read and interpreted in the context of other relevant Annexes to the General Framework Agreement for Peace in Bosnia and Herzegovina (Constitutional Court, *U 32/01*, Decision of 22 June 2001; *Official Gazette of Bosnia and Herzegovina* No. 27/01); (e) the Constitutional Court, in appellate procedure, is competent to make a concrete review of constitutionality within the meaning of Article VI.3 (c) of the Constitution of Bosnia and Herzegovina (Constitutional Court, *U 106/03*, Decision of 26 October 2004).

16. It follows from the quoted case-law that the Constitutional Court, as an institution which upholds the Constitution, is competent to review constitutionality of all acts regardless of their adopters if the issue raised is under one of the Constitutional Court's competences set out in Article VI.3 of the Constitution of Bosnia and Herzegovina. In line with the arguments concerning human rights, the Constitutional Court holds that it must, whenever this is feasible, interpret its jurisdiction in such way as to allow the broadest possibility of removing the consequences of violation of human rights. In the case at hand, the request for a review of constitutionality relates to issues under, respectively, the Constitution of Bosnia and Herzegovina and International Agreements that guarantee protection and exercise of human rights and constitutional principles such as the principle of constituent peoples and the right to non-discrimination.

17. Furthermore, the Constitutional Court points out that the applicant is the First Deputy Chair of the Parliamentary Assembly of Bosnia and Herzegovina. The request for a review of constitutionality relates to adoption of a decision as to whether the provisions of the contested acts are consistent with the Constitution of Bosnia and Herzegovina. Finally, the request contains all the necessary facts and statements on which it is founded.

18. In view of the provisions of Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Article 16 para 2 of the Rules of Procedure of the Constitutional Court, the Constitutional Court has established that the request in question was filed by an authorized person and that the formal requirements under Article 16 para 2 of the Rules of Procedure of the Constitutional Court have been met in the case concerned.

VI. Merits

19. The appellant contested the constitutionality of, respectively, Article 21 of the Statute and the Decisions on the Selection of Municipal Councilors to the City Council of the City of Sarajevo by alleging that they violated the principle of constituent peoples and the right to non-discrimination under Article II.4 of the Constitution of Bosnia and Herzegovina with respect to Serbs as a constituent people in Bosnia and Herzegovina. Although the applicant alleged that he contested the constitutionality of Article 21 of the Statute of the City of Sarajevo in its entirety, the Constitutional Court shall review constitutionality of paragraph 3 of Article 21 of the Statute of the City of Sarajevo only since this is the only relevant provision in view of the allegations made in the request for a review. Additionally, the Constitutional Court points out that its review shall be limited to the Constitution of Bosnia and Herzegovina and it shall not review the contested acts with regard to the Constitution of the Federation of Bosnia and Herzegovina as this does not fall under its competence.

20. Article 21 para 3 of the Statute of the City of Sarajevo reads as follows:

Bosniacs, Croats and Others shall have guaranteed individually a minimum of 20% of places in the City Council regardless of the Election Results.

21. The Constitutional Court shall first examine the constitutionality of the contested provision with respect to the principle of constituent peoples.

22. The Constitutional Court recalls that since the creation of the modern statehood of Bosnia and Herzegovina, the principle of multi-ethnicity (Bosniacs, previously Muslims, Serbs and Croats) has been one of the most important elements that found its place in the Constitution as the supreme legal act of a State.

23. In addition, the composition of population of Bosnia and Herzegovina suggests that it is a pronouncedly multiethnic state. This is supported by the figures from the last census in Bosnia and Herzegovina that was held in 1991. According to the 1991 census, 760,852 persons or 17.4% of the total population of Bosnia and Herzegovina declared themselves

as Croats, 1,902,956 persons or 43.5% of the total population declared themselves as Muslims and 1,366,104 persons or 31.2% of the total population declared themselves as Serbs. According to the 1991 census, the area of the then City of Sarajevo was inhabited as follows: Croats 34,873 or 6.6% of the total population, Muslims 259,470 or 49.2% of the total population, Serbs 157,143 or 29.8% of the total population, Yugoslavs 56,470 or 10.7% of the total population and Others 19,093 or 3.6% of the total population.

24. According to the aforementioned census, the composition of the population in the municipalities comprising the present-day City of Sarajevo (Stari Grad, Centar, Novo Sarajevo and Novi Grad) was as follows: a) Municipality of Stari Grad: 1,126 persons or 2.2% of the total population declared themselves as Croats, 39,410 persons or 77.7% of the total population declared themselves as Muslims, 5,150 persons or 10.1% of the total population declared themselves as Serbs, 3,374 persons or 6.6% of the total population declared themselves as Yugoslavs and 1,684 persons or 3.3% of the total population declared themselves as Others; b) Municipality of Centar: 5,428 persons or 6.8% of the total population declared themselves as Croats, 39,761 persons or 50.1% of the total population declared themselves as Muslims, 16,631 persons or 21% of the total population declared themselves as Serbs, 13,030 persons or 16.4% of the total population declared themselves as Yugoslavs and 4,436 persons or 5.6% of the total population declared themselves as Others; c) Municipality of Novo Sarajevo: 8,798 persons or 9.3 % of the total population declared themselves as Croats, 33,902 persons or 35.7% of the total population declared themselves as Muslims, 32,899 persons or 34.6% of the total population declared themselves as Serbs, 15,099 persons or 15.9% of the total population declared themselves as Yugoslavs and 4,391 persons or 4.6% of the total number of the population declared themselves as Others; d) Municipality of Novi Grad: 8,889 persons or 6.5% of the total population declared themselves as Croats, 69,430 persons or 50.8% of the total population declared themselves as Muslims, 37,591 persons or 27.5% of the total number of the population declared themselves as Serbs, 15,580 persons or 11.4% of the total population declared themselves as Yugoslavs and 5,126 persons or 3.8% of the total population declared themselves as Others.

25. The last sentence of the Preamble of the Constitution of Bosnia and Herzegovina reads as follows: "*Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows…*". The Constitutional Court took the view in its Third Partial Decision No. *U 5/98* (Decision of 1 July 2000, para 19; published in the *Official Gazette of Bosnia and Herzegovina* No. 23/00) that the Preamble constituted an integral part of the Constitutional Court of Bosnia and Herzegovina. The Constitutional Court emphasized the

following in the aforementioned decision: "… *As any provision of an Entity's constitution must be consistent with the Constitution of Bosnia and Herzegovina, including its Preamble, the provisions of the Preamble are thus a legal basis for reviewing all normative acts lower in rank in relation to the Constitution of Bosnia and Herzegovina for as long as the aforesaid Preamble contains constitutional principles delineating [...] spheres of jurisdiction, the scope of rights or obligations, or the role of the political institutions*…" (*ibid*. para 26). The Constitutional Court concluded in the same decision the following: *"... the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenization through segregation based on territorial separation*…" Additionally, the Decision of the Constitutional Court No. *U 5/98* clearly stated that the Bosniacs, Croats and Serbs were constituent peoples on the entire territory of Bosnia and Herzegovina and that the provisions of the Entity's Constitutions excluding the principle of constituent peoples were unconstitutional. The aforementioned decision also stated that: *"... it is an overall objective of the Dayton Peace Agreement to provide for the return of refugees and displaced persons to their homes of origin and thereby, to re-establish the multi-ethnic society that had existed prior to the war without any territorial separation that would bear ethnic inclination*…" (*ibid*, para 73).

26. The aforementioned constitutional principle of multi-ethnicity of Bosnia and Herzegovina, i.e. the principle of constituent peoples in the entire territory of Bosnia and Herzegovina that was elaborated in more detail in the aforementioned decision of the Constitutional Court, must be linked with the contested provisions of the Statute in view of the fact that all pieces of legislation in Bosnia and Herzegovina must be harmonized with the Constitution of Bosnia and Herzegovina as the highest legal act. It clearly follows from the contested provision of the Statute that it excludes Serbs from the composition of the City Council of the City Sarajevo; in other words, it does not provide to Serbs a minimum of 20% seats in the City Council of the City of Sarajevo irrespective of the election results, which is guaranteed to other constituent peoples – Bosniacs, Croats, and Others. Failure to designate Serbs as a constituent people that must participate in the City Council of the City of Sarajevo irrespective of the election results is absolutely unacceptable in view of the fact that, pursuant to the Preamble of the Constitution of Bosnia and Herzegovina and the aforementioned Constitutional Court's decision on constituent peoples, Serbs are a constituent people in the entire territory of Bosnia and Herzegovina.

27. The City Council of the City of Sarajevo is a significant body in the organizational structure of the City of Sarajevo and the fact that one of the constituent peoples is not guaranteed minimum representation in the City Council irrespective of the election results cannot be disregarded. Paragraph 2 of Amendment XXVI to the Constitution of the Federation of Bosnia and Herzegovina stresses the importance of the bodies of the City of Sarajevo and their multi-ethnic character (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 13/97), reading as follows: "*The composition and the manner of decision-making of the bodies of the City of Sarajevo shall reflect multi-ethnicity and particularity of the City of Sarajevo as the Capital of the Federation of Bosnia and Herzegovina*". The competencies of the City Council of the City of Sarajevo are fundamental to the functioning of the City of Sarajevo (e.g. according to Article 24 of the Statute, the City Council adopts the City Statute, decisions, other regulations and general acts and provides interpretation for them, appoints and dismisses the Mayor and Deputy Mayor, adopts the budget and regulations regarding city taxes, manages and disposes of the property of the City of Sarajevo, etc.). Therefore, it is necessary that Serbs, as Bosniacs and Croats, are given minimum guarantees for the participations in the City Council irrespective of the election results since that is the only the way to respect the principle of constituent peoples in the entire territory of Bosnia and Herzegovina. This can only be achieved if the Statue designates Serbs as one of the constituent peoples in the same line with Bosniacs, Croats and Others.

28. In support of this statement, the Constitutional Court refers to its Decision on Constituent Peoples No. *U 5/98* of 1 July 2000, whereby it declared as unconstitutional the provisions of the Entity Constitutions that did not respect the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples. The Constitutional Court prohibited any special privileges to be granted to one or two of these peoples, any domination in governmental structures, or any ethnic homogenization through segregation based on territorial separation. The Constitutional Court holds that it would be superfluous to elaborate on this point that the "group of Others" from the contested provision 21 paragraph 3 of the Statute does not mean that Serbs have the status of one of the constituent peoples since the Constitutional Court concluded in its Third Partial Decision in Case No. *U 5/98* (*ibid*, para 104) that "*… this category is only a half-hearted substitute for the status of a constituent people and the privileges they enjoy in accordance with the Constitution of the Federation…*".

29. Hence, Serbs as one of the constituent peoples must be guaranteed a minimum number of seats in the City Council irrespective of the election results, as guaranteed to other constituent peoples (Bosniacs, Croats and Others). In addition, the Constitutional

Court emphasizes that if the City Council or any other body is constituted on the grounds of regulations that are not consistent with the principle of constituent peoples, the constituting would itself be inconsistent with the Constitution of Bosnia and Herzegovina. However, an issue arises as to what would happen if the minimum representation provided for all constituent peoples could not be achieved through the election of the city councilors from amongst the councilors from each municipality. Should this take place, the current arrangement under Article 21 para 4 of the Statute reads that the City Councilors shall be elected from amongst the candidates from the lists of political parties represented in the Municipal Councils and based on the election results.

30. To that end, the Constitutional Court points out that the political parties at all levels of authority are obliged to observe the principles of the Decision on Constituent Peoples No. *U 5/98* that are primarily based on the 1991 census. Having regard to provision of Article I.2 of the Constitution of Bosnia and Herzegovina, which provides that Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections, the political parties are clearly obliged to respect the principles of the Decision on the Constituent Peoples in view of the fact that the representatives of political parties exercise power after free and democratic elections. Otherwise, the political parties that fail to observe the said principles shall be in a position where the election results would not correspond to the number of mandates to which a certain political party is entitled in a legislative body.

31. In terms of constituting the City Council of the City of Sarajevo based on the contested decisions of the municipal councils, the Constitutional Court stresses that the legal system of Bosnia and Herzegovina does not allow for an effective remedy to contest decisions of municipal councils on the selection of councilors to the city council on the ground that such decisions constituted a city council which is not consistent with the Constitution of Bosnia and Herzegovina. The Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 23/01, 7/02, 9/02 and 20/02) affords protection of the election right and this protection refers to the respect of the rules and regulations as established by this law. Namely, Article 6 para 1 of the said Law provides: *"The protection of the electoral right is secured by the election commissions, the Election Complaints and Appeals Council and the Appellate Division of the Court of Bosnia and Herzegovina*", whereas Article 6 para 2 thereof provides: "*Any individual, political party or coalition who has a legal interest, or whose right established by this law was violated, can file a complaint with the competent authority no later than three (3) days after the violation occurred, except as otherwise provided by law*". In that regard, the Constitutional Court holds that the principle of the rule of law under Article I.2 of the

Constitution of Bosnia and Herzegovina is a goal that, in the present case, provides a foothold for the Constitutional Court to examine whether the contested decisions of the Municipal Councils resulted in the constituting the City Council of the City of Sarajevo in the manner which is not in accordance with the Constitution of Bosnia and Herzegovina.

32. Considering that the City Councils that adopted the contested decisions derive their competence from the unconstitutional provision of the Statue, the Constitutional Court concludes that the constituting the City Council of the City of Sarajevo based on the decisions of the Municipal Councils was not done in accordance with the Constitution of Bosnia and Herzegovina. Therefore, in order to constitute the City Council of Sarajevo City in keeping with the Constitution of Bosnia and Herzegovina, the Municipal Councils of the Municipalities: Stari Grad Sarajevo, Centar Sarajevo, Novo Sarajevo and Novi Grad Sarajevo shall have to select the Councilors to the City Council of Sarajevo City in line with the Constitution of Bosnia and Herzegovina.

33. The Constitutional Court shall also examine the applicant's assertion that the contested provision of Article 21 para 3 of the Statute discriminated against Serbs, which is prohibited under Article II.4 of the Constitution of Bosnia and Herzegovina.

34. Article II.4 of the Constitution of Bosnia and Herzegovina sets forth the principle of non-discrimination with regard to the enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution. Accordingly, the Constitutional Court shall examine whether the contested provision of Article 21 para 3 of the Statute discriminated against Serbs with regard to a group of political rights guaranteed under Article 5 para 1 (c) of the Convention on the Elimination of All Forms of Racial Discrimination of 1995, which is referred to in paragraph 6 of Annex 1.

35. Article 2 of the Convention on the Elimination of All Forms of Racial Discrimination prescribes a positive obligation of the States to prohibit by all appropriate means any form of discrimination, whereas Article 5 para 1 (c) of the aforementioned convention guarantees political rights; in particular, the right to participate in elections, to vote and to stand for election on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service. In reply to the question whether the contested provision of the Statute discriminated against Serbs with regard to their ethnical origin, the Constitutional Court refers to its Decision on Constituent Peoples No. U 5/98 of 1 July 2000 (*ibid,* para 115), which reads as follows: "*However, if a system of government is established*

which reserves all public offices only to members of certain ethnic groups, the 'right to participation in elections, to take part in government as well as in the conduct of public affairs at any level and to have equal access to public service' is seriously infringed for all those persons or citizens who do not belong to these ethnic groups insofar as they are denied the right to stand as candidates for such governmental or other public office". The Constitutional Court refers to paras 125 and 126 of the quoted decision in which the following conclusion was reached: *"... In the final analysis, the designation of Bosniacs and Croats as constituent peoples in accordance with Article I.1 (1) of the Constitution of the Federation serves as the constitutional basis for constitutionally illegitimate privileges given only to these two peoples within the Federation's institutional structures..."* as well as that: "… *Bosniacs and Croats, on the basis of the challenged Article I.1 (1), enjoy a privileged position which cannot be legitimized since they are neither on the level of the Federation nor on the level of Bosnia and Herzegovina in the factual position of an endangered minority which must preserve its existence…*".

36. The Constitutional Court holds that the aforementioned paragraphs can be applied to the present case. It clearly follows from the contested provision of Article 21 para 3 of the Statute that Bosniacs, Croats and Others would be guaranteed a minimum of 20% of seats in the City Council of the City of Sarajevo irrespective of the election results. Serbs were not granted such privilege and they were also one of the constituent peoples just like Bosniacs, Croats and Others. On the contrary, Serbs are not even mentioned in the text of the contested provision. In view of the fact there is no justified reason why Bosniacs and Croats were guaranteed such privileged status with the election of members to the City Council of the City of Sarajevo, the Constitutional Court holds that it would be superfluous to conduct further examination to arrive at the conclusion that the provision of Article 21 para 3 of the Statute violates the right of Serbs not to be discriminated against as provided under Article II.4 of the Constitution of Bosnia and Herzegovina in relation to the political rights under Article 5 para 1 (c) of the Convention on the Elimination of All Forms of Racial Discrimination of 1995.

37. Moreover, the Constitutional Court notes that other provisions of the Statute that are not mentioned in the request speak only of Bosniacs, Croats and Others as constituent peoples and that, as a result, they are granted certain privileges. For instance, Article 35 paras 1, 2, 3, and 4 of the Statute provides that the City Council of the City of Sarajevo, when it comes to the questions of vital national interest, shall adopt its decisions by a majority of votes including at least four members of the City Council from amongst Bosniacs, Croats and Others. It further provides that certain decisions may affect the national interest of Bosniacs, Croats and Others in the area of housing issues, infrastructure/public

services and use of local land. Paragraphs 3 and 4 of the aforementioned article provide that the issues of vital national interest shall be resolved by a commission consisting of one representative of each constituent people to be selected by the Croat and Bosniac Councilors in the City Council. Article 48 para 2 of the Statute provides that the Mayor shall appoint Heads of the City Administration in such way that Bosniacs, Croats and Others shall be given the guaranteed minimum of 15-20% of the positions. Article 75 of the Statute provides that in case amendments to the Statute relate to Articles 8, 15, 17, 21, 35 para 4, 40 para 1 and 72 of the Statute, they shall be considered adopted if two thirds of the City Councilors voted in favor of the amendments and with at least four City Councilors from amongst each of the following groups: Bosniacs, Croats and Others. Moreover, the Constitutional Court notes that the provision of the contested Article 21 para 3 of the Statute was literally copied from Amendment II to the Constitution of the Sarajevo Canton (*Official Gazette of Sarajevo Canton* No. 16/97) which is still in force and provides for the composition of the City Council of the City of Sarajevo. However, the said provisions were not contested by the request concerned and the Constitutional Court may not review them for it must act within the bounds of the posed request as laid down in Article 31 of the Rules of Procedure of the Constitutional Court.

38. For these reasons, the Constitutional Court concludes that the provisions of Article 21 para 3 of the Statute are not consistent with the last sub-paragraph of the Preamble of the Constitution of Bosnia and Herzegovina, Articles I.2 and II.4 of the Constitution of Bosnia and Herzegovina in conjunction with Article 5 para 1 (c) of the Convention on the Elimination of All Forms of Racial Discrimination.

VII. Conclusion

39. The provision of Article 21 para 3 of the Statute and the constituting of the City Council of the City of Sarajevo on the grounds of the contested decisions on the selection of Councilors are not consistent with the last sub-paragraph of the Preamble of the Constitution of Bosnia and Herzegovina, Articles I.2 and II.4 of the Constitution of Bosnia and Herzegovina in conjunction with Article 5 para 1 (c) of the Convention on the Elimination of All Forms of Racial Discrimination and the Decision of the Constitutional Court on Constituent Peoples No. *U 5/98* because the contested provision does not include Serbs as the constituent people but only Bosniacs, Croats and because it does not provide the same guarantees to Serbs as it does to Bosniacs, Croats and Others of having a minimum of 20% of seats in the City Council of the City of Sarajevo irrespective of the election results.

40. Pursuant to Article 61 paras 1 and 2 and Article 63 para 2 of the Rules of Procedure of the Constitutional Court, the Constitutional Court decided unanimously as set out in the enacting clause above.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 3/98

Appeal of Dr. Haris Silajdžić, the Co-Chair of the Council Ministers of Bosnia and Herzegovina, and Mr. P. Čustović, the Public Attorney of Bosnia and Herzegovina, against the Decisions of the Human Rights Chamber for Bosnia and Herzegovina, B. M., S. B. and R. M. against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, No CH/93, 8 and 9, as well as against the Decision of the Human Rights Chamber of Bosnia and Herzegovina, M. B. against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, No. CH/96/22

DECISION
of 5 June 1998

Having regard to Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Article 55, paragraph 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina, on 5 June 1998, adopted the following

DECISION

The Constitutional Court of Bosnia and Herzegovina rejects the appeal of Dr Haris Silajdžić, the Co-Chair of the Council Ministers of Bosnia and Herzegovina, and Mr. P. Čustović, the Public Attorney of Bosnia and Herzegovina, against the Decisions of the Human Rights Chamber for Bosnia and Herzegovina, B. M., S. B. and R. M. against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, No. CH/93, 8 and 9, as well as against the Decision of the Human Rights Chamber of Bosnia and Herzegovina, M. B. against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, No. CH/96/22, relating to the length of the proceedings.

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

Reasons

On 31 December 1997, Dr Haris Silajdžić, Co-Chair of the Council Ministers of Bosnia and Herzegovina, and Mr. P. Čustović, Public Attorney of Bosnia and Herzegovina, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against the above mentioned decisions of the Human Rights Chamber for Bosnia and Herzegovina ("Human Rights Chamber").

The appellants allege that they represent Bosnia and Herzegovina and that the appeal was based on Article VI.3 (b) of the Constitution of Bosnia and Herzegovina. They

request that the Constitutional Court examine the Human Rights Chamber's decisions in accordance with the Constitutional Court's competence. They allege that those decisions violated the Constitution of Bosnia and Herzegovina in a formal and legal manner.

According to the Constitution of Bosnia and Herzegovina, the Constitutional Court shall have appellate jurisdiction over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina (Article VI.3 (b)). The question is thus raised whether the Human Rights Chamber may be considered to be a court under the above-mentioned provision. The Constitutional Court further wants to stress the fact that, according to Article XI.3 of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, Decisions of the Human Rights Chamber are final and binding, unless the Human Rights Chamber decides to re-examine the case.

However, the Constitutional Court finds that in the present dispute the question whether appeals against Human Rights Chamber's decision may be lodged with the Constitutional Court can remain unanswered, as the appeals have to be rejected nonetheless for the following reasons.

The Constitutional Court notes that the respondent Party in both cases is the State of Bosnia and Herzegovina. It is stated in the Decisions of the Human Rights Chamber that Bosnia and Herzegovina had been requested twice, before and after the Chamber's Decision on the admissibility of the application, to submit written observations on the application. However, Bosnia and Herzegovina has not answered those requests. It has not submitted any observations nor has it complied with the summons to the public hearing in those cases.

The Constitutional Court finds that even if it should be assumed that there was a right to an appeal against Decisions of the Human Rights Chamber, parties in the proceedings may not submit objections or any other arguments for the first time in the appeal proceedings.

Considering this circumstance and the fact that Bosnia and Herzegovina remained passive throughout the whole proceedings before the Human Rights Chamber, Bosnia and Herzegovina cannot be permitted to submit objections and arguments before the Constitutional Court for the first time.

Consequently the Constitutional Court rejects both appeals. The Constitutional Court ruled in the following composition: Mirko Zovko, President of the Constitutional Court,

judges Marko Arsović, Prof. Dr Kasim Begić, Hans Danelius, Prof. Dr Ismet Dautbasić, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Zvonko Miljko and Prof. Dr Vitomir Popović.

Cases No. U 3/98 and 4/98
5 June 1998
Sarajevo

Mirko Zovko
President
Constitutional Court of Bosnia and Herzegovina

The Constitutional Court rejected the appeals against the decisions of the Human Rights Chamber since the appellants had not participated in the proceedings before the Human Rights Chamber.

Case No. U 15/99

Appeal of Mrs. S. Z. from Prijedor against the Judgment of the Supreme Court of the Republika Srpska, No. Rev. 91/98 of 26 May 1999, the Judgment of the County Court of Banja Luka, No. Gž-474/97 of 25 September 1997 and the Judgment of the Municipal Court of Prijedor, No. P-61/96 of 27 December 1996

RULING
of 3 December 1999

DECISION
of 15 and 16 December 2000

Having regard to Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Article 70 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, Nos. 2/97, 16/99 and 20/99), the Constitutional Court of Bosnia and Herzegovina, at its session held on 3 December 1999, adopted the following

RULING

Enforcement of the Judgment of the Basic Court of Prijedor, No. P-61/96 of 27 December 1996, affirmed by the Judgments of the County Court of Banja Luka, No. Gž-474/97 of 25 September 1997 and the Supreme Court of the Republika Srpska, No. Rev-91/98 of 26 May 1999, is hereby suspended.

This Ruling shall take effect immediately and the suspension of enforcement shall remain in effect until the Constitutional Court of Bosnia and Herzegovina adopts a decision upon the appeal of S. Z. lodged against the Judgment of the Supreme Court of the Republika Srpska, No. Rev-91/98 of 26 May 1999.

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

Reasons

The Basic Court of Prijedor adopted Judgment No. P-61/96 of 27 December 1996, in which it dismissed the claim of S.Z. from Prijedor to terminate the contract on exchange of real estate concluded on 10 August 1995 with the defendant B.V. By the same judgment, the Basic Court of Prijedor granted the request of B.V. that S.Z. move out of the family house in Prijedor with his children and turn it over to B.V.

The County Court of Banja Luka adopted a second-instance Judgment, No. Gž-474/97 of 25 September 1997, in which it dismissed the complaint of S.Z. and confirmed the first-instance judgment.

The Supreme Court of the Republika Srpska adopted Judgment No. Rev-91/98 of 26 May 1999, in which it dismissed the complaint of S. Z. against the second-instance Judgment.

On 21 October 1999, S. Z. ("appellant"), represented by M. K., a lawyer practising in Banja Luka, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against the Judgment of the Supreme Court of the Republika Srpska. The appellant contended that the challenged judgment, as well as the judgments of the first and second instance, had been based on an erroneous application of the substantive law, due to the fact that the war conditions in which she had concluded the contract of exchange and the difficulties which she had then faced as a member of the Croat minority in Prijedor had not been taken into account by the courts. Furthermore, she contended that she had been forced to conclude the contract and that her human rights to peaceful enjoyment of her property, to respect for her home and to a fair trial – rights guaranteed by the Constitution of Bosnia and Herzegovina as well as by the European Convention for the Protection of Human Rights and Fundamental Freedoms – had been violated by the aforementioned judgments, which had confirmed the validity of the contract.

The appellant further requested that the Constitutional Court suspend the enforcement of the first-instance Judgment of the Basic Court of Prijedor, pointing out that its enforcement would place her in a very difficult situation, as she would be practically ejected on to the street with her family and without any alternative shelter.

The appeal was communicated to the defendant, B. V., who failed to submit his reply.

According to Article 75 of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure"), the Constitutional Court may, until the final decision is reached, wholly or partially adopt a ruling by which it would temporarily suspend enforcement of decisions, laws (acts) or individual acts if their enforcement could have irremediable detrimental consequences.

The Constitutional Court considers that the enforcement of the Judgment of the Basic Court of Prijedor, No. P-61/96 of 27 December 1996, whose constitutionality shall be evaluated during the course of the proceedings instituted by the appeal against the challenged Judgment of the Supreme Court of the Republika Srpska, could have irremediable detrimental consequences for the appellant.

Therefore, the Constitutional Court holds that the requirements for the temporary suspension of the enforcement of the Judgment of the Basic Court of Prijedor, affirmed by the decisions of the County Court of Banja Luka and the Supreme Court of the Republika Srpska, have been met.

The Constitutional Court ruled in the following composition:

President of the Constitutional Court Prof. Dr Kasim Begić,

Judges: Marko Arsović, Hans Danelius, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Mag. iur. Zvonko Miljko, Azra Omeragić and Prof. Dr Vitomir Popović.

U 15/99
3 December 1999
Sarajevo

Prof. Dr Kasim Begić
President
Constitutional Court of Bosnia and Herzegovina

The Constitutional Court may temporarily suspend the enforcement of a first-instance judgment, affirmed by a second-instance judgment and a Judgment of the Supreme Court of an Entity challenged by the appeal, if it finds that its enforcement could have irremediable detrimental consequences for the appellant (Article 70 of the Constitutional Court's Rules of Procedure).

Having regard to Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Articles 54 and 61 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, Nos. 2/97, 16/99 and 20/99), at its session held on 15 and 16 December 2000, the Constitutional Court of Bosnia and Herzegovina adopted the following

DECISION

Upon the appeal of Mrs. S. Z., née B., the Constitutional Court of Bosnia and Herzegovina:

1. Annuls the Judgment of the Supreme Court of the Republika Srpska No. Rev. 91/98 of 26 May 1999, the Judgment of the County Court of Banja Luka No. Gž-474/97 of 25 September 1997 and the Judgment of the Municipal Court of Prijedor No. P-61/96 of 27 December 1996; and

2. Declares that the contract on the exchange of real property of 10 August 1995 concluded between S. Z. and B. V. is null and void.

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

Reasons

I Facts of the Case

A contract on the exchange of property, dated 10 August 1995, was concluded in Prijedor between S. Z. and B. V. According to this contract, B. V. transferred to S. Z. his property, registered as plot of land 2308/1 with a surface of 202 m^2, situated in Bol, on the island of Brač, in Croatia in exchange for S. Z.'s property, plot of land 10/118 with a surface of 459m^2, situated at No.12 Petra Preradovića Street in Prijedor. The contract was drawn up in the office of the lawyer, M. D., in Prijedor and was certified on 5 September 1995 by the Municipal Court of Prijedor.

On 8 March 1996, S. Z. ("appellant") instituted proceedings (case No. P-61/96) before the Municipal Court of Prijedor in which she requested the cancellation of the contract of exchange of real property. She argued that the contract had been concluded due to threats and was not a voluntary act on her part. She referred to the war situation prevailing at the time when the contract was concluded, as a result of which she, as a Croat living in the Serb-dominated Prijedor, had felt threatened and compelled to conclude the contract.

B. V. contested the appellant's claim and argued that the contract of exchange was a voluntary and legally valid agreement. He requested that the Municipal Court of Prijedor order the appellant to move out of the house in Prijedor with her household members and deliver the house to him.

On 27 December 1996, based on written and oral evidence, the Municipal Court of Prijedor decided to reject the appellant's claim and ordered the appellant to move out of the house in Prijedor with her household members and to deliver the house to B. V. within 15 days under threat of forced execution. In its Judgment, the Municipal Court of Prijedor found that the contract was legally valid and that B. V. was now the legal owner of the house in Prijedor.

The appellant appealed against this Judgment to the County Court of Banja Luka in Case No. Gž-474/97. In its Judgment of 25 September 1997, the County Court of Banja Luka found that the contract of exchange was valid under the Law on Contractual and Other Relations and dismissed the appellant's appeal.

The appellant lodged a further appeal with the Supreme Court of the Republika Srpska in Case No. Rev. 91/98 which, by the Judgment of 26 May 1999, dismissed the appeal.

II Proceedings before the Constitutional Court

On 21 October 1999, the appellant, represented by M. K., a lawyer practicing in Banja Luka, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against the Judgment of the Supreme Court of the Republika Srpska. The appellant claimed that the challenged Judgment, as well as the judgments of first and second instance, were based on the incorrect application of the substantive law, due to the fact that the war conditions in which she had concluded the contract of exchange and the difficulties which she had then faced as a member of the Croat minority in Prijedor had not been taken into account by the courts. Furthermore, she claimed that she had been forced to conclude the contract and that her human rights to the peaceful enjoyment of her

property, to respect for her home and to a fair trial – rights guaranteed by the Constitution of Bosnia and Herzegovina and by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") – had been violated by the aforementioned judgments, which had confirmed the validity of the contract.

The appeal was communicated to B. V., who submitted his reply on 18 April 2000. In his reply, he contested the claim of the appellant and argued that the contract he had concluded with her was legally valid. He referred to the fact that the courts had found at three levels that the appellant had concluded the contract of her own free will, since neither he nor any third person had forced her to give up her house. It was only after the end of the war in Bosnia and Herzegovina that she had changed her mind and wanted to have the house back. However, in his opinion there were no legal grounds for the annulment of the contract.

Comments on the appeal were also requested from the Supreme Court of the Republika Srpska, in accordance with Article 16, paragraph 1 of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure"). However, no comments were received from the Supreme Court of the Republika Srpska.

During the course of the proceedings before the Constitutional Court, the appellant requested, on 15 November 1999, that the Constitutional Court should, as a temporary measure, suspend the execution of the Judgment of the Municipal Court of Prijedor by which she had been ordered to leave her house in Prijedor and hand it over to B. V. She pointed out that the execution of that Judgment would bring her into a very difficult situation, as she would practically be thrown into the street with her family, without any possible shelter.

On 3 December 1999, based on Article 75 of the Constitutional Court's Rules of Procedure, the Constitutional Court adopted a Ruling by which it suspended the execution of the judgment of the Municipal Court in Prijedor No. P-61/96 of 27 December 1996 on the grounds that the execution of that Judgment could have irremediable detrimental consequences for the appellant. On 3 November 2000, the Constitutional Court held an oral hearing in the present case, which was attended by the appellant and her lawyer Z. O., and by B. V. and his lawyer R. S., as well as by a representative of the Supreme Court of the Republika Srpska, P. B. At the hearing, both Parties presented their views on the case and answered questions. Mr. P. B. also made a statement on behalf of the Supreme Court of the Republika Srpska.

III Admissibility

According to Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court has appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. The Constitutional Court may consider the appeal only if all legal remedies against the challenged judgment have been exhausted and if it is submitted within a time-limit of 60 days from the date on which the appellant received the decision on the last legal remedy used (Article 11 of the Constitutional Court's Rules of Procedure).

The Constitutional Court finds that the Judgments of the Supreme Court of the Republika Srpska, the County Court of Banja Luka and the Municipal Court of Prijedor raise issues under Article II of the Constitution of Bosnia and Herzegovina and under the European Convention and its Protocol No.1 which, according to Article II.2 of the Constitution of Bosnia and Herzegovina, apply directly in Bosnia and Herzegovina and shall have priority over all other law. Moreover, by bringing the case before the Supreme Court of the Republika Srpska, the appellant has exhausted all other remedies, and she has lodged the appeal within the time-limit stipulated in Article 11 of the Constitutional Court's Rules of Procedure. Consequently, her appeal is admissible.

IV The Legal Evaluation of the Case

In the present case, the Municipal Court of Prijedor found that the contract of exchange between the appellant and B. V. was legally valid under the Law on Obligations and that the appellant was therefore under an obligation to leave her house in Prijedor and hand it over to B. V. in his capacity of the new owner of the house. This judgment was subsequently confirmed by the County Court of Banja Luka and the Supreme Court of the Republika Srpska. The appellant challenged these court decisions in her appeal to the Constitutional Court.

It is not the task of the Constitutional Court to examine the present case on the basis of the provisions of the Law on Contractual and Other Relations or other rules of private law. The Constitutional Court, however, is called upon to determine whether the court decisions, and in the last resort, the Judgment of the Supreme Court of the Republika Srpska, violated the Constitution of Bosnia and Herzegovina and, in particular, Article 8 of the European Convention and Article 1 of Protocol No. 1 to the European Convention which, according to Article II.2 of the Constitution of Bosnia and Herzegovina, are part of the law of Bosnia and Herzegovina and shall have priority over all other law.

Article 8 of the European Convention provides:

1. Everybody has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

Article 1 of Protocol No. 1 provides:

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.

It is clear that the owner of a house who sells the house to another person cannot normally claim any protection of his right to that house as his home or his property after the sale. However, such protection is lost only when the sale was a voluntary transaction, the validity of which is recognized by the law. The voluntary character of the sale may also be questioned if it occurred in an emergency situation or if the seller was under strong pressure or in a serious danger, these being elements which must be taken into account in the determination of whether he or she can be considered to have transferred his or her rights to another person in a valid manner.

In the present case, it has not been alleged that B. V. exposed the appellant to threats or that he forced her in any other way to conclude the contract of exchange with him. Moreover, the appellant's allegations that she had received threats by telephone before the conclusion of the contract are rather vague and of general character. No persons have been identified as responsible for these threats, and the allegations have not been substantiated in any other way.

However, there are other circumstances which must also be taken into account when evaluating the transaction with B. V.

It should first be noted that the house which the appellant exchanged was the house in which she had lived for 60 years, her entire life, and which she had inherited from her father. She must therefore have had a special attachment to the house and there is no reason to believe that she would have under normal circumstances been willing to leave it in order to go and live in a place far away with which she had no particular links. Moreover, what she received in exchange on the island of Brač has been described as an unfinished weekend or summer house, and she had not visited the house before concluding the contract. It is likely that the house on Brač had a significantly lower value than the appellant's house in Prijedor and that the exchange contract was thus, from an economic point of view, unfavorable to the appellant. All these factors make the contract appear as an abnormal transaction which would not have been effected under normal circumstances.

Indeed, the transaction took place in war conditions and while the appellant, who is a Croat, experienced considerable difficulties and, as she has explained, felt exposed even to danger in Prijedor. There can be no doubt that B. V. was aware of the appellant's vulnerable and difficult situation, and he must have understood that this was the reason why she was prepared to conclude the exchange agreement with him.

The contract is dated 10 August 1995, but the appellant has stated that it was antedated and in fact concluded on 4 September 1995. She has stated that "this was a few days after the larger part of her house had been occupied, in accordance with a decision of the local authorities, by a family of Serb refugees, the K. family. In connection therewith, the appellant had felt compelled to leave her house temporarily and go and live elsewhere in the neighborhood. Whatever the precise dates may have been, it has not been contested that the exchange contract was concluded at a time when the appellant's right to remain in possession of the house and her future in Prijedor appeared uncertain". She has explained that she had plans, and made an attempt, to leave Prijedor but that this did not work out as she had planned. She thus remained in Prijedor, and when the K. family left her house after having lived in it for eight and a half months, the appellant returned to live in it despite the exchange contract she had concluded. Since then she has again lived in the house for several years.

One of the basic purposes of the General Framework Agreement for Peace in Bosnia and Herzegovina and the Constitution of Bosnia and Herzegovina, which is Annex 4 to that Agreement, was to combat and eliminate the ethnic cleansing which had taken place during the war period and which had caused many persons belonging to ethnic minorities in various areas of Bosnia and Herzegovina to leave their homes and go and live elsewhere,

either abroad or in other parts of Bosnia and Herzegovina. One important aim, reflected *inter alia* in Article II.5 of the Constitution of Bosnia and Herzegovina, is the return of refugees and displaced persons to their places of origin and to their previous homes.

In Annex 7 to the General Framework Agreement, Article XII.3 provides that in determining the lawful owner of any property, the Commission for Displaced Persons and Refugees shall not recognize as valid any illegal property transaction, including any transfer that was made under duress, in exchange for exit permission or documents, or that was otherwise in connection with ethnic cleansing. This shows that, in the context of the General Framework Agreement, the objective of eliminating the effects and traces of ethnic cleansing is considered to be of such primary importance as to affect the validity of legal transactions in some cases which would otherwise have satisfied the requirements under private law.

In the present case, the Constitutional Court finds it clearly established that the appellant concluded the exchange contract under the influence of her vulnerable position as a member of an ethnic minority at a time when a policy of ethnic cleansing was being pursued in large parts of Bosnia and Herzegovina. It is also clear that the contract was not in conformity with what would have been her wishes under normal conditions, and it must be assumed that B. V. was, at least in a general way, well aware of the reasons which made her willing to accept the contract.

In these circumstances, the Constitutional Court must conclude that the enforcement of the exchange contract would not be in conformity with the appellant's rights to respect for her home under Article 8 of the European Convention and Article II.3 (f) of the Constitution of Bosnia and Herzegovina and to respect for her property under Article 1 of Protocol No. 1 and Article II.3 (k) of the Constitution of Bosnia and Herzegovina. The Judgments of the Supreme Court of the Republika Srpska, the County Court in Banja Luka and the Municipal Court in Prijedor must therefore be annulled and the exchange agreement must be declared to be without legal effect.

Having reached this conclusion in regard to Article 8 of the European Convention and Article 1 of Protocol No. 1, the Constitutional Court does not find it necessary to examine whether the appellant's right under Article 6 of the European Convention to a fair court hearing was respected during the court proceedings.

According to Article VI.4 of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court are final and binding.

Having regard to Article 36 of the Constitutional Court's Rules of Procedure, judges Prof. Dr Vitomir Popović, Prof. Dr Snežana Savić and Mirko Zovko delivered their separate opinions. The separate opinions of the judges shall be enclosed with the case as an annex.

The Constitutional Court ruled in the following composition:

President of the Constitutional Court, Prof. Dr Kasim Begić,

Judges: Hans Danelius, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Dr Zvonko Miljko, Azra Omeragić, Prof. Dr Vitomir Popović, Prof. Dr Snežana Savić, Mirko Zovko.

U 15/99
15 and 16 December 2000
Sarajevo

Prof. Dr Kasim Begić
President
Constitutional Court of Bosnia and Herzegovina

It is not the task of the Constitutional Court to examine the present case on the basis of the provisions of the Law on Contractual and Other Relations or other rules of private law. The Constitutional Court, however, is called upon to determine whether the court decisions violated the Constitution of Bosnia and Herzegovina and in particular, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 1 thereto.

The Constitutional Court annuls the Judgment of the Supreme Court and the judgments of the courts of lower instances, and proclaims the disputed contract on the exchange of real estate concluded between S. Z and B. V. on 10 August 1995 null and void. The Constitutional Court finds it clearly established that S. Z. concluded the exchange contract under the influence of her vulnerable position as a member of an ethnic minority at a time when a policy of ethnic cleansing was being pursued in large parts of Bosnia and Herzegovina. It is also clear that the contract is not in conformity with what would have been her wishes under normal conditions, and it must be assumed that B. V. was, at least in a general way, well aware of the reasons which made S. Z. willing to accept the contract.

ANNEX

Separate dissenting opinion of judge Prof. Dr Vitomir Popovic with respect to the Decision case No. U 15/99

The appeal of Mrs. S. Z., née B., from Prijedor was granted and the Judgments of the Supreme Court of the Republika Srpska No. Rev. 91/98 of 26 May 1999, the County Court of Banja Luka No. Gz-474/97 of 25 September 1997 and the Basic Court of Prijedor No. P-61/96 of 27 December 1996 were annulled by the Decision of the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court"), *No. U 15/99* of 15 and 16 December 2000. The same Decision declared the contract on the exchange of real property (dated 10 August 1995 and signed between S. Z. and B. V.) to be without legal effect.

Having regard to Article 36, paragraphs 2 and 3 of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure"), I choose to deliver my separate opinion with regard to this Decision of the Constitutional Court for the following reasons:

1. In item 4 of the Decision, the Constitutional Court outlines as follows:

It is not the task of the Constitutional Court to examine the present case on the basis of the provisions of the Code on Obligations or other rules of private law, but the Constitutional Court is called upon to determine whether the court decisions, and in the last resort the judgment of the Supreme Court of the Republika Srpska, violate the Constitution of Bosnia and Herzegovina and, in particular Article 8 of the European Convention and Article 1 of Protocol No. 1 to the European Convention which, according to Article II.2 of the Constitution of Bosnia and Herzegovina, are part of the law of Bosnia and Herzegovina and shall have priority over all other laws.

After quoting the aforementioned provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), in paragraph 4 of the same item the Constitutional Court concludes as follows:

It is clear that the owner of a house who sells the house to another person cannot normally after the sale claim any protection of his right to that house as his home or his property. However, such protection is lost only when the sale was a voluntary transaction whose validity is recognized by the law. The voluntary character of the sale may also be questioned if it occurred in an emergency situation or while the seller was under strong

pressure or in a serious danger, these being elements which must be taken into account in the determination of whether or not he can be considered to have in a valid manner transferred his rights to another person.

In paragraph 13, the Constitutional Court concludes as follows:

In the present case, the Constitutional Court finds it clearly established that the appellant concluded the exchange contract under the influence of her vulnerable position as a member of an ethnic minority at a time when a policy of ethnic cleansing was being pursued in large parts of Bosnia and Herzegovina. It is also clear that the contract was not in conformity with what would have been her wishes under normal conditions, and it must be assumed that B. V. was, at least in a general way, well aware of the reasons which made her willing to accept the contract.

Therefore, if the aforementioned paragraphs and drawn conclusion are analyzed, it can be concluded that this Decision of the Constitutional Court is contradictory within itself since it starts from the assumption that *it is not the task of the Constitutional Court to examine the present case on the basis of the provisions of the Code on Obligations or other rules of private law* and then it goes into the merits of the Judgments rendered by the ordinary courts as courts of full jurisdiction. With the exception from the formal reference made to Article 8 of the European Convention, the Constitutional Court, in its Decision, does not explain what the violation of the Constitution of Bosnia and Herzegovina and the European Convention constitutes of, nor does it outline any decision taken by the European Court in Strasbourg, which could, as an example of the case-law, be relevant to the present case.

It is more than obvious that the Constitutional Court cannot conclude generally as follows *finds it clearly established that the appellant concluded the exchange contract under the influence of her vulnerable position as a member of an ethnic minority at a time when a policy of ethnic cleansing was being pursued in large parts of Bosnia and Herzegovina* since it does not fall within the competence of the Constitutional Court, as the Constitutional Court itself concludes in paragraph 2, item 4 of the Decision.

The Constitutional Court does not state any argument which would explain how it is *clear that the contract was not in conformity with what would have been her wishes under normal conditions"* and that "*there can be no doubt that B. V. was aware of the appellant's vulnerable and difficult situation, and he must have understood that this was the reason why she was prepared to conclude the exchange agreement with him.* The legal system does not provide for the term "vulnerable situation" but it defines clearly and precisely

what is "force, threat or compulsion" as it is provided for in the Law on Contractual and other Relations. Moreover the legal system provides for the precise reasons for which a contract may be cancelled or for which the annulment of the contract may be requested.

As to the present case, the appellant concluded the contract on her own initiative with B.V. During the proceedings before the Constitutional Court and public hearing she did not point out to any worthy reason capable to show that the contract was concluded under force, threat or compulsion or that the conclusion of the contract was incompatible with the European Convention or Protocol No. 1 to the European Convention.

On the contrary, the ordinary courts, having conducted the probative proceedings as a whole, having examined the will of the contractual parties, the manner and the time of conclusion of the contract, took the position that the contract had been concluded in the manner and under conditions prescribed in the Law on Contractual and other Obligations. Therefore, according to the competences provided for in the Constitution of Bosnia and Herzegovina and the Rules of Procedure of the Constitutional Court, the Constitutional Court did not have the competence to decide on the merits of the Judgments of the ordinary courts except insofar as the part relating to the violations of the Constitution of Bosnia and Herzegovina and the European Convention is concerned.

Acting in such a manner, the Constitutional Court strayed from its constitutional function and started to transform into a court of full jurisdiction, or, in other words, into an non-existing instance of ordinary, federal or other court, and, practically, as the "upholder of the Constitution", started violating its own Constitution.

I would like to stress that the applicable provisions of the Law on Contractual and other Obligations, which define the term of "force, threat and compulsion", are legal terms taken from the previous civil codes (Swiss from 1911, German from 1990, French from 1904, Austrian and Serbian which are applicable even today in European legislation, and which the European Court of Human Rights in Strasbourg – which applies directly the European Convention and its Protocols – did not challenge nor did it declare any of these codes as incompatible with the European Convention).

2. It was stated in the last paragraph that the Constitutional Court adopted this Decision, ruling in the full composition. However, this is not correct since the Decision was adopted by majority of votes, 6: 3, since judges Snežana Savić, Mirko Zovko and myself voted against it.

Case No. U 14/00

Appeal of Ž. M. from Cazin against the judgment of the Supreme Court of Federation of Bosnia and Herzegovina, No. Už- 39/00 of 18 May 2001

DECISION of 4 and 5 May 2001

RULING of 25 and 26 February 2002

Having regard to Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Articles 54 and 61 of the Court's Rules of Procedure, at its session held on 4 and 5 May 2001, the Constitutional Court adopted the following

DECISION

The appeal of Ž. M. lodged against the judgment of the Supreme Court of Federation of Bosnia and Herzegovina is granted, and:

- the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina No. Už- 39/00 of 18 May 2001,

- the judgment of the Cantonal Court of Bihać No. U-267/99 of 21 December 1999,

- the ruling of the Cantonal Ministry for Urbanism, Physical Planning and Environmental Protection of the Unsko-Sanski Canton No. 11/1-23-1054-4 II/99 of 9 November 1999 and

- the ruling of the Department for Housing and Communal Issues of the Municipality of Cazin No. 05-23-1433/99 of 6 August 1999, are annulled.

The Department for Housing and Communal Issues of the Municipality of Cazin is ordered to hand into the possession and free disposal of Mr. Ž. M., the apartment in the apartment complex "Triplex" situated in Banja Luka, 10/17 Ahmeta Fethagica Street, with a surface area of 128.81 m2, free of persons and personal belongings, which the Factory of Cardboard and Wrapping Material Cazin allocated to the appellant by its ruling No. 01-93/87 of 4 September 1987, within a time-limit of 60 days from the date this decision is published in the *Official Gazette of Bosnia and Herzegovina*, under threat of enforcement.

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

Reasons

I. Facts

1. By its ruling No. 01-93/87 of 4 September 1987, the Factory of Cardboard and Wrapping Material Cazin allocated to its employee Mr. Ž. M. ("appellant") an apartment with a surface area of 128.81 m^2, situated in the apartment complex "Triplex" in Cazin. Mr. Ž. M. occupied the apartment with his family until the end of 1994, when they left Bosnia and Herzegovina due to war hostilities. They now live in the United States of America.

2. On 15 June 1999, the appellant, represented by Mr. M. S., a lawyer practicing in Cazin, lodged a claim for the repossession of his apartment with the Department for Housing and Communal Issues of the Municipality of Cazin. In its ruling No. 05-23-1433/9 of 6 August 1999, the Department for Housing and Communal Issues of the Municipality of Cazin rejected his claim, since he had not submitted a contract on the use of the apartment. This was a condition for repossession and for the acquisition of occupancy rights in accordance with the Law on Housing Relations ("LoHR").

3. The appellant lodged an appeal with the Cantonal Ministry for Urbanism, Physical Planning and Environmental Protection of the Unsko-Sanski Canton. He alleged in his appeal that the ruling on the allocation of the apartment replaced a contract on the occupancy of the apartment. In its ruling No. 11/1-23-1054-U II/99 of 9 November 1999, the Cantonal Ministry dismissed the appeal as ill-founded. The Cantonal Ministry found that Mr. Ž. M. could not be regarded as the occupancy right holder within the meaning of the LoHR and that he was not entitled to regain possession of the apartment.

4. The appellant initiated administrative proceedings before the Cantonal Court of Bihać. He requested that the Cantonal Court of Bihać quash the Cantonal Ministry's ruling. By its judgment No. U-267/99 of 21 December 1999, the Cantonal Court dismissed his request. The Cantonal Court established in its judgment that Mr. Ž. M. had not obtained occupancy rights and that he was not entitled to repossession of the apartment.

5. The appellant lodged an appeal with the Supreme Court of the Federation of Bosnia and Herzegovina. The Supreme Court of the Federation of Bosnia and Herzegovina dismissed the appeal in its judgment No. Už-39/00 of 18 May 2000, with the reason that the issue here is the claim for the repossession of the apartment, which was declared abandoned by the ruling of the Municipality of Cazin of 14 July 1995. It also gave reasons

that the appellant had moved into the apartment in accordance with the ruling to allocate the apartment to him and that he had never concluded a contract on the occupancy of the apartment, i.e. that the appellant does not have the status of an occupancy right holder within the meaning of Article 11 of the LoHR. It also states that he was not a person authorized to lodge a claim for the repossession of the apartment according to Article 4, paragraph 1 of the Law on the Cessation of Application of the Law on Abandoned Apartments.

II Proceedings before the Constitutional Court

6. On 5 July 2000, the appellant lodged an appeal with the Constitutional Court of Bosnia and Herzegovina. He requested that the Court annul the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina No. Už-39/00 of 18 May 2000, the judgment of the Cantonal Court of Bihać No. U-267/99 of 21 December 1999, the ruling of the Cantonal Ministry for Urbanism, Physical Planning and Environmental Protection of the Unsko-Sanski Canton No. 11/1-23-1054-U II/99 of 9 November 1999 and the ruling of the Department for Housing and Communal Issues of the Municipality of Cazin No. 05-23-1433/99 of 6 August 1999. He complained that the contested decisions prevented him and his family from returning to the apartment and therefore violated his right to respect for his home protected in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in Article II.2 of the Constitution of Bosnia and Herzegovina. He alleged that he had moved into the apartment in a legal manner based on the ruling on the allocation of the apartment, which replaced a contract on the use of the apartment. He also alleged that there were other apartments in the same apartment complex, which also had not been transferred into the possession of the previous housing community. This meant that contracts on the occupancy of these apartments had never been concluded with that community; that he had been paying the rent to the enterprise which had allocated the apartment to him; that neither the administrative bodies nor the courts had considered the essence of his problem and that he was therefore a victim of discrimination. He also pointed out that Mr. S. Dž., who now lives with his family in the apartment, prevented him from returning to the apartment.

7. The Constitutional Court of Bosnia and Herzegovina requested that the Supreme Court of the Federation of Bosnia and Herzegovina, the Cantonal Ministry for Urbanism, Physical Planning and Environmental Protection of the Unsko-Sanski Canton and S. Dž., submit their replies to the appeal. The Supreme Court of the Federation of Bosnia and Herzegovina and the Cantonal Ministry for Urbanism, Physical Planning and Environmental Protection of the Unsko-Sanski Canton stated in their replies that the appeal

was ill-founded for reasons which were set out in their decisions. Mr. S. Dž. contested the appellant's appeal and claimed to be the holder of the occupancy right over the apartment which he had acquired in a legal manner, whereas Mr. Ž. M. had never acquired occupancy rights. He also referred to his serious health problems and to his 80% disability (his leg having been amputated).

8. The replies to the appeal were communicated to the appellant who submitted to the Court a certificate of 26 February 2001 of the Housing Fund of the Municipality of Cazin. This certificate states that the apartment complex "Duplex-Triplex", which was the property of the Factory of Cardboard and Wrapping Material Cazin, was not registered as a complex managed and maintained by the Housing Community whose successor was the Fund. It was also stated that contracts had never been concluded with the said Housing Community.

III Admissibility

9. According to Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina has appellate jurisdiction over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. According to Article 11 of the Rules on Procedure of the Constitutional Court of Bosnia and Herzegovina, the Court may examine an appeal only if all legal remedies which are available under the laws of the Entities against the judgment challenged by the appeal have been exhausted and if the appeal is filed within a time-limit of 60 days from the date on which the appellant received the final decision.

10. The Constitutional Court of Bosnia and Herzegovina notes that the judgments of the Supreme Court of the Federation of Bosnia and Herzegovina and the Cantonal Court in Bihać, as well as the rulings of the Cantonal Ministry and the Municipality of Cazin, raise questions under Article II of the Constitution of Bosnia and Herzegovina and the European Convention on Human Rights, which is, according to Article II.2 of the Constitution, directly applicable in Bosnia and Herzegovina and has priority over all other law. Furthermore, by initiating proceedings before the Supreme Court of the Federation of Bosnia and Herzegovina, the appellant exhausted all effective legal remedies and his appeal was lodged within the time-limit provided for in Article 11 of the Court's Rules of Procedure.

It follows that the appeal is admissible.

IV Findings

11. By its ruling No. 01-93/87 of 4 September 1987, the Factory of Cardboard and Wrapping Material Cazin allocated to the appellant the apartment situated in Cazin. The appellant moved into the apartment based on this ruling where he lived with his family until the end of 1994 when he and his family left Bosnia and Herzegovina due to the war hostilities. They are presently living in the United States of America.

12. The appellant, by Court finds that in the present case there has been a violation of the appellant's right under Article 8 of the ECHR to respect for his home.

13. In its reply to the appeal, the Supreme Court of the Federation of Bosnia and Herzegovina stated that the appeal was ill-founded and referred to the reasons given in its judgment. Moreover, the Supreme Court stated that the appellant confirms the fact that he had moved into the apartment only based on the ruling on the allocation of the apartment. He believes that the ruling replaces a contract on the occupancy of the apartment, which is ill-founded and inconsistent with Article 11 of the LoHR.

14. However, the appellant claims that the aforesaid judgments and rulings prevented him from returning to his home and that his right to respect for his home provided for in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in Article II.2 of the Constitution of Bosnia and Herzegovina was therefore violated. Moreover, the appellant complains that he was a victim of discrimination.

15. The Constitutional Court recalls that, according to Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, the Court has "appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina". Accordingly, the Constitutional Court's appellate jurisdiction is limited to a review of the constitutional issues involved which means, in the present case, that the Court must examine whether the decisions regarding the apartment violate the Constitution of Bosnia and Herzegovina and in particular Article 8 of the European Convention on Human Rights and Article 1 Protocol No. 1, which, according to Article II.2 of the Constitution, are part of the law of Bosnia and Herzegovina and have priority over all other law.

16. Article 8 of the European Convention provides in its relevant parts:

> *1. Everybody has the right to respect for (...) his home (...) .*

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

17. The essential purpose of Article 8 of the Convention is the protection of individuals against the arbitrary interference of authorities with their rights guaranteed by Article 8 of the Convention (cf. for instance European Court of Human Rights, *Kroon v. the Netherland*s, judgment of 27 October 1994, Series A No. 297-C, p. 56, paragraph 31).

18. In the present case, the Constitutional Court must first examine whether the apartment is to be considered the appellant's "home" within the meaning of Article 8 of the Convention, and, if so, whether the measures taken constitute an "interference" with his right to respect for his home and whether that interference was justified according to paragraph 2 of Article 8.

19. For an interference to be justified, it must be "in accordance with the law". This condition of legality consists of several elements: (a) the interference has to be based on domestic or international law; (b) the relevant law must be accessible so that an individual can be easily informed about its contents; and (c) the law must also be formulated with reasonable precision and clarity so as to allow an individual to adapt his actions according to the law (cf. for instance European Court of Human Rights, *Sunday Times v. the United Kingdom*, judgment of 26 April 1979, Series A No. 30, p. 31, paragraph 49).

20. With regard to the question whether the apartment at issue in the present case could be regarded as the appellant's "home" within the meaning of Article 8 of the Convention, the Constitutional Court points out that Article 1, item 1 of Chapter One of Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina ("Agreement on Refugees and Displaced Persons") provides that all refugees and displaced persons have the right freely to return to their homes of origin and that they shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991. Indeed, the early return of refugees and displaced persons was an important objective of the settlement of the conflict in Bosnia and Herzegovina. Indeed, one of the basic aims of the General Peace Agreement was the return of persons to their homes of origin. In this respect, the Court considers the factual situation on 30 April 1991 (the date indicated in the Law on Refugees and Displaced Persons and in property laws) to be of particular relevance as a starting point for litigation on the return of possessions to their pre-war owners. Moreover, the Court notes that Article II.5 of the Constitution,

which provides that all refugees and displaced persons have the right to freely return to their homes of origin, raises this right of refugees and displaced persons to the level of constitutional rights which are, according to Article II.4 of the Constitution, secured to all persons in Bosnia and Herzegovina without discrimination on any ground.

21. In the present case, the Constitutional Court notes that the appellant was in factual possession of the apartment at issue and that he had legal grounds for his initial entry into, and his subsequent life in the apartment, which he clearly regarded as his home. The apartment was never handed over to the Housing Association, which was in accordance with an established practice and was not due to any negligence on the part of the appellant. Consequently, no contract on the use of the apartment was concluded with the said Association. However, the appellant paid rent to the factory, which had allocated the apartment to him from the moment he moved into it, and he therefore fulfilled the same obligation, as he would have had to fulfill had he concluded a contract on the use of the apartment. The Law on Housing Relations provides for such a situation as well, leaving it open to the parties, in case one of them does not wish to conclude a contract within 30 days from the date of moving into an apartment, to apply to the competent housing authority, which could then, instead of the Housing Association, make a decision in replacement of the contract. In the present case, no such demand was made, which rather indicates that both parties silently agreed to the factual state. Besides, it is an indisputable fact that the appellant spent 4 years in the apartment from the moment of entry to 30 April 1991, during which period nobody contested his right to use the apartment. Constitutional Court notes that the apartment in question is to be regarded as the appellant's home within the meaning of Article 8 of the European Convention.

22. The Constitutional Court further considers that the fact that the appellant was not able to return to the apartment during a period of approximately 5 years, resulted in an interference with his right to respect for his home within the meaning of Article 8, paragraph 1 of the Convention.

23. It therefore remains to be examined whether this interference was justified under Article 8, paragraph 2 or, in other words, whether it was in accordance with the law, and whether it was necessary in a democratic society to satisfy one of the aims indicated in Article 8, paragraph 2.

24. The Constitutional Court considers that the interference initially served a legitimate aim in accordance with the meaning of Article 8, paragraph 2 of the Convention. The relevant aim was the protection of the rights of others, i.e. the rights of persons who

were forced to leave their homes because of the war. Indeed, the war in Bosnia and Herzegovina caused mass movements of the population and created a great number of housing problems. Many apartments and houses were abandoned or destroyed, or the inhabitants were forcefully evicted. Empty homes were immediately taken over by others. The authorities of, at the time, the Republic of Bosnia and Herzegovina enacted a law which temporarily solved the housing problems caused by the great number of refugees.

25. However in the present case, the appellant has still not been able to realize his rights. Therefore, the "interference", which initially could have been justified and in compliance with the principle of "necessity", can no longer, five years after the end of the war, represent a necessary "interference in a democratic society" with the appellant's right to return to his home. The Constitutional Court notes that in the period from 6 January 1996 to 4 April 1998 the appellant had no legal means, which would have given him even a minimal chance to realize his rights. Only after the Law on Cessation of the Application of the Law on Abandoned Apartments was adopted, the appellant had the opportunity to request the realization of his rights before administrative and then judicial bodies.

26. In these circumstances, the Constitutional Court considers that the prevention of the appellant's return in the present case cannot be considered "necessary in a democratic society" and is therefore disproportionate in relation to the legal aim pursued. Having reached the conclusion that the requirement as to the necessity was not satisfied, the Court does not have to examine whether the interference was in accordance with the law.

27. Therefore, the Court finds that in the present case there has been a violation of the appellant's right under Article 8 of the ECHR to respect for his home.

a) The Right to Property

28. It appears from the appellant's submission that the appellant further complains under Article 1 of Protocol No. 1 to the ECHR. This article provides that:

Every natural person or legal person is entitled to the peaceful enjoyment of his possessions. No one should 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 paragraph 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.

29. Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, set out in the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property. The second rule contained in the second sentence of the same paragraph, covers deprivation of possession and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in light of the general principle enunciated in the first rule.

30. The first condition for the application of Article 1 of Protocol No. 1 is that the appellant's legal position with regard to the apartment constitutes a "possession" within the meaning this Article. The word "possessions" includes a wide range of proprietary interests representing an economic value.

In this respect the Court recalls the arguments put forward above in paragraphs 20 and 21. The apartment was officially allocated to the appellant and he continuously paid the due rent. Moreover, pursuant to Article 30, paragraphs 2 and 6 of the Law on Housing Relations, in case of an illegal occupation an eviction is only possible within three years (by the housing authorities) or eight years respectively (by the owner). During the whole time that the appellant was occupying the apartment, the authorities tacitly accepted the appellant's possession of the apartment. The fact, that the appellant abandoned the apartment due to the war, does not prevent the confirmation of his possession according to Article 30 of the Law on Housing Relations because the Cessation Law declares "All administrative, judicial and any other decisions (…) terminating occupancy rights (…) null and void" and thereby *re-establishes a continuity* temporarily interrupted by the Law on Abandoned Apartments. In view of this, not only the housing authorities but not even the owner could evict the appellant from the apartment. This exclusion of the eviction creates a strong legal status of possession equally strong as that of an occupancy right holder. Lastly, the general goal expressed in Annex 7 to the GFAP and Article II.5 Constitution of Bosnia and Herzegovina to enable and encourage the return of refugees and displaced persons supports the application of Article 1, Protocol No. 1 in all cases where people had to leave their homes due to the war, regardless of their specific legal status. The Court therefore considers the appellant's legal position to represent an acquired economic value falling under the notion of "possessions" of Article 1 of Protocol No. 1.

31. As a result of the judgments of the courts of the Federation, the appellant has been denied the right to make use of its economic value, which the apartment represented for him. The question is now whether this denial was in conformity with his rights according to the Constitution and Article 1 of Protocol No. 1.

32. Article II.5 of the Constitution provides, inter alia, that all refugees and displaced persons have the right, in accordance with Annex 7 to the GFAP, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. It follows that, according to this provision, there is a constitutional right to the restoration of the status *quo ante*.

33. The Court notes that the judgments of the courts of the Federation did not restore to the appellant the economic value which the apartment represented for him and which the Court has found to be protected as a proprietary right under Article 1 of Protocol No. 1. The Court will have to examine whether there was, in the circumstances of this case, a justification for this non-restoration. The answer to this question will depend on whether a fair balance was struck between the appellant's interests and other conflicting interests or, in other words, whether the interference with his rights was proportionate.

34. The Court accepts that there may have been strong reasons in the war period to justify the use of the apartment for providing shelter for refugees. However, the conditions, which then prevailed, have fundamentally changed and can no longer justify an interference with the appellant's rights.

It is also true that the apartment is at present occupied by other persons and that their interests must be taken into account when determining whether the interference with the appellant's rights is proportionate. However, when weighing the various interests involved, the Court must pay particular attention to the fact that the return of refugees and displaced persons to their previous homes is a primary objective of the GFAP and the Constitution and that the restoration of previously existing rights to houses and apartments should in this perspective be seen as a predominating objective.

35. For these reasons, the Court cannot find that the denial of the appellant's claim to the apartment was a proportionate restriction of his rights under Article 1 of Protocol No. 1. Consequently, the judgment of the Supreme Court of the Federation and the judgment of the Cantonal Court of Bihać must be considered to violate that Article.

36. This assessment is further supported when considering the lawfulness of the omission. At the time, the competent authorities assigning the apartment to a third party may have acted on the basis of the Law on Abandoned Apartments. However, the legal basis for the temporary re-allocation of those apartments has been removed through the annulment of "all administrative, judicial and any other decisions enacted on the basis of the regulations referred to in paragraph 1 of Article 1 of this Law on Cessation of Application of Law on Abandoned Apartments (Article 2) and in relation to the order to cease to apply those regulations. The present situation can therefore no longer be regarded as lawful.

37. In all that, it is irrelevant that the competent authorities and the courts may have applied the Cessation Law according to its exact wording, i.e. not returning the apartment to the appellant because they did not consider him an occupancy right holder. In view of their obligation to apply the ECHR and the Constitution of Bosnia and Herzegovina as prevailing law, they are to interpret the Cessation Law in a manner that is compatible with the ECHR and the Constitution of Bosnia and Herzegovina, namely equating the status of the appellant with that of an occupancy right holder.

38. On those grounds, the Court finds that the omission to reinstate the appellant into the apartment is not justified. Consequently, the judgment of the Supreme Court of the Federation of BiH No. UŽ-39/00 of 18 May 2000 and the judgment of the Cantonal Court of Bihać No. U-267/99 of 21 December 1999 disabling the appellant from being reinstated into his apartment are in violation of Article 1 of Protocol No. 1.

b) Freedom from Discrimination

39. The appellant further states that he was discriminated against during the proceedings pertaining to the protection of his property rights in violation of Article 14 in conjunction with Article 8 of the Convention.

40. Article 14 of the Convention provides 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, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

41. Since the appellant has not shown that he was treated differently than other persons in an identical situation, the Court did not examine the violations under Article 14 of the European Convention.

42. It follows that there has been no violation of the appellant's rights under Article 14 of the Convention.

V Conclusion

43. Having established a violation of the appellant's rights under the Constitution and the European Convention on Human rights, the Constitutional Court decided as stated in the operative part.

44. Pursuant to Article VI.4 of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court are final and binding.

The Court ruled in the following composition: President of the Court, Prof. Dr Snežana Savić. Judges: Prof. Dr Kasim Begić, Dr Hans Danelius, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Dr Zvonko Miljko, Azra Omeragić, Prof. Dr Vitomir Popović and Mirko Zovko.

U 14/00
Sarajevo
4 May 2001

Prof. Dr Snežana Savić
The President
Constitutional Court of Bosnia and Herzegovina

The court decisions and previous administrative acts, which dismissed the appellant's claim for repossession of the apartment since he did not conclude the contract on the use of the apartment and thus he cannot be considered the occupancy right holder, have unjustifiably prevented the appellant, a refugee from Bosnia and Herzegovina, from repossessing the apartment. Under the ruling on allocation of the apartment, he was in the factual possession of the apartment up until 30 April 1991 (date established through the property laws). Consequently, these decisions and administrative acts resulted in a violation of the appellant's right to respect for his home provided for by Article 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms and the right to peaceful enjoyment of the property provided for by Article 1 of Protocol No. 1 of European Convention and guaranteed by Article II of the Constitution of Bosnia and Herzegovina and particularly Article II.5 of the Constitution "Refugees and Displaced Persons").

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Articles 54 and 68 of the Rules of Procedure of the Constitutional Court – Amended text (*Official Gazette of Bosnia and Herzegovina*, No. 24/99), in Plenary, composed of the following

Prof. Dr Snežana Savić, President

Prof. Dr Kasim Begić,

Dr Hans Danelius,

Prof. Dr Louis Favoreu,

Prof. Dr Joseph Marko,

Dr Zvonko Miljko,

Azra Omeragić,

Prof. Dr Vitomir Popović

Mirko Zovko

Having considered the request of **Mr. S. Dž. and Ms. N. Dž.**, from Cazin, in case No. **U 14/00** at its session held on 25 and 26 February 2002, adopted the following

RULING

The request of Mrs. S. Dž. and Ms. N. Dž. from Cazin for revision of the Decision of the Constitutional Court of Bosnia and Herzegovina No. U-14/00 of 4 May 2001 is rejected.

Reasons

I. Facts of case

1. On 29 January 2002, Mr. S. Dž. and Mrs. N. Dž. ("applicants") from Cazin, represented by their attorney A. B. a lawyer practicing in Bihać, filed a request with the Constitutional

Court of Bosnia and Herzegovina ("Constitutional Court") to evise its Decision No. *U 14/00* of 4 May 2001.

2. The facts of the case, as they appear from the statements of the applicants, the documents submitted to the Constitutional Court and the case-file in the case No. U 14/00 can be summarized as follows:

3. According to the ruling No. 01-93/89 of 4 September 1987, the Factory of Cardboard and Wrapping Material, Cazin allocated to its employee Mr. Ž. M. an apartment, in the evise its Decision No. *U 14/00* of 4 May 2001.

2. The facts of the case, as they appear from the statements of the applicants, the documents submitted to the Constitutional Court and the case-file in the case No. U 14/00 can be summarized as follows:

3. According to the ruling No. 01-93/89 of 4 September 1987, the Factory of Cardboard and Wrapping Material, Cazin allocated to its employee Mr. Ž. M. an apartment, in the surface of 125.81 m^2, situated in the apartment complex "Triplex" in Cazin. Mr. Ž. M. occupied the apartment with his family until the end of 1994, when they went to United States of America due to the war in Bosnia and Herzegovina.

4. In order to repossess his apartment, Mr. Ž. M. initiated administrative proceedings on 15 June 1999 and, subsequently, proceedings before the courts. However, the administrative bodies and the courts rejected his claim on the grounds he cannot be considered an occupancy right holder in accordance with the Law on Housing Relations being that he failed to conclude the contract on the use of the apartment which was a condition for repossession and for the acquisition of occupancy rights in accordance with the same Law on Housing Relations.

5. On 5 July 2000, Mr. Ž. M. lodged an appeal with the Constitutional Court. He requested the Constitutional Court to annul the judgment Už-39/00 of 18 May 2000 of the Supreme Court of the Federation of Bosnia and Herzegovina, the judgment No. U-267/99 of 21 December 1999 of the Cantonal Court of Bihać, the ruling No. 11/1-23-1054-U II/99 of 9 November 1999 of the Cantonal Ministry for Urbanism, Physical Planning and Environmental Protection of the Unsko-Sanski Canton and the ruling No. 05-23-1433/99 of 6 August 1999 of the Department for Housing and Communal Issues of the Municipality of Cazin. He complained that the contested decisions prevented him and his family from returning to the apartment and therefore violated his right to his home provided for in Article 8 of the European Convention for the Protection of Human

Rights and Fundamental Freedoms ("European Convention") and in Article II.2 of the Constitution of Bosnia and Herzegovina. He further alleged that neither the administrative bodies nor the courts had considered the essence of his problem and that he was therefore a victim of discrimination. He also pointed out that the applicant, who now lives with his family in the apartment, prevented him from returning to the apartment.

6. In accordance with Article 16 of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure"), the Constitutional Court, in addition to the Supreme Court of the Federation of Bosnia and Herzegovina and the Cantonal Ministry for Urbanism, Physical Planning and Environmental Protection, also communicated the appeal of Mr. Ž. M. to the applicant who now resides in the apartment in question and who has the status of an interested party to the proceedings in accordance with Article 17 of the Law on Administrative Disputes. In his reply to the appeal, the applicant, pointing out that Mr. Ž. M. had not acquired the occupancy right, contested the appellant's appeal and claimed to be the holder of occupancy right over the apartment which he had acquired in accordance with the law and in which he lives with his family.

7. On 4 May 2001, the Constitutional Court adopted the decision No. *U 14/00* granting Mr. Ž. M.'s appeal, annulling the challenged courts' decisions and administrative acts and ordering the competent body of Cazin to re-instate Mr. Ž. M. in the apartment within a time-limit of 60 days as from the day of publishing of the decision in the *Official Gazette of Bosnia and Herzegovina* under the threat of forced execution. The Constitutional Court concluded that that the administrative acts and the courts' decisions, according to which Mr. Ž. M.'s claim to repossess the apartment was dismissed on the grounds that he had not concluded the contract on the use of the apartment, which was the condition for the acquisition of occupancy rights, unjustifiably prevented Mr. Ž. M. (a refugee from Bosnia and Herzegovina) from returning to the apartment. He had been in the actual possession of the apartment in accordance with the ruling on the apartment allocation until 30 April 1991 (the date fixed in accordance with the Law on Housing Relations). The Constitutional Court therefore concluded that they violated the right of Mr. Ž. M. to respect for his home provided for in Article 8 of the European Convention, the right to the peaceful enjoyment of his possessions provided for in Article 1 of Protocol No. 1 to the European Convention and in Article II of the Constitution of Bosnia and Herzegovina and particularly Article II.5 of the Constitution of Bosnia and Herzegovina ("Refugees and Displaced Persons").

8. The decision of the Constitutional Court No. *U 14/00* of 4 May 2001 was published in the *Official Gazette of Bosnia and Herzegovina* (*Official Gazette of Bosnia and Herzegovina*

No. 2/02) on 21 January 2002. The decision was also published in the *Official Gazettes* of the Entities (Article 71).

II. Request

9. On 29 January 2002, the applicants requested the Constitutional Court to revise its decision No. *U 14/00* of 4 May 2001 on the grounds that "new, legally relevant, facts emerged which required an essentially different decision."

10. The applicants noted that by decision of the Factory of Cardboard and Wrapping Material Cazin number: 01-406/97 of 2 July 1997, the apartment has been allocated to the applicant, who worked in this company, and that on 15 January 1998 he concluded the contract on use of the apartment and acquired status of the occupancy right holder. The applicant informed the Constitutional Court on these facts in his reply to the appeal of Mr. Ž. M., submitted to the Constitutional Court on 19 January 2001. However, the applicant raised no doubts as to the decisions of the courts dismissing the request of Mr. Ž. M. for repossession of the apartment. When asked to submit his reply to appeal, the applicant failed to engage proper legal assistance and to point out that he and his wife had purchased the apartment in question on 31 August 2000 and that they became owners of the apartment.

Furthermore, the applicants further stated that upon acquiring the ownership of the apartment, they had invested around 30,000.00 KM for its repair and reconstruction of the posts (due to the soil erosion), which increased the economic value of the apartment. The applicants also noted that the execution of the challenged decision of the Constitutional Court would lead to an unfounded enrichment of Mr. Ž. M.

III. Admissibility

11. The request was submitted in accordance with Article 68 of the Constitutional Court's Rules of Procedure, which reads as follows:

"*At the* request *of interested participants or on its own initiative, the Court may alter its decision if new, legally relevant, facts emerge, which require an essentially different decision.*

The interested participant must submit the request to alter the decision of the Court not later than six months from the emergence of the new facts.

The decision of the Court cannot be altered if, after its adoption, more than five years have elapsed."

12. The applicants filed the request for revision of the decision of the Constitutional Court No. *U 14/00* of 4 May 2001. The applicants currently reside in the apartment in question and the decision of the Constitutional Court could have direct effect on them. Therefore, the Constitutional Court considers them an interested party to the proceedings in accordance with Article 68 of Constitutional Court's the Rules of Procedure.

13. However, the applicants stated in their request that on 31 August 2000 they have purchased the apartment, which is to be repossessed by Mr. Ž. M. in accordance with the decision of the Constitutional Court No. U 14/00 of 4 May 2001. This information was confirmed with the contract on the purchase of the apartment and payment receipts. Therefore, they purchased the apartment in question more than eights months before the adoption of the decision of the Constitutional Court. However, they failed to state the said facts in their reply to the appeal lodged by Mr. Ž. M.

14. Considering the above, the Constitutional Court concluded that the conditions referring to the time-limit for filing of the request provided in for Article 68, para 2 of the Constitutional Court's Rules of the Procedure were not met.

15. The Constitutional Court unanimously adopted this Ruling as stated in the enacting clause of this Ruling.

Prof. Dr Snežana Savić
The President
Constitutional Court of Bosnia and Herzegovina

Case No. U 18/00

Appeal of K. H. from Sarajevo against the Judgment of the Cantonal Court of Sarajevo, No. Gž-583/99 of 30 November 1999

DECISION
of 10 and 11 May 2002

Having regard to Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Articles 54, 61 and 74 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, No. 24/99 – Amended text), the Constitutional Court of Bosnia and Herzegovina, at its session held on 10 and 11 May 2002, adopted the following

DECISION

The appeal of K. H., from Sarajevo, is granted and the Judgments of the Municipal Court I of Sarajevo No. P: 678/98 of 1 February 1999 and the Cantonal Court of Sarajevo No. Gž-583/99 of 30 November 1999 are annulled, and Bosnia and Herzegovina is declared to be responsible for remedying the violation of the appellant's rights.

The Council of Ministers of Bosnia and Herzegovina shall implement this decision, and is ordered to pay the appellant the amount of 339.07 KM per month starting from 1 January 1998 with interest calculated as from that day until the date of payment in accordance with the applicable regulations. The aforesaid amount shall be paid to the appellant no later than the 5th of the month for the previous month until the Constitutional Court of Bosnia and Herzegovina decides otherwise upon the request of one of the parties involved. The appellant shall be compensated for the costs of the proceedings.

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

Reasons

I Introduction

1. On 13 April 2000, Mr. K. H. from Sarajevo ("appellant"), through E. G., a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina

("Constitutional Court") against the Judgment of the Cantonal Court of Sarajevo No. Gž-583/99 of 30 November 1999.

II Facts

2. The facts of the case, as they appear from the statements of the appellant and the documents submitted to the Constitutional Court, can be summarized as follows:

3. On 4 March 1979, the appellant was injured in a traffic accident which occurred on the main road Višegrad-Ustiprača in Ajdinovići town. The accident occurred when a stone weighing 10 kilos fell from a height of 9 meters, broke the window of the bus where the appellant was, and struck the appellant on the left side of his head resulting in serious injury.

4. After the appellant had initiated contentious proceedings for compensation for damages, the Municipal Court of Višegrad rendered Judgment No.P-445/80 of 6 March 1981, according to which the Republic Fund for Main and Regional Roads of Bosnia and Herzegovina ("Fund") was ordered to pay compensation for pecuniary and non-pecuniary damages, compensation for the treatment and care that the appellant was given, penalty interest and the costs of contentious proceedings for the period from 4 March 1979 to the date of payment.

5. After the adoption of this Judgment, the appellant initiated several proceedings for compensation for loss of earnings with penalty interest against the same defendant for the period that followed the adoption of the Judgment. Hence, several Judgments were rendered: on 5 October 1983, 25 December 1985, 24 September 1986, 30 September 1987, and 3 December 1991. Each of these Judgments imposed the payment of compensation for damages but the amounts and the period which the compensation for the damages related to differed. However, in each Judgment the appellant's claim was granted.

6. On 29 May 1998, the appellant initiated contentious proceedings before the Municipal Court I of Sarajevo against the Federation of Bosnia and Herzegovina, the Federal Ministry of Traffic and Communications. He requested compensation for loss of earnings with penalty interest for the period from 1 January 1998, due to the event that occurred in 1979.

7. By Judgment No. P: 678/98 of 1 February 1999, the Municipal Court I of Sarajevo dismissed the appellant's claim in its entirety.

8. By Judgment No. Gž-583/99 of 30 November 1999, the Cantonal Court of Sarajevo confirmed the Judgment of the Municipal Court I of Sarajevo.

III Appeal

9. The appellant complains that the challenged Judgment of the Cantonal Court of Sarajevo violated his right to property provided for in Article II.3 (k) of the Constitution of Bosnia and Herzegovina and argues that his request should therefore be granted.

IV Proceedings before the Constitutional Court

10. On 11 April 2000, the appellant lodged an appeal with the Constitutional Court against the Judgment of the Cantonal Court of Sarajevo No. Gž-583/99 of 30 November 1999.

11. In its reply to the appeal of 6 November 2000, the Ministry of Traffic and Communications of the Federation of Bosnia and Herzegovina requested that the appeal be dismissed as ill-founded.

12. In its reply to the appeal of 17 July 2001, the Ministry of Civil Affairs and Communications of the Council of Ministers stated that the Ministry could not be regarded as a party to the proceedings but that only the State of Bosnia and Herzegovina could. This Ministry, however, expressed its willingness to become a party to the proceedings at the request of the Constitutional Court.

13. On 28 August 2001, the Council of Ministers was requested, in accordance with Article 28 of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure"), to submit a reply to the appeal and to answer the question as to who was the real successor of the Fund. The Council of Ministers did not submit any reply.

14. On 3 September 2001, the Ministry of Traffic and Communications of the Government of the Republika Srpska informed the Constitutional Court that the appeal had been referred to the Republic Administration of Roads. At the request of the Constitutional Court, the Republic Administration of Roads submitted a reply on 14 September 2000 in which it stated that it had no opportunity to submit a reply, since it had not been a party to the previous proceedings conducted before the bodies of the Federation of Bosnia and Herzegovina.

15. On 28 November 2001, the Constitutional Court forwarded the appellant's submissions to the Council of Ministers of Bosnia and Herzegovina in which the appellant

clarified his claim and asked for the claim in the appeal to be granted. However, the Council of Ministers of Bosnia and Herzegovina did not give any reply to the appellant's submissions.

V Admissibility

16. According to Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. According to Article 11 of the Constitutional Court's Rules of Procedure, the Constitutional Court may examine an appeal only if all legal remedies which are available under the laws of the Entities against the judgment challenged by the appeal have been exhausted and if the appeal is filed within a time-limit of 60 days from the date on which the appellant received the final decision.

17. In the present case, all these conditions have been fulfilled. The appellant exhausted all legal remedies and the appeal was lodged within the prescribed time-limit, since the appellant's attorney received the challenged judgment on 14 February 2000 and the Constitutional Court received the appeal on 13 April 2000.

18. This appeal fulfils all the conditions provided for in Articles 12 and 14 of the Constitutional Court's Rules of Procedure. It follows that the appeal is admissible.

VI Relevant Domestic Laws

a) The Constitution of Bosnia and Herzegovina

19. **Article I of the Constitution of Bosnia and Herzegovina, in its relevant part, reads as follows:**

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.*

20. **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.*

*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.*

21. **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:

(...)

i) Regulation of inter-Entity transportation

(...)

VII. Findings

a) Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

22. The Constitutional Court examined whether the appellant's civil rights in the present case, in particular, his right to access to a court under Article 6 of the European Convention have been violated. Article 6, 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.

23. The Constitutional Court recalls that the rights guaranteed by Article 6 of the European Convention encompass, *inter alia*, the right to a court, of which the right of access to the courts constitutes one aspect. The access to a court in the sense of Article 6 embodies not only extensive procedural guarantees and requirements of expeditious and public

proceedings, but also the compatibility with the rule of law *(*ECHR, *Hornsby,* Judgment of 19 March 1997*,* para*. 40).* However, if the right of access to the courts can be the subject of limitation by the State, these limitations must not restrict or reduce the access in such a way that the very essence of the right is impaired (ECHR, *Tolstoy-Miloslavsky v. UK*, Judgment of 13 July 1995, Series A, No. 323, para. 59). Furthermore, a limitation will not be compatible with Article 6, paragraph 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 (ECHR, *Ashingdane v.UK,* Judgment of 28 May 1985, Series A No. 93, para.57).

24. The Constitutional Court observes that the proceedings in question concern rights relating to the appellant's claim for compensation for damages as a result of the traffic accident and consequently his property rights. Accordingly, Article 6, paragraph 1 is applicable in this case.

25. The Constitutional Court notes that the appeal falls within the ambit of the appellant's right of access to a court.

26. On 4 March 1979, the appellant was injured in a traffic accident on the road Višegrad-Ustiprača. After he had obtained several judgments in his favor during the period from 1979 to 1991, he initiated, in 1998, civil proceedings before the Municipal Court I of Sarajevo for compensation for damages for the period from 1991 to that date. On 1 February 1999, the Municipal Court I of Sarajevo issued Judgment No. P: 678/98, in which the appellant's request was rejected due to the absence of a proper defendant for the claim. This Judgment was confirmed by the Judgment of the Cantonal Court of Sarajevo No. Gž-583/99 of 30 November 1999.

27. On 6 November 2000, the Ministry of Traffic and Communication of the Federation of Bosnia and Herzegovina declined its competence and requested that the appeal be dismissed as ill-founded.

28. On 17 July 2001, the Ministry of Civil Affairs and Communications of the Council of Ministers of Bosnia and Herzegovina declined its competence in regard to the subject of the appeal.

29. On 28 August 2001, the Ministry of Traffic and Communications of the Republika Srpska refused to express an opinion on the appeal due to its non-involvement in the proceedings before a court of the Federation of Bosnia and Herzegovina.

30. The Constitutional Court notes that all three parties directly or indirectly declined their competence regarding the present case. It is clear from the submitted facts that the event occurred in 1979, within the territory of Socialistic Republic of Bosnia and Herzegovina. Due to the reorganization of the Socialistic Republic of Bosnia and Herzegovina, that area is now within the territory of Republika Srpska. It is also clear that the responsible party was the Fund.

31. Consequently, three issues arise:

– the issue of the competence of Republika Srpska

– the issue of the competence of the Federation of Bosnia and Herzegovina;

– the issue of the competence of Bosnia and Herzegovina.

32. **The Republika Srpska**

It appears both from the factual and legal situation that the Fund practically ceased to exist without providing for a successor. A new body taking over the Fund's duties and finances has never been established. The Constitutional Court observes that according to the Agreement on Realization of the Federation of Bosnia and Herzegovina concluded in Dayton on 9 November 1995 and approved by the Constituent Assembly of the Federation of Bosnia and Herzegovina at its session held on 11 December 1995 (the Decision and Agreement were published in the *Official Gazette of the Federation of Bosnia and Herzegovina* No. 8/95), the Government of the Republic of Bosnia and Herzegovina kept the rights of interference that enable it to function as a government of the internationally recognized State of Bosnia and Herzegovina, while all other civil responsibilities were transferred to the Government of the Federation of Bosnia and Herzegovina. This kind of transfer also included the transfer of responsibilities for the functions that had been transferred by areas of competence and, therefore, included the transfer of non-regulated obligations arising in the performance of duties. At the same time, the Republika Srpska has never taken over the responsibilities or financial means of the Fund.

33. It follows that the Republika Srpska cannot be regarded as responsible for the compensation of damage caused on the territory of the Republika Srpska at the time prior to 14 December 1995 or, in other words, prior to the entry into force of the Constitution of Bosnia and Herzegovina.

34. **The Federation of Bosnia and Herzegovina and Bosnia and Herzegovina**

The Federation of Bosnia and Herzegovina or the responsible Ministry of Traffic and Communications took over the responsibilities and financial funds previously belonging to republic bodies and, consequently, the responsibility for the obligations of the Republic of Bosnia and Herzegovina in accordance with Article 9 of the Law on Federal Ministries and other Bodies of the Federal Administration, according to which the Federal Ministry of Traffic and Communications performs administrative, expert and other duties, established by law, within the responsibility of the Federation in the field of traffic and communications (*Official Gazette of the Federation of Bosnia and Herzegovina*, No. 8/95). However, the Constitutional Court notes that according to Article I of the Constitution of Bosnia and Herzegovina:

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 (...).

35. The Constitutional Court further recalls that Article III of the Constitution of Bosnia and Herzegovina regulates the responsibilities and the relations between the institutions of Bosnia and Herzegovina and the Entities and, according to Article III.1 (i) of the Constitution of Bosnia and Herzegovina, the regulation of inter-Entity transportation is within the exclusive competence of the State.

36. Consequently, the Constitutional Court notes that the State cannot elude its obligation to establish bodies that are within its exclusive competencies under the Constitution of Bosnia and Herzegovina. Nor can the Entities take over the State's competencies as provided for in the Constitution of Bosnia and Herzegovina.

37. It appears that, in the present case, the appellant's appeal falls within the exclusive responsibility of the State.

38. The next question to be answered is whether the State can be sued in the present case.

39. The Constitutional Court notes that regardless of the "passive legitimacy" in the present case, the State is the subject that has the final competence in regard to the possible violations of human rights under Article II of the Constitution of Bosnia and Herzegovina. Therefore, the Constitutional Court notes that the issue of "passive legitimacy" is of

no relevance under the circumstances where the State does not give any protection to individual rights within its exclusive responsibilities provided for in the Constitution of Bosnia and Herzegovina. The Constitutional Court notes that the aim of the European Convention is the protection of rights, which are neither theoretical nor illusory, but rights which are practical and efficient especially with regard to the importance that the right to a fair hearing has in every democratic society.

40. The Constitutional Court further notes that the deficiencies in the organization of the judicial system of the Entities and the State must not influence respect for individual rights and freedoms provided for in the Constitution of Bosnia and Herzegovina or requirements and guarantees provided for in Article 6 of the European Convention. Furthermore, the Constitutional Court finds that an individual must not be overburdened in determining the most effective way of realizing his rights. The Constitutional Court also notes that one of the main principles of the European Convention is that the legal means available to an individual have to be accessible and understandable and that deficiencies in the organization of the legal or judicial system of a State, detrimental to the protection of individual rights, cannot be attributed to an individual. Finally, the Constitutional Court notes that it is the duty of the State to organize its legal system so as to allow the courts to comply with the requirements of Article 6, paragraph 1 of the European Convention (see, ECHR, *Zanghi v. Italy,* Judgment of 19 February 1991, Series A No. 194, p. 47, para. 21).

41. The Constitutional Court concludes that, while the matter at issue must be considered to fall within the competence of the State, there is no State court before which the appellant has been able to vindicate his civil rights. Consequently, there has been a violation of Article 6, paragraph 1 of the European Convention.

b) Opinion on the complaint under Article 13 of the European Convention

42. Article 13 of the European Convention reads as follows:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

43. The Constitutional Court recalls that Article 13 must be interpreted so as to guarantee an *effective remedy before a national authority* to everyone who claims that his rights and freedoms under the European Convention have been violated. (See, ECHR, *Klass v. Germany* Judgment of 6 September 1978, Series A No. 28, p. 29, para. 64).

44. The Constitutional Court further recalls that an obligation under Article 13 only arises when an individual has an "arguable" claim to be the victim of a violation of the rights set forth in the European Convention (ECHR, *Silver and Others v. United Kingdom,* Judgment of 25 March 1983, Series A no 61, para. 113).

45. The Constitutional Court notes that the appellant submitted a claim for compensation for damages to a court within the competence of the Federation of Bosnia and Herzegovina. The Constitutional Court notes that the appellant obtained several judgments during the period from 1979 to 1991 regarding the same issue. An arguable claim in the sense of Article 13 therefore exists.

46. The Constitutional Court further recalls that Article 13 guarantees the availability, within the national legal order, of an effective remedy to enforce European Convention rights and freedoms in whatever form they may happen to be secured. The object of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant European Convention complaint and to grant effective relief to the aggrieved party (see, ECHR, *Lithgow and Others v. the United Kingdom,* Judgment of 8 July 1986, Series A No. 102, p.74, para. 205 and *Pine Valley Developments Ltd and Others*, Judgment of 29 November 1991, Series A No. 202). The Constitutional Court also recalls that the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent party (ECHR, *Aksoy*, Judgment of 18 December 1996, para. 95).

47. The Constitutional Court observes that it is not in dispute that the appellant had suffered physical injuries as a result of a traffic accident which was confirmed in previous judgments issued in that respect but for the prior period. However, as a result of constitutional re-organization, Bosnia and Herzegovina did not establish all bodies necessary to perform its obligations under the Constitution of Bosnia and Herzegovina or, in other words, that it did not establish an operative body which would be competent for inter-Entity transport or a judicial body that would deal with cases brought by appellants against the decisions of those State bodies, which did not satisfy the principle of the rule of law.

48. Accordingly, the Constitutional Court finds that the failure of the State to adopt laws that are important to its functioning and to provide judicial protection for individuals violates the right to an effective domestic remedy provided for in Article 13 of the European Convention.

c) Opinion on the complaint under Article 1 of Protocol No. I to the European Convention

49. Article 1 of Protocol No. I to the European Convention, in its relevant part, 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 the general principles of international law.

The preceding provision 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.

50. 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, recognizes that Parties are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, ECHR, *Allan Jacobson v. Sweden*, Judgment of 25 October 1989, Series A, No. 163, p. 16, para. 53).

51. The Constitutional Court considers that this case does not fall within the ambit of the application of laws controlling the use of property; it concerns a failure by the authorities to effectively secure the appellant's property right.

52. The Constitutional Court notes that where a measure affecting property is within the ambit of neither the second or the third rule, it is necessary to consider whether there occurred a violation of the first rule, and in doing so the Constitutional Court must determine whether a fair balance was struck between the demands of the general interest

of the community and the requirements of the protection of the individual's fundamental rights (see, ECHR, *Sporrong & Lonnroth v. Sweden,* Judgment of 23 September 1982, Series A No. 52, para. 69).

53. The Constitutional Court further recalls that Article 1 of Protocol No. 1 to the European Convention may give rise to positive obligations of the authorities to provide effective protection of the individual's right (see European Commission, No. 20357/92, Dec. 7.3.94, D.R. 76A, p. 80).

54. In the present case, the Constitutional Court has not been provided with any reason that might justify the failure of the authorities to provide proper legal protection of the appellant's property right. Besides, the responsible party has not submitted its viewpoint in regard to the amount of compensation requested by the appellant, which is based on the average income in the Federation of Bosnia and Herzegovina (i.e. on the territory of the appellant's residence) as of 1 January 1998. Under these circumstances, the Constitutional Court finds the request well-founded. The Constitutional Court considers that Bosnia and Herzegovina must be held responsible for the violation of the appellant's right to peaceful enjoyment of his possessions provided for in Article 1 of Protocol No. 1 to the European Convention.

55. Consequently, the Constitutional Court decided as stated in the operative part.

56. Pursuant to Article VI.4 of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court are final and binding.

Judge Prof. Dr Vitomir Popović gave his separate opinion annexed to this decision.

The Constitutional Court adopted this decision by majority vote (6 to 2).

The Constitutional Court ruled in the following composition: President of the Constitutional Court Prof. Dr Snežana Savić, Judges: Prof. Dr Kasim Begić, Hans Danelius, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Doc. Dr Zvonko Miljko, Azra Omeragić, Prof. Dr Vitomir Popović, Mirko Zovko.

U 18/00
10 May 2002
Sarajevo

Prof. Dr Snežana Savić
The President
Constitutional Court of Bosnia and Herzegovina

ANNEX

Prof. Dr Vitomir Popovic Judge of the Constitutional Court Dissenting opinion regarding disagreement with the Decision of the Constitutional Court case No. U 18/00 of 10 May 2002.

Having regard to Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court's Rules of Procedure"), as one of the judges who voted "against" the proposed decision, I am presenting my dissenting opinion with regard to this decision, due to the following reasons:

In the present case, Bosnia and Herzegovina cannot be regarded as the responsible party for remedying the violation of the appellant's rights and the Council of Ministers of Bosnia and Herzegovina cannot be regarded as responsible for the enforcement of this decision and it cannot be ordered to pay the appellant the amount of 339.07 KM per month starting from 1 January 1998 with interest calculated as from that day until the date of payment, for the following reasons:

a) The appellant's request for the compensation for damages resulting from the traffic accident, which occurred in March 1979 on the main road Višegrad-Ustiprača in Ajdinovići town, is based on the Judgment of the Municipal Court of Višegrad No. P-445/80 of 6 March 1981, according to which the Republic Fund for Main and Regional Roads of Bosnia and Herzegovina ("Fund") was ordered to pay compensation for pecuniary and non-pecuniary damages, compensation for the treatment and care that the appellant was given, penalty interest and the costs of contentious proceedings for the period from 4 March 1979 to the date of payment, as well as on later Judgments of the same court of 5 October 1983, 25 December 1985, 24 September 1986, 30 September 1987 and 3 December 1991, whereby the previously determined amounts were changed.

b) The appellant's request was aimed against the Judgments of the courts of the Federation of Bosnia and Herzegovina or, in other words, against the Judgment of the Municipal Court I of Sarajevo No. P-678/98 of 1 February 1999, which dismissed his request with regard to the Federal Ministry of Traffic and Communications, as the "legal successor" of the former Republic Fund for Main and Regional Roads of Bosnia and Herzegovina, and the Judgment of the Cantonal Court of Sarajevo No. Gž-83/99 of 30 November 1999. Thus, the appellant's request was never aimed either against Bosnia and Herzegovina or against the Council of Ministers of Bosnia and Herzegovina and,

therefore, the correctness of the decision of the Constitutional Court is rightfully brought into question, since the Constitutional Court by its decision as responsible declared parties which had never participated as a defendant parties in the contentious proceedings and in regard to them, the appellant did not exhaust all domestic legal remedies which are so provided, in accordance with Article 11, paragraph 3 of the Constitutional Court's Rules of Procedure.

c) The appellant's request filed before court might eventually be aimed against the Ministry of Traffic and Communications of the Republika Srpska or, in other words, against the Republic Fund for Main and Regional Roads of Bosnia and Herzegovina, on the territory of the Republika Srpska – in accordance with Article 1 of the Constitution of Bosnia and Herzegovina on the "changed internal structure of Bosnia and Herzegovina" and the existence of two Entities, the Republika Srpska and the Federation of Bosnia and Herzegovina and, in that case, the appellant should have exhausted all legal remedies available in accordance with legal system of the Republika Srpska.

It is a fact that the appellant, with regard to Bosnia and Herzegovina or the Council of Ministers of Bosnia and Herzegovina, in accordance with Article 11, paragraph 3 of the Constitutional Court's Rules of the Procedure, failed to exhaust all legal remedies. As to the harmful event which occurred on 4 March 1979 on the main road Višegrad-Ustipriča and the responsibility of Bosnia and Herzegovina or the Council of Ministers, it is not possible to make a causal connection and, therefore, the court could have not examined the legal responsibility of Bosnia and Herzegovina and the Council of Ministers of Bosnia and Herzegovina, and in regard to the request outlined in the appeal regarding the Judgments of the Municipal Court I of Sarajevo, No. P-678/98 of 1 February 1999, and the Cantonal Court of Sarajevo, No. Gž-83/99 of 30 November 1999, the request should have been dismissed in its entirety as ill founded.

Case No. U 64/01

Appeal of D.B. from Banja Luka against the Judgment of the Supreme Court of the Republika Srpska, No. Rev. 56/2000 of 15 June 2000

DECISION
of 26 September 2003

The Constitutional Court of Bosnia and Herzegovina, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 54 and Article 61 para 1 (1) of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 24/99, 26/01 and 6/02), composed of the following judges:

Mr. Mato Tadić, President,

Mr. Ćazim Sadiković, Vice-President

Mr. Miodrag Simović, Vice-President

Mr. David Feldman,

Ms. Valerija Galić,

Ms. Hatidža Hadžiosmanović,

Mr. Didier Maus,

Mr. Tudor Pantiru,

Having deliberated on the appeal of **D. B.** in case No. **U 64/01,**

Adopted on 26 September 2003 the following

DECISION

The appeal of D.B. from Banja Luka, against the Judgment of the Supreme Court of the Republika Srpska, No. Rev. 56/2000 of 15 June 2000, is hereby granted;

- A violation of Article II.4 of the Constitution of Bosnia and Herzegovina is hereby established;

- The Judgment of the Supreme Court of the Republika Srpska, No. Rev.56/00 of 15 June 2000 is hereby annulled;

- The Primary School "Ivan Goran Kovačić" from Banja Luka is hereby ordered to immediately enforce this Decision in accordance with the

Judgment of the County Court of Banja Luka No. Ž-198/99 of 4 November 1999.

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

Reasons

I. Introduction

1. On 5 December 2000, D. B. ("the appellant"), from Banja Luka, lodged 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. Rev-56/2000 of 15 June 2000. Upon the request of the Constitutional Court, the appellant supplemented her appeal on 22 April 2002.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 16 para 2 of the Rules of Procedure of the Constitutional Court, on 31 July 2001 the Constitutional Court requested the Supreme Court, the Primary School "Ivan Goran Kovačić" from Banja Luka and the Republika Srpska Public Attorney's Office seated in Banja Luka to submit their replies to the appeal. On 23 August 2001, a reply to the appeal was submitted by the Republika Srpska Public Attorney's Office of Banja Luka as the legal representative of the Primary School "Ivan Goran Kovačić", while the Supreme Court failed to submit its reply. In accordance with Article 20 para 2 of the Rules of Procedure of the Constitutional Court, the reply of the Republika Srpska Public Attorney's Office of Banja Luka was submitted to the appellant on 19 September 2001. On 1 October 2001 the appellant submitted her own observations to the reply of the Republika Srpska Public Attorney's Office of Banja Luka to the Constitutional Court.

3. Pursuant to Article 19 para 1 of the Constitutional Court's Rules of Procedure, the appellant was requested to supplement her appeal on 9 April 2002. The supplement to the appeal of 22 April 2002 was submitted to the Republika Srpska Public Attorney's Office of Banja Luka and the Primary School "Ivan Goran Kovačić" on 16 July 2002. However, they did not submit their respective replies thereto.

4. Upon the Constitutional Court's request, the Basic Court of Banja Luka submitted the entire case file No. RS-193/97 on 27 August 2001.

III. The 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, can be summarized as follows:

6. The appellant worked from 22 August 1994 as the Serb and German language teacher in the Public Institution Primary School "Ivan Goran Kovačić" of Banja Luka ("School"). The School headmaster assigned her to the vacant position of the Serb and German language teacher without a prior vacancy notice announcement and without taking the official decision on employment. In the meantime, by a decision of the Ministry of Defence of the Republika Srpska in September 1995, the appellant was assigned to work in the aforementioned School as the Serb language teacher. Despite the fact that the School headmaster justified his failure to take a decision in this respect by referring to the circumstances of the war, the decision was not taken even after the end of the war.

7. The School headmaster, referring to Article 53 of the Republika Srpska Labour Relations Law, took a Decision on the termination of temporary employment No. 62-2/97 on 30 June 1997. According to the Decision, the employment of D. B., a teacher of the Serb and German language, terminated as of 31 July 1997 upon expiration of the temporary employment. Also on that date all her rights deriving from the employment ceased. In the period from 22 August 1994 to 31 August 1997, the School registered the appellant in the records of active insured parties with the Pension and Disability Insurance Fund of Banja Luka as the School employee.

8. As the Decision on the termination of employment was not submitted to the appellant, an authorized inspector of the Banja Luka Inspections Department carried out an inspection on 15 October 1997 and, *inter alia*, established that the appellant did not receive the Decision on the termination of her employment. At that time, it was ordered that the School headmaster should submit the Decision to the appellant so that she could seek protection of her rights deriving from employment.

9. It appears from the information contained in the Minutes of the Teachers' Staff meeting (letter of the School No. 38/98 of 11 March 1998) that a decision was taken on the Teachers' Staff meeting of 29 September 1997, in the presence of the School headmaster, to announce vacancies for the positions of the Serb language teacher, Biology teacher, Chemistry teacher

and Arts teacher to be filled up with the mediation of the Employment Bureau.

10. Despite the decision of the Teachers' Staff on announcing vacancies for these particular subjects, it appears from the contents of the Minutes taken on 14 October 1997 during the session of the School Board that vacancy announcements were given for all positions except that of the Serb language teacher. The teachers, who had already worked during the 1996/97 academic year or, in other words, the same time period in which the appellant worked, applied for the vacancy announcements for the positions of teachers of Biology, Chemistry and Arts. The School headmaster suggested that these teachers be employed as he was of the opinion that they had proven themselves to be good teachers complying with all the requirements, which was particularly true for the biology and chemistry teachers. He pointed out their long-standing years of experience.

11. The appellant requested a written opinion on her performance from the School Trade Union. At its session held on 28 October 1997, the Union noted, after examining the previous Minutes of the meetings of the Teachers' Staff and the Departmental Board as well as the notes of the headmaster and the school counsellor, that the appellant was always carrying out her duties professionally and in a satisfactory manner.

12. In November 1997, the School employed N.S. on a permanent basis without a prior vacancy announcement for the position of the Serb language teacher. She only had 3 years of working experience in comparison to the appellant who had 28 years of working experience.

13. The appellant received the decision on the termination of her employment on 21 October 1997. On 19 November 1997 she brought an action before the Basic Court of Banja Luka for the protection of her rights deriving from employment.

14. On 31 August 1999, the Basic Court of Banja Luka adopted Judgment No. RS-4/99 and annulled the Decision on the termination of the appellant's employment No. 62-2/97 of 30 June 1997. The defendant was ordered to reinstate the appellant to her position of the Serb and German language teacher and compensate her for the costs of the contentious proceedings within 15 days.

15. On 4 November 1999, the County Court of Banja Luka, deciding upon the defendant's appeal, adopted judgment No. Ž-198/99, confirming the Judgment of the Basic Court of Banja Luka No. RS-4/99 of 31 August 1999 and dismissing the appeal of the School as ill-founded.

16. The School submitted a request for a revision-appeal to the Supreme Court against the judgment of the County Court of Banja Luka No. Ž-198/99 of 4 November 1999. The Supreme Court, deciding upon the request for a revision-appeal, adopted Judgment No. Rev-56/2000 which granted the revision-appeal, altered both lower instance judgments and dismissed the plaintiff's claim. In the opinion of the Supreme Court, "in the present legal matter the lower instance courts have wrongfully applied the substantive law as it is not disputable that the plaintiff was employed without a prior vacancy announcement, without carrying out the employment procedure and without the decision on the employment, which is contrary to Articles 6, 12, 13 and 14 of the Labour Relations Law. These omissions are of such character that they exclude the existence of the employment. The Supreme Court found that the plaintiff was in the, so called, factual employment or, more precisely, factual work. While the employment lasted, the plaintiff had all the rights and responsibilities deriving from the employment but she was not their rightful claimant. The Supreme Court also found that there was no employment at all in the present case and that the factual employment, regardless of its period, can be terminated at any time."

IV. Relevant Law

(1) **Law on Primary Schools** (*Official Gazette of the Republika Srpska* Nos. 4/93 and 6/93)

Article 1 para 1

A primary school shall be an institution for carrying out activities from the scope of primary education and upbringing.

Article 76 para 1

1. A school headmaster shall select a teacher, an associate and a school counsellor, based on a vacancy notice announcement upon receiving an opinion of a School Board….

Article 137 para 1 item 11 and para 2

2. A school shall be fined an amount between 500,000.00 to 1,600,000.00 dinars for a breach in the event that it fails to announce a vacancy notice for the positions of a teacher, an associate or a school counsellor (Article 76).

3. A responsible person in a school shall be fined an amount between 50,000.00 to 200,000.00 dinars for a breach referred to in paragraph 1 of this Article.

(2) **Labour Relations Law** (*Official Gazette of the Republika Srpska* Nos. 25/93, 14/94, 15/96, 21/96, 3/97, 26/97 and 10/98).

Article 4 paras 1 and 2

Employment shall be based on either a temporary or a permanent basis. Temporary employment shall be equal to permanent employment in terms of rights, obligations and responsibilities of employees.

Temporary employment shall be entered into in the event that a replacement of an absent employee or employees, in cases to carry out activities that last up to six months, in the case of a temporary increase of workload and in the event oft employing a trainee in order to fulfill the training period.

Article 6

A headmaster shall decide on the need for employment and a company shall submit a written statement in this regard to the Employment Bureau of the Republika Srpska….

Article 12

A headmaster is obliged to decide on the submitted applications within 15 days from the day of expiration of the time limit for the submission of applications and inform the applicants on his or her decision within a further time limit of 5 days.

Article 13

A headmaster shall take a decision on employment. Each interested party is entitled to lodge a complaint against the decision within 8 days from the date of receipt of the notice if he or she deems that the applicant who does not meet the requirements was selected, or if there was a breach of the procedure of taking the decision, as stipulated by law and the collective agreement. The complaint is lodged to the authority specified in the collective agreement.

Article 14

An employee enters into employment on the date when he or she starts to work based on the final decision on employment. If the employer is a privately owned company, employment commences on the basis of a contract on employment.

Article 14a

An employer is obliged to register the employee in the health and pension and disability insurance fund within the time limit prescribed by law.

Article 53

Employment shall be terminated:

a) *With the consent of an employee:*

1. If he or she makes a written statement saying that he or she wants to terminate his or her employment;

2. If he or she make an arrangement with a school headmaster for the termination of his or her employment;

b) *Without the consent of an employee:*

3. If he or she does not pass an exam required by the law;

4. If he or she refuses to work at an assigned workplace;

5. If he or she refuses to undergo training and/or re-qualification;

6. If he or she refuses to be employed in another company in case of more work at its workplace, i.e. if he or she refuses to work in another company on a temporary basis;

7. If he or she is absent from work without leave for three consecutive days or six days intermittently during the calendar year;

8. If he or she withheld or furnished inaccurate information during his or her employment that could be of particular pertinence for the said employment;

9. If it is found within the period of one year from employment that the employment was conducted unlawfully;

10. If it is found that he or she did not achieve results at his or her workplace and the company has no other corresponding workplace where the employee could work;

11. In a case where proceedings to close down the company have been instituted;

12. Upon the expiration of a time limit specified in a decision on temporary employment;

13. If he or she refuses or does not respond to the request of the company or some other authority to perform activities related to defence issues;

14. If he or she refuses/fails to respond to work under a decree of the competent authority of the Republika Srpska;

15. Upon the expiration of the lay-off period to which an employee was sent due to a decrease in a workload or economic difficulties of a company;

16. In the event that he or she turns 65 years of age and has at least 15 years of service; or 40 years of service (men) and 35 years of service (women) regardless of age;

17. If an employee is employed by a private employer – when the employer is temporarily not working for more than six months;

18. For a person in charge of a company if he or she does not enforce a court decision reinstating an employee to his original workplace;

19. If he or she refuses to remove the consequences of force majeur in the sense of Article 15 of this law;

20. If within 30 days from the date of expiration of the suspension of rights and responsibilities he or she fails to report to an employer to commence working;

21. If he or she was pronounced a sanction on the termination of employment due to a breach of duties;

22. If he or she, during a leave of absence or lay-off within the meaning of Article 64 of this law, is employed by another employer;

***v)** By force majeur.*

A decision on the termination of employment shall, among other things, contain information on the termination of employment, the date of termination and an instruction on the protection of one's rights.

Article 67 paragraph 1 item 1, item 4 (b) and para 2

Companies shall be fined in the amount of 1,000.00 to 3,000.00 dinars for the breaches:

1. in case they fail to submit the application on the need for employment to the employment bureau (Paragraph 1, Article 6 of this Law)…

4b. If they fail to conclude a contract on employment and submit a registration to the health and pension and disability insurance fund for itself and its employees within the prescribed time limit, unless otherwise stipulated by law…

For a violation referred to in paragraph 1 of this Article, a responsible person in the company shall also be fined with the amount of 250.00 to 1,000.00 dinars.

V. Appeal

a) Statements from the appeal

17. The appellant, in her appeal and supplement to the appeal, challenges the judgment of the Supreme Court, stating that she entered into permanent employment with the School on 22 August 1994 and was assigned to the vacancy of the Serb and German language teacher. The School headmaster, although bound by the law, did not issue the decision on permanent employment to her, justifying his action by reference to the then-current war situation.

18. The appellant alleges that she worked in the School until 21 October 1997 when the headmaster of School handed her the decision on the termination of her employment to take effect as of 31 July 1997. The appellant claimed that the headmaster issued her an illegal notice of dismissal and that he employed in her place, without a prior vacancy notice announcement, N.S., who only had 3 years of working experience. The appellant has 28 years of experience. She also claims that the headmaster employed another person on account of political affiliation as well as due to his personal financial interests. She further claims that the headmaster acted in a discriminatory manner toward the employees and students of the School who were of non-Serb ethnicity as well as toward the employees of Serb ethnicity who did not approve this conduct of his.

19. The appellant complains that the judgment of the Supreme Court justified and legalized the illegal termination of her employment on 31 July 1997 upon the decision of the headmaster of the School and upon the notice of dismissal on 31 July August 1998 which denied her employment rights. She contends that she entered into permanent employment, which can be concluded from the fact that the position she was hired for was permanently vacant and that it was not possible to have temporary employment in that case. The fact that the headmaster of the School did not take a decision on employment cannot have detrimental consequences for the teacher. The fact that the headmaster took a decision on permanent employment (without a vacancy announcement) of N.S. to the position of the

Serb language teacher, which occurred at the same time as the termination of the appellant's employment, proved the fact that the position did exist and that it was vacant.

20. The appellant further alleges that the reasons of the challenged judgment were arbitrary because they were not founded in law, considering that the Labour Relations Law did not provide for the "factual employment" or "factual work".

21. The appellant complains that the Supreme Court acted unfairly and that its decision was a politicized act which denied her the right to continue working to a very old age, denied her right to compensation for unpaid wages and prevented her from exercising all other employment rights. The claims of the Supreme Court that the employment did not exist are ill-founded, as the employment booklet reveals that the appellant was employed in the School from 22 August 1994 to 31 August 1997 (3 years and 9 days). It is also evident from the records of the active insured parties of the Pension and Disability Fund that she was registered at the pension and disability insurance in the period from 22 August 1994 to 31 August 1997.

22. The appellant argues that the Supreme Court violated her personal and citizen's rights and the right to work as protected by the Constitution of Bosnia and Herzegovina and suggested that the judgment of the Supreme Court be annulled. She alleges that she did not belong to any political party believing that there should be no discrimination on grounds of religion, race, national, political or any other affiliation. She strived exclusively to perform her professional duties as teacher, which resulted in employment of another teacher (on a permanent basis) to her position. The person employed shared the same political affiliation as the headmaster of the School.

b) Reply to the appeal

23. On 23 August 2001, the Republika Srpska Public Attorney's Office of Banja Luka, in its reply to the appeal, stated that it fully supported its prior statements given during the proceedings of the revision-appeal before the Supreme Court submitted against the judgment of the County Court. It considered that the appellant's employment was on a temporary basis.

VI. Admissibility

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

25. According to Article 11 para 3 of the Constitutional Court's Rules of Procedure, *the Court may examine an appeal only if all legal remedies which are available under the laws of the Entities against the judgment challenged by the appeal have been exhausted and if the appeal is filed within a time-limit of 60 days from the day on which the appellant received the decision on the last legal remedy.*

26. The appellant received the judgment of the Supreme Court on 10 November 2000 and the appeal was submitted to the Constitutional Court on 5 December 2000. It follows that the appeal was submitted within 60 days time limit as provided for by Article 11 para 3 of the Constitutional Court's Rules of Procedure.

27. In the present case, the appellant exhausted all effective legal remedies. The last decision is the judgment of the Supreme Court. It follows that the appeal is admissible.

VII. Merits

28. According to Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court is competent to examine only whether there were violations of rights and freedoms safeguarded by the Constitution of Bosnia and Herzegovina, and the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols ("the European Convention"), including the rights and freedoms laid down in the international agreements in Annex I to the Constitution of Bosnia and Herzegovina.

29. The appellant challenges the judgment of the Supreme Court and complains that the judgment violated her right to work and her human rights deriving from employment, as protected by the Constitution of Bosnia and Herzegovina and the Labour Relations Law of the Republika Srpska. She alleges that she was discriminated against in the exercising her right to work. Although the appellant did not refer in the appeal to specific violations of the Constitution of Bosnia and Herzegovina and the European Convention, it is evident that she believed that her rights under Article 14 of the European Convention and Article II.4 of the Constitution of Bosnia and Herzegovina have been violated. The issue which arises from the appeal refers to a violation of her employment rights protected by the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, which comprise parts of the Annex I to the Constitution of Bosnia and Herzegovina.

30. Under Article II.2 of the Constitution of Bosnia and Herzegovina, all courts in Bosnia and Herzegovina are subject to and obligated to apply the human rights and freedoms set forth in the European Convention and its Protocols.

1) The Constitution of Bosnia and Herzegovina

Non-Discrimination - Article II.4 of the Constitution of Bosnia and Herzegovina.

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. It appears that the appellant's complaints relate, in substance, to discrimination in the enjoyment of her right to have access, on general terms of equality, to public service, and her right to equality before the law concerning her right to work**.**

32. Annex I to the Constitution of Bosnia and Herzegovina incorporates, *inter alia*, the International Covenant on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights as well as additional agreements on human rights which are applied in Bosnia and Herzegovina.

33. **Article 6 para 1 of the International Covenant on Economic, Social and Cultural Rights,** reads as follows:

The States Parties to the present Covenant recognize the right to work, which includes the right to everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

Article 7 of the International Covenant on Economic, Social and Cultural Rights, in its relevant part, reads as follows:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant

34. **Article 25 of the International Covenant on Civil and Political Rights**, insofar as relevant for the present case, reads as follows:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

...

(c) to have access, on general terms of equality, to public service in his country.

35. The Constitutional Court notes that the prohibition of discrimination is a central objective of the General Framework Agreement for Peace in Bosnia and Herzegovina but also within the Constitution of Bosnia and Herzegovina to which a particular importance must be attached. Article II.4 of the Constitution of Bosnia and Herzegovina provides that the enjoyment of the rights and freedoms specified in international agreements listed in Annex I to the Constitution of Bosnia and Herzegovina shall be secured to all persons without discrimination on any grounds.

36. The Constitutional Court recalls that the treatment in question constitutes discrimination if it results in the differential treatment of individuals in analogous positions and if that treatment has no objective or reasonable justification. In order 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 realized (European Court for Human Rights, the *Marckx v. Belgium* judgment, l*oc. cit.*, p. 16, para 33). Therefore, one should first establish whether the appellant was treated in a different manner in comparison to other persons in the same or similar situations. Each different treatment is to be considered discriminatory if it does not have a reasonable and objective justification, i.e. if it does not pursue a legitimate aim or if it does not have a reasonable relationship of proportionality between the means employed and the aim sought to be realized (see, e.g. cases of the Human Rights Chamber No. CH/97/67, *Zahirović*, Decision on admissibility and merits of 19 January 1999, Item 120, decisions January–July 1999; CH/9750, *Rajić*, Decision on admissibility and merits of 3 April 2000, item 53, decisions January–June 2000; CH/98/1309 and other, *Kajtaz et al.*, Decision on admissibility and merits of 4 September 2001, item 154).

37. The Constitutional Court established, based on the evidence submitted to the Constitutional Court and the statements of the appellant, that the appellant entered into employment at the School, a public institution, on 22 August 1994 in a permanently vacant

position of the Serb and German language teacher, without a vacancy announcement, although the Law on Primary Schools (Article 76) provides that a teacher is employed based on a vacancy announcement. Also, the Labour Relations Law provides that primary schools are obliged to place a vacancy announcement. This obligation of primary schools arises from the provisions of the abovementioned law, which regulates the violation of employment without vacancy announcement and sets a fine for primary schools, the legal entity, as well as the responsible party of the legal entity. The appellant entered into employment and started working but did not receive the decision on employment. However, the School registered the appellant as its employee in the health and pension and disability insurance fund, which was its obligation under Article 14a of the Labour Relations Law. She worked until 21 October 1997 although her employment booklet was closed on 31 August 1997. All of this points to the fact that the appellant was employed.

38. On 29 September 1997 the Teachers' Staff took a decision to place a vacancy announcement for the teachers of the Serb language, Chemistry, Biology and Arts. The teachers for the classes of chemistry, biology and art had already been working in the School. The announcement pertained to the subjects of Biology, Chemistry and Arts, but not for the Serb language. The teachers of Biology, Chemistry and Arts working in the School in the academic year 1996/1997 were chosen to continue working. However, the appellant was given a decision on the termination of her employment that was only then (three years afterwards) entitled temporary employment. Another teacher was admitted to her position (permanent employment without a prior vacancy ad) having only 3 years of working experience.

39. The Constitutional Court finds that the School had no objective or reasonable justification in the provisions of the Law on Primary Schools and the Labour Relations Law of the Republika Srpska for such different conduct towards different teachers of the School. First of all, under the provisions of law, the School was obliged, considering that the position of Serb language teacher was permanently vacant, to place an advertisement and employ a teacher for permanent employment. Under the law, the employment of a person to fill the vacant position can only be permanent and the procedure must include placement of a vacancy advertisement. The Constitutional Court finds that the actions of the School when they were placing an advertisement for the classes which were already taught by the teachers, and for which there was still a need, cannot be justified when at the same time this action did not include the Serb language class. The fact that the appellant worked for 3 full years and 9 days gave the appellant the right to consider herself as an employee in permanent employment. The Labour Relations Law indeed provides that the

temporary employment can occur in case of carrying out a work which lasts up until 6 months (Article 4).

40. The Constitutional Court accepts that the war circumstances which were pointed out by the School as an obstacle to the placement of the vacancy advertisement at the time when the appellant was employed could perhaps be accepted while these circumstances were still ongoing. However, the Constitutional Court cannot accept that as a justification for the actions after the end of these war circumstances. At that time, the School had an obligation to place a vacancy advertisement for all the teachers who had entered into employment under those previous circumstances. There was no reasonable justification for the actions of the School towards the appellant. It is concluded from the evidence in the case-file that the appellant's performance was considered to be satisfactory and professional. Such an evaluation was given by the School's Trade Union based on the minutes of the Teachers' Staff and the Departmental Board and based on the notes of the headmaster and the school counsellor. The headmaster of the School also noted such an evaluation during the proceedings before the Basic Court. This statement points to the fact that the appellant as a teacher achieved the set goals and tasks (Article 70 of Law on Primary Schools), and, as such, the School achieved through her work, as an institution for elementary education, a part of its tasks and goals of the elementary education (Article 1 para 1 and Article 2 of Law on Primary Schools).

41. The Constitutional Court emphasises that the School made a distinction between the appellant and other teachers through the act of placing the vacancy advertisement and excluding the appellant and failed to give her the same opportunity even though she belonged to the same group of teachers. There was no objective or reasonable justification for such actions. This therefore indicates that the appellant has been discriminated against. The Constitutional Court finds that the appellant should have had the same treatment as other teachers. This differentiation amounts to a violation of the appellant's employment rights. Obviously, the fact that the vacancy advertisement was not placed for the Serb language class prevented the appellant from applying for the position for which there was still a need.

42. The Constitutional Court again emphasizes that the full application of Article II.2, II.4 and II.6 of the Constitution of Bosnia and Herzegovina requires, *inter alia*, is required of all the courts in Bosnia and Herzegovina when deciding on offering the protection of human rights and fundamental freedoms. The Constitutional Court finds that in the proceedings before the Supreme Court the court did not consider the above referenced provisions of

the Constitution of Bosnia and Herzegovina. The Constitutional Court notes that a form of employment, as designated by the Supreme Court, existed in theory and in practice. However, in the appellant's case, although the employment was not lawfully founded, all other elements – regular performance of duties in the School for more than three years, no violent usurpation of work and, with the tacit approval of the School headmaster, registration of the appellant with the health and pension and disability insurance fund – indicate that the appellant was admitted to work in the School on a permanent basis.

43. The Constitutional Court finds that it does not have sufficient evidence to establish the appellant's claim that she was discriminated against due to the fact that she was not politically affiliated or due to her age, and therefore cannot hold that there has been a violation in this respect.

2) The European Convention

44. The Constitutional Court finds that Article 14 of the European Convention in conjunction with Article 6 para 1 of the European Convention is relevant for the appeal. It arises that the appellant refers to Article 14 of the European Convention in terms of her dismissal from her position as a teacher on the basis of her different political affiliation or her lack of political affiliation or on the grounds of her age.

Article 6 para 1 of the European Convention, in its relevant part, reads as follows:

1. In the determination of his civil rights and obligations (...) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...).

Article 14 of the European Convention:

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.

45. The Constitutional Court recalls that Article 14 of the European Convention only provides for protection against discrimination in relation to matters which fall within the scope of the other normative Articles of the European Convention (the European Court for Human Rights, the *Marckx v. Belgium* judgment of 13 June 1979, Series A No. 31, p.

15- 16, para 32). In this respect, the Constitutional Court is of the view that certain aspects of the appeal give rise to matters which may fall within the scope of Article 6 para 1 of the European Convention with respect to the fairness of the proceedings relating to the appellant's dismissal.

46. As a general rule, Article 6 para 1 of the European Convention requires the existence of a dispute over a right as well as that this right to be of a civil nature. In the present case, the Constitutional Court recalls that only disputes relating to the recruitment, employment and termination of the employment of civil servants which are, as a general rule, outside the scope of Article 6 para 1 of the European Convention are *those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities*. (See European Court for Human Rights, *Pellegrin vs. France*, application No. 28541/95, the judgment of of 8 December 1999, para 66.)

The proceedings in the present case concerned the appellant's right to be employed as a teacher. Teachers, although employed in public institutions, do not have the role of the depositary of public authority (in contrast to armed forces, police and some other public officials) and are not responsible for protecting the general interests of the State or other public authorities. The appellant's right can therefore be placed under protection of Article 6 para 1 of European Convention. However, considering the conclusion adopted by the Constitutional Court within the meaning of non-discrimination under Article II.4 of the Constitution of Bosnia and Herzegovina, the Constitutional Court does not find it necessary to further examine Article 6 para 1 of the Constitution of Bosnia and Herzegovina and Article 14 of European Convention in the present case.

VIII. Conclusion

47. Considering the circumstances, the Constitutional Court concludes that the appellant has been discriminated against in the enjoyment of her right to be admitted to public services, on general terms of equality, and was discriminated against in the enjoyment of her individual right to work. The Constitutional Court concludes that the appellant's rights, as determined by Article II.4 of the Constitution of Bosnia and Herzegovina, Article 6 para 1 and Article 7 of the International Covenant on Economic, Social and Cultural Rights and Article 25 of the International Covenant on Civil and Political Rights which are an integral part of the Constitution of Bosnia and Herzegovina, have been violated.

The Constitutional Court decided as stated in the enacting close of this decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 15/03

Appeal of D. L. from Banja Luka against the Interlocutory Judgment of the Basic Court of Banja Luka, No. P-403/03 of 27 May 1999

DECISION
of 28 November 2003

RULING
of 28 January 2005

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Articles 54 and 61 para 1 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – Amended Text (*Official Gazette of Bosnia and Herzegovina*, No. 24/99, 26/01 and 6/02), in Plenary and composed of the following judges:

Mato Tadić, President

Prof. Dr Ćazim Sadiković, Vice-President

Tudor Pantiru, Vice-President

Prof. Dr Miodrag Simović, Vice-President

Hatidža Hadžiosmanović,

Prof. David Feldman,

Didier Maus,

Valerija Galić,

Having considered the appeal of **D. L.** in Case No. **U 15/03**

Adopted at the session held on 28 November 2003 the following

DECISION

The appeal of D. L. from Banja Luka is granted.

The violation of Article 6, para 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms relating to the reasonable time has been established.

It is hereby ordered that a legally binding decision on the merits be adopted without any further delay, no later than 6 months from the date of the adoption 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* and the *Official Gazette of Republika Srpska*.

Reasons

I. Introduction

1. On 29 April 2002, D. L. from Banja Luka ("appellant"), represented by T. A., a lawyer practicing in Banja Luka, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against the Interlocutory Judgment of the Basic Court of Banja Luka No. P-403/03 of 27 May 1999 for the court's failure to adopt final decision on her civil rights within the reasonable time-limit.

II. Proceedings before the Constitutional Court

2. In accordance with Article 16, para 1 of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure"), replies to the appeal were requested from the Basic Court of Banja Luka and the party to the proceedings, the "City Planning Bureau" Banja Luka.

The Constitutional Court received a reply from the Basic Court of Banja Luka on 13 August 2003, while the reply from the "City Planning Bureau" was received on 1 September 2003.

3. Both the replies of the Basic Court of Banja Luka and the City Planning Bureau were communicated to the appellant as provided under Article 20, para 2 of the Constitutional Court's Rules of Procedure.

4. At the request of the Constitutional Court, the Basic Court of Banja Luka delivered the complete case-file on the pending proceedings.

III. The Facts of the Case

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

6. By the Decision of the Commission for the Allocation of Business and Garage Premises of the Housing Authority of Banja Luka No. 2481-3/87 of 11 November 1987, the common area – garbage disposal room with surface area of 16 m^2 was leased to the appellant for purpose of starting her own tailoring business. Article 4 of the aforementioned Decision provides that the Lease on Business Premises shall be concluded between the

lessee and lessor after obtaining agreement to transform the garbage containment room into business premises, from the Competent Commission within the Municipal Assembly of Banja Luka and in accordance with the Decision on Terms and Conditions of Lease of Common Areas (*Official Gazette of the Municipal Assembly of Banja Luka*, No. 11/86 and 10/87).

7. By the Ruling of the Municipal Commission of Urbanism, Traffic and Utilities of Banja Luka No. 11-360-57/88 of 16 May 1988 the Housing Authority, as an investor, was given permission to start the renovation of the existing garbage containment room into business premises. It was established under the Ruling that the investor may commence work after the Ruling has taken legal force.

8. The appellant opened the tailor shop on 16 June 1988. The shop was operational until 1992, at which time she was forced, due to the war and work prohibition placed by the governing bodies and the lessor, to close down the shop.

9. The Lease on Business Premises No. 1672/88 was concluded with the City Planning Bureau on 11 October 1988. However, the content of the lease did not coincide with the agreement concluded with the appellant on 24 February 1987, due to amendments of the Decision on the Terms and Conditions of the Lease of Common Areas in the Socially Owned Residential-Business Buildings in the Banja Luka Municipality Region, No. 2046-1/87 of 1 October 1987 which was published in the *Official Gazette of the Municipal Assembly of Banja Luka* No. 10/87.

10. The lessor, City Planning Bureau, Banja Luka managed to get a Ruling on the cancellation of the contract from the Basic Court of Banja Luka on 15 December 1997, without having fulfilled the obligations from the Lease No. 1672/88 of 11 October 1988, specifically, the lessor did not reimburse the appellant for the assets invested in renovation of the premises.

11. Due to failure to comply with the terms and conditions of the Lease on Business Premises of 11 October 1988, the appellant lodged an action with the Basic Court of Banja Luka on 23 April 1993.

12. The Basic Court of Banja Luka, acting upon the appellant's action concerning the determination of annulment of part of the Lease on Business Premises No. 1672/88 of 11 October 1988, held the following hearings:

- The Basic Court of Banja Luka scheduled the first hearing for 14 December 1994. The appellant was not present at the hearing because she was not duly informed. The Court ordered that the appellant be summoned by posting the summons on the bulletin board of the court.

- At the hearing held on 26 January 1995 it was noted that the appellant did not appear (she was not informed properly). The Basic Court of Banja Luka ordered that a written summons be sent to the appellant's address indicated in the action.

- At the hearing held on 17 February 1995, the appellant's attorney was ordered to amend the claim and make it comprehensible, exactly state the defendant in accordance with the information obtained from the department for registration within the court.

- It was ascertained at the hearing held on 5 April 1995 that the defendant's attorney, who appeared as a replacement, does not have necessary documentation and therefore the hearing was scheduled for 19 May 1995.

- At the hearing held on 19 May 1995, the appellant's representative was ordered to make corrections to his claim which had been amended by the submission of 4 April 1995, since it is was unclear and contradictory.

- At the hearing held on 5 July 1995, the appellant's legal representative was absent and it was concluded that the next hearing be scheduled in accordance with his proposal.

- The hearing scheduled for 20 September 1995 was postponed for 9 October 1995 since the appellant's legal representative was not present due to justified reasons.

- The hearing scheduled for 9 October 1995 was postponed due to the illness of the judge.

- At the hearing held on 28 December 1995, the defendant's attorney was ordered to communicate the document which the defendant received before the renovation of the premises started, the Decision on Terms and Conditions of the Lease of Business Premises of the area of the Municipality of Banja Luka (*Official Gazette of the Municipality of Banja Luka*, No. 11/86 and 10/87) and the information whether the defendant paid the appellant an annual amount as compensation for the investment in the renovation in accordance with the amortization of the business premises, so that they could be attached with the case-file.

- At the hearing of 5 January 1996 the defendant was ordered to act in accordance with the court's order from 28 December 1995 before the next hearing.

- The defendant's attorney did not show up at the hearing of 31 January 1996. The defendant was ordered to urgently deliver the information requested in the minutes of 28 December 1995.

- At the hearing of 14 June 1996, the court concluded that the appellant's attorney was not duly informed that the defendant had already enclosed, in the case-file, the Official Gazette of the Municipal Assembly of Banja Luka No. 10/87.

- The hearing of 4 July 1996 was held without the defendant's attorney being present. The appellant's attorney amended the claim requesting that the Contract on the Lease of Business Premises No. 1672/88 of 11 October 1988 be cancelled due to the lack of appellant's approval and demanded compensation because she was not using the business premises.

- At the hearing of 4 September 1996, evidence was presented and the appellant's attorney requested a hearing of the witnesses D.G. and J. M., and he also requested that the opinion of the expert Ž. D. be obtained. These proposals were not accepted by the court.

- At the hearing of 19 May 1997, the Basic Court of Banja Luka noted that the defendant did not receive the summons for the hearing of 14 May 1997, or more exactly did not receive it within the deadline provided for by the Law on Contentious Proceedings. Therefore, the hearing was postponed until 2 June 1997.

- At the hearing of 2 June 1997, the appellant was ordered to communicate to the court the appeal against the defendant's Ruling of 1 February 1989 and to communicate to the defendant the second page of the minutes which is integral part of the Ruling of 1 February 1989.

- At the hearing of 4 July 1997, the court requested the information whether the defendant received the appeal against the Ruling of 1 February 1989 and whether the defendant adopted the decision. It was concluded that the next hearing shall be scheduled in accordance with the schedule of the hearings that shall be held after the holidays.

- At the hearing of 6 October 1997, it was concluded that the defendant's submission of 19 September 1997 was enclosed with the case-file. The hearing was postponed due to the absence of the acting judge.

- At the hearing of 7 November 1997, the appellant was ordered to communicate the original appeal filed against the defendant's Ruling of 1 February 1989 with an indicated date of delivery to the defendant. The defendant was ordered to communicate the decision in accordance with the paragraph 3 of Article 13 of contract No. 1672/88 of 11 October 1988.

- At the hearing of 28 November 1997, the appellant's attorney presented to the defendant the original appeal against the defendant's Ruling of 1 February 1988. The defendant informed the court that it is not able to state whether the City Planning Bureau has the decision which it was obliged to adopted in accordance with Article 13, para 3 of the contract of 11 October 1988. The defendant was ordered to communicate the aforementioned decision before the next hearing and also to confirm the number under which the appeal was registered.

- At the hearing of 16 December 1997 the defendant was ordered to deliver the decision requested at the hearing of 7 November 1997 as well as the complete case-file, from the offer to the last decision regarding the legal issue of the parties to the proceedings.

- At the hearing held on 2 February 1998, the defendant was ordered to communicate the decision in accordance with Article 13, para 3 of the Contract No. 1672/88 of 11 October 1988 before the next hearing.

- It was concluded at the hearing of 27 February 1998 that the hearing shall be postponed due to the illness of the acting judge.

- At the hearing held on 23 June 1998, the defendant's attorney was ordered to act in accordance with the rulings and court's communications before the hearing scheduled for 11 August 1998, and to deliver the evidence as to whether the appellant was paid the amount invested in the renovation pursuant to Article 13 of the Lease on Business Premises.

- At the hearing held on 11 August 1998, the witnesses, D. G. and J. M., were heard. The appellant proposed the annulment of the provisions of the contract which are not in accordance with the offer. She also proposed that the invested assets should be regarded as an advance payment of the rent in accordance with the value of the investment and the amount of the rent determined on 16 June 1998.

- At the hearing held on 15 September 1998, it was concluded that the appellant shall be heard as a party to the proceedings. The defendant was ordered to communicate

information to the court which of the defendant's representatives participated in conclusion of the contract in question.

- At the hearing held on 27 October 1998 the defendant's attorney was ordered to deliver the written statement with regard to the amended claim and to inform the court which of the legal representatives of the defendant participated in making agreement with the appellant, within the time limit of 10 days. The appellant was ordered to communicate to the counter party the Ruling on the cancellation of the contract of 5 July 1993 which she received from the defendant.

- At the hearing of 10 December 1988, it was concluded that the witness, D. P., should be summoned.

- At the hearing of 11 February 1999, it was asserted that the witness, D. P., did not show up (summons were returned to the court, incomplete address). It was concluded that the defendant's attorney be heard as a party to the proceedings.

- At the hearing of 25 March 1999, the evidence was adduced through the hearing of the witness R.P. – the defendant's legal representative.

- At the hearing of 27 May 1999, the appellant was heard as a party to the proceedings, the defendant's attorney gave his statement with regard to the appellant's assertions, the insight of the case-file was obtained, the main hearing was concluded and the interlocutory judgment was adopted.

13. The Municipal Basic Court of Banja Luka deciding on the appellant's appeal adopted the Interlocutory Judgment No. P-403/93 of 27 May 1999 which dismissed the appellant's claim for the establishment of annulment of the provisions of Article 2, 12, 13, 14 and 17 of the Lease No. 1672/88 of 24 February 1987, and bind the defendant, the City Planning Bureau, to accept the offer of the appellant to conclude the aforementioned contract.

14. The appellant's request that the defendant, the City Planning Bureau, be obliged to reimburse the assets invested in the renovation of the business premises was granted, provided that the decision on the value of these assets and the costs of the proceedings be adopted after the Interlocutory judgment takes legal force.

15. The appellant filed an appeal against the dismissing part of the Interlocutory Judgment of 27 May 1999 with the County Court of Banja Luka due to a serious violation of the provisions of the Contentious Proceedings, incorrectly and incompletely established facts,

wrong application of the substantive law and the decision on the costs of the proceedings. The City Planning Bureau filed an appeal as well.

16. The County Court of Banja Luka, deciding on the appeals of the parties against the Interlocutory Judgment of the Basic Court of Banja Luka No. P-403/93 of 27 May 1999 adopted Ruling No. Gž-341/01 of 21 November 2001, which granted both the appeal of the appellant and the appeal of the City Planning Bureau, annulled the Interlocutory Judgment of the Basic Court of Banja Luka No. P-403/93 of 27 May 1989 and referred the case back before the Basic Court of Banja Luka for new proceedings.

17. The Basic Court of Banja Luka, acting upon the Ruling of the County Court of Banja Luka No. Gž-341/01 of 21 November 2001, held the following hearings:

- At the hearing held on 25 April 2002, it was concluded that the City Planning Bureau should be summoned for the hearing to be held on 2 July 2002.

- At the hearing held on 2 July 2002, it was concluded that the case-file is with the Independent Judicial Commission as of 27 May 2002. The hearing was postponed.

After the Independent Judicial Commission returned the documents to the Basic Court in Banja Luka, the following hearings were scheduled before the Basic Court in Banja Luka:

- At the hearing of 17 October 2002, it was concluded that the defendant should deliver the evidence showing that the business premises in question are the property of the City of Banja Luka and also show the way in which it became the property of the City of Banja Luka since the defendant, the City Planning Bureau is the investor.

- At the hearing of 26 November 2002, it was concluded that the financial expert should be given opinion on the circumstances of the conversion of the paid plaintiff's funds in KM and the calculation of the legal interest rate for the rent for the disputable period.

The proceedings before the Basic Court in Banja Luka were still pending on the day of adoption of the Decision of the Constitutional Court.

IV. Appeal

a) Statement from the Appeal

18. The appellant asked for the protection of her rights guaranteed by the Constitution of Bosnia and Herzegovina since she alleges that her rights provided for under Article II.3 (k) of the Constitution of Bosnia and Herzegovina, Article 6, para 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), and Article 1 of Protocol No.1 to the European Convention have been violated.

19. The appellant alleges that she suffered the damages as she was incapable of performing her tailoring business in the premises she renovated for that purpose using her own funds. She also contends that she was denied the right to peacefully enjoy her property, and that she has not had any profit from the funds she invested in the renovation as of 1992 until present.

20. Therefore, the appellant proposes, as she has no opportunity to attain her rights before the ordinary courts of the Republika Srpska within reasonable time, that the Constitutional Court decides on the merits of the case in such a way as to annul Articles 2, 12, 13, 14 and 17 of the Lease on Business Premises No. 1672 of 11 October 1988 and oblige the City Planning Bureau to compensate the appellant in the amount of 24,000 KM within 15 days.

b) Response to the Appeal

21. In its reply of 13 August 2003, the Basic Court of Banja Luka noted that the proceedings in this legal matter are pending again and that it will be terminated within a reasonable time considering the adoption of the new Law on Contentious Proceedings. The Basic Court of Banja Luka also noted that the final decision was not adopted in the present dispute and therefore the appeal was premature. The Basic Court of Banja Luka is of the opinion that the appellant has to a great extent contributed to the length of the proceedings since she did not act in accordance with the court's instructions. The Basic Court of Banja Luka proposed that the appeal be dismissed.

22. In a reply to the appeal, the City Planning Bureau pointed out to the lack of the right to be sued since pursuant to the Decision on Disposal, Managing, Allocation and Lease of the Business Buildings, Business Premises and Garages in possession of the City

of Banja Luka (*Official Gazette of the City of Banja Luk*a, No. 15/98), managing of business premises was taken over by the City of Banja Luka. It believes that the appeal is inadmissible for the appellant's failure to use all of the ordinary and extraordinary legal remedies. Furthermore, it emphasizes that the appellant contributed to the length of proceedings because she herself changed the claim seven times and finally presented an unclear claim. The appellant is still in possession of the premises in question and still not paying the rent.

V. 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 other court in Bosnia and Herzegovina.*

Pursuant to Article 11, para 3 of the Constitutional Court's Rules of Procedure, *the Court may examine an appeal only if all legal remedies which are available under the laws of the Entities against the judgment 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 final decision on the last legal remedy he/she used.*

24. In the context of appellate jurisdiction of the Constitutional Court provided for under Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, the term "judgment" is to be interpreted extensively. The term includes not only all kinds of decisions and rulings but also a failure to take a decision where such failure is claimed to be unconstitutional (see Decision of the Constitutional Court No. *U 23/00* of 2 February 2001, published in the *Official Gazette of Bosnia and Herzegovina* No. 10/01).

The appellant requested the protection of the rights guaranteed by the Constitution of Bosnia and Herzegovina for the court's failure to adopt final decision on her civil rights within the reasonable time-limit.

However, the appeal contests the Interlocutory Judgment of the Basic Court in Banja Luka, No. P-403/93 of 27 May 1999. Pursuant to the relevant law on Republika Srpska, the Interlocutory Judgment only decides on whether the claim is well-founded and not on the merits of that request. It follows out from the aforementioned that Interlocutory Judgment did not resolve the appellant's rights and obligations but that the subject of the appeal is failure of the competent court to decide in merits on her civil rights and obligations.

The Constitutional Court points out that, in accordance with Article II.1 of the Constitution of Bosnia and Herzegovina, *Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally* recognized *human rights and fundamental freedoms* and that, pursuant to Article II.2, *the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina* and *(...) shall have priority over all other law.*

The Constitutional Court interprets the appeal and concludes that the appellant invokes its right under Article 6, para 1 of the European Convention due to the court's failure to adopt decision on her civil rights within a reasonable time-limit.

25. Furthermore, following the practice of the European Court of Human Rights, the Constitutional Court holds that the application of the rule set forth in Article 11, para 3 of the Constitutional Court's Rules of Procedure, with respect to the exhaustion of legal remedies, must be applied with some degree of flexibility and without excessive formalism (see European Court of Human Rights, *Cardot v. France*, Judgment of 19 March 1991, Series A No. 200, p. 18, para 34). The Constitutional Court notes that the rule of exhaustion of the legal remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case (see European Court of Human Rights, *Van Oosterwijek v. Belgium*, Judgment of 6 December 198, Series A, No. 40, P. 18, para 35). This means, amongst other things, that not only the existence of formal legal remedies in the legal system, but also the general legal and political context as well as the personal circumstances of the applicants, should be realistically considered.

26. With respect to the aforementioned circumstances, the Constitutional Court notes that there is no effective legal remedy in Bosnia and Herzegovina, or in present case in the Republika Srpska, which would enable the appellant to appeal with respect to the length of the proceedings (see European Court of Human Rights, *mutatis mutandis, Tome Mata v. Portugal,* (Dec.) No. 32082/96, 1999-IX) and finds that the appellant was right to argue that no legal remedy available in the Republika Srpska would be effective with respect to her action. The Constitutional Court finds that deficiencies in the organization of the judicial system of the entities, i.e. states, must not influence respect on the individual rights and freedom stipulated by the Constitution of Bosnia and Herzegovina as well as the requests and guarantees from Article 6 of the European Convention.

The Constitutional Court points out that an excessive burden in terms of finding out the most efficient manner which would lead to realization of his/her rights cannot placed on the appellant.

The Constitutional Court finds that one of the basic postulates of the European Convention is that legal means available to the individual should be easily accessible and understandable and that an omission in the organization of the legal and judicial system of the state that endangers the individual rights protection cannot be attributed to the individual. In addition, the obligation of the state is to organize its legal system so as to enable the courts to comply with the requirements and conditions that are stipulated by Article 6, para 1 of the European Convention (see European Court of Human Rights, *Zanghi vs Italy,* judgment from 19 February 1991, series A, No. 194, para 21).

27. The Constitutional Court finds that the present case concerns the omission of the competent court to adopt a decision within a reasonable time and that the appellant was not availed of a right to an effective legal remedy to dispute the length of the proceedings.

28. In view of the fact that the proceedings were continually postponed, that the case at issue is still pending before the Basic Court of Banja Luka as well as the fact that the appellant was not availed of a right to legal remedy to receive the final decision, the Constitutional Court finds the appeal as admissible.

VI. Merits

29. Pursuant to Article II.2 of the Constitution of Bosnia and Herzegovina, the rights and freedoms determined by the European Convention and its Protocols are directly applied in Bosnia and Herzegovina and they have priority over all the other laws. The Constitutional Court is competent to examine whether, in the present case, there has been violation of the right from the Constitution of Bosnia and Herzegovina and the European Convention to which the appellant complains.

30. The appellant alleges that her right to a fair hearing within reasonable time provided under Article 6, para 1 of the European Convention, 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 had been violated.

1. Article 6, para 1 of the European Convention

31. The Constitutional Court has examined whether the civil proceedings in the present case exceeded the "reasonable time" referred to in Article 6, para 1 of the European Convention, which, in relevant part, reads as follows:

In the determination of his *civil rights…everyone is entitled to a… hearing within a reasonable time…*

The applicability of Article 6, para 1 of the European Convention

32. The Constitutional Court observes that the proceedings in question concern the rights over property. Therefore, the proceedings concern a request for the final decision in a reasonable time in a dispute concerning civil rights. Accordingly, Article 6, para 1 is applicable in the present case.

The period to be taken into consideration

33. The Constitutional Court recalls the case-law of the European Convention organs in relation to the length of proceedings cases where the proceeding commenced prior to the date of the commencement of the European Convention organs' competence *ratione temporis*. The European Convention organs consider that the period to be taken into consideration for the purposes of an appeal regarding the length of proceedings begins on the date of the commencement of their competence *ratione temporis* - however, in assessing the reasonableness of the time which elapsed after that date, account must be taken of the stage the proceedings had reached on that date (see, for example, ECHR, *Foti and others v. Italy* judgment of 10 December 1982, Series A No. 56, p. 18, paragraph 53; *Styranowski v. Poland*, No. 28616/95, ECHR 1998-VIII).

34. The Constitutional Court notes that the appellant initiated proceedings with the Basic Court of Banja Luka on 23 April 1993 requesting the annulment of the Lease on Business Premises. However, the period which the Constitutional Court is competent to examine did not start on that date, but on 14 December 1995 when the Constitution of Bosnia and Herzegovina entered into force. It follows that the overall length of the proceedings is already more than 10 years. Out of those 10 years, seven years and ten months represent the period which needs to be assessed by the Constitutional Court. The proceedings are still pending before the Basic Court of Banja Luka.

35. The Constitutional Court further notes that, for the purpose of assessing the reasonableness of the length of the proceedings, it is also necessary to take into account the state of the proceedings reached on 14 December 1995 (*Kelešević v.* RS, Final report of the Ombudsperson No.(B)30/96 of 20 June 1997, p. 7, paragraphs 47-48).

36. In view of the criteria established through the case law of the European Court of Human Right, the Constitutional Court points out that the reasonableness of the length of proceedings must be assessed in the light of the all circumstances of the case, in particular, the complexity of the case and the conduct of the appellant and the relevant authorities, as well as the importance of the issues questioned by the appellant (see: *Vernilllo v. France,* judgment of 20 February 1981, Series A No. 198, p. 12, paragraph 30; *Zimmerman and Steiner v. Switzerland*, judgment of 13 July 1983, p.11. paragraph 24).

a) Complexity of the case

37. The Constitutional Court notes that the complexity of a case must be considered in the light of the factual and legal aspects of the dispute, and specifically, the evidence that had to be taken and assessed by the court and the legal nature of dispute and related proceedings.

38. The Constitutional Court notes that the present proceedings are concerning the process of establishing the nullity of a part of the Contract on the Lease of Business Premises. The Constitutional Court also notes that there are two parties to the proceedings. The Constitutional Court also does not find that the case, which is examined before the competent court, can be regarded as a complex one both with regard to the facts and the legal matters.

b) Conduct of the appellant

39. The Constitutional Court notes that the hearing in the civil matters within a reasonable time depends of the conduct of the parties to the proceedings (see, European Commission of Human Rights, No. 11541/85, Dec. 12.4.89, D.R. 70 p. 13).

40. The Constitutional Court noted that the appellant did not miss the scheduled hearing without submitting a justifiable reason. She neither requested that the court postpone the hearings nor did she use any methods which might lead to postponement. The Constitutional Court considers that in relation to other issues conduct of the appellant itself cannot justify the length of the proceedings.

41. Therefore the Constitutional Court has found that the postponement of the proceedings can not be regarded as the appellant's fault.

c) Conduct of the court

42. The Constitutional Court noted that, from 14 December 1995 until the adoption of this Decision, the Basic Court of Banja Luka scheduled 31 hearings; the appellant actively participated at the hearings except when she was not duly informed; three hearings had been postponed due to the fact that either the defendant or the witnesses or the judge failed to show up, and from 21 November 2001 after the decision of the County Court of Banja Luka No. Gž-341/01 of 21 November 2001 four hearings had been held, of which two had been postponed since the case-file was made available to the Independent Judicial Commission in Sarajevo.

43. Although the Basic Court of Banja Luka adopted the Interlocutory Judgment No. P-403/93 of 27 May 1999, it was annulled by the Ruling of the County Court of Banja Luka No. Gž-341/01 of 21 November 2001. The case is pending before the Basic Court of Banja Luka. In relation to delay of proceedings, the Constitutional Court did not find the reasoning of the Basic Court of Banja Luka justifying the length of the proceedings to be convincing.

44. The Constitutional Court observes that the overall length of the proceedings in this case, being approximately seven years and 10 months, which is still pending before the first instance court, has not been justified. The Constitutional Court found that the appellant cannot be held responsible for any delay, that the case is not a complex one, and that the conduct of the courts lacks due diligence. Consequently, the Constitutional Court finds that the period of seven years and 10 months of the relevant proceedings cannot be regarded as "reasonable".

45. The Constitutional Court must emphasize, at this point, the fundamental importance in a judicial system that proceedings are carried out within a reasonable time, since unreasonable delay often amounts to a *de facto* denial to individuals of their rights and loss of effectiveness and confidence in the legal system.

46. In light of the aforementioned and having regard to all the circumstances of the case, the Constitutional Court considers that the courts which decided the contentious proceedings without any justification tolerated delay of the proceedings even though the fast outcome of the proceedings was of importance for the appellant. The subject matter of the dispute is the common area which she renovated by investing her own funds with the purpose to start

her private business. It follows that the appellant did not have the opportunity to receive the decision on the merits on her civil rights within a reasonable time.

47. In accordance with the aforementioned, it follows that a reasonable time-limit requirement was not fulfilled which constitutes a violation of Article 6, para 1 of the European Convention - the right to a fair hearing within reasonable time.

2. Right to property

48. The right to property is protected under Article II.3 (k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No.1 to the European Convention. In view of the circumstances of the case and the conclusion reached above, the Constitutional Court considers it unnecessary to determine the part of the appeal relating to violation of Article 1 of Protocol No. 1 to the European Convention (see the European Court of Human Rights, judgment *Zanghi v. Italy*, 19 February 1991, series A No 194, p. 47, paragraph 23).

VII. Conclusion

49. Considering the aforementioned and pursuant to Article 61, para 1, item 1 of the Constitutional Court's Rules of Procedures, it has been unanimously decided as stated in the enacting clause of this Decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Article 59, para 3 and Article 75, para 6 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina*, No. 2/04), in Plenary, composed of the following judges:

Mato Tadić, President

Prof. Dr Ćazim Sadiković, Vice-President,

Tudor Pantiru, Vice-President,

Prof. Dr Miodrag Simović, Vice-President,

Hatidža Hadžiosmanović,

Prof. David Feldman,

Valerija Galić,

Jovo Rosić,

Prof. Dr Constance Grewe,

Having considered the case No. **U 15/03**,

At its session held on 28 January 2005, adopted the following

RULING

It is hereby established that the Municipal Court of Banja Luka failed to execute the Decision of the Constitutional Court of Bosnia and Herzegovina No. U 15/03 of 28 November 2003 within the specified time-limit of six months from the date of service of the said Decision.

Pursuant to Article 75, paragraph 6 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, the present Ruling shall be submitted to the Chief Prosecutor of Bosnia and Herzegovina.

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

Reasons

1. The Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") adopted Decision No. U 15/03 on 28 November 2003 whereby it granted an appeal of D. L. filed against the Interlocutory Judgment of the Basic Court of Banja Luka ("Basic Court") No. P-403/03 of 27 May 1999 and established a violation of Article 6, para 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") with regard to a reasonable time-limit. The Basic Court was ordered to adopt a decision without any further delay and no later than within six months.

2. The said decision of the Constitutional Court was published in the *Official Gazette of Bosnia and Herzegovina* No. 8/04 of 24 March 2004. On 27 February 2004, the Basic Court received the Decision of the Constitutional Court No. U 15/03 of 28 November 2003. The time-limit of six months for enforcement of the Decision started running as of the date of receipt of the Decision. The said time-limit expired on 27 August 2004.

3. Having regard to Article 75, para 5 of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure"), the Basic Court communicated two acts to the Constitutional Court (respectively, Su-1784/04 of 24 September 2004 and P-403/93 of 24 December 2004) whereby it informed the Constitutional Court that it began to process the case upon receipt of the decision of the Constitutional Court and that, by expiry of the term of office of the judge who was in charge of the case, the case had to be transferred to another judge on 7 March 2004 because a newly appointed judge went to maternity leave. Preliminary hearings were held on 27 October 2004 and 24 November 2004 and the main hearing was scheduled for 18 January 2005. No decision was adopted.

4. Having regard to the aforementioned, the Constitutional Court established that the Basic Court failed to execute the Decision of the Constitutional Court No. U 15/03 of 28 November 2003, within the specified time-limit of six months.

5. Pursuant to Article 75, para 6 of its Rules of Procedure, *in the event of a failure to enforce a decision, or a delay in enforcement (...) the Constitutional Court shall render a ruling in which it shall establish that its decision has not been enforced and (...) shall transmit it to the competent prosecutor.*

6. Pursuant to Article 75, para 6 of the Constitutional Court's Rules of Procedure, the Constitutional Court decided unanimously as stated in the enacting clause of the present Ruling.

7. Under Article VI.4 of the Constitution of Bosnia and Herzegovina, the decision of the Constitutional Court shall be final and binding.

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 128/03

Appeal of the Tenants' Council of the building at Srpska Street No. 77/79 in Banja Luka against the Judgments of the Supreme Court of the Republika Srpska, Nos. U-1014/00 of 16 October 2002 and U-1066/00 of 16 October 2002

DECISION ON ADMISSIBILITY AND MERITS
of 21 September 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (2), Article 61 paras 1 and 2 and Article 64 paras 3 through 5 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President

Mr. Ćazim Sadiković, Vice-President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Hatidža Hadžiosmanović,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Having deliberated on the appeal of the **Tenant's Council of the building at Srpska Street No. 77/79 in Banja Luka** in Case No. **U 128/03,**

Adopted at the session held on 21 September 2004 the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by the Tenants' Council of the building at Srpska Street No. 77/79 in Banja Luka against the Judgments of the Supreme Court of the Republika Srpska Nos. U-1014/00 of 16 October 2002 and U-1066/00 of 16 October 2002 is granted.

A violation of Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of the European Convention for Protection of Human Rights and Fundamental Freedoms is established.

The Judgments of the Supreme Court of the Republika Srpska Nos. U-1014/00 of 16 October 2002 and U-1066/00 of 16 October 2002 are quashed.

The Supreme Court of the Republika Srpska is ordered to employ expedited procedure and render a new decision in accordance with Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of the European Convention for Protection of Human Rights and Fundamental Freedoms.

The Supreme Court of the Republika Srpska is ordered to inform the Constitutional Court of Bosnia and Herzegovina about the taken measures within a time-limit of six months after the service of the present Decision, as laid down by Article 75 paragraph 5 of the Rules of Procedure of the Constitutional Court.

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

Reasoning

I. Introduction

1. On 25 and 28 November 2002, the Tenants' Council of the building at Srpska Street No. 77/79, Banja Luka ("the appellant"), represented by Mr. Davorin Reljic, Chairman of the Tenants' Council, lodged appeals with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") against the Judgments of the Supreme Court of the Republika Srpska ("the Supreme Court") Nos. U-1014/00 of 16 October 2002 and U-1066/00 of 16 October 2002.

II. Procedure before the Constitutional Court

1. Given the fact that the appeals concern the same issue arising out of the Constitutional Court's jurisdiction, the Constitutional Court, by virtue of Article 30 of its Rules of Procedure, decided to join appeals U 128/03 and AP 215/02, conduct one set of proceedings and adopt one decision No. U 128/03.

2. Pursuant to Article 21 para 1 of the Constitutional Court's Rules of Procedure, the Supreme Court and the Ministry for Town Planning, Housing and Public Utility Affairs,

Civil Engineering and Environment of the Republika Srpska were requested on 29 October 2003 to submit their respective replies to the appeal.

3. The Supreme Court submitted its reply to the appeal on 13 November 2003.

4. On 9 December 2003, the Ministry for Town Planning, Housing and Public Utility Affairs, Civil Engineering and Environment of the Republika Srpska informed the Constitutional Court that it could not submit its reply as the entire case-file had been referred to the Basic Court of Banja Luka.

5. Pursuant to Article 25 para 2 of the Constitutional Court's Rules of Procedure, the Supreme Court's reply was communicated to the appellant on 27 November 2003.

III. Facts of the Case

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

2. By the Decisions of the Secretariat for Town Planning, Traffic and Public Utility Issues of the City of Banja Luka 01-364-1945/99 and 01-364-753/00 of 15 May 2000, a town planning consent for the remodelling of a part of the attic space at Srpska Street No. 79 into independent housing units was given to the investors, the Primary School "Sveti Sava", Banja Luka and the Public Health Institution "Dom zdravlja" Banja Luka.

9. The Ministry for Town Planning, Housing and Public Utility Affairs, Civil Engineering and Environment of the Republika Srpska by its Decisions 01-364-427/00 of 22 September 2004 and 01-364-753/00 of 22 September 2004, rejected as out of time the appellant's complaints lodged against the said first-instance decisions.

10. The Supreme Court by its Judgments of 16 October, 2002 U-1014/00 and U-1066/00 of 16 October 2002, dismissed as being ill-founded the appellant's actions brought against the said second-instance decisions.

11. The appellant filed a request with the Supreme Court for extraordinary revision of the judgment of the Supreme Court No. U 1014/00 of 16 October 2002. The decision on this request is still pending as confirmed by the Supreme Court's letters SU-VIII-58/03 of 11 February 2003, Uvl-53/02 of 23 April 2004 and SU-VIII-551/04 of 4 August 2004.

IV. Relevant law

12. **Law on Building Additional Annexes to Buildings and Transformation of Common Premises into Apartments in Socially Owned Buildings** (*Official Gazette of the SRBiH* No. 32/87) applicable in the Republika Srpska on the basis of Article 12 of the Constitutional Law on Implementation of the Constitution of the Republika Srpska (*Official Gazette of the Republika Srpska* No. 21/92).

13. Article 14 para 2, in the relevant part, reads as follows:

The municipal authority responsible for town planning affairs shall inform the allocation right holder, i.e. the owner over the special part of the building and the tenant's council of the building of the standpoint which the Assembly of the Municipality took as regards their replies.

14. Article 14 para 3, in its relevant part, reads as follows:

The failure to submit replies referred to in paragraph 1 of this Article within a time limit of 30 days from the day on which the replies were requested shall be considered as a positive response given by the allocation right holders, i.e. the owners over the special part of the building and the tenant's council of the building.

V. Appeal

b) Statements from the appeal

15. The appellant maintained that the court judgments as well as the decisions of the administrative bodies violated the substantive provisions of the Law on Additional Annexes to Buildings and Transformation of Common Premises into Apartments in Socially Owned Buildings and the provisions of the Law on the General Administrative Procedure and, consequently, Article II.3 (e) and (k) and Article II.4 of the Constitution of Bosnia and Herzegovina.

16. The appellant suggested that the Constitutional Court should quash the contested judgments of the Supreme Court and the decisions of the administrative bodies and thus offer protection of its constitutional rights.

b) Reply to the appeal

17. In its reply to the appeal, the Supreme Court submitted that it supported the view expressed in the reasoning for the contested judgment. It pointed out that the appellant acted on the instructions given by the Supreme Court and filed a request for renewal of proceedings against the Decision of the Secretariat for Town Planning, Traffic and Public Utility Issues of the City of Banja Luka 01-30-1945/99 of 15 May 2000. Moreover, the Supreme Court alleged that the appellant filed a request for extraordinary revision of the contested judgment and that the decision on this request is pending. It suggested that the appeal should be dismissed as being ill-founded.

VI. Admissibility

18. According to Article V.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.

19. According to Article 15 para 3 of the Rules of Procedure of the Constitutional Court, “the Court shall examine an appeal only if all effective legal remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is lodged within a time-limit of 60 days from the date on which the decision on the last effective legal remedy used by the appellant was served on him/her”.

20. In the present case, the appeal is directed against the Judgments of the Supreme Court U-1014/00 of 16 October 2002 and No. U-1066/00 of 16 October 2002. The appellant filed a request for extraordinary revision of the Judgment of the Supreme Court No. U 1014/00 of 16 October 2002. However, the Constitutional Court holds that the request for extraordinary revision of the Supreme Court’s decision adopted in administrative dispute, which is to be decided on by the Supreme Court itself due to the nature of the dispute, would not be an effective legal remedy. It follows that the contested judgment of the Supreme Court No. U-1014/00 of 16 October 2002 may be considered as final.

21. Furthermore, the contested judgments of the Supreme Court were rendered on 16 October 2002. The appeals were lodged on 22 and 25 November 2002, i.e. within the time-limit of 60 days as laid down in Article 15 para 3 of the Constitutional Court’s Rules of Procedure. Finally, the appeal meets the conditions set out in Article 16 para 2 of the Rules of Procedure of the Constitutional Court.

22. In view of the provisions of Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 15 para 3 and Article 16 para 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court concludes that the appeal meets the admissibility requirements.

VII. Merits

23. The appellant refuted the contested judgments of the Supreme Court maintaining that they violated its rights under Article II.3 (e) and (k) and Article II.4 of the Constitution of Bosnia and Herzegovina.

24. The aforementioned constitutional provisions correspond to the provisions of Article 6 para 1 and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") and Article 1 of Protocol N.1 to the European Convention.

The right to a fair hearing

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

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

26. Article 6 para 1 of the European Convention reads as follows:

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

27. Taking account of the nature of the dispute in the instant case and the position of the European Court of Human Rights that the first paragraph of Article 6 of the European Convention is applicable (see European Court of Human Rights, the *Fredin* judgment of 18 February 1991, Series A No. 192), the Constitutional Court notes that the administrative dispute conducted on the appellant's action before the Supreme Court constituted "dispute

concerning civil rights and obligations" within the meaning of Article 6 para 1 of the European Convention.

28. The Constitutional Court observes that the first-instance authority did not obtain an opinion from the appellant as the interested party in the procedure of issuing town planning consent to the investors for the adaptation of the building located in Srpska Street No. 77/79 in which the appellant as the Tenant's Council represents the tenant's interests.

29. The appellant lodged complaints against the decisions of the first-instance body. The complaints were rejected by the second-instance body as filed outside the time limit because the appellant, as the interested party and entitled to participate in the procedure of issuance of the town planning consent, could have lodged complaints against the first-instance decisions on the town planning consent only during the time-limit running for any of the parties that actually participated in that procedure.

30. Thereupon, the appellant instituted administrative dispute proceedings before the Supreme Court. The Supreme Court rendered judgments dismissing the appellant's action as being ill-founded on the ground that it considered that the defendant body adopted correct decisions when deciding to reject the appellant's complaints against the first-instance decisions as out of time.

31. The Constitutional Court observes that the Ministry for Town Planning, Housing and Utility Issues, Construction and Environment of the Republika Srpska rejected the appellant's complaints against the first-instance decisions. The Supreme Court rendered the judgments dismissing the appellant's actions having established that they were brought after the expiration of the legal time-limit of 15 days. This time-limit started running as from the date of service of the decision on the parties that actually participated in the procedure. The Supreme Court held that the appellant's complaints were lodged after the expiration of the time-limit of 15 days after the date of service of the decisions on the parties that participated in the procedure. However, the Supreme Court rejected the appellant's actions as being ill-founded.

32. Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of the European Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal coupled with the "right to a fair trial in civil and criminal matters, and other rights relating to criminal proceedings" (see European Court of Human Rights, the *Golder v. the United Kingdom* judgment of 21 February 1975, Series A No. 18, para. 36). The Constitutional Court observes that the rights

guaranteed by Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of European Convention included, *inter alia*, right to court protection with the right to have access to a court constituting one of its aspects. The right to have access to a court under Article 6 para 1 of European Convention does not imply only detailed procedural guarantees and proceedings that are public and expeditious but also compatibility with the law (see European Court of Human Rights, the *Hornsby* judgment of 19 March 1997, para. 40). However, if the right to a court is limited by the State, (potentially) applied limitations must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (see European Court of Human Rights, the *Tolstoy Mioloalawsky v. the United Kingdom* judgment of 13 July 1995, para. 59). Furthermore, limitations will not be compatible with Article 6 para 1 of the European Convention if they do not pursue a legitimate aim and if there is no reasonable amount of proportionality between the means used and the aim sought to be realized (see European Court of Human Rights, the *Ashingdane v. the United Kingdom* judgment of 28 May 1985, para. 57).

33. The Constitutional Court observes that the fundamental human rights safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention must be real and effective both in law and in practice and not to be illusory and theoretical. In concrete terms, the legal remedies anticipated for the protection of rights must be available and they must not be interfered with by acts, omissions, delays or negligence on the part of the authorities and the authorities must be able to protect human rights.

34. In the present case, the appellant first sought protection on account of violation of rights by the second-instance body that decided the appellant's complaints against the first-instance decisions. The second-instance body dismissed its complaints as out of time and referred the appellant to Article 249 sub-paragraph 9 of the Law on Administrative Procedure, which provides a possibility for renewal of procedure. Thereupon, the appellant instituted administrative dispute proceedings before the Supreme Court. The Supreme Court rendered judgments dismissing the appellant's actions.

35. According to Article 230 para 2 of the Law on General Administrative Procedure (*Official Gazette of the SFRY* No. 47/86 and *Official Gazette of the Republika Srpsk*a No. 3/92), valid at the time of adoption of the contested act, a party that did not participate in administrative procedure because he/she was not allowed to do so, may lodge a complaint against a decision issued in that procedure within a time-limit running for the party that participated in the procedure.

36. The Constitutional Court observes that it is beyond dispute that the appellant was not informed about the issuance to the investor of the town planning consent for adaptation of an attic space, which was basically a justified reason for non-observance of the time-limit for lodging a complaint. Furthermore, the administrative bodies and the Supreme Court could not count the time-limit of 15 days to have started running from the date of service of a decision on a participant to the procedure as it was done in the instant case because the appellant was not informed about the procedure. Therefore, rejection of the appellant's complaint resulted in a violation of its right to have access to a court of law.

37. The Supreme Court was obliged to take account of the omission of the administrative body that disregarded a legal obligation of obtaining the appellant's opinion and the potential effect of such decision. It follows from the documents submitted to the Constitutional Court that the appellant was denied the possibility of stating its opinion in the procedure of issuance of the town planning consent for adaptation of the attic space of the building at Srpska Street No. 77/79 in which it represented the interest of the tenants. By doing so, the administrative bodies deciding on the issuance of the town planning consent failed to act in accordance with Article 14 of the Law on Building Additional Annexes to Buildings and Transformation of Common Premises into Apartments in Socially Owned Buildings because they were obliged to obtain the appellant's opinion in the present legal matter and inform it about the position taken.

38. For these reasons, the Constitutional Court concludes that the right to a fair trial under Article 6 para 1 of European Convention and Article II.3 (e) of the Constitution of Bosnia and Herzegovina was violated in the instant case because the appellant was not allowed to participate in the procedure and use an effective legal remedy of access to a court of law.

Other statements

39. In the light of the conclusions in respect of rights under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of the European Convention, the Constitutional Court considers that it would be superfluous to dwell separately on the remainder of statements from the appeal.

VIII. Conclusion

40. Given the aforesaid, the Constitutional Court decided unanimously as set out in the enacting clause above in pursuance of Article 61 paras 1 and 2 of its Rules of Procedure.

41. According to Article VI.4 of the Constitution of Bosnia and Herzegovina, decision of the Constitutional Court shall be final and binding.

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 148/03

Appeal of Meat Industry LIJANOVIĆI, LLC. Široki Brijeg against the Judgments of the Supreme Court of the Federation of Bosnia and Herzegovina, Nos. U-2461/02 of 29 May 2003 and Nos. U-2472/02, U-2477/02, U-2473/02, U-2474/02, U-2471/02, U-2478/02, U-2479/02, U-2475/02, U-2476/02 of 17 July 2003

DECISION
of 28 November 2003

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Articles 54 and 61, para 2 (2) of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina - Amended Text (*Official Gazette of Bosnia and Herzegovina*, No. 24/99, 26/01 and 6/02), in Plenary, and composed of the following Judges:

Mr. Mato Tadić, President

Mr. Prof. Dr Ćazim Sadiković, Vice-President

Mr. Tudor Pantiru, Vice-President

Mr. Prof. Dr Miodrag Simović, Vice-President

Ms. Hatidža Hadžiosmanović,

Mr. Prof. David Feldman,

Mr. Prof. Didier Maus,

Ms. Valerija Galić,

Having considered the appeal of the **Meat Industry LIJANOVIĆI, LLC, Široki Brijeg** in case No. **U 148/03**,

At the session held on 28 November 2003, adopted the following

DECISION

The appeals of Meat Industry LIJANOVIĆI, LLC, Široki Brijeg against the Judgments of the Supreme Court of the Federation of Bosnia and Herzegovina Nos. U-2461/02 of 29 May 2003 and Nos. U-2472/02, U-2477/02, U-2473/02, U-2474/02, U-2471/02, U-2478/02, U-2479/02, U-2475/02, U-2476/02 of 17 July 2003 are granted.

A violation of the rights protected by Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6, para 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Judgments of the Supreme Court of the Federation of Bosnia and Herzegovina, No. U-2461/02 of 29 May 2003 and Nos. U-2472/02, U-2477/02, U-2473/02, U-2474/02, U-2471/02, U-2478/02, U-2479/02, U-2475/02, U-2476/02 of 17 July 2003, are annulled.

The cases are referred back to the Supreme Court of the Federation of Bosnia and Herzegovina for an expedited renewed procedure to be conducted in accordance with Article 61, paras 3 and 4 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina.

The present Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina* and the *Official Gazette of Republika Srpska*.

Reasons

I. Introduction

1. Meat Industry LIJANOVIĆI, LLC ("appellant"), from Široki Brijeg, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against the Judgments of the Supreme Court of the Federation of Bosnia and Herzegovina ("Supreme Court of F BiH") No. U-2461/02 of 29 May 2003 and Nos. U-2472/02, U-2477/02, U-2473/02, U-2474/02, U-2471/02, U-2478/02, U-2479/02, U-2475/02, U-2476/02 of 17 July 2003, with the proposal for the deferral of the enforcement of the Ruling (more closely referenced in the supplement to this Decision) of the Federal Ministry of Finances - Customs Administration, Customs Office Tomislavgrad, until the adoption of the decisions on the appeals (interim measure).

II. Proceedings before the Constitutional Court

2. On 29 September 2003, the Constitutional Court received ten appeals (more closely referenced in the supplement to this Decision), which were filed by the appellant invoking Article VI.3 (b) of the Constitution of Bosnia and Herzegovina.

3. On 5 November 2003, in accordance with Article 16, para 1 of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure") the Constitutional Court requested that the Supreme Court of F BiH, the Federal Ministry

of Finances - Customs Administration Sarajevo and the Customs Office Tomislavgrad submit their replies to the statements from the appeals while it requested the Federal Ministry of Finances-Customs Administration Sarajevo also to submit the Instructions on the Calculation and Charges of the Special Fees on Goods from the Rate Designation 0207.14 00 00, which were submitted to all Customs Offices, by Acts 0906 No. D-6105/02 of 4 July 2000 and 0902 No. D-7108 of 25 July 2000.

4. The Supreme Court of F BiH did not submit its reply to the Constitutional Court.

5. On 13 November 2003, the Federal Ministry of Finance-Customs Administration submitted its reply and the Instructions to the Constitutional Court.

6. The Customs Office Tomislavgrad did not submit its reply to the Constitutional Court.

7. The replies to the appeals were submitted to the appellant in accordance with Article 20, para 2 of the Constitutional Court's Rules of Procedure.

8. Having regard to Article 25 of the Constitutional Court's Rules of Procedure, the Constitutional Court decided, considering that the appeals AP 277/03, AP 269/03, AP 270/03, AP 271/03, AP 272/03, AP 273/03, AP 274/03, AP 275/03, AP 276/03, AP 278/03 relate to the same issue arising from the competence of the Constitutional Court, that single proceedings should be conducted and that one decision under No. *U 148/03* should be adopted.

III. Facts of the Case

9. The facts of the case, which are derived from the appellant's statements and the documents submitted to the Constitutional Court, can be summarized as follows:

10. The appellant is the company that deals with processing of the meat products. The business operation of the appellant is mostly based on the import of the meats and the processing of them in Bosnia and Herzegovina into finished food products, which in the present case implies the import of the mechanically deboned chicken and turkey meat and skin.

11. On 1 April 2002, the appellant declared the goods imported into Bosnia and Herzegovina on the customs border crossing Kamensko as per the unified customs documents of Customs office Tomislavgrad (No. date and quantity of the imported goods more closely described in the supplement to this Decision) for which the customs were

paid in 10% and the amount of 1% for the entering into customs records, while the special fee (levy) was not calculated or collected.

12. After the customs proceedings was conducted and the payment of the customs debt was made by the appellant, the Customs Branch Tomislavgrad instigated *ex officio*, on 29 July 2002, proceedings for the collection of special fees for the goods imported on 1 April 2002 i.e. the frozen chicken meat under tariff designation 0207.14 00 00, which the appellant imported in unified customs documentation (No. and date included in the supplement to this Decision).

13. The Federal Ministry of Finances - Customs Administration, Customs Office Tomislavgrad having resolved the request of Customs Branch Office Tomislavgrad in the legal matter of the appellant, for the collection of the uncalculated and unpaid fees (levy), adopted the Ruling (No. and date of the ruling included in the supplement to this Decision) and obligated the appellant to pay the amounts of (also referred to in the supplement to this Decision) the uncalculated and unpaid special fees (levy) for the goods under tariff number 0207.14 00 00 - frozen chicken meat imported in Bosnia and Herzegovina.

14. The Federal Ministry of Finances - Customs Administration, Customs Office Tomislavgrad based its decision on the fact that it established in the administrative proceedings for the payment of the special fees (levy) that the statements of the Revision Department were correct, and invoked the Decision on Application of the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees in 2002 (*Official Gazette of Bosnia and Herzegovina*, No. 33/01). According to item II, the Decision was to be applied from 1 January 2002, and according to the item I of the above-mentioned Decision, the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees (*Official Gazette of Bosnia and Herzegovina*, No. 2/99, 10/99, 15/99, 17/00, 36/00 and 15/01) was to be applied in its identical text as of 30 June 2002.

15. The appellant filed appeals with the Federal Ministry of Finance against the Ruling of the Federal Ministry of Finances-Customs Administration, Customs Office Tomislavgrad (No. and date included in the supplement to this Decision), challenging the legality of the same and proposing that the Rulings be annulled.

16. The Deputy of the Federal Ministry of Finances, having ruled on the appellant's appeals against the ten challenged rulings of the first instance body, adopted the Rulings (No. and date included in the supplement to this Decision) and dismissed the appeals as

ill-founded, with the reasoning that the Customs Office Tomislavgrad adopted correct and legal decisions when it obligated the appellant to pay the special fees that were not calculated and charged at the moment when the goods were declared.

17. The appellant submitted an action with the Supreme Court of F BiH against the Ruling of the Federal Ministry of Finance. The Supreme Court of F BiH has, in the administrative dispute upon the appellant's actions against the Rulings of the second instance body, adopted the Judgments (included in the operative part of this Decision) which dismissed the actions, with the reasoning that the contested Rulings were correctly adopted and based on the law.

18. It is evident from the documents submitted to the Constitutional Court that the Federal Ministry of Finance promulgated opinion No. 01-16-2632/00 of 23 June 2000, in regard to the application of the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees. In this opinion, it is stated that the above-mentioned Decision is not applicable to the mechanically deboned chicken and turkey meat intended for production. This interpretation was sent to all customs offices for execution by letter 0906 No. D-6105/02 of 4 July 2000.

19. By the Act of the Customs Administration of the Federal Ministry of Finances (0902 No. D-7108 of 25 July 2000), the Customs Offices were informed that the opinion of the Federal Ministry of Finance (No. 01-16-2632/00 of 23 June 2000) on the non-payment of the levy for the deboned chicken and turkey meat and skin intended for the production, is contrary to the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees. It was also stated that, in relation to all shipments on which the customs were declared without payment of the special fee, the Customs Offices were to calculate and collect payment of the special fee. The Customs Administration was to be informed of the same.

20. By Act 0901 No. 16-8-3180-2/02 of 5 April 2002, the Customs Administration informed all Customs Offices that Acts 0906 No. D-6105/02 of 4 July 2000 and 0902 No. D-7108 of 25 July 2000, submitted as the Instructions on the calculation and collection of the special fees for the goods under tariff designation 0207.14 00 00 for certain goods (mechanically deboned chicken and turkey meat and skin intended for the production), were no longer in force. In order to have the Customs Office act uniformly it was ordered that starting from 8 April 2002, the special fees were to be charged on goods under tariff number 0207.14 00 00 in the amount established by the Decision.

IV. Relevant Laws

21. **Law on Foreign Trade Policy** (*Official Gazette of Bosnia and Herzegovina*, No. 7/98)

Article 31, in its relevant part, reads as follows:

"1. The BiH Council of Ministers shall apply a safeguard measure to a product when determined that such product is being imported into Bosnia and Herzegovina in such increased quantities, absolute or relative to domestic *production and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products…".*

Article 33, in its relevant part, reads as follows:

"The Council of Ministers may apply safeguard measures for a limited period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment".

22. **Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees** (*Official Gazette of Bosnia and Herzegovina*, Nos. 2/99, 10/99, 15/99, 17/00, 36/00 and 15/01)

The Decision, in its relevant part, reads as follows:

Having regard to Articles 31, 32 and 33 of the Law on Foreign Trade Policy (...) and Article 14 of the Law on the Council of Ministers of Bosnia and Herzegovina and the Ministries of Bosnia and Herzegovina (...), upon the proposal of the Ministry of Foreign Trade and Economic Relations, the Council of Ministers of Bosnia and Herzegovina adopted the following

D E C I S I O N

I

For the purpose of protection of national production, this Decision determines the products on which a special fee is to be paid during their import in 1999 and the amount of that fee."

II

"A special fee is determined according to the unit of measure for the imported products, as follows:

Tariff Number	*Name*	*Measure Unit*	*Fee according to Measure Unit in KM*
	- Chicken, domestic		
0207.14 00 00	*- cut pieces, waste, frozen*	*1kg*	*2KM*

23. **Decision on Application of Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees in** 2002 (*Official Gazette of Bosnia and Herzegovina,* No. 33/01)

The Decision, in its relevant part, reads as follows:

I

Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees (Official Gazette of Bosnia and Herzegovina, Nos. 2/99, 10/99, 15/99, 17/00, 36/00 and 15/01) shall be applied in the identical text until 30 June 2002.

II

This Decision shall come into force the day following the date of its publication in the "Official Gazette of Bosnia and Herzegovina" and shall be applicable until 1 January 2002.

24. **Law on Administrative Disputes (***Official Gazette of the Federation of Bosnia and Herzegovina*, No. 2/98 and 8/00)

Article 30, in relevant part, reads as follows:

The Court shall decide on the disputes at the session in camera.

The Court may decide to hold an oral hearing ("hearing") if the case is complex or if it considers it as necessary in order to explain the state of the case.

For the reasons referred to in para 2 of this Article, the party may propose that a hearing be held.

V. Appeal

a) Statements from the Appeal

25. The appellant challenged the Judgments of the Supreme Court of F BiH, the Ruling of the Customs Office Tomislavgrad and the Ruling of the Federal Ministry of Finance as it considers that the challenged decisions violated its constitutional rights as follows:

- the right to fair proceedings provided for by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") (Article II.3 (e) of the Constitution of Bosnia and Herzegovina);

- the right to peaceful enjoyment provided for by Article 1 of Protocol No. 1 to the European Convention (Article II.3 (k) of the Constitution of Bosnia and Herzegovina);

- the right to non-discrimination provided for by Article 14 of the European Convention (Article II.4 of the Constitution of Bosnia and Herzegovina).

26. The appellant requests that the Constitutional Court adopts, based on Article 75 of the Constitutional Court's Rules of Procedure, an interim measure, which would suspend the execution of the challenged decisions until the adoption of a decision by the Constitutional Court, as the execution of these decisions could have detrimental consequences for the appellant that could not be overcome.

The appellant claims that the administrative proceedings in the dispute for the annulment of the greater number of the challenged Rulings, based on the same factual and legal basis, are currently still pending before the Supreme Court of F BiH. The appellant claims that the execution of the challenged decisions, given that there are no funds in its withdrawal account, would cause the account to be blocked and would result in the instigation of bankruptcy proceedings and the cessation of its operations, as well as the end of the appellant's existence in the market.

The appellant believes that the actions of the Supreme Court of F BiH, the Federal Ministry of Finance and the Customs Office Tomislavgrad violated his its right to fair proceedings protected by Article 6 of the European Convention in that the proceedings were not conducted prior to the adoption of the first instance ruling nor was the appellant given the opportunity to provide a statement on the facts and evidence which preceded the adoption of the Rulings. The appellant also claims that the statements from the appeal

were not examined in the second instance proceedings, that the statements from the action were not examined in the proceedings before the Supreme Court of F BiH as well as that the reasons of the adopted decisions are incomplete and do not contain the reasons on the decisive facts.

27. Therefore, the appellant requests that the Constitutional Court adopt the appeal and annul the Judgment of the Supreme Court of F BiH and refer the case back to the Supreme Court of F BiH for expedited proceedings and the adoption of a judgment.

b) Reply to the appeal

28. In its reply to the appeal, the Federal Ministry of Finance stated that it completely accepts all the reasons provided in the challenged Judgment of the Supreme Court of F BiH and that it finds that the same did not violate the provisions of the Constitution of Bosnia and Herzegovina, or the provisions of the European Convention and requests that the Constitutional Court dismiss the appeals.

VI. Admissibility

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

The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

30. The issues that arise from the appeal refer to the violation of the appellant's rights as protected by European Convention. It follows from Article II. 2 of the Constitution of Bosnia and Herzegovina that the rights and freedoms provided for by European Convention and its Protocols are applied directly in Bosnia and Herzegovina and have priority over all other law.

Article 11, para 3 of the Constitutional Court's Rules of Procedure reads as follows:

"The Court may examine an appeal only if all legal remedies which are available under the laws of the Entities against the judgment *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 final decision.*

31. In the present case, the challenged Judgments of the Supreme Court of F BiH are not subject to any of the regular legal remedies.

32. The appellant received the Judgment of the Supreme Court of F BiH No. U-2461/02 of 29 May 2003 on 4 August 2003. He received judgment Nos. U-2472/02, U-2477/02, U-2473/02, U-2474/02, U-2471/02, U-2478/02, U-2479/02, U-2475/02, U-2476/02 of 17 July 2003 on 31 July 2003. The appellant filed appeals against the above referenced judgments with the Constitutional Court on 26 September 2003.

33. It follows that the appeals were submitted within the time-limit provided in Article 11, para 3 of the Constitutional Court's Rules of Procedure.

Therefore, the appeals are admissible.

VII. Merits

34. The appellant challenges the judgments of the Supreme Court of F BiH as it finds that the challenged judgments and rulings of the Federal Ministry of Finance violated his constitutional rights to fair proceedings as protected by Article 6 of the European Convention, the right to property under Article 1 of Protocol No. 1 to the European Convention, and the right to non-discrimination under Article 14 of the European Convention, which corresponds to Articles II.3 (e), II.3 (k) and II.4 of the Constitution of Bosnia and Herzegovina

Under Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court needs to examine the issue of whether the rights referenced in the Constitution of Bosnia and Herzegovina and the European Convention were violated in the proceedings before the Supreme Court of F BiH.

Article II.3 (e) of the Constitution of Bosnia and Herzegovina, Article 6 of European Convention

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in para 2 above; these include:

...

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

36. Article 6, para 1 of the European Convention, in the first sentence, read as follows:

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

...

1. Existence of the "dispute" within the meaning of Article 6, para 1 of European Convention

37. In regard to the existence of a "dispute", the Constitutional Court invokes the principles provided in the jurisprudence of the European Court for Human Rights and summarized in its Judgment *Benthem* of 23 October 1985 (Seria A, No. 97, pages 14-15, para 32).

38. It clearly arises from this case that the dispute occurred through the instigation of proceedings by the customs bodies for the purpose of achieving payment of the special fees for the goods imported on 1 April 2002 (frozen chicken meat tariff number 0207.14 00 00 imported by the appellant as per unified customs documents). The dispute before the customs bodies was finalized by the decision of the Deputy Federal Minister of Finance, in which the appeal was dismissed as ill-founded. The proceedings before the customs bodies were conducted and finalized without summoning the appellant or his representative. The dispute continued with the submission of actions to the Supreme Court of F BiH, which adopted the aforementioned judgments, dismissed the actions in the course of the administrative dispute upon the appellant's action against the ruling of the second instance body with the reason that the contested rulings were adopted correctly and are based on the law.

39. The Constitutional Court notes that the subject being contested before the Constitutional Court is not simply the last decision of the Supreme Court of F BiH but also the events that preceded such a decision of the Supreme Court of F BiH or in other words, the proceedings which were conducted before the customs (administrative) bodies.

40. The Constitutional Court finds that the proceedings before the customs bodies, in themselves, do not represent a "dispute", but the proceedings in the administrative dispute conducted before the Supreme Court of F BiH can be considered a "dispute" within the meaning of Article 6 of the European Convention. The Constitutional Court notes that the goal of the administrative dispute was to establish the existence of some fact or right on which the outcome of the administrative proceedings before the customs bodies depended. The Constitutional Court finds that, if the ruling in the administrative dispute before the Supreme Court of F BiH can result in the annulment of the decisions adopted in

the administrative proceedings, then those proceedings must be considered as one whole and, as such, can be subject of consideration by the Constitutional Court in relation to a claim of a violation of Article 6 of the European Convention if those proceedings were also included in the appeal (see Decision of the Constitutional Court in case *No. U 65/02* of 26 September 2003).

2. "Civil rights and obligations"

41. Article 6, para 1 establishes the procedural guarantees for reaching a decision in certain disputes. The use of the expression "civil rights and obligations" must have had a purpose for the founders of the European Convention for the establishment of the boundaries of the application of Article 6, para 1. The expression cannot be applied to all disputes in connection with "civil rights and obligations" under the domestic law; this right or obligation must be the one which is possible to qualify as "civil". This term, however, can have several meanings.

42. In the present case, it is necessary to resolve the preliminary question whether the present administrative dispute is a "dispute" concerning "civil rights and obligations".

43. Under the jurisprudence of the European Court for Human Rights, the starting point in each case must be the character which is given to these rights and obligations according to the legal system of the defendant. However, this does not provide more than an initial indication as the term "civil rights and obligations" is "independent" in the sense of the European Convention "it cannot be interpreted only in accordance with the domestic law of the defendant party"; "whether the right should be considered civil, in the sense of meaning of that expression in the European Convention, it must be established in relation to the essential contents and effects of that right - and not by its legal qualification - according to the domestic law of the relevant state" (see: Judgment *König* v. *Germany,* 28 June 1978, Series A 27, pages 29-30, paras 88-89).

44. To this end, the legal systems of other states need to be considered as well. In fact, it needs to be seen whether some kind of uniform concept of "civil rights and obligations", which would either include or exclude the facts of that case, exists (see the aforementioned Judgment *König v. Germany*, para 89).

45. The European Court for Human Rights finds that expression "disputes" concerning "civil rights and obligations" includes all proceedings whose outcome is decisive for private rights and obligations, even if proceedings concerns the dispute between the

individual and public authorities which act independently and regardless of the fact whether they belong, according to the domestic legal system of the defending state, to the field of private rights or public rights or whether they have a mixed character (see: Judgment *Ringeisen v. Austria,* 16 July 1971, Series A, No. 13, page 39, para 94; the aforementioned Judgment *König*, Series A 27, pages 30 and 32, paras 90 and 94). In fact, it is not sufficient that the dispute or proceedings have a minor connection or insignificant consequences which affect civil rights or obligations: "civil rights or obligations must be the subject - or one of the subjects - of the dispute; the outcome of the dispute must be directly decisive for that right" (*La Compte, Van Leuven and De Meyere* Judgment of 23 June 1981, Series A, No. 43, page 21, para 47).

46. In the present case, the subject of the dispute is the collection of the special fees on imported goods. In order to establish the character of this payment, it is necessary to define the character of the legal provisions which regulates the payment of such fees and the nature of the obligations that arises from this legal provision.

47. The obligation of collection of the special fees-levy arises from Article I of the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees. The Decision prescribes that the goods are selected and subject to special fees during their import in 1999 in order to protect the domestic products. It also prescribes the amount of that fee. In essence, the levy does not represent a customs duty, i.e. a tax obligation, in the typical meaning of those terms, but it represents a levy which regulates the domestic market, i.e. an additional obligation on the part of the party importing the goods. The obligations which arise from the Decision would, in essence, represent an obligation under the area of public law, prescribed by the state to protect domestic producers. From this it follows that the dispute about the obligation to pay the levy could represent an area which falls outside the scope of the protection of Article 6 of European Convention. However, the Constitutional Court considers that, even if the nature of the obligation does not bring it directly within the scope of the protection of Article 6 of the European Convention, the legal system of the state must be organized in such a way as to guarantee a minimum of procedural protection under Article 6 of European Convention in such cases. This is so because the obligations in the area of payment of obligations to the state most often have a great influence on the property rights of natural persons. The right to property and the right to engage in business have a substantive character, in relation to which the jurisprudence of the European Court for Human Rights clearly recognizes as a civil right the right to compensation for the substantive loss incurred by the illegal action of the state.

48. In the present case, there is no doubt of the existence of the regulations which regulate this area but, at the same time, it is uncontested that the administrative bodies of the Federation have adopted a series of acts which have closely regulated this area in such way that they exclude the obligation of payment of the special fees-levy for the import of the chicken meat imported by the appellant. This has created a completely different legal situation from the one regulated by the above decision, according to which these obligations for the appellant, at the time of import, did not exist. In accordance with the above, an issue arises as to the existence of the obligation to pay the special fees-levy for the import of chicken meat for the period during which the Decision adopted by the administrative bodies of the Federation was in force. The other issue is the legality of the Decision adopted by the administrative bodies of the Federation and the effect of these Decisions on the appellant's obligations with respect to the payment of the special fees-levy. The Constitutional Court notes that neither the customs administrative bodies nor Supreme Court of F BiH paid due attention to this issue which was raised by the appellant before all bodies and courts that have decided on its case and is a preliminary question on which the outcome of the proceedings and the existence of the appellant's obligation with respect to the payment of these special fees or levies depends.

49. In cases where a decision is adopted by administrative bodies, there must be an opportunity to contest the same before a court which functions in accordance with Article 6 of European Convention. Considering that the administrative dispute, in the present case, was raised before the Supreme Court of F BiH entirely as a first-instance proceeding, that opportunity did indeed exist. However, where proceedings before the Supreme Court of F BiH are conducted (as they usually are) without the presence of the parties, in the opinion of the Constitutional Court they do not in practice provide the minimum procedural guarantees prescribed by Article 6 of European Convention.

50. The Constitutional Court considers that it does not represent a "fourth instance" court with respect to the application of domestic law but that its basic task is to uphold the Constitution of Bosnia and Herzegovina and the rights contained therein. The Constitutional Court may examine the manner in which regular courts interpret and apply, in this respect, the domestic law, in a case where the domestic laws were applied and interpreted in such a way as to violate rights protected under the Constitution of Bosnia and Herzegovina. With regard to the issue whether some right or obligation must be in accordance with European Convention and with the requirements of Article 6, the Constitutional Court recalls that, according to the Constitution of Bosnia and Herzegovina, the European Convention has priority over all other law so that the rights and laws applied by the regular courts must

be in accordance with European Convention regardless of the literal meaning of certain provisions of the laws applied in the legal system.

51. In accordance with the above, the Constitutional Court finds that, even if some rights could clearly be classified as being in the field of public law which falls outside the scope of Article 6 of European Convention, it is necessary, within the national framework, to secure the minimum procedural guarantees of the conduct of proceedings in accordance with Article 6 of European Convention, and the ultimate obligation falls particularly on judicial bodies which have the constitutional obligation, regardless of the character of the dispute, to secure full compliance with the requirements of Article 6 of the European Convention.

52. The Constitutional Court notes that in the present case, by the action of the administrative bodies of the Federation, a completely new legal situation arose, one that involved the application of a new public law relationship between the appellant and the state. Furthermore, this was not duly considered by the administrative bodies that conducted the proceedings for the establishment of the appellant's obligation. As a result, a financial obligation was imposed on the appellant. This obligation had effect on its property i.e. "civil rights and obligations". The Constitutional Court reiterates that the individual must be protected from the arbitrary actions of the state and that any failure in this regard may call for an application of Article 6 of the European Convention. The main purpose of this Article, as well as of the entire European Convention, is indeed the protection of individuals from the arbitrary actions of the state.

53. In accordance with the above referenced, the Constitutional Court concluded that Article 6 of European Convention is applicable in the present case.

3. Complying with Article 6 of European Convention

54. It is necessary to establish whether the Supreme Court of F BiH has, within its competence, met the conditions stipulated in Article 6, para 1 of European Convention or, in other words, whether the proceedings before the Supreme Court of F BiH contained the procedural guarantees required by Article 6 of European Convention.

55. The Constitutional Court notes that the proceedings before the Supreme Court of F BiH were conducted without the presence of the parties, although the appellant has constantly pointed to the practice of the customs bodies which decide without its presence and without the opportunity to contest in person the statements in the reports. The appellant

did not explicitly request to be present at the hearing before the Supreme Court of F BiH, but this was its basic objection to the procedure adopted by the customs bodies, which the appellant had expressed in its appeal. Nevertheless, the Supreme Court of F BiH did not find it necessary to summon either the appellant or the representatives of the customs bodies to the session in which it was decided on the appellant's action.

4. Presence at the session of the Supreme Court of F BiH and public hearing

56. The Constitutional Court recalls that the parties have to have the opportunity to be present at the session of the court. This primarily refers to the trial before the first instance court. However, the right to a fair trial also implies the right to be present before the courts of higher instance which decide on the appeals, except when the examination before these courts is limited to a procedural or purely legal issue, when the personal presence of the accused (or other parties) is not of any significance.

57. The Constitutional Court further notes that Article 6, para 1 of the European Convention deals with the public hearing, while the Law on Administrative Disputes deals with the holding of the closed session of the council of the court. Considering that the European Convention, according to Article II. 2 of the Constitution of Bosnia and Herzegovina has priority over all other law and all domestic institutions are obligated to apply it directly, this term must be interpreted in the spirit of the term "public hearing" provided for by Article 6, para 1 of the European Convention.

58. The Constitutional Court finds that the administrative dispute, in the present case, is a solely first instance proceeding and that only proceedings before the Supreme Court of F BiH have the character of regular court proceedings and that the proceedings must be held in a manner so as to satisfy the requirements of "public hearing" and the requirements of the right of the public to control the judiciary.

59. In the present case, Article 30 of Law on Administrative Disputes provides that the administrative disputes shall be resolved in closed session, a session which excludes the public. However, paras 2 and 3 of this Article states that there may be the opportunity to hold the oral session and even if one of the parties submits such a request. The Constitutional Court notes that the regular practice of the Supreme Court of F BiH points out that the sessions of the Supreme Court of F BiH, as a rule, are held without the public and without summoning the parties. Furthermore, the Constitutional Court finds that there are a series of important legal issues for the correct resolution of disputes (the Constitutional Court pointed to this issue in this decision), but that the Supreme Court of F BiH nevertheless

decided to hold a closed session disregarding the statements of the appellant referring to the fact that he did not participate in the proceedings conducted before the customs bodies. It therefore follows that the appellant was not given the opportunity to have the proceedings before the court made public and was not given the opportunity to examine personally the statements from the claims against the appellant or to personally give forth the reasons for the submission of the action in the administrative dispute.

60. The Constitutional Court concludes that in the present case, the right to a public hearing was not observed.

b) The right to property in conjunction with the right to non-discrimination - Article II.3 (k) of the Constitution of Bosnia and Herzegovina, Article 1 of Protocol No. 1 to the European Convention, Article II.4 of the Constitution of Bosnia and Herzegovina and Article 14 of European Convention.

61. With regard to the statements of the appellant referring to the violation of its property rights and the violation of his right to non-discrimination regulated by Article II.3 (k) and Article II. 4 of the Constitution of Bosnia and Herzegovina, Article 1 of Protocol No. 1 to the European Convention and Article 14 of European Convention, the Constitutional Court finds that in view of its conclusions made with regards to Article 6 of European Convention, it is not necessary to examine the statement of the appellant.

VIII. Conclusion

62. The Constitutional Court has, in accordance with Article 61, para 2 (2) of the Constitutional Court's Rules of Procedure, decided by a majority of votes as stated in the enacting clause of this Decision.

63. Considering the decision of the Constitutional Court, it is not necessary to examine separately the appellant's request for the adoption of an interim measure.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

SUPPLEMENT TO THE DECISION

on the facts in separate appeals

AP 277/03

On 1 April 2002, the appellant declared goods at the Kamensko Border Crossing for import into Bosnia and Herzegovina, in customs document No. 3662 of 1 April 2002 issued by the Tomislavgrad Customs Post. The customs duties in the amount of 10% and the customs registration fee of 1% were paid for the import of 20,159 kg of frozen chicken meat, tariff number 0207.14 00 00, whereas a special fee (levy) was neither calculated nor paid.

On 29 July 2002, after conducting the customs proceedings and after the appellant effected payment of the customs debt, the Tomislavgrad Customs Post started *ex officio* the procedure of subsequent calculation of a special fee for the goods imported on 1 April 2002, namely the frozen chicken meat, tariff number 0207.14 00 00 imported by the appellant under the unified customs document of the Tomislavgrad Customs Post No. 3662 of 1 April 2002.

By Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-736/02 of 20 August 2002, which was adopted in administrative proceedings upon the request of the Tomislavgrad Customs Post, the importer, the Meat Industry "Lijanovići" LLC Široki Brijeg was obliged to pay the amount of 41,038 KM for the uncalculated and uncollected special fee (levy) for goods bearing the tariff number 0207.14 00 00 – frozen chicken meat. Namely, 20,159 kg of this type of goods were imported in 2002 according to the unified customs document No. 3662 of 1 April 2002.

The appellant filed a complaint against the Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-736/02 of 20 August 2002 to the Federal Ministry of Finance. The Finance Ministry adopted Ruling No. 07-UP-II-05-856/02 of 31 October 2002 and dismissed the appellant's complaint as ill-founded. It follows from the reasons provided in the aforesaid Ruling that the Tomislavgrad Customs Office adopted a correct and lawful decision when it obliged the appellant to pay the 41,038 KM, this being the amount which was not calculated and collected as a special fee (levy) during the import of the goods concerned. Namely, it is beyond dispute that the imported goods were subject to the payment of an import fee pursuant to Decision Determining the Products subject

to Special Fees Payment on Import in 1999 and the Amount of Fees (*Official Gazette of Bosnia and Herzegovina,* Nos. 2/99, 10/99, 15/99, 17/00, 36/00, 15/01 and 33/01).

The appellant filed an appeal with the Supreme Court of F BiH against the Ruling of the Finance Ministry No. 07-UP-II-05-856/02 of 31 October 2002. The Supreme Court of F BiH, in administrative proceedings against the challenged Ruling of the Finance Ministry, adopted Judgment No. U-2461/02 of 29 May 2003, dismissing the action. The Supreme Court of F BiH found that the reasons provided in the challenged Ruling stated were correct and based on the law.

AP 269/03

On 1 April 2002, the appellant declared goods at the Kamensko Border Crossing for import into Bosnia and Herzegovina, in customs document No. 3660 of 1 April 2002 issued by the Tomislavgrad Customs Post. The customs duties in the amount of 10% and the customs registration fee of 1% were paid for the import of 20,158 kg of frozen chicken meat, tariff number 0207.14 00 00, whereas a special fee (levy) was neither calculated nor paid.

On 29 July 2002, after conducting the customs proceedings and after the appellant effected payment of the customs debt, the Tomislavgrad Customs Post started *ex officio* the procedure of subsequent calculation of a special fee for the goods imported on 1 April 2002, namely the frozen chicken meat, tariff number 0207.14 00 00 imported by the appellant under the unified customs document of the Tomislavgrad Customs Post No. 3660 of 1 April 2002.

By Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-738/02 of 20 August 2002, which was adopted in administrative proceedings upon the request of the Tomislavgrad Customs Post, the importer, the Meat Industry LIJANOVIĆI, LLC, Široki Brijeg was obliged to pay the amount of 40,316 KM for the uncalculated and uncollected special fee (levy) for goods bearing the tariff number 0207.14 00 00 – frozen chicken meat. Namely, 20,158 kg of this type of goods were imported in 2002 according to the unified customs document No. 3660 of 1 April 2002.

The appellant filed a complaint against the Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-738/02 of 20 August 2002 with the Federal Ministry of Finance ("Finance Ministry"). The Finance Ministry adopted Ruling No. 07-UP-II-05-848/02 of 31 October 2002 and dismissed the appellant's complaint as ill-founded. It

follows from the reasons provided in the aforesaid Ruling that the Tomislavgrad Customs Office adopted a correct and lawful decision when it obliged the appellant to pay the 40,316 KM, this being the amount which was not calculated and collected as a special fee (levy) during the import of the goods concerned. Namely, it is beyond dispute that the imported goods were subject to the payment of an import fee pursuant to the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees (*Official Gazette of Bosnia and Herzegovina*, No. 2/99, 10/99, 15/99, 17/00, 36/00, 15/901 and 33/01).

The appellant filed an appeal with the Supreme Court of F BiH against the Ruling of the Finance Ministry No. 07-UP-II-05-848/02 of 31 October 2002. The Supreme Court of F BiH, in administrative proceedings against the challenged Ruling of the Finance Ministry, adopted Judgment No. U-2472/02 of 17 July 2003, dismissing the action. The Supreme Court of F BiH found that the reasons provided in the challenged Ruling were correct and based on the law.

AP 270/03

On 1 April 2002, the appellant declared goods at the Kamensko Border Crossing for import into Bosnia and Herzegovina, in customs document No. 3665 of 1 April 2002 issued by the Tomislavgrad Customs Post. The customs duties in the amount of 10% and the customs registration fee of 1% were paid for the import of 20,147 kg of frozen chicken meat, tariff number 0207.14 00 00, whereas a special fee (levy) was neither calculated nor paid.

On 29 July 2002, after conducting the customs proceedings and after the appellant effected payment of the customs debt, the Tomislavgrad Customs Post started *ex officio* the procedure of subsequent calculation of a special fee for the goods imported on 1 April 2002, namely the frozen chicken meat, tariff number 0207.14 00 00 imported by the appellant under the unified customs document of the Tomislavgrad Customs Post No. 3665 of 1 April 2002

By Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-733/02 of 20 August 2002, which was adopted in administrative proceedings upon the request of the Tomislavgrad Customs Post, the importer, the Meat Industry LIJANOVIĆI, LLC, Široki Brijeg was obliged to pay the amount of 40,294 KM for the uncalculated and uncollected special fee (levy) for goods bearing the tariff number 0207.14 00 00 – frozen chicken

meat. Namely, 20,158 kg of this type of good was imported in 2002 according to the unified customs document No. 3665 of 1 April 2002.

The appellant filed a complaint against the Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-733/02 of 20 August 2002 with the Federal Ministry of Finance ("Finance Ministry"). The Finance Ministry adopted Ruling No. 07-UP-II-05-853/02 of 31 October 2002 and dismissed the appellant's complaint as ill-founded. It follows from the reasons provided in the aforesaid Ruling that the Tomislavgrad Customs Office adopted a correct and lawful decision when it obliged the appellant to pay the 40,294 KM, this being the amount which was not calculated and collected as a special fee (levy) during the import of the goods concerned. Namely, it is beyond dispute that the imported goods were subject to the payment of an import fee pursuant to the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees *(Official Gazette of Bosnia and Herzegovina,* No. 2/99, 10/99, 15/99, 17/00, 36/00, 15/01, 33/01).

The appellant filed an appeal with the Supreme Court of F BiH against the Ruling of the Finance Ministry No. 07-UP-II-05-853/02 of 31 October 2002. The Supreme Court of F BiH, in administrative proceedings against the challenged Ruling of the Finance Ministry, adopted Judgment No. U-2477/02 of 17 July 2003, dismissing the action. The Supreme Court of F BiH found that the reasons provided in the challenged Ruling were correct and based on the law.

AP 271/03

On 1 April 2002, the appellant declared goods at the Kamensko Border Crossing for import into Bosnia and Herzegovina, in customs document No. 3659 of 1 April 2002 issued by the Tomislavgrad Customs Post. The customs duties in the amount of 10% and the customs registration fee of 1% were paid for the import of 20,505 kg of frozen chicken meat, tariff number 0207.14 00 00, whereas a special fee (levy) was neither calculated nor paid.

On 29 July 2002, after conducting the customs proceedings and after the appellant effected payment of the customs debt, the Tomislavgrad Customs Post started *ex officio* the procedure of subsequent calculation of a special fee for the goods imported on 1 April 2002, namely the frozen chicken meat, tariff number 0207.14 00 00 imported by the appellant under the unified customs document of the Tomislavgrad Customs Post No. 3659 of 1 April 2002.

By Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-739/02 of 20 August 2002, which was adopted in administrative proceedings upon the request of the Tomislavgrad Customs Post, the importer, the Meat Industry LIJANOVIĆI, LLC, Široki Brijeg was obliged to pay the amount of 41,010 KM for the uncalculated and uncollected special fee (levy) for goods bearing the tariff number 0207.14 00 00 – frozen chicken meat. Namely, 20,505 kg of this type of goods were imported in 2002 according to customs document No. 3659 of 1 April 2002.

The appellant filed a complaint against the Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-739/02 of 20 August 2002 with the Federal Ministry of Finance ("Finance Ministry"). The Finance Ministry adopted Ruling No. 07-UP-II-05-849/02 of 31 October 2002 and dismissed the appellant's complaint as ill-founded. It follows from the reasons provided in the aforesaid Ruling that the Tomislavgrad Customs Office adopted a correct and lawful decision when it obliged the appellant to pay the 41,010 KM, this being the amount which was not calculated and collected as a special fee (levy) during the import of the goods concerned. Namely, it is beyond dispute that the imported goods were subject to the payment of an import fee pursuant to the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees (*Official Gazette of Bosnia and Herzegovina*, 2/99, 10/99, 15/99, 17/00, 36/00, 15/01 and 33/01).

The appellant filed an appeal with the Supreme Court of F BiH against the Ruling of the Finance Ministry No. 07-UP-II-05-849/02 of 31 October 2002. The Supreme Court of F BiH, in administrative proceedings against the challenged ruling of the Finance Ministry, adopted Judgment No. U-2473/02 of 17 July 2003, dismissing the action. The Supreme Court of F BiH found that the reasons provided in the challenged Ruling stated were correct and based on the law.

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On 1 April 2002, the appellant declared goods at the Kamensko Border Crossing for import into Bosnia and Herzegovina, in customs document No. 3667 of 1 April 2002 issued by the Tomislavgrad Customs Post. The customs duties in the amount of 10% and the customs registration fee of 1% were paid for the import of 20,439 kg of frozen chicken meat, tariff number 0207.14 00 00, whereas a special fee (levy) was neither calculated nor paid.

On 29 July 2002, after conducting the customs proceedings and after the appellant effected payment of the customs debt, the Tomislavgrad Customs Post started *ex officio* the procedure of subsequent calculation of a special fee for the goods imported on 1 April 2002, namely the frozen chicken meat, tariff number 0207.14 00 00 imported by the appellant under the customs document of the Tomislavgrad Customs Post No. 3667 of 1 April 2002.

By Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-731/02 of 20 August 2002, which was adopted in administrative proceedings upon the request of the Tomislavgrad Customs Post, the importer, the Meat Industry LIJANOVIĆI, LLC, Široki Brijeg was obliged to pay the amount of 40,878 KM for the uncalculated and uncollected special fee (levy) for goods bearing the tariff number 0207.14 00 00 – frozen chicken meat. Namely, 20,439 kg of this type of good was imported in 2002 according to the unified customs document No. 3667 of 1 April 2002.

The appellant filed a complaint against the Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-731/02 of 20 August 2002 with the Federal Ministry of Finance ("Finance Ministry"). The Finance Ministry adopted Ruling No. 07-UP-II-05-850/02 of 31 October 2002 and dismissed the appellant's complaint as ill-founded. It follows from the reasons provided in the aforesaid Ruling that the Tomislavgrad Customs Office adopted a correct and lawful decision when it obliged the appellant to pay the 40,878 KM, this being the amount which was not calculated and collected as a special fee (levy) during the import of the goods concerned. Namely, it is beyond dispute that the imported goods were subject to the payment of an import fee pursuant to the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees (*Official Gazette of Bosnia and Herzegovina*, 2/99, 10/99, 15/99, 17/00, 36/00, 15/01 and 33/01).

The appellant filed an appeal with the Supreme Court of F BiH against the Ruling of the Finance Ministry No. 07-UP-II-05-850/02 of 31 October 2002. The Supreme Court of F BiH, in administrative proceedings against the challenged Ruling of the Finance Ministry, adopted Judgment No. U-2474/02 of 17 July 2003, dismissing the action. The Supreme Court of F BiH found that the reasons provided in the challenged Ruling were correct and based on law.

AP 273/03

On 1 April 2002, the appellant declared goods at the Kamensko Border Crossing for import into Bosnia and Herzegovina, in customs document No. 3663 of 1 April 2002 issued by the Tomislavgrad Customs Post. The customs duties in the amount of 10% and the customs registration fee of 1% were paid for the import of 20,245 kg of frozen chicken meat, tariff number 0207.14 00 00, whereas a special fee (levy) was neither calculated nor paid.

On 29 July 2002, after conducting the customs proceedings and after the appellant effected payment of the customs debt, the Tomislavgrad Customs Post started *ex officio* the procedure of subsequent calculation of a special fee for the goods imported on 1 April 2002, namely the frozen chicken meat, tariff number 0207.14 00 00 imported by the appellant under the customs document of the Tomislavgrad Customs Post No. 3663 of 1 April 2002.

By Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-735/02 of 20 August 2002, which was adopted in administrative proceedings upon the request of the Tomislavgrad Customs Post, the importer, the Meat Industry LIJANOVIĆI, LLC, Široki Brijeg was obliged to pay the amount of 40,490 KM for the uncalculated and uncollected special fee (levy) for goods bearing the tariff number 0207.14 00 00 – frozen chicken meat. Namely, 20,245 kg of this type of goods were imported in 2002 according customs document No. 3663 of 1 April 2002.

The appellant filed a complaint against the Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-735/02 of 20 August 2002 with the Federal Ministry of Finance ("Finance Ministry"). The Finance Ministry adopted ruling No. 07-UP-II-05-847/02 of 31 October 2002 and dismissed the appellant's complaint as ill-founded. It follows from the reasons provided in the aforesaid Ruling that the Tomislavgrad Customs Office adopted a correct and lawful decision when it obliged the appellant to pay the 40,490 KM, this being the amount which was not calculated and collected as a special fee (levy) during the import of the goods concerned. Namely, it is beyond dispute that the imported goods were subject to the payment of an import fee pursuant to the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees (*Official Gazette of Bosnia and Herzegovina*, Nos. 2/99, 10/99, 15/99, 17/00, 36/00, 15/01 and 33/01).

The appellant filed an appeal with the Supreme Court of F BiH against the Ruling of the Finance Ministry No. 07-UP-II-05-847/02 of 31 October 2002. The Supreme Court of F BiH, in administrative proceedings against the challenged Ruling of the Finance Ministry, adopted Judgment No. U-2471/02 of 17 July 2003, dismissing the action. The Supreme Court of F BiH found that the reasons provided in the challenged Ruling were correct and based on the law.

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On 1 April 2002, the appellant declared goods at the Kamensko Border Crossing for import into Bosnia and Herzegovina, in customs document No. 3666 of 1 April 2002 issued by the Tomislavgrad Customs Post. The customs duties in the amount of 10% and the customs registration fee of 1% were paid for the import of 20,185 kg of frozen chicken meat, tariff number 0207.14 00 00, whereas a special fee (levy) was neither calculated nor paid.

On 29 July 2002, after conducting the customs proceedings and after the appellant effected payment of the customs debt, the Tomislavgrad Customs Post started *ex officio* the procedure of subsequent calculation of a special fee for the goods imported on 1 April 2002, namely the frozen chicken meat, tariff number 0207.14 00 00 imported by the appellant under the customs document of the Tomislavgrad Customs Post No. 3666 of 1 April 2002.

By Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-732/02 of 20 August 2002, which was adopted in administrative proceedings upon the request of the Tomislavgrad Customs Post, the importer, the Meat Industry LIJANOVIĆI, LLC, Široki Brijeg was obliged to pay the amount of 40,370 KM for the uncalculated and uncollected special fee (levy) for goods bearing the tariff number 0207.14 00 00 – frozen chicken meat. Namely, 20,185 kg of this type of good was imported in 2002 according to customs document No. 3666 of 1 April 2002.

The appellant filed a complaint against the Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-732/02 of 20 August 2002 with the Federal Ministry of Finance ("Finance Ministry"). The Finance Ministry adopted Ruling No. 07-UP-II-05-854/02 of 31 October 2002 and dismissed the appellant's complaint as ill-founded. It follows from the reasons provided in the aforesaid Ruling that the Tomislavgrad Customs Office adopted a correct and lawful decision when it obliged the appellant to pay the

40,370 KM, this being the amount which was not calculated and collected as a special fee (levy) during the import of the goods concerned. Namely, it is beyond dispute that the imported goods were subject to the payment of an import fee pursuant to the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees (*Official Gazette of Bosnia and Herzegovina*, Nos. 2/99, 10/99, 15/99, 17/00, 36/00, 15/01 and 33/01).

The appellant filed an appeal the Supreme Court of F BiH against the Ruling of the Finance Ministry No. 07-UP-II-05-854/02 of 31 October 2002. The Supreme Court of F BiH, in administrative proceedings against the challenged Ruling of the Finance Ministry, adopted Judgment No. U-2478/02 of 17 July 2003, dismissing the action. The Supreme Court of F BiH found that the reasons provided in the challenged Ruling were correct and based on the law.

AP 275/03

On 1 April 2002, the appellant declared goods at the Kamensko Border Crossing for import into Bosnia and Herzegovina, in customs document No. 3661 of 1 April 2002 issued by the Tomislavgrad Customs Post. The customs duties in the amount of 10% and the customs registration fee of 1% were paid for the import of 20,571 kg of frozen chicken meat, tariff number 0207.14 00 00, whereas a special fee (levy) was neither calculated nor paid.

On 29 July 2002, after conducting the customs proceedings and after the appellant effected payment of the customs debt, the Tomislavgrad Customs Post started *ex officio* the procedure of subsequent calculation of a special fee for the goods imported on 1 April 2002, namely the frozen chicken meat, tariff number 0207.14 00 00 imported by the appellant under the unified customs document of the Tomislavgrad Customs Post No. 3661 of 1 April 2002

By Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-737/02 of 20 August 2002, which was adopted in administrative proceedings upon the request of the Tomislavgrad Customs Post, the importer, the Meat Industry LIJANOVIĆI, LLC, Široki Brijeg was obliged to pay the amount of 41,142 KM for the uncalculated and uncollected special fee (levy) for goods bearing the tariff number 0207.14 00 00 – frozen chicken meat. Namely, 20,571 kg of this type of good was imported in 2002 according to customs document No. 3661 of 1 April 2002.

The appellant filed a complaint against the Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-737/02 of 20 August 2002 with the Federal Ministry of Finance ("Finance Ministry"). The Finance Ministry adopted Ruling No. 07-UP-II-05-855/02 of 31 October 2002 and dismissed the appellant's complaint as ill-founded. It follows from the reasons provided in the aforesaid Ruling that the Tomislavgrad Customs Office adopted a correct and lawful decision when it obliged the appellant to pay the 41,142 KM, this being the amount which was not calculated and collected as a special fee (levy) during the import of the goods concerned. Namely, it is beyond dispute that the imported goods were subject to the payment of an import fee pursuant to the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees (*Official Gazette of Bosnia and Herzegovina*, Nos. 2/99, 10/99, 15/99, 17/00, 36/00, 15/01 and 33/01).

The appellant filed an appeal with the Supreme Court of F BiH against the Ruling of the Finance Ministry No. 07-UP-II-05-855/02 of 31 October 2002. The Supreme Court of F BiH, in administrative proceedings against the challenged Ruling of the Finance Ministry, adopted Judgment No. U-2479/02 of 17 July 2003, dismissing the action. The Supreme Court of F BiH found that the reasons provided in the challenged Ruling were correct and based on the law.

AP 276/03

On 1 April 2002, the appellant declared goods at the Kamensko Border Crossing for import into Bosnia and Herzegovina, in customs document No. 3658 of 1 April 2002 issued by the Tomislavgrad Customs Post. The customs duties in the amount of 10% and the customs registration fee of 1% were paid for the import of 20,523 kg of frozen chicken meat, tariff number 0207.14 00 00, whereas a special fee (levy) was neither calculated nor paid.

On 29 July 2002, after conducting the customs proceedings and after the appellant effected payment of the customs debt, the Tomislavgrad Customs Post started *ex officio* the procedure of subsequent calculation of a special fee for the goods imported on 1 April 2002, namely the frozen chicken meat, tariff number 0207.14 00 00 imported by the appellant under the unified customs document of the Tomislavgrad Customs Post No. 3658 of 1 April 2002.

By Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-740/02 of 20 August 2002, which was adopted in administrative proceedings upon the request of the

Tomislavgrad Customs Post, the importer, the Meat Industry LIJANOVIĆI, LLC, Široki Brijeg was obliged to pay the amount of 41,046 KM for the uncalculated and uncollected special fee (levy) for goods bearing the tariff number 0207.14 00 00 – frozen chicken meat. Namely, 20,523 kg of this type of good was imported in 2002 according to the unified customs document No. 3658 of 1 April 2002.

The appellant filed a complaint against the Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-740/02 of 20 August 2002 with the Federal Ministry of Finance ("Finance Ministry"). The Finance Ministry adopted Ruling No. 07-UP-II-05-851/02 of 31 October 2002 and dismissed the appellant's complaint as ill-founded. It follows from the reasons provided in the aforesaid Ruling that the Tomislavgrad Customs Office adopted a correct and lawful decision when it obliged the appellant to pay the 41,046 KM, this being the amount which was not calculated and collected as a special fee (levy) during the import of the goods concerned. Namely, it is beyond dispute that the imported goods were subject to the payment of an import fee pursuant to the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees (*Official Gazette of Bosnia and Herzegovin*a, Nos. 2/99, 10/99, 15/99, 17/00, 36/00, 15/01 and 33/01).

The appellant filed an appeal with the Supreme Court of F BiH against the Ruling of the Finance Ministry No. 07-UP-II-05-851/02 of 31 October 2002. The Supreme Court of F BiH, in administrative proceedings against the challenged Ruling of the Finance Ministry, adopted Judgment No. U-2475/02 of 17 July 2003, dismissing the action. The Supreme Court of F BiH found that the reasons provided in the challenged Ruling were correct and based on the law.

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On 1 April 2002, the appellant declared goods at the Kamensko Border Crossing for import into Bosnia and Herzegovina, in customs document No. 3657 of 1 April 2002 issued by the Tomislavgrad Customs Post. The customs duties in the amount of 10% and the customs registration fee of 1% were paid for the import of 20,017 kg of frozen chicken meat, tariff number 0207.14 00 00, whereas a special fee (levy) was neither calculated nor paid.

On 29 July 2002, after conducting the customs proceedings and after the appellant effected payment of the customs debt, the Tomislavgrad Customs Post started *ex officio*

the procedure of subsequent calculation of a special fee for the goods imported on 1 April 2002, namely the frozen chicken meat, tariff number 0207.14 00 00 imported by the appellant under the unified customs document of the Tomislavgrad Customs Post No. 3657 of 1 April 2002.

By Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-741/02 of 20 August 2002, which was adopted in administrative proceedings upon the request of the Tomislavgrad Customs Post, the importer, the Meat Industry LIJANOVIĆI, LLC, Široki Brijeg was obliged to pay the amount of 40,034 KM for the uncalculated and uncollected special fee (levy) for goods bearing the tariff number 0207.14 00 00 – frozen chicken meat. Namely, 20,017 kg of this type of good was imported in 2002 according to the unified customs document No. 3657 of 1 April 2002.

The appellant filed a complaint against the Ruling of the Tomislavgrad Customs Office No. UP: 0916-02-I-01-16-741/02 of 20 August 2002 with the Federal Ministry of Finance ("Finance Ministry"). The Finance Ministry, deliberating on the appellant's complaint, adopted Ruling No. 07-UP-II-05-852/02 of 31 October 2002 and dismissed the appellant's complaint as ill-founded. It follows from the reasons provided in the aforesaid Ruling that the Tomislavgrad Customs Office adopted a correct and lawful decision when it obliged the appellant to pay the 40,034 KM, this being the amount which was not calculated and collected as a special fee (levy) during the import of the goods concerned. Namely, it is beyond dispute that the imported goods were subject to the payment of an import fee pursuant to the Decision Determining the Products subject to Special Fees Payment on Import in 1999 and the Amount of Fees (*Official Gazette of Bosnia and Herzegovina*, Nos. 2/99, 10/99, 15/99, 17/00, 36/00, 15/01 and 33/01).

The appellant filed an appeal with the Supreme Court of F BiH against the Ruling of the Finance Ministry No. 07-UP-II-05-852/02 of 31 October 2002. The Supreme Court of F BiH, in administrative proceedings against the challenged Ruling of the Finance Ministry, adopted Judgment No. U-2476/02 of 17 July 2003, dismissing the action. The Supreme Court of F BiH found that the reasons provided in the challenged Ruling were correct and based on the law.

Case No. AP 12/02

Appeal of Ms. N. Z. from Livno submitted because of unreasonably long duration of investigation conducted against Dž. R. from Sarajevo, as well as her mental sufferings due to absence of hope in revealing the truth about this event and conclusion of the court proceedings and punishment of a person responsible for death of her husband

DECISION ON ADMISSIBILITY AND MERITS
of 19 April 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 16 para 2 (9), Article 59 para 2(2), Article 61 paras 1 and 2 and Article 64 para 1 of the Constitutional Court's Rules of Procedure of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), as a Grand Chamber and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Miodrag Simović, Vice-President

Ms. Hatidža Hadžiosmanović, Vice-President

Ms. Valerija Galić,

Mr. Jovo Rosić,

Having considered the appeal of **Ms. N. Z.** in case No. **AP 12/02**,

Adopted at its session held on 19 April 2004 the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Ms. N. Z. from Livno is granted in relation to violation of 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 and is rejected as inadmissible in relation to Article 6 para 1 (reasonable time limit) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

A violation of 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 established.

The Municipal Court in Livno is ordered to take measures and actions prescribed by the law to complete criminal proceedings in the case number K-81/01.

The Municipal Court in Livno is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 75 para 5 of the Constitutional Court's Rules of Procedure of Bosnia and Herzegovina.

Within the meaning of Article 77 para 2 of the Constitutional Court's Rules of Procedure, N. Z. is awarded compensation for non-pecuniary damage in the amount of KM 2,000 to be paid by the Federation of Bosnia and Herzegovina within 30 days as from the date of publishing this Decision 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* and the *Official Gazette of Republika Srpska*.

Reasoning

I. Introduction

1. On 24 January 2002 Ms. N. Z. ("the appellant"), from Livno, represented by Mr. Z. P., a lawyer practising in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") due to unreasonably long duration of investigation conducted against Dž. R. from Sarajevo.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 21 para 1 of the Rules of Procedure the Constitutional Court ("Constitutional Court's Rules of Procedure"), the Municipal Court in Livno and Cantonal Prosecutor's Office in Livno were requested on 18 March 2004 to submit their replies to the appeal.

3. On 29 March 2004 the Municipal Court in Livno submitted its reply.

4. Pursuant to Article 21 para 2 of the Rules of Procedure the Constitutional Court, the reply of the Municipal Court in Livno was communicated to the appellant on 7 April 2004.

III. Facts of the Case

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

6. H. Z. – the appellant's husband died due to consequences of a car accidence which had happened on 21 October 1996 at the main road Livno-Grahovo. At the time of the accident, the appellant's husband was a companion-traveller in a military vehicle "Golf A3" driven by Dž. R. from Sarajevo, which skidded off the road and turned over.

7. On 22 October 1996 the investigative judge of the Municipal Court in Livno carried out an investigation of the scene of the accident and the case was registered under number Kri-59/96. According to the order of the investigative judge, an autopsy of the deceased was performed in the autopsy room of the Split Hospital.

8. On 22 October 1996 the criminal military police of the Second Battalion in Livno took statements from the driver and survived companion-travellers from the vehicle.

9. The appellant, as a wife of deceased, was heard before the Municipal Court II in Sarajevo in the case registered under number Kr-1/98 in the capacity of damaged party upon request of the Basic Court in Livno, number Ki-19/96.

10. The Cantonal Court in Sarajevo initiated an investigation against Dž. R. in case number Ki-28/98 for the same event and it heard the appellant in the capacity of a damaged party on 26 May 1998.

11. The Municipal Public Prosecutor's Office in Livno joined two mentioned cases referring to investigation and raised an indictment against Dž. R. on 11 June 2001 for criminal offence - grave offence against safety of public transportation under Article 320 para 2 in conjunction with Article 315 para 1 of the Criminal Code of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina*, Nos. 43/98 and 23/99) and the criminal proceedings are pending before that Court under number K-81/01.

12. The accused was requested for his address of residence during the proceedings before the Municipal Court in Livno and after the address had been obtained main hearings were scheduled for 10 December 2001, 17 April 2002 and 24 May 2002, but none of them have been held because the accused did not respond to the summons. The indictment was

delivered to the accused through his defence attorney, lawyer practicing in Sarajevo, who filed an objection against the indictment on 16 May 2002. The Court did not decide on that objection.

IV. Relevant Laws

13. **Criminal Procedure Code** (*Official Gazette of the Federation of Bosnia and Herzegovina*, Nos. 43/98 and 23/99), which is applicable in this case, relevant provisions read as follows:

"Article 139

(1) Certain expressions used in this law are defined as follows:

(…)

(6) The term "injured party" designates a person injured or threatened in some personal or property right or by a crime.

Article 167

(1) If the inquiry is not completed within 6 months, the investigative judge must report to the president of the court the reasons why the inquiry was not completed.

(2) If necessary the president of the court shall take steps to complete the inquiry.

Article 173

(1) The principals, defence counsel and the injured party may always lodge a complaint with the president of the court before which proceedings are being conducted because of prolongation of proceedings and other irregularities in the course of the preliminary examination.

(2) The president of the court shall investigate the allegations in the complaint; and if the proponent has so requested, shall inform him what action has been taken.

Article 174

(1) The measures which may be taken against an accused to guarantee his presence and the successful conduct of criminal proceedings are the summons, compulsion to appear, the word of the accused that he will not leave his place of residence, bail and custody.

(...)

Article 295

(1) If the accused has been duly summoned and fails to appear at the main trial nor does he justify his absence, the court shall order that he be compelled to appear. If this cannot be done immediately, the panel shall decide that the main trial not be held, and order that the accused be compelled to appear at the next main trial. If the accused manages to justify his absence by the time he is compelled to appear, the presiding judge of the panel shall withdraw the order that he be compelled to appear.

(2) If the accused, duly summoned, is obviously evading attendance at the main trial, and yet the grounds for custody envisaged in Article 183 of this law do not exist, the panel may order custody to ensure the presence of the accused at the main trial. (...)"

V. Appeal

a) Statements from the appeal

14. The appellant states reasonable time limit under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") has exceeded all reasonable time limits in the present case in which the investigation has been conducted for over four years. She also states she has suffered mental pain due to death of her husband as well as absence of hope the proceedings shall be concluded. At the same time, she requests the Federation of Bosnia and Herzegovina is to be obliged to compensate her damage in the amount of KM 25,000 for her mental sufferings caused by failure of competent court organs to take adequate proceedings to reach a decision pronouncing sanctions to the person being responsible for car accident and death of her husband.

b) Reply to the appeal

15. The Municipal Court in Livno has stated, amongst other things, that the case was, in the meantime, allocated to another president of the Panel and that the case in question would be taken into consideration and be given priority due to promptness of concluding it, taking into account seriousness of the criminal offence and length of criminal proceedings.

VI. Admissibility

16. 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.*

17. According to Article 15 para 3 of the Constitutional Court's Rules of Procedure, *the Constitutional Court shall examine an appeal only if all effective legal remedies available under the law against a judgment/decision challenged by the appeal are exhausted and if the appeal was lodged within a time-limit of 60 days as from the date on which the decision on the last effective legal remedy used by the appellant was served on him/her.*

18. The rule of exhaustion of domestic legal remedies requires the appellant to obtain a final decision. The final decision constitutes reply to the last legal remedy being effective and adequate to examine lower-instance decision in relation to factual and legal aspect. In doing so, the appellant decides whether to use legal remedy regardless of whether the issue is about a regular or extraordinary legal remedy. Decision rejecting a legal remedy for the reason the appellant has not complied with formal requirements of legal remedy (time limit, payment of taxes, form or fulfilment of other legal requirements) cannot be considered as a final one. Use of such legal remedy does not suspend 60 days time limit prescribed under Article 15 para 3 of the Constitutional Court's Rules of Procedure (see Ruling of the Constitutional Court, *U 15/01* of 4 and 5 May 2001).

19. Even though the appellant did not explicitly state, the Constitutional Court considers this case raises issues of not being subjected to inhuman treatment and of the right to a fair trial under Articles 3 and 6 of the European Convention. In addition, the appellant does not seek non-pecuniary damage for her mental sufferings caused by failure of competent court organs to conduct adequate proceedings in order to pronounce sanction to person being responsible for car accident and death of her husband.

20. The Constitutional Court interprets that one of the appellant's allegations that a reasonable length of proceedings and investigation has been exceeded in the present case and that, thereby, her right to a fair trial protected under Article 6 of the European Convention has been violated. As to examination whether the appellant's appeal may be considered within Article 6 para 1 of the European Convention ensuring certain procedural guarantees in determination of somebody's civil rights and obligations or any criminal charges, before all, the Constitutional Court notes the appellant requests conclusion of the criminal proceedings, that is the proceedings against another person. In view of that, it is

justified question whether the right of damaged party to conduct and conclude investigation against another person falls within the scope of Article 6 of the European Convention.

21. According to linguistic meaning, Article 6 of the European Convention, which the appellant refers to, guarantees fair proceedings in the *determination of his civil rights and obligations or any criminal charge against* the appellant. Autonomous interpretation of Article 6 of the European Convention given by the European Convention organs does not point out to the fact the damaged party in the criminal proceedings has filed an arguable claim for protection listed in that Article. Only persons accused for commission of a criminal offence are entitled to protection under this Article which is applicable in the criminal proceedings (see Decision of the Human Rights Chamber, *Unković v. the Federation of Bosnia and Herzegovina*, case number CH/99/2150, para 94).

22. The Constitutional Court notes the Code of Criminal Procedure provides for a right of damaged party to participate in the proceedings as damaged party because he/she is "a person injured or threatened in some personal or property right or by a crime" (Article 139 para 1 (6)). However, this right is not among rights protected under Article 6 of the European Convention.

23. In accordance with above stated, the Constitutional Court finds this part of the appeal is *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina and therefore, having in mind provisions of Article 16 para 2 (9) of the Constitutional Court's Rules of Procedure, that part of the appeal is inadmissible.

24. However, as to other appellant's allegations, that she has been suffering mental pain due to absence of hope in conclusion of the proceedings, finding truth and punishing the one being guilty of death of his husband, the Constitutional Court finds positive provisions do not contain any legal remedy available to the appellant to remedy such actions, that is for compensation on the name of mental sufferings she tries to compensate by the appeal she filed with the Constitutional Court. Finally, the appeal meets the requirements under Article 16 paras 2 and 4 of the Constitutional Court's Rules of Procedure. Therefore, the Constitutional Court concludes the appeal is admissible in this part.

25. In view of the provisions of Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Article 15 para 3 and Article 16 para 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court established that the present appeal meets the admissibility requirements.

VII. Merits

26. The appellant claims that reasonable time limit for conclusion of the court proceedings in the present case has been exceeded and that her right to a fair trial under Article 6 of the European Convention, as well as her mental sufferings due to absence of hope in revealing the truth about this event and conclusion of the court proceedings and punishment of a person responsible for death of her husband, have therefore been violated. Thereby, she claims her right not to be subjected to inhumane treatment under Article 3 of the European Convention has been violated and she seeks the Federation of Bosnia and Herzegovina to compensate her with the amount of KM 25,000 for her mental sufferings due to the competent courts' failure to act.

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

"Enumeration of rights:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in para 2 above; these include:

(...)

b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment."

28. Article 3 of the European Convention reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

29. The issue whether the treatment was inhuman has to be assessed in relation to circumstances of the case and prevailing opinions. The proceedings have to have minimum level of severity – if it is to fall within the scope of Article 3 of the European Convention. Based on applicable case-law, special elements referring to inhuman treatment which were taken into account in relation to the appellant's claim there has been violation of Article 3 of the European Convention, are as follows: dimension and character of emotional distress caused to family member of a victim distinct from those inevitably caused to all the relatives of victims of a serious human rights violation, the extent to which the family member witnessed the events in question, the overall context surrounding this event and involvement of the family member in the proceedings following the event. As to conducts

of the authorities, special elements to be taken into account are: conducts of authorities after the event in question had happened, the extent to which the proceedings on the event were conducted (see judgment of the European Court for Human Rights *Çakici v. Turkey*, of 10 May 2001, Decisions and Reports 2001. IV, para 156; Decision of the Human Rights Chamber, case number CH/99/2150, *Unković v. the Federation of Bosnia and Herzegovina*, of 10 May 2002, paras 111-119).

30. Applying those elements to the appellant's case, the Constitutional Court has held that the appellant is wife of a person who died in car accident and who initiated the criminal proceedings against the accused before the court. The appellant was not a witness to the accident but is entitled to the truth about the event and responsibility for it, as well as to just punishment of the guilty person. She answered the summons investigating this event and contacted the competent court expressing her interest in conclusion of the proceedings.

31. The Constitutional Court notes that criminal investigation is finished and that the indictment was raised against a person accused for causing the accident, even though a long period of five years has elapsed from the car and despite the postponements and procedural obstacles. However, the criminal proceedings before the court is still pending before the court and the main hearing has not yet been held, even though it was scheduled on three occasions and postponed since the accused failed to appear and the court has not taken any actions in the proceedings during the last two years.

32. The Constitutional Court takes into account the fact the investigation has been finished but it cannot neglect the fact the indictment was raised only five years after the car accident had happened. The reasons for present postponement are justified by the fact the accused did not respond to the summons of the court. The Constitutional Court does not find any acceptable justification for such actions of the court in such important proceedings, especially having in mind circumstances surrounding the event and that a person driving the vehicle at the critical moment is known, that the insight investigation for accidents was carried out, that there are witnesses who gave their statements immediately after the accident and that the autopsy of the victim was performed. During this whole period, the appellant suffered due to death of her husband, on one side, and due to lack of truth about the event and establishment of responsibility and punishment of responsible person, on the other side. The Constitutional Court finds there is no reasonable justification for this mental suffering of the appellant which is ongoing.

33. Therefore, taking into account all above stated, the Constitutional Court finds violation of the appellant's right not to be subjected to inhuman treatment in the period following

the car accident in which her husband had died, until the criminal proceedings conducted against the person accused for this accident is concluded.

VIII. Conclusion

34. Having regard to Article 16 para 2 (9), Article 61 paras 1 and 2 and Article 64 para 1 of the Constitutional Court's Rules of Procedure, the Constitutional Court decided as set out in the enacting clause.

35. Having considered the appellant's request for compensation of non-pecuniary damage, the Constitutional Court accepted the appellant has suffered non-pecuniary damages due to inhuman and humiliating treatment towards her in relation to unreasonable length of criminal proceedings. Therefore, under Article 77, para 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court orders the Federation of Bosnia and Herzegovina to pay the appellant the amount of KM 2,000.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 58/03

The appeals of:
- Mr. S. G., against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina, No. U-18/02 of 3 December 2002 and Nos. U-18-2/03, U-20/03 and U-24/03 of 17 September 2003,
- Mr. E. B., against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina No. U-17/02 of 3 December 2002 and Nos. U-13-1/03 of 8 July 2003 and nos. U-18-1/03 and U-19-1/03 of 17 September 2003, and
- Mr. D. Č., against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina No. U-13-2/02 of 8 July 2003 and Nos. U-19-2/03 and U-25-1/03 of 17 September 2003

DECISION ON INTERIM MEASURE
of 4 January 2004

DECISION ON ADMISSIBILITY AND MERITS
of 29 October 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 59, para 2 (5) and Article 78, para 1 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina - New Amended Text (*Official Gazette of Bosnia and Herzegovina*, No. 2/04), as a Grand Chamber, composed of the following judges: Mr. Mato Tadić, President, Prof. Dr Ćazim Sadiković and Prof. Dr Miodrag Simović and Ms. Hatidza Hadziosmanovic as Vice-Presidents and Ms. Valerija Galic and Mr. Jovo Rosic, having deliberated on the appeal of **Messrs. S. G.**, **E. B. and D. Č.**, in case No. **AP 58/03,** at its session held on **4 January 2004**, adopted the following

DECISION ON INTERIM MEASURE

The requests of Messrs. S. G., E. B. and D. Č. for interim measures are granted.

The action in criminal proceedings in cases of the Cantonal Court in Sarajevo, No. Ki-125/01, Ki-209/01, Ki-320/01, Ki-232/01, Ki-247/01 and Ki-121/02 is temporarily deferred.

This Decision shall enter into force immediately and the deferral shall remain into force until the adoption of the final Decision of the Constitutional Court of Bosnia and Herzegovina on the constitutionality of Article 6, para 3, Article 7, para 2 and Article 8 of the Law on Immunity of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 19/03).

Reasons

1. On 27 February 2003, Messrs. S. G. and E. B. from Sarajevo, filed appeals with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina ("Constitutional Court of the Federation") Nos. U-18/02 and U-17/02 of 3 December 2002. By these rulings, the Constitutional Court of the Federation stayed the proceedings

regarding decision-making on the constitutional issue of claim to immunity of the appellants which was submitted to it by the Cantonal Court of Sarajevo ("Cantonal Court") by the requests Nos. Su-835/02 and Su-834/02 of 24 July 2002 and 23 August 2002.

2. Mr. E. B., filed an appeal on 7 November 2003; Mr. S. G. filed an appeal on 1 December 2003 while Mr. D. Č. from Mostar filed an appeal with the Constitutional Court against the rulings of the Constitutional Court of Federation Nos. U-13-1/03 of 8 July 2003, Nos. U-18-1/03, U-19-1/03 of 17 September 2003, U-18-2/03, U-20/03, U-24/03 of 17 September 2003, U 13-2/03 of 8 July 2003, U-19-2/03 and U-25-1/03 of 17 September 2003. By these rulings, the Constitutional Court of the Federation dismissed the appeals of Messrs. E. B., S. G. and D. Č., against the rulings of the Cantonal Court by which it was decided that the appellants do not have the right to immunity in the certain criminal proceedings conducted against them before the Cantonal Court.

3. Appellants complain that the challenged rulings violated their human rights and particularly right to a fair hearing, as guaranteed by Article 6, para 1 of the European Convention for the Protection of Human Rights and Fundamental Rights ("European Convention") and right as guaranteed by Article 7, para 1 of the European Convention which prohibits the retroactive application of the criminal law. Appellants claim that, contrary to the Decisions of the Constitutional Court, Nos. 59/01, 60/01 and 61/01 of 10 May 2002, in the proceedings that ended by the challenged rulings, the right to immunity from criminal prosecution (as constituted by the previous provision of Article IV.B.4.10 of the Constitution of Federation of Bosnia and Herzegovina) was denied to them by the retroactive application of the right by the Constitutional Court of the Federation and previously by the Cantonal Court.

At the same time, the appellants also proposed that the Constitutional Court joins the proceedings and adopts one decision on the merits of the case upon their appeals. All three appellants propose that the Constitutional Court adopts one decision granting their appeals as well-founded and establishing that according to the provisions of Article IV.B.4.10 of the Constitution of the Federation of Bosnia and Herzegovina, the appellant has the right to immunity from criminal prosecution for the actions encompassed by the rulings of the Cantonal Court in the relevant criminal cases.

4. The appellants also proposed that the Constitutional Court adopts interim measures by which the Cantonal Court would be prohibited to conduct any other action in the criminal proceedings until the Constitutional Court adopts final decisions on their appeals. They claim that, if the criminal proceedings against them are to continue prior to the adoption of

the final decision of the Constitutional Court on the appeals, they would continue to suffer the violation of their human rights and other detrimental consequences. They also add that the Constitutional Court adopted the interim measures on their proposal in the previous cases *U 59/01*, *U 60/01* and *U 61/01* by which it stayed the enforcement of the decisions in the criminal proceedings until final decision was adopted on their appeals.

5. Having regard to Article 30 of the Constitutional Court' Rules of Procedure, the Constitutional Court decided, considering that the appeals relate to the same legal issue arising under the competence of the Constitutional Court, that one proceedings shall be conducted and one decision No. *AP 58/03* shall be adopted. The following appeals were joined: AP 58/03, AP 59/03, AP 401/03, AP 549/03 and AP 590/03.

6. In examining the admissibility of the request for issuance of the interim measure, the Constitutional Court invoked Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Article 78, para 1 of the Constitutional Court's Rules of Procedure.

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

The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

Article 78, para 1 of the Constitutional Court's Rules of Procedure:

The Chamber may, until the adoption of a final decision, upon a request of a party, issue any interim measure it deems necessary in the interest of the parties or the correct conductance of the proceedings before the Court.

7. Constitutional Court finds that it is obvious that the circumstances of such cases, relating to all three appellants, raise an issue under Article 7, para 1 of the European Convention in connection with Article 6, para 1 of the European Convention. Such conclusion relates to the objections of the appellants that they were denied their right to immunity from criminal prosecution, as guaranteed by the Constitution of the Federation of Bosnia and Herzegovina, in the criminal proceedings before the Cantonal Court by an unauthorized application of the criminal legislation.

The Constitutional Court recalls that the proceedings for decision-making on the disputes referring to the constitutionality of certain provisions, including Article 8 of the Law on Immunity of the Federation of Bosnia and Herzegovina, were instituted by the nine representatives of the House of Peoples of the Parliamentary Assembly of Bosnia

and Herzegovina and Mr. Adnan Terzić, Chair of the Council of Ministers of Bosnia and Herzegovina.

8. The Constitutional Court notes that it is necessary in all criminal proceedings that the appellants are guaranteed the enjoyment of their constitutional rights and effective court protection. This protection also implies effective prevention of any threat by the criminal sanctions of the court authorities in cases when their action could result in the violation of the appellant's constitutional rights in applying the regulations the constitutionality of which was questioned. With respect to that, the Constitutional Court notes that the court authorities must act in accordance with the European Convention that shall have priority over all other law.

9. In the present case, the Constitutional Court concludes that the continuation of the criminal proceedings against the appellants, prior to deciding on the constitutionality of the challenged provisions of the Law on Immunity of the Federation of Bosnia and Herzegovina could result in irreparable consequences for the appellants since it could lead to the legal insecurity. Therefore, the Constitutional Court finds that the enforcement of the decision in further criminal proceedings upon rulings of the investigative judge, referred to in the operative part of this decision, could result in the irreparable damaging consequences for the appellants.

10. Having regard to Article 78, para 1 of the Constitutional Court's Rules of Procedure, the Constitutional Court decided to grant the request for adoption of the interim measure.

11. Based on the aforementioned, it was decided unanimously as stated in the operative part of this Decision.

12. Constitutional Court reminds that the Decision on interim measure does not in any case, prejudge the final decision on admissibility or merits of the case in question.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 59, para 2, item 2, Article 61, paras 1 and 3 and Article 78, para 6 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina - New Amended Text (*Official Gazette of Bosnia and Herzegovina*, No. 2/04), in Plenary and composed of the following judges

Mr. Mato Tadić, President,

Mr. Ćazim Sadiković, Vice-President,

Mr. Tudor Pantiru, Vice-President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić

Ms. Constance Grewe

Having considered the appeal of **Mr. S. G., Mr. E. B. and Mr. D. Č.** in case **AP 58/03**

Adopted at the session held on 29 October 2004 the following

DECISION ON ADMISSIBILITY AND MERITS

The appeals of:

- Mr. S. G., against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina No. U-18/02 of 3 December 2002 and Nos. U-18-2/03, U-20/03 and U-24/03 of 17 September 2003,

- Mr. E. B., against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina No. U-17/02 of 3 December 2002 and Nos. U-13-1/03 of 8 July 2003 and Nos. U-18-1/03 and U-19-1/03 of 17 September 2003,

- Mr. D. Č., against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina No. U-13-2/02 of 8 July 2003 and Nos. U-19-2/03 and U-25-1/03 of 17 September 2003,

are hereby dismissed as inadmissible.

Decision on Interim Measure No. AP 58/03 issued by the Constitutional Court of Bosnia and Herzegovina is hereby annulled.

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

Reasons

I. Introduction

1. On 27 February 2003, Mr. S. G. and Mr. E. B. from Sarajevo, filed appeals with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina ("Constitutional Court of the Federation") Nos. U-18/02 and U-17/02 of 3 December 2002. By these rulings, the Constitutional Court of the Federation stayed the proceedings regarding decision-making on the constitutional issue of claim to immunity of the appellants which was submitted to it by the Cantonal Court of Sarajevo ("Cantonal Court") by the requests Nos. Su-835/02 and Su-834/02 of 24 July 2002 and 23 August 2002.

2. Mr. E. B. filed an appeal on 7 November 2003, Mr. S. G. filed an appeal on 1 December 2003 while Mr. D. Č. from Mostar filed an appeal with the Constitutional Court against the rulings of the Constitutional Court of Federation Nos. U-13-1/03 of 8 July 2003, Nos. U-18-1/03, U-19-1/03 of 17 September 2003, U-18-2/03, U-20/03, U-24/03 of 17 September 2003, U 13-2/03 of 8 July 2003, U19-2/03 and U-25-1/03 of 17 September 2003. By these rulings, the Constitutional Court of the Federation dismissed the appeals of Mr. E. B., Mr. S. G. and Mr. D. Č., against the rulings of the Cantonal Court by which it was decided that the appellants' have no right to claim immunity in the criminal proceedings against them pending before the Cantonal Court.

3. The appellants also proposed that the Constitutional Court issues interim measures by which the Cantonal Court would be prohibited to conduct any proceedings until the Constitutional Court adopts final decisions on their appeals. They claim that, if the criminal proceedings against them are to continue prior to the final decision of the Constitutional Court on the appeals, they would continue to suffer the violation of their human rights and other damaging consequences. They also add that the Constitutional Court issued the interim measures on their proposal in the previous cases *U 59/01*, *U 60/01* and *U 61/01* by which it deferred the enforcement of the decisions in the criminal proceedings until final decision was adopted on their appeals.

II. Proceedings before the Constitutional Court

4. In accordance with Article 21, paras 1 and 2 of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure"), the Constitutional Court shall send the request for institution of proceedings or the appeal to the adopter of the disputed act for the purpose of giving the latter the opportunity to respond or to submit documents and shall communicate the appeal to the other party in the proceedings that resulted in the judgment challenged by the appeal, for the purpose of giving that party the opportunity to submit a reply.

5. Considering that the appeals in question are based on the appellants' claims on the retroactive effect of certain provisions of the Law on Immunity of Federation of Bosnia and Herzegovina, based on which the challenged rulings were adopted and that at the same time the dispute on the constitutionality of certain provisions of the Law on Immunity of Bosnia and Herzegovina as well as the Law on Immunity of Federation of Bosnia and Herzegovina was initiated before the Constitutional Court, the Constitutional Court examined the replies which, upon request of the Constitutional Court, were submitted by the adopters of the challenged laws.

6. Constitutional Court decided, considering that the appeals refer to the same issue arising under competence of the Constitutional Court, to conduct one set of proceedings and adopt one decision No. *AP 58/03*. The following appeals were joined: *AP 58/03, AP 59/03, AP 401/03, AP 549/03* and *AP 590/03*.

7. By the Decision on interim measure, AP 58/03, the Constitutional Court granted the appellants' request for adoption of interim measure and any action in the criminal proceedings in the cases of the Cantonal Court No. Ki-125/01, Ki-209/01, Ki-320/01, Ki-232/01, Ki-247/01 and Ki-121/02 was temporarily suspended. That decision entered into

force on the date of its adoption, while the suspension remained in force until the adoption of the final decision of the Constitutional Court on the constitutionality of Article 6 para 3, Article 7, para 2 and Article 8 of the Law on Immunity of the F BiH (*Official Gazette of F BiH*, No. 19/03).

III. Facts of the case

8. The facts of the case, as they appear from the appellants' assertions and the documents submitted to the Constitutional Court, can be summarized as follows:

9. Cantonal Court by rulings of the investigative judge No. Ki-125/01 and Ki-209/01 of 13 April 2001, Ki-232/01 of 19 September 2001 and Ki-247/01 of 9 October 2001, which were confirmed by the rulings of the panel of that court, No. Kv-462/01 of 12 September 2001, Kv-487/01 of 20 September 2001, Kv-517/01 of 2 November 2001 and Kv-567/01 of 6 November 2001 initiated investigation against the appellants for reasonable doubt of having committed certain criminal offenses while exercising their functions as follows: Mr. E. B., Prime-Minister of Government of Federation of Bosnia and Herzegovina, Mr. S. G. and Mr. D. Č., Ministers in the Government of Federation of BiH. Mr. E. B., Mr. S. G. and Mr. D. Č. all filed appeals against these rulings with the Constitutional Court, complaining they have violated their constitutional rights.

10. On 10 and 11 May 2002, the Constitutional Court adopted decision No. *U 59/01* granting the appeal of E. B. as well-founded. It adopted decision No. *U 60/01* granting the appeal of Mr. S. G. as well-founded and decision No. *U 61/01* granting the appeal of Mr. D. Č. as well-founded. It annulled the challenged rulings and ordered the Cantonal Court to forward the appellants' claims of immunity, being the constitutional issues that arose during the proceedings pending before that court, to the Constitutional Court of the Federation which has *in rem* jurisdiction to deliberate and adopt decision on this issue.

11. Constitutional Court found that the challenged decisions initiated criminal proceedings against the appellants. However, the claim to immunity issues was not resolved earlier which represents the violation of the right to fair trial arising under Article II.3 (e) of the Constitution of BiH and Article 6 of European Convention for Protection of Human Rights and Fundamental Freedoms ("European Convention").

12. Constitutional Court of the Federation by the rulings No. U-17/02 and U-18/02 of 3 December 2002, stayed the proceedings on the decision making on issue submitted by the Cantonal Court by requests No. Su-834/02 and Su-835/02. In the reasoning of its decision, the Constitutional Court of the Federation noted that during the proceedings

before the Constitutional Court of Federation there were no longer reasons for existence of the constitutional issue on which the Constitutional Court of Federation should decide since in the new situation, following the adoption of Decision on Amendments to Constitution of BiH (amendments LXIV-LXVII) and Law on Immunity of Federation of BiH (published in *Official Gazette of F BiH*, No. 52/02) by the High Representative, the competence of the Constitutional Court of Federation, with respect to issues of immunity which appear in the criminal and contentious proceedings, exists only in case of filing the appeal with this body against the final and binding decision of the competent court by which it resolved on the immunity claim field by the persons against who the criminal or contentious proceedings is pending (Article 6 of Law).

13. The Cantonal Court in its rulings No. Kv-58/03, Kv-94/03 and Kv-96/03 of 19 March 2003, Kv-125/03 and Kv-147/03 of 9 April 2003, Kv-124/03 of 15 April 2003 and Kv-162/03 of 21 April 2003 decided that the appellants are not entitled to right to immunity in the criminal proceedings.

14. Appellants filed appeals against these rulings with the Constitutional Court of Federation stating that the Cantonal Court has retroactively applied on their case the Law on Immunity of Federation of Bosnia and Herzegovina and Rules on Competence and Work of the Courts in resolving the issues of immunity in criminal and contentious proceedings deciding they are not entitled to immunity although they were protected at the time of committing the incriminated actions from the criminal prosecution by the provisions of Article IV.B.4.10 of the Constitution of the Federation of Bosnia and Herzegovina.

15. Constitutional Court of Federation dismissed their appeals as follows: the appeal of Mr. E. B. by ruling No. U-13-1/03 of 8 July 2003 and Nos. U-18-1/03 and U-19-1/03 of 17 September 2003; the appeal of Mr. S. G. by rulings Nos. U-18-2/03, U-20/03 and U-24/03 of 17 September 2003 and Mr. D, Č. by rulings Nos. U-13-2/03 of 8 July 2003 and U-19-2/03 and U-25-1/03 of 17 September 2003.

16. Constitutional Court of Federation reasoned that considering that it decides exclusively in accordance with authorizations arising under Constitution of Federation of Bosnia and Herzegovina, in the present case was therefore decided based on provisions of Amendments LXVI supplementing Article IV.C.3.10 of the Constitution of Federation of Bosnia and Herzegovina and according to valid legal provisions on immunity as is exclusively provided for by in the constitutional provision which was contained in the above referenced Article.

IV. Relevant Laws

17. **Constitution of Federation of Bosnia and Herzegovina**

Amendment LXV to the Constitution of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, No. 52 of 28 October 2002), erased Article IV.B.4.10 which the appellants referred to, which read:

President of the Federation, Vice-President of the Federation, Prime Minister, Deputy Prime Minister and other members of the Government shall not be criminally prosecuted or responsible in contentious proceedings for any act committed in performing their office.

Amendment LXVI to the Constitution of the Federation of Bosnia and Herzegovina (published in the same Official Gazette) added new text, which reads as follows:

The Constitutional Court shall decide on the issues following from the law governing immunity in the Federation."

Article IV.A.20 (d) reads:

(1) In addition to other powers specified in the Constitution, the Parliament of the Federation shall have responsibility for:

(...)

(d) enacting laws to exercise responsibilities allocated to the Federation Government, which shall take effect as specified therein but no sooner than when promulgated in the Official Journal of the Federation.

18. **The Law on Immunity of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH*, No. 52/02)

Article 3

Persons Entitled to Immunity
(Exemption from Criminal and Civil Liability)

Members of the House of Representatives and Delegates to the House of Peoples, as well as the members of the Cantonal Legislatures shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the Parliament of the Federation, or the Cantonal Legislatures.

The President and Vice-President of the Federation, members of the Federation Government as well as the members of the Cantonal Governments shall not be held civilly liable for any acts carried out within the scope of their duties in the executive authority of the Federation, or the executive authority of the respective Canton.

Article 6
(Procedure in Criminal Proceedings)

If, in the course of criminal proceedings, an individual listed in para 1. of Article 3. of this Law claims that an act which is the basis for such proceedings was carried out within the scope of his or her duties as defined in Article 4. hereof, this issue shall be heard and decided by a judgment (judgement shall be translated as decision/odluka)of a competent court.

Model procedural rules governing the hearing of such issues including the identification of the competent court for the hearing of the same, shall be drawn up by the competent ministry.

Such judgment shall be final and binding, subject to appeal to the Constitutional Court of the Federation.

Article 8
(Rendering Inefficient)

Previous procedural prohibitions of criminal prosecution or initiation of contentious proceedings against persons entitled to immunity shall be rendered inefficient as of the date of entry into force of this Law. Such rendering inefficient shall not prejudge the right to defence in crmininal and contentious proceedings previously regulated by the law."

19. **Rules on competence and manner of work of the courts in resolving the issues of immunity in the criminal and contentious proceedings** (*Official Gazette of F BiH* No. 1/03)

Article 2

Municipal Court, Cantonal Court, that is the Supreme Court of the Federation of Bosnia and Herzegovina shall be competent to decide on the right to immunity in criminal and contentious proceedings, which Court, in accordance with Cantonal, that is Federal Law, shall be competent to conduct contentious proceedings according to the moment on which a person invoked immunity ("competent court").

Article 3

The competent court shall decide on the right of a person which invoked immunity.

A decision referred to in para 1 of this Article shall be issued, within 15 days from the date on which a person invoked immunity, by the competent court sitting in a Panel composed of three judges.

V. Appeal

a) Statements from the appeal

20. Appellants filed appeals with the Constitutional Court and allege that the challenged rulings of the Constitutional Court of the Federation have violated their right to a fair trial, guaranteed under Article 7 para 1 of European Convention, prohibiting retroactive application of the criminal law. The appellants claim they have been deprived of their right to immunity from criminal prosecution, constituted under previous provision of Article IV.B.4.10. of the Constitution of the Federation of Bosnia and Herzegovina, by retroactive application of the law by the Constitutional Court of the Federation and, previously, by the Cantonal Court in the proceedings concluded by challenged Rulings, contrary to Decisions of the Constitutional Court Nos. *U 59/01, U 60/01* and *U 61/01* of 10 May 2002.

21. The High Representative for Bosnia and Herzegovina, in his reply submitted upon the request of the Constitutional Court in the proceeding regarding dispute on constitutionality of certain provisions of the Law on Immunity of Bosnia and Herzegovina and the Law on Immunity of the Federation of Bosnia and Herzegovina, "imposed" by the High Representative, in relation to adjustment of Article 8 of challenged laws, points out that these provisions remove all process assumptions for initiation of the proceedings against members of the Parliament and holders of executive power existing in previous provisions. In other words, members of the Parliament and of executive power shall not be able to invoke procedural protection to protect themselves from any court proceedings because they are holders of public authority, as of the date of entry of challenged laws into force. The High Representative concludes that the challenged laws were not in opposition to the general principle of unfeasibility of retroactive application of Article 7 of European Convention as these laws do not exclude the possibility of substantive defense from the criminal responsibility for the actions committed in relation to the previously applicable laws which provided for such defense.

22. House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina –Constitutional Commission stated in its reply that the initiative was justified and confirmed legal arguments of the applicants for assessment of the constitutionality of the challenged laws.

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 other court in Bosnia and Herzegovina."

24. Pursuant to Article 15 para 3 of the Constitutional Court's Rules of Procedure, "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 appellants received the decision on the last legal remedy that he/she used.".

25. The rule of exhaustion of remedies requires the appellants to reach the final decision. A final decision represents a response to the last legal remedy used which is effective and adequate to examine a lower instance decision in both factual and legal aspects. Thereby, the legal remedy must depend on the appellants, regardless of whether it is an ordinary or extraordinary legal remedy. A decision rejecting the legal remedy due to the lack of fulfillment of the formal requirements of the legal remedy by the appellants (time-limit, form or fulfillment of other legal conditions) cannot be considered as a final decision (see Ruling of the Constitutional Court of Bosnia and Herzegovina, *U 15/01* of 4 and 5 May 2001). Such legal remedy does not terminate the time limit of 60 days as provided for by Article 15, para 3 of the Constitutional Court's Rules of Procedure (see Ruling of the Constitutional Court, No. *U 15/01* of 4 and 5 May 2001).

26. In the present case the subject of the appeal is a decision which is final with regard to the issue of immunity, whereas no final decision has been yet issued with regard to the appellants' guilt for the criminal offence they are charged with. However, the Constitutional Court holds that immunity is an important preliminary issue which is considered separately from the whole criminal proceedings, since it follows from the provisions of the Law on Immunity that when immunity is claimed the competent courts have to issue a decision on that matter. Once the issue of immunity is decided it cannot be raised again in specific criminal proceedings. The Constitutional Court therefore holds that the standards of the right to fair proceedings also refer to the proceedings in which the right to immunity

is decided, since, if the claim of immunity is rejected and the criminal proceedings continued, the issue of immunity cannot be raised again. In view of the aforesaid, the Constitutional Court considers that the appeals in the present case are admissible although no final decision has been yet issued with regard to the appellants' guilt of the criminal offence they are charged with.

27. In the present case, the subject of the appeal are the rulings of the Constitutional Court of the Federation mentioned in the operative part of this Decision, against which no legal remedies are available under the law. Furthermore, challenged Rulings of the Constitutional Court of the Federation have been delivered to the appellants as follows:

- Mr. S. G., Ruling number U-18/02 of 3 December 2002, delivered on 31 December 2002 while the appeal against that Ruling was filed with the Constitutional Court on 27 February 2003; Rulings Nos. U-18-2/03, U-20/03 and U-24/03 of 17 September 2003, delivered on 3 and 20 October 2003 while the appeals against those Rulings were filed with the Constitutional Court on 1 December 2003;

- Mr. E. B., Ruling number U-17/02 of 3 December 2002 delivered on 31 December 2002 while the appeal against that Ruling was filed with the Constitutional Court on 27 February 2003; Ruling number U-13-1/03 of 3 July 2003 delivered on 27 September 2003, and Rulings Nos. U-18-1/03 and U-19-1/03 of 17 September 2003 on 20 October 2003 while the appeal against those Rulings was filed with the Constitutional Court on 7 November 2003;

- Mr. D. Č., Ruling number U-13-2/03 of 8 July 2002 delivered on 29 September 2003, Ruling number U-19-2/03 of 17 September 2003 delivered on 22 October 2003, Ruling number U-25-1/03 of 17 September 2003 on 23 October 2003 and the appeal against those Rulings were filed with the Constitutional Court on 28 November 2003.

It follows from the above stated that the appeals were filed within 60 days time limit as prescribed under Article 15 para 3 of the Constitutional Court's Rules of Procedure. Finally, the appeals meet the requirements under Article 16 para 2 of the Constitutional Court's Rules of Procedure.

28. Having in mind provisions of Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 15 para 3 and Article 16 para 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court has found that the present appeals meet the admissibility requirements.

VII. Merits

29. First of all, the Constitutional Court recalls of the previous case law in deciding on the appeals in which the appellants invoked immunity during the court proceedings.

30. In its previous Decisions Nos. *U 59/01, U 60/01* and *U 61/01* of 10 May 2002 which are decisions issued upon the appellants' appeals filed against final Rulings of the Cantonal Court on initiation of the investigation, the Constitutional Court concluded that there has been a violation of the right to a fair trial under Article 6 para 1 of European Convention because the criminal proceedings were initiated before the issue of immunity was decided. In such cases, the Constitutional Court did not examine the issue of immunity in the merits, but stated that it had to be decided in a procedure prescribed by the law. On that occasion, it was pointed out that the ordinary courts were obliged to consider the issue of immunity as an important preliminary issue in criminal proceedings and the Constitutional Court considered their failure to do so as a violation of the right to a fair trial under Article 6 para 1 of the European Convention.

31. The Constitutional Court points out that the decisions in the mentioned cases were adopted on 10 May 2002. At that time the legal circumstances were considerably different from the circumstances in the specific case. Namely, at that time Article IV.B.4.10 of the Constitution of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, No. 1/94) was applicable which strictly prohibited conducting of criminal proceedings against specific holders of executive authority for criminal offences committed within the scope of their respective duty. The mentioned provision of the Constitution of the Federation of Bosnia and Herzegovina was also incorporated in the cantonal constitutions, so the specified holders of the cantonal executive authority enjoyed immunity from criminal prosecution for the criminal offences committed within the scope of their duty. Moreover, at that time there was no clear procedure stipulating actions of the courts in cases of claims of immunity.

32. In the meantime, the legal circumstances have been significantly changed. Article IV.B.4.10 of the Constitution of the Federation of Bosnia and Herzegovina, which afforded to certain holders of executive authority immunity from criminal prosecution, was deleted by Amendment LXV (*Official Gazette of the Federation of BiH* No. 52 of 28 October 2002) to the Constitution of the Federation of Bosnia and Herzegovina. Moreover, the Law on Immunity of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 52/02, 32/02) and the Law on Immunity of the Federation of Bosnia and Herzegovina

(*Official Gazette of the Federation of BiH* No. 19/03) were enacted. The said laws specified the scope of persons enjoying the right to immunity and set out a clear procedure which the courts are obliged to comply with in deciding on the claim of immunity.

33. The Constitutional Court points out that it adopted a decision No. *U 24/03* on 22 September 2004, whereby it established that the challenged provisions of the Law on Immunity of Bosnia and Herzegovina and the Law on Immunity of the Federation of Bosnia and Herzegovina were in conformity with the Constitution of Bosnia and Herzegovina.

34. In view if the aforesaid and particularly the new legal situation, the Constitutional Court concludes that the appeal in question cannot be decided in accordance with the case law from the Constitutional Court's decisions in cases No. *U 59/01*, *U 60/01* and *U 61/01*.

35. The appellants challenge the mentioned ruling of the Constitutional Court of the Federation arguing that it violated his right to a fair hearing under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention and that the principle of prohibition of retroactive application of law under Article 7 of the European Convention has been violated.

The right to a fair trial

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

3. Enumeration of rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in para 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, para 1 of the European Convention, in the relevant part, reads as follows:

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

37. The Constitutional Court notes that in its decision No. *U 5/99* of 3 December 1999 (*Official Gazette of Bosnia and Herzegovina* No. 3/00) it took the position that it is competent to review whether a judgment (decision) of an entity constitutional court is in conformity with the Constitution of Bosnia and Herzegovina. Consequently, in the present case the Constitutional Court will examine whether the challenged ruling of the Constitutional Court of the Federation, whereby the claim of immunity was finally decided, violated the appellants' rights to a fair trial for the purposes of Article 6 para 1 of the European Convention.

38. The Constitutional Court points out that its task in the present case is not to examine whether the appellants are entitled to immunity, because that issue was finally decided by a decision of the Constitutional Court of the Federation. The task of the Constitutional Court in the present case is to examine whether the challenged ruling of the Constitutional Court of the Federation violated the appellants' rights to a fair trial in the proceedings in which their claim of immunity was decided.

39. In the present case, the appellants consider that the Constitutional Court of the Federation in the challenged ruling misinterpreted and misapplied the substantive law thereby having violated his right to a fair trial under Article 6 para 1 of the European Convention.

40. The Constitutional Court recalls its position (see the decision No. *U 62/01* of 5 April 2002, published in the *Official Gazette of Bosnia and Herzegovina*, No. 24/02) according to which *the appellate jurisdition of the Constitutional Court is confined to the issues under the Constitution and the Court is not called upon to review lower courts' decisions with regard to the interpretation and application of laws by ordinary courts except in cases where the constitutional rights have been violated or disregarded by lower instance courts' decisions, or in case of arbitrary or discriminatory application of law, or where there has been a violation of procedural rights (right to a fair trial, right of access to a court, right to an effective remedy etc) or when the established facts indicate to a violation of the Constitution.*

41. The Constitutional Court holds that the said position can be applied in the present case. It cannot be concluded from the assertions in the appeal and the submitted documentation that the appellants' constitutional rights have been violated by the ruling of the Constitutional Court of the Federation. Moreover, it cannot be concluded that the application of the law has been arbitrary or discriminatory, or that there has been a violation of the procedural rights (e.g. that the courts were not impartial, that the appellants were denied the right of access to the court or to an effective legal remedy). It can neither be argued that the

established facts indicate any violation of the Constitution of Bosnia and Herzegovina, given that the Constitutional Court found in its decision No. *U 24/03* of 22 September 2004 that the provisions of the Law on Immunity of Bosnia and Herzegovina and of the Law on Immunity of the Federation of Bosnia and Herzegovina were in conformity with the Constitution of Bosnia and Herzegovina and the said laws were the ground on which the Constitutional Court issued the ruling which has been challenged by the appeal. Moreover, the ruling of the Constitutional Court of the Federation contains sufficient reasons from which it can be concluded why that court considers the appellants' claims of immunity in the present cases as ill-founded.

42. In view of the aforesaid, the Constitutional Court finds 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 para 1 of the European Convention.

c) Prohibition of retroactive application of law

Article 7 of the European Convention reads as follows:

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.

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

43. The appellants see retroactive application of the law in that the Constitutional Court of the Federation applied in his case the Law on Immunity enacted by the High Representative instead of the previous constitutional provisions according to which they enjoyed immunity from criminal prosecution, particularly when taken into consideration that they were applicable at the time when they allegedly committed the criminal offences charged with.

44. The Constitutional Court has already explained that it holds that the appellants had a fair trial during the proceedings in which the claim of immunity was decided. It has also been stated that the court shall not engage in dealing with the manner in which the Constitutional Court of the Federation applied the substantive law in the present case.

45. In view of the aforesaid, the Constitutional Court concludes that it is not necessary to separately examine whether the challenged ruling of the Constitutional Court of the Federation violated the principle of prohibition of retroactive application of law, particularly in view of the Constitutional Court's finding in its decision *U 24/03* of 22 September 2004 that the provisions of the Law on Immunity of Bosnia and Herzegovina and of the Law on Immunity of the Federation of Bosnia and Herzegovina are in conformity with the Constitution of Bosnia and Herzegovina and have no retroactive effect which is prohibited under Article 7 of the European Convention.

VIII. Conclusion

46. In view of the aforesaid, the Constitutional Court concludes that immunity is the issue which is considered separately from the whole proceedings and once decided, it cannot be claimed again in the same proceedings. The Constitutional Court therefore holds that the standards of the right to a fair trial also apply to the proceedings in which the claim of immunity is decided and the final decision on that issue can be subject to review by the Constitutional Court. In the present case, the Constitutional Court did not find that the challenged ruling of the Constitutional Court of the Federation violated the appellants' right to a fair trial under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of the European Convention, or the principle of prohibition of retroactive application of law under Article 7 of the European Convention.

47. Pursuant to Article 61 paras 1 and 3 of the Constitutional Court's Rules of Procedure, the Constitutional Court decided, by majority of votes, as stated in the operative part of this decision.

48. In view of the Decision of the Constitutional Court number *U 24/03* of 22 September 2004 and Decision on the Merits of the present appeals and having in mind provisions of Article 78 para 6 of the Constitutional Court's Rules of Procedure, the Constitutional Court decided to withdraw interim measure issued by a Decision on interim measure number *AP 58/0*3, because there are no reasons for it to stay in force.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

ANNEX

Separate opinion of Valerija Galić, Judge of the Constitutional Court of Bosnia and Herzegovina in the Decisions in cases Nos. AP 72/04; AP 58/03; AP 412/04; AP 527/04; AP 584/03 and AP 591/03 at its Plenary session held on 29 October 2004 and decision in case AP 322/04 at its Plenary session held on 19 November 2004

Having regard to Article 41 of the Rules of Procedure the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of BiH*, number 2/04) I dissent my opinion in decisions of the Constitutional Court issued in the above mentioned cases in part referring to violation of the appellant's right to a fair trial guaranteed under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of European Convention for the Protection of Human Rights and Fundamental Freedoms. Since mentioned appeals contested decisions on the issue of the right to immunity issued by regular courts and Constitutional Court of the Federation of Bosnia and Herzegovina, in principle for the same reasons, I hereby present a separate opinion for the following reasons:

1. When deciding on the appellants' appeals filed against rulings issued by the competent regular courts on the issue of their right to immunity from criminal liability, the Constitutional Court of the Federation of BiH issued rulings rejecting the appeals and upholding the rulings of the regular courts establishing the appellant's were not entitled to the right to immunity from criminal liability. Essential reasons for which regular courts and the Constitutional Court of FBiH issued those decisions were that the immunity was a privilege of public-legal character which the holder of the immunity is entitled to while holding office and that according to the Law on Immunity of FBiH (*Official Gazette of the Federation of BiH,* number 19/03), which entered into force on 6 October 2002, the holders of executive power in the Federation of BiH and the Cantons shall only be recognized the right to immunity from civil liability.

In addition, the Constitutional Court of FBiH based its rulings on the fact that the Article IV.B.4.10. of the Constitution of FBiH, establishing immunity of the President of the Federation, Vice-President of the Federation, the Prime Minister, the Deputy Prime Minister and remaining members of the Government of the FBiH, was deleted by Ammendment LXV to the Constitution of FBiH (also entered into force on 6 October 2002).

2. Decisions of the Constitutional Court of BiH adopted in individual cases in the aforementioned appeals by majority of votes, upheld such legal position of the Constitutional Court of FBiH. The Constitutional Court of BiH considered the rulings of the Constitutional Court of FBiH contained enough reasons showing why that Court considered the appellants' objections in relation to immunity as ill-founded, and considered there has been no violation of the appellants' right to a fair trial under Article I.3 (e) of the Constitution of BiH and Article 6 paragraph 1 of the Convention. In addition, the Constitutional Court of BiH refers to its Decision No. *U 24/03* of 22 September 2004 establishing the provisions of the Law on Immunity of BiH and Law on Immunity of FBiH were in conformity with the Constitution of BiH, and the Constitutional Court of FBiH used those laws as basis for issuance of rulings being challenged by aforementioned appeals.

3. My opinion is that challenged rulings of the Constitutional Court of FBiH, upheld by decisions of the Constitutional Court of BiH issued by majority of votes, were wrong for the following reasons:

3.1. As pointed out in the rulings of the Constitutional Court of FBiH, it is undisputable that the immunity is a public privilege assigned to holder of public office in the capacity as holder of public and legal office and not as a private person – not for protection of his personal interests but for the interest of the institution so that the office-holders would not be prevented by tendentious indictments in exercising their function. That means, the office-holder cannot be renounced of that privilege. The immunity is connected with performing of duties in a strict sense.

3.2. According to jurisprudence of the European Court of Human Rights, the immunity, as a right having public and legal significance, is separated from the scope of protection of civil rights guaranteed under Article 6 paragraph 1 of the Convention. However, when the issue is about criminal charges, that is in criminal cases, according to the case-law of the European Court, gurantees set forth under Article 6 of the Convention may include the issues of immunty from criminal prosecution if it is relevant to be decided before a case is sent to trial, that is if a fairness of the trial would be brought into questions due to initial failure to comply with those requests. The European Court has clearly stated that existence of charges did not always depend on official act, that is may have a form of other measures containing indication of such allegation in certain situations or which similarly have essential affect to the situation of the suspect, for example request for revocation of immunity of a person (see judgment of 19 February 1991, *Frau*, A 195-E, page 73).

3.3. In part of decisions being the subject matter of this separate opinion referring to admissibility of the appeals, the Cosntitutional Court also pointed out that the immunity

from criminal liability is a significant preliminary issue to be considered separately from the entire criminal proceedings, and that the standars of a right to a fair hearing also refer to the proceedings deciding on the right to immunity.

3.4. The right to a fair hearing with all the elements set forth in Article 6 of the Convention, in my opinion, constitutes maybe the most important and the farest-reaching guarantee of the Convention. That right is a summary of almost all so-called procedural human rights and logically preceeds to all other substantial human rights which would not be possible to acquire without adequate mechanism of their protection. Therefore, the European Court for Human Rights often pointed out to "prominent position the right to a fair proceedings has in a democratic society".

3.5. Therefore, I consider it very important for the regular courts to apply relevant substantive and legal provisions in the proces of making decision on the appellants' bjection of immunity, if they wanted to make a correct decision. However, the regular courts retroactively applied the Law on Immunity in the decision making process, as referred to in paragraph 1 of this separate opinion, even though the text of the Law did not explicitly contain the clause of retroactivity, which was upheld by the Constitutional Court of FBiH.

3.6. Since retroactive application of the Law on Immunity of FBiH was the issue of constitutional and legal dispute before the Constitutional Court of BiH at the same time the appeals were pending before it, the Constitutional Court issued interim measures in cases *AP 58/03* and *AP 72/0*4 temporary suspending criminal proceedings conducted against appellants before the competent court pending the adoption of a decision of the Constitutional Court on review of constitutionality of Article 8 of the Law on Immunity of FBiH.

3.7. At its session held on 22 September 2004, the Constitutional Court of BiH adopted a Decision number *U 24/03* establishing the Law on Immunity of BiH and Law on Immunity of FBiH were in conformity with the Constitution of BiH. In reasons of disputable decisions, the Constitutional Court of BiH referred to Decision *U 24/03*. Starting from the operative part of the Decision, the Constitutional Court of BiH concluded the Constitutional Court of FBiH correctly applied the Law on Immunity when it rejected the appellants' appeals. However, besides general conclusion on correct application of the Law on Immunity of FBiH, a reply to appellants' allegations on retroactive application of the Law on Immunity of FBiH was not given at all.

3.8. I consider such conclusion of the Constitutional Court of BiH is in contravention with the very Decision *U 24/03*. It is undisputable that the operative part of the Decision *U 24/03*

contains decision of the Constitutional Court on conformity of challenged provisions of the Law on Immunity with the Constitution of BiH. However, the reasons of the Decision contain interpretation of challenged provisions of the Law on Immunity and, amongst others, Article 8 from the aspect of retroactivity. In the present case, I consider that not only the operative part has special legal force but also the parts of reasons given in Decision *U 24/03*. Therefore, paragraph 37, amongst other things, states: *(...) When the person leaves office, the immunity operates ratione materiae in relation to the acts performed earlier in the exercise of his or her official functions in order to prevent the institution or office which he or she occupied being indirectly attacked through a legal action against a previous office-holder when the current office-holder would enjoy immunity (....)*

I, particularly, consider paragraph 68 is important, and it reads as follows: *However, for the reasons explained earlier, the challenged laws do not retroactively deprive people of any right. In the context of criminal proceedings, they merely provide for a procedure whereby a court is to decide whether a person who asserts an immunity has acted within the scope of that immunity when he or she is alleged to have done the acts of which he or she is accused, where the immunity has not been waived or withdrawn by a competent person or body. The Constitutional Court knows of no international or comparative law authority for saying that procedures cannot be changed in relation to past alleged offences. Normally when a person is charged with an offence the applicable substantive criminal laws and law of sentencing are those which applied at the time of the offence, but the procedural rules are those in operation at the time of the trial. In the view of the Constitutional Court, the challenged laws merely prescribe a new procedure for deciding whether a person was acting within the scope of legal immunity at the time of the alleged crime. As long as it is a fair procedure (and the Constitutional Court has already indicated that the procedure is fair in principle) the challenged laws will not give rise to anything that can be characterized as retroactive legislation or as being incompatible with the principles of the Constitution of Bosnia and Herzegovina.*

3.9. Taking quoted parts of the reasons as starting point, I consider the reasons of disputable decisions are in contradiction with reasons of Decision *U 24/03*. If the Constitutional Court of BiH in mentioned decision has held that the Law on Immunity was not retroactive starting from undisputable principle in the international law referring to prohibition of retroactive effect of legal provisions (paragraph 67 of the Decision *U 24/03*), than it is not clear why it supported retroactive application of the Law on Immunity of FBiH by the regular courts and Constitutional Court of FBiH in relation to the appellants' right to immunity. I consider that general prohibition of retroactive effect of legal clauses or their provisions under Article I.2 of the Constitution of BiH, according to which Bosnia and

Herzegovina is a state of rule of law whose one of fundamental elements is requirement of strict legal control and establishment of trust into the legal system including prohibition of retroactive effect of legal clauses and their provisions, has thereby been violated. Prohibition of retroactivity lies upon the principle of legal security.

3.10. For those reasons, I consider the appellant's allegations that their right to a fair trial guaranteed under Article II.3 (e) of the Constitution of BiH and Article 6 paragraph 1 of the Convention have been violated by wrong application of substantive law, that is by retroactive application of the law, are well founded. In my opinion, regular courts established wrong legal basis which were upheld by the Constitutional Court of FBiH and Constitutional Court of BiH from the aspect of substantive law in relation to the issue of immunity of the appellants from criminal liability – former holders of executive power. In the present cases, I consider the appellants' right to immunity should have been decided on the basis of application of constitutional provisions being in force at a time of the appellants' exercise of their official functions in executive power bodies and, allegedly, commission of incriminated acts for which criminal proceedings have been pending against them in accordance with procedures prescribed under the Law on Immunity. Any different interpretation and manner in which lower courts applied mentioned law, in my opinion, would be wrong and arbitrary and could lead to arbitrariness. In the present cases, the appellants' right to a fair trial under Article II.3 (e) of the Constitution of BiH and Article 6 paragraph 1 of the Convention have been violated by retroactive application of the Law on Immunity of FBiH.

3.11. For the above stated reasons, I consider the appeals should have been granted in relation to violation of the right under Article II.3 (e) of the Constitution of BiH and Article 6 paragraph 1 of the Convention, the rulings of the Constitutional Court of FBiH and regular courts annulled and cases returned to regular courts for reconsideration in accordance with Article II.3 (e) of the Constitution of BiH and Article 6 paragraph 1 of the Convention and legal positions of the Constitutional Court presented in the Decision *U 24/0*3. However, due to opposite opinions I could not agree with decisions issued in mentioned cases by majority of votes of my esteemed colleagues, the judges of the Constitutional Court of BiH.

Case No. AP 163/03

Appeal of Mr. P. R. from Zenica against the Ruling of the Cantonal Court in Zenica, No. Gž-676/02 of 14 February 2003 and Ruling of the Municipal Court in Zenica, No. P-473/02 of 20 May 2002

DECISION ON ADMISSIBILIT
of 30 June 2004

RULING
of 22 April 2005

DECISION ON ADMISSIBILITY AND MERITS
of 22 April 2005

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 15 para 3, Article 16 para 2 item 14 and Article 59 para 2 item 1 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina - New amended text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), as a Grand Chamber composed of the following judges: Mr. Mato Tadić, President, Mr. Ćazim Sadiković and Mr. Miodrag Simović, Vice-Presidents and Ms. Valerija Galić and Mr. Jovo Rosić, having deliberated on the appeal of **Mr. P. R.** in case **No. AP 163/03,** at its session held on 30 June 2004 adopted the following

DECISION ON ADMISSIBILITY

The appeal lodged by Mr. P. R., against the Ruling of the Cantonal Court in Zenica, No. Gž-676/02 of 14 February 2003 and Ruling of the Municipal Court in Zenica, No. P-473/02 of 20 May 2002, is rejected as inadmissible for being premature.

Reasons

1. On 23 May 2003, Mr. P. R. ("appellant"), from Zenica filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against the rulings of the Cantonal Court in Zenica Gž-676/02 of 14 February 2003 and Municipal Court in Zenica P-473/02 of 20 May 2002.

2. The appellant brought an action before the Municipal Court in Zenica requesting the enforcement of a legally binding judgment of the Basic Court in Zenica, No. P-215/94 of 30 April 1994 and that the defendant, namely N. J., be ordered to reimburse the loan in the amount of 2,530 DEM with default interest payable from 11 March 1992 to the date of settlement in full, along with the costs of the civil proceedings. The appellant stated that considering the delay in the payment of debt and the time of bringing the action, the total debt claimed by his action amounted to 19,907.50 EURO, i.e. 38,818.00 KM.

3. The Basic Court in Zenica, by its ruling No. P-473/02 of 20 May 2002 rejected the action.

4. Deciding on the appellant's appeal, the Cantonal Court in Zenica granted the appellant's appeal by its ruling Gž-676/02 of 14 February 2003, annulled the ruling of the Municipal Court in Zenica P-473/02 of 20 May 2002 and referred the case back to the Municipal Court in Zenica for renewed proceedings which are still pending.

5. In examining the admissibility of the appeal, the Constitutional Court referred to the provisions of Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 15 para 3 and Article 16 para 2 item 14 of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure").

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

The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

Article 15 para 3 of the Constitutional Court's Rules of Procedure reads as follows:

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.

Article 16 para 2 item 14 of the Constitutional Court' Rules of Procedure reads as follows:

A request or appeal shall not be admissible in any of the following cases:

(...)

14. the appeal is premature;

6. According to the said provisions, an appeal may be filed only against a judgment whereby the proceedings in a certain case were concluded.

7. In the instant case, the proceedings on the subject of the appeal are still pending before the Municipal Court in Zenica.

8. In view of the provisions of Article 16 para 2 item 14 of the Constitutional Court's Rules of Procedure, under which the appeal will be rejected as inadmissible if it is

premature, the Constitutional Court decided, unanimously, as stated in the enacting clause of this Decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 59 para 3 and Article 71 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary, composed of the following judges: Mr. Mato Tadić, President, Mr. Miodrag Simović and Ms. Hatidža Hadžiosmanović, Vice-Presidents and Mr. David Feldman, Ms. Valerija Galić, Mr. Jovo Rosić and Ms. Constance Grewe, having deliberated on the request of **Mr. P. R.** in case No. **AP 163/03,** at its session held on 22 April 2005 rendered the following

RULING

The request filed by Mr. P. R. for review of the decision of the Constitutional Court of Bosnia and Herzegovina No. AP 163/03 of 30 June 2004 is granted.

Reasoning

1. On 9 July 2004 Mr. P. R. ("appellant"), from Zenica, filed a request with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") for review of the decision of the Constitutional Court, No. *AP 163/03* of 30 June 2004.

2. By ruling No. P-473/02 of 21 May 2002, the Municipal Court in Zenica ("Municipal Court") rejected the appellant's action requesting the payment of the debt. By ruling No. Gž-676/02 of 14 February 2003, the Cantonal Court in Zenica ("Cantonal Court") granted the appeal of the defendant, annulled the first instance ruling and referred the case back for new proceedings.

3. In addition, by ruling No. P-473/02 of 21 May 2002, upheld by the ruling of the Cantonal Court, No. Gž-676/02-1 of 14 February 2003, the appellant was fined 300KM for having offended the court in his written submission.

4. The Constitutional Court, by decision *AP 163/03* of 30 June 2004, rejected the appellant's appeal as premature as it held that the appeal was filed against the rulings

issued in civil proceedings in which the court decided on the appellant's action and not against the ruling fining the appellant for having offended the court.

5. However, in his request for review of the Constitutional Court's decision No. *AP 163/03* of 30 June 2004, the appellant alleged that the appeal was not filed against the rulings issued upon his claim within the action, but against the ruling fining him for offending the court.

6. In examining the admissibility of the request for review of its decision, the Constitutional Court invoked the provisions of Article 71 of the Rules of Procedure of the Constitutional Court (Constitutional Court's Rules of Procedure), which, in its relevant part, read as follows:

Article 71

(1) In case that a new fact has been discovered, which could have a decisive influence on the outcome of the dispute, and which when the decision was adopted, was unknown to the Court and could not have been reasonably known to the party, that party may submit a request for a review of that decision to the Court within six months from the time the party learned of that fact.

(2) The request referred to in paragraph 1 of this Article should refer to the decision which review is requested as well as the necessary information, which point to the fact that the conditions provided in paragraph 1 of this Article have been met. The evidence supporting the request shall be submitted with the request. The request and the documents shall be submitted to the Secretariat of the Court.

(...)

(4) A request for a review of a decision shall first be examined by the Chamber, which shall forward the proposal to the plenary Court.

(6) A review of a decision of the Court shall not be possible if more than one year elapsed since its adoption.

7. According to the quoted Article of the Constitutional Court's Rules of Procedure, in order to grant a request for review of a decision of the Constitutional Court it is necessary that new fact, which could have a decisive influence on the outcome of the dispute, which was unknown to the Court, which could not have been reasonably known to the party, be

discovered if the request was submitted within the time-limit of 6 months from the time the party learned of that fact but no longer than one year from the day of adoption of the decision the review of which is requested.

8. As the Constitutional Court's decision, the review of which is requested, was adopted on 30 June 2004 and the request was submitted on 9 July 2004, the Constitutional Court concludes that the request was submitted within the time limit set out in Article 71 paras 1 and 6 of the Constitutional Court's Rules of Procedure.

9. Pursuant to Article VI.4 of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding. As the request for review of a decision of the Constitutional Court questions the finality of the decision of the Constitutional Court, the possibility of reviewing its decisions, according to Article 71 of the Constitutional Court's Rules of Procedure, is a special procedure and must be subject to a close scrutiny.

10. In reviewing its final decision, the Constitutional Court is limited to review whether the facts *prima facie* are of such nature that they could have a decisive influence on the outcome of the dispute. In order to establish whether the facts on which the request for review is based are of such a nature to have a decisive influence on the outcome of the dispute, they must be considered in relation to the Constitutional Court's decision, the review of which is requested. In that respect, the Constitutional Court outlines that request itself is not sufficient to conclude that the facts presented in the request have a decisive influence. Moreover, the Constitutional Court may exclude the possibility that the facts at issue are of such a nature that they could have a decisive influence on the outcome of the dispute. The Constitutional Court is to decide whether the facts presented in the request raise a dilemma as to the conclusions stated in the Constitutional Court's decision the review of which is requested.

11. As to the whether the request in the case at hand is well-founded, the Constitutional Court, after having compared the request and the appeal dated 23 May 2003, concluded that the appeal was definitely filed against the ruling fining the appellant for having offended the court and not against the rulings deciding on his claim within the action. The Constitutional Court failed to take this into account when it adopted its decision. It follows that the appellant's request for review of the decision of the Constitutional Court, No. *AP 163/03* of 30 June 2004 is well founded.

12. For all the reasons mentioned above, at the proposal put forward by the Chamber of the Constitutional Court invoking the provisions of Article 71 of its Rules of Procedure, the Constitutional Court decided unanimously as stated in the operative part of this Ruling.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (2), Article 61 paras 1 and 2 and Article 64 para 3 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Miodrag Simović, Vice-President

Ms. Hatidža Hadžiosmanović, Vice-President

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Having deliberated on the appeal of **Mr. P. R.** in case No. **AP 163/03,**

adopted at the session held on 22 April 2005 the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. P. R. is hereby granted.

A violation of Article II.3 (e) and (h) of the Constitution of Bosnia and Herzegovina and Articles 6 and 10 of European Convention for Protection of Human Rights and Fundamental Freedoms is hereby established.

The rulings of the Cantonal Court in Zenica, No. Gž-676/02-1 of 14 February 2003 and Municipal Court in Zenica, No. P-473/02 of 20 May 2002 are hereby annulled.

The Municipal Court in Zenica is ordered to adopt new decision in accordance with Article II.3 (e) and (h) of the Constitution of Bosnia and

Herzegovina and Articles 6 and 10 of European Convention for Protection of Human Rights and Fundamental Freedoms in an expedited procedure.

The Municipal Court in Zenica is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within a time limit of 90 days from the date of delivery of this Decision, on the measures taken in accordance with Article 75 para 5 of the Rules of Procedure 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* and the *Official Gazette of the Republika Srpska.*

Reasons

I. Introduction

1. On 23 May 2003, Mr. P. R. ("appellant") from Zenica, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against the ruling of the Cantonal Court in Zenica ("Cantonal Court"), No. Gž-676/02-1 of 14 February 2003 and ruling of the Municipal Court in Zenica ("Municipal Court"), No. P-473/02 of 20 May 2002. On 10 March 2004, the appellant submitted a supplement to the appeal.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 21 paras 1 and 2 of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure"), on 17 February 2005 the Cantonal Court and Mr. B. J. ("defendant") were requested to submit their replies to the appeal.

3. On 2 March 2005, the Cantonal Court submitted its reply to the appeal. The defendant failed to submit his reply.

4. Pursuant to Article 25 para 2 of the Constitutional Court's Rules of Procedure, the Cantonal Court's reply was submitted to the appellant on 9 March 2005.

III. Facts of the case

5. The circumstances of the case as they appear from the appellant's statements and the documents submitted to the Constitutional Court, can be summarized as follows.

6. By ruling No. P-473/02 of 20 May 2002, the Municipal Court rejected the appellant's action in which he requested the collection of a debt.

7. By ruling No. Gž-676/02 of 14 February 2003, the Cantonal Court granted the appellant's appeal, annulled the first instance ruling and referred the case back to the first instance court for new proceedings.

8. In addition to the aforementioned first instance ruling, the Municipal Court, by the ruling No. P-473/02 of 21 May 2002, confirmed by the ruling of the Cantonal Court, No. Gž-676/02-1 of 14 February 2003, fined the appellant 300KM for having offended the court in his submission delivered to the court after having been invited to rectify errors in his action and to provide additional information. In his submission, the appellant alleged the following: "With regard to my action dated 1 April 2002 (which you, obviously, took for an April Fools' Day joke), I received ruling No. P-473/02 of 6 May 2002. In this ruling you are requesting that I correct errors in my action and submit a supplement to the action. I was astounded at that ruling. First of all, I have to say: "It's rubbish!" and I would like to add: "HEEEEEEEELP"! You should have given it more thought before taking such steps. However, it is obvious that you (*juristice*) failed to do that. As for my case, there is another legal interest which "*is screaming at you* ", that interest is so visible that it is unbelievable that you cannot see it. This is in fact what I am asking, whereas you want to convince me that I do not have such a right, you make my action conditional on some unfeasible corrections and supplements so it follows that the enforcement of the challenged ruling can be done only if I revoke my action or even if I renounce my claim within the action. What's more, I cannot get rid of the impression that this is just what they, consciously or unconsciously (I could not begin to guess) ask me to do. Such a behavior of the court, including the threat of rejecting my action, is unacceptable. The standpoint of the court according to which I have to submit an argumentation in support of my legal interest… as the action requests the establishment of the facts, is unbelievable at such an extent that I cannot even believe that they wrote such a thing. However, they did it. Here it is in black and white. It should be assumed that the jurists know this. However, now I hear that they do not. Awful! Finally, I ask you to consider seriously this submission and to conduct a regular legal procedure because none of the reasons you gave in your ruling was founded. If, in spite of all this I said, you still fail to do it, or you do another injudicious action, I

shall take it for a direct action done by the hurt "ego" of your court. Otherwise, I shall pretend I did not receive the aforementioned request of the court or I shall consider it an involuntary omission. I have a lot of other things to say, but I think that this would be enough."

IV. Relevant laws

9. **The Law on Civil Procedures of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina, Nos. 42/98 and 3/99*), in its relevant part, reads as follows:

Article 99 paragraphs 1 and 3

The civil court shall impose a fine of 300 convertible marks on the person who in his application offends the court, the party or other participants to the proceedings.

(...)

If the person fined cannot afford to pay the fine, the fine shall be replaced with imprisonment for a number of days determined by the court in proportion to the fine pronounced, but which number cannot exceed ten days.

V. Appeal

a) Statements from the appeal

10. The appellant complains that the challenged rulings imposing a fine on him violated his right to a fair under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), right to freedom of expression under Article II.3 (h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention, right to effective legal remedy under Article 13 of 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.

11. The appellant alleges that his surprise to learn that the court requested him to supplement and specify his action may not be considered as an offense of the court and that he did not use any words with an aim to infringe the court's authority. He holds that the offence was "made-up" and that it cannot be proven. The appellant alleges that the

words and expressions he used are suitable and not offensive at all. Finally, he proposes that his appeal be granted, and the challenged rulings be annulled as illegal.

b) Reply to appeal

12. In response to the appeal, the Cantonal Court alleges that the appellant's complaints about the violation of his right to a fair trial are unfounded as the challenged rulings were issued in accordance with Article 99 para 1 of the Law on Civil Procedure of Federation of Bosnia and Herzegovina (*Official Gazette of F BiH* No. 42/98 and 3/999) ("Law on Civil Procedure of F BiH") which entitles the court to impose a fine when the party offends the court or other parties to the proceedings. The Cantonal Court proposes that the appeal be dismissed as ill-founded.

VI. Admissibility

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

14. According to Article 15 para 3 of the Constitutional Court's Rules of Procedure, 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.

15. In the case at hand, the appeal is directed against the ruling of the Cantonal Court, No. Gž-676/02-1 of 14 February 2003, against which there are no further effective legal remedies available under the law. The appellant received the challenged ruling on 31 March 2003 and the appeal was filed on 23 May 2003, i.e. within the time limit of 60 days as laid down in Article 15 para 3 of the Constitutional Court's Rules of Procedure. Finally, the appeal has met the requirements set out in Article 16 para 2 of the Constitutional Court's Rules of Procedure.

16. In view of the provisions of Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 15 para 3 and Article 16 para 2 of its Rules of Procedure, the Constitutional Court established that the requirements with regard to the admissibility have been met in this case.

VII. Merits

17. The appellant complains that the challenged rulings violated his right to a fair trial under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, right to freedom of expression under Article II.3 (h) of the Constitution of Bosnia and Herzegovina and Article 10, right to an effective legal remedy under Article 13 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.

a) The right to a fair hearing

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

All persons *within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:*

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

Article 6 para 1 of the European Convention reads as follows:

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

18. The present appeal raises the question whether the decision of acting judge to pronounce pecuniary fine in accordance with Article 99 of the Law on Civil Procedures for the appellant's offence of the court is justified and whether the appellant's right to fair trial provided under Article 6 of the European Convention was violated.

19. The main objection presented by the appellant in his appeal refers to the fact that his submission delivered to the Municipal Court was found to be insulting and at the same time infringing the court's authority, without any grounds. This was the reason, in accordance with Article 99 of the Law on Civil Procedures, he was pronounced a fine. It arises from the case file that the Municipal Court imposed the fine in the amount of 300KM, finding that the appellant's submission (the content of the submission is presented under item 8 of this Decision), was offensive by its nature and at the same time infringing the authority of

the court. The Cantonal Court failed to reexamine the appellant's assertions and the first instance court's qualification that this was the offence and it accepted the lower instance court's arguments as valid. The fine was imposed by the same judge who conducted the proceedings regarding the payment of the debt. Therefore, it can be concluded that the appellant did not have the guarantees that he would be heard by an impartial court, which is one of the requirements of Article 6 of the European Convention.

20. The concept of independent and impartial court as defined under Article 6 para 1 of the European Convention implies that the court must be independent from the executive and legislative bodies as well as from the parties to the proceedings. Impartiality implies that the court must establish complete and true facts of the case and apply corresponding substantive law to the case at issue. There is no doubt that the court which acted in the present case met the independence requirements. However, when qualifying and examining the appellant's communication, the Constitutional Court notes that the courts failed to demonstrate necessary level of impartiality and objectivity, as they considered it established fact that the appellant's wording to the court was being offensive in nature. The appellant noted that it was not necessary to supplement the claim originally submitted and that he alleged in his communication that his claim was clear and precise enough and that it only should have been read more closely. The appellant claims that the court requested that "some corrections and amendments be done in his action, which was not possible, and it thus follows", according to the appellant, "that it would be best if the case at issue be resolved if he withdraws his action or to even if he withdraws his claim altogether". In the end, the appellant requests "the court to seriously consider his submission and to conduct a regular legal procedure, as he believes that "not a single reason from the rulings in question supports the requests of the court to supplement his claim".

21. Under the jurisprudence of the European Court for Human Rights in Strasbourg, in similar cases, during the evaluation of the oral statements and written submissions, the Court is to act with utmost caution. It is necessary that the court does not express subjective point of view, that it does not take any sides, that it does not prejudice a matter or that it does not express personal convictions. The impartiality of the court is supposed until proven otherwise. On the other hand, the court must have objective approach in its impartiality in the sense that it offers guarantees sufficient to exclude any legitimate doubt as to its impartiality. (European Court of Human Rights, *Sander v. United Kingdom*, 34129/96, item 22, CEDEH 2000-V, and *Piersack v. Belgium*, decision of 1 October 1982, Series A No. 53, item 30).

22. Under the provisions of the Law on Civil Procedures, offending the court, party or other participant in the procedure is qualified as punishable offense for which a fine of 300.00 KM is imposed. Therefore, the present offense is not a criminal offense there is no "criminal charge" within the meaning of Article 6 of the European Convention but the offense and sentence which have disciplinary character. However, this does not determine the applicability of Article 6 para 1 of the European Convention. The European Court of Human Rights has held that "criminal charge" is an autonomous concept - that is to say, an act which is classified in national law as a regulatory offence may none the less be regarded as giving rise to a criminal charge for the purposes of Article 6 para 1, if the essential character of the legislative scheme is criminal, rather than civil, in nature -in order to ensure that a State cannot avoid the obligation to provide a fair hearing merely by classifying an act as non-criminal in its legislation. (European Court of Human Rights, the *Engel v. the Netherlands (No. 1)* judgment of 8 June 1976, Series A No. 22; the *Oztürk* judgment of 27 May 1984, Series A No. 73, paragraphs 46-50; the *A.P., M.P. and T.P. v. Switzerland* judgment of 19 August 1997, Reports 1997-V; the *Lauko v. Slovakia* judgment of 2 September 1998, Reports 1998-VI p. 2492 at § 56; the *Janosevic v. Sweden* judgment of 23 July 2002, § 65.). However, all these conditions and requests do not mean that the court can decide partially on the sentence disregarding the fact whether the appellant, in written or oral form, insulted the court and infringed upon its authority, or that it previously failed to complete the analysis of the text and then eventually pronounce its sentence. After the appellant's text is analyzed, it can be established that this text cannot be qualified as being disrespectful of the court since it was not established that this text prevents the court from acting with the goal to prevent or punish the behavior that obstructs, causes damage or abuse the justice in any other way in terms of the case or generally.

23. Taking into account the allegations contained in the appellant's submission, it is obvious that the court disregarded the appellant's constitutional rights when it applied the provisions of the Law on Civil Procedures to the facts which were not ascertained in an impartial and objective manner. The court therefore misapplied the law. The misapplication of the law is reflected in fact that the ironical allegations expressed by the appellant were regarded by the court as an offence undermining the authority of the court. The Constitutional Court holds that the words in writing which the appellant addressed to the court may not be regarded as an offence as their aim was the clarification of the dispute at issue and not undermining the court's authority. Finally, the Constitutional Court points to the fact that the court which fined the appellant was the one which was offended by the appellant's submission. This is sufficient to say that there is a justified doubt as to the court's impartiality. A court cannot have any personal interests or reasons in assessing the

facts nor can it assess whether a text or words are offensive if the words or text set forth in the allegations concern the court itself. For these reasons a court which brought "personal feelings" or a "feeling" of being offended or understanding that it was personally affected by alleged offense caused to the court may not be considered sufficiently impartial or objective (European Court of Human Rights, *Kyprianou v. Cyprus,* Decision of 27 January 2004, Application No. 73797/01, paragraphs 31-35).

24. For the aforesaid reasons, the Constitutional Court holds that the appellant's right to a fair hearing under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention has been violated.

b) Freedom of expression

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

All persons within the territory *of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:*

a. Freedom of expression.

Article 10 of the European Convention reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

25. Article 10 para 2 of the European Convention requires that every violation of the freedom to expression must be "prescribed by law", the reason being that the person must have possibility to predict with certainty the consequences of his/her actions. This represents the protection against arbitrariness in imposing the limitations on freedom to

expression. The same Article provides that every limitation on the freedom of expression is “necessary in a democratic society” in order to protect certain interests. These interests include, *inter alia,* the maintenance of authority and impartiality of the judiciary. Therefore, even when the aim of restrictions is the protection of the authority and impartiality of the judiciary, it must be reduced to an extent which is necessary to a democratic society. This means that the restriction of the rights must not exceed “necessary” in order to protect certain interest. A national law which would allow a disproportional prison punishment or fine for a mild peace of criticism addressed to the judiciary probably would not be regarded as a necessary measure in a democratic society by the court and therefore would not be allowed according to Article 10 paragraph 2 of the European Convention. Essentially, it is important that the aim is clear, which means that the state must be in position to indicate clearly the reasons of disturbance of the right and must indicate the manner in which such a disturbance contributed to the achievement of the aim, i.e. protection of the authority and impartiality in the case at hand.

26. In the case at hand the question is whether the appellant’s submission to the court represents the violation of the freedom to expression and violation of the authority and impartiality of the court or the appellant’s submission in writing may not be interpreted as being a violation of the constitutional rights, i.e. protected values. The appellant is of the opinion that that his submission addressed to the court did not offend the authority and impartiality of the court in any way as being covered by Article 10 of the European Convention. The appellant alleges that the court interpreted his words in a too severe manner and that his aim was not to offend the court but to draw the court’s attention to his request and to make the court read more attentively his request as it contained all what such a document ought to contain in order to act upon it. The appellant alleges that he had not the intention to offend the court regardless of the fact that his submission was unusual in terms of communication between the parties and the court and alleges that his submission is ironic rather than offensive.

27. The Constitutional Court must examine this interpretation and establish whether the appellant’s constitutional right to freedom of expression under Article 10 of the European Convention was violated. Taking into account that Article 10 of the European Convention prescribes limitations on freedom of expression in order to keep dignity and authority of the court, the Constitutional Court holds that the appellant’s allegations are ironic in nature with the elements of critical approach and may not be regarded as an offence caused to the court since they were expressed within the scope of tolerance imposed by a democratic society.

28. The Constitutional Court notes that regular courts did not objectively analyze content of the appellant's text to a satisfactory extent. It can be hardly established through linguistic and legal analysis that the text in question really contains allegations of offensive content with aim of infringing the authority of the court. Referring to new reading of his text since it contains all the elements for taking legal actions, even if stated ironically, is not sufficient basis to conclude the appellant has violated the right to freedom of expression and infringed the boundaries set out under Article 10 para 2 of the European Convention or insulted the court. Moreover, the fact that the appellant was fined and was not given an opportunity to be heard means not only that he was deprived the opportunity to present facts and evidence to his benefit but it also constitutes an interference with the freedom of expression secured to the appellant by the Constitution of Bosnia and Herzegovina and European Convention. Therefore, the Constitutional Court holds that the appellant's right to freedom of expression under Article II.3 (h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Court has been violated in the present case.

c) Other allegations

29. The Constitutional Court finds, in the light of conclusion made in relation to alleged violations of Articles 6 para 1 and 10 of the European Convention, it is not necessary to consider other allegations of the appellant as to violation of the right to effective legal remedy under Article 13 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.

VIII. Conclusion

30. The appellant's rights to a fair trial and the right to freedom of expression under Articles 6 and 10 of the European Convention have been violated since regular courts incompletely and wrongfully established factual background when determining fine and misapplied substantive law qualifying his submission as insult of the court and infringing its authority.

31. The Constitutional Court concludes that the appellants' right to a fair trial and right to freedom of expression under Article II.3 (e) and (h) of the Constitution of Bosnia and Herzegovina and Articles 6 para 1 and 10 of the European Convention have been violated.

32. Pursuant to Article 61 paras 1 and 2 and Article 64 para 3 of the Constitutional Court's Rules of Procedure, the Constitutional Court, unanimously, decided as stated in the enacting clause of this decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 288/03

Appeal Ms. N. L., Ms. S. L. and Mr. J. L. from Banja Luka for the failure to enforce the ruling of the Basic Court in Banja Luka, No. I-463/02 of 12 April 2002

DECISION ON ADMISSIBILITY AND MERITS
of 17 December 2004

RULING
of 22 April 2005

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 59 paragraph 2 item 2 and Article 61 paragraphs 1 and 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina - New Amended Text (*Official Gazette of Bosnia and Herzegovina*, No. 2/04), in Plenary and composed of the following judges;

Mr. Mato Tadić, President,

Mr. Ćazim Sadiković, Vice-President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović,

Mr. David Feldman, Judge,

Ms. Valerija Galić, Judge,

Mr. Jovo Rosić, Judge,

Having considered the appeal of **Ms. N. L., Ms. S. L. and Mr. J. L.**, in case No. **AP 288/03**:

At the session held on 17 December 2004, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Ms. N. L., Ms. S. L. and Mr. J. L. is hereby granted.

A violation of Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of European Convention for Protection of Human Rights and Fundamental Freedoms is hereby established.

This Decision shall be submitted to the Government of the Republika Srpska to have the protection of appellants' constitutional rights secured in accordance with this Decision.

The Government of the Republika Srpska is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months from the delivery of this Decision, on the measures taken, in accordance with Article 75 paragraph 5 of the Rules of Procedure 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* and the *Official Gazette of the Republika Srpska.*

Reasons

I. Introduction

1. On 8 October 2003, Ms. N. L., Ms. S. L. and Mr. J. L. ("the appellants") from Banja Luka, represented by Mr. S. M., a lawyer practicing in Banja Luka, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") for the failure to enforce the ruling of the Basic Court in Banja Luka ("Basic Court"), No. I-463/02 of 12 April 2002.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 21 paras 1 and 2 of the Rules of Procedure of the Constitutional Court, the Basic Court and the participant in the proceedings, the Military Attorney's Office of the Republika Srpska ("Military Attorney's Office"), were requested on 5 May 2004 to submit their replies to the appeal.

3. The Basic Court submitted its reply to the appeal on 24 May 2004 and the Military Attorney's Office on 3 June 2004.

4. Pursuant to Article 25 para 2 of the Constitutional Court's Rules of Procedure, the Basic Court's and Military Attorney's Office's replies were forwarded to the appellant on 6 December 2004.

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 can be summarized as follows:

6. The appellants brought an action against the Army of the Republika Srpska for compensation of non-pecuniary damages they sustained due to the fact that their husband and father was killed during the war in Bosnia and Herzegovina as a reserve soldier of the Army of the Republika Srpska ("Army of RS").

7. The Basic Court issued a judgment No. P-3775/98 of 26 August 1999, which was upheld by a judgment of the County Court in Banja Luka No. Gž-1014/00 of 23 November 2001 whereby the Army of RS was obliged to pay the appellants a total amount of 24,000.00 KM by way of compensation for non-pecuniary damages due to the mental sufferings as well as the amount of 2,000.00KM by way of compensation for pecuniary damages representing the costs of the funeral.

8. The appellants filed a proposal for enforcement of the said judgment of 7 February 2002. By its ruling No. I-463/03 of 12 April 2002, the Basic Court authorized the requested enforcement. The motion of the Army of RS requesting the postponement of the authorized enforcement was dismissed by a ruling of the Basic Court No. I-463/02 of 15 May 2003. The legally binding ruling authorizing enforcement was submitted to the debtor on 14 March 2003. The enforcement has not been carried out up to date.

IV. Relevant laws

9. **Law on Postponement of Enforcement of Court Decisions on Payment of Compensation for Pecuniary and Non-Pecuniary Damages Caused by the War Activities and on the Basis of Frozen Bank Accounts Payable from the Republika Srpska Budget** (*Official Gazette of the Republika Srpska,* No. 25/02 and 51/03) reads as follows:

Article 1

This Law shall postpone the enforcement of the court decisions on payment of compensation for pecuniary and non-pecuniary damages caused by the war actions and for payment of the old foreign-currency savings payable from the budget of Republika Srpska as well as the other court decision, out-of-court settlements and other administrative acts for the claims from the period of war actions and adopted until the date when this law entered into force.

Article 2 para 2

Pecuniary and non-pecuniary damages caused by the war activities imply the damages caused due to the war activities in the Republika Srpska in the period from 20 May 1992 to 9 June 1996.

10. The **Law on Temporary Postponement of Enforcement of the Claims Payable from the Republika Srpska Budget** (*Official Gazette of the Republika Srpska* No. 110/03 and 63/04)

Article 1

This Law shall temporary postpone the enforcement of the claims payable from the Republika Srpska budget for the internal public debt.

Article 2 para 1 lines 1 and 4

Internal debt shall imply the public debt of the Republika Srpska budget towards legal and physical person occurred until 31 December 2002 as follows:

- claims occurred during the war and immediate war danger in the period between 1992 until 19 June 1996

- enforced court decision and other act payable from the budget of the Republika Srpska.

Article 3 para 1

Temporary enforcement based on this law, shall be applied until the adoption of the law which shall regulate the manner of settlement of claims payable from the Budget of the Republika Srpska for the internal debt and no later than 31 December 2004.

11. The **Law on Establishment and Manner of Settlement of the Internal Debt of the Republika Srpska** (*Official Gazette of the Republika Srpska* No. 63/04 of 15 July 2004)

Article 18

Pecuniary and non-pecuniary damages occurred during the war action from 20 May 1992 to 19 June 1996 in the amount of 600.00 million KM shall represent the compensation for the damages to the legal and physical persons whose right to compensation for

pecuniary and non-pecuniary damages was acknowledged by the legally binding court judgment or out-of-court settlements as well as to the physical and legal persons whose right to damage compensations shall be regulated by the special law.

Article 19 paras 1 and 2

Manner and time limits for verification of the individual claims for the pecuniary and non-pecuniary damages occurred during the war action in the period between 20 May 1992 and 19 June 1996 shall be regulated by special law.

The Court shall be obligated to submit to the Ministry of Finances all legally binding court judgments and other court decisions referring to the pecuniary and non-pecuniary damages referred to in Article 18 of this Law.

Article 21

Obligations referred to in Article 18 of this Law after completed verification and no later than 31 December 2007 shall be settled by the issuance of the bonds under the following terms:

1. with the maturity time limit up to 50 years

2. with payment in ten equal yearly installments starting nine years before the final date of maturity.

3. with no interest rate

Article 23

The Law on Temporary Postponement of the Enforcement of Claims for Enforceable Decisions payable from the Republika Srpska Budget (Official Gazette of the Republika Srpska No. 110/03) and Law on Amendments to the Law on Temporary Postponement of Enforcement of the Claims Payable from the Republika Srpska Budget adopted by the People's Assembly of the Republika Srpska on 29 June 2004 shall cease to be in force by entering into force of this Law.

12. The **Law on Enforcement Proceedings** (*Official Gazette of SFRY* Nos. 20/78, 6/82, 74/87, 57/89, 20/90, 27/90 and 35/91 and *Official Gazette of the Republika Srpska* Nos. 17/93 and 14/94).

Article 39 para 2

Ruling on enforcement of monetary claims shall be submitted to the debtor and the ruling on enforcement from the funds of the debtor's account shall be submitted to the organization unit in charge of the accounts payable and which has those funds.

13. The **Law on Enforcement Proceedings** (*Official Gazette of Republika Srpska* No. 59/03, entered into force on 1 August 2003).

Article 170

(1) In case the bank finds that there are legal and other obstacles fro the enforcement based on

the provisions of Chapter XII of this Law, it shall suspend the ruling on the enforcement, freeze the funds of the party and inform the court on the obstacles it encountered.

(2) If the obstacles are of permanent nature, the court shall terminate the proceedings and in the event of other reasons it shall inform the person seeking the enforcement and the bank on the further actions.

Article 232

The provisions of the Law on Enforcement Proceedings (Official Gazette of SFRY No. 20/78, 6/82, 74/87, 57/89, 20/90 and 35/91 and Official Gazette of RS No. 17/93 and 14/94) shall cease to be in force by entering into force of this Law.

Article 229

The procedure of enforcement that began as of the date when this law entered into force shall be finalized under the provisions of this Law.

V. Appeal

a) Assertions from the appeal

14. The appellants hold that there has been a violation of their constitutional right to a fair trial under Article II.3 (e) of the Constitution of BiH and Article 6 paragraph 1 of European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") due to the failure of enforcement of the Basic Court's ruling

No. I-463/02 of 12 April 2002 which was submitted on 14 March 2003 to the Ministry of Finances of the Republika Srpska ("Ministry of Finances") for enforcement.

b) Reply to the appeal

15. The Basic Court claims that it is not responsible for any violation of the appellants' constitutional rights considering that it authorized the enforcement in question and submitted the ruling on enforcement to the Ministry of Finances.

16. In its reply to the appeal, the Military Attorney's Office also claims that it is not responsible for a possible violation of the appellants' constitutional rights and that the ruling in question is not to be enforced on the basis of the Law on Postponement of Enforcement of the Court Decisions payable from the Republika Srpska budget.

VI. Admissibility

17. 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.

18. Pursuant to Article 15 paragraph 3 of the Constitutional Court's Rules of Procedure, 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.

19. In the context of the Constitutional Court's appellate jurisdiction under Article VI.3 (b) of the Constitution of BiH, the expression "judgment" must be interpreted widely. That expression should include not only all kinds of decisions and rulings, but also the failure to adopt the decision when such failure is found to be unconstitutional. (see the Constitutional Court's decision No. *U 23/00* of 2 February 2001, published in the Official Gazette of BiH, No. 10/01). The Constitutional Court emphasizes that according to Article II.1 of the Constitution of BiH, Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms and, according to Article II.2 of the Constitution of BiH, the rights and freedoms set forth in the European Convention and its Protocols shall apply directly in Bosnia and Herzegovina.

20. The Constitutional Court therefore interprets the appeal considering that the appellants invoke their right under Article 6 paragraph 1 of the European Convention which contains the right of access to a court.

21. Invoking the jurisprudence of the European Court for Human Rights with respect to the issue of exhaustion of legal remedies, the Constitutional Court emphasizes that in the application of the rules under Article 15 para 3 of the Constitutional Court's Rules of Procedure that rule must be applied with certain degree of flexibility and without an excessive formalism (see the European Court of Human Rights *Cardot v. France* judgment of 19 March 1991, Series A, No. 200, paragraph 34). The Constitutional Court reiterates that the exhaustion of legal remedies rule possible under the law is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case (see the European Court for Human Rights *Van Oosterwijck v. Belgium* judgment of 6 November 1980; Series A, No. 40, para 35). That, among other things, means that one must not only take into consideration the existence of the formal legal remedies in the legal system but also the complete legal and political context as well as the personal circumstances of the appellant.

22. Having regard to the mentioned circumstances, the Constitutional Court notes that in Bosnia and Herzegovina and in the present case the Republika Srpska, there is no effective legal remedy which would make it possible for the appellants to complain of a failure to enforce the legally binding ruling authorizing enforcement of the court judgment. The Constitutional Court finds that the omissions in the organization of the judicial system of the entity, or the state, must not influence the respect for the individual rights and freedoms as established by the Constitution of BiH as well as the requirements and guarantees set forth in Article 6 of European Convention.

23. The Constitutional Court emphasizes that an excessive burden must not be placed on the individual in finding the most efficient way in which to realize his/her rights. Moreover, the Constitutional Court notes that one of the basic postulates of the European Convention is that the legal remedies that are available to the individual must be easily accessible and understandable and that the failure in the organization of the legal and court system of the state that threatens the protection of the individual rights cannot be assigned to the individual. In addition, the state accordingly has the obligation to organize its legal system so as to allow the courts to comply with the requirements and conditions of the European Convention (see the European Court of Human Rights *Zanghi v. Italy* judgment of 19 February 1991, Series A, No. 194, paragraph 21).

24. In the present case, the Constitutional Court finds that this case concerns a failure to enforce the legally binding ruling authorizing the enforcement of the court judgment as well as the fact that the appellants did not have an effective legal remedy whereby they would obtain the requested enforcement.

25. In view of the aforesaid, the Constitutional Court finds that the appeal in question is admissible.

VII. Merits

26. The appellants find that the failure of enforcement of the ruling on enforcement of the court judgment gave rise to a violation of their right to a fair trial under Article II. 3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

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

Article 6, paragraph 1 of the European Convention reads as follows:

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

(...)

27. The Constitutional Court notes that the appellants see the violation of the right to a fair trail in the failure of enforcement of the court decision by which they were awarded pecuniary and non-pecuniary compensation. With regard to the appellants' cited assertions, the Constitutional Court invokes the case law of the European Court of Human Rights (see the European Court of Human Rights *Hornsby v. Greece* judgment of 19 March 1997, paragraph 40) according to which Article 6 para 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal;

in this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see the European Court of Human Rights *Philis v. Greece* judgment of 27 August 1991, Series A-209, p. 20, paragraph 59). However, that right would be illusory if the local legal system of the contractual state allows that final, enforceable court decisions are not enforced, to the detriment of one of the parties. It would be unacceptable that Article 6 of European Convention needs to prescribe in detail the procedural guarantees given to the parties – proceedings which are fair, public and expedited – without the protection of enforcement of the court decision; interpreting Article 6 of European Convention so to exclusively concern the conducting of the proceedings would likely lead to the situations which are incompatible with the principles of rule of law which the Contracting states undertook when they ratified the Convention (see the European Court of Human Rights *Golder v. United Kingdom*, judgment of 7 May 1974, Series A-18, pages 16-18, paragraphs 34-36). Enforcement of the judgment adopted by any court must therefore be seen as the integral part of the "hearing" within the meaning of Article 6 of the European Convention. In addition, the European Court of Human Rights already accepted that principle in cases concerning the length of the proceedings (see the European Court of Human Rights *De Pede v. Italy and Zappia v. Italy* judgment of 26 September 1996, Reports on Judgments and Decisions 1996-IV, pages 1383-1384, paragraphs 20-24 and pages 1410 and 1411, paragraphs 16-20).

28. The Constitutional Court holds that the mentioned position of the European Court of Human Rights may be applied to the present case, considering that it is also related to the failure of enforcement of legally valid court decisions. The Constitutional Court adds that the European Court of Human Rights also emphasized in case *Hornsby* that *the effective protection of a party to such proceedings and the restoration of legality presuppose the obligation on the administrative authorities' part to comply with a judgment of that court* (see paragraph 41 of the decision). Finally, the Constitutional Court recalls that in the instant case the European Court for Human Rights decided that Article 6 para 1 of European Convention has been violated due to the authorities' failure to comply with the enforcement of the court judgment.

29. In addition to the jurisprudence of the European Court of Human Rights, there are a number of the decisions which were adopted by the institutions founded in accordance with Annex 7 of the General Framework Agreement for Peace in BiH, which concern the non-compliance with the decisions of the courts in Bosnia and Herzegovina. For example, the Human Rights Chamber for Bosnia and Herzegovina, in the *Blentić v. the Republika Srpska* case (see case No. CH/96/17 decision on admissibility and merits delivered on

3 December 1997) found a violation of the right to a fair trial because *the police took no action despite their obligation to assist in enforcement of the court decision*. The Ombudsmen for Human Rights for BiH in the *B.D. v. Federation of BiH* case (see case No. (B) 746/97), Reports of 24 March 1999) found a violation of Article 6 of the European Convention in the fact that *the authorities did not enforce the judgment and order for enforcement issued by the Basic Court in Tuzla for more than two years*. Moreover, the Ombudsmen for Human Rights for BiH in the *A.O. v. the Republika Srpska* case (see case No. (B) 60/96, Reports of 13 April 1999) found a violation of Article 6 paragraph 1 of the European Convention in *failure of Basic Court from Banja Luka to enforce the final and binding decision, which was issued by the Commission founded under Annex 7 in the applicant's favor*.

30. In view of the aforementioned, it is evident that there is an established case law with respect to the fact that the failure to enforce the legally binding decisions constitutes a violation of the right to a fair trial. It is undisputable in the instant case that the appellants are in possession of a legally valid judgment, the enforcement of which was authorized by a ruling of the Basic Court. Moreover, it is undisputable that the judgment in question has not been enforced and the failure of its enforcement is being justified by adoption of the Law on Temporary Postponement of Enforcement of Court Decisions Payable from the Budget of the Republika Srpska (Official Gazette of the Republika Srpska No. 110/03) which was in force until adoption of the Law on Establishment and Manner of Settlement of Internal Debt of the Republika Srpska. The Constitutional Court further notes that the court failed to act in accordance with Article 170 of the Law on Enforcement Proceedings according to which (...) (*if the obstacles are of permanent nature) the court shall terminate the proceedings and in the event of other reasons it shall inform the person seeking the enforcement and the bank on the further actions.*

31. The Constitutional Court holds that the administrative authorities must comply with the legally valid court judgments. Moreover, the Constitutional Court points out that the state, in principle, cannot adopt laws whereby it will prevent enforcement of legally valid court decisions, as it would be in contravention with the principle of the rule of law under Article I.2 of the Constitution of BiH and with the right to a fair hearing under Article II.3 (e) of the Constitution of BiH and Article 6 para 1 of the European Convention.

32. Naturally, one cannot challenge the right of the state to adopt laws whereby certain human rights are revoked or limited but only in cases when such limitation is provided by the European Convention, the provisions of which regulate limitations of certain rights, such as the right to property etc. However, the European Convention does not afford the

right to the member states to adopt laws by which it will prevent enforcement of legally valid court decisions adopted in accordance with Article 6 of the European Convention. In the present case, the law itself prevents the enforcement of the legally binding court decisions, which are related to the established claims based on pecuniary non-pecuniary compensation that occurred during the war in Bosnia and Herzegovina. As regards the adoption of the aforementioned law, the Constitutional Court finds that no reasons for such deviation from the obligations taken over by the ratification of the European Convention are stated in Article 15 of the European Convention.

33. Should the mentioned law be seen as an interference by the state with certain property rights of citizens (considering that it is directed towards the suspension of enforcement of monetary claims) there should be a fair balance struck between the requirements of the general interest of the community and the need for the protection of the fundamental rights of an individual, i.e. there should be a reasonable proportionality between the means employed and the aim sought to be achieved. Moreover, such a law should be adopted in the public interest, pursuing legitimate goals and meeting the already mentioned principle of proportionality. The necessary balance, i.e. the proportionality between the public interest of the community and fundamental rights of the individual shall not be established if *certain persons must bear an excessive burden* (see the European Court of Human Rights *Spörrong and Lonnorth v. Sweden* judgment of 23 September 1982, Series A-52, pages 26-28, paragraphs 70-73).

34. When these views are taken in connection with the cited Law which established the manner of settlement of the internal debt of the Republika Srpska, one comes to the conclusion that such law, in addition to the fact that its adoption is questionable within the meaning of the principles under the European Convention, also violates the principle of proportionality with respect to the fundamental rights of individuals. Regardless of the evident public interest of the state to adopt this law, due to the enormous debt which was incurred as the result of the pecuniary and non-pecuniary damages caused by the war actions and which is contained in Article 18 of the Law in question, the Constitutional Court holds that by adoption of such law *an excessive burden was placed on the individuals* and therefore the requirement of proportionality between the public interest of the community and fundamental rights of individuals was not met. The Constitutional Court sees the excessive burden which is placed on the individuals in the fact that Article 21 paragraph 1 of this Law provides that the claims which were established in the legally binding court judgments shall be settled *by issuing of bonds with the maturity date of up to 50 years*

which justifiably imposes the question whether any of the citizens who will possess such type of bonds will live to charge these bonds and thus realize their rights. Moreover, the challenged law provides that the obligations shall be settled without interest rates being charged, which, considering the mentioned grace period, surely means that the amounts to be paid out to the individuals shall be considerably decreased.

35. The Constitutional Court concludes that in the present case there has been a violation of the right to a fair hearing under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

VIII. Conclusion

36. Having regard to Article 61 paras 1 and 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court unanimously decided as stated in the operative part of this decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 59 para 3 and Article 71 of the Rules of Procedure of the Constitutional Court - New Amended Text (*Official Gazette of Bosnia and Herzegovina*, No. 2/04), in Plenary, composed of the following judges: Mr. Mato Tadić, President, Vice-Presidents, Mr. Miodrag Simović and Ms. Hatidža Hadžiosmanović and judges Mr. David Feldman, Ms. Valerija Galić, Mr. Jovo Rosić and Ms. Constance Grewe, having deliberated on the appeal of Military Attorney's Office of the Army of the Republika Srpska, in case No. **AP 288/03**, at its session held on 22 April 2005, adopted the following:

RULING

The request of the Military Attorney's Office of the Army of the Republika Srpska for review of the Decision of the Constitutional Court of Bosnia and Herzegovina No. AP 288/03 of 17 December 2004 is dismissed as ill-founded.

Reasons

1. On 7 March 2005, the Military Attorney's Office of the Army of the Republika Srpska ("Attorney's Office") submitted to the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") a request for review of the decision of the Constitutional Court, No. AP 288/03 of 17 December 2004.

2. By decision No. AP 288/03 of 17 December 2004, the Constitutional Court granted an appeal filed by Ms. N. L., Ms. S. L. and Mr. J. L. and found the violation of the right to a fair trial under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") for failure to enforce the legally valid judgment of the Basic Court in Banja Luka, No. P-3775/98 of 26 August 1999 ordering the Army of the Republika Srpska to pay the appellants the amount of 24,000KM as a compensation for non-pecuniary damage, i.e. mental pain and suffering caused by the death of their father

and husband during the war in Bosnia and Herzegovina and to pay them the amount of 2,000KM as pecuniary damage compensation for the costs of funeral. The aforementioned valid judgment was not enforced as the Law on Temporary Deferral of Enforcement of the Decisions payable from the budget of the Republika Srpska entered into force (*Official Gazette of the Republika Srpska*, No. 110/03).

3. In decision AP 288/03, the Constitutional Court concluded the following:

The Constitutional Court holds that by adoption of such law "an excessive burden was placed on the individuals" and therefore the requirement of proportionality between the public interest of the community and fundamental rights of individuals was not met. The Constitutional Court sees the excessive burden which is placed on the individuals in the fact that Article 21 paragraph 1 of this Law provides that the claims which were established in the legally binding court judgments shall be settled "by issuing of bonds with the maturity date of up to 50 years" which justifiably imposes the question whether any of the citizens who will possess such type of bonds will live to charge these bonds and thus realize their rights. Moreover, the challenged law provides that the obligations shall be settled without interest rates being charged, which, considering the mentioned grace period, surely means that the amounts to be paid out to the individuals shall be considerably decreased. The Constitutional Court concludes that in the present case there has been a violation of the right to a fair hearing under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

4. The Attorney' Office alleges in its request for review that the regulations which were the basis for deferring the enforcement of the legally valid judgments payable from the budget of the Republika Srpska were adopted for justified economic reasons, enormous debt and impossibility of enforcement chargeable to the budget of the Republika Srpska and pursuant to the recommendations of the International Monetary Fund. Moreover, the Attorney's Office invokes the case-law of the former Human Rights Chamber for Bosnia and Herzegovina according to which the Republika Srpska was ordered to pass special laws regulating the issue of war damage compensation. The Republika Srpska complied with it by passing the requested laws. The Attorney's Office alleges that the Constitutional Court decided differently from the Human Rights Chamber in a case with the identical situation. Moreover, the Attorney's Office alleges that the appeal in the case at hand should have been rejected in accordance with Article 16 para 2 item 7 of the Rules of Procedure of the Constitutional Court as the regulations which were the basis for suspension of the execution of the legally valid judgments proved that the appeal was manifestly (*prima*

facie) ill-founded. Finally, the Attorney's Office alleges the case at hand engaged the appellate competence of the Constitutional Court and that the Constitutional Court could not review the compatibility of the law with the Constitution of Bosnia and Herzegovina as the compatibility of a law with the Constitution of Bosnia and Herzegovina may be reviewed in proceedings initiated by an authorized person.

5. In examining the admissibility of the request for review of the decision of the Constitutional Court, the Constitutional Court invoked the provisions of Article 71 of the Rules of Procedure of the Constitutional Court, which, in its relevant part, read as follows:

Article 71

(1) In case that a new fact has been discovered, which could have a decisive influence on the outcome of the dispute, and which when the decision was adopted, was unknown to the Court and could not have been reasonably known to the party, that party may submit a request for a review of that decision to the Court within six months from the time the party learned of that fact.

(2) The request referred to in paragraph 1 of this Article should refer to the decision which review is requested as well as the necessary information, which point to the fact that the conditions provided in paragraph 1 of this Article have been met. The evidence supporting the request shall be submitted with the request. The request and the documents shall be submitted to the Secretariat of the Court.

(...)

(4) A request for a review of a decision shall first be examined by the Chamber, which shall forward the proposal to the plenary Court.

(6) A review of a decision of the Court shall not be possible if more than one year elapsed since its adoption.

6. According to the quoted Article of the Rules of Procedure of the Constitutional Court, in order for the Constitutional Court to grant a request for review of its decision, it is necessary that a new fact is discovered, one that could have a decisive influence on the outcome of the dispute, which was unknown to the Court, which could not have been reasonably known to the party and if the request was submitted within the time-limit of 6

months from the time the party learned of that fact but no longer than one year from the day of adoption of the decision whose review is requested.

7. As the Constitutional Court's decision, the review of which is requested, was adopted on 17 December 2004 while the request was submitted on 7 March 2005, the Constitutional Court concludes that the request was filed within the time limit set out in Article 71 para 1 of the Rules of Procedure of the Constitutional Court.

8. According to Article VI.4 of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding. As the request for review of a decision of the Court disputes the finality of the decision of the Constitutional Court, the possibility of reviewing the decisions of the Constitutional Court, according to Article 71 of the Rules of Procedure the Constitutional Court, is a special procedure and must be subject to a close scrutiny.

9. In reviewing a final decision of the Constitutional Court, the Constitutional Court is limited to review whether the facts *prima facie* are of such nature that they could have a decisive influence on the outcome of the dispute. In order to establish whether the facts on which the request for review is based are of such a nature to have a decisive influence on the outcome of the dispute, they must be considered in relation to the Constitutional Court's decision the review of which is requested. In that respect, the Constitutional Court outlines that request itself is not sufficient to conclude that the facts presented in the request have a decisive influence.

10. Constitutional Court emphasizes that this decision, the request of which is requested, did not go into reviewing the constitutionality of the Law on Establishment and Manner of Settling the Internal Debt of the Republika Srpska (*Official Gazette of Republika Srpska* No. 63/04) but the case at hand was analyzed, based on the appellate jurisdiction arising under Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, from the aspect of the proportionality, i.e. striking the fair balance between the general interest of community and the need for protecting the fundamental rights of the individual in the event when the adoption of law causes the delay in enforcement of the legally binding decisions.

11. As to whether the request at hand is well-founded, the Constitutional Court concludes that the request is based on the facts and evidence which had been examined during the procedure of adoption of the challenged decision and which the Constitutional Court took into consideration when having decided on the admissibility and merits of the appeal.

The allegations pointing to the economic reasons for passing the regulations deferring the enforcement of the legally valid court decisions, case-law of the Human Rights Chamber for Bosnia and Herzegovina and complaints about the fact that the appeal is manifestly ill-founded and the lack of competence to review the compatibility of the law with the Constitution of Bosnia and Herzegovina were known to the Constitutional Court at the time of adoption of the challenged decision and therefore do not represent the facts which could be the basis for reviewing the decision of the Constitutional Court.

12. Having regard to the aforesaid reasons, the Constitutional Court holds that the appellant did not submit evidence which could serve as a basis for concluding that the requirements set out in Article 71 of the Rules of Procedure of the Constitutional Court have been met for adopting a different admissibility decision in the case at hand. The Constitutional Court holds that the allegations set forth in the request are not of such nature, content or relevance as to be the basis for adopting a different admissibility decision and for granting the present request.

13. For all the reasons mentioned above, at the proposal put forward by the Chamber of the Constitutional Court in accordance with provisions of Article 71 of the Rules of Procedure of the Constitutional Court, the Constitutional Court decided unanimously as stated in the enacting clause of this Ruling.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 129/04

Appeals of Ms. M. H. et al. with regard to the persons who went missing during the war in Bosnia and Herzegovina

DECISION ON ADMISSIBILITY AND MERITS
of 27 May 2005

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 item 2 and Article 61 paras 1 and 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina*, No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Tudor Pantiru, Vice-President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović, Vice-President,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Having considered the appeal of **Ms. M. H. et al.,** in Case No. **AP 129/04**

Adopted at the session held on 27 May 2005 the following

DECISION ON ADMISSIBILITY AND MERITS

The following appeals filed with regard to the persons who went missing during the war in Bosnia and Herzegovina are granted:

AP 129/04 Ms. M. H., AP 166/04 Ms. F. R., AP 167/04 Ms. R. M., AP 168/04 Mr. E. D., AP 169/04 Ms. M. D., AP 170/04 Ms. Đ. B., AP 171/04 Ms. H. H., AP 172/04 Ms. M. M., AP 173/04 Mr. D. A., AP 174/04 Ms. H. M., AP 175/04 Ms. B. M., AP 176/04 Ms. N. A., AP 177/04 Ms. T. H., AP 178/04 Ms. M. S., AP 181/04 Mr. Dž. J., AP 182/04 Ms. R. S., AP 183/04 Mr. S. S., AP 184/04 Ms. T. M., AP 185/04 Ms. R. D., AP 186/04 Ms. Š. S., AP 187/04 Ms. R. S., AP 188/04 Ms. J. A., AP 189/04 Ms. H. A., AP 190/04 Ms. F. O.,

AP 191/04 Ms. E. H., AP 192/04 Ms. F. M., AP 193/04 Ms. M. A., AP 194/04 Ms. M. N., AP 195/04 Mr. A. K., AP 196/04 Ms. R. M., AP 197/04 Ms. A. J., AP 198/04 Ms. S. S., AP 199/04 Mr. M. M., AP 200/04 Ms. A. Lj., AP 201/04 Ms. H. J., AP 202/04 Ms. M. M., AP 203/04 Ms. Š. M., AP 204/04 Mr. A. M., AP 205/04 Ms. E. I., AP 206/04 Ms. Ć. B., AP 208/04 Ms. T. D., AP 209/04 Ms. A. M.; AP 228/04 Association of Families of Missing Persons and Town Organization of Camp Inmates of Istočno Sarajevo – the appeals filed on behalf of the following members of the families of missing persons: Mr. R. V., Ms. R. G., Ms. R. G., Ms. M. J., Ms. J. B., Mr. D. P., Ms. M. S., Mr. D. T. and Mr. R. K.; AP 229/04 Ms. V. V., Association of Families of Missing Persons and Town Organization of Camp Inmates of Istočno Sarajevo – the appeals filed on behalf of the following members of the families of missing persons: AP 230/04 Ms. D. T., AP 232/04 Ms. Z. C., AP 233/04 Ms. M. T., AP 234/04 Mr. G. P., AP 235/04 Ms. N. S., AP 236/04 Ms. S. R., AP 237/04 Ms. Z. M., AP 239/04 Ms. Ž. K., AP 240/04 Ms. D. K., AP 241/04 Ms. R. M., AP 242/04 Ms. P. M. and AP 243/04 Mr. M. S.; Municipal Committee of the Families of Captured Persons, Killed Soldiers and Missing Persons of Bijeljina – appeals filed on behalf of the following members of the families of missing persons: AP 261/04 Mr. Ž. K., AP 262/04 Mr. Z. K., AP 263/04 Mr. G. K., AP 265/04 Mr. R. K., AP 266/04 Ms. J. S., AP 267/04 Ms. N. S., AP 268/04 Ms. J. K., AP 269/04 Ms. S. S., AP 270/04 Ms. Lj. Đ., AP 271/04 Mr. A. Đ., AP 272/04 Ms. D. T., AP 273/04 Ms. M. M. and AP 274/04 Ms. S. K.; AP 425/04 Municipal Committee of the Families of Captured Persons, Killed Soldiers and Missing Persons of Bijeljina – appeals filed on behalf of the following members of the families of missing persons: Mr. M. G., Mr. Ž. B., Mr. Ž. M., Ms. Lj. M. and Mr. S. R.; AP 570/04 Municipal Committee of the Families of Captured Persons, Killed Soldiers and Missing Persons of Prnjavor – appeals filed on behalf of the following members of the families of missing persons: Ms. S. K., Mr. Lj. Nj., Mr. B. S., Ms. N. M., Ms. R. D., Ms. R. Z., Mr. M. Ž., Ms. D. Đ., Ms. P. D., Ms. M. S., Mr. O. K. and Mr. V. B.; Municipal Committee of the Families of Captured Persons, Killed Soldiers and Missing Persons of Prnjavor – appeals filed on behalf of the following members of the families of missing persons: AP 571/04 Mr. Z. T., AP 572/04 Mr. M. A., AP 573/04 Ms. Lj. J., AP 574/04 Ms. Dž. M., AP 575/04 Ms. M. H., AP 576/04 Ms. M. S., AP 577/04 Ms. A. M., AP 578/04 Ms. N. D., AP 579/04 Ms. A. B., AP 580/04 Ms. Ž. M., AP 581/04 Mr. V. D., AP 582/04 Mr. M. M.,

AP 583/04 Ms. G. T., AP 584/04 Ms. D. Z., AP 585/04 Ms. S. M., AP 586/04 Ms. V. M., AP 587/04 Ms. A. G., AP 588/04 Mr. M. S., AP 589/04 Mr. I. S., AP 590/04 Ms. P. V., AP 591/04 Mr. J. M., AP 592/04 Ms. M. V., AP 593/04 Ms. N. V. AP 594/04 Mr. Ž. K. and AP 595/04 Ms. V. Ž.; AP 931/04 Ms. J. B., AP 957/04 Ms. N. K., AP 958/04 Ms. S. B., AP 171/05 Ms. M.Č., AP 709/05 Ms. M. P., AP 956/05 Ms. M. G., AP 958/05 Mr. M. G., AP 959/05 Ms. S. G., AP 960/05 Ms. R. J., AP 1041/05 M. S., AP 1044/05 Mr. M.D. and AP 1045/05 Ms. Z. M.

It is hereby established that the right not to be subjected to inhuman treatment under Article II.3 (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the right to private and family life under Article II.3 (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms have been violated.

The Government of the Federation of Bosnia and Herzegovina and the Government of the Republika Srpska are hereby ordered to forward to the appellants, through their competent commissions for tracing missing persons, all accessible and available information on members of their families who went missing during the war on the territory of Bosnia and Herzegovina, urgently and without further delay and no later than 30 days as from the date of receipt of the present Decision.

The parties referred to in Article 15 para 3 of the Law on Missing Persons (*Official Gazette of Bosnia and Herzegovina,* No. 50/04) are hereby ordered to provide for operational functioning of the institutions established in accordance with the Law on Missing Persons, i.e. the Missing Persons Institute, the Fund for Providing Assistance to the Families of Missing Persons in Bosnia and Herzegovina and the Central File Records on the Missing Persons in Bosnia and Herzegovina immediately and without further delay and no later than 30 days.

The present Decision of the Constitutional Court of Bosnia and Herzegovina shall, by virtue of Article 64 para 1 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, be forwarded to

the Council of Ministers of Bosnia and Herzegovina, the Government of the Federation of Bosnia and Herzegovina, the Government of the Republika Srpska and the Government of the Brčko District of Bosnia and Herzegovina for implementation.

The Council of Ministers of Bosnia and Herzegovina, the Government of the Federation of Bosnia and Herzegovina, the Government of the Republika Srpska and the Government of the Brčko District of Bosnia and Herzegovina are hereby ordered to submit information to the Constitutional Court of Bosnia and Herzegovina about the measures taken in accordance with Article 75 para 5 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, within six months as from the delivery of the present Decision.

The present Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina* and the *Official Gazette of the Republika Srpska*.

Reasons

I. Introduction

1. The following persons filed appeals with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") in 2004 and 2005 in respect of persons who went missing during the war in Bosnia and Herzegovina: Ms. M. H., Ms. F. R., Ms. R. M., Mr. E. D., Ms. M. D., Ms. Đ. B., Ms. H. H., Ms. M. M., Mr. D. A., Ms. H. M., Ms. B. M., Ms. N. A., Ms. T. H., Ms. M. S., Mr. Dž. J., Ms. R. S., Mr. S. S., Ms. T. M., Ms. R. D., Ms. Š. S., Ms. R. S., Ms. J. A., Ms. H. A., Ms. F. O., Ms. E. H., Ms. F. M., Ms. M. A., Ms. M. N., Mr. A. K., Ms. R. M., Ms. A. J., Ms. S. S., Mr. M. M., Ms. A. Lj., Ms. H. J., Ms. M. M., Ms. Š. M., Mr. A. M., Ms. E. I., Ms. Ć. B., Ms. T. D., Ms. A. M., Association of the Families of Missing Persons and Town Organization of Camp Inmates of Istočno Sarajevo – on behalf of the following members of the families of missing persons: Mr. R. V., Ms. R. G., Ms. R. G., Ms. M. J., Ms. J. B., Mr. D. P., Ms. M. S., Mr. D. T., and Mr. R. K., Ms. V, V.; Association of the Families of Missing Persons and Town Organization of Camp Inmates of Istočno Sarajevo – on behalf of the following members of the families

of missing persons: Ms. D. T,; M., Z. C., Ms. M. T., Mr. G. P., Ms. N. S., Ms. S. R., Ms. Z. M., Ms. Ž. K., Ms. D. K., Ms. R. M., Ms. P. M. and Mr. M. S.; Municipal Committee of the Families of Captured Persons, Killed Soldiers and Missing Persons of Bijeljina – on behalf of the following members of the families of missing persons: Mr. Ž. K., Mr. Z. K., Mr. G. K., Mr. R. K., Ms. J. S., Ms. N. S., Ms. J. K., Ms. S. S., Ms. Lj. Đ., Mr. A. Đ., Ms. D. T., Ms. M. M. and Ms. S. K.; Municipal Committee of the Families of Captured Persons, Killed Soldiers and Missing Persons of Bijeljina – on behalf of the following members of the families of missing persons: Mr. M. G., Mr. Ž. B., Mr. Ž. M., Ms. Lj. M. and Mr. S. R..; Municipal Committee of the Families of Captured Persons, Killed Soldiers and Missing Persons of Prnjavor – on behalf of the following members of the families of missing persons: Ms. S. K., Mr. Lj. Nj., Mr. B. S., Ms. N. M., Ms. R. D., Ms. R. Z., Mr. M. Ž., Ms. D. Đ., Ms. P. D., Ms. M. S., Mr. O. K. and Mr. V. B.; Municipal Committee of the Families of Captured Persons, Killed Soldiers and Missing Persons of Prnjavor – on behalf of the following members of the families of missing persons: Mr. Z. T., Mr. M. A., Ms. Lj. J; Ms. Dž. M., Ms. M. H., Ms. M. S., Ms. A. M., Ms. N. D., Ms. A. B., Ms. Ž. M., Mr. V. D., Mr. M. M., Ms. G. T., Ms. D. Ž., Ms. S. M., Ms. V. M., Ms. A. G., Mr. M. S., Mr. I. S., Ms. P. V., Mr. J. M., Ms. M. V., Ms. N. V., Mr. Ž. K. and Ms. V. Ž., Ms. J. B., Ms. N. K., Ms. S. B., Ms. M. Č. Ms. M. P., Ms. M. G., Ms. N. S., Mr. M. G., Ms. S. G., Ms. R. J., M. S., Mr. M. D. and Ms. Z. M. (“appellants”).

II. Proceedings before the Constitutional Court

2. Having regard to Article 21 para 2 of the Rules of Procedure of the Constitutional Court (“Constitutional Court’s Rules of Procedure”), the State Commission for Tracing Missing Persons, the Commission for Investigation of the Events in and around Srebrenica, the Republika Srpska Office for Tracing Missing and Captured Persons, the Government of the Republika Srpska, the International Committee of the Red Cross, the Federation of Bosnia and Herzegovina Office for Tracing Missing and Captured Persons and the Government of the Federation of BiH were requested respectively on 29 April 2004, 16 February 2005, 28 and 29 April 2005 to submit their replies to the appeals.

3. The replies to the appeals were submitted by the Government of Republika Srpska on 28 May 2004 and 14 March 2005 and by the Commission for Investigation of the Events in and around Srebrenica on 22 June and 1 July 2004.

4. Pursuant to Article 25 para 2 of the Constitutional Court’s Rules of Procedure, the reply of the Government of Republika Srpska was communicated to some of the appellants during 2004.

5. As the Constitutional Court received several appeals within its competence concerning the same matter, the Constitutional Court, pursuant to Article 30 of its Rules of Procedure, adopted a decision on joining the cases in which one set of proceedings would be conducted and one decision No. AP 129/04 adopted. The following appeals have been joined: AP 166/04, AP 167/04, AP 168/04, AP 169/04, AP 170/04, AP 171/04, AP 172/04, AP 173/04, AP 174/04, AP 175/04, AP 176/04, AP 177/04, AP 178/04, AP 181/04, AP 182/04, AP 183/04, AP 184/04, AP 185/04, AP 186/04, AP 187/04, AP 188/04, AP 189/04, AP 190/04, AP 191/04, AP 192/04, AP 193/04, AP 194/04, AP 195/04, AP 196/04, AP 197/04, AP 198/04, AP 199/04, AP 200/04, AP 201/04, AP 202/04, AP 203/04, AP 204/04, AP 205/04, AP 206/04, AP 208/04, AP 209/04, AP 228/04 (in respect of the appellants referred to in the enacting clause of the present Decision), AP 229/04, AP 230/04, AP 232/04, AP 233/04, AP 234/04, AP 235/04, AP 236/04, AP 237/04, AP 239/04, AP 240/04, AP 241/04, AP 242/04, AP 243/04, AP 261/04, AP 262/04, AP 263/04, AP 265/04, AP 266/04, AP 267/04, AP 268/04, AP 269/04, AP 270/04, AP 271/04, AP 272/04, AP 273/04, AP 274/04, AP 425/04 (in respect of the appellants referred to in the enacting clause of the present Decision), AP 570/04 (in respect of the appellants referred to in the enacting clause of the present Decision), AP 571/04, AP 572/04, AP 573/04, AP 574/04, AP 575/04, AP 576/04, AP 577/04, AP 578/04, AP 579/04, AP 580/04, AP 581/04, AP 582/04, AP 583/04, AP 584/04, AP 585/04, AP 586/04, AP 587/04, AP 588/04, AP 589/04, AP 590/04, AP 591/04, AP 592/04, AP 593/04, AP 594/04, AP 595/04, AP 931/04, AP 957/04, AP 958/04, AP 171/05, AP 709/05, AP 956/05, AP 958/05, AP 959/05, AP 960/05, AP 1041/05, AP 1044/05 and AP 1045/05.

III. Facts of the case

6. The facts of the case set out below, drawn from the allegations of the appellants and documents submitted to the Constitutional Court, may be summarized as follows:

Appeals relating to the persons who went missing in Srebrenica in July 1995

7. In respect of the family members (sons, husbands, fathers and brothers) who went missing in Srebrenica in July 1995, the appeals were filed by the following individuals: Ms. F. R., Ms. R. M., Mr. E. D., Ms. M. D., Ms. Đ. B., Ms. H. H., Ms. M. M. (two appeals relating to two different persons who went missing): Mr. D. A., Ms. H. M., Ms. B. M., Ms. N. A., Ms. T. H., Ms. M. S., Ms. R. S., Mr. S. S., Ms. T. M., Mr. Dž. J., Ms. R. D., Ms. S. S., Ms. R. S., Ms. J. A., Ms. H. A., Ms. F. O., Ms. E. H., Ms. F. M., Ms. M. A., Ms. M. N.,

Mr. A. K., Ms. R. M., Ms. A. J., Mr. M. M., Ms. A. Lj., Ms. H. J., Ms, S. M., Mr. A. M., Ms. E. I., Ms. Ć. B., Ms. T. D. and Ms. A. M.

8. All appellants claim that the respective members of their families went missing while treading through the woods in an attempt to reach Tuzla during the military operations in and around Srebrenica in July 1995. Several appellants claim having seen soldiers in arms marching away the members of their families in an unknown direction and were never again seen or heard of. In addition to their appeals, the appellants submitted confirmations issued by the International Committee of the Red Cross or the State Commission for Tracing Missing Persons, or both confirmations certifying that their family members were registered as missing persons and that the procedure of search was undertaken. None of the appellants has received information as to the fate of their family members ever since their disappearance in July 1995 save the appellant Ms. Ć. B. who, following a period of eight years, found out the mortal remains of her son and husband (who were subsequently buried in Potočari). However, she still knows nothing about her other son who was marched away by the Serb soldiers when he attempted to leave Srebrenica.

Appeals relating to the persons who went missing in the area of Zvornik, Prijedor and Srebrenica before July 1995

9. The following families whose members (fathers, husbands, sons and brothers) went missing in the area of Zvornik, Prijedor and Srebrenica before July 1995 filed appeals with the Constitutional Court: Ms. M. H., Ms. S. S., Ms. J. B., Ms. N. K. and Ms. S. B.

10. The appellants do not know the fate of their family members for whom they alleged that they went missing in the aforementioned areas during the war in Bosnia and Herzegovina. In addition to the appeals, the appellants submitted confirmations issued by the International Committee of the Red Cross or the State Commission for Tracing Missing Persons, or both confirmations certifying that the appellants' family members were missing and that the process of their search was opened.

Appeals relating to the persons who went missing in the area of Sarajevo between 1992 and 1995

11. The Association of the Families of Missing Persons and Camp Inmates of Istočno Sarajevo filed appeals on behalf of the families whose members went missing in the area of the City of Sarajevo between 1992 and 1995. The appeals were filed on behalf of the

following families whose members went missing: Mr. R. V., Ms. R. G., Ms. R. G., Ms. M. J., Ms. J. B., Ms. D. P., Ms. M. S., Mr. D. T. and Mr. R. K.

12. Individual appeals concerning persons who went missing in the area of the City of Sarajevo were submitted by: Mr. G. P., Ms. N. S., Ms. S. R., Ms. Z. M., Ms. Ž. K., Ms. D. K., Ms. R. M., Ms. P. M., Mr. M. S., Ms. M. G and Ms. M. P.

13. All appellants claim that their family members went missing in the area of the City of Sarajevo during the war between 1992 and 1995 and that they have had no information about their fate ever since. Several appellants alleged having seen soldiers in arms marching away the members of their families in an unknown direction and were never again seen or heard of. In addition to their appeals, the appellants submitted confirmations issued by the International Committee of the Red Cross or the Republika Srpska Office for Tracing Missing Persons, or both confirmations certifying that the members of their families were registered as missing persons and that the procedure of their search was undertaken.

Appeals relating to persons who went missing in the area of: Hadžići, Trnovo, Hrasnica, Travnik, Tuzla, Zavidovići, Zenica, Donji Vakuf, Bosanski Petrovac, Ozren, Derventa, Doboj, Bratunac, Srebrenica, Bihać, Lukavac, Kladanj, Glamoč, Banovići, Goražde and Ključ

14. In respect of persons who went missing in the aforementioned areas during the war in Bosnia and Herzegovina, the following persons filed appeals: Mr. M. G., Ms. V. V., the Association of Families of Missing Persons and the Town Organization of Camp Inmates of Istočno Sarajevo on behalf of Ms. D. T., Ms. Z. C. and Ms. M. T.; the Municipal Committee of Families of Captured Persons, Killed Soldiers and Missing Persons of Bijeljina on behalf of Mr. Ž. K., Mr. Z. K., Mr. G. K., Mr. R. K., Ms. J. S., Ms. N. S., Ms. J. K., Ms. S. S., Ms. Lj. Đ., Mr. A. Đ., Ms. D. T., Ms. M. M. and Ms. S. K.; the Municipal Committee of Captured Persons, Killed Soldiers and Missing Persons of Bijeljina on behalf of Mr. M. G., Mr. Ž. B., Mr. Ž. M., Ms. Lj. M. and Mr. S. R., the Municipal Committee of Captured Persons, Killed Soldiers and Missing Persons of Prnjavor on behalf of Ms. S. K., Mr. Lj. Nj., Mr. B. S., Ms. N. M., Ms. R. D., Ms. R. Z., Mr. M. Ž., Ms. D. Đ., Ms. P. D., Ms. M. S., Mr. O. K. and Mr. V. B.; the Municipal Committee of Captured Persons, Killed Soldiers and Missing Persons of Prnjavor on behalf of Mr. Z. T., Mr. M. A., Ms. Lj. J., Ms. Dž. M., Ms. M. H., Ms. M. S., Ms. A. M., Ms. N. D., Ms. A. B., Ms. Ž. M., Mr. V. D., Mr. M. M., Ms. G. T., Ms. D. Z., Ms. S. M., Ms. V. M., Ms. A. G., Mr. M. S., Mr. I. S., Ms. P. V., Mr.

J. M., Ms. M. V., Ms. N. V., Mr. Ž. K. and Ms. V. Ž., as well as individual appeals filed by: Ms. M.Č., Mr. M. G., Ms. S. G., Ms. R. J., M.S., Mr. M.D. and Ms. Z. M.

15. The appellants claim that they have received no information as to the fate of their family members after they went missing during the war in Bosnia and Herzegovina between 1992 and 1995. In addition to their appeals, the appellants submitted confirmations issued by the International Committee of the Red Cross or the Republika Srpska Office for Tracing Missing Persons, or both confirmations certifying that the members of their family were registered as missing persons and that the procedure of their search was undertaken.

IV. Relevant law

16. **Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina**

Article V

The Parties shall provide information through the tracing mechanisms of the ICRC on all persons unaccounted for. The Parties shall also cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for.

17. **Protocol No. 1 to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977**

Article 33 paragraphs 1 and 3

As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.

Information concerning persons reported missing pursuant to paragraph I and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency

18. **Law on Missing Persons** (*Official Gazette of Bosnia and Herzegovina*, No. 50/04)

Article 7

The Missing Persons Institute of Bosnia and Herzegovina ("Institute") shall be established as an independent institution for tracing missing persons in/from Bosnia and Herzegovina with a view of improving the process of tracing missing persons and having a more efficient identification of mortal remains of missing persons.

An international organization may act as a co-founder of the Institute.

The manner of foundation and assumption of the role of the founder, as well as a specification of responsibilities and financial support shall be regulated by a Foundation Agreement to be concluded by the co-founders according to this Law and other laws of Bosnia and Herzegovina.

According to this Law and other applicable laws, the Institute shall be a legal person registered as an institution of Bosnia and Herzegovina which shall assume, according to this Law, administrative competencies to perform activities with regard to the process of tracing missing persons and issuance of relevant documents.

The working relation of the employees with the Institute shall be regulated in accordance with the Labour Law applicable to all institutions of Bosnia and Herzegovina.

Article 15

The Fund for Providing Assistance to the Families of Missing Persons in Bosnia and Herzegovina (" Fund") shall be established with a view of providing financial support and exercise of the rights of the members of families of missing persons.

A decision on the establishment of the Fund shall be adopted by the Council of Ministers of Bosnia and Herzegovina, within the time limit of 30 days as from the date of entry into force of this Law.

The seat, manner of financing, management as well as other issues relating to the activities of the Fund shall be regulated by an Agreement signed by the Council of Ministers of Bosnia and Herzegovina, the Government of the Federation of Bosnia and Herzegovina, the Government of Republika Srpska and the Brcko District of Bosnia and Herzegovina, within the time limit of 30 days as from the date of entry into force of the Decision referred to in paragraph 2 of this Article.

In addition to the budget, the revenues of the Fund may originate from donations, gifts, foundations and other forms of financial support coming from national and international natural and legal persons as specified by the Agreement referred to paragraph 3 of this Article.

19. **Decision on the Establishment of a State Commission for Tracing Missing Persons** (*Official Gazette of the Republic of Bosnia and Herzegovina*, Nos. 9/96 and 17/96).

The Commission shall carry out the following duties and tasks:

- *maintain records of citizens of the Republic of Bosnia and Herzegovina who went missing as a result of hostilities in the territory of the Republic of Bosnia and Herzegovina and the neighbouring states, i.e. former Yugoslav republics ;*
- *undertake direct activities to trace persons referred to in the previous line and to establish the truth about their fate;*
- *provide available information to authorized institutions issuing decisions on the rights of the veterans, the missing, the detained and the killed;*
- *issue certificates to the families of the missing, the detained and the killed on the basis of its records;*
- *cooperate with specialized UN agencies (the UNHCR, etc.), a UN Special Envoy for Human Rights for the Former Yugoslavia, a Human Rights Commission expert, the IFOR, the ICRC Working Group for the Search of Missing Persons, the International Tribunal in the Hague and other international and local organizations dealing with the issue of missing, captured and killed persons.*

20. **Decision on the Establishment of a Republika Srpska Office for Tracing Missing Persons** (*Official Gazette of the Republika Srpska*, No. 40/03)

Paragraph II lines 1 and 2

The activities and tasks of the Republika Srpska Office for Tracing Missing Persons shall be as follows:

- *To coordinate all activities relating to the investigation of the fate of missing and detained persons from the Republika Srpska; to gather, process and systematize all information that clarifies the fate of missing and detained persons;*

- *To analyze and on-site verification of authenticity of information obtained from other parties and individuals; to keep records on all persons who were detained in the camps between 1991 and 1995 and exchange them through the Commission; to collect and process information on the mass and individual graves and possible locations of mortal remains; to prepare, organize and make interviews on detained and missing persons with the competent authorities of the Federation of Bosnia and Herzegovina, Croatia and Serbia and Montenegro.*

V. Appeal

a) Statements from the appeal

21. It is maintained in all appeals that the appellants do not have any reliable information as to the fate of their family members from the date of their disappearance until present time. The appellants seek to learn the truth about the fate of the members of their families. They also seek establishment and punishment of persons responsible for the disappearance of their family members and award of compensation for the mental anguish that they suffered for not knowing what happened to the members of their families. The appeals invoke violations of the following constitutional rights: the right to life under 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 ("European Convention"), the right not to be subjected to torture, to inhuman or degrading treatment or to punishment under Article II.3 (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, the right to freedom and security of persons under Article II.3 (d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention, the right to private and family life, home and correspondence under Article II.3 (f) of the Constitution of Bosnia and Herzegovina, the right to an effective remedy under Article 13 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.

b) Reply to the appeal

22. The Office of the Legal Representative of the Government of the Republika Srpska filed its reply in two letters that the Constitutional Court received on, respectively, 28 May 2004 and 14 March 2005. The Government of the Republika Srpska, in its reply of 28 May 2004, made comments as to the admissibility of the appeals concerned whereas it commented on the admissibility and merits issue in its reply of 14 March 2005.

23. By referring to Article 15 of the Constitutional Court's Rules of Procedure, the Government of the Republika Srpska submitted that the Constitutional Court did not entertain jurisdiction *ratione materiae* to examine the appeals concerned since no court or authority of the Republika Srpska rendered a judgment or a decision in the case at issue.

24. Furthermore, the Government of the Republika Srpska submitted that the appellants were obliged to adduce and substantiate the appeal in order for the latter to be admissible. To that end, the Republika Srpska referred to the decision of the Constitutional Court in case No. U 10/02 of 4 March 2002, in which an appeal was rejected because the appellant failed to specify the rights and freedoms guaranteed under the Constitution of Bosnia and Herzegovina. The Government of the Republika Srpska also submitted that the present appeals were of general character and they did not specify the rights and freedoms safeguarded by the Constitution of Bosnia and Herzegovina. Moreover, the Government of the Republika Srpska underlined that some appeals did not contain facts whereas some were incomplete and contradicted one another.

25. According to the opinion of the Government of the Republika Srpska, the Constitutional Court does not entertain jurisdiction *prima facie* to decide the case in question since the appeals were originally lodged with the Human Rights Chamber for Bosnia and Herzegovina, whose work ended as of 31 December 2003.

26. Accordingly, the Government of the Republika Srpska argued that the applications did not fulfil the conditions under, respectively, the Constitutional Court's Rules of Procedure and Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, the latter stipulating appellate jurisdiction of the Constitutional Court over issues under the Constitution of Bosnia and Herzegovina.

27. Apart from the comments made above, the Government of the Republika Srpska submitted that all appeals should be rejected in any case in view of the fact that the Human Rights Chamber for Bosnia and Herzegovina, in its decision in the *Selimović and Others* case (Decision on Admissibility and Merits, 7 March 2003, CH/01/8365), ordered the Republika Srpska to conduct an investigation concerning "events that led to the established violations of human rights so that the applicants and other family members could learn the truth about the fate of their missing loved ones". The Government of the Republika Srpska pointed out that, as a result of the decision in the *Selimović* case, the Republika Srpska set up a Commission that was entrusted with a task of establishing the whole truth relating to the events in and around Srebrenica in July 1995. The Commission was to submit its report to all families of the missing persons.

28. As regards the comments on the merits, the Government of the Republika Srpska stressed that Bosnia and Herzegovina and its Entities have established a procedure for tracing persons whose fate became unknown as a result of the conflict in Bosnia and Herzegovina. According to the rules of the said procedure, all parties are obliged to exchange facts and information about missing persons. In the instant case, with reference to certain appeals filed by members of the families of missing persons, the Republika Srpska did not receive requests for tracing those persons by the state-level or federation-level commission for tracing missing persons and it was not in a position to conduct an investigation as to the disappearances and prepare a report in that regard.

29. The Commission for Investigation of the Events in and around Srebrenica, in its reply to the appeals, merely stated that it drew up a Report on the events in Srebrenica and submitted it to its founder, i.e. the Government of the Republika Srpska, on 16 June 2004.

VI. Admissibility

30. 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.

31. Pursuant to Article 15 para 3 of the Constitutional Court's Rules of Procedure, the Court may examine an appeal only if all effective remedies that are available under law against a judgment or decision challenged by the appeal have been exhausted and if the appeal was filed within a time-limit of 60 days of the date on which the appellant received the decision on the last remedy that he/she used.

32. The remedies exhaustion rule requires that the appellant reaches the so-called final decision. The final decision represents a reply to the last remedy effective and adequate to examine a lower instance decision on the points of fact and law. In the process, the appellant decides whether to use the remedy, ordinary or extraordinary. A decision rejecting the remedy because the appellant failed to observe the formal requirements of the remedy (time-limit, payment of fees, form or fulfilment of other legal conditions) cannot be considered to be final decision. The use of such remedy does not restart the 60 days time-limit referred to in Article 15 paragraph 3 of the Constitutional Court's Rules of Procedure (Constitutional Court of Bosnia and Herzegovina, *U 15/01*, Ruling of 4 and 5 May 2001).

Exhaustion of all effective remedies available under law

33. The first question that arises with regard to the examination of admissibility of the appeals concerned is the question of exhaustion of all effective remedies under law in view of the fact that the appellants filed their requests for tracing missing persons solely to the International Committee of the Red Cross or to a state-level or entity-level commission for tracing missing persons.

34. Article VI.3 (b) of the Constitution of Bosnia and Herzegovina sets forth that the Constitutional Court has appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. The purpose of the said Article is to render it possible for ordinary courts to examine facts and legal issues pertaining to a certain case and to resolve it by observing the rights and freedoms protected under the Constitution of Bosnia and Herzegovina.

35. The European Court of Human Rights held that the remedies exhaustion rule does not require a court determination. In line with the case-law of the European Court of Human Rights, the Constitutional Court interpreted Article VI.3 (b) of the Constitution of Bosnia and Herzegovina so as to, for instance, include applications in cases where a court fails to adopt a decision within a reasonable time (Constitutional Court of Bosnia and Herzegovina, *U 23/00*, Decision of 2 February 2001, published in the *Official Gazette of Bosnia and Herzegovina*, No. 10/01). In other words, the requirement of existence of a court determination, as laid down in Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, must not be interpreted restrictively. Similar to the case-law of the European Court of Human Rights, an appeal filed with the Constitutional Court must be admissible if an appellant proved that he/she exhausted remedies other than addressing courts if such remedies were available, or if he/she proved that no other remedy was available.

36. The Constitutional Court considers that applicants/appellants should have a normal recourse to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (European Court of Human Rights, *Akdivar and Others v. Turkey*, Judgment of 30 August 1996, Reports 1996-IV, paragraph 66). In other words, the rule of exhaustion of all remedies is not an absolute rule and it does not have to be applied automatically. There may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (*ibid*, paragraph 67).

37. To that end, the Constitutional Court recalls that according to Article 13 of the European Convention, there is a positive obligation on the part of each State to secure an effective remedy before a national authority. In the present case, the Constitutional Court considers that there was no effective remedy to be employed by the appellants in addressing competent bodies because the appellants did not receive information as to the fate of their family members who went missing during the war in Bosnia and Herzegovina. According to the Constitutional Court, referral to ordinary courts would yield no result. Namely, addressing ordinary court would raise a series of questions, for instance: which court entertained competence since one did not know where each disappearance occurred and whether the missing person was alive or not. Consequently, although it is apparent that the appellants failed to exhaust remedies, the Constitutional Court considers that it entertains jurisdiction over the case in question because the appellants did not have at their disposal an effective and adequate remedy to protect their rights and the decision of the Constitutional Court needs to fill in the legal gap in the present case.

38. By establishing a link between the previous paragraphs and the case concerned, the Constitutional Court ascertains that the appellant addressed the International Committee of the Red Cross and a state-level or one of the entity-level commissions for tracing missing persons, but they were not supplied with information regarding the missing members of their families. Hence, the appellants took reasonable actions aimed at tracing the members of their families by addressing organizations for tracing missing persons. The Constitutional Court has previously ascertained that appellants are not required to conduct proceedings before ordinary courts prior to filing their appeals if special circumstances were engaged. In the instant case, the Constitutional Court considers that there are special circumstances that absolve the appellants from the obligation of conducting proceedings before ordinary courts.

39. According to the Constitutional Court, the special circumstances are reflected in the fact that the tracing of persons who went missing during the last war conflict in Bosnia and Herzegovina is a very delicate issue since investigations would mostly be conducted by the bodies of the entity on whose territory the said persons went missing. On the other hand, there is no specialized institution at the level of Bosnia and Herzegovina that operates efficiently, its task being conductance of impartial investigations concerning persons who went missing during the war. The Constitutional Court has already ascertained that addressing ordinary courts would yield no result; in other words, the appellants did not have at their disposal effective remedies to protect their constitutional rights.

40. In view of the aforesaid, the Constitutional Court considers that there was no effective remedy in the case concerned that would guarantee an efficient and impartial investigation as to the missing family members. Therefore, the appellants must be absolved from the obligation of exhaustion of remedies and the present appeals must be proclaimed to be admissible in that regard.

Jurisdiction *ratione temporis*

41. The Constitutional Court entertains jurisdiction *ratione temporis* in respect of acts and events that took place following the entry into force of the Constitution of Bosnia and Herzegovina, i.e. 14 December 1995. Accordingly, the Constitutional Court does not entertain jurisdiction to examine the constitutionality of acts and events that took place prior to the entry into force of the Constitution of Bosnia and Herzegovina. However, the Constitutional Court considers that it may revise such acts and events for the purpose of evidence for establishment of a violation that occurred following the entry into force of the Constitution of Bosnia and Herzegovina (*U 38/02*, Decision of 19 December 2002, paragraphs 36-37, published in the *Official Gazette of Bosnia and Herzegovina*, No. 8/04).

42. The European Court of Human Rights considered that in case events complained about by an applicant, took place prior to the entry into force of the European Convention and continued thereafter, only the latter may be a subject to complaint (European Court, *Kerojarvi v. Finland*, Decision on Admissibility, 7 April 1993, Series A-328). Likewise, the Human Rights Chamber for Bosnia and Herzegovina concluded that it had jurisdiction over the issue of an allegation concerning violation of human rights of members of families who went missing during the armed conflict in part in which the alleged violations continued after the entry into force of Annex 6 of the General Framework Agreement for Peace in Bosnia and Herzegovina. The Human Rights Chamber for Bosnia and Herzegovina held that, since the members of families were not officially informed about the fate and whereabouts of their missing loved ones, the alleged violations continued until the date of submission of the applications (*Selimović and Others v. the Republika Srpska*, Decision on Admissibility and Merits, 7 March 2003, CH/01/8365 and others, paragraph 169).

43. In the instant case, the appellants sought to learn the truth about the fate and whereabouts of the missing members of their families. However, the appellants were not provided with the requested information to date. Consequently, the alleged violations are continuing violations and the Constitutional Court entertains jurisdiction *ratione temporis* to examine the present appeals in that regard.

Jurisdiction *ratione materiae*

44. In order to be compatible *ratione materiae* with the jurisdiction of the Constitutional Court, an appeal must adduce a violation of a right protected under the Constitution of Bosnia and Herzegovina. In the cases at isuse, the appellants sought information concerning the whereabouts of their missing family members as well as to be awarded compensation for not knowing about their fate until present time. Moreover, the appellants sought the naming of those responsible for their family members that went missing and bringing those persons to justice. The appellants claimed that they were subjected to inhuman and degrading treatment and that they were deprived of the right to family life, the right to an effective remedy and the right to property.

45. The Government of the Republika Srpska submitted that a certain number of the appellants failed to specify the constitutional provisions that they referred to and that a certain number of the appeals do not contain facts pertaining to the appeal. The Constitutional Court observes that all appeals under consideration contain the minimum indicating facts and violations of human rights under the Constitution of Bosnia and Herzegovina. Furthermore, the Constitutional Court underlines that it has, given the existence of special circumstances, adopted a more flexible approach in terms of inclusion of constitutional deemed to have been violated and reference to its competencies under Article VI.3 (b) of the Constitution of Bosnia and Herzegovina.

46. In view of the aforesaid, the Constitutional Court considers that it entertains jurisdiction *ratione materiae* to examine the appeal concerned.

Jurisdiction *ratione personae*

47. The Government of the Republika Srpska argued that there was no court judgment against it, that it could not be considered as a party to the proceedings before the Constitutional Court and that the Constitutional Court does not entertain jurisdiction *ratione personae* to examine the appeal in question.

48. The Constitutional Court has already established that its jurisdiction did not necessarily depend on the existence of a court determination. However, the issue of jurisdiction *ratione personae* differs from the remedies exhaustion rule. By arguing that the appellants should have addressed ordinary courts prior to filing their appeal, the Government of the Republika Srpska submitted that, since it was not a party to the proceedings before ordinary courts, it could not be a party to the proceedings before the Constitutional Court.

49. The Constitutional Court observes that the Republika Srpska undertook to search for missing persons on its territory pursuant to Article V of Annex 7 and Article IX of Annex 1-A to the General Framework Agreement for Peace of Bosnia and Herzegovina. Therefore, the Republika Srpska was responsible for the success of the process of search for missing persons and it was responsible for providing information that the appellants sought in their appeals before the Constitutional Court.

50. The same arguments are to be applied with regard to the Government of the Federation of Bosnia and Herzegovina. However, since no reply to the present appeals by the Government of the Federation of Bosnia and Herzegovina was filed, the Constitutional Court did not elaborate separately on the admissibility of part of the appeals that were submitted on grounds of missing persons on the territory of the Federation of Bosnia and Herzegovina. Moreover, the Constitutional Court points out that its jurisdiction *ratione personae* over not only the Government of the Republika Srpska and the Government of the Federation of Bosnia and Herzegovina but also the Council of Ministers of Bosnia and Herzegovina in view of the fact that the competent institutions of Bosnia and Herzegovina, after the Parliamentary Assembly of Bosnia and Herzegovina enacted a Law on Missing Persons, also undertook to supply information to the families of missing persons concerning the faze of their family members who went missing during the war.

51. In view of the aforesaid, the Constitutional Court considers that it entertains jurisdiction *ratione personae* to examine the present appeals.

VII. Merits

52. The Constitutional Court shall first examine the appeals in terms of existence of a violation of the right not to be subjected to inhuman treatment under, respectively, Article II.3 (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention.

53. Article II.3 (b) 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:

b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment;

Article 3 of the European Convention reads as follows:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

54. In view of the allegations set out in the appeals concerned, the issue that follows is whether the suffering, which was imposed on the appellants because the authorities did not supply any information regarding the fate of the members of their families, could be considered as inhuman treatment. In similar cases, the European Court of Human Rights ruled that withholding of information and knowledge about the next of kin to the members of families could properly be characterized as inhuman treatment, which was prohibited under Article 3 of the European Convention.

55. A relevant decision of the European Court of Human Rights in this regard is *Cyprus v. Turkey* (Judgment of 10 May 2001, Reports on Judgments and Decisions, 2001-IV), which relates to the number of missing persons during the Turkish military intervention in northern Cyprus, the territory that was subsequently sealed off and became inaccessible to the relatives of the missing persons. The European Court of Human Rights concluded that the applicants must undoubtedly have suffered "most painful uncertainty and anxiety" in view of the circumstances in which their family members disappeared (*ibid*, paragraph 155). The European Court of Human Rights further examined whether such suffering could be characterized as a violation of Article 3 of the European Convention and pointed out as follows:

Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond – the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court further recalls that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather in the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct. (*ibid*, paragraph 156).

56. It follows from the aforesaid that the European Court of Human Rights attached a certain weight to the way in which the authorities responded to the situation concerned. The European Court of Human Rights observed that the authorities have failed to undertake

any investigation into the circumstances surrounding the disappearance of the missing persons. The absence of any information about the fate of the persons who went missing condemned the relatives of those persons to live in a prolonged state of acute anxiety which cannot be said to have been erased with the passage of time. The European Court of Human Rights did not consider, in the circumstances of this case, that the fact that certain relatives may not have actually witnessed the detention of family members or complained about such to the authorities of the respondent party deprived them of victim status under Article 3 of the European Convention (*ibid*, paragraph 157). Thereafter, the European Court of Human Rights concluded that the silence of the authorities of the respondent party in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorized as inhuman treatment within the meaning of Article 3 of the European Convention and that the relatives of the missing persons were victims of a continuing violation of Article 3 of the European Convention (*ibid*, paragraphs 157-158).

57. In the *Selimović* case, the Human Rights Chamber for Bosnia and Herzegovina concluded that the close family ties between the missing persons and their relatives as well as an enormous suffering experienced by the relatives constitute "inhuman treatment" under Article 3 of the European Convention. The Chamber further held that the competent authorities did almost nothing to establish the fate and whereabouts of assumed victims and they did not conduct a purposeful investigation, thereby aggravating the situation (*ibid*, paragraphs 188-189). This having been said, the Human Rights Chamber for Bosnia and Herzegovina concluded that the omission on the part of the authorities to disclose the location of the missing persons constituted a violation of Article 3 of the European Convention.

58. Given the similarity between the facts in the *Selimović* case and the case under consideration by the Constitutional Court, the Constitutional Court considers that the suffering that was imposed on the appellants as a result of withholding of information about the fate of members of their families who went missing during the war, undoubtedly constituted inhuman treatment prohibited by, respectively, Article II.3 (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention. By observing the criteria established by the European Court of Human Rights, the Constitutional Court ascertained that the appellants and the missing persons were the next of kin (sons, husbands, wives, fathers, mothers, brothers, sisters). The Constitutional Court, and the Human Rights Chamber for Bosnia and Herzegovina in its decision in the *Selimović* case (*ibid*, paragraph 185), considers that the fact that family members did not witness in all

cases the events that resulted in the disappearance of a family member does not deprive the members of families of missing persons of the status of a victim.

59. Bearing in mind the aforesaid and the facts that the disappearances occurred on the territory of Bosnia and Herzegovina and that no efficient investigation was conducted in this regard although more than ten years have passed from the cessation of the war, not to forget that the competent authorities failed to inform the members of families of missing persons about the fate of their loved ones, the Constitutional Court concludes that the members of families of missing persons were subjected to inhuman treatment, which was prohibited by Article II.3 (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention. This is the responsibility of the Council of Ministers of Bosnia and Herzegovina, the Government of the Federation of Bosnia and Herzegovina and the Government of the Republika Srpska.

60. Moreover, the Constitutional Court stresses that it would be of particular importance if the Council of Ministers of Bosnia and Herzegovina, the Government of the Federation of Bosnia and Herzegovina, the Government of the Republika Srpska and the Brčko District of Bosnia and Herzegovina promptly establish and make provisions for operation of institutions under the Law on Missing Persons, namely the Missing Persons Institute, the Fund for Providing Assistance to the Families of Missing Persons and the Central File Records of Missing Persons in Bosnia and Herzegovina.

61. **Article II.3 (f) 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:

f) The right to private and family life, home, and correspondence.

Article 8 of the European Convention reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

62. The Constitutional Court considers that not only does Article 8 oblige the States to restrain themselves from interfering but it imposes a positive obligation on the competent authorities of Bosnia and Herzegovina to take all necessary measures of efficient protection of the right to private and family life, home and correspondence.

63. The Human Rights Chamber recognizes the right of the members of the families of missing persons to have an access to information on missing members of their families. In the case *Unković against the Federation of Bosnia and Herzegovina,* the Human Rights Chamber held that information on the fate and whereabouts of a family member falls within the ambit of the right to respect for private and family life set out in Article 8 of the European Convention. When such information exists within the possession or control of the respondent party and the respondent party refuses arbitrarily and without justification to disclose it to the family member upon his or her request, which was properly submitted to a competent authority of the respondent party or Red Cross, then the respondent party has failed to fulfil its positive obligation to secure the family member's right protected by Article 8 of the European Convention (see case CH/99/2150 *Unković against the Federation of Bosnia and Herzegovina,* decision of 6 May 2002, item 126; case CH/99/3196, *Palić against the Republika Srpska*, Decision on Admissibility and Merits of 9 December 2000, paragraphs 82-84; see European Court of Human Rights, the *Gaskin against the United Kingdom* judgment of 7 July 1989, Series A -160).

64. In the case at hand, the Constitutional Court recalls that the persons went missing on the territory of the present day Entities of Bosnia and Herzegovina (the Federation of Bosnia and Herzegovina and the Republika Srpska) which, despite their obligation to examine the reports on persons who went missing on their territory, failed to do anything. They did not provide the appellants with information which would allow them to know what happened with their family members. The Constitutional Court considers that in the instant case the Governments of the Entities of Bosnia and Herzegovina must have at their disposal certain information about the persons whose disappearance was reported, which they did not transmit to the appellants. This fact is sufficient to the Constitutional Court to conclude that the competent authorities of the Entities refuse without any reasonable justification to present information at their disposal to the appellants.

65. In view of the aforesaid, the Constitutional Court concludes that the rights of the appellants as family members of the missing persons to respect for private and family life under Article II.3 (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention have been violated and that the Government of the Federation of Bosnia and Herzegovina and the Government of the Republika Srpska are to be held responsible for it.

Other allegations

66. In view of the conclusion of the Constitutional Court with regard to violation of right under Article II.3 (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, as well as Article II.3 (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the Constitutional Court considers that it is not necessary to dwell separately on other allegations from the appeals.

Compensation issue

67. The Constitutional Court ascertains that the Parliamentary Assembly of Bosnia and Herzegovina enacted the Law on Missing Persons, which entered into force on 17 November 2004. The law, *inter alia*, established the principles for the promotion of the tracing process and the manner of exercise of social and other rights by the members of families of missing persons. Additionally, the Law established a Missing Persons Institute of Bosnia and Herzegovina as an institution to which the activities concerning the process of tracing missing persons and issuance of appropriate documents were transferred. The said Law also established a Fund for Providing Assistance to the Families of Missing Persons in Bosnia and Herzegovina. The Constitutional Court considers that, in addition to the establishment of violation of the said constitutional rights of the appellants as a form of satisfaction, it would be necessary that the competent authority provides an efficient operation of the said Institute and the Fund without delay so as to remove further consequences of violations of constitutional rights of the appellants and render exercise of their other rights under law possible. It should be noted at this point that the Constitutional Court has established violations of Articles 3 and 8 of the European Convention on account of the fact that the appellants had no information about the fate of their family members and it ordered measures for redress of the said violations of constitutional rights. As regards the compensation issue raised by the appellants, the Constitutional Court considers that the Law on Missing Persons provides sufficient support to the members of families of missing persons. Namely, Articles 11, 12 and 13 of the said Law set forth the right, criteria and amounts of financial aid for the members of families of missing persons whereas Article 16 thereof lays down a procedure for exercise of the right to financial aid conducted by the Fund for Providing Assistance to the Families of Missing Persons. With a view of implementing the right to financial aid for the families of missing persons as stipulated in the Law on Missing Persons, the Constitutional Court ordered the parties referred to in Article 15 of the said Law to promptly establish and make provisions for operation of institutions under the Law on Missing Persons, which include the Fund for

Providing Assistance to the Families of Missing Persons. Therefore, the Constitutional Court considers that the members of families of missing persons will, after the responsible parties make provisions for operation of institutions established by the Law on Missing Persons, have secured financial aid and there is no need for the Constitutional Court to adopt a decision on individual compensation claims made by the appellants.

VIII. Conclusion

68. The fact that almost ten years have passed from the cessation of the war in Bosnia and Herzegovina and the fact that during this period the competent authorities failed to submit information to the appellants regarding the fate of members of their families that went missing during the said war, are sufficient to the Constitutional Court to conclude that the right to prohibition of inhuman treatment under Article II.3 (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention as well as the right to respect for private and family life under Article 8 of the European Convention have been violated in respect to the members of families of missing persons.

69. Pursuant to Article 61 paras 1 and 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court decided unanimously as a stated in the operative part hereof.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 464/04

Appeal of Ms. Lj. S., Ms. D. S. and Mr. D. S. from Milići for the failure to enforce the ruling of the Basic Court in Banja Luka, No. I-3787/01 of 16 October 2001

DECISION ON ADMISSIBILITY AND MERITS
of 17 February 2005

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (2) and Article 61 paras 1 and 2 of the Constitutional Court's Rules of Procedure of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 2/04), as a Grand Chamber and composed of the following Judges:

Mr. Mato Tadić, President,

Mr. Ćazim Sadiković, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Hatidža Hadžiosmanović,

Ms. Valerija Galić,

Having considered the appeal of **Ms. Lj. S., Ms. D. S. and Mr. D. S.** in case No. **AP 464/04**, adopted on 17 February 2005 the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Ms. Lj. S., Ms. D. S. and Mr. D. S. is granted.

A violation of Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of the European European Convention for the Protection of Human Rights and Fundamental Freedoms is established.

This Decision shall be submitted to the Government of the Republika Srpska to provide the constitutional rights in accordance with this Decision.

The Government of the Republika Srpska is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 75 para 5 of the Rules of Procedure of Procedure 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* and the *Official Gazette of the Republika Srpska*.

Reasoning

I. Introduction

1. On 19 May 2004, Ms. Lj. S., Ms. D. S. and Mr. D. S. ("the appellants"), from Milići, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for failure to enforce the Ruling of the Basic Court in Banja Luka number I-3787/01 of 16 October 2001 allowing its execution.

II. Procedure before the Constitutional Court

2. Pursuant to Article 21 paras 1 and 2 of the Rules of Procedure of theConstitutional Court of BiH ("Constitutional Court's Rules of Procedure"), the Basic Court and the participants to the proceedings (the Ministry of Defence of the Republika Srpska and Army of the Republika Srpska), represented by Military Prosecutor's Office of the Army of the Republika Srpska ("the defendant") were requested on 3 December 2004 and 28 December 2004, respectively, to submit their replies to the appeal.

3. On 22 December 2004 the Basic Court submitted its reply to the appeal and the defendant submitted its reply on 13 January 2005.

4. Pursuant to Article 25 para 2 of the Constitutional Court's Rules of Procedure, the replies of the Basic Court and the defendant were communicated to the appellant on 31 December 2004 and 24 January 2005, respectively.

III. Facts of the Case

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

6. The appellants in their appeal requested the defendant to compensate them pecuniary and non-pecuniary damages they suffered since their father died during war actions in Bosnia and Herzegovina, as a soldier of the defendant.

7. The Basic Court in Vlasenica issued a Judgment number 737/99 of 24 November 2000 obliging the defendant to pay the appellants the total amount of KM 15,000 by way of compensation for non-pecuniary damages due to their mental sufferings and to pay them KM 1,500 by way of compensation for pecuniary damages for burial expenses. This Judgment became legally valid on 22 December 2000.

8. On 29 January 2001 the appellants lodged a proposal for enforcement of the aforementioned Judgment. The Basic Court in Banja Luka issued a Ruling number I-3787/01 of 16 October 2001 allowing requested enforcement. After the Ruling allowing enforcement had became legally valid, it was communicated to the Ministry of Finance of the Republika Srpska ("the Ministry of Finance") on 5 November 2002. The Ruling has not been enforced to date.

IV. Relevant Laws

9. **The Law on Deferral of Enforcement of Court Decisions Payable from the Budget of the Republika Srpska on the Basis of Payment of Pecuniary and Non-Pecuniary Damage Caused by the War Actions and on the Basis of Payment of Old Foreign Currency Savings** (*Official Gazette of the Republika Srpska*, Nos. 25/02 and 51/03)

Article 1

This Law suspends execution of court decisions payable from the Budget of the Republika Srpska for payment of pecuniary and non-pecuniary damage caused by war actions and for payment of old foreign currency savings, as well as other court decisions, out of court settlements and other legal acts issued on the basis of claims referring to war actions period as of the date of entry into force of this law.

Article 2 para 2

Pecuniary and non-pecuniary damage caused by war actions understands damage caused by war actions in the Republika Srpska in the period between 20 May 1992 and 19 June 1996.

10. The Law on Provisional Suspension of Payment of Claims Payable from the Budget of the Republika Srpska (*Official Gazette of the Republika Srpska*, Nos. 110/03 and 63/04)

Article 1

This law provisionally suspends payment of claims payable from the budget of the Republika Srpska on the basis of internal public debt.

Article 2 para 1(items 1 and 4)

Internal debt understands public debt of the budget of the Republika Srpska towards legal and natural persons occurred as of 31 December 2002 as follows:

- claims occurred during the war or immediate threat of war in the period from 1992 until 19 June 1996;

- enforceable court decisions and other acts burdening the Budget of the Republika Srpska.

Article 3 para 1

Provisional suspension following this law shall be applicable until the laws regulating the manner of meeting the claims from the Budget of the Republika Srpska are passed on the basis of internal debt, at latest by 31 December 2004.

11. **The Law on Establishment and Manner of Settling the Internal Debt of the Republika Srpska** (*Official Gazette of the Republika Srpska*, number 63/04 of 15 July 2004).

Article 18

The amount of 600,00 million KM of pecuniary and non-pecuniary damage caused during war actions in the period from 20 May 1992 until 19 June 1996, constitutes compensation of damage to legal and natural persons who were recognized the right to compensation of pecuniary and non-pecuniary damage by legally valid court decisions or out of court settlements, as well as to legal and natural persons whose right to compensation of damage shall be regulated by a special law.

Article 19 paras 1 and 2

Manner and deadlines for verification of individual claims on the basis of pecuniary and non-pecuniary damage caused during war actions in the period from 20 May 1992 until 19 June 1996 shall be regulated by a special law.

The Courts shall be obliged to submit the Ministry of Finance legally valid court judgments and other court decisions referring to pecuniary and non-pecuniary damage under Article 18 of this law.

Article 21

After verification, obligations referred to in Article 18 of this law shall be fulfilled at latest by 31 December 2007 by issuance of bonds under the following conditions:

1. with maturity date that falls due up to 50 years

2. payment in 10 equal annual instalments starting nine years before the final date of becoming mature

3. without interest.

Article 23

The Law on Provisional Deferral of Payment of Claims on the Basis of Enforceable Decisions Payable from the Budget of the Republika Srpska (Official Gazette of the Republika Srpska, number 110/03) and the Law on Amendments to the Law on Provisional Deferral of Payment of Claims from the Budget of the Republika Srpska, passed by the National Assembly of the Republika Srpska on 29 June 2004, cease to be valid as of the date of entry of this law into force.

12. **The Law on Executive Proceedings** (*Official Gazette of SRFY*, Nos. 20/78, 6/82, 74/87, 57/89, 20/90, 27/90 and 35/91, and *Official Gazette of the Republika Srpska*, Nos. 17/93 and 14/94)

Article 39 para 2

Ruling on execution over monetary claims shall be submitted to the debtor's debtor as well, and the ruling on enforcement over the account funds of the debtor shall be submitted to the organizational unit performing payment transactions with which those funds have been run.

13. **The Law on Executive Proceedings** (*Official Gazette of the Republika Srpska*, number 59/03, entered into force on 1 August 2003)

Article 170

(1) The Bank shall keep a ruling on enforcement, confiscate the means of person over which the enforcement shall be done, if it considers there are legal or other obstacles for enforcement referred to in provisions of Chapter XII of this law, and shall inform the court about the obstacles..

(2) If permanent obstacles are at stake, the court shall terminate the proceedings, and in case of other reasons it shall inform the person seeking enforcement and the Bank on further actions.

Article 232

The provisions of the Law on Executive Proceedings (Official Gazette of the Social Federal Republic of Yugoslavia, Nos. 20/78, 6/82, 74/87, 57/89, 20/90, 27/90 and 35/91, and Official Gazette of the Republika Srpska, Nos. 17/93 and 14/94) cease to be valid as of the date of entry of this law into force.

Article 229

Procedure of enforcement initiated as of the date of entry of this law into force shall be concluded in accordance with provisions of this law.

V. Appeal

a) Statements from the appeal

14. The appellants consider their constitutional right to property has been violated since the Ruling on enforcement of the Basic Court in Banja Luka, No. I-3787/01 of 16 October 2001, communicated to the Ministry of Finance for enforcement was not enforced. Even though the appellants do not explicitly state, it is apparent from the appeal that they consider their right to a fair trial under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") to have been violated.

b) Reply to the appeal

15. The Basic Court points out it is has not been responsible for any violation of constitutional right of the appellants since it allowed enforcement in question it communicated to the Ministry of Finances.

16. The defendant in its reply contests allegations from the appeal since it finds that the appellants did not contest a court decision but only requested the enforcement of the judgment which, according to the defendant, implies that the judgment in the present case was issued in accordance with the Constitution of Bosnia and Herzegovina and adequate laws. In addition, the defendant states that enforcement of decision payable from the Budget of the Republika Srpska was done in 2001 in accordance with the Law on Executive Proceedings until adoption of the Law on Deferral of Enforcement of Court Decisions Payable from the Budget of the Republika Srpska for payment of pecuniary and non-pecuniary damage caused by war actions and for payment of old foreign currency savings. Therefore, the defendant considers that the appellants' claims refer to internal debt of the Republika Srpska. The issue of settling that debt is part of general strategy of settling the internal debt of the Republika Srpska and regulated by the Law on Establishment and Manner of Settling the Internal Debt of the Republika Srpska. For those reasons, the defendant suggests the Constitutional Court to dismiss the appeal.

VI. Admissibility

17. 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.*

18. According to Article 15 para 3 of the Constitutional Court's Rules of Procedure, *the Constitutional Court shall examine an appeal only if all effective legal remedies available under the law against a judgment/decision challenged by the appeal are exhausted and if the appeal was lodged within a time-limit of 60 days as from the date on which the decision on the last effective legal remedy used by the appellant was served on him/her.*

19. Within the context of appellate jurisdiction of the Constitutional Court under Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, term "judgement" has to have broad interpretation. This term should include not only all kinds of decisions and rulings but also a failure to issue a decision when such failure has been found to be unconstitutional (see Decision of the Constitutional Court number *U 23/00* of 2 February 2001, published in the *Official Gazette of Bosnia and Herzegovina*, No. 10/01). The Constitutional Court points out that Bosnia and Herzegovina and both Entities should ensure the highest level of civil rights and fundamental freedoms, according to Article II.1 of the Constitution of Bosnia and Herzegovina, and that the rights and freedoms set forth under the European Convention and its Protocols shall be directly applied in Bosnia and Herzegovina according to Article II.2 of the Constitution of Bosnia and Herzegovina.

20. Therefore, the Constitutional Court interprets the appeal and concludes that the appellants refer to their right under Article 6 para 1 of the European Convention containing the right of access to court.

21. Invoking the case-law of the European Court for Human Rights referring to exhaustion of legal remedies, the Constitutional Court points out that the rule contained in Article 15 para 3 of the Constitutional Court's Rules of Procedure must be applied with certain degree of flexibility and without excessive formalism (see European Court for Human Rights, *Cardot v. France*, judgment of 19 March 1991, Series A number 200, para 34). The Constitutional Court emphasises that the rule of exhaustion of legal remedies available under the law is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case (see European Court of Human Rights, *Van Oosterwijck v. Belgium*, judgment of 6 November 1980, Series A number 40, para 35). This means, amongst other things, that it must take realistic account not only of the existence of formal remedies within the legal system concerned but also of the general legal and political context in which they operate as well as the individual circumstances of the appellant.

22. Having in mind above stated circumstances, the Constitutional Court notes that there is no effective remedy available in Bosnia and Herzegovina, or in the Republika Srpska in the present case, that would enable the appellants to appeal against failure to enforce the legally valid ruling allowing enforcement of the court judgment. The Constitutional Court finds that omissions in organization of judicial system of the Entity and the State, must not affect respect for individual rights and freedoms established under the Constitution of Bosnia and Herzegovina and requirements and guarantees set forth under Article 6 of the European Convention.

23. The Constitutional Court points out that an excessive burden cannot be placed upon an individual while finding out the most effective way to exercise his/her rights. Also, the Constitutional Court notes that one of the main principles of the European Convention is that legal remedies available to an individual should be easily accessible and comprehensible, and that omissions in organization of legal and court system of the state, jeopardising protection of individual rights, cannot be attributed to an individual. In addition, the States have the obligation to organize their legal systems so as to allow the courts to comply with requirements and conditions set forth under the European Convention (see European Court of Human Rights, *Zanghi v. Italy*, judgment of 19 February 1991, Series A number 194, para 21).

24. In the present case, the Constitutional Court finds that the case concerns the issue of failure to enforce legally valid ruling allowing enforcement of the court judgment and that the appellants did not have available effective legal remedy to seek requested enforcement.

25. For the above stated reasons, the Constitutional Court concludes the appeal is admissible.

VII. Merits

26. The appellants consider their right under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, as well as 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 to have been violated for failure to enforce the ruling on execution of the court judgment.

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in para 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 para 1 of the European Convention, in relevant part, reads as follows:

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

27. The appellants essentially complain of the fact the court decision awarding them compensation for pecuniary and non-pecuniary damage is not being enforce. As to those allegations, the Constitutional Court refers to the case-law of the European Court of Human Rights according to which Article 6 para 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 (see European Court of Human Rights, *Hornsby v. Greece*, judgment of 19 March 1997, para 40). In this way, this embodies "the right to court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes

one aspect (see European Court of Human Rights, *Philis v. Greece*, judgment of 27 August 1991, Series A-209, page 20, para 59). However, that right would be illusory if domestic legal system of the Signatory States allows final, enforceable court decisions remain not enforce to the detriment of one of the parties. It would be unacceptable if Article 6 of the European Convention would prescribe procedural guarantees given to the parties – fair, public and expeditious proceedings – without protection of compliance with court decision. Interpretation of Article 6 of the European Convention as explicitly referring to the conduct of the proceedings would have lead to situations incompatible with principles of the rule of law taken over by the State Parties to the European Convention (see European Court of Human Rights, *Golder v. United Kingdom*, judgment of 21 February 1975). Therefore, enforcement of a judgment issued by any court should be considered as an integral part of the "trial" within the meaning of Article 6 of the European Convention.

28. In addition to the case-law of the European Court of Human Rights, there are lots of decisions issued by the institutions founded in accordance with Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina, the Human Rights Chamber (see case number CH/96/17, *Blentić v. the Republika Srpska*, Decision on Admissibility and Merits delivered on 3 December 1997) and Human Rights Ombudsperson for Bosnia and Herzegovina (see case number (B) 746/97, *B.D. v. the Federation of Bosnia and Herzegovina*, Reports of 24 March 1999), having established violation of Article 6 of the European Convention for failure to enforce legally valid court decisions. Also, the Constitutional Court has already held in its jurisprudence that the authorities are obliged to secure execution of legally valid court decisions and that application of the law depriving it violates the appellant's right to a fair trial (see Constitutional Court, Decision No. *AP 288/03* of 17 December 2004). From the above stated it follows that there has been case-law established in relation to position that failure to enforce court decision constitutes violation of the right to a fair trial.

29. The Constitutional Court considers mentioned positions may be applied in the present case as well, since the appellants' complain of the failure to enforce legally valid court decision. In the present case enforcement of legally valid judgment was also allowed by a legally valid ruling of the competent court. However, the judgment was not enforce after the court had communicated the Ruling allowing execution to the Ministry of Finances. The fact stated as a reason for the failure was that, in the meantime, the Law on Provisional Deferral of Enforcement of Court Decisions Payable from the Budget of the Republika Srpska, which was in force until the Law on Establishment and the Manner of Settlement of Internal Debt of the Republika Srpska was passed, entered into force. The Constitutional Court notes that, after aforementioned laws had been passed, the Court did

not act in accordance with Article 170 of the Law on Executive Proceedings according to which *the court shall terminate the proceedings if the issue is about obstacles of a permanent nature, and that it shall inform the claimant and the Bank about further actions in case of other reasons*.

30. The Constitutional Court considers the administrative organs, as well as any others, must comply with legally valid court judgments. Also, the Constitutional Court points out that the State, in principle, cannot pass laws depriving execution of legally valid court decision since it would be in violation of the principle of the rule of law under Article I.2 of the Constitution of Bosnia and Herzegovina and of the right to a fair trial under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of the European Convention.

31. The State cannot be denied of the right to pass laws depriving or limiting certain human rights, but only in cases when such limitation is provided by the European Convention according to which certain rights, as the right to property, may be limited under certain conditions. However, the European Convention does not entitle Contracting States to pass laws preventing enforcement of legally valid court decisions issued in accordance with Article 6 of the European Convention. In the present case, it is the law that prevented enforcement of a legally valid court decision referring to established claims to be paid from the Budget of the Republika Srpska. However, as to passing of the law in question, the Constitutional Court consider there are no reasons for such departing from obligations taken over upon ratification of the European Convention stated under Article 15 of the European Convention (see aforementioned Decision of the Constitutional Court number AP 288/03).

32. The Constitutional Court points out that in any case, limiting human rights and fundamental freedoms striking a fair balance between the requirements of general interest of the community and need to protect rights of an individual, should be taken into account. That means there should be reasonable relationship of proportionality between the means employed and the aim sought to be realized. Necessary balance, that is proportionality between a public interest of the community and fundamental rights of an individual shall not be struck if "the persons have to bare an excessive burden" (see European Court of Human Rights, *Sporrong and Lönnroth v. Sweeden*, judgment of 23 September 1982, Series A-52, pages 70-73).

33. When above positions are brought into connection with quoted law establishing the manner of settlement of internal debt of the Republika Srpska, one can reach a conclusion

that such a law, in addition to the fact its issuance is questionable within the meaning of the principles set forth under the European Convention, has infringed the principle of proportionality in relation to fundamental rights of an individual. Namely, even besides evident public interest of the State to pass mentioned law due to enormous debt occurred on the basis of pecuniary and non-pecuniary damage caused during war actions, referred to in Article 18 of quoted law, the Constitutional Court considers "individuals had to bear excessive burden" due to issuance of such a law. Therefore, a requirement of proportionality between public interest of the community and fundamental rights of individuals has not been met. The main reason for which the Constitutional Court considers that the individuals have to bear an excessive burden is the fact that Article 21 para 1 item 1 of this law provides for the claims established under legally valid court judgment shall be settled by "issuance of bonds with maturity date that falls due up to 50 years", for which reason a question whether any citizen possessing such bond shall live a possibility to collect payment for bonds and exercise his/her rights, is justified to put. In addition, disputable law provides for bonds to be settled without interest which means the amount paid to individuals shall be decreased, when taking into account mentioned delay period. In previously quoted Decision number AP 288/03, the Constitutional Court has held that application of provisions of mentioned law deprived execution of legally valid court decision in a manner and scope established under the legally valid court decision which is contrary to the right to access to court, which is an integral part of the right to a fair trial.

34. Also, the Constitutional Court in its previous jurisprudence has held that it was in its appellate jurisdiction to evaluate constitutionality within the meaning of Article VI.3 (c) of the Constitution of Bosnia and Herzegovina, if necessary. Otherwise, the Constitutional Court would be deprived of its function of "the court" (see Constitutional Court, Decision number *U 106/03* of 26 October 2004).

35. In accordance with above stated, the Constitutional Court considers legislation in this case lacks necessary legal quality to the extent requirements of Article 6 para 1 of the European Convention. The Constitutional Court recalls that the Constitution of Bosnia and Herzegovina shall be the highest form of general act of a State and shall have priority over all other laws which are not in accordance with the Constitution of Bosnia and Herzegovina. Within the aim of supporting the Constitution of Bosnia and Herzegovina, the Constitutional Court concludes that the Government of the Republika Srpska is obliged to provide the appellant a possibility to have her legally valid court decision executed, as allowed by a legally valid court ruling.

36. For the above stated reasons, the Constitutional Court finds the right to a fair trial under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of the European Convention have been violated in the present case.

Other statements

37. Having in mind conclusion referring to violation of right under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 para 1 of the European Convention, the Constitutional Court considers there is no need to rule upon alleged violation of the right to property under Article 1 of Protocol No. 1 to the European Convention.

VIII. Conclusion

38. The Constitutional Court concludes there has been violation of the right to access to court as an element of the right to a fair trial, if the law or any other act of the authorities deprive execution of a legally valid court judgment, when such a law or other act places "an excessive burden on the individual" which does not satisfy the requirement of proportionality between a public interest of the community and fundamental rights of an individual.

39. Having regard to Article 61 paras 1 and 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court unanimously decided as set out in the enacting clause of this decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 661/04

Appeal of Mr. M. Š. from Trebinje against the Judgment of the County Court in Trebinje, No. Kž-37/04 of 25 May 2004 and Judgment of the Basic Court in Trebinje, No. K-15/04 of 24 March 2004

DECISION ON ADMISSIBILITY AND MERITS
of 22 April 2005

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 59, para 2 (2), Article 61, paras 1 and 2 and Article 64, para 3 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina - New Amended Text (*Official Gazette of Bosnia and Herzegovina*, No. 2/04), in Plenary and composed of the following judges:

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović, Vice-President,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Having considered the appeal of **Mr. M. Š.,** in Case **No. AP 661/04**

adopted at the session held on 22 April 2005 the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. M. Š. is granted.

It is established that 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 have been violated.

The Judgment of the County Court in Trebinje No. Kž-37/04 of 25 May 2004 and Judgment of the Basic Court in Trebinje, No. K-15/04 of 24 March 2004 are hereby annulled.

Pursuant to Article 64, paragraph 3 of the Rules of Procedure of the Constitutional Court, the case shall be referred back to the Basic Court in Trebinje which is ordered to issue a new decision in an expedited procedure

in accordance with Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Municipal Court in Trebinje is ordered to submit information to the Constitutional Court on the measures taken within a time limit of six months in accordance with Article 75, paragraph 5 of the Rules of Procedure 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* and the *Official Gazette of the Republika Srpska*.

Reasons

I. Introduction

1. On 28 July 2004 Mr. M. Š. ("appellant"), from Trebinje, represented by Mr. N. R., a lawyer practicing in Trebinje, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against the Judgment of the County Court in Trebinje ("County Court"), No. Kž-37/04 of 25 May 2004 and Judgment of the Basic Court in Trebinje ("Basic Court"), No. K-15/04 of 24 March 2004.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 21, paras 1 and 2 of the Rules of Procedure of the Constitutional Court, the County Court and County Public Prosecutor were requested on 3 December 2004 and Basic Court on 4 February 2005 to submit their replies to the appeal. The Basic Court was requested on 11 March 2004 to submit the complete file in case No. K-15/04.

3. The County Court submitted its reply to the appeal on 10 December 2004, County Public Prosecutor on 16 December 2004 and the Basic Court on 15 March 2004.

4. Having regard to Article 25, paragraph 2 of the Rules of Procedure of the Constitutional Court, replies to the appeal were submitted to the appellant on 7 December 2004.

III. Facts of the case

5. The circumstances of the case as they appear from the appellant's statements and the documents submitted to the Constitutional Court, can be summarized as follows:

6. By its Judgment No. K-15/04 of 24 March 2004, the Basic Court found the appellant guilty of criminal offense of an unauthorized production and trafficking of narcotics under Article 224, para 2 in connection with para 1 of the Criminal Code of the Republika Srpska and sentenced him to 3 years of imprisonment including the detention time from 20 December 2003 and further on. Prior to that, the appellant was sentenced by the judgment of the Basic Court in Trebinje No. K-4/01 of 8 May 2001 to two years of imprisonment including the time spent in detention from 11 April to 11 May 2003 for the criminal offense of robbery referred to in Article 223, paragraph 2 of the Criminal Code of the Republika Srpska. That judgment was confirmed by the judgment of the County Court in Trebinje No. Kž-111/01 of 28 September 2001. By a Decision on pardon of the President of the Republika Srpska, No. 01-85/02 of 15 February 2002, that sentence was replaced by the suspended sentence with 3 years probation period. Based on that, by application of provisions of Articles 42 and 44 of the Criminal Code of the Republika Srpska, the Basic Court, in the present case, has taken this previously pronounced sentence of two years of imprisonment as already established and it sentenced the appellant to a compound sentence of three years and three months of imprisonment including the time he spent in detention.

7. During the probative proceedings, the Basic Court has, *inter alia*, heard witnesses of both prosecution and defense and took the statement of Mr. K.S. who was transporting three bags of narcotics – Indian cannabis as decisive evidence at the time in question. He testified that he was hired by the appellant for this job. This witness stated that the criminal proceedings for the criminal offense of illegal production and trafficking of narcotics were initiated against him and that he has concluded an agreement with the competent prosecutor on confession of his guilt on 20 December 2003. According to the agreement he confessed his guilt and was sentenced to three months of imprisonment which was a sentence below minimal sentence prescribed. At the same time, Mr. K.S. agreed to testify in the criminal proceedings against the appellant.

8. The Basic Court concluded that this testimony should be given full faith and that there was other evidence substantiating the correctness of this statement. Namely, one of the witnesses confirmed that the appellant and Mr. K.S. had met and that they had *talked about something, something which was not known to him* and that the members of the

appellant's family had requested him to change his statement. Another witness, a police officer who stopped the vehicle in which Mr. K.S. was transporting narcotics, stated that at the time he stopped the vehicle for the routine check up, the mobile phone of Mr. K.S. rang and that Mr. K.S. told him that *his friend Milan* was calling him. He saw himself on the display of the mobile phone the note *Milan* and number of network *065*.

9. Furthermore, it follows from the first instance judgment that the Basic Court established that the appellant was driving "Zastava 101" vehicle at the critical moment, and that he was driving in front of Mr. K.S. *so he could inform him about possible police patrols*. The Court reached such a conclusion based on the testimony of the patrolling police officers, who confirmed seeing "BMW" vehicle driven by Mr. K.S. but not "Zastava 101" vehicle allegedly driven by the appellant. Based on this evidence, the Basic Court found it indisputable that appellant had driven vehicle "Zastava 101" in front of "BMW" vehicle driven by Mr. K.S.

10. The Basic Court found the statements of group of witnesses as "directed exclusively at aiding the appellant in his defence" and did not accept them as true ones. Namely, the Basic Court has dismissed the statement of the appellant's father that "Zastava 101" vehicle was in his possession in the moment in question which was confirmed by one more witness, the appellant's relative, and considered them as incorrect and *directed exclusively at aiding the appellant*. With the same reasons, the Basic Court dismissed the statement of the witness, the appellant's friend, who testified he spent the night in question with the appellant and friend Mr. P.S. and with his girlfriend, first being in café bar and then at home watching a movie. This was confirmed by Mr. P.S. in his testimony. He also stated that they watched a movie in his house and that they left around 11:30 hours and that the appellant did not leave the company at any moment. The Court did not accept these statements and explained this refusal as *not being convincing or, objective* but rather as *subjective and given exclusively with the purpose of helping the accused in his defense, without being categorical in their testimonies*.

11. By its Judgment No. Kž-37/04 of 25 May 2004 the County Court dismissed the appellant's appeal, granted the appeal of the County Public Prosecutor and altered the first instance judgment in part of the decision on sentence, in terms that the appellant was sentenced to three years and four months of imprisonment for committed criminal offence, including the time he spent in detention from 20 December and further on. Also, the County Court considered it as established previously pronounced sentence of two years of imprisonment for the criminal offence of robbery, including the time he spent in detention in the period from 11 April until 11 May 2003. So, by applying Article 42, para

2, Articles 43, 44 and 48, paras 1 and 3 of the Criminal Code of the Republika Srpska, the Court sentenced the appellant to a compound sentence of three years and six months of imprisonment. It included the whole time he spent in detention into his sentence.

12. Upon the appeals of the appellant and County Public Prosecutor, the County Court held its session in the presence of the appellant, his attorney and County Public Prosecutor. After having deliberated upon allegations, the County Court issued contested decision. In the reasons of this Decision, the County Court concluded that provisions of the criminal proceedings were not substantively violated in the first instance proceedings and that the first instance court presented sufficient and convincing reasons for having faith in the statement of witness Mr. K.S. and not the group of witnesses of defence. Particularly, the County Court pointed out that *the appeal in itself is extremely inconsistent when requesting the court to have faith in the statement of accused who was heard as a witness, without asking why the court would trust the accused when there is established fact that he was sentenced upon the judgment for aggravated criminal offence....*

13. Also, the County Court established in the contested judgment that witness Mr. K.S. did not have a reason to give false statement against the appellant and that the reasons of the first instance judgment were reasonable in part referring to explanation of the fact that no one saw the appellant driving "Zastava 101" vehicle, but this did not mean the appellant in fact did not drive the vehicle. For the above stated reasons, the County Court concluded that the Basic Court correctly assessed evidence and correctly and completely established factual background.

IV. Applicable laws

14. **The Law on Criminal Procedure of the Republika Srpska** (*Official Gazette of Republika* Srpska, No. 50/03), in its relevant part, reads as follows:

Article 3

(1) A person shall be considered innocent of a crime until guilt has been established by a final verdict.

(2) A doubt with respect to the existence of facts composing characteristics of a criminal offense or on which depends an application of certain provisions of criminal legislation shall be decided by the Court with a verdict and in a manner that is the most favorable for accused.

(...)

Article 10

(...) (2) The Court may not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, nor on evidence obtained through essential violation of this Code.

(3) The Court may not base its decision on evidence derived from the evidence referred to in paragraph 2 of this Article.

(...)

Article 14

The court, the prosecutor and other bodies participating in the criminal proceedings shall be obliged to objectively study and establish with equal attention facts that are exculpatory as well as inculpatory for the suspect or the accused.

Article 15

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

Article 268

(1) Each party and the defense attorney are entitled to call witnesses and to present evidence.

(...) (3) During the presentation of the evidence, direct examination, cross-examination and redirect examination shall be allowed.

(...)

Article 269

(1) Direct examination, cross-examination and redirect examination shall always be permitted to the party and defence attorney who called a witness. (...)

(...)

Article 287

(1) The Court shall reach a verdict solely based on the facts and evidence presented at the main trial.

(2) The Court shall be obliged to conscientiously evaluate every evidence in isolation and in connection with other evidence and, based on such evaluation, to conclude whether a fact has been proved.

(...)

Article 303

(1) The following constitute an essential violation of the provisions of criminal procedure:

(...)

(g) if the right to defense was violated;

(...)

(z) if the verdict is based on evidence that may not be used as the basis of a verdict under the provisions of this Code

(...)

(j) if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts. (...)

V. Appeal

a) Statements from the appeal

15. The appellant complains that his right to a fair trial was violated by contested judgments since the first instance court incorrectly found the appellant had committed a criminal offence of unauthorized production and trafficking of narcotics, even though there were not enough reasons for such a conclusion. Namely, the appellant alleges that the first instance court based its judgment exclusively on the statement of one witness Mr. K.S., whose moral credibility, as he further states, is questionable since he was a former police officer "who was dismissed from his office due to numerous fraudulent handlings and criminal conducts". Also, the appellant states that, according to the agreement on confession of guilt concluded between this witness and County Public Prosecutor, a sentence in duration of three months was imposed on that witness for an offence for which a sentence of three to fifteen years of imprisonment is prescribed, and that in return for

that he "pointed his finger at the appellant as organizer of trafficking of narcotics". Also, the appellant pointed out that the Basic Court assessed only that testimony as "categorical, detailed, objective, convincing, correct and authentic", while assessing all other evidence of defence as subjective and incorrect without giving more detailed reasons for such a conclusion. The appellant considered the contested judgment also violated his right to presumption of innocence which is an integral part of the right to a fair trial, particularly for the reason the County Court took the fact that the appellant had already had a prior criminal record as decive fact for not giving the same faith to the appellant's guilt.

b) Reply to the appeal

16. The County Court in its reply contests allegations of the appeal and pointed out that the court did not take quantity but quality of evidence as decisive element when establishing legally relevant facts. Also, the County Court considers allegations of the appeal concern only the assessment of evidence made by the court and that it does not question legality of the proceedings in the present case. Therefore, the County Court proposes that the appeal be dismissed by the Constitutional Court.

17. The Basic Court states in its reply that the right to a fair trial has not been violated by the first instance judgment.

18. The County Public Prosecutor also contests allegations of the appeal. He considers there has been no violation of the constitutional rights of the appellant, particularly the right under Article 6, paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").

VI. Admissibility

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

20. According to Article 15, para 3 of the Rules of Procedure of the Constitutional Court, 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.

21. The legal remedies exhaustion rule requires that the appellant reaches a so-called final decision. A final decision represents a response to the last legal remedy used which is effective and adequate to examine a lower instance decision in both factual and legal aspects.

22. In the present case, the subject matter of the appeal is the judgment of the County Court No. Kž-37/04 of 25 May 2004, against which there are no other effective remedies available under the law. Furthermore, one can see from the stamp on the challenged judgment that this judgment was received in the Basic Court on 1 June 2004 in order to be delivered to the appellant, and the appeal was submitted on 28 July 2004, that is within a 60 days time-limit as provided for under Article 15, para 3 of the Rules of Procedure of the Constitutional Court. Finally, the requirements provided for in Article 16, paragraph 2 of the Rules of Procedure of the Constitutional Court have been met in this case.

23. In view of the provisions of Article VI.3. (b) of the Constitution of Bosnia and Herzegovina, Article 15, para 3 and Article 16, para 2 of the Rules of Procedure of the Constitutional Court, the Constitutional Court established that the admissibility requirements have been met in the appeal in question.

VII. Merits

24. The appellant complains that the challenged judgments have violated his right to a fair trial under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6, paras 1 and 2 of the European Convention.

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

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

26. Article 6 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. (...)

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

27. The appellant complains against the decision issued in the criminal proceedings conducted against him, so Article 6 of the European Convention is applicable in this case. Therefore, the Constitutional Court shall examine whether those were fair proceedings as required under Article 6 of the European Convention.

28. The statements presented in the appeal refer to the established factual background and court assessment of evidence on which challenged judgments are based. The appellant considers there has been violation of his right to a fair trial since, as he states, the first instance judgment was solely based on the statement of one witness and the court did not correctly assess the appellant's statement and statements of the group of witnesses of defense.

29. According to its jurisprudence, the Court is therefore not called upon to review the establishment of facts or the interpretation and application of ordinary laws by the lower courts, unless the lower courts' decisions are in violation of rights under the Constitution. This is the case if in an ordinary court's decision constitutional rights have been disregarded or wrongly applied, including cases where the application of a law was obviously arbitrary, where the applicable law was in itself unconstitutional or where fundamental procedural rights (fair trial, access to court, effective remedies etc.) were violated (see Constitutional Court, Decision No. *U 39/01* of 5 April 2002, published in the *Official Gazette of Bosnia and Herzegovina* No. 25/02; and Decision No. *U 29/02* of 27 June 2003, published in the *Official Gazette of Bosnia and Herzegovina* No. 31/03). Moreover, the Constitutional Court recalls that it is not within its competence to assess quality of conclusions made by the ordinary courts as to assessment of facts, if this assessment does not seem apparently arbitrary. The former Human Rights Chamber had the same case-law, considering "it is not within its competence to substitute its own assessment of the facts to that of the national courts, if such conclusions are not inadmissible or arbitrary" (see former Human Rights Chamber, *Trgosirovina Sarajevo (DDT)* v. Federation of BiH, case number CH/01/4128, Decision on admissibility of 6 September 2000).

30. As the European Court of Human Rights pointed out in its numerous decisions, Article 6 of European Convention has "the prominent place in a democratic society" (European Court of Human Rights, *De Cubber v. Belgium*, judgment of 26 October 1984, Series A number 86, paragraph 30). The consequence is that Article 6 of the European

Convention cannot be interpreted restrictively (European Court of Human Rights, *Moreira de Azevedeo v. Portugal*, judgment of 23 October 1990, Series A number 189, paragraph 66). Article 6 paragraph 1 the European Convention contains list of elements inherent to the fair exercise of justice, so there will be violation of Article 6 paragraph 1 of the European Convention if there is violation of any of elements set out under this right (see Constitutional Court, Decision number *U 25/01* of 26 December 2003, published in the *Official Gazette of Bosnia and Herzegovina*, No. 3/04, paragraph 25). If we consider constitutional right to a fair trial in the context of applicable positive law in Bosnia and Herzegovina, it has to be recognized that substantive part of the right to a fair trial consists of conscientious and thorough evaluation of evidence and facts established in the proceedings before ordinary courts. This is one of the fundamental provisions referring to presentation and evaluation of evidence which finds its place in all applicable procedural laws in Bosnia and Herzegovina, so as in the Law on Criminal Procedure of the Republika Srpska. Article 287, paragraph 2 of that Law reads as follows: *(...) The Court shall be obliged to conscientiously evaluate each evidence in isolation and in connection with other evidence (...)*, so it appears as inseparable element of the right to a fair trial.

31. Therefore, even though the Constitutional Court has limited itself to examining factual background and assessment of evidence by regular courts, it did not completely exclude that possibility but has limited its competence to a case when examination of factual background is done if "the proceedings contained violation of the right to a fair trial within the meaning of Article 6 of the European Convention" that is if established factual background points to violation of the Constitution" or if assessment of evidence "apparently deems to be arbitrary". In that sense there are numerous examples of court case-law when the Constitutional Court dealt with assessment of factual background and evidence established by ordinary courts (see Constitutional Court, Decision number *U 15/99* of 15 December 2000, *Official Gazette of Bosnia and Herzegovina* No. 13/01; Decision number *U 14/00* of 4 May 2001, Official Gazette of Bosnia and Herzegovina No. 33/01).

32. These findings can be applied in the present case as well. Namely, the first instance court in the greatest part based its decision on the appellant's guilt on the statement of witness Mr. K.S. against whom criminal proceedings were initiated due to criminal offense of unauthorized production and trafficking of narcotics referred to in Article 224, paragraph 2 in conjunction with paragraph 1 of the Criminal Code of the Republika Srpska. During the proceedings Mr. K.S. concluded an agreement with the competent prosecutor on confession of guilt according to which he agreed that a sentence milder than minimal sentence of

imprisonment prescribed under the law be imposed on him for the aforementioned criminal offence and, in return, to testify against the appellant in the proceedings.

33. The Constitutional Court recalls the case-law of the former European Commission for Human Rights according to which use of evidence at a hearing obtained from accomplice who was given immunity from criminal prosecution due to his testimony, can bring into question an issue of fairness of the proceedings in relation to the accused within the meaning of Article 6 paragraph 1 of the European Convention (see former Human Rights Commission, *X v. United Kingdom*, application No. 7306/75 of 6 October 1976). In order to answer the question whether the appellant's right to a fair trial was thereby violated, it is necessary to take into account the whole procedure in the light of applicable positive criminal legal provisions.

34. In that sense, the Constitutional Court points out that one of the basic principles of the Law on Criminal Procedure of the Republika Srpska ("Law") is that the court and other prosecution organs are obliged to establish facts to the detriment of the suspect, that is the accused, truthfully and completely, as well as the ones in his favor. Moreover, the Law prescribes presumption of innocence and application of the principle *in dubio pro reo*, a principle meaning that even the least doubt as to evidence should benefit the accused, which is a substantial element of the right to a fair trial under Article 6 of the European Convention (see European Court for Human Rights, *Barbera, Messeque and Jabardo v. Spain*, judgment of 6 December 1988, Series A No. 146, paragraph 77). The Court is obliged to assess all the evidence in isolation and in relation to other evidence thoroughly, and then, on the basis of such assessment, to make a conclusion whether a fact has been proved (Article 281 of the Law). Also, under Article 15 of the Law, the court and other organs shall not be obliged or limited by special formal probative, but shall assess existence or non-existence of a fact freely based on the principle of free assessment of evidence.

35. Free assessment of evidence is, therefore, free of legal rules that would *a priori* determine value of certain evidence. However, this free assessment of evidence requires reasons for individual evidence and for all the evidence viewed jointly, as well as that all presented evidence is brought in logical correlation. Principle of free assessment of evidence does not constitute an absolute freedom. That freedom is limited by general rules and legalities of human thought and experience. Therefore, an ordinary court, in the reasons of its judgment, is obliged to describe the process of individual assessment of evidence and bringing of individual evidence in connection with other evidence and process of reaching the conclusion on certain fact being proved.

36. Moreover, the facts the ordinary courts should establish could be proved by indirect and circumstantial evidence – indications. The Constitutional Court points out that argumentation on the basis of indications, is not in itself contrary to principle of fair trial under Article 6 paragraph 1 of the European Convention. However, for argumentation on the basis of indications applicable rule is that indications have to act as firm, closed circle allowing only one conclusion in relation to relevant fact and objectively to exclude completely the possibility of making different conclusion in relation to the same fact. Accordingly, the facts established on the basis of indirect evidence have to be indisputably established and mutually connected and logically correlated so that they lead to the only possible conclusion that the accused had committed criminal offence he is charged with (see Supreme Court of the former SFRY, No. *Kž-38/70* of 22 December 1970). Also, presented circumstantial evidence have to be completely harmonized and constitute not the group of evidence but a system of connected indications that will exclude any other possibility but the one established by the first instance court (see Supreme Court of the former SFRY, judgment number *Kž-1744/68*).

37. In the light of the above stated, the Constitutional Court recalls that the first instance court, in the greatest part, based the judgment convicting the appellant on the statement of the witness who concluded an agreement with prosecution confessing his guilt, as the only indirect evidence. Other evidence, which substantiate correctness of key testimony according to the position of the first and the second instance courts, is actually circumstantial evidence or indications. As to the testimony of the mentioned witness, even though such witnesses may often be unreliable, it in itself is not a reason not to have faith in the statement of such witness. On the other side, the Law gives possibility to defence to cross-examine and try to prove inconsistency of statements of such witness and thereby, possibly, discredit him/her. The Constitutional Court did not find elements that would show the appellant was deprived of this procedural possibility.

38. The Law introduces the institute of confession of guilt as something new in the criminal legal system in Bosnia and Herzegovina which, to a certain extent, is an equivalent to the institute of "plea bargaining" from Anglo Saxon Law. Originally, as well as in the new criminal legislation, the fundamental *ratio* of this institute is decrease of number of trials and making proceedings cheaper. On the other side, this institute is also used in Anglo Saxon Law for obtaining certain information and testimonies against other persons, mostly against organized criminal groups or nets, which can be very positive. However, when obtaining evidence in such a manner, that is when providing testimonies by exercise of this institute in a country with continental legal system, as Bosnia and Herzegovina,

it is necessary to apply other, fundamental principles of the criminal legislation to such kind of evidence as solicit and conscientious evaluation of evidence in isolation and in connection with each other and principle *in dubio pro reo*. As already stated, by applying the principle of free evaluation of evidence, the courts cannot *a priori* attach greater value to such an evidence because it was obtained on the basis of agreement on confession of his guilt concluded with witness who was previously accused for the same offence. On the contrary, the courts have to evaluate this evidence in the same manner and based on the same rules prescribed under the Law for any other presented evidence, i.e. in isolation and in connection with other evidence, and bring all presented evidence in logical relation.

39. However, the Constitutional Court considers the reasons stated in both challenged judgments as to the issue why the witness Mr. K.S. was given faith, and why the testimonies of group of witnesses of defence were rejected as unreliable and untruth, are not satisfactory from the aspect of solicit and conscientious evaluation of evidence as required under the Law or from the aspect of Article 6, paragraph 1 of the European Convention. Namely, the County Court found ... *if having in mind such presented content of testimony of Mr. K. S., first with regard to the circumstances under which they were acquainted with each other, which was confirmed by witness B.N., and then with regard to the circumstances under which the agreement was made between K.S. and the accused, it is than unclear why should K.'s testimony be taken as untrue, and finally, why would he have any reason to incriminate the accused without any grounds. Even if he had a reason for that when negotiating with the prosecutor on the conditions for confession of guilt, why would he point out his finger at ... (the appellant) and not someone else*. The questions the County Court thereby raises by substantiating correctness of the first instance judgment and its position are the very questions to be answered by the first and the second instance courts. Ordinary courts should have answered the question why they took it established the appellant had reached an agreement on commission of the criminal offence with witness Mr. K.S., when only the statement being in favor of that was the one given by that witness, having noticeable personal interest due to the agreement concluded with the prosecutor according to which he was determined a sentence below legally prescribed minimal sentence. This is particularly important in a situation in which there is no other direct evidence with regard to circumstances of agreement for commission of criminal offence, and circumstantial evidence are not such as to constitute a system of firmly and logically connected indications which, as already stated, would refer to the only conclusion possible that it is the appellant who has committed criminal offence he is charged with.

40. Furthermore, the fact that was indisputably established by the first and the second instance courts is that not a single person, not even police patrol controlling traffic at that part of the road, saw the appellant driving “Zastava 101“ vehicle in front of a vehicle in which Mr. K.S. was transporting drugs during the night in question with intention to “scout the road“, as concluded by regular courts. A police officer as a witness clearly stated that in his testimony. In addition, the appellant’s father testified that he had the vehicle during the night in question. That was confirmed by a testimony of the appellant’s relative and appellant’s two friends testified the appellant was with them during that night and did not leave their company. Based on such presented evidence, regular courts however concluded that it was indisputably established that the appellant did really „scout the road“ driving vehicle ”Zastava 101“. In the reasons of such conclusion the County Court stated *it is normal that no police officer saw the accused (the appellant) with his vehicle since he was scouting the road*, and if having in mind other circumstances *with respect to obligation of writing a report about vehicle they stop during controls..., and with regard to the circumstance that the attention of the police patrol was directed to BMW vehicle driven by Mr. K.S.* Also, giving reasons why it rejected testimonies being in favor of the appellant, the courts concluded only that those testimonies “were not categorical” and that they were “aimed at supporting“ the appellant, without giving more detailed reasons on the basis of which they got such an impression, that is the process of evaluation of that evidence as required by the principle of free evaluation of evidence.

41. The Constitutional Court considers such reasons did not meet the requirement of solicit and conscientious evaluation of evidence, since subjective belief of the court that the appellant had committed criminal offence he was charged with was not sufficient. It also considered the truth of the court’s conclusion has to be real, reasoned and based on objective facts. Regular courts cannot say they do have faith in a certain witness only because his/her statement is in contravention with the statement of another witness they have faith in. Furthermore it is not sufficient to only qualify evidence subjectively as “convincing, true and objective“, that is as “unconvincing, subjective and aimed at helping the accused“.

42. According to the Constitutional Court, such reasoning does not even satisfy the obligation to respect the principle *in dubio pro reo*. Namely, the statement of group of witnesses of defence may logically and reasonably cause doubt with respect to the fact whether the appellant really drove the vehicle “Zastava 101“ during the night in question or he spent that night with his friends. Therefore, it is an issue to be fully clarified and given convincing and logical reasons. This is even more so because the court, the prosecutor and

other organs have obligation under the Law to establish all the facts – the facts that are both exculpatory and inculpatory for the accused. Due to application of the principle *in dubio pro reo*, inculpatory fact the accused have to be established with certainty unlike the exculpatory facts which are taken as established even when there is only a possibility or doubt in their existence. The Constitutional Court considers the reasons given by the first and the second instance courts were not clear and precise enough. Those reasons of the court did not show the manner in which the courts applied principle *in dubio pro reo* with respect to the appellant as the accused. According to the Constitutional Court, such reasons and conclusion made do not meet requirements of the Law or Article 6 of the European Convention but create an impression of arbitrariness.

43. In view of the above stated, the Constitutional Court finds challenged judgments have violated 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.

44. Also, the appellant considers there has been violation of the principle of presumption of innocence, as an element of the right to a fair trial, protected under Article 6, paragraph 2 of the European Convention. The appellant sees such violation in a sentence contained in the reasons of the second instance judgment which reads: *The complaint itself constitutes extreme inconsistency when requesting the court to have faith in the statement of the accused, who was heard as a witness, without asking itself why the court would have faith in the statement of the accused who was already convicted of serious criminal offence in accordance with a final and binding judgment...*

45. The Constitutional Court holds that these allegations of the appellant refer to special aspect of the general concept of "a fair trial" in criminal proceedings. Therefore, further examination with respect to the violation of this provision shall not be conducted, when violation of Article 6, paragraph 1 of the European Convention has already been established (see Decision of the Constitutional Court, No. *AP 454/04* of 18 January 2005, and European Court of Human Rights, *Deweer v. Belgium*, judgment of 27 February 1980, Series A No. 35, paragraph 56).

46. In view of the above stated, and bearing in mind the impression of the proceedings in its entirety, the Constitutional Court found in the present case there has been violation of the right to a fair trial under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6, paragraph 1 of the European Convention.

VIII. Conclusion

47. The Constitutional Court finds there has been violation of a 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, since the convicting judgment, in its major part, is based on the statement of the witness who concluded an agreement with the prosecutor on confession on guilt. The court did not give logical and convincing reasons for evaluation of that and other presented evidence but it seems such evaluation was arbitrary.

48. Having regard to Article 61, paras 1 and 2 and Article 64, para 3 of the Rules of Procedure of the Constitutional Court, the Constitutional Court unanimously decided as stated in the operative part of this Decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 696/04

Appeal of Mr. Bogdan Subotić against Bosnia and Herzegovina for being arrested and detained by the SFOR

DECISION ON MERITS
of 23 September 2005

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

Mato Tadić, President,

Tudor Pantiru, Vice-President,

Miodrag Simović, Vice-President,

Hatidža Hadžiosmanović, Vice-President,

David Feldman,

Valerija Galić,

Jovo Rosić,

Constance Grewe,

Having deliberated on the appeal of **Mr. Bogdan Subotić** in case No. **AP 696/04**

Adopted at the session held on 23 September 2005 the following

DECISION ON MERITS

The appeal filed by Mr. Bogdan Subotić is granted.

Violations of rights under Article II.3 (b), (d) and (f) of the Constitution of Bosnia and Herzegovina and Article 3, Article 5, paras 1, 2, 4, and 5 and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms are hereby established.

Bosnia and Herzegovina is ordered within meaning of Article 76 para 2 of the Rules of the Constitutional Court of Bosnia and Herzegovina, to pay Mr. Bogdan Subotić, within a time limit of three months from the date of delivery of this decision, the amount of 600 KM for non-pecuniary damage

caused by the violation of Article 5, para 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the amount of 2,400 KM for non-pecuniary damage caused by the violation of other constitutional rights defined by this Decision.

Bosnia and Herzegovina is ordered, within meaning of Article 76 para 2 of the Rules of the Constitutional Court of Bosnia and Herzegovina, to inform the Constitutional Court of Bosnia and Herzegovina of the measures taken to enforce this Decision.

The appeal filed by Mr. Bogdan Subotić against Bosnia and Herzegovina for being arrested and detained by the SFOR is dismissed as ill-founded in reference to the violation of Article 5 paragraph 3 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 Brčko District of Bosnia and Herzegovina.*

Reasons

I. Introduction

1. On 9 August 2004, Mr. Bogdan Subotić ("appellant") from Banja Luka, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against Bosnia and Herzegovina for being arrested and detained by the SFOR. On 16 September 2004, the appellant submitted a supplement to the appeal.

II. Proceedings before the Constitutional Court

2. Pursuant to then applicable Article 21 para 1 of the Rules of Procedure of the Constitutional Court, on 2 March 2005 the Public Attorney's Office of Bosnia and Herzegovina was requested to submit a response to the appeal.

3. The Public Attorney's Office of Bosnia and Herzegovina submitted its reply to the appeal on 18 March 2005.

4. Pursuant to then applicable Article 25 para 2 of the Rules of Procedure of the Constitutional Court, the reply to the appeal was forwarded to the appellant on 3 June 2005.

5. At the request of the Constitutional Court, on 14 and 18 March 2005, the Ministry of the Interior of the Republika Srpska-Public Security Center Banja Luka and Public County Prosecutor's Office Banja Luka submitted information on the subject matter of the appeal.

6. On 15 September 2005, the appellant informed the Constitutional Court that he had submitted a request for compensation for damage to the Compensation Commission with the Ministry of Justice of the Republika Srpska.

III. Facts of the case

7. The circumstances of the case, as they appear from the appellant's statements and the documents submitted to the Constitutional Court, can be summarized as follows.

8. On 3 March 2004, the appellant was arrested in his family house in Banja Luka by the SFOR and was taken into detention in an unknown location where he spent six days, after which he was released.

9. According to information which the Constitutional Court received from the Ministry of the Interior of the Republika Srpska – Public Security Center Banja Luka, No. 10-02/4-1-230-399/04 on 8 March 2004, the Public Security Center submitted a report on the arrest of the appellant to the Public Basic Prosecutor's Office Banja Luka. According to the report, on 3 March 2004 between 8 p.m. and 8.30 p.m. the appellant was arrested in Banja Luka, at Grmečka 47b Street by members of the SFOR who took him in a helicopter to an unknown direction. Upon the arrest, the members of the SFOR carried out a search of the appellant's house, confiscated certain items from the house and delivered a receipt for the confiscated items to the members of the appellant's family. On 4 March 2004, the responsible team conducted an investigation of the appellant's house and wrote an official note about the investigation. On 25 March 2004, the Public County Prosecutor's Office Banja Luka received, as a supplement to the previous official note, another official note on the questioning of the appellant and the circumstances under which he was arrested by the SFOR.

10. According to information which the Constitutional Court received from the Public County Prosecutor's Office Banja Luka, No. KTA-111/04, the Public County Prosecutor's

Office, having received the official note of 25 March 2004 from the Public Security Center Banja Luka, closed the matter as it found no grounds for taking further action because it established that it was not possible to institute criminal proceedings against the members of the SFOR.

11. By act No. 0/01-1384/04 of 8 June 2004, the Government of the Republika Srpska informed the appellant that it was aware of the armed action taken by the SFOR on 3 March 2004 when he was arrested. According to that act, the President of the Government of the Republika Srpska made a statement with regard to the matter and expressed the position taken by the authorities in respect of the matter. According to Annex I.A of the General Framework Agreement for Peace in Bosnia and Herzegovina, the SFOR shall have the authority, without interference or permission of any Party, to do all that it judges necessary and proper, including the use of military force, to carry out its responsibilities. In view of such state of the facts, the position of the Government and of other representatives of the authorities of the Republika Srpska with regard to the mandate of the SFOR does not allow any measure or action to be taken. Finally, the appellant was informed that he had the right to submit a request for non-pecuniary damage compensation to the SFOR.

12. By act No. 488-293/04 of 19 May 2004, the Ombudsman of the Republika Srpska confirmed the receipt of the appellant's complaint dated 6 May 2004 and informed the appellant that he had carried out a preliminary examination of the complaint and decided to open an investigation. The appellant was also informed that the Ombudsman of the Republika Srpska had no competence to take any action against the SFOR and/or other international organizations and/or individuals. On 10 June 2004 the Ombudsman of the Republika Srpska informed the appellant that after a consideration of the response of 8 June 2004 of the Republika Srpska he had found no grounds for further examination of the appeal and had decided to stay the investigation.

13. There is no evidence proving that the appellant instituted any other proceedings before the competent bodies of Bosnia and Herzegovina before he lodged an appeal with the Constitutional Court for having been arrested and detained by the SFOR.

IV. Appeal

a) Statements from the appeal

14. The appellant alleges that on 3 March 2004 around 9 p.m. three armed persons got into his house with guns drawn, while five or six other armed soldiers wearing "phantom

caps" were standing on the stairs. One of them asked him to say his name. After having checked his identity that person handcuffed him; he was taken out and saw a number of other armed soldiers sheltered and ready to open fire. The appellant alleges that dark glasses on his eyes and headphones they put on his head prevented him from seeing and hearing where he was. Thereupon, two persons took him in a helicopter to an unknown destination. The appellant alleges that neither he nor any member of his family was introduced to these persons; none of these persons were wearing some insignia on the basis of which they could be identified, none of them produced any kind of summons, indictment, order or anything similar to indicate what was happening. Upon the landing of the helicopter, he was taken into some premises where the cap, glasses and headphones were taken off him and one of seven American commandos said, in the language of the appellant, that he was under arrest for having violated Dayton Agreement; then a medical worker examined him, after which he was taken to a prison cell. He alleges that during his detention he was taken to the toilet and bathroom on regular basis, but every time with the mentioned devices on his head and with his hands and legs tied. During all this time he was deprived of any kind of natural light and the possibility of orientation in space and time. Two American officers interrogated him separately on two occasions. They introduced themselves and wore official uniforms. The conversation he had with them was proper and was in relation to the former President of the Republika Srpska Radovan Karadžic accused of war crimes. The appellant alleges that on 8 March 2004 he had a heart attack in his cell and that immediately afterwards he was given medical aid in the SFOR Military Hospital where he stayed for few hours, after which he was taken again to his cell being subjected to same treatment as referred to above. The appellant alleges that just before he was released they tied him, put the mentioned items on his head and took him into an off road vehicle. As he felt sick he asked them to take the cap off his head. They did it and in such difficult position he was taken back to his family house.

15. The appellant alleges that his family members informed him that upon his arrest a group of people, among whom some were in plain cloths and some of them wore the SFOR uniforms with the signs indicating the country they were coming from, carried out a search of the house and confiscated some items from their house. The members of the appellant's family were not allowed to see the confiscated items. Finally, they asked the family to sign the record of confiscated items. They refused to comply with their request as they were not allowed to see the whole procedure. At the moment when they were about to leave the house, one of the present persons in plain clothes left his visit card for further contact. The appellant alleges that on the following day the members of his family addressed the Public Security Center Banja Luka and Red Cross Office in Banja

Luka in order to report the incident. Upon several failed attempts, on 6 March 2004 the appellant's daughter managed to talk to a person working for the SFOR and obtained some brief information concerning her father. Thereupon, another person working for the SFOR talked to her, introduced himself/herself and fixed an appointment with the members of the appellant's family in their family house. However, all questions that the appellant's family asked remained unanswered.

16. According to the appellant's allegations, after he was released, the members of the SFOR came to his house on several occasions, constantly avoiding any contact with his lawyer and state authorities. They also failed to return any of the confiscated items.

17. In addition to the appeal the appellant submitted medical documentation issued by the SFOR. The appellant alleges that the documentation was altered and falsified by the SFOR before it was delivered to him, which points to the fact that his treatment in the SFOR hospital was interrupted but not on the doctor's recommendation.

18. In view of all the aforementioned, the appellant complains about the violation of the right to liberty and security under Article 5 paras 1, 2, 3, 4 and 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), the right not to be subjected to torture or to inhuman or degrading treatment or punishment under Article 3 of the European Convention and right to respect for private and family life under Article 8 of the European Convention.

19. The appellant is of the opinion that Bosnia and Herzegovina is responsible for the violation of the aforementioned rights since Bosnia and Herzegovina, as the contracting party to the international documents, assumed a responsibility for guaranteeing the highest level of protection of human rights and freedoms on its territory and to prevent any interference with the security of a person by the authorities or individuals operating in its territory.

20. The appellant asserts that he has addressed the Constitutional Court, the guardian of the Constitution of Bosnia and Herzegovina, since the legal system of Bosnia and Herzegovina does not provide for a legal procedure for protection of the aforementioned rights and he requested the Constitutional Court to issue a decision establishing violation of human rights and freedoms and to order the State of Bosnia and Herzegovina to pay him the amount of 300,000.000 KM by way of compensation for the damage (pecuniary and non-pecuniary).

b) Reply to the appeal

21. In response to the appeal the Public Attorney' s Office alleges that according to the relevant provisions regulating the status of the SFOR, the SFOR is not subject to the jurisdiction of the authorities of Bosnia and Herzegovina so the appellant could not pursue any legal remedy against the acts of the SFOR. The Public Attorney's Office alleges that the appeal is not admissible as the Constitutional Court is not competent to deal with this matter. As alleged in the response, the Constitutional Court is competent to examine the legality and constitutionality of the issues under the Constitution of Bosnia and Herzegovina but is not competent to examine the responsibility of Bosnia and Herzegovina and its Entities for implementation of the international agreements, including the General Framework Agreement for Peace in Bosnia and Herzegovina. The appeal concerns the actions taken by the SFOR which does not come under the jurisdiction of Bosnia and Herzegovina, which means that its judicial bodies cannot take decisions concerning such matters.

22. The Public Attorney's Office further refers to the case of the European Court of Human Rights (*Banković and Others v. Belgium)* in which the Court considered the responsibility of the member states of the NATO for the military actions taken on the territory of the former Yugoslavia due to the violation of the human rights of the citizens of that country. Taking into account that case, the Public Attorney's Office concluded that only SFOR could be held responsible for the violation of human rights and fundamental freedoms at the case at hand.

V. Applicable Laws

23. **Constitution of Bosnia and Herzegovina**

Article II.1
Human Rights

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

Article II.2

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. (...)

24. **Annex 1A of the General Framework for Peace in Bosnia and Herzegovina (Agreement on the Military Aspects of the Peace Settlement)**

Article I: General Obligations

(...)

2. The purposes of these obligations are as follows:

(...)

b) to provide for the support and authorization of the IFOR and in particular to authorize the IFOR to take such actions as required, including the use of necessary force, to ensure compliance with this Annex, and to ensure its own protection;

Article VI

(...)

The Parties understand and agree that the IFOR Commander shall have the authority, without interference or permission of any Party, to do all that the Commander judges necessary and proper, including the use of military force, to protect the IFOR and to carry out the responsibilities listed above in paragraphs 2, 3 and 4, and they shall comply in all respects with the IFOR requirements.

25. **Annex 6 of the General Framework Agreement for Peace in Bosnia and Herzegovina (Agreement on Human Rights)**

Article I

The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex.»

26. **Resolution 1088 (1996) Adopted by the UN Security Council on 12 December 1996**

The Security Council,

(...)

19. Authorizes the Member States acting under paragraph 18 above to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement, stresses that the parties shall continue to be held equally responsible for compliance with that Annex and shall be equally subject to such enforcement action by SFOR as may be necessary to ensure implementation of that Annex and the protection of SFOR, and takes note that the parties have consented to SFOR's taking such measures;

27. **Agreement between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organization (NATO) Concerning the Status of NATO and its Personnel (concluded on 23 November 1995 in the Wright-Peterson Airbase, Ohio).**

(…)

2. *The provisions of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 concerning experts on mission shall apply mutatis mutandis to NATO personnel involved in the Operation, except as otherwise provided for in the present agreement. Moreover NATO, its property and assets shall enjoy the privileges and immunities specified in that convention and as stated in the present agreement.*

3. All personnel enjoying privileges and immunities under this Agreement shall respect the laws of the Republic of Bosnia and Herzegovina insofar as it is compatible with the entrusted tasks/mandate and shall refrain from activities not compatible with the nature of the Operation.

VI. Admissibility

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

29. According to Article 16 para 1 of the Rules of the Constitutional Court ("Constitutional Court's Rules"), the Court shall examine an appeal only if all effective remedies that are available under law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him/her.

30. The first question to be examined in relation to the admissibility of the appeal is the question of exhaustion of all effective legal remedies available under the law as the

appellant addressed first the Government of the Republika Srpska, Ombudsman of the Republika Srpska and Public Security Center Banja Luka in order to request protection of his human rights.

31. The Attorney's Office of Bosnia and Herzegovina alleges that the Constitutional Court is not competent to decide on this matter as the appeal relates to the actions taken by the SFOR which does not fall under the jurisdiction of Bosnia and Herzegovina and therefore its judicial bodies may not make decisions on this matter.

32. The Constitutional Court recalls that Bosnia and Herzegovina has undertaken the obligation to guarantee on its territory the highest level of protection of human rights and freedoms as provided for in Article II of the Constitution of Bosnia and Herzegovina and Article 1 of Annex 6 of the General Framework Agreement for Peace in Bosnia and Herzegovina. Bosnia and Herzegovina and its Entities are therefore responsible for the protection of human rights of all persons on their territory and thus they are responsible parties for the protection of the appellant's rights.

33. The Constitutional Court notes that the appeal in the case at hand is not directed against the SFOR but against Bosnia and Herzegovina. The appellant complains about the failure of the competent authorities of Bosnia and Herzegovina to take necessary measures which would protect his constitutional rights. Therefore, the Constitutional Court shall not deal with the issue of responsibility of the SFOR for the violation of the appellant's rights but with the issue of responsibility of the competent national authorities. Taking into account the aforesaid, the Constitutional Court holds that it is competent *ratione personae* to examine this appeal.

34. According to Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina. The aim of the aforementioned Article is to make it possible for the ordinary courts to examine the facts and legal issues relating to a matter and to make it possible for them to resolve it by respecting the rights and freedoms guaranteed by the Constitution of Bosnia and Herzegovina.

35. The European Court of Human Rights has held that the legal remedies exhaustion rule does not necessarily require a court judgment. Taking into account the case-law of the European Court of Human Rights, the Constitutional Court has interpreted Article VI.3 (b) of the Constitution of Bosnia and Herzegovina as allowing it to accept applications in

the cases in which a court failed to take a decision within the reasonable time limit (see Decision of the Constitutional Court, *No. U 23/00* of 2 February 2001 published in *Official Gazette of Bosnia and Herzegovina*, No. 10/01). In other words, the requirement relating to the existence of a court decision, as laid down in Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, must be interpreted in a more flexible manner. In view of the case-law of the European Court of Human Rights, the Constitutional Court must declare the appeal admissible if the appellant submitted evidence proving that he/she exhausted all other legal remedies provided that they are available and provided that he proves that there are no other available and effective remedies. It is therefore important that the legal remedies exhaustion rule depends also on the accessibility and effectiveness of the legal remedy.

36. The Constitutional Court holds that the legal remedies must be available and effective to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, otherwise they will lack the requisite accessibility and effectiveness (European Court of Human Rights, *Akdivar and Others v. Turkey*, Judgment of 30 August 1996, Reports 1996-IV, para 66). In other words, the rule of exhaustion of all remedies is not an absolute rule and it does not have to be applied automatically. According to generally recognized rules of international law, there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see ECHR, *Van Oosterwijck v. Belgium,* judgment of 6 November 1980, Series A No. 40 pages 18-19, paras 36-40).

37. In this respect, the Constitutional Court recalls that Article 13 of the European Convention provides that there is an obligation of the State to provide for an effective legal remedy before the national authorities. In the case at hand, the Constitutional Court holds that the appellant took reasonable actions in respect of the protection of his constitutional rights when he addressed the aforementioned bodies. Taking into account that the Government of the Republika Srpska informed the appellant that the Government and other authorities did not find any basis for taking any measure and that the Ombudsman of the Republika Srpska and Public Prosecutor's Office Banja Luka did not take any measure nor did they instruct the appellant how to protect his rights as they considered that the national authorities are not competent to deal with the matter, it is obvious that the appellant remained without any legal remedy he could pursue, which, of course, raised the issue of protection of his constitutional rights. The Constitutional Court is of the opinion that even if the appellant had been instructed to address ordinary courts, he would not have had any success. In the case at hand, the Constitutional Court sees special circumstances in the fact that the case concerns the consequences of the conduct of the members of the SFOR which was

present in Bosnia and Herzegovina on the basis of the General Framework Agreement for Peace in Bosnia and Herzegovina, its Annexes and other international documents and which enjoyed immunity and did not fall under the jurisdiction of the national authorities. On the other hand, there is an indispensable need to ensure the highest level of protection of the constitutional rights for all persons on the territory of Bosnia and Herzegovina. The fact that human rights have been violated by persons who are not accountable to national authorities cannot remove the State's obligation to protect such rights. Therefore, the Constitutional Court is competent to deal with this matter as the appellant had not an effective and appropriate remedy at his disposal which could protect his rights.

38. Finally, the appeal has met the requirements laid down in Article 16 paras 2 and 4 of the Constitutional Court's Rules of as it is not manifestly (*prima facie)* ill-founded nor is there any other formal reason for which the appeal would be inadmissible.

39. Taking into account Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Article 16 paras 1, 2 and 4 of the Constitutional Court's Rules, the Constitutional Court established that the appeal has met admissibility requirements.

VII. Merits

40. The appellant alleges that the rights to freedom and security under Article 5 paras 1, 2, 3, 4 and 5 of the European Convention have been violated for unlawful arrest and detention by the SFOR, the right not to be subjected to torture or to inhuman or degrading treatment or punishment under Article 3 of the European Convention and right to respect for private and family life under Article 8 of the European Convention.

a) Right to liberty and security of person

41. 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:

a. The rights to liberty and security of person.

42. Article 5 para 1 of the European Convention 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:

a. the lawful detention of a person after conviction by a competent court;

b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

a. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

b. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

c. 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;

d. the lawful arrest or detention of a person to prevent his affecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

43. The appellant alleges that at the moment of the arrest by the members of the SFOR, nobody introduced himself/herself to him or his family, nobody was wearing insignia on the basis of which they could be identified, and nobody produced any summons, indictment or order or anything similar to indicate what was going on. Upon his arrival at the unknown destination, the only thing he was told was that he was arrested for having violated Dayton Agreement. The appellant alleges that during his detention he was questioned only about Radovan Karadžic, the former President of the Republika Srpska accused of war crimes. The appellant alleges that he was released six days later. None of the authorities of Bosnia and Herzegovina took any measure in respect of the arrest and detention of the appellant.

44. The Public Attorney's Office of Bosnia and Herzegovina did not contest the allegations set forth in the appeal.

45. Based on all the aforesaid the Constitutional Court concludes that the members of the SFOR arrested and detained the appellant with the sole aim of getting information on Radovan Karadžic.

46. The purpose of Article II.3 (d) of the Constitution of Bosnia and Herzegovina and Article 5 para 1 of the European Convention is the protection of a person from unlawful arrest or deprivation of liberty. The reasons which may justify unlawful arrest or deprivation of liberty are specified in Article 5 para 1 of the European Convention. However, in the case at hand the Constitutional Court cannot find any reason which could justify the arrest and detention of the appellant.

47. The Constitutional Court holds that this is a sufficient basis for concluding that the arrest and detention of the appellant was unlawful in the sense of Article 5 para 1 of the European Convention. The appellant therefore holds that Bosnia and Herzegovina should be held responsible. The Attorney' s Office of Bosnia and Herzegovina is of the opinion that only the SFOR could be held responsible in the case at hand, but it does not fall under the jurisdiction of the judicial or other authorities of Bosnia and Herzegovina according to the relevant provisions regulating the status of the SFOR .

48. According to the letters of the Government of the Republika Srpska, Public Security Center Banja Luka and Public Basic Prosecutor's Office Banja Luka, the competent authorities were informed of the fact that the appellant was deprived of liberty by the members of the SFOR, but they declined their competence in respect of the SFOR. Therefore thay did not take any measure except an investigation, which was conducted at the scene by the members of the Public Security Center Banja Luka.

49. The Constitutional Court recalls that in case *Sabahudin Fijuljanin against the Federation of Bosnia and Herzegovina,* No. CH/02/12499 of 11 January 2003, the Human Rights Chamber for Bosnia and Herzegovina ("Chamber") imposed a interim measure by which it ordered the respondent parties to request the SFOR to place the applicant immediately under the jurisdiction of the authorities of the Federation of Bosnia and Herzegovina. The respondent parties complied with the order on interim measure and SFOR handed over the applicant to the authorities of the Federation of Bosnia and Herzegovina, and he was released that same day.

50. The Constitutional Court recalls that Bosnia and Herzegovina, by signing the General Framework Agreement for Peace in Bosnia and Herzegovina and its Annexes and for the purpose of its implementation, transferred a part of its State competences to the international community and its bodies and organizations, including IFOR and later SFOR. According to Article 6 of Annex 1 to the General Framework Agreement the IFOR (SFOR) shall have the authority to do all necessary and proper to carry out its responsibilities. According to Article 12 of that Annex, the IFOR (SFOR) Commander is

the final authority in theatre regarding interpretation of this agreement. The Constitutional Court acknowledges the necessity for Bosnia and Herzegovina, as a subject of the international law, to respect its obligations undertaken according to the international agreements. However, Bosnia and Herzegovina has undertaken the obligation to guarantee the highest level of protection of human rights to all persons on its territory, i.e. within its jurisdiction as provided for in the Constitution of Bosnia and Herzegovina (Annex 4) as an integral part of the General Framework Agreement for Peace in Bosnia and Herzegovina and in Annex 6 to the General Framework Agreement.

51. The Constitutional Court notes that neither the provisions of the General Framework Agreement for Peace in Bosnia and Herzegovina nor the rules of international law impose on Bosnia and Herzegovina the obligation to give priority to the application of Annex 1 over the Constitution of Bosnia and Herzegovina or Annex 6 or to violate the principle of protection and fulfillment of the guaranteed fundamental rights and freedoms. On the contrary, Bosnia and Herzegovina is obligated to provide, at any time, the fulfillment of guaranteed human rights for the persons on its territory. According to the case-law of the European Court, the European Convention does not exclude the transfer of competences to international organizations provided that European Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer (see ECHR, *Matthews against the United Kingdom,* judgment of 18 February 1999, Reports and Decisions 1999-I). The Constitutional Court holds that the same reasons may be applied to the case at hand. Furthermore, the European Court of Human Rights considers that the state in whose territory the violation of the rights safeguarded by the European Convention occurred retains the responsibility to take appropriate steps to protect the victims, even if the violation is a result of the actions of representatives over whom the mentioned state has no *de facto* control (see the European Court for Human Rights, *Ilascu vs. Moldova and Russia*, Judgment of 8 July 2004).

52. The aim of the European Convention is not to guarantee rights which are theoretical or illusory but those which are practical and effective. (European Court of Human Rights, *Akdivar and Others v. Turkey*, Judgment of 30 August 1996, Reports 1996-IV, para 66). Therefore, the fact that the SFOR may be held responsible for the actions violating the appellant's rights does not release the State from the obligation to take adequate measures of protection of the appellant's rights. The Constitutional Court emphasizes that the judgment in case of *Banković and Others* (see ECHR, *Banković and Others against Belgium, Czech Republic and Others,* judgment of 12 December of 2001), on which Bosnia and Herzegovina relies, does not assist it. The Constitutional Court recalls

that the situation in the aforementioned case was different from the present case. In the present case, the complaints related to Bosnia and Herzegovina's failure to act on its own territory, where the rights of the appellant who was under the jurisdiction of Bosnia and Herzegovina were violated. By contrast, the application filed with the European Court of Human Rights in the *Banković* case was directed against Member States of the NATO which acted outside their own territories and whose actions caused alleged violations of human rights outside their territories. Furthermore, the European Court of Human Rights confirmed in the *Banković* case that according to the European Convention the High Contracting Parties are responsible for the actions that their representatives take outside their territories, for example the activities of NATO members, but only on condition that they have real control over the area where they are operating. The Constitutional Court considers that this rule applies to the countries the SFOR members come from only when they are the High Contracting Parties to the European Convention. In the case at hand the evidence indicates that the personnel of SFOR who arrested the appellant belonged to the Armed Forces of USA, which is not one of the High Contracting Parties to the European Convention. (However, the USA had signed the International Pact on the Civil and Political Rights, which is one of the instruments contained in the Annex 1 to the Constitution of Bosnia and Herzegovina and imposes similar obligations to those imposed on states falling under the jurisdiction of the European Court of Human Rights.)

53. According to Article 1 of the European Convention, the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the European Convention. This provision obliges the High Contracting Parties not only to refrain from violating those rights and freedoms but to protect those rights and to prevent a third party from (persons and organizations) from violating the rights of the individuals (see ECHR, *X and Y v. the Netherlands,* judgment from 1985, Series A No. 91, *Plattform "Ärzte für das Leben" v. Austria,* judgment from 1988, Series A No. 139 and *McCann and Others v. the United Kingdom,* judgment of 27 September 1995, Series A No. 324). Accordingly, the European Convention imposes a positive obligation on the respondent party to investigate thoroughly into allegations of arbitrary deprivations even in cases where it cannot be established, although it is alleged, that the deprivation of liberty is attributable to the authorities (see Decision of the Chamber, *CH/02/9851 and Others, M. Ć. And Others against the Republika Srpska,* Decision on Admissibility and Merits of 4 December 2003, para. 60, as well as the previously cited judgment of the European Court of Human Rights *Ilascu vs. Moldova* and Russia).

54. The Constitutional Court accepts the fact that the competent local authorities can face a difficult task if it is necessary to undertake appropriate measures in relation to SFOR

members as an international organization that enjoys immunity and which, in addition, has much stronger means and measures of coercion than the state itself. However, they are obliged to undertake the steps that are adequate for such situation. The obligation to protect, e.g. right to freedom and safety of a person as well as the right not to be subjected to torture or to inhuman treatment arises from the general obligations of the state under Article 1 of the European Convention in terms of securing to everybody under its jurisdiction the rights and freedoms defined in the European Convention. Therefore, the competent local authorities were obliged to conduct an investigation on violation of the appellant's rights. Such investigation does not necessarily have to give positive results. The European Convention does not impose an obligation on the state to achieve particular results but only to conduct the appropriate proceedings. Since the obligation relates to action and not the result, it is possible for the authorities to fulfill their positive obligations in accordance with the European Convention even if they are ultimately unable to establish the facts and circumstances in which the violation of the right occurred (see the Chamber's Decision, No. CH/98/668, *Ćebić against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, Decision on Admissibility and Merits of 2 June 2003, paras 80 and 85).

55. However, the local authorities failed to take appropriate steps in order to protect those rights, regardless of the fact that the appellant and his/her family asked for the protection of their constitutional rights by the authorities that they considered competent in accordance with the local law. They did not conduct an appropriate investigation in reference to that, nor did they take the smallest step in that direction. They even did not address SFOR at all in order to ascertain the truth about the events. This fact itself must be considered the most serious failure since it deprives the appellant of the basic guarantees of human rights. Because no investigation was conducted after the information on what happened to the appellant, the authorities cannot be exempted from responsibility for the violation of constitutional rights. Apart from that, the state of facts does not indicate that the local authorities could not have persuaded SFOR to release the appellant and financially compensate him for the damage caused. Nor are they free of any obligation to compensate the appellant for the damage caused by violation of his constitutional rights if SFOR refuses to do so. In an earlier case (see the Decision on Admissibility of the Constitutional Court No. *U 28/00* of 28 November 2003) the Constitutional Court considered that the immunity of international forces (UNPROFOR), according to international regulations, does not exempt state authorities from responsibility if international forces are acting as state representatives in maintaining peace and security or, as in this case, in the implementation of an international agreement (General Framework Agreement for Peace

in Bosnia and Herzegovina), which was also signed by Bosnia and Herzegovina (current name of the former Republic of Bosnia and Herzegovina).

56. On the basis of the aforementioned, the Constitutional Court concludes that the appellant's right from Article 5, para 1 of the European Convention has been violated.

Article 5, para 2 of the European Convention

57. Article 5 para 2 of the European Convention reads as follows:

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

58. The Appellant states that, only after taking him by helicopter and arriving to an unknown location, he was informed by SFOR that he was arrested for "violation of the Dayton Agreement".

59. The Public Attorney's Office of Bosnia and Herzegovina did not challenge these assertions from the appeal.

60. Pursuant to Article 5 para 2 of the European Convention, the arrested person must be informed, in a simple language, without technical expressions that he/she can understand, important legal and factual reasons for his/her arrest. Such information must be prompt but it does not have to be given by the official person who conducts arrest at the moment of arrest. Whether the contents and promptness of the given information are satisfactory should be determined for every concrete case in accordance with its specific characteristics (see European Court for Human Rights, *Fox, Campbell and Hartley,* judgment of 30 August 1990, series A, No. 182).

61. In the present case, the appellant was not informed of "lawful" reasons for his arrest nor of any facts which might have disclosed concrete criminal action by anyone, nor was he in a position to initiate an assessment of the issue of the "lawfulness" of his arrest and detention. Therefore, the Constitutional Court considers that the contents of the information given to the appellant about the reasons for his arrest and detention do not meet minimum standards under Article 5 para 2 of the European Convention.

62. On the basis of the aforementioned, the Constitutional Court concluded that the appellant's right from Article 5 para 2 of the European Convention has been violated.

Article 5 para 3 of the European Convention

63. Article 5 para 3 of the European Convention, in its relevant part reads as follows:

Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. (...)

64. The appellant considers that Article 5 para 3 of the European Convention has been violated since he was not brought before the judge or other officer authorized by law to exercise judicial power.

65. The Public Attorney's Office of Bosnia and Herzegovina did not challenge these assertions from the appeal.

66. However, Article 5, para 3 of the European Convention is applicable only in cases where the persons were arrested or detained pursuant to Article 5 para 1 (c) of the European Convention. The Constitutional Court has already concluded that the present case is not about the "lawful" arrest in terms of Article 5 para 1 of the European Convention and therefore, it follows that there is no separate violation of Article 5 para 3 of the European Convention.

Article 5 para 4 of the European Convention

67. Article 5 para 4 of the European Convention reads as follows:

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.

68. The appellant considers that Article 5 para 4 of the European Convention has been violated since he was not in a position to initiate the proceedings in which the court would, in a short period of time, decide on the lawfulness of his arrest and detention.

69. The Public Attorney's Office of Bosnia and Herzegovina did not challenge these assertions from the appeal.

70. The Constitutional Court recalls that, according to Article 5 of the European Convention, the term "lawfulness" has the same meaning as in Article 5 para 1 of the

European Convention. In terms of Article 5 para 4 of the European Convention everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the circumstances and real conditions that are important for the "lawfulness" of his arrest or detention can be reviewed. This means that the appellant had to have effective remedy at his disposal for review of "lawfulness" of his arrest and detention (see European Court for Human Rights, *Brogan et all vs. the United Kingdom,* judgment of 29 November 1998, series A, No. 145 B).

71. In the present case, the appellant did not have any remedy for ascertaining "lawfulness" of the arrest and detention so the Constitutional Court concludes that Article 5 para 4 of the European Convention has been violated.

Article 5 para 5 of the European Convention

72. Article 5 para 5 of the European Convention reads as follows:

Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

73. The appellant considers that Article 5 para 5 of the European Convention has been violated since, in the legal system of Bosnia and Herzegovina, no legal procedure for the protection of the aforementioned rights has been stipulated; therefore, he addressed the Constitutional Court as the guardian of the Constitution of Bosnia and Herzegovina to make decision with which it should ascertain violation of the aforementioned human rights and oblige Bosnia and Herzegovina to compensate him for the physical and consequential damage in the amount of KM 300.000.

74. As has already been stated, the Public Attorney's Office of Bosnia and Herzegovina states that the Constitutional Court is not competent to make decision in this case since the complaint from the appeal refers to the activities of SFOR, which is not under jurisdiction of Bosnia and Herzegovina, and therefore its judicial authorities cannot make decisions on that matter.

75. The Constitutional Court recalls that, Article 436 of the Criminal Procedure Code of Bosnia and Herzegovina stipulates which persons have right to compensation for the damage and that such right, in terms of para 2 of this Article also belongs to "the person that was deprived of liberty without legal base for that". Pursuant to Article 433 of the same Law, the damaged person can request compensation from the competent ministry of Bosnia and Herzegovina and then, address the competent court, pursuant to Article 434

of the same Law. The Constitutional Court has already, in this decision, pointed out that the existence of legal remedies has to be sufficiently certain and not only in theory but also in practice, otherwise they would not be effective nor there would be obligation to use them.

76. In the present case, both the government institutions and the Ombudsman of Republika Srpska indicated the impossibility of any further action in this case since the arrest and detention were conducted by SFOR. Further, the Constitutional Court has never had any case of compliance with procedure for compensation of damage from the Law on Criminal Procedure of Bosnia and Herzegovina by the competent authorities or courts in case of the person that is in the same position as the appellant. The Constitutional Court considers that formal regulation of the right to compensation, in the concrete case, does not meet criterion from Article 5 para 5 of the European Convention (see Decision of the Chamber, No. CH/97/45, *Hermas vs. Federation of BiH,* Decision on Admissibility and Merits, 18 February 1989, paras 73-77).

77. The Constitutional Court concludes that Article 5 para 5 of the European Convention has been violated.

78. According to all aforementioned, the Constitutional Court concludes that the appellant's rights from Article II.3 (d) of the Constitution of Bosnia and Herzegovina and Article 5 paras 1, 2, 4 and 5 of the European Convention have been violated.

b) Right of persons not to be subjected to torture, inhuman or degrading treatment or punishment

79. Article II.3 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:

b. The right not to be subjected to torture or to inhuman or degrading treatment or punishment.

80. Article 3 of the European Convention reads as follows:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

81. The appellant stated that on the occasion of his being arrested he was handcuffed and put the dark glasses over his eyes, so he could see nothing at all while the headphones were put over his ears so he could hear nothing through them. During his stay in the prison cell he was taken to the toilet and bathroom on regular basis, but every time with the equipment on his head and with his hands and legs tied. During all that time he was deprived of any natural light and was disoriented in the space and time. The appellant also stated that he had a heart attack in the prison cell upon which he was provided a medical assistance in the SFOR military hospital where he stayed for several hours and then brought back to the prison-cell where he was subjected to the same procedure that has been already mentioned above. The appellant stated that just prior to his being released he was thrown into a sort of road vehicle together with the mentioned items on his head and tied-up. Thus, while lying down in a rolled-up position on the floor without sufficient amount of air he felt nauseous and asked them to free his head. After that, they removed the cap from his head but he remained in a difficult position while taken back to his family house.

82. The Public Attorney's Office of Bosnia and Herzegovina did not challenge the statements from the appeal.

83. The Constitutional Court reminds that by Article II.3 (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention one of the fundamental values of the democratic society is guaranteed. Even under the most difficult circumstances, like the fight against terrorism and crime, torture is unconditionally prohibited, as well as inhuman or degrading treatment or punishment. No deviation is possible, neither in a situation where a general threat is directed against the nation (see, the European Court for Human Rights, *Aksoy v. Turkey,* Judgment of 18 December 1996, Reports on the Judgments and Decisions 1996-VI, para 62). As far as the persons deprived of freedom are concerned, any kind of violence or unnecessary measure due to the behavior of the arrested person undermines the human dignity and, in principle, it constitutes a violation of Article 3 of the European Convention (see, the European Court for Human Rights, *Ribitsch v. Austria*, Judgment of 4 December 1995, series A, no 336, para 38).

84. According to the jurisprudence of the bodies of the European Convention, the concept of inhuman treatment is that which deliberately causes severe mental or psychological suffering, which, given the particular situation, is unjustifiable if it attains a minimum level of severity. The Constitutional Court reminds that the European Court for Human Rights established the violation of the right of person no to be subjected to inhuman and degrading treatment as provided for in Article 3 of the European Convention in the case where the person, in course of the interrogation, was forced to stand spread-eagled,

leaning against a wall with his fingertips for a long time, with his head covered with a black hood and being subjected to intensive noise with deprivation of sleep and sufficient nourishment (see, the European Court for Human Rights, *Ireland vs. the United Kingdom*, Judgment of 18 January 1978, series A.25, pages 66-67).

85. In the situation where the authorities of Bosnia and Herzegovina failed to undertake measures in examining the conditions of arrest and detention of the appellant and when the statements from the appeal were not challenged in the reply to the appeal, the Constitutional Court does not consider it necessary to further examine the conditions of the appellant's detention or any possible doubts regarding the well-foundedness of the appellant's statements.

86. The Constitutional Court concluded that the treatment the appellant was subjected to during the time of arrest and detention and his being kept in the state of prolonged uncertainty in regards to his fate constitutes an inhuman treatment and violation of Article II.3 (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention.

c) Right to respect for private and family life, home and correspondence

87. Article II.3 (b) 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:

f) the right to private and family life, home, and correspondence.

88. Article 8 of the European Convention reads as follows:

1. everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

89. The appellant considers that his right from Article 8 of the European Convention

was violated. He stated, *inter alia*, that there were three armed persons who broke into his family house with their guns pointed at them and upon his being taken away, a group of people, some of which were in plain clothes and some in uniforms with visible insignia of SFOR and their home countries they come from, searched the house and took away certain items from the house. None of confiscated items were returned to the appellant. Neither the appellant nor the members of his household were shown an order for such an action and the members of appellant's family were asked to sign the receipt for confiscated items.

90. The Public Attorney's Office of Bosnia and Herzegovina did not challenge the said statements from the appeal.

91. The Constitutional Court considers that the appeal indisputably enters the scope of law from Article II.3 (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. It is also undisputable that a state has a positive obligation to secure the respect for this right of an individual. The case-law of the European Convention acknowledges that the search of an apartment or house means the interference with the right to privacy and that the violation of the right to someone's home always includes the interference with someone's privacy (see, the European Court for Human Rights, *Niemietz*, 1992, series A, no 251-B, page 33). The action of SFOR, in this specific case, constitutes the interference with the appellant's right to peaceful enjoyment of the mentioned right. In the light of Article 8, para 2 of the European Convention, therefore, the Constitutional Court must establish whether that interference a) was in accordance with law, b) served a legitimate objective, and c) was necessary in democratic society, i.e. whether the principle of proportionality was violated.

92. The Constitutional Court reminds again that all annexes of the General Framework Agreement for Peace in Bosnia and Herzegovina are of the same importance and they particularly do not allow the violation of the principle of protection of the highest level of the guaranteed human rights and fundamental freedoms. Also, it recalls Article 3 of the Agreement between the Republic of Bosnia and Herzegovina and North Atlantic Treaty on the status of NATO and its personnel, according to which: *All personnel enjoying privileges and immunities under this Agreement shall respect the laws of the Republic of Bosnia and Herzegovina insofar as it is compatible with the entrusted tasks/mandate and shall refrain from activities not compatible with the nature of the Operation***.** The Constitutional Court recalls that the Criminal Procedure Code of BiH provides for special procedural guarantees in regard to the search of an apartment, other premises, movables or persons, and makes reference to the international documents on human rights**.**

93. In a case that the Constitutional Court considered earlier (see the Decision of the Constitutional Court no *AP 642/03,* para 41 through 42) the appellant's home was searched with his consent given to the SFOR and in the presence of the police officers from Police Department who were supposed to be guarantee of lawful acting during the search. The SFOR members started the search after they had obtained the appellant's consent and secured the presence of local police. The Constitutional Court considered that in that case the interference with the appellant's right to peaceful enjoyment of his home represented a necessary measure in public interest and in the interest of protecting the rights and freedoms of others and that it was proportional to the desired objective.

94. However, in the case at hand the interference with the right to respect for the appellant's home and private life was not "in accordance with the law" as required by Article 8 paragraph 2 of the European Convention. It might be possible to interpret the concept of "law" in a wide sense due to the specific situation concerning the activities of SFOR in Bosnia and Herzegovina, so that Annex 1.a to the General Framework Agreement for Peace in Bosnia and Herzegovina and other documents regulating the status and framework of SFOR activity could be considered "law" for the purpose of justifying the interference with the appellant's right. However, even if that is possible the Constitutional Court considers that the interference was not in accordance with the law because the actions of SFOR members in the case at hand exceeded the framework that is provided for both in the domestic law and in the standards of international documents. The *bona fides* of the members of SFOR in this specific case cannot by itself give rise to an assumption that the measures of coercion which they took were lawful.

95. According to the aforementioned, the Constitutional Court concluded that there was a violation of the right from Article II.3 (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

d) Request for compensation

96. Due to the violation of the mentioned human rights, the appellant has requested the compensation for physical and consequential damage in the amount of 300,000 KM.

97. The Public Attorney's Office of Bosnia and Herzegovina did not give an explicit response to this request since it considers that the Constitutional Court has no jurisdiction in this case.

98. In line of Article 76, para 2 of the Constitutional Court's Rules, the Constitutional Court, in exceptional cases, may determine the compensation for consequential damage

should it be requested by the appellant. However, the Constitutional Court recalls that, unlike the procedure before ordinary courts, the compensation for physical damage is determined in a symbolic amount in exceptional cases of violation of the guaranteed human rights and freedoms.

99. The Constitutional Court has already emphasized in this decision that no other procedure for the compensation of damage can be considered to offer an effective legal remedy. Also, the Constitutional Court has established violations of the appellant's rights under Article II.3 (b) and (d) of the Constitution of Bosnia and Herzegovina and Articles 3 and 5 and paras 1, 2, 4 and 5 of the European Convention. The Constitutional Court has taken into consideration the former practices of the Human Rights Chamber in determining the compensation claimed by persons who had been in the similar situation to the appellant. In its Decision, no CH/97/41, where the applicant requested 10,000 DM for each month of unlawful detention and given the fact that he had spent ten months in prison, his request amounted to 100,000 DM plus 50,000 DM for physical and consequential damage sustained by his family, but the Human Rights Chamber awarded compensation in the total amount of 30,000 DM. In the Decision no CH/98/1027 and CH/99/1842, the Chamber ordered the amount of 25,000 KM to be paid to the appellant for physical and consequential damage because he was unlawfully detained for almost two months and because he sustained severe wounds. In the case no CH/97/45, the Chamber ordered the amount of 18,000 KM to be paid to the applicant for physical and consequential damage sustained due to violations of rights under Articles 3, 4, and 5 of the European Convention and due to the fact that he had suffered discrimination in the enjoyment of the said rights. The applicant had spent around six months in unlawful detention.

100. Taking account of the mentioned case-law of the Chamber and all circumstances of the present case, the Constitutional Court considered that the appellant is entitled to the amount of 600 KM in respect of the consequential damage caused by the violation of his right under Article II.3 (d) of the Constitution of Bosnia and Herzegovina and Article 5, para 5 of the European Convention. In addition, for the violations of his rights under Article II.3 (b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3 and 8 of the European Convention the appellant is entitled to the amount of 2,400 KM. The total compensation is therefore 3,000 KM.

VIII. Conclusion

101. There is an urgent need for all persons in the territory of Bosnia and Herzegovina to be secured the highest level of protection of the guaranteed constitutional rights. The

fact that human rights may have been violated by persons not accountable to the domestic jurisdictions, remove the obligation of the state to protect the said rights. The obligation to protect, for example, the right to freedom and security of an individual, as well as the right not to be subjected to the torture and inhuman treatment, are related to the general obligations of the state as referred to in Article 1 of the European Convention, which requires the state to secure the rights and freedoms defined in the European Convention to everyone under its jurisdiction. That is why the competent domestic bodies were obliged to conduct an investigation in relation to the violation of appellant's rights. The Constitutional Court considers that it has jurisdiction to make a decision in this case since the appellant had no effective or adequate legal remedy at his disposal to protect his rights.

102. Pursuant to Article 61 paras 1, 2 and 3 of the Constitutional Court's Rules, the Constitutional Court decided as stated in the enacting clause of this Decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 777/04

Appeal of Mr. S. T. against the Decision of the High Representative for Bosnia and Herzegovina, No. 278/04 from 30 June 2004

DECISION ON ADMISSIBILITY
of 29 September 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 15 para 3, Article 16 para 2 (14) and Article 59 para 2 (1) of the Rules of Procedure of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina*, No. 2/04), as a Grand Chamber, composed of the following judges: Mato Tadić, President, Prof. Dr Ćazim Sadiković and Prof. Dr Miodrag Simović, Vice-Presidents, and Mr. Jovo Rosić and Ms. Valerija Galić, having considered the appeal of **Mr. S. T.**, in Case No. **AP 777/04** at its session held on 29 September 2004, adopted the following

DECISION ON ADMISSIBILITY

The appeal of Mr. S. T., filed against the Decision of the High Representative for Bosnia and Herzegovina, No. 278/04 from 30 June 2004 is rejected as inadmissible because it is premature.

Reasons

1. On 30 August 2004, Mr. S. T. ("appellant") from Dobrinja, Novi Grad, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against the Decision of the High Representative for Bosnia and Herzegovina, No. 278/04 of 30 June 2004. The appellant requested the Constitutional Court to adopt interim measure ordering that the interpretation of the Decision of the High Representative for Bosnia and Herzegovina, in the part referring to the alleged ban from him getting employment in the companies with majority state ownership, be put out of force as well as to make it possible for him to get employment according to the previously concluded contract.

2. On 29 June 2004, the High Representative for Bosnia and Herzegovina issued the Decision by which the appellant was removed from his position of Member of Novi Grad/ Bosanski Novi SDS Municipal Board and from other public and party positions he held until 30 June 2004 due to which any entitlement to receive remuneration or any privileges or status arising out of his post(s) ceases forthwith. The appellant is barred, with the same

Decision, from holding any official, elective or appointive public office and from running in elections and from office within political parties unless or until such time as the High Representative may, with the subsequent decision possibly expressly authorize him to do so, or to run in elections. It is stated in the Decision that such measure was taken against the appellant since he, as a leading member of Srpska Demokratska Stranka – Serb Democratic Party ("SDS") Novi Grad is culpable for the SDS's failure to purge the political landscape of the conditions conducive to the sustenance of individuals indicted for war crimes before the International Tribunal.

3. On 30 August 2004, the appellant filed the appeal with the Constitutional Court stating that his right from Articles 6, 8, 10, 13 and 14 of the European Convention on Human Rights and Fundamental Freedoms ("European Convention") and Article 1 of the Protocol 1 to the European Convention as the right to property is violated since he is denied the right to employment. He suggested that the Constitutional Court, since his work contract was cancelled, obliges Bosnia and Herzegovina to reimburse him for the lost earnings and other fees in the amount of KM 50.000 as well as to reimburse him for the consequential damage due to making reference to his name in public media.

The appellant requested the Constitutional Court to adopt interim measure ordering that the interpretation of the Decision of the High Representative for Bosnia and Herzegovina, in the part referring to the alleged ban from getting employment in the companies with majority state ownership, be put out of force as well as to make it possible for him to get employment according to the previously concluded contract.

4. Having examined the admissibility of the appeal, the Constitutional Court invoked the provisions of Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 15, para 3 and Article 16 para 2 (14) of the Constitutional Court's Rules of Procedure.

Article VI.3 (b) of the Constitution of Bosnia and Herzegovina reads:

The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

Article 15 para 3 of the Constitutional Court's Rules of Procedure reads:

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.

Article 16 para 2 (14) of the Constitutional Court's Rules of Procedure reads:

A request or appeal shall not be admissible in any of the following cases:

(...)

14. the appeal is premature.

5. The Constitutional Court recalls that, according to its jurisprudence, it is authorized to review the legal acts of the High Representative when he substitutes for the domestic authorities (see Decision of the Constitutional Court No. *U 9/00* of 3 November 2000, *Official Gazette of Bosnia and Herzegovina*, No. 1/01). The Constitutional Court is also authorized to review whether all legal documents are in conformity with the Constitution of Bosnia and Herzegovina, regardless of the adopter, as long as this assessment is based on one of the jurisdictions stated in Article VI.3 of the Constitution of Bosnia and Herzegovina (see Decision of the Constitutional Court No. *25/00, Official Gazette of Bosnia and Herzegovina*, No. 17/00). The Constitutional Court also recalls its ruling No. *U 37/01* of 2 November 2001, whereby it rejected the appeal stating that the Decision of the High Representative cannot be considered the court judgment as it is required by Article VI.3 (b) of the Constitution of Bosnia and Herzegovina.

6. The Constitutional Court recalls that, pursuant to Article II.2 of the Constitution of Bosnia and Herzegovina, the *European Convention shall apply directly in Bosnia and Herzegovina.* In addition, in accordance with Article II.6 of the Constitution of Bosnia and Herzegovina, all *(...) all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, (...) shall apply and conform to the human rights and fundamental freedoms from Article II.2.* Further, pursuant to Article II.4 of the Constitution of Bosnia and Herzegovina and Annex I to the Constitution of Bosnia and Herzegovina, large number of other international agreements on human rights shall also apply in Bosnia and Herzegovina. At the same time, the aforementioned Article stipulates that the enjoyment of the rights and freedoms provided for in this Article or in the international agreements shall be secured *(...) to all persons in Bosnia and Herzegovina without discrimination on any ground (...).* It follows that enjoyment of the rights and freedoms as guaranteed by the European Convention and other international agreements must be provided for to all persons in Bosnia and Herzegovina without any exceptions from the obligation of compliance with these standards.

7. For this reason and taking into consideration the previous jurisprudence, the Constitutional Court took the position that, as the institution that upholds the Constitution

of Bosnia and Herzegovina, it has competence to review all legal documents, regardless of adopter, if the issue falls under jurisdiction provided under Article VI.3 of the Constitution of Bosnia and Herzegovina.

8. Considering the formal aspects of the challenged and similar decisions of the High Representative as well as the consequences they have for persons they refer to, the Constitutional Court considers that such decision seriously opens issues of existence of possible violations of certain rights and fundamental freedoms as protected by the Constitution of Bosnia and Herzegovina and European Convention. Among other things, the Constitutional Court notices that lack of possibility to challenge the present decision of the High Representative, leaves the person without any protection of his human rights and fundamental freedoms. Such approach also leaves the individual without any effective legal remedy whereby the existence of the right from Article 13 of the European Convention is brought into question. This, therefore, opens the issue whether there is a violation of right to non-discrimination arising from Article II.4 of the Constitution of Bosnia and Herzegovina.

9. In the present case, the Constitutional Court notices that the challenged Decision of the High Representative for Bosnia and Herzegovina, as separate legal document, does not contain any factual or legal ground or instruction on legal remedy. However, on the other hand, there is an obligation of all state authorities in Bosnia and Herzegovina to review, through application of the principles of the European Convention, all legal documents that might lead to violation of rights and provide protection for the possible violations (see item 6).

10. In the present case, it is evident that the appellant filed appeal against the Decision of the High Representative for Bosnia and Herzegovina whereby the appellant was removed from his position as Member of the Municipal Board of the SDS Novi Grad and from other public and party positions he held until 30 June 2004 due to which any remuneration or any privileges or status arising out of his posts ceased. Therefore, the appellant is barred from holding any official, elective or appointive public office and from running in elections and from office within political parties. However, the appellant did not attempt to challenge the Decision of the High Representative before the competent courts which, in accordance with the Constitution of Bosnia and Herzegovina must apply the European Convention directly and provide protection of the guaranteed rights and freedoms. He, in fact, appealed directly to the Constitutional Court.

11. Pursuant to provisions of Article 15 para 3 of the Constitutional Court's Rules of Procedure, the appeal may be filed only against the judgment which is final in the proceedings concerning the particular case.

12. Considering the provisions of Article 16 para 2 (14) of the Constitutional Court's Rules of Procedure, in accordance to which the appeal shall be rejected as inadmissible if it is premature, the Constitutional Court decided, unanimously, as stated in the enacting clause of this Decision.

13. Considering the decision on admissibility in this case, the Constitutional Court considers that there are no grounds to consider the appellant's request for interim measure.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 921/04

The appeal of Mr. Lj. B. from Trn – the Municipality of Banja Luka against rulings of the Court of Bosnia and Herzegovina, Nos. KV-198/04 of 11 October 2004 and KŽ-98/04 of 9 August 2004

DECISION ON INTERIM MEASURE
of 17 December 2004

DECISION ON ADMISSIBILITY
of 17 December 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (5) and Article 78 paras 1 and 3 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary, composed of the following Judges: Mr. Mato Tadić, President, Mr. Ćazim Sadiković, Vice-President, Mr. Miodrag Simović, Vice-President, Ms. Hatidža Hadžiosmanović, Ms. Valerija Galić, Mr. Jovo Rosić, having considered the appeal of **Mr. Lj. B.** in case No. **AP 921/04,** at its session held on 17 December 2004, adopted the following

DECISION ON INTERIM MEASURE

The request of Mr. Lj. B. for an interim measure, insofar as it is related to the request for termination of the appellant's detention ordered by the rulings of the Court of Bosnia and Herzegovina, is dismissed as ill-founded.

Having regard to Article 78 paragraph 3 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, the Court of Bosnia and Herzegovina is ordered to bring Mr. Lj. B., within 24 hours from the date of receipt of this Decision, before the competent judge in accordance with Article 5 paragraph 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the criminal case in which a ruling No. KPS-105/04 of 29 September 2004 was issued whereby Mr. Lj. B.'s detention was extended pending the conclusion of the main hearing and which was upheld by the ruling of the Court of Bosnia and Herzegovina No. KV-198/04 of 11 October 2004.

The Court of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within five days from the date of receipt of this Decision, of the undertaken measures referred to in paragraph 2 of this Decision, all in accordance with Article 75 paragraph 5 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina.

This decision shall enter into force forthwith and remain in force until the final decision by 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*.

Reasons

1. On 20 October 2004, **Mr. Lj. B.** ("appellant") from Trn – Municipality of Banja Luka, represented by Mr. K. S., a lawyer practicing in Banja Luka, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against a ruling of the Court of Bosnia and Herzegovina ("Court of BiH") No. KV-198/04 of 11 October 2004. The appellant also requested the Constitutional Court to issue an interim measure whereby it would terminate his detention. The aforementioned case has been registered as No. AP-921/04.

2. On 23 August 2004, before the aforementioned appeal was filed, the appellant filed an appeal with the Constitutional Court against a ruling of the Court of BiH, No. Kž-98/04 of 9 August 2004. The appellant also requested the Constitutional Court to issue an interim measure whereby it would terminate his detention. The aforesaid case has been registered as No. AP-749/04.

3. In both cases the appellant challenges the legality of the detention ordered against him. As to case No. AP-749/04, the appellant challenges the legality of the detention during the preliminary proceedings and in case No. AP 921/04 he challenges the lawfulness of the extension of the detention ordered pending the conclusion of the main hearing. Since both cases raise the same issue, i.e. the lawfulness of detention, the Constitutional Court decided to join the aforementioned cases within the meaning of Article 30 of the Constitutional Court's Rules of Procedure, and register them as No. AP 921/04.

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:

Case no AP 921/04

5. By a ruling No. KPS-105/04 of 29 September 2004, which was upheld by a ruling of the Appellate Panel of the same Court, No. KV-198/04 of 11 October 2004, the Court of BiH extended the detention ordered against the appellant until the conclusion of the main hearing held on the indictment of the Prosecutor's Office of Bosnia and Herzegovina ("Prosecutor's Office") No. KT-142/04 of 27 September 2004, charging the appellant with the criminal offense – organized crime – under Article 205 para 2 of the Criminal Code in connection with criminal offense – money laundering – under Article 209 para 2 of the Criminal Code (Official Gazette of Bosnia and Herzegovina, Nos. 3/03, 32/03 and 37/03). Thereafter, the appellant filed an appeal against the ruling of the Court of BiH, No. KV-198/04 of 11 October 2004.

Case No. AP 749/04

6. On a proposal put forward by the Prosecutor's Office, the Court of BiH, by ruling No. KV-142/04 of 27 July 2004 upheld by a ruling of the Appellate Panel of the same Court, No. Kž-98/04 of 9 August 2004, extended the detention ordered against the appellant until 29 September 2004. The custody was previously ordered against the appellant by rulings Nos. KPP-105/04 of 30 April 2004 and KV-85/04 of 26 May 2004. Thereafter, the appellant filed an appeal against the ruling of the Court of BiH, No. Kž-98/04 of 9 August 2004.

The facts relevant for issuance of the interim measure

7. In both appeals, the appellant complains that the challenged rulings violated his right to a fair trial under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"). As to the alleged violation of the right to a fair trial, the appellant alleges that he was unnecessarily kept in detention, which is in violation of Article II.3 (d) of the Constitution of Bosnia and Herzegovina and Article 5 para 3 of the European Convention. The appellant complains about a violation of Article 5 para 3 of the European Convention as he has been detained since 29 April 2004. He also alleges that the detention ordered against him has been extended on several occasions and that it was finally decided that he would be kept in custody until the conclusion of the main hearing without having been brought before the judge to give a statement, which is expressly provided for in Article 5 para 3 of the European Convention.

8. In examining the admissibility of the request for interim measure, the Constitutional Court invoked the provisions of Article VI.3 (b) of the Constitution of Bosnia and Herzegovina and Article 78 paras 1 and 3 of the Rules of Procedure of the Constitutional Court.

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

The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

Article 78 paras 1 and 3 of the Constitutional Court's Rules of Procedure reads as follows:

The Chamber may, until the adoption of a final decision, upon a request of a party, issue any interim measure it deems necessary in the interest of the parties or the correct conductance of the proceedings before the Court.

The plenary Court may, on its own motion, issue an interim measure referred to in paragraph 1 of this Article.

9. According to the allegations from the appeal and the challenged rulings, detention was initially ordered against the appellant and subsequently extended for the reasons provided for in Article 132 of the Criminal Procedure Code (*Official Gazette of Bosnia and Herzegovina*, Nos. 3/03, 32/03 and 36/03). The Constitutional Court holds that the reasons for ordering a detention under Article 132 of the Criminal Procedure Code are also laid down in Article 5 para 1 item (c) of the European Convention. In view of the aforesaid, the Constitutional Court recalls that the appellant complains of a violation of Article 5 para 3 of the European Convention on account of not being brought before the judge whilst detention was ordered against him, extended several times and is still in effect.

10. Article 5 para 3 of the European Convention reads as follows:

Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

11. As the appellant complains of a violation of Article 5 para 3 of the European Convention, the Constitutional Court, in terms of the applicability of the aforementioned article, invokes

the jurisprudence of the European Court of Human Rights as follows: Article 5 para 3 of the European Convention applies, exclusively, to the category of persons mentioned in item c) i.e. to the detained persons (see, ECHR, *B. v. Austria,* judgment of 28 March 1990, Series A-175 and *Quinn,* judgment of 22 March 1995, Series A No. A-311). In item 10 of this decision, the Constitutional Court concluded that the appellant has been deprived of liberty for the reasons provided for in Article 5 para 1 item (c) of the European Convention and is still in detention and the Constitutional therefore concludes that Article 5 para 3 of the European Convention is applicable in the instant case.

12. In view of the aforementioned, the Constitutional Court shall examine whether there are reasons for issuing an interim measure as the appellant alleges that the detention which has been ordered against him is in violation with the provisions of Article 5 para 3 of the European Convention.

13. The Constitutional Court recalls that Article 78 of the Constitutional Court's Rules of Procedure is applicable to situations in which the Constitutional Court finds that there could occur irremediable detrimental consequences which the Constitutional Court may assess only on the basis of the reasons and evidence on admissibility submitted with the request for issuance of an interim measure, i.e. the appeal. According to the established case law of the Constitutional Court, in examination of a request for interim measure, the appellant is requested to submit arguments and evidence in support of his allegations set forth in the request for interim measure as the allegations and evidence relating to the alleged violation of the constitutional rights in proceedings may not be analogically applied in deciding on interim measure.

14. In the instant case, the appellant did not in detail substantiate his allegations set forth in the request for interim measure, i.e. he did not allege detrimental consequences which could incur on him if not released from custody. However, it is indisputable that in deciding on pre-trial custody the appellant was not brought before the judge. The Court of BiH undoubtedly alleges that according to their established case law, the persons against whom pre-trial custody is ordered are not to be brought before the judge competent to order detention as the Criminal Procedure Code did not explicitly provide for such an obligation. In such a situation, i.e. if a party to the proceedings does not challenge the appellant's complaints of a violation of his constitutional rights, the Constitutional Court concludes that it unnecessary to require from the appellant to specifically submit arguments in support of his request for interim measure.

15. The Constitutional Court refers to Article II.1 of the Constitution of Bosnia and Herzegovina which provides that 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 and have priority over any other laws. The Constitutional Court has repeatedly held in its established case law that the provisions of the European Convention are to be applied to this and similar cases if they are not regulated by the national law or are not regulated in a clear manner. As to the instant case, the Constitutional Court holds that from the point of view of the protection of human rights, detention is a delicate measure of deprivation of liberty of a person and as such may be ordered only when all requirements laid down in Article 5 of the European Convention have been met.

16. In the instant case, the Court of BiH asserts that the Criminal Procedure Code does not provide for a strict obligation to bring the person to be detained before a judge. Furthermore, the Court of BiH alleges that the same Code provides that a suspect is to be brought before the judge only in case of unclear, unspecified and unsubstantiated proposal for ordering a pre-trial custody. However, Article 5 para 3 of the European Convention provides that *everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought* ***promptly*** *before a judge or other officer authorised by law to exercise judicial power.* The former European Commission for Human Rights has held that Article 5 para 3 of the European Convention *lays down an* ***unconditional*** *obligation upon the Contracting States to bring automatically and promptly, an arrested or detained person before a judge or other officer authorized to exercise judicial power and that it was therefore not necessary that the detained person appeals against the initial decision ordering arrest or detention* (see Application No. 9017/80, *Mc.Goff v. Sweden,* Decisions and Reports 31 (1983)).

17. The European Court of Human Rights has in a number of its decisions pointed out the significance of Article 5 para 3 of the European Convention. It has held that *Article 5 paragraph 1 (c) offers guarantees befitting the "judicial" power conferred on him by law and is designed to ensure that no one should be arbitrarily dispossessed of his liberty* (see ECHR, *Schiesser,* judgment of 4 December 1979, Series A-34 and S*koogströme,* judgment of 15 July 1983, Series A-83) *to ensure that the arrest or detention shall last the shortest possible time* (see, Reports of 13 July 1983, pages 13 and 30-31).

18. In addition to the reiteration of the significance of Article 5 para 3 of the European Convention, the European Court of Human Rights has in number of its judgments found a

violation of the said Article in cases in which a detained person was not brought promptly, i.e. within the shortest possible time before the judge. As an example the Court shall invoke the case in which a detained person was not brought before the judge or a court officer until 4 days and six hours after his arrest and in another case six days and sixteen hours and a half. The Court found a violation of Article 5 para 3 in the aforementioned cases (see, ECHR, *Brogan v. the United Kingdom,* judgment of 29 November 1988, Series A-145-B) The Court also found a violation of Article 5 para 3 in a case in which the applicant was not brought before the military court until five days after his arrest (see, ECHR, *Koster,* judgment of 28 November 1991, Series A-221).

19. In view of the aforementioned jurisprudence of the European Court of Human Rights upheld by the Constitutional Court, it is evident that a great importance is ascribed to Article 5 para 3 of the European Convention. The European Court found a violation in cases in which the arrested persons were not brought before the judge within four or five days. Furthermore, the situation in which the arrested persons have not been brought before the judge at all before the commencement of the trial is absolutely unacceptable.

20. It is indisputable that in the instant case the appellant was arrested, that detention was ordered against him, that the detention was extended and that he is still detained without being brought before the judge as required by Article 5 para 3 of the European Convention. Such a situation may not be justified by the arguments of the Court of BiH that the Criminal Procedure Code does not explicitly provide that the person to be detained must be brought before the judge as Article II.1 of the Constitution of Bosnia and Herzegovina provides that the provisions of the European Convention shall have priority over any other law.

21. As regards the appellant's request for an interim measure whereby his detention would be terminated, the Constitutional Court reiterates that it has found by a preliminary analysis of the reasons for ordering detention as well as the reasons for its extension that they meet the standards set forth in Article 5 para 3 item (c) of the European Convention and it therefore decided to dismiss the appellant's request for an interim measure in that part as ill-founded.

22. In view of the aforesaid, the Constitutional Court concludes that the courts should directly apply the provisions of Article 5 para 3 of the European Convention even in cases when the Criminal Procedure Code does not provide for a strict obligation to bring a detained person, i.e. the person who is imposed pre-trial custody before the competent judge who shall make it possible for him to make a statement.

23. Based on the aforesaid, it was unanimously decided as stated in the operative part of this decision.

24. The Constitutional Court recalls that the decision on interim measure does not, in any case, prejudge a decision on admissibility, i.e. on the merits of the case concerned.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, Article 16 para 2 (8 and 14) and Article 59 para 2(1) of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in plenary composed of the following judges Mr. Mato Tadić, President, Mr. Ćazim Sadiković, Vice-President, Mr. Miodrag Simović, Vice-President, Ms. Hatidža Hadžiosmanović, Mr. David Feldman, Ms. Valerija Galić, Mr. Jovo Rosić, having considered the appeal of **Mr. Lj. B.**, case No. **AP 921/04,** at its session held on 17 December 2004, adopted the following

DECISION ON ADMISSIBILITY

The appeal of Mr. Lj. B. from Trn – the Municipality of Banja Luka, filed against rulings of the Court of Bosnia and Herzegovina Nos. KV-198/04 of 11 October 2004 and KŽ-98/04 of 9 August 2004, due to the new legal circumstances in view of the fact that the Court of Bosnia and Herzegovina harmonized the criminal proceedings in question with Article II.3 (d) of the Constitution of Bosnia and Herzegovina and Article 5 paragraph 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is hereby rejected as inadmissible.

The decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina* and the *Official Gazette of the Republika Srpska*.

Reasons

1. On 20 October 2004, Mr. Lj. B. ("appellant") from Trn – Municipality Banja Luka, represented by Mr. K. S. a lawyer practicing in Banja Luka, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") against a ruling of the Court of Bosnia and Herzegovina ("Court of BiH") No. KV-198/04 of 11 October 2004. The appellant also filed a request for issuance of an interim measure whereby the Constitutional Court would terminate detention ordered against him. The

mentioned case has been registered with the Constitutional Court under number AP 921/04.

2. Prior to filing the appeal, on 23 August 2004, the appellant filed an appeal with the Constitutional Court against a ruling of the Court of BiH No. Kž-98/04 of 9 August 2004. The appellant also filed a request for issuance of an interim measure whereby the Constitutional Court would terminate the detention ordered against him. The mentioned case has been registered with the Constitutional Court under number AP 749/04.

3. In both cases, the appellant challenges the lawfulness of detention, in case No. AP 749/04 the lawfulness of detention during the preliminary proceedings and in case AP 921/04 the lawfulness of extending the detention pending the conclusion of the main trial. Since both cases concern the same issue, i.e. challenging lawfulness of detention, the Constitutional Court decided to join the mentioned cases for the purposes of Article 30 of the Rules of the Procedure of the Constitutional Court and register them as number AP 921/04.

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:

Case No. AP 749/04

5. On a proposal put forward by the Prosecutor's Office, the Court of BiH, by ruling No. KV-142/04 of 27 July 2004 upheld by a ruling of the Appellate Panel of the same Court, No. Kž-98/04 of 9 August 2004, extended the detention ordered against the appellant until 29 September 2004. The custody was previously ordered against the appellant by rulings of the Court of BiH Nos. KPP-105/04 of 30 April 2004 and KV-85/04 of 26 May 2004. Thereafter, the appellant filed an appeal against a ruling of the Court of BiH No. Kž-98/04 of 9 August 2004.

6. In both appeals the appellant complains that the challenged rulings violated his right to a fair trial under Article II.3 (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"). As to the alleged violation of the right to a fair trial, the appellant alleges that he was unnecessarily kept in detention, which is in violation with Article II.3 (d) of the Constitution of Bosnia and Herzegovina and Article 5 para 3 of the European Convention. The appellant complains of a violation of Article 5 para 3 of the European Convention as he has been detained since 29 April 2004. He also alleges that the

detention ordered against him has been extended on several occasions and it was finally decided that he would be kept in custody until the conclusion of the main hearing without having been brought before the judge, which is expressly provided for in Article 5 para 3 of the European Convention.

Case No. AP 921/04

7. By a ruling No. KPS-105/04 of 29 September 2004 which was upheld by a ruling of the same Court No. KV-198/04 of 11 October 2004, the Court of BiH extended the detention ordered against the appellant until the conclusion of the main hearing held upon the indictment brought by the Prosecutor's Office No. KT-142/04 of 27 September 2004 charging the appellant with the criminal offense – organized crime – under Article 205 paragraph 2 of the Criminal Code (*Official Gazette of Bosnia and Herzegovina* in connection with criminal act – money laundering – under Article 209 paragraph 2 of the Criminal Code (*Official Gazette of Bosnia and Herzegovina*, Nos. 3/03, 32/03 and 37/03). Thereafter, the appellant filed an appeal against the ruling of the Court of BiH No. KV-198/04 of 11 October 2004.

In examining the admissibility of the appeal the Constitutional Court invoked the provisions of Article VI.3 (b) of the Constitution o Bosnia and Herzegovina and Article 16 of para 2 (8 and 14) of the Rules of the Procedure of the Constitutional Court.

Article VI.3 (b) of the Constitutional Court of Bosnia and Herzegovina reads as follows:

The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

Article 16 para 2 (8 and 14) of the Rules of the Procedure of the Constitutional Court reads as follows:

A request or appeal shall not be admissible in any of the following cases:

(...)

8. the legal circumstances have changed

14. the appeal is premature

Admissibility of the appeal in relation to Article 5 (3) of the European Convention

8. The Constitutional Court notes that the appellant requested in both appeals the termination of detention and his release since he believed that he was deprived of liberty contrary to the provisions of Article 5 para 3 of the European Convention. He also requested the issuance of the interim measure on those grounds.

9. Deciding on the appellant's request for issuance of the interim measure, the Constitutional Court adopted a decision No. *AP 921/04* of 19 November 2004, whereby it dismissed the appellant's request to be released. However, the same decision ordered the Court of BiH to bring the appellant before the competent judge in accordance with Article 5 para 3 of the European Convention and inform the Constitutional Court on measures taken, within five days from the day of receipt of the decision on the interim measure. The Constitutional Court took the position that the ordinary courts should directly apply the provisions of Article 5 para 3 of the European Convention in cases when the Criminal Procedure Code does not provide for a strict obligation to bring a detained person, i.e. the person against whom a pre-trial detention was ordered, before the competent judge to give a statement.

10. Within the time limit of five days upon the receipt of the decision on interim measure, on 30 November 2004, the Court of BiH informed the Constitutional Court that the appellant's detention was terminated and that he was released. Moreover, the Court of BiH emphasized that at the general session held on 6 October 2004 it adopted a conclusion according to which the application of Article 5 para 3 of the European Convention shall be considered obligatory and that the judges for preliminary proceedings, in examining a proposal for ordering detention, are obliged to summon the accused prior to issuance of their decision, whereby they would fulfill the obligation from the aforementioned Article of the European Convention that a person deprived of liberty shall be promptly brought before the judge.

11. Having regard to the aforementioned, the Constitutional Court noticed that the Court of BiH released the appellant, while at the same time the appellant's request was that the Constitutional Court adopt a decision whereby it would order the appellant's release. In the meantime, new legal circumstances have occurred and they are reflected in the fact that the Court of BiH terminated the appellant's detention and released him, which means that the criminal proceedings concerned have been harmonized with Article 5 para 3 of the European Convention. In such situation, the Constitutional Court considers it unnecessary

to examine the lawfulness of the detention in accordance with Article 5 para 3 of the European Convention since the detention does not exist any longer. The Constitutional Court therefore concludes that the legal circumstances have changed as referred to in Article 16 para 2 (8) of the Constitutional Court's Rules of Procedure.

12. Moreover, the Constitutional Court emphasizes that the appellant retains the right to file with the competent authority a compensation claim after the conclusion of the criminal proceedings at issue in accordance with the relevant provisions of the Code of Criminal Procedure (*Official Gazette of Bosnia and Herzegovina*, No. 3/03), if he considers to have been a victim of a violation of the constitutional rights and to be entitled to compensation on that ground.

Admissibility of the appeal in relation to Article 6 of the European Convention

13. The Constitutional Court notes that the appellant sees a violation of the right to a fair trial under Article 6 of the European Convention in the fact that he was deprived of liberty contrary to Article 5 para 3 of the European Convention. As regards the quoted appellant's assertions, the Constitutional Court pointed out that according to the case law of the European Court of Human Rights and of the Constitutional Court (see, the European Court of Human Rights, *Barbera, Messeque and Jobardo v. Spain,* judgment of 6 December 1988, Series A-146, paragraph 68, and the Constitutional Court's decision No. *U 63/01* of 27 June 2003, paragraph 19*)* the issue of fairness of a trial shall be evaluated on the basis of the proceedings as a whole, since a shortcoming which occurred in one stage of the proceedings can be remedied in the subsequent stage. This in principle means that the assessment of fairness of the proceedings cannot be made until the proceedings have been concluded by the final decision.

14. In the present case, the proceedings are in the initial stage, since the main hearing has just been opened and no court decision on the merits has been adopted. The Constitutional Court therefore concludes that the present appeal is premature for the purposes of Article 16 para 2 (14) of the Constitutional Court's Rules of Procedure.

15. Having regard to the provisions of Article 16 para 2 (8 and 14) of the Constitutional Court's Rules of the Procedure according to which the appeal shall be rejected as inadmissible if the legal circumstances have changed, i.e. if the appeal is premature, the Constitutional Court decided unanimously as in the operative part of the decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 26/00

Referral of the Municipal Court of Cazin of a question regarding the compatibility of Article 54 of the Law on Amendments to the Labor Law with the Constitution of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, No. 32/00)

DECISION
of 21 December 2001

Having regard to Article VI.3 (c) of the Constitution of Bosnia and Herzegovina and Articles 54 and 57 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, No. 24/99 and 26/01), the Constitutional Court of Bosnia and Herzegovina, at its session held on 21 December 2001, adopted the following

DECISION

Article 54 of the Law on Amendments to the Labor Law (*Official Gazette of the Federation of Bosnia and Herzegovina*, No. 32/00) is in conformity with the Constitution of Bosnia and Herzegovina.

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

Reasons

I Facts of the Case

1. In 1992, most enterprises and public services in Bosnia and Herzegovina were forced to reduce the scope of their activities or to call a halt to their work due to the war conditions and the destruction of buildings and property on the territory of Bosnia and Herzegovina. The result of this reduction was that the need for to employ a great number of employees ceased.

2. A Law on Labor Relations during the State of War and in the Case of Immediate Danger of War (*Official Gazette of the RBiH*, No. 21/92, 16/93 and 13/94), enacted at that time, provided that an employee could be laid off temporarily if there was no need for his or her work or if the need for his or her work was less than usual during a state of war or in the case of immediate danger of war. Such an employee could be laid off until the cessation of the war conditions, and he or she would be entitled to compensation in the amount specified by the employer according to the material resources of the employer. After the war period, enterprises and public services gradually resumed their activities,

which made it possible for them to employ laid off employees so that the number of such employees was gradually reduced.

3. On 5 October 1999, the House of Representatives of the Federation of Bosnia and Herzegovina and, on 21 July 1999, the House of Peoples adopted a new Labor Law. This Law was published in the *Official Gazette of the Federation of Bosnia and Herzegovina* No. 43/99 on 28 October 1999 and entered into force eight days after its promulgation on 5 November 1999.

4. The Labor Law regulates the conclusion of employment contracts, working hours, salaries, termination of employment contracts, exercise of rights and obligations deriving from employment, conclusion of collective agreements, peaceful resolution of collective labor disputes and other issues deriving from employment (Article 1). The Law also regulates the status of laid off employees (Article 143).

5. According to Article 143 of the Labor Law, apart from the employees who have the status of laid off employees on the effective date of this Law, the same status is accorded to the employees who were employed on 31 December 1991 and who, within three months from the effective date of this Law, addressed the employer in written form or directly for the purpose of establishing a legal and working status. An employee who has the status of a laid off employee on the effective date of this Law shall retain that status during not more than six months from that date, unless the employer invites the employee to work before the expiry of this time-limit. While laid off, the employee shall be entitled to compensation in the amount specified by the employer (paragraphs 1, 2 and 3 of Article 143). If a laid off employee is not invited to work before the expiry of the time-limit, his or her employment shall be terminated with a right to severance pay which shall not be lower than three average salaries paid at the level of the Federation during the three previous months for up to five years of service and for each additional year of service at least another half of the average salary (paragraph 4). Paragraph 5 provides for another form of compensation, and paragraphs 6 and 7 provide that the conditions and time-limits for the severance payment shall be determined in a written contract between the employer and employee and that the employer may not employ an employee with the same qualifications or educational background within one year except the laid off employees whose employment have been terminated.

6. At the session of the House of Representatives held on 2 August 2000 and at the session of the House of Peoples held on 31 July 2000, the Parliament of the Federation of Bosnia and Herzegovina adopted the Law on Amendments to the Labor Law ("Law

on Amendments”). This Law was published on 30 August 2000 (*Official Gazette of the Federation of Bosnia and Herzegovina*, No. 32/2000) and entered into force eight days after it had been published, i.e. on 7 September 2000.

7. According to Article 50 of the Law on Amendments, paragraph 4 of Article 143 was replaced by a provision according to which the amount of severance pay was considerably reduced in cases where the employment of a laid off employee has been terminated (it shall be calculated by multiplying the average salary at the level of the Federation on the day of the entry into force of this Law by the following coefficients: up to 5 years of employment - coefficient 1.33, 5 to 10 years of employment - coefficient 2.00, 10 to 20 years of employment - coefficient 2.66, over 20 years of employment - coefficient 3.00)

8. Articles 51, 52, 53 and 54 deal with the working status of the laid off employees.

9. Article 54 of the Law on Amendments reads as follows:

The procedure to exercise and protect the rights of employees instituted before the entry into force of this Law shall be completed according to the regulations applicable on the territory of the Federation before the entry into force of this Law, if it is more favorable to the employee, with the exception of Article 143 of the Labor Law.

10. Contentious proceedings, initiated by Mrs. S.D. from Cazin against “Una-banka”, Bihać, for the purpose of payment of severance pay according to Article 143, paragraph 4 of the Labor Law, were being conducted before the Municipal Court of Cazin. Mrs. S.D., in her submissions of 3 October 2000 and 20 January 2001, made a motion for review of the constitutionality of Article 54 of the Law on Amendments. The Municipal Court of Cazin, having found that the motion was well-founded, submitted a request under Article VI.3 (c) of the Constitution of Bosnia and Herzegovina to the Constitutional Court of Bosnia and Herzegovina.

II Proceedings before the Court

11. On 5 February 2001, the Municipal Court of Cazin requested that the Constitutional Court review, in accordance with Article VI.3 (c) of the Constitution of Bosnia and Herzegovina, the conformity of Article 54 of the Law on Amendments with the Constitution of Bosnia and Herzegovina.

12. On 20 February 2001, the Parliament of the Federation of Bosnia and Herzegovina was requested to submit a reply in accordance with Article 16 of the Court’s Rules of

Procedure. On 18 July 2001, the Secretary of the House of Peoples submitted the following documents and information:

- Proposal for the Law on Amendments,
- Opinion by the Federal Ministry for Social Affairs, Displaced Persons and Refugees,
- Extract from the Minutes taken at the session of the House of Peoples when the Proposal for the Law on Amendments was deliberated.

III. Complaints

13. The Municipal Court of Cazin ("applicant") stated that contentious proceedings, initiated by S.D. from Cazin against "Una-banka" Bihać for the purpose of the payment of severance pay in accordance with Article 143, paragraph 4 of the Labor Law, were being conducted before it. The applicant also stated that S.D., in her submissions of 3 October 2000 and 20 January 2001, had requested the review of the constitutionality of Article 54 of the Law on Amendments. The applicant pointed out that it submitted a request under Article VI.3 (c) of the Constitution of Bosnia and Herzegovina. It further noted that the amended paragraph 4 of Article 143 of the Labor Law regulates in a more unfavorable manner the right to severance pay, granted to the laid off employees whose employment was terminated, in comparison with the previous provision. It therefore concluded that the provision of Article 54 of the Law on Amendments, according to which the procedure to exercise and protect the rights of employees instituted before the entry into force of this Law shall be completed according to the regulations applicable before the entry into force of this Law, if it is more favorable to the employee, with the exception of Article 143 of the Labor Law, was not in conformity with the provisions of Article II.1, 2 and 3 (a) and Article IV.3 (h) of the Constitution of Bosnia and Herzegovina, since "it violated the human rights pertaining to the acquisition of those rights which fall within the ambit of equal employment conditions, especially taking into account the retroactive effect of the said provision". The applicant also stated that a certain number of employees had been given the right to severance pay in accordance with the former provision that was more favorable. It stated that with regard to the dispute before the Municipal Court of Cazin, the employees in question had been put in a more unfavorable position in comparison with other employees, which interfered with the constitutional right to life, i.e. employment and acquisition of the right to employment under equal conditions.

14. Upon the request of the Secretary of the House of Peoples of 18 July 2001, the Legislative Commission of the House of Peoples gathered the necessary data and information for the further conduct of the proceedings before the Constitutional Court. In the reasons of the submitted proposal for the Law on Amendments, the following explanations were given in regard to Article 50:

This provision entails a reduction of the severance pay which the employer has to grant to the employee at the moment of termination of his/her employment, since the payment of the previous severance pay amount would create a more difficult economical position for the employers, even their liquidation, which would further cause a situation in which the employees who had an employment would become unemployed. Therefore, the proposed amount of the severance pay represents an objective amount for the employees whose employment was terminated.

According to the opinion of the responsible Federal Ministry, the aim of the initiative by the international community (World Bank, OHR, IMF etc.) was to reduce the amount of the severance pay, since the employers had not be able to apply the previous provision concerning that amount. It was also stated that according to the Law on Amendments the amount of the severance pay was considerably reduced. In order to satisfy the purpose of those provisions, Article 54 of the Law on Amendments provided that the procedure to exercise and protect the rights of employees instituted before the entry into force of this Law would be completed according to the regulations applicable before the entry into force of this Law, if it was more favorable to the employee, with the exception of Article 143 of the Labor Law. That Article, which dealt with the amount of the severance pay, was the main reason for adopting the Law on Amendments. If the provision concerning the amount of the severance pay had continued to be applicable, the purpose of the adoption of the Law on Amendments might not have been satisfied.

IV Admissibility

15. The request was submitted under Article VI.3 (c) of the Constitution of Bosnia and Herzegovina, which 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.

16. The request for the review of the conformity of Article 54 of the Law on Amendments was lodged by the Municipal Court of Cazin whose decision in the dispute concerning the severance pay depended on the application of the provision in question.

17. Consequently, the Constitutional Court concludes that the request is admissible.

V Referred Question

18. The question which arises in this dispute is whether the provision of Article 54 of the Law on Amendments, which provides that the procedure to exercise and protect the rights of employees instituted before the entry into force of this Law shall not be resolved in accordance with the more favorable regulations of Article 143 of the Labor Law, applicable before the entry into force of the Law on Amendments, violates the Constitution of Bosnia and Herzegovina.

VI Conclusion

19. According to Article II.1 of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. According to Article II.2 of the Constitution of Bosnia and Herzegovina, the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols ("European Convention") and its Protocols shall apply directly in Bosnia and Herzegovina. Since the referred question in the present case relates to the provision on the right of laid off employees to severance pay, the Constitutional Court considers it justified to examine in the first place the conformity of that provision with Article 1 of Protocol No. 1 to the European Convention.

a) Article 1 of Protocol No. 1 (Article II.3 k) of the Constitution)

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

Every natural person 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.

21. Article 1 of Protocol No. 1 is comprised of 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 possessions. The second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, *inter alia*, to control the use of property in accordance with the general interest (see, for instance, ECHR, *Sporrong and Lönnroth* judgment of 23 September 1982*)*.

22. The words "property" and "possessions" are not to be interpreted in a restrictive manner but shall be considered to include existing monetary claims and various other rights of the individual which have an economic value. It follows that, insofar as the laid-off employees whose employment was terminated had already, before the Law on Amendments entered into force, obtained a right to severance pay according to Article 143 of the Labor Law, this was a property right protected under Article 1 of Protocol No. 1. For such employees Article 54 of the Law on Amendments meant that they were deprived of a part of their property. Such deprivation would be in conformity with Article 1 of Protocol No. 1 only if it satisfied the conditions in the second sentence of the first paragraph of that Article.

23. According to the second sentence of the first paragraph of Article 1 of Protocol 1, 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. Even if there is a public interest, a deprivation of property is in conformity with this provision only if a fair balance is struck between the public interest and the interest of the individual who is deprived of his property, This means, with few exceptions, that the individual is entitled to reasonable compensation for his loss (cf., for instance, ECHR*, James and Others v. United Kingdom*, judgment of 21 February 1986).

24. However, the Constitutional Court notes that a State also has a certain margin of appreciation in determining which economic and social policy is best suited to serve the general interest of the population.

25. In the present case, the legislator considered, when adopting the Law on Amendments, that a reduction of the severance pay was of vital interest to the economy, since the heavy burden imposed on employers by the obligation to pay these amounts to former employees was in many cases beyond the capabilities of the companies and would force many companies into liquidation and bankruptcy and would thereby also further aggravate the employment situation in the country. The legislator considered that, by reducing the amount of severance pay, a reasonable balance would be struck between the public interest and the interests of the laid off employees.

26. The Constitutional Court has ascertained that the amount to be paid according to Article 143 of the Labor Law would be 3,836 KM per employee and that the amount to be paid under Article 50 in connection with Article 54 of the Law on Amendments would be about 1,000 KM per employee. The difference between these amounts with respect to more than 100,000 employees, whose employment would be terminated according to Article 143 of the Labor Law, would represent the financial means by which the economic viability of the companies would be strengthened.

27. The Constitutional Court is aware of the serious economic situation in the Federation of Bosnia and Herzegovina. Economic data submitted to the Constitutional Court by the Government of the Federation of Bosnia and Herzegovina in accordance with Article 28 of the Rules of Procedure of the Constitutional Court clearly demonstrates these difficulties. The macro-economic forecast of development in the Federation of Bosnia and Herzegovina presented by the Government of the Federation shows that compared to the level achieved on the territory of the Federation in 1990, only 34,9% of industrial production, 65,1% of employment, 47,6% of export and 52,7% of gross domestic product was achieved in 1991. In 2000, the annual domestic product was 1,121 USD per citizen. The percentage of unemployed persons is 40%, the proportion of employed persons to dependent persons is 1:4, and the total debt amounts to 3,5 billion KM. Export/import ratio is 27,4 %.

28. On the basis of this data, the Court must accept that the amount which, under the previous legal provisions, should be paid to former employees would undoubtedly represent a huge burden for the entire economy of the Federation of Bosnia and Herzegovina. There is therefore a clear public interest in reducing these payments.

29. The Government of the Federation of Bosnia and Herzegovina has drawn certain conclusions on the basis of an analysis of the macro-economic situation in the Federation and has established certain guidelines for the stabilization of the economy. It has pointed out, *inter alia*, that it is necessary to stimulate a long-term increase of employment. The tax burden on revenue should be reduced, employers should be given benefits, credit financing should be ensured, stimulating mechanisms should be applied for small and middle-sized enterprises, the expenses for defense, order and security should be reduced, state administration should be rationalized, and a sustainable fiscal deficit should be maintained. The Court finds that, in the present economic situation, the aims of the Law on Amendment could not reasonably have been achieved by offering financial support from the State authorities, since that would have further aggravated the already very serious economic situation in the Federation. It would probably have necessitated an increase

in taxes and have resulted in a further impoverishment of the population and led to a slowdown of economic progress.

30. The Constitutional Court further notes that the right to severance pay was not totally eliminated by the Law on Amendments but was only reduced to a lower amount. In view of the serious economic difficulties in the Federation and the very high amounts involved if full payments were to be made to all laid off employees, the Constitutional Court accepts that the deprivation of property which followed from the new law could, in these special circumstances, be considered a proportionate measure taken in the public interest and that therefore it does not violate Article 1 of Protocol No. 1 to the European Convention or the corresponding provision in Article II 3. (k) of the Constitution of Bosnia and Herzegovina.

b) Article 14 of the European Convention, in connection with Article 1 of Protocol No. 1 (Article II.4 of the Constitution)

31. The Court will also examine whether Article 54 of the Law on Amendments violates Article 14 of the European Convention in connection with Article 1 of Protocol No.1, or Article II.4 of the Constitution, by discriminating against the employees to whom Article 54 of the Law on Amendments applies as compared with employed persons or with employees who were granted severance pay before the Law on Amendments came into force.

32. Article 14 of the 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, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

33. Article II.4 of the Constitution reads as follows:

The enjoyment of the right and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

34. Article 14 of the Convention prohibits discrimination only with respect to the rights and freedoms guaranteed in the Convention. This, however, does not exclude that the

Article may be violated even though the right referred to, taken alone, has not been violated. In fact, a limitation of this right, although justified in itself, must be made in a non-discriminatory manner (cf. *Belgian Linguistic case,* judgment of 23 July 1968, Series A No.6). The same applies, *mutatis mutandis*, to Article II.4 of the Constitution which links the prohibition against discrimination to the rights guaranteed in the Constitution and in certain international treaties.

35. An act or regulation is discriminatory if it distinguishes between persons or groups of persons who are in a comparable situation and if that distinction lacks an objective and reasonable justification, or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.

36. The Constitutional Court notes that a question of discrimination arises only when persons or groups who are in the same situation or in an analogous situation are treated differently. In the present case, all laid off employees who were entitled to severance pay when the Amendment Law was enacted and entered into force but had not yet been granted an amount of such pay were treated alike. The Constitutional Court considers that the laid off employees are clearly in a different situation from those who are employed. The Court also takes the view that they differ from those laid off employees who had already obtained severance pay under the previous law. In fact when laws are changed, it is frequently unavoidable that a distinction arises between those to whom the old law applies and those whose rights are regulated by the new law. These two categories of persons cannot be considered to be in an analogous situation, and the distinction which follows from the change in the legislation cannot therefore be considered to be of a discriminatory nature. Consequently, there is no appearance of discrimination in this case.

The Court unanimously adopted this Decision, ruling in the following composition:
President of the Court, Prof. Dr Snežana Savić
Judges: Prof. Dr Kasim Begić, Dr Hans Danelius, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Dr Zvonko Miljko, Azra Omeragić, Prof. Dr Vitomir Popović and Mirko Zovko.

U 26/00
21 December 2001
Sarajevo

Prof. Dr Snežana Savić
President
Constitutional Court of Bosnia and Herzegovina

The considerable reduction of the severance pay in case when the laid-off employees are dismissed shall not represent a violation of the right to a peaceful enjoyment of the possessions or the right not to be discriminated against if the legislator was constrained to do so due to extreme economic conditions.

Case No. U 50/01

Referral of the Cantonal Court of Široki Brijeg of a question regarding the compatibility of Article 37 of the Law on Amendments to the Law on Insurance of Property and Persons with the Constitution of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, No. 6/98)

DECISION ON MERITS
of 30 January 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (c) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (2), Article 61 para 2 and Article 63 para 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Ćazim Sadiković, Vice-President,

Mr. Tudor Pantiru, Vice- President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Having deliberated on the request of the **Cantonal Court of Široki Brijeg** in Case No. **U 50/01,**

Adopted at the session held on 30 January 2004 the following

DECISION ON MERITS

It is hereby established that Article 37 of 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 No. 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 for the Protection of Human Rights and Fundamental Freedoms.

The Parliament of the Federation of Bosnia and Herzegovina is ordered to harmonize Article 37 of the Law on Amendments to the Law on Insurance of Property and Persons of the Federation of Bosnia and Herzegovina 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, within a time-limit of three months after the date of publication of the present Decision in the Official Gazette of Bosnia and Herzegovina.

The Parliament of the Federation of Bosnia and Herzegovina is obliged to inform the Constitutional Court of Bosnia and Herzegovina about the measures taken to enforce this Decision, in pursuance of Article 75 para 5 of the Rules of Procedure 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* and the *Official Gazette of the Republika Srpska*.

Reasoning

I. Introduction

1. On 9 October 2001, the Cantonal Court of Široki Brijeg, by invoking Article VI.3 (c), referred to the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") a question regarding the compatibility of Article 37 of the Law on Amendments to the Law on Insurance of Property and Persons (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 6/98; "the Amended Law"). The original law ("the Law") was enacted on 3 February 1995 and published in the *Official Gazette of Bosnia and Herzegovina* No. 2/95.

II. Procedure before the Constitutional Court

2. On 17 April 2003, the Constitutional Court requested the House of Peoples and the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina to submit their respective replies.

3. The House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, in its reply dated 8 May 2003, informed the Constitutional Court that it would submit its opinion after consultations with the legal service within the Government of the Federation of Bosnia and Herzegovina.

4. In a letter dated 1 July 2003, the Parliament of the Federation of Bosnia and Herzegovina submitted to the Constitutional Court the legal opinion of the Government of the Federation of Bosnia and Herzegovina.

5. In a letter dated 16 September 2003, at the request of the Constitutional Court, the House of Peoples of the Federation of Bosnia and Herzegovina submitted excerpts from the tape recording and minutes from the session of the Parliament of the Federation of Bosnia and Herzegovina at which the Law was enacted.

6. In a letter dated 30 September 2003, the Constitutional Court requested the parties to the proceedings before the lower instance courts, i.e. the defendant, the insurance company "Sarajevo osiguranje" and the plaintiff Z. J., for their opinion on the case.

7. The plaintiff submitted his observations on the case in a letter dated 29 October 2003.

8. In a letter dated 3 November 2003, the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina informed the Constitutional Court that it did not have anything new or different to add to the legal opinion of the Government of the Federation of Bosnia and Herzegovina.

III. Facts of the Case

9. The facts of the case, drawn from the referral by the Cantonal Court and the documents submitted to the Constitutional Court, may be summarized as follows:

10. The plaintiff was involved in a road accident on 21 June 1991. On 6 January 1992 the plaintiff brought an action before the Municipal Court for compensation for damages caused to his car as well as payment of default interest from 31 December 1991 onwards.

11. The "Sarajevo osiguranje" ("the defendant") contested the claim for damages and submitted that the default interest was computed incorrectly since the damage occurred as of the date on which an expert established the extent of the plaintiff's claim in relation to the defendant, i.e. as of 27 January 1998. The Municipal Court accepted the findings and opinion of a financial expert according to which legal default interest should be computed as from the moment when the damage was established, i.e. as from 10 February 1992, until the beginning of the war and from the end of the war until 31 December 1997.

12. The Municipal Court, in its Judgment No. P-301/98 dated 30 March 2001, decided that the defendant is obliged to pay default interest rate to the plaintiff for the period

between 10 February 1992 until 8 April 1992 and from 23 December 1996 in the amount of KM 4,575.00 until final payment. In view of the fact the contested Article 37 of the Amended Law exempts payment of default interest during the state of war, the Municipal Court held that the defendant was not obliged to pay out to the plaintiff default interest for that period of time. The Municipal Court rejected the plaintiff's objection that Article 37 of the Amended Law was in violation of the Constitution of Bosnia and Herzegovina by pointing out that the court did not entertain jurisdiction to decide on the constitutionality of provisions of a law.

13. Thereupon, the plaintiff filed an appeal with the Cantonal Court contesting the Municipal Court's decision on the basis of grave violation of the provisions of the Law on Civil Procedure and incorrect application of the substantive law. With regard to incorrect application of substantive law, the plaintiff alleged that the default interest rate should have been computed as of 31 December 1991, the date when the plaintiff requested the court to enforce payment. Moreover, the plaintiff alleged that Article 37 of the Amended Law should not have been applied since it was not compatible with the Constitution of Bosnia and Herzegovina.

14. When the case reached the Cantonal Court, that court decided to refer the case to the Constitutional Court for a decision as to whether Article 37 of the Amended Law was compatible with the Constitution of Bosnia and Herzegovina; more specifically, with Article II.3 (k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention").

IV. Relevant law

(1) Law on the Insurance of Property and Persons (*Official Gazette of the Federation of Bosnia and Herzegovina* Nos. 2/95 and 6/98)

Article 28

An insurance company shall hold full responsibility for obligations deriving from insurance and reinsurance agreements.

(...)

Article 37 of the Amended Law

No interest shall be computed on the amounts of loss compensation (principal amount) prescribed by an executive order (court decision and court settlement) and out-of-court settlement for the period of imminent threat of war in Bosnia and Herzegovina.

(2) Law on Contractual Obligations (*Official Gazette of the SFRY* Nos. 29/78, 39/85 and 57/98, *Official Gazette of the RBiH* Nos. 2/92, 13/93 and 13/94)

Impossibility of fulfilment for which neither party is responsible

Article 137

(1) When fulfilment of obligation of one party to a bilateral contract has become unachievable because of the event for which none of the parties is responsible, obligation of the other party shall be terminated as well, and if the latter has fulfilled a part of his/her obligation, he/she can demand refunding based on the rules for the return of illicitly obtained values.

When the obligation of compensation becomes due

Article 186

The obligation of compensation shall be considered due as of the moment when the damage occurred.

Full compensation

Article 190

Taking into consideration the circumstances that arose after the damage was caused, the court shall award compensation in the amount that is required to bring the injured party's material position into the status in which it would have been if it had not been for the harmful action or lack of action.

III. DEFAULT INTEREST

When a person is in debt

Article 277

(1) The debtor, who is late with fulfilling his/her capital commitments, owes the penalty interest at the rate stipulated by a Federation law, along with the principal sum.

(3) Law on Default Interest (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 27/98)

Article 2

The debtor, who is late with fulfilling his/her capital commitments, owes the default interest rate at a rate of 18% per year added to the amount of debt until the payment of the debt, along with the principal sum.

For the period less than one year a compound rate of interest shall be computed.

(6) Decision on Proclaiming the State of Imminent Threat of War (*Official Gazette of the Republic of Bosnia and Herzegovina* Nos.1/92 and 13/94 of 9 June 1994)

I

The state of imminent threat of war is proclaimed on the territory of Bosnia and Herzegovina.

IV

This Decision shall take immediate effect and it shall be published in the next issue of the Official Gazette of the RBiH.

(7) Decision on the Cessation of Application of the Decision on Proclaiming the State of Imminent Threat of War on the Territory of the Federation of Bosnia and Herzegovina, (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 25/96 of 23 December 1996)

I

The Decision on Proclaiming the Imminent Threat of War (Official Gazette of the Republic of Bosnia and Herzegovina Nos. 1/92 and 13/94) and Item II of the Decision on

*Repeal of the State of War (*Official Gazette of the Republic of Bosnia and Herzegovina *No. 50/95) shall cease to be in effect on the territory of the Federation of Bosnia and Herzegovina.*

III

This Decision shall take effect on the day of its publication in the Official Gazette of the Federation of Bosnia and Herzegovina.

V. Referred question

a) Statements from the Cantonal Court

15. In its referral to the Constitutional Court, the Cantonal Court stated that it considered the disputed Article 37 to be in violation of the Constitution of Bosnia and Herzegovina since the default interest rate was the plaintiff's property and its deprivation could not be justified by invoking the public interest point. The Cantonal Court emphasized that the case also raised a series of other questions; for instance, whether a law could have a retroactive effect and whether the application of the law ensures equality of other debtors before law. In particular, some cases have already been decided in accordance with the previous law, which did not contain a provision on retroactive exemption from payment of default interest rate. The Cantonal Court also pointed out that the issue raised concerns regarding equality before law since the same exemption from payment of default interest charges did not apply to physical persons who were obliged to pay compensation including default interest for the overdue time. The Cantonal Court explicitly requested the Constitutional Court to declare Article 37 of the Amended Law in violation of Article II.3 (k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

b) Reply to the referred question

16. The Government of the Federation of Bosnia and Herzegovina ("the Government") submitted in its reply that the Constitution of Bosnia and Herzegovina did not provide for retroactive application of law and that the statement that Article 37 violated the right to peaceful enjoyment of possessions was well-founded. To this end, the Government also submitted that the application of the disputable provision put individuals on an unequal footing when compared to insurance companies since only insurance companies were exempted from paying default interest rate whereas individuals in the same situations were still required to pay the said interest. The Government further submitted that,

consequently, the constitutionality of Article 37 could be questioned and it concluded that Article 37 of the Amended Law should be changed.

17. The excerpts from the tape recordings and minutes from the session of the Parliament of the Federation of Bosnia and Herzegovina did not reveal any arguments justifying the adoption of Article 37 of the Amended Law.

VI. Admissibility

a) Jurisdiction of the Constitutional Court

18. According to Article VI.3 (c) of the Constitution of Bosnia and Herzegovina, 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, 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 determining the jurisdiction of the Constitutional Court in cases referred to it in pursuance of Article VI.3 (c) of the Constitution of Bosnia and Herzegovina, it is thus necessary to establish two issues: (1) that the body referring the matter to the Constitutional Court is a court in Bosnia and Herzegovina, (2) that the issues referred to the Constitutional Court concern a law and its compatibility with the Constitution of Bosnia and Herzegovina, the European Convention or with laws of Bosnia and Herzegovina, or, alternatively, that the referral concerns a broader question of international law.

20. Accordingly, the Cantonal Court is competent to refer a question to the Constitutional Court in accordance with Article VI.3 (c) of the Constitution of Bosnia and Herzegovina.

21. In view of the aforesaid, it follows that the present request is admissible.

VII. Merits

22. The Constitutional Court considers that compatibility of Article 37 with the Constitution of Bosnia and Herzegovina primarily implies the question whether this provision 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.

23. Article II.3 (k) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads as follows:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

k) The right to property.

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

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

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

24. Article II.3 (k) of the Constitution of Bosnia and Herzegovina is a reflection of the human rights and fundamental freedoms protected by Article 1 of Protocol No 1 to the European Convention. Article 1 of Protocol No 1 to the European Convention comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to specific conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph. The three rules are not distinct in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They must therefore be construed in the light of the general principle laid down in the first rule.

1. Does the default interest under Article 37 of the Amended Law constitute possessions within the meaning of Article 1 of Protocol No. 1 to the European Convention?

25. In this regard, the Constitutional Court points to the case-law of the European Court of Human Rights, which adopted a broad view on the meaning of possessions within the

ambit of Article 1 of Protocol No. 1. It held, among other things, that property rights are not limited to ownership of physical goods but that also economic interest constitutes possession within the meaning of Article 1 of Protocol No. 1 to the European Convention (see European Court of Human Rights, the *Bramelid and Malmstrom v. Sweden,* decision of 12 October 1982, Decisions and Reports, No. 29).

26. Article 1 of Protocol No. 1 of the European Convention protects the peaceful enjoyment of possessions which is already in existence and does not guarantee the acquisition of possessions in the future. With regard to claims to assets which have never been in the possession of the claimant, the European Court of Human Rights has, however, in some cases taken a different viewpoint. For instance, if the claimant has a legitimate expectation that a claim will be determined in accordance with the general law, such a claim would constitute a possession for the purpose of Article 1 of Protocol No. 1 (see the European Court of Human Rights, the *Pressos Compania Naviera S.A. and Others v Belgium* judgment of 20 November 1995, Series A No. 332, para. 31). In such cases, the right to possession arises at the point of time when the factual circumstances giving rise to the claim occurs. Similarly, the Constitutional Court held that the right to severance pay due to termination of employment contract amounts to property (see Decision of the Constitutional Court, No. *26/00*, published in the *Official Gazette of Bosnia and Herzegovina* No. 8/02, para 22).

27. In this particular case, the issue at stake concerns the legal claim to recover default interest on the awarded sum of KM 4,575.00 for the war period. Article 28 of the Law stipulates that “an insurance company shall hold full responsibility for obligations deriving from insurance and reinsurance treaties”. Article 186 of the Law on Obligations establishes that the compensation shall be considered due from the moment when the damage occurred. Moreover, Article 190 of the said Law establishes full compensation and Article 277 guarantees that default interest shall be paid out in the event the debtor is late in fulfilling his obligations. In other words, the plaintiff had a legitimate expectation at the time when the car accident occurred that default interest would be awarded to him in case of delay in payment in accordance with the law and the signed agreement with the insurance company.

28. The Constitutional Court therefore concludes that the legitimate expectation of the plaintiff to have the insurance company paying out to him the default interest in the amount and for the time as prescribed by the law constitutes a legal claim amounting to property as protected under Article II.3 (k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol 1 to the European Convention.

2. <u>Does Article 37 of the Amended Law entail interference with the right to peaceful enjoyment of property?</u>

29. As it has been established that the plaintiff's claim for the default interest constitutes property, the Constitutional Court will move on to consider whether Article 37 interferes with that property.

30. Article 37 exempts insurance companies from any liability to effect payment of default interest during the wartime period. The effect of such exemption is a decrease in the amount of default interest to be paid in connection with a delay in payment of direct damage. In view of the fact that it has already been established that a claim for payment of the default interest constitutes property, exemption made by Article 37 to non-payment of default interest during the wartime period shall be qualified as a partial deprivation of property within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1 to the European Convention.

3. <u>Does the deprivation serve a legitimate aim in the public or general interest and is it proportionate to the aim sought to be realized?</u>

31. Given the fact that it has been established that exemption from payment of default interest during the wartime period is a deprivation of property, the following question to be considered is whether that deprivation serves a legitimate aim in the public interest and whether the means used are proportionate to the aim sought to be realized.

32. The notion of "public interest" or "general interest", which can justify the interference with the right to property, entails that the purpose of the interference has to be for the general benefit of a community or serve the interest of a larger group in society. The European Court of Human Rights has in general held that the national authorities are better placed to appreciate what is in the public or general interest. The state thus enjoys a certain margin of appreciation when determining whether a measure serves the public interest or not. The European Court of Human Rights has held that it will in general accept the judgment of the national authorities unless it is manifestly without a reasonable foundation.

33. Article 37 came into effect subsequent to the war, but it applied to the wartime period when a state of imminent threat of war existed in the territory of the Republic of Bosnia and Herzegovina. The Amended Law does not specify the aim of Article 37 nor does it indicate how it serves the public or general interest. The excerpts from the session of the

Parliament of the Federation of Bosnia and Herzegovina do not provide any guidance as to what was the legislator's intention behind the adoption of Article 37. The opinion of the Government of the Federation of Bosnia and Herzegovina confirmed that the Government considered Article 37 to be unconstitutional. There is nothing in the *travaux preparatoires* that could explain the aim of adoption of Article 37.

34. The Constitutional Court indicates that the authorities are responsible in case of interference with human right and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina. Hence, it does not rest with the Constitutional Court to analyze which legal aim is pursued in such cases. It is a fact that the legislator – in the instant case, the Parliament of the Federation of Bosnia and Herzegovina – failed to advance arguments that would justify the adoption of Article 37 that obviously encroached upon individual property rights. Therefore, the Constitutional Court takes such conduct as evidence that there is no legitimate aim that justifies interference.

35. Given the fact that no legitimate aim that would justify interference was established, the Constitutional Court concludes that the amended Article 37 is not compatible with Article II.3 (k) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No.1 to the European Convention.

36. In view of the fact that the Constitutional Court concluded that the amended Article 37 is not compatible with the Constitution of Bosnia and Herzegovina, it would be superfluous to conduct further examination of proportionality of the interference, its compatibility with the principle of legal certainty or its discriminatory nature.

VIII. Conclusion

37. Pursuant to Article 61 para 3 of the Rules of Procedure of the Constitutional Court, the Constitutional Court decided by the majority of votes as set out in the enacting clause above.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 55/02

Referral of the Basic Court in Doboj of a question regarding the compatibility of Article 20 of the Law on Housing Relations with the Constitution of Bosnia and Herzegovina (Official Gazette of the SR Bosnia and Herzegovina, No. 14/84, 12/87 and 36/89 and Official Gazette of the Republika Srpska, No. 19/93 and 22/93)

DECISION
of 26 September 2003

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (c) of the Constitution of Bosnia and Herzegovina and Article 54 of the Rules of the Procedure of the Constitutional Court of Bosnia and Herzegovina *(Official Gazette of Bosnia and Herzegovina* No. 24/29, 26/01 and 6/02), in Plenary and composed of the following judges:

Mato Tadić, President,

Prof. Dr Ćazim Sadiković

Prof. Dr Miodrag Simović

David Feldman,

Valerija Galić,

Hatidža Hadžiosmanović,

Didier Maus

Having deliberated on the **request of the Basic Court in Doboj** in case No. **U 55/02,**

Adopted on 26 September 2003 the following

DECISION

Upon the request of the Basic Court in Doboj for the review of the constitutionality of Article 20 of the Law on Housing Relations – Amended Text (*Official Gazette of the SR Bosnia and Herzegovina*, No. 14/84, 12/87 and 36/89 and *Official Gazette of the Republika Srpska,* No. 19/93 and 22/93), it is established that the contested Article is in conformity with Article II.3 (f) and (k) 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 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* and the *Official Gazette of the Republika Srpska*.

Reasons

I. Introduction

1. On 4 July 2002, in accordance with Article VI.3 (c) of the Constitution of Bosnia and Herzegovina, the Basic Court in Doboj ("applicant") filed with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") a request for a review of the constitutionality of Article 20 of the Law on Housing Relations. The question which arises in this dispute before the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") is whether Article 20 of the aforesaid Law is in compliance with the Constitution of Bosnia and Herzegovina, especially with Article II.3 (f) and (k) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") and Article 1 of Protocol No. 1 to the European Convention.

II. Proceedings before the Constitutional Court of Bosnia and Herzegovina

2. On 4 July 2002, the applicant filed a request with the Constitutional Court.

3. On 7 January 2003, the Constitutional Court requested that the National Assembly of the Republika Srpska submit a reply to the request in accordance with Article 16 of the Rules of Procedure of the Constitutional Court ("Constitutional Court' Rules of Procedure"). The National Assembly of the Republika Srpska has not submitted the reply to the request yet.

4. On 7 January 2003, the Constitutional Court, in accordance with Article 19 of the Constitutional Court' Rules of Procedure, requested that the applicant supplement the request in accordance with Article 14, para 3 of the Constitutional Court's Rules of Procedure.

5. On 24 February 2003, the applicant supplemented the request as requested by the Constitutional Court.

6. On 14 August 2003, according to Article 16 of the Constitutional Court' Rules of Procedure the Constitutional Court submitted the reply of B.T. and D.T. to the parties in the proceedings before the applicant for the purpose of submitting their respective replies.

7. On 25 August 2003, the legal representative B.T. submitted her reply to the requst. D.T. has not replied yet.

III. Facts of the Case

8. The facts of the case, as they appear from the statements of the applicant and the other parties to the proceedings and from the documents submitted to the Constitutional Court, can be summarized as follows:

9. Due to the problems in marriage and impossibility to overcome the marriage crisis, B.T, after being forcibly dislodged from the apartment by D.T, filed an action for dissolution of marriage that was concluded in 1980. By Judgment No P-653/2001 of 4 December 2001 the marriage of B.T. and D.T. was dissolved. It has been stated in the judgment that the couple had two children born in 1980 and in 1981. After the divorce, the parties could not agree who will remain the occupancy right holder over the apartment of 61 m2 which was allocated for use to D.T. in 1984.

10. B.T. initiated non-contentious proceedings before the applicant, registered under No Rl.121/02, whereby she was requesting that the court declare her the occupancy right holder over the apartment in question.

11. While deliberating on the submitted proposal of the proponent, according to Article 21 of the Law on Civil Non-contentious Proceedings in conjunction with Article 213 of the Law on Civil Proceedings the applicant decided to stay the proceedings by its Ruling No Rl.121/02 of 10 June 2002 until the Constitutional Court adopts a final decision with regards to the request for a review of the constitutionality of Article 20 of the Law on Housing Relations with the Constitution of Bosnia and Herzegovina on which the final decision of applicant depends.

IV. Applicable Law

12. **Article 20 of the Law on Housing Relations – Amended text** (*Official Gazette of SR Bosnia and Herzegovina* No 14/84, 12/87, 36/89; *Official Gazette of the Republika Srpska,* No 19/93, 22/93) which is applied in the Republika Srpska in accordance with Article 12 of the Constitutional Law for Enforcement of the Constitution of the Republika Srpska, reads as follows:

If in case of divorce a married couple being the joint holders of an occupancy right cannot agree on who shall remain the occupancy right holder, the decision shall be taken by the competent court, on the request of either spouse, in an extra-judiciary procedure, taking into account the housing needs of both spouses, their children and other persons

living in the same household, the reasons for the dissolution of marriage as well as other social circumstances.

A former spouse who stopped to be the occupancy right holder by virtue of a court decision is bound to leave the apartment together with the apartment users who were the members of his of her family household, as soon as they are provided with an emergency accommodation.

Upon the owner's proposal, the competent court may decide for the spouse who remained the occupancy right holder after a divorce, to move into another apartment offered by the owner if that apartment meets the requirements of the occupancy right holder who is staying in the apartment and if the other spouse is provided with an emergency accommodation.

13. **Article 10 of the Law on Privatization of State Apartments** (*Official Gazette of Republika Srpska* No 11/00, 18/01, 20/01, 35/01 and 47/02) reads as follows:

The occupancy right holder has the right to buy the apartment.

If spouses are the occupancy right holders they are entitled to buy the apartment together and one of them may buy it only with the approval of the other one (…).

14. **Article 264, paragraph 2 of the Family Law (***Official Gazette of SR Bosnia and Herzegovina*, No. 21/79, 44/89), which was applicable in the Republika Srpska according to Article 12 of the Constitutional Law for the Enforcement of the Constitution of the Republika Srpska, in its relevant part, reads as follows:

Property gained through work during the marital relationship (...) shall be considered their mutual property.

15. **Article 267, paragraph 1 of the Family Law** reads as follows:

Every spouse, by bringing an action, may request that a competent court establish his/her part in a common marital property (…).

V. Request

a) Statements from the Request

16. The applicant requested that the Constitutional Court give an answer regarding whether the provisions of Article 20 of the Law on Housing Relations, which regulates

occupancy right after divorce, violates the right to home under Article II.3 (f) and the right to property under Article II.3 (k) of the Constitution of Bosnia and Herzegovina in the circumstances as presented in this case. The applicant further stated that the contested provision, under the circumstances of the present case, does not open a place for its interpretation which would satisfy a principle of legal equity since a possible decision in this case, applying this provision, has to be taken to the detriment of one of parties. The applicant further stated that the spouses consented to the divorce, neither of the spouses had another solution for their housing needs, neither of the spouses were found guilty for the dissolution of marriage, it was dissolved due to incompatibility of the spouses' temperaments, whereby other social circumstances did have decisive character and the owner of the apartment could not offer any other solution.

b) Reply to the request

17. In her reply of 25 August 2003, B.T. did not comment on the request for a review of the constitutionality itself. She stated that the facts of the dispute in the case before the applicant are in favour of her situation and thereby presented some evidence. Among other things B.T. requested to be allocated the occupancy right over the apartment in question.

VI. Admissibility

18. The request was submitted under Article VI.3 (c) of the Constitution of Bosnia and Herzegovina, which 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 jurisprudence adopted regarding its appellate jurisdiction, the Constitutional Court held that, in accordance with generally accepted principles of international law, it is outside the competence of the Constitutional Court *ratione temporis* to decide whether the events which occurred before the entry into force of the Constitution of Bosnia and Herzegovina on 14 December 1995 gave rise to violations of human rights. Following this jurisprudence *per analogiam* and taking into account the fact that the National Assembly of Republika Srpska adopted the Law on Taking over the Law on Housing Relations in 1993 (*Official Gazette of Republika Srpska,* No 19/93) and that it did not make any changes or

amendments ever since, the Constitutional Court could not have the competence to review the constitutionality of this Law.

20. However, this jurisprudence cannot be followed with regard to the Constitutional Court's jurisdiction according to Article VI.3 (c) of the Constitution of Bosnia and Herzegovina. According to the transitional arrangements of Annex II.2 of the Constitution of Bosnia and Herzegovina, *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 BH Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina*. Therefore, the Constitutional Court noted that the Republika Srpska, among the other signatory parties to the Constitution of Bosnia and Herzegovina, by its constitutional force overtook all laws which were in force on 14 December 1995. Moreover, it clearly follows from the wording of the last part of the provision of Annex II.2 of the Constitution of Bosnia and Herzegovina that Republika Srpska has accepted that the Constitutional Court is a competent body for reviewing the constitutionality of these laws on the basis of this Constitution, if necessary.

21. Furthermore, such an interpretation is supported by the principles of legal uniformity and legal certainty. The system of concrete control over the constitutionality of norms has a very important function to avoid, on the basis of generally binding clarification of constitutional issues, divergence in judicial judgments, legal uncertainty and legal disharmony. This concentration of review power within the competences of the Constitutional Court has, moreover, the goal of providing that the courts abide by the laws.

22. On the other hand, having found that courts in Bosnia and Herzegovina do not have the competence for separate review of the constitutionality of all laws, it falls within the competence of the Constitutional Court to include the laws enacted even before 14 December 1995 within its review competences in order to fully protect the constitutional system of Bosnia and Herzegovina. For these reasons, the Constitutional Court found the request in the present case as *ratione temporis* admissible.

23. The request for a review of the conformity of Article 20 of the Law on Housing Relations was lodged by the applicant whose decision in dispute concerning the allocation of housing right over the apartment to one of the spouses depends on the review of the constitutionality of the contested provision. In the case of non-compliance of the contested provision of Article 20 of the Law on Housing Relations with the Constitution of Bosnia and Herzegovina, the proceedings before the applicant should be stayed as proposed by

B.T. due to the lack of legal grounds while in case of compliance of that provision with the Constitution of Bosnia and Herzegovina the applicant would have to decide on the merits of the case. Since the question of constitutionality of the provision in issue is decisive for the case before the applicant, the Constitutional Court concluded that the request has met the criteria with regards to this part of admissibility.

24. The Constitutional Court has no other reservations as to the admissibility of the request. Therefore, the request is admissible.

VII. Merits

25. Pursuant to Article II.1 of the Constitution of Bosnia and Herzegovina, *Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms*. According to Article II.2 of the Constitution, *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.* Since the referred question in the present case relates to the provision on the right of spouses to property, the Constitutional Court considers it justified to first examine the conformity of that provision with Article II.3 (f) of the Constitution of Bosnia and Herzegovina or Article 8 of the European Convention.

26. (a) Article II.3 (f) 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: (...)

f. The right to private and family life, home, and correspondence.

26. (b) Article 8 of the European Convention

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

27. The Constitutional Court will examine the applicant's allegations under Article 8 of the European Convention which in its first paragraph provides *inter alia* that *Everyone has the right to respect for (...) his home (...)*. In this respect the question that arose first is whether the apartment of B.T. and D. T. could be considered "home" within the meaning of Article 8 and, if so, whether the measures provided in the Law on Housing Relations amounted to an interference with her/his rights under that provision.

28. The basic goal of Article 8 of the European Convention is the protection of the individual against unjustified interferences of the State with his or her private and family life, home and correspondence. According to the jurisprudence of the European Court of Human Rights the expression "home" comprises both the rented home as well as the home owned as private property (see judgment of the European Court of Human Rights, *Gillow v. GB*, of 24 November 1986, A 124-C). In line of this interpretation, the Constitutional Court has extended the scope of Article 8 of the European Convention to apply to apartments occupied on the basis of an existing occupancy right (see judgment of the Constitutional Court, *U 8/99* of 11 May 1999, published in *Official Gazette of Bosnia and Herzegovina,* No. 24/99). Therefore, the Constitutional Court has no doubt that the apartment in question can be considered as their home. The Constitutional Court is moreover satisfied that the apartment remained their home after divorce (see admissibility decision of the former European Commission of Human Rights, *Wiggins v. the United Kingdom*, Application No. 7456/76, of 8 February 1978, 44). Furthermore, the fact that B.T. was forcibly evicted from the apartment by her husband does not give rise to any changes in that respect.

29. With regard to the question whether the contested Article 20 of the Law on Housing Relations interferes with the parties' rights, the Constitutional Court provided an affirmative answer since the provisions of that Article provide that a court has to take the decision, *on a request of either spouse, who shall remain the occupancy right holder*, and therefore, who is *bound to leave the apartment*.

30. According to Article 8 of the European Convention, a public authority can interfere with the appellant's right to home only if such an interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public security, economic welfare of the country, prevention of disorder or crime, protection of health and morals or protection of the rights and freedoms of others.

31. The Constitutional Court noted that the contested provision has the aim to separate former spouses from a factual joint living arrangement as the relationship had become so irreparable that a divorce was unavoidable. A joint living after divorce and under such circumstances could provoke further harm and damages. The State is not interested in such

living arrangement and, therefore, it does not support it. Moreover, such an unbearable situation in a house or apartment would have undesirable consequences on the children, even if they are of adult age but still live in the same house or apartment. Finally, every person has a right to live in peaceful, safe and pleasant atmosphere respecting, as far as the circumstance of every particular case can allow, his/her dignity.

32. Article 20 of the Law on Housing Relations, therefore, is pursuing a legitimate aim which is necessary for the protection of health and morals, and for the protection of the rights and freedoms of others.

33. Referring, *mutatis mutandis*, to the opinion expressed by the European Court of Human Rights in its judgment in the *Handyside Case* (judgment of 7 December 1976, Seria A No. 24, paragraph 49) the Constitutional Court considers that it must also examine whether the measures for which the Law on Housing Relations provided were proportionate to the legitimate aim pursued. In so doing, the Constitutional Court has had to consider the fact that the second paragraph of Article 8 of the European Convention leaves Member States considerable discretion in selecting the ways which appear to them to be the most adequate in order to achieve these aims. In this respect, the Constitutional Court accepts that in the situation where an apartment is not able to be divided into two smaller habitable units whereby the owner of the apartment is also unable to offer two smaller apartments instead of the former spouses' single apartment, then the eviction from the apartment combined with providing this person with a temporary accommodation represents the most adequate measure.

34. In consideration of the above, the Constitutional Court finds Article 20 of the Law on Housing Relations to be in accordance with Article II.3 (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

35. (a) Article II.3 (k) of the Constitution of Bosnia and Herzegovina

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include: (...)

k. The right to property.

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

Every natural person 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.

36. Firstly, the Constitutional Court has serious reservations as to the applicability of *ratione materiae* under Article 1 of Protocol No. 1 to the European Convention to the present request for the review of constitutionality.

37. Article 1 of Protocol No. 1 to the European Convention comprises three distinct rules. The first rule, set out in the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property. The second rule contained in the second sentence of the same paragraph, covers deprivation of possession and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see a judgment of the European Court of Human Rights, *Sporrong and Lönnroth v. Sweden*, of 23 September 1982, Serial A No. 52, paragraph 61).

38. The words "property" and "possessions" are not to be interpreted in a restrictive manner. The word "possessions" includes a wide range of proprietary interests representing an economic value (cf. the judgment of the Constitutional Court, *U 14/00*, of 4 April 2001, published in *Official Gazette of Bosnia and Herzegovina*, No. 33/2001). According to its jurisprudence, the Constitutional Court recalls that the occupancy right embodies *sui generis* proprietary interests representing an economic value (see judgment of the Constitutional Court, *U 8/99,* of 5 November 1999, published in *Official Gazette of Bosnia and Herzegovina,* No. 24/99).

39. There is no doubt that both spouses, who were before the applicant as parties to the proceedings, have acquired an equal property right to the apartment in question. They clearly have such a status in accordance with the provisions of Article 19, paragraph 2 of the Law on Housing Relations, which provides: *If a contract on the use of an apartment was concluded by one member of a married couple living in a joint household, the other spouse shall also be considered as holder of the occupancy right.* This provision represents a clear demonstration that both spouses are entitled to the apartment. Therefore, the apartment in question, which the parties to the proceedings allege to have acquired,

could be regarded as their possession within this meaning and are protected under Article 1 of Protocol No. 1 to the European Convention.

40. On the other hand, the request in the part relating to Article 1 of Protocol No. 1 to the European Convention is based essentially on the second sentence of the first paragraph of this Article, since the applicant is alleging that it has serious doubts regarding the unconstitutionality of the provisions of Article 20 of the Law on Housing Relations due to the fact that any decision taken according to this provision and under the circumstances of the present case would be an unconstitutional deprivation of the "possessions" from one of the parties to the proceedings.

41. Although there is no reference to "expropriation" as such in Article 1 of Protocol No. 1 to the European Convention, its wording and especially the phrase "deprived of his possessions except in the public interest" and the reference to the "general principles of international law" clearly shows that it is intended to apply to formal or *de facto* expropriation. That is further conditioned by an action "whereby the State lays hand – or authorizes a third party to lay hands – on a particular piece of property for a purpose which is to serve the public interest. This interpretation is confirmed by the "*Travaux préparatoire*" for Article 1 of the First Protocol (see admissibility decision of the former European Commission of Human Rights, *E 8588/79 & 8589/79*, of 12 October 1982, Decisions and Reports (DR) 29, p. 81 f).

42. The relevant provisions of Article 20 of the Law on Housing Relations, whose compatibility with the Constitution of Bosnia and Herzegovina the applicant has rendered doubtful is something completely different. They are practical expression of a general legislative policy toward private persons and concern the proprietary relations between spouses after the divorce proceedings. The general interest of this type of legislation is naturally to favour the interests which are considered most worthy of protection, which has nothing to do with the notion of *public interest* as it arises in the context of "expropriation" (see *mutatis mutandis, ibid*, 82).

43. Following the previous paragraphs, the Constitutional Court concludes that the second sentence of the first paragraph of Article 1 of Protocol 1 to the European Convention can not be applied as a legal basis for a review of the constitutionality of Article 20 of the Law on Housing Relations, and that the request in that part is inadmissible *ratione materiae* with the European Convention unless the legal provisions governing private relations between individuals and which compel one of spouses to give up their occupancy right

over her/his apartment in the case of divorce is arbitrarily and unjustly deprived of that property in favour of another.

44. The occupancy right, according to the jurisprudence of the Constitutional Court cited in the paragraph 39 of this Decision can be seen as a property right. Bringing this interpretation into the conformity with Article 19, para 2 of the Law on Housing Relations, there is no doubt that the apartment acquired during their marriage over which both spouses have an occupancy right can be seen as their common property within the meaning of the relevant provisions of the Family Law. In order to support this approach to the issue in question, the Constitutional Court reminds that, according to Article 10, para 2 of the Law on Privatization of State Apartments *the spouses (...) are entitled to buy the apartment together and one of them may buy it with the approval of the other one.* It follows that the Constitutional Court has to provide a response whether the sacrifice of the entire property interest of one spouse in favour of the other, is justified under the circumstances of that particular case or it would constitute an arbitrary deprivation of property.

45. According to the relevant provisions of the Law on Housing Relations, a common occupancy right can be justified as long as the marriage is valid. Thereafter, due to the nature of the occupancy right and, especially, taking into account the reasoning with regard to Article 8 of the European Convention, there is no possibility that both former spouses can remain the occupancy right holders after they have divorced. Such a possibility would not be in compliance with the practice that common marital property ceases to exist after a divorce of the spouses, except in order to ascertain it for the purpose of its division. The competent court has to decide, on the basis of principles of equity in fairness which of the former spouses shall stay in the apartment, in case of no agreement between them. Such a decision, if there is no other solution as in the present case, could be both very difficult and painful.

46. Nevertheless, in order to avoid an unjustified enrichment of the former spouse who has continued to live in the apartment, the other spouse should be properly compensated if necessary. Therefore, his property interest expressed in his occupancy right to the apartment has to be considered as a part of the common marital property in accordance with the relevant provisions of the Family Law. The fact that the apartment has not been privatized should not be an obstacle for compensation but it has to be taken into consideration when establishing the amount of compensation.

47. Considering the aforementioned, the Constitutional Court finds Article 20 of the Law on Housing Relations to be in compliance with Article II.3 (k) of the Constitution of

Bosnia and Herzegovina and Article 1 of Protocol 1 to the European Convention in the present case.

VIII. Conclusion

48. Pursuant to Article 54 of its Rules of Procedure, the Constitutional Court decided unanimously as stated in the enacting clause of this Decision.

49. The Constitutional Court points out that taking a decision with regards to the procedure from Article VI.3 (c) of the Constitution of Bosnia and Herzegovina shall not prejudice a possible adoption of the decision of the Constitutional Court in disputes that might be arising in relation to the jurisdiction of the Constitutional Court as referred to in Article VI.3 (b) of the Constitution of Bosnia and Herzegovina.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 2/04

Referral of Mr. Mustafa Pamuk, Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, regarding question of procedural regularity of the Objection of the Bosniac Caucus of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina on the destructivity to the vital interest of the Bosniac people in the Draft Law on Amendments to the Law on Refugees and Displaced Persons of Bosnia and Herzegovina

DECISION ON MERITS
of 28 May 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article IV.3 (f) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (2) and Article 61 paras 1 and 2 and Article 64, para 1 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, No. 60/05), in Plenary, composed of the following Judges:

Mato Tadić, President,

Prof. Dr Ćazim Sadiković, Vice-President,

Tudor Pantiru, Vice-President,

Prof. Dr Miodrag Simović, Vice-President,

Hatidža Hadžiosmanović, Judge,

Prof. David Feldman

Valerija Galić,

Jovo Rosić,

Having considered the request of **Mr. Mustafa Pamuk**, Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, in case No. **U 2/04,**

Adopted at the session held on 28 May 2004 the following

DECISION ON MERITS

It is hereby established that the Objection of the Bosniac Caucus in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina on the destructiveness in the Draft Law on Amendments to the Law on Refugees and Displaced Persons of Bosnia and Herzegovina to the vital interest of the Bosniac people was made in accordance with the procedure provided under the Constitution of Bosnia and Herzegovina.

It is hereby established that the Draft Law on Amendments to the Law on Refugees and Displaced Persons of Bosnia and Herzegovina is destructive to the vital interest of Bosniac people.

The procedure for adoption of the Law on Amendments to the Law on Refugees and Displaced Persons of Bosnia and Herzegovina should be carried out pursuant to the procedure under Article IV.3 (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* and the *Official Gazette of the Republika Srpska*.

Reasons

I. Introduction

1. On 16 March 2004, Mr. Mustafa Pamuk, Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ("applicant"), filed a referral with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") whereby he sought a review of procedural regularity, i.e. for establishement of the constitutional grounds for the Objection made by the Bosniac Caucus that the Draft Law on the Amendments to the Law on Refugees and Displaced Persons of Bosnia and Herzegovina, is destructive to the vital interests of Bosniac people.

II. Proceedings before the Constitutional Court

2. In accordance with Article 21 para 1 of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure"), the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina was requested on 5 April 2003 to submit a reply to the request. The reply to the request was not submitted.

III. Request

a) Statements from the Request

3. On 11 November 2003, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina ("House of Representatives") communicated to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ("House of Peoples") the Draft Law on Amendments to the Law on Refugees and Displaced Persons of Bosnia and Herzegovina for deliberation and adoption. The House of Representatives adopted

these amendments at its 22nd session. The House of Peoples, at its 18th session held on 26 February 2004, deliberated, under item 8 of the agenda, the Draft Law on Amendments to the Law on Refugees and Displaced Persons of Bosnia and Herzegovina. The proposal of the amendments to the aforementioned law reads as follows:

Article 1

*Paragraph 2 shall be added in Article 19 of the Law on Refugees and Displaced Persons of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina *Nos. 23/99 and 21/03), which reads as follows:*

Persons who exchanged their property in the period provided under property laws, and who filed the request for reinstatement of the exchanged property, shall be entitled to have reinstated their property after they prove that they exchanged the property under duress and after they place the exchanged property at the disposal of the contractual party

Article 2

This law shall take legal force on the eighth day upon publishing in the Official Gazette of Bosnia and Herzegovina *and* Official Gazettes of the Republika Srpska and the Federation of Bosnia and Herzegovina*.*

4. In accordance with Article 134 para 3 of the Rules of Procedure of the House of Peoples, the Bosniac Caucus in the House of Peoples drew up a written statement No. 02-02-1131/03 of 26 February 2004, wherein they took the position that the aforementioned Draft Law was destructive to the vital interests of Bosniac people. This statement given in more details in the submission of 3 March 2004 contains three precise reasons for which the delegates of this Caucus consider that the Proposal is destructive to the vital interest of Bosniac people. The following conclusion can be inferred from these two documents:

5. First of all, the Bosniac Caucus considers that the quoted Law regulates issues concerning the citizens of Bosnia and Herzegovina only. For that reason, they are of the opinion that the aforementioned amendments regulate the rights of citizens of other state. The statement invokes the Decision of the Constitutional Court No. *U 15/99*, which establishes the presumption of existence of duress as a condition to annul the contracts on exchange of real property concluded in the time period provided under the Property Laws. Furthermore, it was noted in the request that the amendments would contribute to the preservation of the consequences of ethnic cleansing in the country and they would prolong implementation of the property laws with regard to refugees and displaced persons.

6. Item 2 of the Objection contains the list of the laws which, in the opinion of the Bosniac Caucus, "fully and exclusively" regulated property issues with respect to war time including the issues of exchange of real property between private persons. As stated in the Objection, those laws are as follows:

- Law on the Cessation of Application of the Law on the Use of Abandoned Property in the Republika Srpska (*Official Gazette of the Republika Srpska*, Nos. 38/98, 41/98, 12/99, 31/99, 38/99, 65/01 and 13/02, 64/02, 39/03, 96/03);

- Law on the Cessation of Application of the Law on Temporarily Abandoned Real Property Owned by Citizens of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina*, Nos. 11/98, 29/98, 27/99, 43/99, 37/01, 56/01, 15/02 and 24/03);

- Law on Abandoned Apartments (*Official Gazette of the Republic of Bosnia and Herzegovina*, Nos. 6/92, 8/92, 16/92, 13/94, 36/94 and 9/95) and

- Law on Implementation of the Decisions of the Commission for Real Property Claims of the Refugees and Displaced Persons (*Official Gazette of the Republika Srpska*, Nos. 31/99, 39/00, 13/02 and 65/01, *Official Gazette of Bosnia and Herzegovina*, Nos. 43/99, 51/00, 56/00 and 27/02).

7. It is the opinion of the Bosniac Caucus that the quoted provisions of the amended Law would offer parallel and contradictory legal solutions which would derogate the entire set of the aforementioned Property Laws. As further asserted, this would jeopardize legal certainty which is of vital importance for the implementation of Annex VII.

8. Finally, the position was taken under item 3 of the Statement that the obstacles that cannot be overcome are being placed before the citizens of the country in the implementation of their requests. These conditions are proving the existence of duress and placing exchanged property at the disposal of the "citizen of another state and at the territory of another state". With regard to the aforementioned, the Bosniac Caucus considers that the provisions cannot be implemented since they "presuppose actions of institutions of another state which cannot be obligated by the Law of Bosnia and Herzegovina". At the end of item 3 the Bosniac Caucus concluded that the aforementioned provisions were destructive to the vital interest of all citizens of Bosnia and Herzegovina and by that of all the peoples and Bosniac people.

9. In accordance with Article 134 para 3 of the Rules of Procedure of the House of Peoples, deliberation on the Draft Law was adjourned and deliberation on the Objection was opened. Pursuant to Article 135 para 1 of the Rules of Procedure of the House of Peoples, the Serb Caucus submitted a written complaint No. 02-50-3-238/04 of 27 February 2004.

10. It was underlined in the complaint that the conclusion that the Law would preserve the consequences of ethnic cleansing was unacceptable since "none of the Peoples can be considered to be an exclusive victim of the war". It was furthermore noted that the protection of rights of one group could be implemented by denying the same rights to another social group.

11. The complaint was communicated to the Caucuses of constituent peoples on the same day. In accordance with Article 136 para 1 of the Rules of Procedure of the House of Peoples, they appointed members to the Joint Commission. The Joint Commission consisting of Halid Genjac (Bosniac Caucus), Ilija Filipović (Croat Caucus) and Vinko Radovanović (Serb Caucus) held a meeting on 3 March 2004. The Commission did not find a solution but it adopted a conclusion that the entire case should be referred to the Constitutional Court for further proceedings. To that end, the applicant filed the request with the Constitutional Court in accordance with Article IV.3 (f) of the Constitution of Bosnia and Herzegovina on 16 March 2004.

b) Reply to the Request

12. No reply to the request was submitted.

IV. The Relevant Law

13. **General Framework Agreement for Peace in Bosnia and Herzegovina – Annex 7, Agreement on Refugees and Displaced Persons**

Article I.3, and I.3 (a) of Annex 7 reads as follows:

3) The Parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons. To demonstrate their commitment to securing full respect for the human rights and fundamental freedoms of all persons within their jurisdiction and creating without delay conditions suitable for return of refugees and displaced persons, the Parties shall take immediately the following confidence building measures:

a) the repeal of domestic legislation and administrative practices with discriminatory intent or effect;

Article XI reads as follows:

The Commission shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since 1 April 1992, and where the claimant does not enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.

Article XII.7 reads as follows:

The decisions of the Commission are final and any title, deed, mortgage, or other legal instrument created or awarded by the Commission shall be recognized as lawful throughout Bosnia and Herzegovina.

14**. Law on the Implementation of the Decisions of the Commission for Real Property Claims of Refugees and Displaced Persons** (*Official Gazette of the Republika Srpska*, No. 31/99, 2/00, 39/00, 65/01, 13/02, 39/03 and *Official Gazette of the Federation of Bosnia and Herzegovina*, Nos. 43/99, 51/00, 56/01, 27/02 and 24/02)

Article 7, paras 6 and 7:

In case when a person with a legal interest in the property or apartment at issue which was acquired after the date referred to in the operative part of the Commission decision and when he she may present a valid contract on exchange or transfer of a right, the competent authority shall, pursuant to the provisions of the Law on General Administrative Proceedings (...) resolving preliminary issues, discontinue proceedings and refer the parties to start proceedings before the competent court to decide the assertions.

Exceptionally, in case when a person has legal interest in the property or apartment at issue which was acquired after the date referred to in the operative part of the Commission decision and when the competent administrative authority adopted a conclusion on granting enforcement prior to the entry of this law into force, the said authority shall suspend enforcement proceedings ex officio *until adoption of an effective court decision if the party concerned presents both evidence on starting proceedings before the competent court and a valid contract on exchange or transfer of a right.*

Article 13 reads as follows:

The competent court shall determine whether the transfer of rights to the appellant was conducted voluntarily and in accordance with the law.

If the transfer of rights was conducted between 1 April 1992 and 14 December 1995, and its validity is disputed by the respondent, the burden of proof shall lie on the party claiming to have acquired rights to the property under the transaction to establish that the transaction was conducted voluntarily and in accordance with the law.

If the validity of the transfer has been determined in previous proceedings which took place prior to the entry into force of this Law, the decision taken in the previous proceedings shall be null and void.

The court may make whatever orders are necessary to give effect to its decision, including orders setting aside legal transactions, orders for making or erasing entries in the appropriate public books/registers, and orders lifting any order for suspension of the administrative proceedings.

The relevant parties to the appeal shall notify the competent administrative body of the court's decision.

The responsible administrative body shall resume enforcement proceedings as required, or discontinue proceedings in accordance with the court's decisions.

V. Admissibility

15. The request was submitted by the Chair of the House of Peoples of Bosnia and Herzegovina. With that regard the request meets the admissibility requirement set out in Article 15 para 1 (c) of the Constitutional Court's Rules of Procedure.

16. In addition to the request, the Chair of the House of Peoples also submitted verified copy of the Draft Law on Amendments to the Law on Refugees and Displaced Persons from Bosnia and Herzegovina with explanation of the procedure which is in accordance with Article 20 of the Constitutional Court's Rules of Procedure.

17. In terms of the explanation of the institution of the proceedings under Article IV. 3 (f) of the Constitution of Bosnia and Herzegovina, the Constitutional Court states the following.

18. The mechanism of protection of vital interests of one people is very important in states with multiethnic, multilingual and multi-religious communities or communities which are typical in their differences. On the other hand, each invocation of vital interest

has for a consequence a stricter criterion for adoption of general acts (Article IV.3 (e)) and, as the last remedy, procedure before the Constitutional Court (Article IV. 3 (f)). The consequences are interruption of parliamentary procedures, which may have an adverse effect on the work of the legislative body and functioning of the state. For that reason, the requirements of Article IV.3 (f) of the Constitution of Bosnia and Herzegovina must be explained and they must express serious controversies in opinions and doubts on violation of this constitutional mechanism, accompanied by an expression of conviction. Considering that this request was filed by a legislative body acting as a political authority, such a request may be considered admissible if there is an objective interest for the resolution of the dispute. In other words, the applicant does not have to declare the subjective interest for the resolution of the dispute which is typical for the appeals of the individuals. Having this in mind, the Constitutional Court is not bound by the request itself as the public interest prevails over the request itself. In the present case, the request, including the Statement of the Bosniac Caucus, invokes the destructiveness of the vital interest of that people. The request contains more reasons based on which it is believed that the amendments to the Law are destructive for the vital interests of the Bosniac people. The reasons refer to the important issues of realization of the property laws and return of the refugees and displaced persons and eliminating the consequences of the ethnic cleansing. The request also points to possible creation of the legal uncertainty in this area.

19. Based on the previous paragraph of this Decision, the Constitutional Court concludes that the request was sufficiently explained as to satisfy this admissibility requirement. The Constitutional Court has yet to examine whether the referral procedure of this matter to the Constitutional Court has been respected.

20. It follows from the case file that the Objection of the Bosniac Caucus No. 02-02-11331/3 of 26 February 2004 was signed by all five delegates: Halid Genjac, Mustafa Pamuk, Hasan Čengić, Osman Brka and Hilmo Neimarlija. The objection of the Serb Caucus of 27 February 2004 registered under No. 02-50-3 was raised by the absolute majority of that Caucus - that is, by three members: Boško Šiljegović, Vinko Radovanović and Nade Radović. The aforementioned statement and the objection have been signed by the majority of the delegates of the respective Caucuses. On the same day, the Joint Commission in the following composition was set up: Halid Genjac (Bosniac Caucus), Ilija Filipović (Croat Caucus) and Vinko Radovanović (Serb Caucus). The Joint Commission had a meeting on 3 March 2004 and it failed to resolve this issue. The Commission concluded that the Chair should refer the case to the Constitutional Court in accordance with the relevant provisions of the Constitution of Bosnia and Herzegovina and the Rules of Procedure of the House of Peoples, which was done on 16 March 2004. Since the House of Peoples

observed the time limits provided in the Constitution as the Joint Commission was set up "immediately" after an objection was raised (27 February), the Constitutional Court does not consider that the procedure of appointment of candidates from the Caucuses to the Joint Commission immediately after raising an objection can be the reason for a different interpretation of the term "immediately". Namely, the expedience of this procedure is a priority obligation of the delegates and an integral part of the requirements under Article IV.3 (f) of the Constitution of Bosnia and Herzegovina. Such an interpretation, according to which the term "immediately" virtually means "on the date of rising of an objection", is in line with the posed requests for the following reasons:

(a) It is a suspension of a parliamentary procedure concerning a certain issue;

(b) Objections on the destructivity of a decision in terms of vital interests of one people are extremely fundamental issues;

(c) The words "immediately" and "five days" for the work of the Joint Commission suggest the expediency of the procedure in the House of Peoples;

(d) The Constitutional Court is obliged to examine the case in expedient procedure and take it as a priority issue, which implies the case involves public interest whose resolution is eliminated by a dispute in the House of Peoples.

Finally, the Joint Commission adopted a Conclusion on 3 March 2004, i.e. on the fifth day from the date on which the Commission was set up – hence, in accordance with the time limit prescribed by Article IV.3 (f) of the Constitution of Bosnia and Herzegovina. Thus, all constitutional requirements under Article IV. 3 (f) of the Constitution of Bosnia and Herzegovina have been met.

21. Having regard to provision of Article IV.3 (f) of the Constitution of Bosnia and Herzegovina and Article 16 para 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court established that the request was instituted by an authorized party and that all formal requirements under Article 16 para 2 of the Constitutional Court's Rules of Procedure have been met.

22. It follows that the request is admissible.

VI. Merits

23. The Constitutional Court must first define the issue of scope of the competence of the Constitutional Court under Article IV. 3 (f) of the Constitution of Bosnia and Herzegovina.

The Constitutional Court shall resolve that issue by connecting the notion of "procedural regularity" under Article IV. 3 (f) of the Constitution of Bosnia and Herzegovina with other provisions regulating the issue of the majority and procedure for adoption of the laws and particularly with Article IV.3 (f) of the Constitution of Bosnia and Herzegovina.

24. The Parliamentary Assembly of Bosnia and Herzegovina adopts all decisions in legislative field upon approval of both chambers (Article IV.3 (c)). According to Article IV.3 (d) of the Constitution of Bosnia and Herzegovina *all decisions in both chambers shall be adopted by majority of those present and voting (...). If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity*.

25. According to Article IV.3 (e) of the Constitution of Bosnia and Herzegovina *a proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb Delegates*. A decision can be declared destructive by referral of the delegates of the Caucus of one people (at least three candidates) to Article IV.3 (e) of the Constitution of Bosnia and Herzegovina. The consequence of that is a stricter voting criterion compared to one from Article IV.3 (c), more precisely, *such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniac, Croat, and Serb Delegates present and voting*. Thus, this allows for the continuation of the parliamentary procedure despite the objection as to destructiveness for the vital interest of one constituent people in a more democratic manner, since the term parliamentary "majority" gains a new dimension. If the Chamber fails to reach the required majority, the law may not pass the parliamentary procedure in the House of Peoples as it could not get its confidence.

26. If there is no voting on the matter since *a majority of the Bosniac, Croat, or Serb Delegates objects to the invocation of paragraph (e), the Chair of the House of Peoples shall immediately convene a Joint Commission consisting of three Delegates selected by the Bosniac, Croat, Serb Delegates, to resolve the issue. If the Commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall review it for procedural regularity in an expedited procedure*. This means, that the objection to the invocation of Article IV. 3 (e) of the Constitution of Bosnia and Herzegovina, suspends the

voting procedure referred to in previous paragraph of this Decision and the House of People shall act in accordance with Article IV. 3 (f) of the Constitution of Bosnia and Herzegovina.

27. It follows from the quoted provisions that the procedure of protection of vital interests of one people is clearly and precisely defined under the quoted provisions. This procedure must be respected. The role of the Constitutional Court should be review of whether the aforementioned procedure was complied with, which is requirement for the admissibility of the case itself. On the other hand, it clearly follows from the quoted provisions that these type of disputes are arising out of a situation in which the representatives of constituent peoples cannot reach an agreement on whether or not a decision is destructive of vital interest of one of the peoples. This has for a consequence a blockage of the work of the Parliamentary Assembly with regard to this issue since the proposed decision cannot get the confidence of a majority of delegates of certain people. In this regard, the Constitutional Court as the supreme state court and guardian of the Constitution of Bosnia and Herzegovina (Article VI.3) should have the role of assisting in de-blocking the work of the Parliamentary Assembly of Bosnia and Herzegovina by its decision on the merits, if the Parliamentary Assembly is not capable of overcoming the problem by itself. This procedure is urgent since the prompt intervention of the Constitutional Court is necessary in order for the legislative authority to continue performing its role. The adoption of the decision on the merits regarding whether or not the decision is destructive for vital interest of one people, is very important in a situation when the state needs the law to regulate certain field while deliberation and voting on certain law is blocked by the objection raised regarding vital interest of a people. The Constitutional Court has a preventive function in terms of the constitutionality of the acts pending in the parliamentary procedure and eliminating the destructiveness to the vital interest of one or more constituent peoples.

28. From all the above arises that the Constitutional Court is competent to examine two issues in merits:

a) existence of the vital interest of one or more constituent peoples;

b) the destructive issue to the vital interest of one or more constituent peoples.

29. Finally, the Constitutional Court notes that the decision which arises from the proceedings under Article IV. 3 (f) of the Constitution of Bosnia and Herzegovina does not have for its goal to develop and examine the constitutionality of the legal solutions, which represent the background of the proceeding before the Constitutional Court. The goal of this decision is to give a final answer to the question which was not answered by

either House of Peoples or formed Joint Commission - the question of existence of the destructive issue for the vital interests of the one or more constituent peoples.

a) Existence of vital interest

30. In order to examine the request as to the issue whether the Draft Law on Amendments to the Law on Refugees and Displaced Person from Bosnia and Herzegovina is destructive to the vital interest of Bosniac people, the Constitutional Court should primarily define the term "vital interest" within meaning of Article IV. 3 (f) of the Constitution of Bosnia and Herzegovina, considering that the Constitution of Bosnia and Herzegovina itself does not contain any definition or closer explanation of this constitutional term.

(a) 1. Term - vital interest

31. Nonetheless, the Constitutional Court will not go any further into enumeration of the elements of the vital interests of one people. The term, the vital interest of one constituent people is the functional category which needs to be approached from that point of view. However, the Constitutional Court, in accordance with Article VI.3 of the Constitution of Bosnia and Herzegovina, upholds the Constitution and is limited by it in terms of functional interpretation. To that end, in examination of each case, the Constitutional Court shall, within the given constitutional framework, be guided by the values and principles essential for a free and democratic society which embodies, *inter alia*, respect for the inherent dignity of the man, great diversity of beliefs, respect for cultural identity and identity of the groups as well as the trust in the social and political institutions which promote participation of individuals and groups in a society. On the other hand, the protection of the vital interests must not jeopardize implementation of the theory of the state functionality, which is closely connected to the neutral and essential understanding of the term citizenship, as the criterion of "national" affiliation. In other words, the protection of vital interest must not lead to reduced protection of the rights of "others" and right of minority groups (ethnic, religious, social etc.) and unnecessary disintegration of the civil society as the necessary category of the modern sovereignty.

32. In view of the provisions of Article I.2 of the Constitution of Bosnia and Herzegovina which provide that Bosnia and Herzegovina shall be a democratic state, i.e. *that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society* (line 3 of the Preamble), one may see the commitment that is legally binding for all public authorities and it cannot be isolated from the remaining elements of the Constitution, particularly from ethnic structures and must therefore be interpreted

with the reference to the composition of the Constitution as a whole, which helps define the term of vital interest of each constituent people.

33. The last line of the Preamble of the Constitution of Bosnia and Herzegovina defines Bosniacs, Serbs and Croats as "constituent peoples" (along with Others) and citizens of Bosnia and Herzegovina". In its Third Partial Decision *U 5/98* (Decision of 30 June and 1 July 2000, Official Gazette of Bosnia and Herzegovina, No. 23/00, paragraph 52), the Constitutional Court concluded that *however vague the language of the Preamble of the Constitution of BiH may be due to this lack of definition of the status of Bosniacs, Croats, and Serbs as constituent peoples, it clearly designates all of them as constituent peoples, i.e. as peoples*. Furthermore, the Constitutional Court concluded that "taken in conjunction with Article I of the Constitution, the text of the Constitution of BiH thus distinctly distinguishes constituent peoples from national minorities with the intention of affirming the continuity of Bosnia and Herzegovina as a democratic multi-ethnic state" (*ibid*, paragraph 53). In connection therewith, one may conclude that the notion of constituent status of peoples is not an abstract notion but it incorporates certain principles without which a society with differences protected under its respective constitution could not function efficiently. Accordingly, the term "constituent status" has a direct effect on the term "vital interest".

34. The Constitutional Court already clearly pointed that "effective participation of the constituent peoples in state authorities*"* is the element that is inherent to the notion of vital interest of one people (see Decision of the Constitutional Court *U 5/98* of 30 June and 1 July 2000 published in *Official Gazette of Bosnia and Herzegovina* No. 23/00, paragraphs 52, 55 and 68). In addition to the element *effective participation of the constituent peoples in the state authorities* the Constitutional Court also examined the issues of group rights of the constituent peoples on several occasions. It emphasized that *the effective possibility of the equal use of the Bosnian, Croatian and Serbian languages, not only before the institutions of Bosnia and Herzegovina but also at the level of the Entities and any subdivisions thereof with regard to the legislative, executive and judicial powers and in public life* as one of the group rights is protected, *inter alia*, by Article II. 4 in conjunction with Articles I.4, II.3 (m) and II. 5 of the Constitution of BiH as well as the European Charter for Regional and Minority Languages (see Decision of the Constitutional Court *U 5/98* of 18 and 19 August 2000, *Official Gazette of Bosnia and Herzegovina*, No. 36/00, item 34). The Constitutional Court further concluded (*ibid*, item 44) that *religions and churches other than the Orthodox Church, like the Catholic religion or Islam, have always been part of the multi-religious life in Bosnia and Herzegovina in the sense of*

pluralism which is required both by the European Convention and the Constitution of BiH as a necessary precondition for a democratic society. It is clear from these examples that other elements of the constituent peoples are closely connected to the constitutional and international-legal mechanisms of protection of individual and group rights.

<u>(a) 2 Existence of the vital interests of the Bosniac people</u>

35. In the present case, it must be first examined whether the challenged Draft Law concerns the vital interest of the Bosniac people.

36. In the written statement of 3 March 2004, it is stated that the Draft Law is destructive to the vital interest *of all citizens of BiH, all of its people and therefore Bosniac people*. The Constitutional Court notes that the original document expressed concerns with respect to the Draft Law being destructive to the vital interests of the Bosniac people. The Constitutional Court shall therefore limit its examination to whether the Draft Law is destructive to the vital interest of the Bosniac people only.

37. The Objection contains three clear reasons given by the representative of the Bosniac Caucus for considering the Draft Law destructive to the vital interest. These are as follows:

- It contributes to maintaining of the consequences of the ethnic cleansing in BiH;

- It undermines a whole set of property laws which are of vital interest for the implementation of Annex 7 to the Peace Agreement in BiH and

- It cannot be implemented as it presupposes the actions to be taken by the institutions of other states.

38. In the objection of the Serb Caucus it is stated that the amendments to the cited Law do not contribute to preservation of the consequences of ethnic cleansing and that *none of the Peoples can be considered to be an exclusive victim of war*. It is further stated that the protection of human rights of one group cannot be achieved at the expense of denying the rights of other social groups.

39. For resolution of this matter, the Constitutional Court invoked the provision of Article II.5 of the Constitution of Bosnia and Herzegovina, which provides that *all refugees and displaced persons have the right to freely return to their homes of origin*.

These persons have the right, in accordance with Annex 7 of the General Framework Agreement, to have property which they were deprived in the course of hostilities since 1991 restored to them and to be compensated for any property that cannot be restored to them. All obligations or statements given under the duress concerning that property shall be considered null. This constitutional provision points out that Annex 7 does not serve only as interpretation of the Constitution of Bosnia and Herzegovina (see First Partial Decision of the Constitutional Court *U 5/98* published in *Official Gazette of Bosnia and Herzegovina* No. 11/00, paragraph 15) but also as its further elaboration, particularly with respect to the right to return referred to in Article II. 5 of the Constitution of Bosnia and Herzegovina (see third partial decision of the Constitutional Court in case *U 5/98* of 30 June and 1 July 2000 published in *Official Gazette of Bosnia and Herzegovina* No. 36/00, particularly paragraph 18).

40. Although Article II.5 of the Constitution of Bosnia and Herzegovina and Annex 7 in principle point to special individual rights for all refugees and displaced persons, these rights also have a significant collective dimension in terms of the rights of the constituent people to return in case the constituent people represent "minority" in certain area. So Article I. 1 of Annex 7 points to the fact that *the early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina*. Article I. 2 of Annex 7 provides that *the parties shall ensure the return of the refugees and displaced persons, without risk of (...) discrimination, particularly on account of their ethnic origin, religious belief.* Article I.3 (b) of Annex 7 provides that *the prevention and prompt suppression of any written or verbal incitement, through media or otherwise, of ethnic or religious hostility or hatred* in the places of return of minority. Article II.1 of Annex 7 provides that *the parties undertake to create in their territories that political, economic and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group*.

41. By using the terms "ethnic origin, religious belief", "ethnic or religious hostility or hatred" "without preference for any particular group", these provisions of Annex 7 clearly point to a collective dimension of the return which is tied to the group right of every constituent people to return to their homes of origin which they were forced to abandon, *inter alia,* due to their ethnic affiliation. In other words, Annex 7 provides the measures to be taken in order to eradicate the consequences of ethnic cleansing and its discriminatory effect in Bosnia and Herzegovina (see Third Partial Decision of the Constitutional Court *U 5/98*, ibid, paragraphs 90 ff; paragraphs 137 ff) and has primarily the task to neutralize the consequences of the mass exodus of the members of the constituent peoples and other

consequences of the war conflict. The Constitutional Court adopted similar conclusion in decision *U 15/99* (decision of 15 and 16 December 2000, published in *Official Gazette of BiH* No. 13/01, page 7) which reads as follows:

> *One of the basic purposes of the General Framework Agreement for Peace in Bosnia and Herzegovina and the Constitution of Bosnia and Herzegovina, which is Annex 4 to that Agreement, was to combat and eliminate the ethnic cleansing which had taken place during the war period and which had caused many persons belonging to ethnic minorities in various areas of Bosnia and Herzegovina to leave their homes and go and live elsewhere, either abroad or in other parts of Bosnia and Herzegovina. One important aim, reflected inter alia in Article II.5 of the Constitution of Bosnia and Herzegovina, is the return of refugees and displaced persons to their places of origin and to their previous homes.*

42. It is evident from the previous paragraph of this Decision that the return of refugees and displaced persons is the individual right but its implementation to a greater extent affects the establishment of a multiethnic society which existed before the war without any territorial divisions on ethnic grounds. Therefore, a multiethnic society cannot be achieved without the presence, *inter alia*, of all constituent peoples in the entire territory of the country. *In conclusio*, the Constitutional Court emphasizes that the return of refugees and displaced persons is closely connected to the interests of all constituent peoples in BiH and that it represents the element inherent to the notion of vital interest.

43. The Draft Law provides for *persons who exchanged their property in the period provided for by the property laws and submitted a request for repossession of their exchanged property shall acquire the right to repossession of the property after having proved that they exchanged property under duress and after they give the exchanged property on disposal to other party*. Basic characteristic of this Draft Law is that it concerns the contract on exchange of the property. These contracts were made between the members of the different constituent peoples for purpose of moving to a territory in which they would no longer be a "minority". Therefore, the regulation of this subject matter has direct influence on the return of all people and in the present case of the Bosniac people and efficient realization of their collective right. In that regard, the Constitutional Court concludes that the Draft Law concerns the vital interest of the Bosniac people.

b) Destructiveness to the vital interest

44. The Constitutional Court needs to examine whether the Draft Law is destructive to the vital interest of the Bosniac people.

45. The Draft Law provides that *persons who exchanged the property in the period provided under property laws, and who filed the request to have to them restored the exchanged property, shall be entitled to have to them restored their property after they prove that they exchanged the property under duress and after they place the exchanged property at the disposal of the contractual party*. The Constitutional Court notes that the restoration of the property to the persons who exchanged their property in the period as provided for by the property laws is conditioned by (a) proving "that they exchanged property under duress" and (b) "placing their property at the disposal of the contractual party". Therefore, the challenged Draft Law conditions the return of the refugees in two ways and interferes with the vital interest of all constituent peoples. It remains for the Constitutional Court to examine whether the "proving of existence of duress" and "placing their property at disposal of the other party" are the conditions of destructive nature for vital interests.

46. The challenged Draft Law regulates the repossession of property which was subject to the legal transaction of exchange. The Constitutional Court notes that legal transactions in general implies the assumption of validity of the legal transaction concerned, which arises out of the constitutional principle of legal certainty (Article I. 2 of the Constitution of BiH). Thus, contracts on the exchange of the property as such cannot be annulled *ex lege* and this is not provided for in the challenged Draft Law. On the other hand, the challenged Draft Law allows the person who returns to file a formal request for the repossession of the exchanged property but is conditioned by the proving of the existence of duress and placing at disposal of the exchanged property. This implies that the legal transaction remain in force if the returnee does not meet these two conditions.

47. The Constitutional Court concludes on the other hand that the return of property is in principle unconditional since that aspect of the consequences of the war in Bosnia and Herzegovina may be resolved only in that way. This is the reason why the Commission for Refugees and Displaced Persons, by its final, binding and enforceable decisions (Article 12 (2) and (7) of Annex 7), determined the state of property from 1 April 1992 and carried out reallocation of property right.

48. Article XII.3 of Annex 7 provides that *in determining the lawful owner of any property, the Commission shall recognize as valid any illegal property transaction, including any transfer that was made under duress, in exchange for exit permission or documents, or that was otherwise in connection with ethnic cleansing.*

49. By referring to both two previous paragraphs of this Decision, the Constitutional Court notes that the said provision permits the transaction of property in Bosnia and Herzegovina, during the relevant time indicated by the property laws provided that it is in accordance with Annex 7. Having regard to the conflict of principle of assumption of validity of legal transaction and return of the refugees and displaced persons (considering the conditions under which these contracts were made), Annex 7 resolved this problematic issue by entity laws, *inter alia,* on enforcement of the decision of the CRPC (see part of the Decision, Applicable Laws). Article 13, paragraph 2 of the said Laws provides that *if the transfer of rights was conducted between 1 April 1992 and 14 December 1995, and its validity is disputed by the respondent, the burden of proof shall lie on the party claming to have acquired rights to the property under the transaction to establish that the transaction was conducted voluntarily and in accordance with the law.* Therefore, it is clear that these contracts remain in force if the defendant proves that the contract was made voluntarily.

50. Such resolution of the conflict of interests of parties seeking the return of their property, on one hand and pronouncing the contract on exchange as valid, on the other, is close to the jurisprudence of the Constitutional Court in its decision *U 15/99* (Decision of 15 December 2000, *Official Gazette of BiH* No. 13/01, page 6) in which it was concluded that *the objective of eliminating the effects and traces of ethnic cleansing (...) is considered to be of such primary importance as to affect the validity of legal transactions in some cases which would otherwise have satisfied the requirements under private law*. In addition the Constitutional Court concluded that the members of the ethnic minority made *contracts on exchange under the influence of their vulnerable position as members of the ethnic minority* (ibid, page 7).

51. In addition, the Human Rights Chamber for Bosnia and Herzegovina ("Chamber") found in several cases (see *Samardzić,* CH/02/9130 of 10 January 2003, item 51 ff.; and *Borota*, CH/01/7257 of 7 February 2003, item 61 ff.) that the allocation of the burden of proof on the user of «the contested property" is justified in the sense of Article 8 of the European Convention and Article 1 of Protocol No. 1 to the European Convention. The Chamber further concluded that the allocation of burden of proof contains the "presumption that the war-time exchanges were concluded under duress." The Chamber also concluded that *there is a general presumption of lack of good will and freedom of choice for transactions concluded during the critical period. However, the presumption is refutable and still requires a case-by-case approach in establishing duress. It is exactly because there is a presumption of duress and not a cancellation of all contracts ex lege that court proceedings are needed.*

52. The Constitutional Court holds that the amendments to the Law would lead to confusion with respect to the property laws and would create parallel and contradictory provisions and particularly with respect to the jurisprudence of the Constitutional Court in Case No. *U 15/99*, referred to in paragraph 50 of this Decision.

53. Finally the Constitutional Court finds that the objection of the Serb Caucus, according to which the protection of the human rights of one group in the present case may not be achieved by deprivation of the rights of the other social group, is ill-founded. The Constitutional Court confirms that the rights and interests of individuals and groups may be opposite in certain situations. In such situations, the Constitutional Court enjoys a certain margin of appreciation as to the reasonable solution within the limits provided for in the Constitution of Bosnia and Herzegovina. Such a solution must not acknowledge the rights of one group in disproportion to the other protected group, which is surely not the case here.

54. For all of the above, the Constitutional Court holds that the unconditional proving of duress is destructive to the vital interest of the Bosniac people.

55. With respect to the other conditions, the Constitutional Court referred to the submitted documentation. It may be inferred from the unofficial transcript of the 18th session of the House of Peoples, held on 26 February 2004, and reasons adduced in support of the Draft Law that the aim of the author was the protection of *refugees (mostly from Croatia) who made an exchange with the refugees from Bosnia and Herzegovina*. According to paragraph 3 of the reasons, *the persons from Croatia who exchanged their property with the persons from Bosnia and Herzegovina shall forfeit their property in Bosnia and Herzegovina obtained through exchange, whereas the property in Croatia they had exchanged cannot be restored to them since the persons who exchanged the property with them registered themselves as the owners of that property and they are* not obliged to return it.

56. In that regard, it is clear that the return of Bosniac refugees, *inter alia*, could be conditioned by placing the property in Croatia at disposal. Thus, the goal of this provision would be to regulate the issue of exchange of the property with another state that could only be regulated by an agreement between the states. Thus the return of the Bosniacs, as constituent people, and reallocation of their property which was the subject of the exchange transaction, would be questioned, which is in opposition to the vital interest of this constituent people with respect to its return to its prewar homes and thus it is destructive to the vital interest of the Bosniac people.

VII. Conclusion

57. Pursuant to Article 59 para 2 (2) and Article 61 paras 1 and 2 of the Constitutional Court's Rules of Procedure, the Constitutional Court decided as stated in the enacting clause of this Decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 8/04

Referral of Mr. Mustafa Pamuk, Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, regarding question of procedural regularity of the Objection of the Croat Caucus of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina on the destructiveness to the vital interest of the Croat people in the Draft Framework Law on Higher Education in Bosnia and Herzegovina

DECISION ON ADMISSIBILITY AND MERITS
of 25 June 2004

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (f) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (2), Article 61 paras 1 and 2 of the Rules of the Procedure of the Constitutional Court of Bosnia and Herzegovina –New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), in Plenary and composed of the following judges:

Mato Tadić, President,

Prof. Dr Ćazim Sadiković, Vice-President,

Tudor Pantiru, Vice-President,

Prof. Dr Miodrag Simović, Vice-President,

Hatidža Hadžiosmanović

Prof. David Feldman,

Valerija Galić,

Jovo Rosić,

Having deliberated on the request of **Mr. Mustafa Pamuk** in case No. **U 8/04**,

Adopted at the session held on 25 June 2004 the following

DECISION ON ADMISSIBILITY AND MERITS

It is hereby established that the Objection of the Croat Caucus in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina on the destructiveness in the Draft Framework Law on Higher Education in Bosnia and Herzegovina to the vital interest of the Croat people was made in accordance with the procedure provided under the Constitution of Bosnia and Herzegovina.

It is hereby established that the Draft Framework Law on Higher Education in Bosnia and Herzegovina, wherein the possibility of using one or more languages of the constituent peoples and the manner of enactment of the statutes of the higher education institutions is envisaged, is destructive to the vital interest of the Croat people.

The procedure for adoption of the Framework Law on Higher Education in Bosnia and Herzegovina is to be conducted according to the procedure laid down in Article IV.3 (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* and the *Official Gazette of the Republika Srpska*.

Reasons

I. Introduction

1. On 13 May 2004, Mr. Mustafa Pamuk, Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ("applicant") submitted to the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") a referral for the review of procedural regularity, i.e. for establishment of the constitutional grounds for the Objection made by the Croat Caucus that the Draft Framework Law on Higher Education in Bosnia and Herzegovina ("Framework Law") is destructive to the vital interest of the Croat People.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 21, para 1 of the Rules of Procedure of the Constitutional Court (Constitutional Court's Rules of Procedure), on 7 June 2004 the Constitutional Court requested that the Council of Ministers of Bosnia and Herzegovina and the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina submit their replies to the request, and the Bosniac and Croat Caucuses of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina to present their observations and position with respect to the request.

III. Request

a) Statements from the request

3. On 24 March 2004 the Council of Ministers of Bosnia and Herzegovina submitted the Framework Law to the Parliamentary Assembly of Bosnia and Herzegovina - the House of Peoples and the House Representative – for deliberation and adoption. At its

23rd session held on 4 May 2004, the House of Peoples of the Parliamentary Assembly o Bosnia and Herzegovina ("House of Peoples") discussed the Framework Law – First Reading under item 10 of the Agenda, whereas during the resumption of the 23rd session held on 7 May 2004 the Framework Law – Second Reading - was discussed as the only item on the Agenda.

4. In accordance with Article 134, para 3 of the Rules of Procedure of the House of Peoples, the Croat Caucus of the House of Peoples made a Objection in writing, No. 02-02-7-19/04 of 7 May 2004, considering the Framework Law destructive to the vital interest of the Croat People. The Objection contains three reasons why the Delegates of the Croat Caucus consider the Framework Law destructive to the vital interest of the Croat People.

5. Firstly, the Croat Caucus holds that the Framework Law does not provide for a clearly defined, unquestionable and unequivocally guaranteed provision stipulating that the Croats shall, just as two other equal and constituent peoples in Bosnia and Herzegovina, have in the future at least one University in Bosnia and Herzegovina in Croat official language, and two other peoples in their official languages because such a provision in the Statute of the University in Mostar will depend on the assessment and decision of the "competent Entity body", as set out in Article 35 of the Framework Law, which is the body approving the Statute. Moreover, the Framework Law does not provide for an equal representation of all three constituent peoples in the competent Entity body, whereas that body is obliged to follow advises and recommendations of the Centre for Information, Recognition and Quality Assessment (CIRQA) which does not take its decisions on the basis of consensus, as provided for in Articles 43-55 of the Framework Law.

6. Secondly, the Framework Law "appropriates" the exclusive competence of the Cantons, as federal units having the responsibility in the matter of education, and transfers it to the Federation of Bosnia and Herzegovina ("Federation"), which is in violation with Article III.4 (b) of the Constitution of the Federation, which provides clearly, precisely and unequivocally that the Cantons shall have the responsibility for "making education policy, including decisions concerning the regulation and provision of education". Moreover, the Constitution of the Federation does not provide for any provision stipulating the transfer of the cantonal competencies to the Federation.

7. Thirdly, the Croat Caucus holds that there is a justified and well-founded doubt and fear that the Croat people might be outvoted in decision-making process at the federal level, especially in the federal bodies and those which, according to the proposed Framework Law, shall be established in the Federation for dealing with the issues in the

field of education.

8. Thereupon, in accordance with Article 134, para 3 of the Rules of Procedure of the House of Peoples, the debate on the Framework Law was suspended, whereas a debate on the Statement was opened. In accordance with Article 135, para 1 of the Rules of Procedure of the House of Peoples, the Bosniac Caucus raised an Objection to the Statement made by the Croat Caucus and submitted it in writing as No. 02-02-7-19/04 immediately after the end of the session held on 7 May 2004.

9. The following is stated in the Objection: "a) the Framework Law provides for clearly defined, undisputable and unequivocal guarantees of non-discrimination and equal rights for all peoples in Bosnia and Herzegovina; b) the allegations with respect to the "appropriation" of the competence of the cantons are unfounded since Article 56 of the Framework Law provides in a definite manner that the legal and constitutional prerequisites must be provided for higher education functions in the Entities; c) doubt and fear of outvoting in decision-making process at the federal level are unfounded since Article 3 of the Framework Law provides that the competent Entity body which is designated as responsible for a concrete function in the area of higher education by the Federation of BiH or a Ministry designated as responsible for a concrete function in the area of higher education by the Republika Srpska, shall operate on the basis of consensus. Moreover, the Constitution of the Federation establishes the mechanisms of protection of vital national interest. The given Statement prejudges the manner of resolving the issue of higher education in Bosnia and Herzegovina since that question shall be resolved later through amendments to the Constitution of the Federation, and may not be adopted by outvoting; d) generally speaking, the Framework Law is based on the principles set out in the Conventions and other International Agreements signed by Bosnia and Herzegovina (Convention on the Recognition of Qualifications concerning Higher Education in the European Region – Lisbon Convention, Bologna Declaration, etc.) so the application of the international standards in drafting of the Framework Law, which provide for equal conditions for all, makes the Statement considering the Framework Law destructive to a vital interest of only one people unfounded.

10. During the resumption of the session of 7 May 2004, the caucuses of the constituent peoples appointed one member each for the Joint Commission. The Joint Commission in the following composition: Mr. Ilija Filipović (Croat Caucus), Mr. Halid Genjac (Bosniac Caucus) and Mr. Nade Radović (Serb Caucus) met on 11 May 2004. As the Joint Commission did not find any solution, it decided to refer the case to the Constitutional Court for further procedure. On 13 May 2004 the applicant submitted a request to the

Constitutional Court in accordance with Article IV. 3 (f) of the Constitution of Bosnia and Herzegovina.

b) Reply to the request

11. Replies to the request were not submitted. On 10 June 2004 the Croat Caucus of the House of People informed the Constitutional Court that it supported its observations and position alleged in the Objection on Destructiveness of the Framework Law to the vital interest of the Croat People and presented to the members of the Joint Commission. On 11 June 2004 the Bosniac Caucus of the House of Peoples informed the Court of its position with regard to the Objection of the Croat Caucus, which was basically, in a detailed presentation, identical to the position expressed in the Objection raised on 7 June 2004, with the indication that there was a request in the invocation of the destructiveness to the vital interest, which was not submitted to the amendment procedure through the competent assembly bodies.

IV. Relevant Laws

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

Amendment LXXI

The official languages of the Republika Srpska are: the language of the Serb people, the language of the Bosniak people and the language of the Croat people. The official scripts are Cyrillic and Latin.

Amendment LXXVII

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

(...)

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

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

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

Article I.6

The official languages of the Federation of Bosnia and Herzegovina shall be: Bosnian language, Croat language and Serb language. The official scripts shall be Latin and Cyrillic.

Other languages may be used as a means of communication and instruction.

Article III.4

The Cantons shall have all responsibility not expressly granted to the Federation Government. They shall have, in particular, responsibility for:

(...)

(b) Making education policy, including decisions concerning the regulation and provision of education.

(...)

Amendment XXXVII
Definition of vital interest

Vital national interests of constituent peoples are defined as follows:

(...)

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

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

(...)

14. The relevant provisions of the **Framework Law on Higher Education** ead as follows:

Article 3

In this Law the following terms shall have the meanings indicated:

(...)

Competent Entity Body" that operates on the basis of consensus, and that is designated as responsible for a concrete function in the area of higher education by the Federation

of BiH, or a Ministry designated as responsible for a concrete function in area of higher education by the Republika Srpska.

Article 13

The formal responsibility for all activities of a licensed public higher education institution shall be vested in the governing board of the university or college ("governing board").

The number of members of the governing board, duration of the term of office, structure of the governing board, chairing of the governing board and other issues concerning the governing board shall be regulated by the statute of the higher education institution.

Students and all categories of staff of higher education institutions shall be represented in the governing board.

The senate of a university, which shall be responsible to the governing board for the academic work of the university, shall comprise representatives of the academic staff and representatives of the students. The method of selection of members of the senate, academic issues which fall within the competence of the senate as well as other issues within the area of work of the senate of a university shall be regulated by the statute.

Agreement to the statute of a higher education institution shall be given by the competent Entity body in accordance with the law.

Article 18

Higher education institutions shall, in accordance with provisions of this Law, have the rights to:

(...)

viii) Determine as their language, or languages, of administration one or more languages of constituent peoples of Bosnia and Herzegovina

Article 35

A competent Entity body shall be responsible for:

(...)

issuing a decision on licensing and accreditation of a higher education institution on the basis of special criteria and recommendations of the Board of CIRQA;

granting approval of statutes of higher education institutions;

(...)

Article 45

The Council of Ministers shall appoint a Board ("CIRQA Board") to govern CIRQA.

The CIRQA Board shall consist of nine members appointed by the Council of Ministers on the basis of equal representation for the three constituent peoples in Bosnia and Herzegovina, for a renewable term of three years, provided that initial appointments shall be phased so that one third of the membership is replaced or renewed each year.

The statute of CIRQA shall regulate the method of work and decision-making of the CIRQA Board, as well as other issues necessary for the work of CIRQA.

The statute of CIRQA shall be adopted by the CIRQA Board.

The statute of CIRQA shall come into force following the approval of the statute by the Council of Ministers, on the basis of an opinion given by the State Ministry.

(...).

Article 49

Licensing and accreditation of higher education institutions shall be decided upon by the competent Entity body, on the basis of conditions set and recommendations made by the CIRQA Board.

(...)

At the time of this Law coming into force, the existing universities in Bosnia and Herzegovina shall be considered to be accredited and shall be required to apply for review of accreditation within four years of the date of entry into force of this Law.

V. Admissibility

15. The request was submitted by the Chair of the House of Peoples. Therefore, the request meets one of the admissibility requirements as to the authorized person to submit a request to the Constitutional Court. With regard to further admissibility requirements, the Constitutional Court considers that they depend on the interpretation of the competences

of the Constitutional Court provided under Article IV.3 (f) of the Constitution of Bosnia and Herzegovina.

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

17. The Parliamentary Assembly of Bosnia and Herzegovina adopts all legislations upon the approval of both chambers (Article IV.3 (c)). According to Article IV.3 (d) *all decisions in both chambers shall be adopted by majority of those present and voting (...). If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity.*

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

19. When a majority of the Bosniac, of the Croat, or of the Serb Delegates objects to the invocation of Article IV.3 (e), the Chair of the House of Peoples shall immediately convene a Joint Commission consisting of three Delegates selected by the Bosniac, by the Croat, and by the Serb Delegates, to resolve the issue. If the Commission fails to do so

within five days, the matter will be referred to the Constitutional Court, which shall review it for procedural regularity in an expedited procedure. This means that the objection to the invocation of Article IV.3 (e) of the Constitution of Bosnia and Herzegovina stays the procedure of voting set out in the previous item of this Decision and the House of Peoples acts in accordance with Article IV.3 (f) of the Constitution of Bosnia and Herzegovina.

20. It follows from the quoted provisions that the procedure of protection of vital interest of one people is clearly and precisely prescribed by the quoted provisions. This procedure must be respected. The role of the Constitutional Court should be the review of whether the aforementioned procedure is being followed if that is requested from the Constitutional Court. On the other hand, it clearly follows from the quoted provisions that this type of dispute arises out of a situation in which the representatives of constituent peoples cannot reach an agreement on whether or not a decision is destructive to the vital interest of one of the peoples. This results in a blockage of the work of the Parliamentary Assembly with regard to the issue since the proposed decision cannot get the confidence of a majority of delegates of certain people. In this regard, the role of the Constitutional Court as the highest state court and guardian of the Constitution of Bosnia and Herzegovina (Article VI.3 of the Constitution of Bosnia and Herzegovina) is to contribute to de-blocking the work of the Parliamentary Assembly of Bosnia and Herzegovina by its decision on the merits, if the Parliamentary Assembly is not capable to overcome the problem by itself. This procedure is urgent since the prompt intervention of the Constitutional Court is necessary in order to enable the work of the legislative body. This second role of the Constitutional Court, i.e. adoption of the decision on the merits regarding whether or not the decision is destructive to the vital interest of one people, is very important in a situation when the state needs a law to regulate certain field, whereas deliberation and voting on certain law is blocked by the objection raised regarding the vital interest of a people.

21. Moreover, this role of the Constitutional Court shows similarity with the competence of the Constitutional Court under Article VI.3 (a) of the Constitution of Bosnia and Herzegovina. Article VI.3 (a) of the Constitution of Bosnia and Herzegovina enables review of constitutionality of laws and other applicable general acts, whereas the competence of the Constitutional Court under Article VI.3 (f) of the Constitution of Bosnia and Herzegovina has a preventive function. This provision makes it possible for the Constitutional Court to adopt a decision on the merits with regard to the issue on which the Parliamentary Assembly of Bosnia and Herzegovina could not agree. The adoption of the decision on the merits would enable the continuation of the legislative procedure in accordance with the opinion of the Constitutional Court. This means that the Constitutional Court examines

the constitutionality of laws that are pending in the parliamentary procedure. To that end, the Constitutional Court notes that it is the guardian of the Constitution of Bosnia and Herzegovina and its decisions deriving from all competences, including those set out in Article IV.3 (f) of the Constitution of Bosnia and Herzegovina, are final and binding (Article VI.4). This type of competence of the Constitutional Court is not new in constitutional and legal systems. The French *Conseil Constitutionnel* has the same jurisdiction under Article 61 and under the Constitution of 1958. Its role arising out of this competence is preventive and its decisions are final and binding for all bodies. The proceedings are also urgent and they, in principle, should be finalized within one month.

22. The mechanism of protection of vital interests of one people is very important in the states with multiethnic, multilingual and multi-religious communities or communities which are typical of their differences. On the other hand, each invocation of vital interest has for a consequence a stricter criterion for adoption of general acts (Article IV.3 (e)) and, as a last resort, procedure before the Constitutional Court. The consequences are the interruption of parliamentary procedures, which may have an adverse effect on the work of the legislative body and functioning of the state. For that reason, the requirements laid down in Article IV.3 (f) of the Constitution of Bosnia and Herzegovina must be explained and they must express serious controversies in opinions and doubts regarding the violation of that mechanism. Considering that this request was filed by a legislative body acting as a political authority, such a request may be considered admissible if there is an objective interest for the resolution of the dispute. In other words, the applicant does not have to declare the subjective interest for the resolution of the dispute, which is typical for the appeals of the individuals. Bearing this in mind, the Constitutional Court is not bound by the request itself as the public interest prevails over the request itself.

23. As to the case at issue, the Objection of the Croat Caucus refers to the vital interest of that people, but also to two other constituent peoples in Bosnia and Herzegovina. The request contains several reasons for which the Framework Law is destructive to the vital interest of Croat people. The reasons refer to the issue of use of the official languages of the constituent peoples in the field of higher education, respect of division of competencies between the Cantons and the Federation set out in the Constitution of the Federation and the issue of equal constitutional rights in the decision-making process at the level of the Federation.

24. It follows from the analysis of procedural regularity and case-file that the Objection of the Croat Caucus, No. 02-02-7-19/04 of 7 May 2004, was signed by all five delegates, namely Mr. Ilija Filipović, Mr. Velimir Jukić, Mr. Tomislav Limov, Mr. Anto Spajić and

Mr. Branko ZrNo. The Objection raised by the Bosniac Caucus, No. 02-02-7-19/04 of 7 May 2004, was signed by the majority of delegates of that Caucus, namely Mr. Halid Genjac, Mr. Hilmo Neimarlija, Mr. Hasan Čengić and Mr. Osman Brka. On the same day, the Joint Commission in the following composition: Mr. Ilija Filipović, Mr. Halid Genjac and Mr. Nade Radović, was convened. The Joint Commission meet on 11 May 2004 but as it did not find any solution; it decided to refer the whole case to the Constitutional Court for further procedure. The applicant submitted a request to the Constitutional Court on 13 May 2004.

25. The Constitutional Court established that the case was submitted by an authorized person, that the procedural regularity in the sense of Article IV.3 (f) of the Constitution of Bosnia and Herzegovina was respected and that the formal requirements under Article 16, para 2 of the Constitutional Court's Rules of Procedure were met.

26. It follows that the request is admissible.

VI. Merits

27. The applicant requests review of the procedural regularity, i.e. establishment of the constitutional grounds for the Objection made by the Croat Caucus that the Proposal for the Framework Law is destructive to the vital interest of the Croat People.

28. In order to review the request with respect to the Statement that the Framework Law is destructive to the vital interest of the Croat People, the Constitutional Court has to first define the term of "vital interest" in the sense of Article IV.3 (f) of the Constitution of Bosnia and Herzegovina.

VI. 1. Notion of vital interest

29. In view of Article I.2 of the Constitution of Bosnia and Herzegovina, which provides that Bosnia and Herzegovina shall be a democratic state, i.e. "that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society" (line 3 of the Preamble), one may see the commitment that is legally binding for all public authorities and it cannot be isolated from the remaining elements of the Constitution, particularly from ethnic structures, and must therefore be interpreted with the reference to the composition of the Constitution as a whole, which helps to define the notion of vital interest of each constituent people.

30. The last line of the Preamble of the Constitution of Bosnia and Herzegovina defines Bosniacs, Serbs and Croats as «constituent peoples (along with Others), and citizens of Bosnia and Herzegovina". In its Third Partial Decision *U 5/98* (Decision of 7 January 2000, *Official Gazette of Bosnia and Herzegovina*, No. 23/00, para 52), the Constitutional Court concluded that "however vague the language of the Preamble of the Constitution of BiH may be due to this lack of definition of the status of Bosniacs, Croats, and Serbs as constituent peoples, it clearly designates all of them as constituent peoples, i.e. as peoples". Furthermore, the Constitutional Court concluded that "taken in conjunction with Article I of the Constitution, the text of the Constitution of BiH thus distinctly distinguishes constituent peoples from national minorities with the intention of affirming the continuity of Bosnia and Herzegovina as a democratic multi-ethnic state" (*ibid*, para 53). In connection therewith, one may conclude that the notion of constituent status of peoples is not an abstract notion but it incorporates certain principles without which a society with differences protected under its respective constitution could not function efficiently. Accordingly, the term "constituent status" has a direct effect on the term "vital interest".

31. As the Constitution of Bosnia and Herzegovina prescribes in certain places a proportionate share of participation of constituent peoples in appointments to state authorities, quota-based system is established while composing the House of Peoples (Article IV.1), appointment of Chair and Vice-Chair of the Houses of the Parliamentary Assembly (IV.3 (b)), composition of the Presidency of Bosnia and Herzegovina (Article V) and the first composition of the Governing Board of the Central Bank of Bosnia and Herzegovina (Article VII, para 1, item 2). In addition to the quota-based system, Article IV.1 (b) of the Constitution of Bosnia and Herzegovina set forth the decision-making process in the House of Peoples conditioning it with minimum presence and representation of delegates of each constituent people. Finally, Article IV.3 (e) and (f) and Article V.2 (d) of the Constitution of Bosnia and Herzegovina introduce the principle of protection of the vital interest of constituent peoples as an additional safeguard of constitutional protection.

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

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

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

34. In addition to the constitutional element of "effective participation of the constituent peoples in state authorities*"*, the Constitutional Court also examined the issues of group rights of the constituent peoples on several occasions. It emphasized that "the effective

possibility of the equal use of the Bosnian, Croatian and Serbian languages, not only before the institutions of Bosnia and Herzegovina but also at the level of the Entities and any subdivisions thereof with regard to the legislative, executive and judicial powers and in public life" as one of the group rights is protected, *inter alia*, by Article II.4 in conjunction with Articles I.4, II.3 (m) and II.5 of the Constitution of Bosnia and Herzegovina as well as the European Charter for Regional and Minority Languages (see Decision of the Constitutional Court, *U 5/98* of 18 and 19 August 2000, *Official Gazette of Bosnia and Herzegovina*, No. 36/00, item 34). The Constitutional Court further concluded (*ibid*, item 44) that "religions and churches other than the Orthodox Church, like the Catholicism or Islam, have always been part of the multi-religious life in Bosnia and Herzegovina in the sense of pluralism which is required both by the European Convention and the Constitution of BiH as a necessary precondition for a democratic society". It is clear from these examples that other elements of the constituent peoples are closely connected to the constitutional and international and legal mechanisms of protection of individual and group rights.

35. Nonetheless, the Constitutional Court will not go any further into enumeration of the elements of the vital interests of one people save the said examples. The notion of vital interest of one constituent people is the functional category which needs to be approached from that point of view. However, the Constitutional Court, in accordance with Article VI.3 (1) of the Constitution of Bosnia and Herzegovina, upholds the Constitution and is limited by it in terms of functional interpretation. To that end, in examination of each case, the Constitutional Court shall, within the given constitutional framework, be guided by the values and principles essential for a free and democratic society which embodies, *inter alia*, respect for the inherent dignity of the man, great diversity of beliefs, respect for cultural identity and identity of the groups as well as the trust in the social and political institutions which promote participation of individuals and groups in a society. On the other hand, the protection of the vital interests must not endanger the implementation of the theory of the state functionality, which is closely connected to the neutral and essential understanding of the term of citizenship, as the criterion of "national" affiliation. In other words, the protection of vital interest must not lead to unnecessary disintegration of the civil society as the necessary category of the modern sovereignty.

VI. 2 Existence of the vital interests of Croat people

36. Article 1 of the Framework Law provides that «the Framework Law on Higher Education in Bosnia and Herzegovina shall set principles of organization of higher education in Bosnia and Herzegovina, responsibility of education authorities in this area,

establish bodies for implementation of the Law and international commitments of Bosnia and Herzegovina, and determine the process of quality assurance in the area of higher education." Article 18 of the Framework Law regulates the issue of use of the official languages in higher education institutions, whereas Section III regulates the issue of responsibility and the manner of decision-making process.

37. The first item of the Objection of the Croat Caucus refers to the issue of use of the official languages of the constituent peoples in the field of higher education. The second item refers to the issue of division of the constitutional competencies between the Cantons and the Federation as to the decision-making process for certain questions. Finally, the third item refers to the issue of equal rights of the constituent peoples in the decision-making process at the Federation level. Despite the fact that the Objection contains three items, the Constitutional Court notes that the second and third items essentially treat the same issue, i.e. equal rights of the constituent peoples in decision-making process.

38. The Constitutional Court has already recalled that "the effective possibility of the equal use of the Bosnian, Croatian and Serbian languages, not only before the institutions of Bosnia and Herzegovina but also at the level of the Entities and any subdivisions thereof with regard to the legislative, executive and judicial powers and in public life" is one of the protected group rights. It should be noted that in a wider sense the official use of a language includes certainly the education in that language.

39. It is necessary to emphasize that the efficient participation of constituent peoples in terms of prevention of absolute domination of one people over the other represents the vital interest of each constituent people.

40. Unlike the Constitution of Bosnia and Herzegovina, the Entities Constitutions explicitly prescribe these two questions, namely the Constitution of the Republika Srpska (Amendment LXXVII) and the Constitution of the Federation (Amendment XXXVII) identically define the vital national interests of the constituent peoples, so that both of them provide for "equal rights of the constituent peoples in decision-making process; education, religion, language, culture, tradition and cultural heritage".

41. The Constitutional Court concludes that the Framework Law and the Statement of the Croat Caucus raises the questions inherent to the term of vital interest of all constituent peoples, i.e. the Croat People in this case.

42. It remains that the Constitutional Court examines whether the Framework Law is destructive to the vital interest of the Croat People.

VI. 3 Destructiveness of the vital interest

43. The Constitutional Court recalls that the Croat Caucus has made an Objection according to which the provisions of the Framework Law regulating the use of official language, process of adoption of the statutes of the higher education institutions and division of the responsibilities between the cantons and the Federation and decision - making process thereto at the Federation level are destructive to the vital interest of the Croat people. The contested provisions, namely Article 35 and Articles 43-55 are alleged in the reasons of the Statement.

VI. 3. 1. The issue of language

44. Article 18 of the Framework Law provides that Higher education institutions shall, in accordance with provisions of this Law, have *inter alia* the rights to determine as their language, or languages of administration, one or more languages of constituent peoples of Bosnia and Herzegovina. The aforementioned provision provides for the possibility to determine all three but also one or two official languages of the constituent peoples as official language at a higher education institution if the statute providing for such provision is approved.

45. According to Article 35 of the Framework Law, a competent Entity body shall approve the higher education institutions' statutes providing for the provisions on the official language. Despite the fact that Article 3 of the Framework Law makes a difference with respect to the definition of that body in Republika Srpska and the Federation, it clearly follows from the reasons of the Law that those are Entity Ministries in both cases. As the ministries are managed by the ministers who independently take decisions according to the constitution and law, it is clear that the provision stipulating that the "body at issue takes decisions by consensus" is inviolable. It follows that the approval of the Statute of a higher education institution exclusively depends on the assessment and standpoint of the respective minister.

46. According to Article 49, para 3 of the Framework Law, the existing universities in Bosnia and Herzegovina, at the time of this Law coming into force, shall be considered to be accredited and shall be required to apply for review of accreditation within four years of the date of entry into force of this Law. In the sense of Article 3 of the Framework Law, the accreditation shall mean "a formal decision, on the basis of defined criteria, by or on behalf of the authorities responsible for higher education, that a higher education institution fulfils the generally accepted quality standards and that its qualifications

confer on holders (in accordance with applicable law) a number of rights, e.g. access to a further stage of education, to specific occupations, to the use of a title, whereas "licensing" shall mean "the act of granting of permission to provide higher education according to the provisions of this Law". However, in revision procedure as well as in case of establishment of new higher education institutions, a competent Entity body shall take decisions on licensing and accreditation of a higher education institution on the basis of special criteria and recommendations of the Board of CIRQA in the sense of Article 35 of the Framework Law. According to Article 45 of the Framework Law, the CIRQA Board shall consist of nine members appointed by the Council of Ministers on the basis of equal representation for the three constituent peoples in Bosnia and Herzegovina. The statute of CIRQA shall regulate the method of work and decision-making of the CIRQA Board. The statute of CIRQA shall come into force following the approval of the statute by the Council of Ministers, on the basis of an opinion given by the State Ministry. Therefore, according to the aforementioned procedure, a decision on the accreditation for a higher education institution shall be taken by the competent department minister on the basis of special criteria and recommendations (which is not binding) of the body in which all three constituent peoples are equally represented, but whose decision-making process shall be prescribed subsequently by a statute. The possibility of outvoting remains since the law does not provide for decision-making process on the basis of consensus.

47. It follows that the Framework Law does not provide unconditionally that a decision (in the sense of Article 18) on the use of an official language of a higher education institution provided for in the Statute of that institution shall be approved, since the competent Entity Minister shall give the approval of it. This means that the allegations in item 1 of the Objection of the Croat Caucus, according to which the Framework Law does not provide for a clearly defined, unquestionable and unequivocally guaranteed provisions that the Croats, just as two other equal and constituent peoples, shall have a higher education institution in their own language, are founded.

48. However, the Constitutional Court holds that such an approach to the issue of official use of a language, whose consequence would be that certain higher education institutions would have for official language only one or two official languages of the constituent peoples, may constitute a limitation of the right to equal use of the official languages of all three constituent peoples. In a multi-national state such as Bosnia and Herzegovina the legitimated aim is not assimilation or segregation on the ground of language. The Constitutional Court has already noted in its decision *U 5/98* that "the legislation of BiH must account for the effective possibility of the equal use of the Bosnian, Croatian and Serbian languages the effective possibility of the equal use of the Bosnian, Croatian and

Serbian languages (...) and in public life. The highest standards of Articles 8 through 13 of the European Charter for Regional and Minority Languages should thus serve as a guideline for the three languages mentioned. Lower standards mentioned in the European Charter might – taking the appropriate conditions into consideration – thus be sufficient only for other languages."

49. *In conclusion,* the Constitutional Court finds that the manner in which the Framework Law, in Articles 13, 18 and 35, provides for the use of only one or two official languages in the higher education institutions and the statute-making process of the higher education institution, is destructive to the vital interest of the constituent peoples, i.e. Croat people in this case, since it does not provide for the possibility of equal use of the official languages of all three constituent peoples in Bosnia and Herzegovina. Finally, The Constitutional Court notes that any law solution which would be in violation with the principle of equality of all languages of the constituent people on the whole territory of Bosnia and Herzegovina would constitute a serious violation of that principle and could raise the issue of destructiveness to the national interest of any of the constituent peoples of Bosnia and Herzegovina.

VI.3.2. The issue of equal right of the constituent people in decision-making process

50. The Constitutional Court notes that the allegations in items 2 and 3 of the Objection of the Croat Caucus relate to the issue of compliance with the division of responsibilities between the Cantons and the Federation in decision-making process, i.e. the possibility of outvoting of the representatives of the Croat people in decision-making process at the Federation level.

51. According to Article III.4 of the Constitution of the Federation, the Cantons shall have the responsibility for making education policy, including decisions concerning the regulation and provision of education. The Croat Caucus alleges that the Framework Law "appropriates" the aforementioned responsibility of the Cantons and transfers it to the Federation, which is, taking into account the possibility of outvoting in decision-making process at the Federation level, destructive to the vital interest of the Croat people. However, Article 56, para 2 of the Framework Law provides that the provisions of this Law that require the assignment of authority for given higher education functions in the Entities shall be applied as of the moment when legal conditions have been created for such assignment. The Framework Law therefore does not prejudge the responsibility, provided for in the Constitution of the Federation, for making decisions with respect to the issues in the field of higher education. Moreover, the Constitution of the Federation clearly

provides for the mechanisms of protection of vital interests of all three constituent peoples in deciding on the issues falling within the vital interest at the level of the Federation (Amendments XXXVIII – XL). The Constitutional Court recalls that “the efficient participation of constituent peoples in state authorities”, seen beyond the constitutional framework, must not be enforced or imposed to the detriment of the efficient functioning of the state and its bodies (see items 32 and 33).

52. *In conclusion,* as to the issues raised in items two and three of the Objection of the Croat Caucus, the Constitutional Court finds that the Framework Law contains the provisions destructive to the vital interest of any of the constituent peoples, i.e. Croat people in this case.

53. The Constitutional Court emphasizes that this Decision, which derived from the procedure under Article IV.3 (f) of the Constitution of Bosnia and Herzegovina does not aim to review the constitutionality of law solutions which constitute the background of the proceedings themselves before the Constitutional Court. The aim of this Decision is to give a final answer to the question which neither the House of Peoples nor the Joint Commission of the House of Peoples could answer, i.e. the issue of destructiveness of the Framework Law to the vital interest of one or more peoples. In accordance with this Decision, the House of Peoples is obliged to resume and terminate its blocked procedure with respect to the Framework Law according to the procedure set out in Article IV.3 (e) of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

54. Having regard to Article 61, paras 1 and 2 of the Constitutional Court’s Rules of Procedure, the Constitutional Court unanimously decided as stated in the enacting clause of this Decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 10/05

Referral of Mr. Velimir Jukić, Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, regarding question of procedural regularity of the Objection of the Croat Caucus in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina on the destructiveness of the Draft Law on the Public Broadcasting System of Bosnia and Herzegovina to the vital interest of the Croat people

DECISION ON ADMISSIBILITY AND MERITS
of 22 July 2005

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI.3 (f) of the Constitution of Bosnia and Herzegovina, Article 59 para 2 (2), Article 61 paras 1 and 3 of the Rules of Procedure of Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 2/04) - New Amended Text, in plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Hatidža Hadžiosmanović, Vice-President

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Having considered the request of **Mr Velimir Jukić**, Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina in case No. **U 10/05**, adopted on 22 July 2005 the following

DECISION ON ADMISSIBILITY AND MERITS

It is established that the Objection of the Croat Caucus in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina on the destructiveness of the Draft Law on the Public Broadcasting System of Bosnia and Herzegovina to the vital interest of the Croat people does not meet the requirements of procedural regularity, as the Draft Law on the Public Broadcasting System of Bosnia and Herzegovina is not destructive to the vital interest of the Croat people in Bosnia and Herzegovina.

The procedure for adoption of a Law on the Public Broadcasting System of Bosnia and Herzegovina should be conducted according to the procedure under Article IV.3 (d) of the Constitution of Bosnia and Herzegovina.

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

Reasons

I. Introduction

1. On 6 July 2005, Mr. Velimir Jukić, Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ("applicant"), filed a referral with the Constitutional Court of Bosnia and Herzegovina ("Constitutional Court") seeking therein a review of procedural regularity and existence of constitutional grounds to consider the Draft Law on the Public Broadcasting System of Bosnia and Herzegovina ("Draft Law") destructive to the vital interest of the Croat people in Bosnia and Herzegovina.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 21 para 1 of the Rules of Procedure of the Constitutional Court ("Constitutional Court's Rules of Procedure") the Bosniac, Croat and Serb Caucuses in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina were requested on 7 July 2005 to submit their respective replies to the request.

III. Request

a) Statements from the request

3. On 9 February 2005 the Council of Ministers of Bosnia and Herzegovina ("Council of Ministers") referred to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ("House of Peoples") the Draft Law accompanied by a request for consideration under Article 99 of the Rules of Procedure of the House of Peoples (consideration of laws in an expedited procedure). The House of Peoples, at its 38th session held on 22 February 2005, accepted the request of the Council of Ministers to consider the Draft Law in an expedited procedure in accordance with Article 99 of the Rules of Procedure of the House of Peoples. The Draft Law establishes as follows: a) a single public broadcasting system composed of three legally separated public broadcasters that supplement one another; one provides services at the entire territory of the State whereas

the other two provide services in the respective Entities; each broadcaster is responsible for the contents of its program, including news and finance management in keeping with the obligations arising out of the license; b) Corporation of public broadcasters as a joint legal entity for infrastructure, international representation of the public broadcasters, rights related to foreign programs and advertising; c) three organizational units of the Corporation seated in, respectively, Sarajevo, Mostar and Banja Luka and taking part in the program production for the public broadcaster of Bosnia and Herzegovina; d) Board of the Public Broadcasting System which is the Corporation's management body; and e) a single system for collection of the radio and television subscription fee that is needed to ensure the financial viability of the Public Broadcasting System, etc. Pursuant to the Rules of Procedure of the House of Peoples, the Constitutional and Legal Affairs Committee of the House of Peoples supplied its opinion at the 39th session of the House of Peoples held on 7 March 2005 that the Draft Law complied with the Constitution of Bosnia and Herzegovina.

4. In addition, the Committee for Foreign Affairs and Trade Policy of the House of Peoples, as the competent proponent of the Draft Law, submitted a report to the House of Peoples on 28 June 2005 in which it reported the following conclusions: a) it supported the principles set out in the Draft Law by a majority of votes; b) it noted that the amendments to the Draft Law were put forward by the Croat Caucus (thirteen amendments), Delegate Ruža Stojanović (four amendments) and Delegate Hasan Čengić (six amendments); and c) it adopted four amendments put forward by Delegate Ruža Stojanović and one amendment put forward by the Croat Caucus, the latter being identical to one of the amendments of Delegate Ruža Stojanović.

5. Thereupon, the Croat Caucus, by virtue of Article 89 of the Rules of Procedure of the House of Peoples, repeated its amendments to the Draft Law. After its first reading, the Draft Law was adopted at the 43rd session of the House of Peoples held on 29 June 2005 by a majority of votes that did not include the votes of the Croat Delegates. After the second reading, the amendments to the Draft Law were considered and a vote was cast in this regard. As all amendments put forward by the Croat Caucus were defeated, the Croat Caucus, according to Article IV.3 (e) of the Constitution of Bosnia and Herzegovina, submitted a declaration prior to the conclusion of the discussion of the matter concerned at the session of the House of Peoples that it considered that the Draft Law was destructive to the vital interest of the Croat people.

6. In substance, the declaration of the Croat Caucus whereby it is claimed that the Draft Law is destructive to the vital interest of the Croat people in Bosnia and Herzegovina makes the following claims:

a) The proponent failed to follow to a sufficient extent the obligatory norms of the Constitution of Bosnia and Herzegovina and the corresponding provisions of international legal documents on human rights that must be provided on equal terms for everyone. Additionally, the Draft Law does not comply fully with the European standards and practices for settling these issues in states composed of multilingual communities.

b) Reasons for this can primarily be found in the fact that the Draft Law established that the Public Broadcasting System of Bosnia and Herzegovina was to be composed of three public broadcasters: a) PBS BiH as a public broadcaster of Bosnia and Herzegovina; b) RTV F BiH as a public broadcaster of the Federation of Bosnia and Herzegovina; and c) RTV RS as a public broadcaster of the Republika Srpska. Conversely, the Croat Caucus suggested that there should be three public broadcasters in addition to the state-level public broadcaster: a) RTV F BiH – Sarajevo as a public broadcaster of the Federation of Bosnia and Herzegovina in the Bosnian language; b) RTV F BiH – Mostar as a public broadcaster of the Federation of Bosnia and Herzegovina in the Croat language; and c) RTV RS – Banja Luka as a public broadcaster of the Republika Srpska in the Serb language. In line with the aforesaid, the Croat Caucus requested all provisions of the Draft Law to be adjusted to the extent that there are, apart from the state-level public broadcaster, three additional public broadcasters in the official languages of the constituent peoples in Bosnia and Herzegovina. It also requested that the Council of Ministers should be obliged to ensure that all financial and technical prerequisites for broadcasting of the program of the PBS BiH on three channels and in three official languages of the constituent peoples would be available no later than 30 July 2006. Moreover, it was requested that the Council of Ministers should be obliged to ensure all financial and technical prerequisites for establishment of a public broadcaster of the Federation Bosnia and Herzegovina in the Croat language in cooperation with the Government of the Federation of Bosnia and Herzegovina, within one year of the date of entry into force of this Law.

c) Furthermore, the Draft Law anticipates the establishment of a Board of the Public Broadcasting System of Bosnia and Herzegovina ("System Board") that would prompt and direct carrying out of responsibilities defined by the law through the Corporation of public broadcasters in Bosnia and Herzegovina. The System Board would consist of twelve members. All members of the boards of governors of the public broadcasters (four

from each public broadcaster) would comprise the System Board and their membership of the System Board would be *ex officio*. Conversely, the Croat Caucus suggested that the System Board should consist of ten members: three members from among each constituent people and one member from among Others. The System Board would be appointed by the Parliamentary Assembly of Bosnia and Herzegovina for a term of four years. The System Board would be appointed following a public vacancy notice procedure announced and conducted by the Communications Regulatory Agency, the latter being also responsible for determining the list of candidates who meet the stipulated conditions.

d) When reasoning its allegations about the issues from the Objection as to the destructiveness of vital national interests of the Croat people in Bosnia and Herzegovina, reference is extended to the right to freedom of expression under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"). Namely, a group of experts of the Advisory Panel to the Media Division of the Director General of Human Rights of the Council of Europe prepared a Report on Media Diversity in Europe in 2002 and it was underlined therein that Article 10 of the European Convention not only enshrined an individual right to media freedom, but also entailed a duty to guarantee pluralism of opinion and cultural diversity of the media in the interests of a functioning democracy and freedom of information for all and that governments of the member states should act against increasing concentration in media. To that end, reference is made to the right to non-discrimination under Article 14 of the European Convention when it comes to use of language and being informed in one's language as well as representation of culture and traditional heritage in the programs of public broadcasters. There are also references to, respectively, the constitutional principle of equal rights for all constituent peoples which is deemed to have been violated, and the rights under Articles 10 and 14 of the European Convention. Another reference is made to Article 11 of the European Charter for Regional or Minority Languages, which obliges the Parties to ensure for the users of the regional or minority languages within the territories in which those languages are spoken the creation of at least one radio station and one television channel in the regional or minority languages. It is pointed out that national minorities in European countries may have radio and television channels in their own languages whereas the Croat people in Bosnia and Herzegovina, although not a national minority but a constituent people, cannot have one radio and television channel in their own language. Finally, reference is made to the Recommendations of the Council of Europe 748 (1975) and 1147 (1991) (which recommended the Member States to recognize regional and minority interests in national broadcasting and stated that there is no single

solution for organizing radio and television) that are deemed to have been violated by the Draft Law.

e) In substance, it is claimed that the Draft Law discriminates against the culture and traditional heritage of the Croat people in Bosnia and Herzegovina in relation to the other two constituent peoples because it was rendered impossible for the Croat people to have a radio and television channel in their own language while the same was effectively rendered possible for the other two peoples. To that end, it is alleged that the other two channels (RTV F BiH and RTV RS) are *de facto* produced in the Bosnian and Serb languages and *the Croat people in Bosnia and Herzegovina cannot be satisfied with occasional informative and other shows during Catholic holidays in poor Croatian*. It is underlined that the Chair of the Council of Ministers and the Entity Prime Ministers signed on 6 November 2003 an Agreement on Basic Principles for the Public Broadcasting System of Bosnia and Herzegovina to be composed of three public broadcasters and a joint infrastructure. The said Agreement was signed without the representatives of the Croat people although this was a crucial issue relevant to their vital interests. Additionally, it is pointed out that the Draft Law does not define the implementing instruments of programming principles under Article 26 thereof and it leaves room for authorized personnel of the public broadcasters to make decisions at their discretion (how much of each language would be heard on the air, and whether and to what extent ethnic, regional, traditional, religious, cultural, linguistic and other characteristics of the constituent peoples and of all citizens in Bosnia and Herzegovina would be observed). This is absolutely unacceptable for the Croat people and it represents a justifiable danger that the rights of the constituent peoples and citizens of Bosnia and Herzegovina would be manipulated and subjected to unequal treatment in the programs of the public broadcasters at the expense of the Croat people in Bosnia and Herzegovina.

7. Following the submission and elaboration of the Objection as to the destructiveness of vital interests, the discussion of the Draft Law was suspended in pursuance of Article 134 paragraph 3 of the Rules of Procedure of the House of Peoples and a debate on the Objection was opened. Thereafter, the Bosniac caucus objected to the Objection on vital interest. A joint commission consisting of Mr. Halid Genjac (Bosniac Caucus), Mr. Ilija Filipović (Croat Caucus) and Mr. Vinko Radovanović (Serb Caucus) was appointed at the session of the House of Peoples held on 29 June 2005. The commission was to convene within five days and make all efforts to find a solution. Pursuant to Article 135 paragraph 1 of the Rules of Procedure of the House of Peoples, the Bosniac caucus submitted in writing an Objection to the Objection as to destructiveness of vital interests on 30 June 2005. In substance, the objection consists of the following: a) Article 26 paragraphs 1, 3, 4 and 5 of

the Draft Law specifies an obligation of respect of the norms of the Constitution of Bosnia and Herzegovina and the corresponding provisions of international legal documents on ensuring human rights for every person on equal terms; b) the provisions of Article 27 of the Draft Law are dedicated in their entirety to the implementation of the programming principles in the manner that would guarantee the respect of Article 10 of the European Convention with specifying the provisions that ensured pluralism of political, religious and all other ideas in the programs of the public broadcasters in Bosnia and Herzegovina; and c) reference to the European Charter for Regional or Minority Languages is inadequate in this context since the Croat people are a constituent people in Bosnia and Herzegovina and the provision of Article 26 of the Draft Law follows the constitutional position of all constituent peoples of Bosnia and Herzegovina.

8. Following the submission of the Objection, the Joint Commission convened on 30 June 2005 and failed to find a solution. It established that the entire case should be referred to the Constitutional Court for further procedure. The applicant filed the request with the Constitutional Court on 6 July 2005 in keeping with Article IV.3 (f) of the Constitution of Bosnia and Herzegovina.

b) Reply to the request

9. The Croat Caucus (Mr. Velimir Jukić, Mr. Branko Zrno and Mr. Ilija Filipović) in the House of Peoples informed the Constitutional Court on 11 July 2005 that it supported the arguments advanced in the Objection as to the destructiveness to the vital interests of the Draft Law as well as the discussion of the Draft Law at the respective session of the House of Peoples.

IV. Relevant laws

10. Relevant provisions of the **Constitution of Bosnia and Herzegovina** read as follows:

Article IV

3. (...)

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 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.

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

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

(...)

11. Relevant provisions of the **Constitution of the Republika Srpska** read as follows:

Amendment LXXVII

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

(...)

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

Education, religion, language, promotion of culture, tradition and cultural heritage;

(...)

12. Relevant provisions of the **Constitution of the Federation of Bosnia and Herzegovina** read as follows:

Amendment XXXVII
Definition of vital interest

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

(...)

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

Education, religion language, promotion of culture, tradition and cultural heritage

(...)

13. Relevant provisions of the **Draft Law on the Public Broadcasting System of Bosnia and Herzegovina** read as follows:

Article 3

(1) The Public Broadcasting System of Bosnia and Herzegovina shall be composed of:

a) The Public Broadcasting Service of Bosnia and Herzegovina ("PBS BiH") which is the public broadcaster of Bosnia and Herzegovina;

b) The Radio-Television of the Federation of Bosnia and Herzegovina ("RTV FBiH"), which is the public broadcaster of the Federation of Bosnia and Herzegovina;

c) The Radio-Television of the Republika Srpska ("RT RS"), which is the public broadcaster of Republika Srpska;

d) The Corporation of public broadcasters of Bosnia and Herzegovina ("Corporation").

(2) The laws on the PBS BiH, the RT RS and the RTV FBiH shall be harmonized with the provisions of this Law.

(3) The turnover of goods and services between the system members shall not be subject to payment of sales tax

Article 7

(1) This Law shall establish a Board of the Public Broadcasting System of Bosnia and Herzegovina ("System Board"). The System Board shall prompt and direct carrying out of

responsibilities referred to in Article 6 hereof through the Corporation for the purpose of a more rational and more effective operation of the Public Broadcasting System of Bosnia and Herzegovina.

(2) The System Board shall consist of twelve members. All members of the boards of governors of the public broadcasters (four from each public broadcaster) shall comprise the System Board. Their membership in the System Board shall be ex officio.

(3) The System Board shall be chaired by the Chairperson of the Board of Governors of the PBS BiH.

(4) The public broadcasters shall secure equal funding of the work of the System Board.

Article 9

(1) The CRA shall assign frequencies to the public broadcasters for one TV station and two radio-stations for the entire territory of Bosnia and Herzegovina and two TV stations and two radio-stations in each Entity under the rates fixed by the CRA. The assigned frequencies must be sufficient to ensure interference-free coverage for as much of the population of Bosnia and Herzegovina for the PBS BiH programme, as much of the population of the Federation of Bosnia and Herzegovina for the RTV FBiH programme, and as much of the population of Republika Srpska for the RT RS programme as is practically possible.

(2) The Council of Ministers shall be authorized to start a procedure of establishment of a new radio and television channel within the System following consultations with the CRA and the Board. The Council of Ministers shall consider initiatives after making an independent, transparent and detailed analysis involving program, scope, technical, financial and other information justifying establishment of a new channel.

Article 26

(1) The public broadcasters' programming shall serve the public interest and shall be in accordance with professional standards and the rules and regulations of the CRA. The public broadcasters shall be obliged to ensure diverse and balanced radio and television programmes that meet high standards of ethics and quality, that show respect for human life, dignity and the physical integrity of persons, and that foster democratic freedoms, social justice and international understanding and peace.

(2) The public broadcasters' programming shall include culture, information, education, entertainment and sport.

(3) The programmes of the public broadcasters shall take into account national, regional, traditional, religious, cultural, linguistic and other specific features of the constituent peoples and all citizens of Bosnia and Herzegovina. The programmes of the public broadcasters shall also serve cultural and other needs of national minorities in Bosnia and Herzegovina.

(4) The programs of the public broadcasters shall take into account the rights of the constituent peoples and others and they shall be edited equally in three languages and two scripts.

(5) The public broadcasters shall, in the production of own programs and in co-production programs, ensure equal representation of contents reflecting the heritage of all three constituent peoples and appropriate representation of Others.

(6) The public broadcasters shall produce and edit programmes in accordance with the highest professional criteria and with respect for artistic and creative licence, independent of the opinions of governmental bodies, political parties and/or other interested groups.

(7) The public broadcasters shall have the right to broadcast sessions or parts of sessions of the parliament, i.e., to inform the public on parliamentary activities in any suitable manner, in accordance with its editorial guidelines. For that purpose, the public broadcasters shall have free access to the sessions of parliament.

(8) The public broadcasters shall be obliged to publicly present their annual programme plans as well as reports on the realisation of previous programme plans. Everyone has the right to submit to the public broadcasters objections and suggestions related thereto.

(9) Annually, the public broadcasters shall submit a report of their activities, a financial report and a report on financial audit to the Parliamentary Assembly of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina and the National Assembly of the Republika Srpska.

Article 27

(1) In the realisation of fundamental programming principles, the public broadcasters shall in particular do as follows:

a) Inform the public in a truthful, complete, impartial and timely manner of political, economic, educational, scientific, religious, cultural, sport and other events in the country and abroad;

b) Facilitate an open and free discussion on issues of public interest, taking into account universality of appeal;

c) Respect and promote pluralism of political, religious and other ideas;

d) Treat impartially all political, economic, educational, scientific, religious, cultural and other issues in order to enable equal presentation of different viewpoints with a view to fostering democratic spirit, mutual understanding and tolerance;

e) Foster and develop all forms of creative capacities that contribute to the development of culture, art and entertainment;

f) Contribute to respect and promotion of fundamental human rights and freedoms, democratic values and institutions as well as promotion of a dialogue;

g) Respect privacy, dignity, honour and reputation of man and fundamental rights of others, children and youth in particular;

h) Public broadcasters shall adjust monitoring of their informative, cultural, educational and entertainment programs to the persons with damaged hearing and other persons with special needs.

(2) News shall be unbiased, independent and correct. Before dissemination, information material comprising the news must be examined, with reasonable care, according to circumstances, as to its content, origin and truth. Commentary shall be clearly distinguished from news.

V. Admissibility

14. The present request was submitted by the Chair of the House of Peoples. Therefore, the request meets the admissibility requirement as to the authorized person to submit a request to the Constitutional Court.

15. The mechanism for protecting the vital interests of one people is very important in the states with multi-ethnic, multilingual and multi-religious communities or communities which accommodate similar differences. On the other hand, each invocation of vital

interest results in a stricter criterion for adoption of general acts, including a special majority requirement (Article IV.3 (e) of the Constitution of Bosnia and Herzegovina) and as a last resort, procedure before the Constitutional Court. The consequence is the interruption of parliamentary procedures, which may have an adverse effect on the work of the legislative body and functioning of the state. For that reason, as the Constitutional Court has previously held in its Decisions *U 2/04* (Decision of 28 May 2004, Official Gazette of Bosnia and Herzegovina No. 98/04, paragraph 18) and *U 8/04* (Decision of 25 June 2004, Official Gazette of Bosnia and Herzegovina No. 40/04 paragraph 22) that the procedure under Article IV.3 (f) of the Constitution of Bosnia and Herzegovina should be invoked only if there are reasons for holding that a draft Law is destructive to the vital interests of one of the constituent peoples, and/or that there is a serious controversy and doubt as to whether the procedures set out in Article IV.3 (e) and (f) have been properly followed. On the other hand, considering that a request to the Constitutional Court under Article IV.3 (f) is filed by a legislative body acting as a political authority, such a request may be considered admissible as long as there is an objective interest in the resolution of the dispute, even if the applicant does not assert a subjective interest in the resolution of the dispute. Bearing this in mind, the Constitutional Court is not bound by the request itself, as the public interest prevails over the request itself.

16. In the instant case, the Objection of the Croat Caucus refers to the vital interests of that people. The Objection contains several reasons for considering that the Draft Law is destructive to the vital interests of the Croat people. In substance, the reasons set out in the Objection as to the destructiveness of the vital interests are reflected in the following: it is claimed that the Draft Law violates the right of the Croat people in Bosnia and Herzegovina to freedom of expression under Article 10 of the European Convention for they are denied a radio and television channel in their own language. It is also claimed that the Croat people in Bosnia and Herzegovina are discriminated against in relation to the Bosniac and Serb peoples because the latter *de facto* have radio and television channels in their own languages. Moreover, it is maintained that the Croat people in Bosnia and Herzegovina are discriminated against on grounds of representation of their culture and traditional heritage in the programs of the public broadcasters as compared to the other two constituent peoples. Furthermore, it is argued that the Draft Law does not provide mechanisms for the implementation of the programming principles of the public broadcasters defined under Article 26 thereof and that the System Board does not provide guarantees that the members of all constituent peoples would be equally represented in it.

17. It is clear from the analysis of the procedural regularity that the Objection of the Croat Caucus No. 02-02-3-6/05 of 29 June 2005, was signed by the majority of the Delegates, namely Mr. Ilija Filipović, Mr. Velimir Jukić, Mr. Anto Spajić and Mr. Branko ZrNo. The objection raised by the Bosniac Caucus No. 02-02-3-6/05 of 30 June 2005, was signed by all five Delegates of that Caucus, namely Mr. Osman Brka, Mr. Halid Genjac, Mr. Hilmo Neimarlija, Mr. Hasan Čengić and Mr. Mustafa Pamuk. On the same day, a joint commission was established in the following composition: Mr. Ilija Filipović, Mr. Halid Genjac and Mr. Vinko Radovanović. The commission convened on 30 June 2005 but, as it failed to find a solution, it decided to refer the whole case to the Constitutional Court for further procedure. The applicant submitted a request to the Constitutional Court on 6 July 2005 and attached thereto a certified transcript of the Draft Law, pursuant to Article 20 of the Constitutional Court's Rules of Procedure.

18. The Constitutional Court thus found that the request in question was submitted by an authorized person, that the preconditions for a reference set out in Article IV.3 (e) and (f) of the Constitution of Bosnia and Herzegovina have been met, and that the formal requirements under Article 16 paragraph 2 of the Constitutional Court's Rules of Procedure have also been met.

19. It follows that the present request is admissible.

VI. Merits

20. The applicant requests a review of the procedural regularity of the Objection made by the Croat Caucus in the House of Peoples that the Draft Law is destructive to the vital interests of the Croat people in Bosnia and Herzegovina. The consequences of allowing the special procedure under Article IV.3 (e) to be invoked, where the representatives of the constituent peoples cannot reach agreement as to whether or not a proposed decision is destructive to the vital interests of one or more of the peoples, are serious. They include a blockage of the work of the Parliamentary Assembly with regard to the issue in question, since the proposed decision is highly unlikely to obtain the support of a majority of the Delegates of at least one of the constituent peoples. For this reason, the Constitutional Court has previously held that Article IV.3 (f) requires it as the supreme guardian of the Constitution of Bosnia and Herzegovina to assist in unblocking the work of the Parliamentary Assembly if the Parliamentary Assembly cannot overcome the problem itself. In order to achieve this, the Constitutional Court has held that it must examine two issues on their merits:

a) whether the proposed decision objectively affects the vital interests of one or more of the constituent peoples; and

b) if so, whether the proposed decision would be destructive to those interests.

(see Constitutional Court, decision No. U 2/04 of 28 May 2004, published in the *Official Gazette of Bosnia and Herzegovina* No. 98/04, paragraphs 27 and 28). In other words, a Objection made by a majority of Delegates of one of the constituent peoples under Article IV.3 (e) of the Constitution of Bosnia and Herzegovina will not be regarded as meeting the requirement of procedural regularity if, as an objective constitutional matter, the interest affected by a proposed decision is not the vital interest of one or more of the constituent peoples, or is not destructive to such interest.

21. In order to review the request with respect to the Objection that the Draft Law is destructive to the vital interest of the Croat people, the Constitutional Court must therefore first decide whether the Draft Law affects the "vital interests" within the meaning of Article IV.3 (e) of the Constitution of Bosnia and Herzegovina.

VI.1. The notion of a vital interest of a constituent people

22. The Constitutional Court, noting that the Constitution of Bosnia and Herzegovina contains no definition of 'vital interests', has in the past declined to define or enumerate exhaustively the elements of the vital interests of the constituent peoples. However, it has drawn attention to a number of factors that shape its understanding of the term: Decision of the Constitutional Court U 2/04, paragraphs 31 et seq. First, the notion of the 'vital interests' is functional: it cannot be separated from the notion of the constituent status of the constituent peoples whose vital interests are served and protected by Article IV.3 (e) and (f) of the Constitution of Bosnia and Herzegovina. The last line of the Preamble to the Constitution defines Bosniacs, Serbs and Croats as "constituent peoples (along with Others), and citizens of Bosnia and Herzegovina". In its Third Partial Decision *U 5/98* (Decision of 7 January 2000, Official Gazette of Bosnia and Herzegovina No. 23/00, paragraph 52), the Constitutional Court concluded that "however vague the language of the Preamble of the Constitution of BiH may be due to this lack of definition of the status of Bosniacs, Croats, and Serbs as constituent peoples, it clearly designates all of them as constituent peoples, i.e. as peoples". Furthermore, the Constitutional Court concluded that "taken in conjunction with Article I of the Constitution, the text of the Constitution of BiH thus distinctly distinguishes constituent peoples from national minorities with the intention of affirming the continuity of Bosnia and Herzegovina as a democratic multi-ethnic state" (*ibid*, paragraph 53).

23. Secondly, the notion of constituent status of peoples is not an abstract notion but it incorporates certain principles without which a society with differences between peoples protected under its constitution could not function efficiently (Decision of the Constitutional Court U 2/04, paragraph 33). Accordingly, a proposed decision of the Parliamentary Assembly that affects the ability of the state to function efficiently while protecting such differences is more likely to affect the vital interests of a constituent people than other proposed decisions.

24. Thirdly, the meaning of 'vital interests' is partly shaped by Article I.2 of the Constitution of Bosnia and Herzegovina, which provides that Bosnia and Herzegovina shall be a democratic state, i.e. "that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society" (line 3 of the Preamble). To this end, the interest of the constituent peoples in fully participating in the system of government and the operation of public authorities can be seen as a vital interest. The Constitution of Bosnia and Herzegovina reflects this, requiring officials appointed to positions in the institutions of Bosnia and Herzegovina to be 'generally representative of the peoples of Bosnia and Herzegovina' (Article IX.3). On one hand, this means that the state authorities should, in principle, be a representative reflection of advanced co-existence of all peoples in Bosnia and Herzegovina, including minorities and others. On the other hand, "efficient participation of constituent peoples in the authorities", if it falls outside the constitutional framework, must never be carried out or imposed at the expense of effective operation of the state and its authorities. To that end, the Constitutional Court reasoned that "no provision of the Constitution allows for the conclusion that these special rights for the representation and participation of the constituent peoples in the institutions of BiH may be applied also for other institutions or procedures. On the contrary, insofar as these special collective rights might violate the non-discrimination provisions, (…) they are legitimized solely by their constitutional rank and therefore have to be narrowly construed. In particular, it cannot be concluded that the Constitution of BiH provides for a general institutional model which could be transferred to the Entity level or that similar, ethnically-defined institutional structures on an Entity level need not meet the overall binding standard of non-discrimination according to Article II.4 of the Constitution of BiH or the constitutional principle of collective equality of constituent peoples" (Third Partial Decision U 5/98*,* paragraph 68). It can be correctly inferred from the aforesaid that the special ethnically-defined institutional structures are the only means of achieving a compromise between basing the composition of institutions entirely on collective representation of the constituent peoples on the one hand and basing it entirely on the results of individual citizens' electoral choices on the other hand. The Constitution of Bosnia and Herzegovina

also imposes a quota system when composing the House of Peoples (Article IV.1), for appointing the Chair and Vice-Chairs of the Houses of the Parliamentary Assembly (IV.3 (b)), for composing the Presidency of Bosnia and Herzegovina (Article V), and when first composing the Governing Board of the Central Bank of Bosnia and Herzegovina (Article VII paragraph 1 item 2). In addition to the quota-based system, Article IV.1 (b) of the Constitution of Bosnia and Herzegovina sets forth the decision-making process in the House of Peoples, requiring a minimum presence and representation of Delegates of each constituent people. Finally, Article IV.3 (e) and (f) and Article V.2 (d) of the Constitution of Bosnia and Herzegovina introduce the principle of protection of vital interests of the constituent peoples as an additional constitutional safeguard.

25. The meaning of these safeguards was interpreted by the Constitutional Court in the aforementioned Decision No. *U 5/98*, underlining therein that "it is a generally recognized principle to be derived from the list of international instruments in Annex I to the Constitution of BiH that a government must represent the whole people belonging to the territory without distinction of any kind, thereby prohibiting – in particular according to Article 15 of the Framework Convention on the Protection of National Minorities which is incorporated into the Constitution of BiH through Annex I – a more or less complete blockage of its effective participation in decision-making processes. Since effective participation of ethnic groups is an important element of democratic institutional structures in a multi-ethnic state, democratic decision-making would be transformed into ethnic domination of one or even more groups if, for instance, absolute and/or unlimited veto-power would be granted to them, thereby enabling a numerical minority represented in governmental institutions to forever impose its will on the majority" (*ibid*, paragraph 55). Accordingly, the Constitutional Court concludes that the effective participation of constituent peoples in the processes of political decision-making and prevention of absolute domination of one people by the others represent the vital interests of each constituent people.

26. Fourthly, the vital interests of the constituent peoples include upholding various rights and freedoms which significantly help to ensure that the constituent peoples can effectively advance their interests in collective equality and participation in the state. As well as being constitutional rights (see Article II.4 of the Constitution of Bosnia and Herzegovina in conjunction with Articles I.4, II.3 (m) and II.5 of the Constitution of Bosnia and Herzegovina, the European Charter for Regional or Minority Languages and the Fourth Partial Decision of the Constitutional Court No. *U 5/98* of 18 and 19 August 2000, *Official Gazette of Bosnia and Herzegovina* No. 36/00, paragraph 34), the freedom to use one's own language when participating, and to have access to education, information and ideas

in that language, are among these vital interests (see Decision of the Constitutional Court, *U 8/04*, paragraphs 38 through 41.) The same applies to freedom to pursue multi-cultural religious life (*ibid.*, paragraph 34; Fourth Partial Decision No. *U 5/98* of 18 and 19 August 2000, paragraph 44).

27. To sum up, without attempting to enumerate further the elements of the vital interests of one people, the notion of vital interest of a constituent people is a functional category and needs to be interpreted accordingly. In accordance with Article VI.3 para 1 of the Constitution of Bosnia and Herzegovina, the Constitutional Court upholds the Constitution and interprets it functionally. To that end, in examining each particular case, the Constitutional Court shall, within the given constitutional framework, be governed by the values and principles essential for a free and democratic society which embodies, *inter alia*, respect for the inherent dignity of man, great diversity of beliefs, respect for cultural identity and identity of groups as well as trust in the social and political institutions which promote participation of individuals and groups in a society. On the other hand, the protection of the vital interests must not endanger the functionality of the state, which is closely related to the neutral and essential understanding of the notion of citizenship, as the criterion of "national" affiliation. In other words, the protection of the vital interests must not lead to unnecessary disintegration of civil society as a necessary element in modern statehood.

VI.2. Existence of the vital interests of the Croat people

28. In the light of the above, the Constitutional Court considers that official use of a language is a vital interest of the constituent peoples. This includes the freedom to use that language in all aspects of public life, including broadcasting on public radio and television channels.

29. In addition, effective participation of the constituent peoples in decision-making procedures (including those relating to the operation of public broadcasting services), preventing absolute domination of one people by the others, is a vital interest of each constituent people.

30. The Constitutional Court observes that the Entity Constitutions identically define the vital national interests of the constituent peoples as including the interests in "equal rights of the constituent peoples in the decision-making process; education, religion, language, culture, tradition and cultural inheritance" (see Amendment LXXVII to the Constitution of the Republika Srpska and Amendment XXXVII to the Constitution of the Federation of

Bosnia and Herzegovina). Although the Constitution of Bosnia and Herzegovina does not include such a provision, the Constitutional Court finds the express terms of both Entity Constitutions persuasive in this respect.

31. In view of those considerations, the Constitutional Court concludes that the Draft Law and the Declaration of the Croat Caucus raise legitimate questions relating to the effect of the Draft Law on the vital interests of the Croat people in Bosnia and Herzegovina since the Draft Law, among other things, regulates the use of the official languages of the constituent peoples, representation of tradition and cultural heritage in the programs of the public broadcasters, and the control of implementation of the programming principles of the public broadcasters by the System Board. The Croat Caucus objects to the said solutions and considers that they discriminate against the Croat people as opposed to other two constituent peoples and violate their rights to freedom of expression under Article 10 of the European Convention.

32. It rests with the Constitutional Court to examine whether the Draft Law is destructive to the vital interests of the Croat people in Bosnia and Herzegovina.

VI.3. Destructiveness of the vital interests

33. The Constitutional Court recalls that the declaration of the Croat Caucus on the destructiveness to the vital interest of the Croat people lays particular emphasis on the following crucial issues: a) the suggested legal arrangements violate the right of the Croat people to freedom of expression for they are denied a radio and television channel in their own language; b) the suggested legal arrangements discriminate against the Croat people with regard to the other two constituent peoples on grounds of use of the Croat language in the programs of the public broadcasters and representation of culture and traditional heritage in the programs of the public broadcasters; and c) the suggested legal arrangements do not supply guarantees that the programming principles defined by the Draft Law would be implemented, as indicated by the suggested composition of the System Board. It may be that existing *de facto* arrangements for the public broadcasting system in Bosnia and Herzegovina and in the Entities result in unconstitutional discrimination between constituent peoples or that the Draft Law if passed and implemented would fail to insure the removal of any *de facto* discrimination. If that is the case it would be possible to take proceedings to enforce constitutional rights in the usual way. However, it is not the Constitutional Court's responsibility to determine the constitutionality of existing and possible future arrangements in the context of request under Article IV.3 (f) of the Constitution of Bosnia and Herzegovina.

34. In assessing these arguments, the Constitutional Court is not required or empowered by Article IV.3 of the Constitution of Bosnia and Herzegovina to decide whether the Draft Law, if passed, would infringe constitutional rights or would for some other reason be unconstitutional. The sole task of the Constitutional Court is to decide whether the draft Law is destructive to the vital interests of the Croat people in relation to (a) the use of the Croat language, (b) representation of Croat traditions and cultural heritage in broadcasts, and (c) control of decision-making in relation to the implementation of the programming principles.

VI.3.1. Issue of language in the context of freedom of expression under Article 10 of the European Convention

35. For reasons outlined above, the language rights of the constituent peoples may represent the vital interests. The importance of expression, and by implication of language as a medium of expression, is underlined by Article 10 of the European Convention, which reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

36. The European Court undoubtedly attaches in its judgments enormous significance to the right to freedom of expression under Article 10 of the European Convention. For instance, in the *Handyside* case (Judgment of 7 December 1976, Series A No. 24), the European Court took the view that freedom of expression constituted "one of the essential foundations of a democratic society and one of the basic conditions for its progress…" In addition, the European Court underlined that it was incumbent on the press, audiovisual media included, to impart information and ideas of public interest and that the public had a right to receive them (*Jersild*, Judgment of 23 September 1994, Series A No. 298). Were

it otherwise, the press would be unable to "play its vital role of 'public watchdog' (ibid. paragraph 35, quoting *The Observer and Guardian*, Judgment of 26 November 1991, Series A No. 216, paragraph 59).

37. In view of the fact that the present case concerns a Draft Law claimed by the applicant to be destructive to the vital interests of the Croat people in Bosnia and Herzegovina for not guaranteeing freedom of expression in the Croat language (and, thereby, allegedly violating collective and individual right of the Croat people to the right to freedom of expression under Article 10 of the European Convention), the Constitutional Court shall refer to the case-law of the European Court of Human Rights when deciding cases where appellants are broadcasting companies.

38. In the *Informationsverein Lentia* case (Judgment of 24 November 1993, Series A No. 276) concerned five applications for broadcasting licenses (one for television and four for radio) which were refused, because the Austrian Broadcasting Corporation held a monopoly. The Austrian Government relied on the third sentence of paragraph 1 of Article 10 of the European Convention, or, in the alternative, on the limitations in paragraph 2 of Article 10, and argued that the monopoly enabled the State to regulate the technical aspects of audio-visual activities and to determine their place and role in modern society. The European Court for Human Rights found a violation of Article 10 of the European Convention, observing that the State is the 'ultimate guarantor' of pluralism, and that a public broadcasting monopoly could not be justified.

39. In addition, the European Court has emphasized that a State must take account not to violate the right of a person to receive information when regulating public broadcasting. In the *Autronic AG* case (Judgment of 22 May 1990, Series A No. 178), the Swiss Government refused to issue a license to the said company specialized in electronics for receiving programs emitted by a Soviet satellite. The European Court found a violation of the right under Article 10 of the European Convention.

40. It may be inferred from the quoted case-law of the European Court that the European Court considers public monopolies in audiovisual media to violate Article 10 of the European Convention primarily because they cannot ensure several different sources of information and a plurality of points of view. However, the present issue is not concerned with plurality of viewpoints but with the use of language. The Draft Law neither excludes nor favours any language of the constituent people in relation to other languages; on the contrary, Article 26 paragraphs 4 and 5 thereof guarantee equality of three official languages of the constituent peoples. The Draft Law does not contain provisions that

would manifestly (*prima facie*) or necessarily suggest that the Croat language would not be equally represented with the other two languages of the constituent peoples, and Article 26 paragraphs 4 and 5 guarantee the equal representation of the Croat language. This serves to distinguish the provisions in question from those provisions of the Framework Law on Higher Education that the Constitutional Court held to be destructive to the vital interests of the Croat people (and other constituent peoples) in Bosnia and Herzegovina in Decision No. *U 8/04* of 25 June 2004, paragraph 49.

41. The Constitutional Court also considers to be unjustified the invocation by the Croat Caucus of the rights guaranteed to minorities under the European Charter for Regional or Minority Languages, which obliges the Parties to ensure for the national minorities the creation of at least one radio station and one television channel in the regional or minority languages. The European Charter for Regional or Minority Languages guarantees special rights to national minorities and in order to be able to invoke exercise of those rights, a certain group of people must be defined as a minority in the positive legislation of a state. The Croat people are not a national minority in Bosnia and Herzegovina but a constituent people as set out in the last line of the Preamble to the Constitution of Bosnia and Herzegovina. As such, they cannot invoke special rights enjoyed by national minorities only. The Croat Caucus argues that as a constituent people the Croat people in BiH should be entitled to rights at least as extensive as those guaranteed by the aforementioned Charter. This misunderstands the purpose of the Charter. The purpose of the European Charter for Regional or Minority Languages is to protect groups which, by reason of their minority status, lack effective protection for their language rights against domination by the languages of majority groups. In Bosnia and Herzegovina the language rights of the constituent peoples enjoy extensive protection under the Constitution and laws of Bosnia and Herzegovina. The constitutional principle of the collective equality of the constituent peoples requires equal treatment of all constituent peoples by public authorities and public services in BiH and the Entities. This applies to their rights to use their own languages and to enjoy their cultural traditions. As noted above, Article 26 paragraphs 4 and 5 of the Draft Law itself protects the language rights of the Croat people. That being so, there is no need to give additional protection to those rights by providing special radio and TV services in the Croat language to advance Croat language and traditions. The European Charter for Regional or Minority Languages therefore cannot form the basis of a claim that the Draft Law is destructive to the vital interests of the Croat people.

42. Therefore, the Constitutional Court concludes that the Draft Law is not destructive to the vital interests of the Croat people in Bosnia and Herzegovina with respect to the use of the Croat language.

VI.3.2. Issue of the position and representation of the Croat language, culture and traditional heritage in relation to the other two constituent peoples under the Draft Law taking account of the non-discrimination under Article 14 of the European Convention

43. For the reasons developed above, the Constitutional Court regards a proposed decision of the Parliamentary Assembly that discriminates against one of the constituent peoples as being particularly likely to be destructive of one of that people's vital interests. The constitutional importance of the principle of collective equality was emphasized by the Constitutional Court in its Third Partial Decision in case No. *U 5/98* of 1 July 2000 (see *Official Gazette of Bosnia and Herzegovina* No. 23/00). It is reinforced by Article 14 of the European Convention, which provides 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

44. The Constitutional Court pointed to the principles employed for testing whether a law has "discriminatory purpose or effect" in its Third Partial Decision in case No. *U 5/98*, paragraph 79. The Constitutional Court considers that the said principles can be applied to the instant case and they are repeated below:

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

means used and the aim sought to be realized. The principle of proportionality thus presupposes four steps of consideration: whether there is a justified public aim, whether the means employed can pursue a legitimate goal, whether the means are necessary, i.e. whether they have the minimum of relevance to fulfil the goal and finally, whether the burdens imposed are proportional in comparison to the significance of the goal.

b) A law is discriminatory if, although *prima facie* neutral, it is administered in a discriminatory way.

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

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

45. In relation to the first point, do the suggested solutions in the Draft Law discriminate against the Croat people in Bosnia and Herzegovina with regard to their language, culture and traditional heritage as compared with the other two constituent peoples? If so, the Draft Law would be destructive of the vital interests of the Croat people in Bosnia and Herzegovina. Do the suggested provisions of the Draft Law *prima facie* discriminate by using criteria such as language, religion, political or other opinion, national origin, association with a minority or any other status to classify groups of people that are treated differently on those grounds? It is clear to the Constitutional Court that the Draft Law does not supply any grounds to infer that the Croat people would be discriminated against in relation to the other two peoples as regards representation of the Croat language, culture and traditional heritage in the programs of the public broadcasters. Indeed, the provisions of Article 26 paragraphs 4 and 5 of the Draft Law clearly stipulate that the programs of the public broadcasters shall be edited equally in three languages and two scripts and they shall ensure equal representation of contents reflecting the heritage of all three constituent peoples. As noted above, this makes the case very different from Decision No. *U 8/04* of 25 June 2004, where the relevant provisions of the law expressly made it possible to use only one or two of the languages of the constituent peoples as the official language or languages in higher education institutions. Nothing on the face of the Draft Law in the present case suggests that the Draft Law is intrinsically discriminatory or will be applied in a discriminatory way. Indeed, the indications are to the opposite effect.

46. The Constitutional Court notes the claim that the Draft Law is destructive to the vital interests of the Croat people in Bosnia and Herzegovina because the existing television stations of the Federation of Bosnia and Herzegovina and of the Republika Srpska are *de facto* television stations in the Bosnian and Serb languages and satisfy the needs of the Bosniac and Serb peoples. However, the Constitutional Court does not accept that argument. The Constitutional Court considers that the programming principles and standards defined in Articles 26 and 27 of the Draft Law (with particular stress on equal representation of all three official languages, two scripts, and the culture and traditional heritage in program broadcasting) must be applied to all broadcasters at all levels (state, entity, cantonal, municipal). If it is properly implemented, the Draft Law should help to ensure that all television and radio broadcasters are increasingly open to the languages, cultures and traditions of all three constituent peoples. The Constitutional Court therefore would not consider the Draft Law to be destructive to the vital interests of the Croat people even if it is correct to say that, at present, the other state-owned channels prefer to broadcast programs for the other two constituent peoples (as to which no evidence has been presented to the Constitutional Court).

47. In view of the aforesaid, the Constitutional Court considers that there are no grounds for concluding that the Draft Law is destructive to the vital interests of the Croat people in Bosnia and Herzegovina with regard to discrimination on grounds of representation of their language, culture and traditional heritage in the programs of the public broadcasters.

VI.3.3. Issue of participation of the Croat people in the System Board and implementation of principles set out in Articles 26 and 27 of the Draft Law

48. The Constitutional Court has clearly indicated in its case-law that "effective participation of the constituent peoples in state authorities" is an element inherent to the notion of vital interest of a constituent people (*mutatis mutandis*, *U 5/98*, Third Partial Decision of 1 July 2000). However, the Constitutional Court also took the position that "effective participation of the constituent peoples in the authorities, if it falls outside the constitutional framework, must never be carried out or imposed at the expense of efficient operation of the state and its authorities" (*mutatis mutandis*, *U 8/04*, Decision of 25 June 2004). Moreover, the Constitutional Court adopted decisions in which it found a violation of the constitutional principle of constituent status of peoples on the entire territory of Bosnia and Herzegovina in cases when a constituent people was not guaranteed participation in a representative body that was otherwise guaranteed to the other two constituent peoples (see, for instance, *U 4/05*, Decision of 22 April 2005; published in the *Official Gazette of Bosnia and Herzegovina* No. 32/05).

49. In the present case, the Constitutional Court takes the view that the System Board cannot be regarded as a "state authority" in the same way as the Parliamentary Assembly, government, ministries, etc., are state authorities. The System Board would not exercise the legislative or executive power of the State, but would be responsible for implementing principles and legislative rules made by other bodies. Furthermore, the System Board cannot be said to be a representative body authorized to adopt legally binding acts within the scope of its jurisdiction as was the case in the matter of constitutionality of elections to the City Council of the City of Sarajevo in U 4/05, above. The conclusion to be drawn is that it would not be necessary to define the composition of the Board with respect to representation of the constituent peoples and Others. In view of the competences of the System Board, particularly with reference to the programming principles affecting vital national interest of all constituent peoples and the application of those principles in practice, the Constitutional Court considers that it would be very desirable, and might be constitutionally necessary, for all constituent peoples and Others to be appropriately represented on the Board. This would help to ensure that decisions of the Board are taken in a manner that would secure the application of those principles, and to reduce the risk of subsequent challenges to the constitutionality of the composition of the Board and of its decisions. Nevertheless, the terms of the Draft Law do not prevent the members of the System Board (and the Boards of the component elements in the Public Broadcasting System of Bosnia and Herzegovina) from being selected in such a way as to meet this aim. Accordingly, there are no grounds to claim that the Draft Law is destructive to the vital interests of the Croat people in Bosnia and Herzegovina because it does not stipulate that representatives of all constituent peoples and Others must be appointed to the System Board.

VII. Conclusion

50. The Objection of the Croat Caucus in the House of Peoples on the destructiveness of the Draft Law to the vital interest of the Croat people in Bosnia and Herzegovina, made under the procedure laid down in Article IV.3 (e) of the Constitution of Bosnia and Herzegovina, does not satisfy the requirement of procedural regularity as that term is used in Article IV.3 (f), because the Draft Law is not destructive to the vital interests of the Croat people in Bosnia and Herzegovina. The appropriate procedure in further proceedings in the Parliamentary Assembly for adopting the law is therefore the one prescribed by Article IV.3 (d) of the Constitution of Bosnia and Herzegovina.

51. Having regard to Article 61 paragraphs 1 and 3 of the Constitutional Court's Rules of Procedure, the Constitutional Court decided by a majority of votes as stated in the

enacting clause above. The dissenting opinion of Judge Valerija Galić and the Declaration of Mr. Mato Tadić, President of the Constitutional Court, on joining the dissenting opinion of Judge Valerija Galić shall make an integral part of this Decision.

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

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

ANNEX

Separate opinion of Valerija Galić, Judge of The Constitutional Court of BiH, dissenting from the Decision of the Constitutional Court of BiH in case No. U 10/05

Pursuant to Article 41 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (*Official Gazette of Bosnia and Herzegovina* No. 2/04), I hereby deliver my separate opinion dissenting from the aforesaid Decision for the following reasons:

In substance, my first disagreement with the majority decision of the Constitutional Court in the aforesaid case relates to the conclusion expressed in paragraph 42 of the Decision in regard to Article 26 of the Draft Law on the issue of equality of languages in the context of freedom of expression referred to in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

1. In terms of examination of the disputed Article 26 of the Draft Law, it is necessary to refer to the relevant provisions of the Constitution of Bosnia and Herzegovina, the Decision on Constituent Peoples adopted by the Constitutional Court of Bosnia and Herzegovina, the European Convention for the Protection of Human Rights and a number of other international agreements on human rights (Article 2.1 of the Universal Declaration of Human Rights, Article 19.2 of the International Covenant on Civil and Political Rights and Article 11 of the European Charter for Regional or Minority Languages), which all together stress the value of intercultural relations and multilingualism.

2. The preservation of the ethnical, cultural, linguistic, religious and any other identity, particularly those of a minority, represents a value that is the result of the civilization development until present time provided that it does not endanger other important values such as the territorial integrity of a country. It should be noted that the European history shows that a number of wars were waged due to unresolved national issues and lack of appropriate mechanisms for the protection of minority peoples and minorities. This is the reason why most of the European documents point to the protection and promotion of intermulticultural relations, multilingualism, media pluralism and diversity, which represent an important contribution to the development of Europe on the principles of democracy and cultural diversity within the national sovereignty and territorial integrity. Models relying on the historical heritage in the countries such as Finland, Belgium,

Germany, Denmark, Great Britain and Switzerland are example where that issue was resolved in a satisfactory manner.

3. Moreover, it is necessary to point out the views of expert groups of the Council of Europe in charge of media, who stress the need for providing media pluralism as a fundamental principle of the European media policy and cultural diversity as an integral part of the cultural identity preventing domination of one culture over the minority culture. This is also reflected in the recommendations of the Parliamentary Assembly of the Council of Europe, which were invoked both by the applicants as well as by the Bosniac Caucus in their objection to the Declaration. Moreover, I consider the Venice Commission's opinion on "vital interest veto" from March 2005 to be very important. In its item 33, it is pointed to the fact that the definition of the vital interest should not be excessively broad but focused on rights of particular importance to the respective peoples, mainly in areas such as language, education and culture. I would like to refer to the Resolution of the Parliamentary Assembly of the Council of Europe - the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) in which it was stated that it was to continue following closely the question of freedom of the media in Bosnia and Herzegovina and, in particular, the independence of the Communications Regulatory Agency ensuring that the public service broadcasting laws are adopted and implemented as soon as possible in accordance with the relevant European standards.

4. In the instant case, Article 10 of the European Convention is particularly important. According to the European Court for Human Rights, Article 10 is one of the foundations for democratic society and one of the fundamental conditions for progress. On the basis of such a position, which may be considered as a consistent case-law, the European Court has developed a broad interpretation of the rights laid down in Article 10 of the European Convention which includes freedom to hold opinions and to receive and impart information.

5. Inferring from the aforementioned standards of the European Court and democratic criteria provided for in the aforementioned documents relating to the guarantees of freedom and pluralism of media *ipso facto* languages, cultures and other values of the constituent peoples of Bosnia and Herzegovina and signatories of the Declaration in the instant case, I hold that Article 26 of the Draft Law does not meet the aforementioned standards, which represents the key point of my dissent from the Decision.

6. Namely, it is undisputable that Article 26 of the Draft Law guarantees, within the programmes' principles, the compliance with the equality principles in terms of use of all three official languages of the constituent peoples and all citizens of Bosnia and Herzegovina. In my opinion, the aforementioned provision is rather a general norm that only gives an indication that the principles stated in that provision will be respected. However, invoking both European Court standards and the rule of law principles that the laws must be formulated with the sufficient precision and that the legal consequences must be definite and suitable to the legitimate expectations they will be applied to, I consider that Article 26 of the Draft Law does not meet these standards. Considering the significance of the subject matter regulated by this law, my opinion is that there should have been a more flexible and more subtle approach to this issue in terms of the requests of the signatories of the Objection emphasized in the parliamentary procedure with the goal to have this provision made more precise. Without making an assumption that the proposal of the signatories of the Objection referring to three channels in three official languages is the most favourable solution, I consider that the principles set out in Article 26 should have been made operational as to ensure the satisfactory effects in the application of this Law. In its present form, Article 26 of the Draft Law is only declaratory in its nature.

Additionally, I consider that in this case, the statements referred to in paragraph 41 of the Decision cannot represent the basis for the Constitutional Court to consider the invocation by the Croat Caucus of the rights guaranteed to minorities under the European Charter for Regional or Minority Language as unjustified. Namely, the conclusion made in this paragraph, in my opinion, implies that the status of the "national minority" would better facilitate the Croat people in realizing their legitimate rights.

7. I also disagree with the conclusions of the Decision relating to the issue of participation of the Croat people in the System Board of the Public Broadcasting System as well as the implementation of the program principles from Articles 26 and 27 of the Draft Law. The System Board of the Public Broadcasting System referred to in Articles 7 and 8 of the Draft Law is the significant body within the Public Broadcasting System and it has significant powers within the scope of its activities as well as a range of discretionary powers. Complying with the European standards, according to which the level of the law's precision that is required in the internal legislation depends on the significant level of the instruments in the field that should be covered by the law and that the protection must exist especially in the cases where the text conveys discretionary powers, I consider the request of the applicants for specifying the equal participation of the members of

the constituent peoples in the System Board of the Public Broadcasting System as being well-founded and legitimate in its entirety. It is undisputable that the System Board of the Public Broadcasting System is a public body at the level of BiH. In the majority of laws establishing the public bodies at the level of BiH, the equal composition of those bodies among the members of constituent peoples of BiH is specified in precise terms, in most cases. However, there is a question why such practice was not followed in this Law as well? In addition, I am of the opinion that it will be very difficult to implement the provision on the composition of the System Board of the Public Broadcasting System in terms of the number, composition and bodies that appoint the management boards of the Public Broadcasting Systems at the levels of the entities and level of BiH, established in accordance with the valid laws. I am of the opinion that the manner, in which the System Board of the Public Broadcasting System is envisaged in Articles 7 and 8 of the Draft Law, does not ensure even the minimum of compliance with the principle of the equality of all three constituent peoples. In fact, the System Board consists of 12 members: four from each Public Broadcasting Systems; seven members make quorum for the work while the decisions can be adopted by the present majority (four members), which means *de iure* and *de facto* the representatives of the Public Broadcasting System can adopt any important decisions for all three constituent peoples.

8. For all these reasons, I cannot agree with the conclusions from the Decision that the Draft Law is not destructive to the vital interests of the Croat people. In my opinion, the adopted Decision is only a pragmatic concession made to the Parliamentary Assembly of BiH in unblocking its work during the adoption of the contested Law. In terms of the pragmatic level of the relations between the Constitutional Court of BiH and the Parliamentary Assembly of BiH, especially regarding the jurisdiction arising under Article IV.3 (f) of the Constitution of BiH and its exercise, the Constitutional Court can successfully influence the political processes and contribute to the rationalization of the decision-making process successfully. However, on the other side, the role of the Constitutional Court as a safeguard of the objective constitutional system and as a part of the exercise of this jurisdiction, is also to protect the rights of the parliamentary majority and retaining the parliamentary majority within the constitutional powers, which, in my opinion, has not been achieved in this case.

9. The apprehension of one people, in this case of the Croat people as a minority people, that it cannot formally safeguard by means of a law the ethnical, cultural, linguistic, religious and any other identity that represent a value being the result of the civilization

development until present time, provided that it does not endanger other important values such as the territorial integrity of a country, will always represent for me the vital interest of a people. In my opinion, the inability to represent the vital interest in accordance with the democratic standards through a law makes this law destructive to the interests of a certain people. Therefore, insisting on the part of the applicant in the Objection for adoption of the law that will satisfy the democratic standards in realization and treasuring the national, cultural, language and other identity through public media cannot be considered as a wish for sovereignty or political autonomy but should be understood, in my opinion, primarily as a struggle for full equality of all three constituent peoples and as an apprehension of the Croat people as a minority people that it will be subjected to the accelerated assimilation because it cannot obtain its vital interests either through law or *de facto*.

Declaration of Mr. Mato Tadić,
President of the Constitutional Court of BiH,
on joining the Dissenting opinion in respect of the Decision of the Constitutional Court of BiH in case No. U 10/05

Pursuant to Article 41 of the Rules of Procedure of the Constitutional Court of BiH – New Amended Text (*Official Gazette of BiH* No. 2/04), I hereby declare that I disagree with the majority Decision of the Constitutional Court of BiH adopted in case No. *U 10/05* and I fully support the separate opinion delivered by Ms. Valerija Galić, Judge of the Constitutional Court of BiH, dissenting from the Decision of the Constitutional Court of BiH in the said case.

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Case No. AP 58/03
The appeals of:
- Mr. S. G., against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina, No. U-18/02 of 3 December 2002 and Nos. U-18-2/03, U-20/03 and U-24/03 of 17 September 2003,
- Mr. E. B., against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina No. U-17/02 of 3 December 2002 and Nos. U-13-1/03 of 8 July 2003 and nos. U-18-1/03 and U-19-1/03 of 17 September 2003, and
- Mr. D. Č., against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina No. U-13-2/02 of 8 July 2003 and Nos. U-19-2/03 and U-25-1/03 of 17 September 2003

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Case No. AP 163/03
Appeal of Mr. P. R. from Zenica against the Ruling of the Cantonal Court in Zenica, No. Gž-676/02 of 14 February 2003 and Ruling of the Municipal Court in Zenica, No. P-473/02 of 20 May 2002

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Case No. AP 288/03
Appeal Ms. N. L., Ms. S. L. and Mr. J. L. from Banja Luka for the failure to enforce the ruling of the Basic Court in Banja Luka, No. I-463/02 of 12 April 2002

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Case No. AP 464/04
Appeal of Ms. Lj. S., Ms. D. S. and Mr. D. S. from Milići for the failure to enforce the ruling of the Basic Court in Banja Luka, No. I-3787/01 of 16 October 2001

DECISION ON ADMISSIBILITY AND MERITS of 17 February 2005
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Case No. AP 661/04
Appeal of Mr. M. Š. from Trebinje against the Judgment of the County Court in Trebinje, No. Kž-37/04 of 25 May 2004 and Judgment of the Basic Court in Trebinje, No. K-15/04 of 24 March 2004

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Article II.3 (f) of the Constitution of Bosnia and Herzegovina
Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms
(Right to respect for private and family life)

Case No. U 15/99
Appeal of Mrs. S. Z. from Prijedor against the Judgment of the Supreme Court of the Republika Srpska, No. Rev. 91/98 of 26 May 1999, the Judgment of the County Court of Banja Luka, No. Gž-474/97 of 25 September 1997 and the Judgment of the Municipal Court of Prijedor, No. P-61/96 of 27 December 1996

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Case No. U 14/00
Appeal of Ž. M. from Cazin against the judgment of the Supreme Court of Federation of Bosnia and Herzegovina, No. Už- 39/00 of 18 May 2001

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Case No. AP 129/04
Appeals of Ms. M. H. et al. with regard to the persons who went missing during the war in Bosnia and Herzegovina

DECISION ON ADMISSIBILITY AND MERITS of 27 May 2005

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Case No. AP 696/04
Appeal of Mr. Bogdan Subotić against Bosnia and Herzegovina for being arrested and detained by the SFOR

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Case No. U 55/02
Referral of the Basic Court in Doboj of a question regarding the compatibility of Article 20 of the Law on Housing Relations with the Constitution of Bosnia and Herzegovina (Official Gazette of the SR Bosnia and Herzegovina, No. 14/84, 12/87 and 36/89 and Official Gazette of the Republika Srpska, No. 19/93 and 22/93)

DECISION of 26 September 2003

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Article II.3 (g) of the Constitution of Bosnia and Herzegovina
Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms
(Freedom of thought, conscience and religion)

Case No. U 5/98
Request of Mr. Alija Izetbegović, Chair of the Presidency of Bosnia and Herzegovina, for review of conformity of certain provisions of the Constitution of the Republika Srpska

and the Constitution of the Federation of Bosnia and Herzegovina with the Constitution of Bosnia and Herzegovina

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Article II.3 (h) of the Constitution of Bosnia and Herzegovina
Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms
(Freedom of expression)

Case No. AP 163/03
Appeal of Mr. P. R. from Zenica against the Ruling of the Cantonal Court in Zenica, No. Gž-676/02 of 14 February 2003 and Ruling of the Municipal Court in Zenica, No. P-473/02 of 20 May 2002

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Article II.3 (k) of the Constitution of Bosnia and Herzegovina
Article 1 Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms
(Protection of property)

Case No. U 5/98
Request of Mr. Alija Izetbegović, Chair of the Presidency of Bosnia and Herzegovina, for review of conformity of certain provisions of the Constitution of the Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina with the Constitution of Bosnia and Herzegovina

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Case No. U 83/03
Request of Mr. Nikola Špirić, First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina for a review of constitutionality of Article 3a of the Law on the Cessation of Application of the Law on Abandoned Apartments (Official Gazette of the Federation of Bosnia and Herzegovina, Nos. 11/98, 38/98, 12/99, 31/01, 56/01, 15/02, 24/03 and 29/03)

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Case No. U 15/99
Appeal of Mrs. S. Z. from Prijedor against the Judgment of the Supreme Court of the Republika Srpska, No. Rev. 91/98 of 26 May 1999, the Judgment of the County Court of Banja Luka, No. Gž-474/97 of 25 September 1997 and the Judgment of the Municipal Court of Prijedor, No. P-61/96 of 27 December 1996

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Case No. U 14/00
Appeal of Ž. M. from Cazin against the judgment of the Supreme Court of Federation of Bosnia and Herzegovina, No. Už- 39/00 of 18 May 2001

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Case No. U 26/00
Referral of the Municipal Court of Cazin of a question regarding the compatibility of Article 54 of the Law on Amendments to the Labor Law with the Constitution of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, No. 32/00)

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Case No. U 50/01
Referral of the Cantonal Court of Široki Brijeg of a question regarding the compatibility of Article 37 of the Law on Amendments to the Law on Insurance of Property and Persons with the Constitution of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, No. 6/98)

DECISION ON MERITS of 30 January 2004

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Case No. U 55/02
Referral of the Basic Court in Doboj of a question regarding the compatibility of Article 20 of the Law on Housing Relations with the Constitution of Bosnia and Herzegovina (Official Gazette of the SR Bosnia and Herzegovina, No. 14/84, 12/87 and 36/89 and Official Gazette of the Republika Srpska, No. 19/93 and 22/93)

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Article II.3 (m) of the Constitution of Bosnia and Herzegovina
Article 2 Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms
Freedom of movement

Case No. U 5/98
Request of Mr. Alija Izetbegović, Chair of the Presidency of Bosnia and Herzegovina, for review of conformity of certain provisions of the Constitution of the Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina with the Constitution of Bosnia and Herzegovina

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Article II.4 of the Constitution of Bosnia and Herzegovina
Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms
(Prohibition of discrimination)

Case No. U 5/98
Request of Mr. Alija Izetbegović, Chair of the Presidency of Bosnia and Herzegovina, for review of conformity of certain provisions of the Constitution of the Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina with the Constitution of Bosnia and Herzegovina

PARTIAL DECISION III of 30 June and 1 July 2000
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PARTIAL DECISION IV of 18 and 19 August 2000
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Case No. U 44/01
Request of Mr. Sejfudin Tokić, Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for a review of constitutionality of Articles 11 and 11(a) of the Law on Territorial Organization and Local Self-Government (Official Gazette of the Republika Srpska, Nos. 11/94, 6/95, 26/95, 15/96, 17/96, 19/96 and 6/97) and the title itself of the Law on the Town of Srpsko Sarajevo as well as its Articles 1 and 2 (Official Gazette of the Republika Srpska, Nos. 25/93, 8/96, 27/96 and 33/97)

DECISION ON MERITS of 27 February 2004
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Case No. U 4/05
Request of Prof. Dr Nikola Špirić, First Deputy Chair of the Parliamentary Assembly of Bosnia and Herzegovina for a review of constitutionality of Article 21 of the Statute of the City of Sarajevo (Official Gazette of Sarajevo Canton, Nos. 12/98 and 14/98) and the following Decisions on the Selection of the Councilors to the City Council of the City of Sarajevo: the Decision on the Selection of the Councilors Delegated to the City Council of Sarajevo City from amongst the Councilors of the Municipal Council of the Municipality of Stari Grad Sarajevo, No. 02-49-137/05 of 3 March 2005, the Decision on the Selection of the Councilors to the City Council of the City of Sarajevo of the Municipal Council of the Municipality of Centar Sarajevo, No. 01-49-429/05 of 24 February 2005, the Decision on the Selection of the Councilors delegated to the City Council of the City of Sarajevo from amongst the Councilors of the Municipality of Novo Sarajevo, No. 01-02-183/05 of 2 March 2005 and the Decision on the Selection of the Councilors to the City Council of the City of Sarajevo from amongst the Councilors of the Municipal Council of the Municipality of Novi Grad Sarajevo, No. 01-02-1755/1 of 28 February 2005

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Case No. U 14/00
Appeal of Ž. M. from Cazin against the judgment of the Supreme Court of Federation of Bosnia and Herzegovina, No. Už- 39/00 of 18 May 2001

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Case No. U 64/01
Appeal of D.B. from Banja Luka against the Judgment of the Supreme Court of the Republika Srpska, No. Rev. 56/2000 of 15 June 2000

DECISION of 26 September 2003

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Case No. U 26/00
Referral of the Municipal Court of Cazin of a question regarding the compatibility of Article 54 of the Law on Amendments to the Labor Law with the Constitution of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, No. 32/00)

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Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms
(No punishment without law)

Case No. U 24/03
Request of nine Delegates of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for a review of constitutionality of the provisions of Article 6 para 2, Article 7 para 2 and Article 8 of the Law on Immunity of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 32/02) and Article 6 para 3, Article 7 para 2 and Article 8 of the Law on Immunity of the Federation of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 19/03)

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Case No. AP 58/03
The appeals of:
- Mr. S. G., against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina, No. U-18/02 of 3 December 2002 and Nos. U-18-2/03, U-20/03 and U-24/03 of 17 September 2003,
- Mr. E. B., against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina No. U-17/02 of 3 December 2002 and Nos. U-13-1/03 of 8 July 2003 and nos. U-18-1/03 and U-19-1/03 of 17 September 2003, and
- Mr. D. Č., against the rulings of the Constitutional Court of the Federation of Bosnia and Herzegovina No. U-13-2/02 of 8 July 2003 and Nos. U-19-2/03 and U-25-1/03 of 17 September 2003

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Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms
(Right to an effective remedy)

Case No. U 18/00
Appeal of K. H. from Sarajevo against the Judgment of the Cantonal Court of Sarajevo, No. Gž-583/99 of 30 November 1999

DECISION of 10 and 11 May 2002
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Case No. U 26/01
Request of twenty-five representatives of the National Assembly of the Republika Srpska for review of conformity of The Law on the Court of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 29/00) with the Constitution of Bosnia and Herzegovina

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Case No. U 24/03
Request of nine Delegates of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for a review of constitutionality of the provisions of Article 6 para 2, Article 7 para 2 and Article 8 of the Law on Immunity of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 32/02) and Article 6 para 3, Article 7 para 2 and Article 8 of the Law on Immunity of the Federation of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 19/03)

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