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OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA NO. 3

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FOREWORD

Dear Reader,

Welcome to the Bulletin of the Constitutional Court of Bosnia and Herzegovina in English, Issue No. 3. In the manner it was designed, the publication actually represents a collection (selection) of a number of relevant decisions taken by Constitutional Court of Bosnia and Herzegovina in the last few years. These are the most important decisions (out of a several thousand decisions) establishing the case-law and the standards of the Constitutional Court of Bosnia and Herzegovina.

The Constitutional Court cannot publish all decisions, nor is it necessary to do so in a publication such as this one. The decisions encompassed by this Bulletin and other decisions are available online on the website of the Constitutional Court (www.ustavnisud.ba). A large number of decisions have been translated into the English language. This is the reason why the Constitutional Court continues to publish the most significant decisions in the paper form by being guided by the significance of the constitutional issues dealt with in certain decisions and the case-law and standards which are established and upheld through them.

The first issue of the Bulletin in English was published in 2006 (50 decisions taken in the period 1998-2005) and the second issue was published in 2011 (50 decisions taken in the period 2006-2009). Every year as of 1997, the Constitutional Court has published the Bulletin in the official languages and alphabets in Bosnia and Herzegovina. Twenty-six issues have been so far published in the national languages, including Issue No. 26 for 2015. The decisions therein were inserted by turns, in the Bosnian, Croatian or Serbian language.

Although the decisions of the Constitutional Court of Bosnia and Herzegovina are published on a regular basis on the website of the Court, the publications such as this Bulletin are of manifold significance, first of all practical significance.

In particular, as an available relevant work and reference source it considerably contributes to the development and advancement of the rule of law and protection and promotion of the values and importance of human rights and fundamental freedoms, and better functioning of the legal state in general. We are convinced that in that manner it contributes to the development of democratic society as well. Furthermore, it upholds the public nature of the activities of the Constitutional Court, which is not only a democratic standard and requirement but also an obligation stipulated by the Rules of the Constitutional Court. The Rules of the Constitutional Court are a self-regulation act

stipulating the procedure before the Constitutional Court on the basis and in accordance with the Constitution of Bosnia and Herzegovina. In addition, it also stipulates financial and administrative independence, details of the organisation and other issues significant for the work of the Constitutional Court.

A special aim of publishing the Bulletin in the English language is to provide international experts and the public at large with information about the jurisdiction and case-law of the Constitutional Court of Bosnia and Herzegovina, its special constitutional position and role in the state and society.

To better understand not only the constitutional position of the Constitutional Court but also the judicial system and relationships in Bosnia and Herzegovina in general, it is important to refer to the background of the constitutional judiciary in Bosnia and Herzegovina and provide detailed information on the jurisdiction of the Constitutional Court according to the applicable Constitution.

The current Constitutional Court of Bosnia and Herzegovina is one of the six institutions of Bosnia and Herzegovina as provided for in the Constitution (Parliamentary Assembly, Presidency, Council of Ministers, Constitutional Court, Central Bank and Standing Committee on Military Matters, which ceased to exist through the process of reform in Bosnia and Herzegovina in 2006, although formally it remained to exist as a constitutional (historic) category.

The history of constitutional judiciary in Bosnia and Herzegovina dates back to the middle of the XX century. Federal constitutional court and the constitutional courts of the member republics were established in the SFR Yugoslavia and its federative units through the adoption of the federal and republic constitutions in 1963. Bosnia and Herzegovina was one of the six republics/federative units of the SFR Yugoslavia until 1992 when it acquired independence and international personality as the 177th member state of the United Nations.

As the former Constitutional Court of Bosnia and Herzegovina started to work the year after, in 1964, it follows that the tradition of constitutional judiciary has been in place for more than half a century. However, the current Constitutional Court of Bosnia and Herzegovina, as established by the 1995 Constitution of Bosnia and Herzegovina (Annex 4 of the General Framework Agreement for Peace in Bosnia and Herzegovina, the so-called Dayton Agreement) was constituted on 22 May 1997. It took its first decision on 16 October 1997.

In 2014, the Constitutional Court celebrated 50 years of the constitutional judiciary in Bosnia and Herzegovina. The monograph „Constitutional Court of Bosnia and Herzegovina 1964-2014" was published on that occasion (both in the national languages

and English). As appropriate to such a concept of publication, the monograph presented an overview of the case-law of the Constitutional Court of Bosnia and Herzegovina through the phases of its existence, activities and development (available at website). Thus, the case-law of the Constitutional Court of Bosnia and Herzegovina has been available to the national and international public from the very beginning.

The Constitutional Court took more than 25 000 decisions whereby more than 50 000 cases have been resolved since 1997. Only a small number of them were included in this publication and other publications of the Constitutional Court. All those decisions which were included in this issue and the previous issues of the Bulletin in the English language were already published in the bulletins in the national languages. The largest number of decisions relate to the cases falling under the scope of the appellate jurisdiction (issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina - Article VI(3)(b)). Out of a total number of taken decisions, a small number of decisions, i.e. 125 decisions were taken until 2015 falling within the scope of abstract jurisdiction (review of constitutionality of laws or „lifting the blockade of the Parliament" under Article VI(3)(a) and (c) and Article IV(3)(f) of the Constitution of Bosnia and Herzegovina).

It is also important to note that in the period 2004-2006 the Constitutional Court extended a substantial support to the Commission for Human Rights within the Constitutional Court, as a legal successor to the Human Rights Chamber. That Commission decided approximatively 9 000 cases pending before the Human Rights Chamber after its term expired.

As to the jurisdiction of the Constitutional Court, Article VI(3) provides for a broad and general provision according to which the Constitutional Court shall „uphold this Constitution". The competences are further specified by the provisions of Article VI(3)(a), (b) and (c) and the provision of Article VI(3)(f) – lifting the blockade of the legislative process in the Parliamentary Assembly and protection of „vital interest" of any constituent people in Bosnia and Herzegovina (Bosniacs, Croats or Serbs). Amendment I to the Constitution, as the only one passed in March 2009, introduced a new Article VI(4), whereby Brčko District became a constitutional category. That Amendment provides that the Constitutional Court of Bosnia and Herzegovina *shall have jurisdiction to decide in any dispute relating to the protection of the determined status and powers of the Brčko District of Bosnia and Herzegovina that may arise between an Entity or more Entities and the Brčko District of Bosnia and Herzegovina under this Constitution and the awards of the Arbitral Tribunal. Any such dispute may also be referred by the majority of the councilors of the Assembly of the Brčko District of Bosnia and Herzegovina, including at least one fifth of the elected councilors from among each of the constituent peoples.*

Thus, as to the jurisdiction and obligation to „uphold this Constitution, Article VI(3) – Jurisdiction – provides 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 an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

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

(*Nota bene*: Although the review of constitutionality of laws or certain provisions of a law adopted by the Parliamentary Assembly of Bosnia and Herzegovina is not explicitly provided as a responsibility of the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court removed that „constitutional gap" through its case-law. In particular the Constitutional Court, through its constitutional activism, established that jurisdiction in such cases by giving reasoning that „the substantial term of responsibility determined in the very Constitution of Bosnia and Herzegovina contains a title for such a competence of the Constitutional Court, especially when one takes into account the role of the Constitutional Court as a body upholding the Constitution 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.

b) The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

Article VI(1) provides that the Constitutional Court of Bosnia and Herzegovina shall have nine members.

a) Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency.

b) Judges shall be distinguished jurists of high moral standing. Any eligible voter so qualified may serve as a judge of the Constitutional Court. The judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighboring state.

By virtue of Article VI(1)(c) of the Constitution, the Parliamentary Assembly of Bosnia and Herzegovina may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights. However, the Parliamentary Assembly of Bosnia and Herzegovina has not so far availed itself to this possibility. Indeed, there are some initiatives and proposals in this regard, although without sufficient support in the Parliament.

Involvement of international judges in the composition and decision-making of the Constitutional Court of Bosnia and Herzegovina imposed the need for the English language to become a working language of the Constitutional Court, in addition to the national languages. This is one more reason for translating and publishing the bulletin and other publications in the English language.

***

Unlike the first few years at the beginning of its work, the last ten years show a constant increase in number of cases before the Constitutional Court and it amounts to a yearly number of over 5 000 cases.

For example, the relevant statistical data for 2015 show the fundamental structure of the cases before the Constitutional Court in that year. In particular, in the period from 1 January to 31 December 2015 the Constitutional Court received 5 785 cases. Out that number, 11 cases were the requests for review of constitutionality and 5 774 cases falling under the appellate jurisdiction. As 6 235 cases were transferred from the previous years, there were 12 020 cases pending before the Constitutional Court in 2015. Out of that number 6 071 cases were decided by the Constitutional Court by the end of 2015, namely 18 U cases and 6 053 AP cases. The Court resolved those cases by taking 2 309 decisions (merger of similar cases). Out of that number, there were 903 decisions on admissibility and merits and 1 406 decisions on admissibility. A violation of one or several rights

safeguarded by the Constitution of Bosnia and Herzegovina and European Convention was found in 1 103 cases.

As until now, the decisions in this Bulletin are classified according to the constitutional responsibilities of the Constitutional Court and then according to the legal basis provided for in the Rules of the Constitutional Court. Further classification is made according to the type of decisions, namely, decisions on admissibility and merits and decisions on admissibility.

The Bulletin contains an index of decisions classified according to the responsibilities of the Constitutional Court, according to the admissibility requirements and list of rights. Apart from that index, there is an index of key words in the Cyrillic and Latin alphabet.

By interpreting the Constitution all this time, the Constitutional Court of Bosnia and Herzegovina has established the constitutional standards and, by referring to the European Convention standards and the case-law of the European Court of Human Rights, it represents one of the key institutions and mechanisms for their promotion and application in Bosnia and Herzegovina. This is of great importance for the constitutional instruments for protection of human rights and fundamental freedoms, and democracy and rule of law in general. This is why this Bulletin, just like the previous ones, represents a possibility for all those who are interested in it and legal practitioners above all to get informed of the manner of work and results of the Constitutional Court of Bosnia and Herzegovina. We are convinced that new legal opinions or well-established legal opinions of the Constitutional Court, which are presented in this publication, will contribute to a better understanding of the constitutional and social reality in our country.

Without any intention to suggest certain decisions encompassed by this Bulletin or to say why they are particularly interesting (at any rate, every decision in this publication is selected for a special reason, primarily for the constitutional issue dealt with in them), we would like to put an emphasis on some of them, such as:

- The issue of reasonable doubt was dealt with by the Constitutional Court in Decision No. AP 1885/13;

- The issue of retroactive application of the Criminal Code of Bosnia and Herzegovina in the context of a war crime was dealt with by the Constitutional Court in Decision AP 325/08;

- In Decision No. AP 2843/07, the Constitutional Court dealt with the quality of certain provisions of the Law on Pension and Disability Insurance of the Republika Srpska, which stipulates one of the most restrictive time-limits in the legal system, which may even result in the loss of the right for a certain period of time (in the present case, the pension);

- Decision No. U 1/11 is one of the most important decisions wherein the Constitutional Court dealt with the issue of distribution of responsibilities between Bosnia and Herzegovina and the Entities in the context of the Law on the Status of State Property Located on the Territory of the Republika Srpska and under the Disposal Ban.

The previous issues of the Bulletin in the English language also contain the decisions dealing with the important constitutional issues and the issues of general interest for the society in Bosnia and Herzegovina. As such they represent a creative and brave contribution of the Constitutional Court to the interpretation and application of the constitutional norm and constitutional development in Bosnia and Herzegovina on the basis of the special constitutional text – Constitution – which is an annex, i.e. a part of the international peace agreement.

In the previous Bulletins, the emphasis is placed on the following decisions:

- Decision on „Constituent Status of all Three Peoples in Bosnia and Herzegovina" on the whole territory of Bosnia and Herzegovina (U 5/98);

- In Decision No. U 9/00 the Constitutional Court concluded that the High Representative had intervened in the legal order of Bosnia and Herzegovina substituting himself for the national legislative authorities by imposing a law, which was the reason why the law he had imposed was to be regarded a national law subject to the review by the Constitutional Court.

- Decision No. AP 286/06 is an interesting example as this was the first time that the issue of canon law was raised in the case-law.

This brief review of interesting decisions, i.e. constitutional issues in Bulletin No. 3, which you are reading right now, and the reminder of previously published two issues of the Bulletin in the English language illustrate how meanwhile the Constitutional Court of Bosnia and Herzegovina resolved some of its own constitutional dilemmas on know how to interpret the constitutional text with regards to the issue on constituting jurisdiction, admissibility etc. Regardless of all precaution and reservation which the court manifested all the time, it has shown to a certain extent its constitutional activism which exists not only as a possibility but also as its obligation within the standards developed in constitutional theory and practice, as was done and is done by the constitutional courts in certain countries with considerably longer constitutional tradition.

Finally, we would like to reiterate that all decisions of the Constitutional Court of Bosnia and Herzegovina are continuously placed in the official languages of Bosnia and Herzegovina and a number of them in the English language on the website of the Constitutional Court (www.ustavnisud.ba). This issue of the Bulletin and the previous one

in the national languages and in the English language may be found on the website of the Constitutional Court.

Finally, the Constitutional Court of Bosnia and Herzegovina would like to thank The AIRE Centre from London and the Government of the United Kingdom of Great Britain and Northern Ireland for the financial support for the printing of this publication. This is but one form of cooperation between the Constitutional Court of Bosnia and Herzegovina and the AIRE Centre as of lately.

Sarajevo, June 2016

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

FOREWORD FROM THE AIRE CENTRE

Dear readers,

The next few years will be decisive for Bosnia and Herzegovina (BiH) and its aspiration to join the European Union. It will need to make headway in the implementation of the reform agenda, particularly its judicial aspect, before the EU reviews its application to accede to the Union.

The project Legal Reform: Preparing State and Entity Court Systems for EU Accession, implemented by AIRE Centre with the financial support of the British Foreign and Commonwealth Office, has been cooperating with the key BiH institutions with a view to eliminating the obstacles on that road, in accordance with the Chapter 23 requirements.

The project objectives aim at strengthening human and minority rights protection and the implementation of the European Convention on Human Rights in BiH, contributing to the reform of the rule of law in BiH; and reinforcing the regional networks of judges and judicial training institutes.

The AIRE Centre has over the past few years established close cooperation with the Constitutional Court of BIH on prior project activities in the context of judicial reform. The project raises this cooperation to a higher level, with the Constitutional Court, a partner on the project, has actively and wholeheartedly engaging in all the project activities. The key activities to achieve the project goals and objectives involve training of BiH court judges and legal advisers and publishing activities.

It has been a great honour and pleasure to cooperate with the BiH Constitutional Court on the preparation of the third issue of the BiH Constitutional Court Bulletin. This Bulletin includes a selection of Constitutional Court decisions, notably 41 decisions and one ruling, adopted over a four-year period (from early 2010 to end 2013). The Bulletin presents relevant decisions adopted within the Court's appellate and abstract review jurisdiction, as well as its jurisdiction regarding the „unblocking of the parliament".

This publication contributes to the transparency of the Constitutional Court at both the national and international levels by providing both BiH civil servants and judges, officers of international organisations and potential donors in the justice sector with insight in the Court's case law in a very simple and user-friendly manner.

Biljana Braithwaite
Programme Manager for the Western Balkans
AIRE Centre

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Case No. U 27/13

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Staša Košarac, the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, submitted a request for review of the regularity of the procedure, i.e. that the Constitutional Court establishes whether a constitutional basis existed to declare that the Draft Legislation Amending the Law on Conflict of Interest in Governmental Institutions of BiH number 01.02-02-1-36/13 of 17 July 2013 is destructive of the vital national interest of the Bosniac People

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article IV(3)(f) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić,

Ms. Constance Grewe,

Mr. Mirsad Ćeman,

Ms. Margarita Tsatsa-Nikolovska,

Mr. Zlatko M. Knežević

Having deliberated on the request of **Mr. Staša Košarac, Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina** in case no. **U 27/13**, at its session held on 29 November 2013, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

It is hereby established that the Statement of the Bosniac People Caucus in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina that the Draft Legislation Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina number 01.02-02-1-36/13 of 17 July 2013 is destructive of the vital national interest of the Bosniac People meets the procedural regularity requirements under Article IV(3)(f) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the Draft Legislation Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina number 01.02-02-1-36/13 of 17 July 2013 is not destructive of the vital national interest of the Bosniac People.

The procedure of the enactment of the Law Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina number 01.02-02-1-36/13 of 17 July 2013 is to be conducted in accordance with Article IV(3)(d) of the Constitution of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 8 November 2013 Mr. Staša Košarac, the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the applicant"), submitted a request for review of the regularity of the procedure, *i.e*. requested that the Constitutional Court establishes whether a constitutional basis existed to declare that the Draft Legislation Amending the Law on Conflict of Interest in Governmental Institutions of BiH number 01.02-02-1-36/13 of 17 July 2013 („the Draft Legislation") is destructive of the vital national interest of the Bosniac People.

II. Request

a) The allegations from the request

2. The applicant alleged that the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the House of Peoples"), at its 33rd session held on 8 November 2013, had considered the Request of the Council of Ministers of Bosnia and Herzegovina for Consideration of the Draft Legislation (the Council of Minister's request submitted along with the request) requesting urgent consideration in accordance with Article 122 of the Rules of the House of Peoples. Following the adoption of the Request for Consideration of the Draft Legislation in an expedited procedure, the delegates of the Bosniac People Caucus Halid Genjac, Sulejman Tihić and Nermina Kapetanović, pursuant to Article 161 of the Rules of Procedure of the House of Peoples, declared that the Draft Legislation was destructive of the vital national interest of the Bosniac People. After declaring that the Draft Legislation had been destructive of the vital national interest of the Bosniac People, the deliberation on the Draft Legislation was adjourned and the vote was taken as to

whether the Draft Legislation was destructive of the vital national interest of the Bosniac People. The Serb People Caucus, by 5 votes „against", stated that the Draft Legislation was not destructive of the vital national interest of the Bosniac People. The Croat People Caucus, by 5 votes „against", stated that the Draft Legislation was not destructive of the vital national interest of the Bosniac People (the applicant submitted an unauthorised transcript and an unsigned copy of the minutes of the session of the House of Peoples held on 5 November 2013). In addition, the applicant stated that given that the majority of delegates of the Croat People Caucus and the Serb People Caucus stated that the Draft Legislation was not destructive of the vital national interest of the Bosniac People, a Joint Commission for Settling the Issue of a Vital Interest („the Joint Commission") comprising three Delegates, one of each elected by the Bosniac, Croat and Serb Delegates to resolve the disputed issue. The Joint Commission held a session on 5 November 2013, where members of the Joint Commission Ms. Borjana Krišto and Mr. Dragutin Rodić maintained their position that the Draft Legislation was not destructive of the vital national interest of the Bosniac People. Furthermore, the Joint Commission concluded that it failed to reach a solution and determined that, in accordance with the provisions of the Constitution of Bosnia and Herzegovina and the Rules of Procedure of the House of Peoples, the entire case should be referred to the Constitutional Court for further procedure (the applicant submitted the minutes of the session of the Joint Commission of 5 November 2013).

3. According to the Statement of the delegates of the Bosniac People Caucus, made on 5 November 2013 and signed by Mr. Sulejman Tihić, Ms. Nermina Kapetanović and Mr. Halid Genjac (a copy of the Statement was attached to the request, „the Statement"), the Statement Makers declared that the Draft Legislation was destructive of the vital national interest of the Bosniac People. In the reasoning of the Statement, the Statement Makers pointed out that the adoption of the Draft Legislation would amend hitherto Articles 8 and 8(a) and new Article 8(c) would be added in a manner that would make all those articles in complete contravention of the entire Chapter IV of the hitherto Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (which, in Chapter IV Articles 16 through 28, regulates the permanent residence of displaced persons and refugees so that it stipulates, *inter alia*, their facilitated re-registration of permanent residence whereby a returnee may not be requested any document other than documents substantiating identity or pre-conflict permanent residence). Namely, as further outlined, contrary to the provisions of the mentioned chapter, an obligation would be established for returnees (including those who have their place of residence registered and those who are yet going to register it) to obtain a proof of existence of a legal basis for registration of permanent residence at a specific address. All the returnees who registered permanent residence in accordance with the provisions of the foregoing Chapter IV would be exposed

to verification of compliance with the requirement which they had not been obliged to satisfy in their registration of permanent residence. Such juxtaposition between articles of the same law that would generate, as concluded in the Statement, inadmissible legal uncertainty and exposure of returnees to arbitrary treatment by police officers in resolving the issues related to permanent residence, which are enormously important for all returnees. It was further stated that it should be taken into account that the ethnic structure of the total number of refugees and those who were expelled and displaced during the 1992-1995 war shows that the Bosniacs, coming mostly from the territory of the present-day entity of Republika Srpska, make up the largest percentage. Bosniacs make up the largest percentage of the returnees to the said entity. It is also highlighted that ambiguities and mentioned juxtaposition between articles that would occur by adopting the proposed amendments may be used as a pretext for legalisation of the already present unlawful practice in the Republika Srpska, where police officers in the relevant public security stations (mainly of mononational composition), through an alleged revision procedure, annul the permanent residence of returnees (mainly Bosniacs), as they had already done in Srebrenica and Foča. The Basic Court in Srebrenica and the County Court in Bijeljina already confirmed by their respective judgments that the officials in the Srebrenica Police Station had violated human rights through erroneous interpretation of clear regulations pertaining to the registration of permanent residence. The Statement alleges that the final consequences of the unlawful annulment of permanent residence for returnees and refugees are extremely serious, as registration of permanent residence at the pre-war address is the requirement for securing aid in rebuilding homes and by annulment of that residence the requirement for such aid shall be lost, moreover, a permanent residence is also the basis for realization of social rights, voting right, *etc*. The Statement further reads that it is obvious that the adoption of the Draft Legislation would result in hindering or preventing the realization of the guaranteed rights of the displaced persons and refugees who intend to return, but also those who have returned to their homesteads, which directly contradicts the Dayton Peace Agreement and Annex VII thereto. Since all available official and relevant data tell us that the largest number of refugees and displaced persons are of Bosniac ethnic origin, particularly from the territory of present-day Republika Srpska, as well as that the largest number of returnees are Bosniacs, it was concluded that it is clear that the Draft Legislation is detrimental of the vital interest of Bosniac people.

4. According to the Statement of the Croat People Caucus delegate Ms. Borjana Krišto, the member of the Joint Commission, dated 5 November 2013 (the statement was attached to the request), it follows that the Draft Legislation is not destructive of the vital national interest of the Bosniac People, as it contains not a single provision whatsoever placing in a more favorable or unfavorable position any of the constituent peoples, the Bosniac people

in the particular case, and, therefore, the vital national interest of the Bosniac people was not violated. The mentioned Draft Legislation, through amendments of the entire text applies equally to all citizens of Bosnia and Herzegovina. In view of the above, she fully maintains her position and the position of the delegates of the Croat People Caucus, *i.e.* their statement made at the session of the House of Peoples held on 5 November 2013.

5. According to the Statement of the Serb People Caucus delegate Mr. Dragutin Rodić, the member of the Joint Commission, dated 5 November 2013 (the statement was attached to the request), the contents are completely identical to the Statement of the Croat People Caucus delegate Ms. Borjana Krišto, the member of the Joint Commission, dated 5 November 2013 i.e. „that she fully maintains her position and the position of the delegates to the Serb People Caucus, *i.e.* their statement made at the session of the House of Peoples of 5 November 2013."

b) Reply to the Request

6. The Constitutional Court found that the requirement for adversary proceedings before the Constitutional Court was satisfied as the applicant had submitted the statement made by Mr. Dragutin Rodić, the member of the Serb People Caucus and the Joint Commission, and the statement made by Ms. Borjana Krišto, the member of the Croat People Caucus and the Joint Commission, who, on their behalf and on behalf of the Serb People Caucus and the Croat People Caucus, had challenged the allegations of the Statement Makers. As a result, the Constitutional Court requested no replies by the Serb People Caucus and the Croat People Caucus.

III. Relevant Law

7. The **Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina** (*the Official Gazette of Bosnia and Herzegovina* Nos. 32/01 and 56/08), as relevant, reads:

Article 1

This Law shall regulate the permanent and temporary residence of citizens of Bosnia and Herzegovina (hereinafter citizen), including the temporary residence of displaced persons in Bosnia and Herzegovina (hereinafter: „DPs").

Unless otherwise prescribed by the Special Provisions in Chapter IV of this Law, all provisions of this Law shall apply equally to every citizen of BiH.

No provision of this Law may be interpreted so as to restrict the right of citizens to freely choose their place of residence.

Article 8

When registering and de-registering permanent or temporary residence, citizens shall be bound to provide correct and authentic data.

Within 60 days of establishing permanent residence or 60 days after the entry into force of this Law, whichever is longer, a citizen shall submit an application for registration of such residence, including his/her home address, with the competent authority in his/her place of permanent or temporary residence. Along with his/her application, s/he shall submit his/her ID card or other evidence of identity.

When registering the permanent residence of a minor due to a change of permanent residence, the individuals/authorities specified in Article 7, paragraph 2 shall follow the procedure set forth in paragraph 2 of this Article, submitting the minor's birth certificate or other evidence of identity.

When registering the permanent residence of a child following his/her birth, the individuals/authorities specified in Article 7, paragraph 2 shall register the child with the relevant competent authority within 60 days of the child's birth, following the procedure set forth in paragraph 2 of this Article and submitting the child's birth certificate or other evidence of identity.

De-registration of permanent residence may be carried out with the competent authority or ex officio. Upon receipt of an application for permanent residence pursuant to the preceding paragraphs of this Article, the competent authority shall register the citizen's permanent residence once de-registration of the permanent residence has been completed. The competent authority which received an application for de-registration of the permanent residence shall immediately, ex officio, notify the competent authority in the citizen's previous permanent place of residence on de-registration. The competent authority that received the application for permanent residence shall be immediately notified on de-registration of the permanent place of residence.

The procedure from the moment of submission of the application for registration of permanent residence and de-registration of previous permanent place of residence until the registration of new permanent place of residence may not exceed a 15-day-period.

The competent authority shall be bound to issue a stamped copy of the registration form to the citizen concerned immediately, which shall serve as evidence that s/he has applied for registration of permanent/temporary residence as provided for by this Law. The stamped form shall also serve as evidence that the competent authority has facilitated the de-registration of the citizen's prior place of permanent residence.

Article 8a

In case that the competent authority establishes, in the procedure either ex officio or upon request of the party in interest, that a citizen of BiH has registered his/her permanent

or temporary residence contrary to the provisions referred to Article 8, paragraph 1 of this Law, it shall issue the ruling revoking the permanent or temporary residence of the party concerned.

Chapter IV - SPECIAL PROVISIONS

Article 16

The persons covered by the provisions contained in this Chapter are displaced persons and returnees.

Article 17

A returnee to a pre-conflict permanent place of residence from which s/he has never de-registered or been de-registered has thereby re-established his/her pre-conflict permanent residence and does not need to reregister his/her permanent residence.

Article 18

A returnee who, before this Law came into force, de-registered or was ex officio de-registered from his/her pre-conflict permanent residence shall have the right to facilitated re-registration as outlined in this Chapter.

Article 19

In the event that the competent authority in the pre-conflict permanent residence is no longer in possession of the register containing residence data for a particular citizen, the authority shall be bound to verify the citizen's pre-conflict permanent residence with the body that is currently in possession of the register.

In case that for whatever reason it is not possible to verify the pre-conflict permanent residence of a citizen in accordance with Paragraph 1 of this Article, the returnee shall be entitled to facilitated re-registration as foreseen by the provisions of this Law.

Article 20

A returnee entitled to facilitated re-registration shall provide the competent authority with evidence of identity and with a document in proof of pre-conflict permanent residence within 60 days after returning to his/her pre-conflict permanent residence. No document other than evidence of identity and a document in proof of pre-conflict permanent residence may be requested for facilitated re-registration.

If a document proving evidence of identity or pre-conflict permanent residence cannot be provided, the returnee shall have the right to prove evidence of identity or evidence of his/her preconflict permanent residence by other means, including statements made by or in support of the returnee.

Article 21

Through facilitated re-registration, the returnee shall have his/her pre-conflict permanent residence re-established and shall be issued with a certificate of registration.

Article 22

Immediately following the issuance of an ID Card to a returnee in his/her place of pre-conflict permanent residence, the competent authority in the pre-conflict permanent residence shall notify the competent authority in the place of temporary residence where the returnee held as a DP about the returnee's re-established permanent residence.

The competent authority in the former place of temporary residence shall, immediately on receipt of such notification, ex officio de-register the returnee from his/her former place of temporary residence.

The citizen concerned and the competent authority in the re-established pre-conflict permanent residence shall be immediately notified on de-registration by the aforementioned authority.

This process shall be completed within 15 days after the returnee has applied for facilitated reregistration.

This Article shall not apply to a returnee from abroad.

Article 23

All DPs are bound to register their place of temporary residence.

Article 24

A DP who voluntarily decides to take up a new temporary residence shall be entitled to facilitated registration.

Article 25

A DP entitled to facilitated registration shall provide the competent authority with evidence of identity and with a document in proof of his/her previous place of temporary residence, within 60 days after taking up a new temporary residence. No document other than evidence of identity and a document in proof of the DP's previous place of temporary residence may be requested for facilitated registration.

If a document proving evidence of identity or previous place of temporary residence cannot be provided, a DP shall have the right to prove evidence of identity or his/her previous place of temporary residence by other means, including statements made by that person or by other persons in support of the DP concerned.

Article 26

Through facilitated registration, a DP shall have established his/her new place of temporary residence and shall be issued with a certificate of registration.

Article 27

Immediately following the issuance of an ID Card to a DP in his/her new place of temporary residence, the competent authority in the new place of temporary residence shall notify the competent authority in the previous place of temporary residence held by the DP about the DP's new temporary residence.

The competent authority in the former place of temporary residence shall, immediately on receipt of such notification, ex officio de-register the DP from his/her former place of temporary residence.

The DP concerned and the competent authority in the new place of temporary residence shall be immediately notified on de-registration by the aforementioned authority.

This process shall be completed within 15 days after the displaced person has applied for facilitated registration.

This Article does not apply to a DP whose previous place of temporary residence was abroad.

Article 28

A DP who voluntarily decides to take up permanent residence in a place other than his/her pre-conflict permanent residence shall be registered by the competent authority within the new place of permanent residence in accordance with Chapter II of this Law.

8. The **Draft Legislation Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina in an Expedited Procedure no. 01.02-02-1-36/13 of 17 July 2013**, as relevant, reads:

Article 2

Article 8, as amended, reads:

Article 8

When registering and de-registering permanent residence, citizens shall be bound to provide correct and authentic data.

In the procedure of registering permanent residence and residential address, citizens shall be obliged to submit evidence of having valid grounds for the residence on the address they are registering on. One of the following items of evidence shall be considered

as evidence that a citizen has a valid basis for the permanent residence on the address he/she registers as residential:

a) Evidence of ownership, co-ownership or possession of the apartment, house or other residential facility.

b) Verified tenancy contract or verified contract on subtenancy enclosed to the verified proof of the lessor's ownership, co-ownership or possession thereof.

c) Certificate that before the competent body the ownership dispute is pending, i.e., that the legalization or registration procedure is initiated of the facility, apartment or house on the address on which the permanent residence is registered.

Verified statement of the lessor showing that the lessor meets the requirements of items a), b) and c) of the previous paragraph of this Article and gives his/her consent that certain person could be registered on his/her residential address shall as well be considered as valid proof of permanent residence.

Marital or common-law partners and relatives of first lineage (parents and children), adopters and adoptees, in the registration of residence may lodge a application for residence registration on the address of already registered martial or common-law partner, first lineage relative or adopter or adoptee only with a proof of marital or common-law status, family relationship or adoption without obtaining evidence under paragraph 2 of this Article, with registration of the existence of such relationship.

The competent bodies of social care, nursing homes, geriatric and other specialized institutions shall be bound to submit to the body competent for the registration of permanent residence all relevant data on residence addresses of their residents and users of their services, citizens of Bosnia and Herzegovina, who cannot secure evidence under paragraph 2 of this Article in the registration process, in order to prove a valid grounds for registration of residence on the address on which the permanent residence is registered.

Citizens of Bosnia and Herzegovina who are in the state of social need and cannot secure evidence under paragraph 2 of this Article, and are not registered as the aid beneficiaries before the competent bodies of social care, may request aid from the authorized body of social care in obtaining evidence on the valid basis for registration of residence on the address on which the permanent residence is registered.

A person that does not have a place or address of residence or the funds for securing housing needs („the homeless person") may be enabled by the authorized body of social care to register his/her residence on the address of the social care institution and in such case the homeless person shall be obliged to submit to the competent body or social care institution a contact address which may be at the natural or legal person, with their consent.

A citizen shall be bound to register his/her residence before the competent authority within 15 days from the date of settling on the address on which he/she registers the permanent residence.

When registering the permanent residence of a minor, the individuals/authorities specified in Article 7(2) of the Law shall submit the minor's birth certificate.

When registering the permanent residence of a child following his/her birth, the individuals/authorities specified in paragraph 8 of this Article shall register the child with the relevant competent authority within 30 days of the child's birth, submitting the child's birth certificate".

Article 3

Article 8a, as amended, reads:

Article 8a

For each citizen with permanent residence registered, the competent bodies shall be bound to perform check of meeting the requirements under Article 8(2), (3) and (4) within five years from the date of entry into force of this Law. Data gathering may be electronically performed by the use of data digitally signed before bodies authorized for record keeping in which the relevant data is located.

In the procedure of requirements fulfillment checking, the competent bodies shall be bound to evaluate evidence for sensitive and socially endangered categories of citizens of Bosnia and Herzegovina under Article 8(4), (5) and (6) with special care and understanding.

In the procedure of requirements fulfillment checking, the following may be used as relevant: registers of birth, marriages and deaths, property records, records of the employment institute, health care, pension and disability insurance, users of utility and other services, etc., on which the special instructions shall be issued by the Agency Director."

Article 4

After Article 8a, Articles 8b, 8c, 8d and 8e shall be added, which shall read:

(...)

8c

If the competent body establishes, in the procedure performed ex officio or upon the request by the party with legal interest, that a citizen of Bosnia and Herzegovina has

registered his/her permanent residence contrary to the provisions of Article 8(1) of the Law, it shall revoke the residence by ruling."

(...)

VI. Admissibility

9. In the particular case the request was filed by the Chair of the House of Peoples, so the request meets one of the admissibility criteria in respect of the authorized applicant. As to the rest of the admissibility criteria, the Constitutional Court deems that they depend upon the very interpretation of the responsibilities of the Constitutional Court referred to in Article IV(3)(f) of the Constitution of Bosnia and Herzegovina.

10. The Constitutional Court recalls that the essence of the responsibility of the Constitutional Court referred to in Article IV(3)(f) of the Constitution of Bosnia and Herzegovina is the resolution of the issue of „procedural regularity". What the notion of „procedural regularity" implies ought to be concluded through a targeted and systematic interpretation of, first and foremost, the provisions of Article IV(3) of the Constitution of Bosnia and Herzegovina.

11. Under the provisions of Article IV(3)(d) through (f) of the Constitution of Bosnia and Herzegovina, it is clear that the procedure for declaring a decision destructive of the vital interest of a constituent people comprises the invocation by the majority of delegates from one Caucus (a minimum of three delegates) of Article IV(3)(e) of the Constitution of Bosnia and Herzegovina. The result thereof is the stricter voting criterion, that is to say the adoption of such a decision requires the consent of the House of Peoples, voted for by the majority of delegates of all three constituent peoples present and voting. In that way it was made possible for the parliamentary procedure to carry on despite the objection to the destructiveness to the vital interest of one constituent people, under the stricter democratic requirements though, because the notion of the parliamentary majority takes on another dimension. If the House of Peoples fails to reach the required majority, the decision cannot go past the parliamentary procedure at the House of Peoples, because it does not have its confidence. However, if the voting takes no place, because the majority of delegates of a constituent people raises an objection by invoking the vital interest, the voting procedure on the proposed decision shall be suspended and the House of Peoples shall proceed under Article IV(3)(f) of the Constitution of Bosnia and Herzegovina.

12. So, on the basis of the relevant provisions of the Constitution of Bosnia and Herzegovina it follows clearly that the procedure for the protection of vital interests of one people is clearly and decidedly specified by the cited provisions and that that procedure

must be complied with. In that respect, the Constitutional Court observes that the Statement had been signed by three delegates of the Bosniac People Caucus, namely: Mr. Halid Genjac, Mr. Sulejman Tihić and Ms. Nermina Kapetanović, that is to say the majority of the Bosniac People Caucus. The Serb People Caucus (five votes „against") and the Croat People Caucus (five votes „against") voted against the Statement. The Constitutional Court established those facts on the basis of the allegations of the applicant and the documentation attached to the request. Further, following the vote by means of which no agreement had been reached that the Draft Legislation was detrimental to the vital interest of the Bosniac people, a Joint Commission was formed, made up of as follows: Mr. Halid Genjac, Ms. Borjana Krišto and Mr. Dragutin Rodić, which convened on 5 November 2013. However, the Joint Commission failed to find a solution, rather it determined that the disputed issue should be referred to the Constitutional Court for further procedure. The Constitutional Court established the aforementioned on the basis of the allegations made by the applicant and on the basis of the Minutes from the session of the Joint Commission of 5 November 2013, which the applicant also attached to the request. Thereafter, the Serb People Caucus, a member of the Joint Commission and the Croat People Caucus, a member of the Joint Commission, gave on 5 November 2013 written statements wherein they stated that they entirely stood by their respective standpoints and the standpoints of their respective caucuses expressed at the session of the House of Peoples of 5 November 2013. It follows from the aforementioned that the admissibility requirement has been met in the present case in relation to the procedure of referring the case to the Constitutional Court for decision-making.

13. On the other hand, based on the cited provisions it follows clearly that these types of disputes arise in a situation in which the members of the constituent peoples cannot come to an agreement as to whether or not a decision is destructive of a vital interest of a given people. The effect thereof is such that it blocks the work of the Parliamentary Assembly, as the proposed decision cannot receive the confidence of the majority of delegates of a given people. In that respect, the role of the Constitutional Court should involve the following: that the Constitutional Court, as a guardian of the Constitution of Bosnia and Herzegovina (Article VI(3) of the Constitution of Bosnia and Herzegovina), by its decision on the merits, enables the lifting of a blockade of the work of the Parliamentary Assembly of Bosnia and Herzegovina, which is unable to resolve the disputed issue. This procedure is of an urgent nature, as the intervention of the Constitutional Court is necessary within the shortest time possible in order for the legislative body to be able to continue performing its role. This second role of the Constitutional Court, namely the adoption of a position on the merits regarding the existence or non-existence of the destructiveness to the vital interest of one people, is very important in situations where the state needs a specific decision in

order to be able to regulate a certain area, and the voting on that decision is blocked by an objection to the destructiveness to the vital interest of one people.

14. The mechanism of protection of the vital interest of one people is very important in states where multiethnic, multilingual, multi-religious communities, or communities which are peculiar according to their differences, exist. On the other hand, any invocation of a vital interest shall result in a reinforced criterion for the adoption of general acts, including a special condition of the majority of votes (Article IV(3)(e) of the Constitution of Bosnia and Herzegovina) or, as a last resort, a procedure before the Constitutional Court. The consequences thereof are the terminations of parliamentary procedures, which can generate negative consequences for the work of the legislative body and, thereby, for the functioning of the state. Therefore, one should invoke the procedure referred to in Article IV(3)(f) of the Constitution of Bosnia and Herzegovina if there are relevant reasons for one to think that a proposal of a decision of the Parliamentary Assembly is destructive of the vital interest of one constituent people and/or if there is a serious controversy in the opinion or a doubt relating to the issue whether procedures referred to in Article IV(3)(e) and (f) were correctly observed (see the Constitutional Court, Decision on Merits no. U *7/06* of 31 March 2006, paras 19-25 with further references, published in the *Official Gazette of BiH*, no. 34/06).

15. In the particular case, the essence of the reasons offered in the Statement relates to the Draft Legislation (through amendments to Articles 8 and 8a and by inserting a new Article 8c) making difficult or impossible the exercise of the guaranteed rights of the displaced persons and refugees intending to return and those who have returned to their pre-war places of residence by prescribing conditions for the registration of the place of residence at a certain address and controlling the correct fulfillment of those requirements, and since the largest number of refugees and displaced persons, and consequently of returnees, come from among the Bosniac people, the Draft Legislation is detrimental to the vital interest of the Bosniac people. In accordance with the aforementioned, the Constitutional Court holds that the respective request and the Statement contain the reasons for which the Statement Makers hold that the Draft Legislation is destructive of the vital interest of the Bosniac people. Therefore, the Constitutional Court holds that this admissibility requirement of the respective request has been met.

16. In view of the aforementioned, the Constitutional Court holds that the respective request was filed by an authorized subject and that the procedural regularity was observed within the meaning of Article IV(3)(e) and (f) of the Constitution of Bosnia and Herzegovina, and that the formal requirements referred to in Article 16(2) of the Rules of the Constitutional Court were met.

VII. Merits

17. The applicant requested the review of the regularity of the procedure, that is to establish the existence or non-existence of a constitutional basis for the Statement reading that the Draft Legislation be considered detrimental to the vital interest of the Bosniac people.

18. The Statement indicates that the Draft Legislation, by prescribing conditions for BiH citizens for the registration of the place of residence at a certain address and controlling the fulfillment of those requirements after the registration of the place of residence, makes difficult or impossible the exercise of the guaranteed rights of the displaced persons and refugees intending to return and those who have returned to their pre-war places of residence, which is detrimental to the vital interest of the Bosniac people, since the largest number of the mentioned persons come from among the Bosniac people.

Notion of a vital interest of a constituent people

19. In its hitherto case-law, the Constitutional Court, in relation to the proceeding under Article IV(3)(f) of the Constitution of Bosnia and Herzegovina, has never engaged in enumerating by name the elements of the vital interest of one people. Instead, the Constitutional Court pointed out that the notion of a vital interest of one constituent people is a functional category, and that it is to be approached from that point of view. In that sense, regarding this issue, the Constitutional Court pointed out through its case-law that there are several factors shaping the understanding of the mentioned notion. First, since the notion of a „vital interest" is a functional category, it cannot be considered separately from the notion of a „constituent status of peoples" whose vital interests are safeguarded under Article IV(3)(e) and (f) of the Constitution of Bosnia and Herzegovina. In this respect the Constitutional Court, also, indicated that the notion of a „constituent status of peoples" is not an abstract notion, rather that it incorporates certain principles without which a society, with differences safeguarded by the Constitution, could not function efficiently. Next, the Constitutional Court, also, indicated that the meaning of the notion of a „vital interest" was partly shaped also by Article I(2) of the Constitution of Bosnia and Herzegovina, which emphasizes that Bosnia and Herzegovina is a democratic state, thus, in that respect, the interest of the constituent peoples to participate at full capacity in the system of the government and the activities of the public authorities can be regarded as a vital interest. Thus, according to the jurisprudence of the Constitutional Court, the effective participation of the constituent peoples in the process of adoption of political decisions, in terms of preventing absolute domination of one group over another, constitutes a vital interest of every constituent people. Also, the Constitutional Court pointed out that the state authority ought to be, in principle, a representative reflection of an advanced coexistence of all

peoples in Bosnia and Herzegovina, including national minorities and Others. On the other hand, „the effective participation of the constituent peoples in the government", if exceeding the constitutional framework, must never be implemented or imposed to the detriment of the effective functioning of the state and its bodies (for more details see, *op. cit.,* Decision no. *U 7/06,* paras 33-37, with further references).

20. Also, the case-law indicated, regarding the same issue, that in accordance with Article VI(3)(1) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall safeguard the Constitution of Bosnia and Herzegovina and that it shall be limited thereby regarding the functional interpretation. In that respect, when considering each particular case the Constitutional Court will rely, within the assigned constitutional framework, upon the values and principles essential to a free and democratic society that incorporates, *inter alia*, the respect for an inherent human dignity of a human, the accommodating of a great variety of beliefs, the respect for a cultural identity and identities of groups and religions, social and political institutions promoting the participation of individuals and groups in the society. On the other hand, the protection of a vital interest must not imperil the state sovereignty and functionality, which is closely associated with the neutral and essential comprehension of the notion of citizenship, as a criterion of affiliation to a „nation", i.e. it must not lead to unnecessary disintegration of a civil society, as a necessary element of modern statehood (*ibid*, para. 38).

Examination of destructiveness to the vital interest of the Bosniac people

21. The Statement Makers pointed out that the Draft Legislation makes difficult or impossible the exercise of the guaranteed rights of the displaced persons and refugees intending to return and those who have returned to their pre-war places of permanent residence by prescribing conditions for the registration of the place of residence at a certain address, and controlling the fulfillment of those requirements after the registration of the place of permanent residence, which is detrimental to the vital interest of the Bosniac people, since the largest number of the mentioned persons come from among the Bosniac people.

22. The Constitutional Court finds that the Draft Legislation, in the disputed provisions (amending Articles 8 and 8a and inserting Article 8c), stipulates that when registering the place of permanent residence and address of residence the citizens of BiH are obliged to attach a proof of a valid ground for permanent residence at the address which they are registering, then for each citizen with the registered place of permanent residence a proof of a verification of meeting the requirements for the registration, and the annulment of the

registered place of permanent residence by a competent authority in case they failed to meet the required conditions.

23. The Constitutional Court emphasizes that, in general, the manner of legal regulation of the registration of permanent and temporary residence of all citizens may have implications on the respect for one of the fundamental human rights under the Constitution of Bosnia and Herzegovina – the right to freedom of movement and residence (Article II(3)(m) of the Constitution of Bosnia and Herzegovina). Also, the Constitutional Court emphasizes that, in general, the manner of legal regulation of this issue may have implications also on the return of refugees and displaced persons. Bearing in mind that during the war developments in Bosnia and Herzegovina significant displacement of population from their pre-war places of permanent residence had taken place, the Constitutional Court holds that the issue of the return of refugees and displaced persons to their pre-war places of permanent residence constitutes the vital national interest of all the constituent peoples, the Bosniac people included.

24. However, by analyzing the mentioned provisions of the Draft Legislation, especially from the aspect of the reasons stated in the Statement, the Constitutional Court cannot establish that they alter in any way the existing legal solutions relating to the return of refugees and displaced persons and their property, which have no negative implications whatsoever in relation to the constitutional right to return of refugees and displaced persons to their pre-war places of residence. Also, the Constitutional Court holds that, from the aspect of the destructiveness to the vital national interest, the hypothesis of the Statement Makers is unacceptable in that it reads that unlawful annulments of the registrations of the places of permanent residence by the police authorities in Republika Srpska will take place, because it is based on assumptions relating to the possible future actions of the said authorities. Besides, it is indisputable that there exists judicial protection even in the event of possible unlawful actions on the part of the said bodies. The Constitutional Court accepts the reasoning offered in support of the Draft Legislation when referring it to the parliamentary procedure that the present case concerns the improvement of the text of the basic law and the specification of the conditions for the registration and the cancellation of the registration of permanent and temporary place of residence aimed at preventing abuses of this mechanism. Thereby, the Constitutional Court holds that the Draft Legislation contains not a single provision whatsoever placing in either a more favorable or more unfavorable position any of the constituent peoples.

25. In view of the aforementioned, the Constitutional Court concluded that the allegations made by the Statement Makers that the Draft Legislation is detrimental to the vital interest of the Bosniac people are ill-founded.

26. In accordance with this decision, the House of Peoples ought to resume the procedure of enacting the Draft Legislation under the procedure provided for in Article IV(3)(d) of the Constitution of Bosnia and Herzegovina.

VIII. Conclusion

27. The Constitutional Court concludes that the Draft Legislation does not contain a single provision whatsoever placing in a more favorable or unfavorable position any of the constituent peoples, the Bosniac people in the particular case, neither does it affect the constitutional right to return of refugees and displaced persons. Thus, the vital interest of the Bosniac people has not been violated.

28. Pursuant to Article 61(1) and (5) of the Rules of the Constitutional Court, the Constitutional Court has decided as set out in the enacting clause of this decision.

29. Pursuant to Article 41 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of Judge Mirsad Ćeman, joined by the Vice-President Seada Palavrić, shall make an annex to this decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of Judge Mirsad Ćeman joined by Vice-President Seada Palavrić

Pursuant to Article 41(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), **contrary to the decision of the majority** in the case no. **U 27/13** of 29 November 2013 (request for the review of regularity of the procedure, i.e. the establishment of existence or non-existence of constitutional basis for declaring the Draft Legislation Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina number 01.02-02-1-36/13 of 17 July 2013 destructive of the vital national interest of the Bosniac People), with due respect for the majority opinion, I disagree with the opinion and decision of the majority, which is the reason why, by voting against, I could not support the decision for the following reasons:

1. Summary of positions:

- **Makers of the Statement** (the delegates of the Bosniac People Caucus in the BiH Parliamentary Assembly) dated 5 November 2013, indicate that „by prescribing conditions for the citizens of Bosnia and Herzegovina for the registration of the place of permanent residence at a certain address and controlling the correct fulfillment of those requirements", i.e. the Draft Legislation makes difficult or impossible the exercise of the guaranteed rights of the displaced persons and refugees intending to return and those who have returned to their pre-war places of permanent residence, which is detrimental to the vital interest of the Bosniac people, since the largest number of the mentioned persons come from among the Bosniac people".

The essence of the reasons offered in the Statement, whereby the majority of delegates of the Bosniac People Caucus declaring the Draft Legislation detrimental to the vital national interest of the Bosniac People, relates to the Draft Legislation (through amendments to Articles 8 and 8a and by inserting a new Article 8c) „making difficult or impossible the exercise of the guaranteed rights of the displaced persons and refugees".

- **The Constitutional Court** assessed that „in general, the manner of legal regulation of the registration of permanent and temporary residence of all citizens may have implications on the respect for one of the fundamental human rights under the Constitution of Bosnia and Herzegovina – the right to liberty of movement and residence (Article II(3)(m) of the Constitution of Bosnia and Herzegovina)", that is to say it may have „implications also on the return of refugees and displaced persons", and that, „bearing in mind that during the war developments in Bosnia and Herzegovina significant displacement of population from their pre-war places of residence had taken place… the issue of the return of refugees and

displaced persons to their pre-war places of residence constitutes the vital national interest of all the constituent peoples, the Bosniac people included". However, the Constitutional Court concludes that the Daft Law, nevertheless, „… does not contain a single provision whatsoever placing in a more favorable or unfavorable position any of the constituent peoples, the Bosniac people in the particular case, neither does it affect the constitutional right to return of refugees and displaced persons, which is why the vital interest of the Bosniac people has not been violated".

So, the Constitutional Court, among other things, on the one hand, holds that the manner of legal regulation of the registration of permanent and temporary residence of all citizens may have implications on the respect for one of the fundamental human rights under the Constitution of Bosnia and Herzegovina – the right to liberty of movement and residence, that is to say it may have „implications also on the return of refugees and displaced persons", and, on the other hand, it finds that the applicable special provisions of the challenged law (Chapter IV – Special Provisions, Articles 16-28), still constitute appropriate guarantees that those rights will not be violated.

2. Reasons

I am of the opinion that the Constitutional Court could have, and must have resolved this issue on the basis and within the scope of the essential direct or derived constitutional principles:

- the principles of the rule of law (legal certainty) under Article I(2) of the Constitution of Bosnia and Herzegovina in correlation with the right to freedom of movement and permanent residence under Article II(3)(m) of the Constitution of BiH, and

- the principle of proportionality, i.e. balance of legitimate interests (which arise from the European Convention for the Protection of Human Rights and Fundamental Freedoms and protocols thereto as an integral part of the Constitution of BiH).

Namely, in addition to the formal, when considering this and such issues, the Constitutional Court (and certainly the legislators at all levels) must bear in mind with greater sensibility Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina (the so-called Dayton Peace Agreement) and the still indisputable fact about **the incomplete process of return of refugees and displaced persons** (of those wishing to return, but also of their descendants – why not), which still implies and obligates to give a realistic impetus to return, by removing any sort of formal and other barriers in the realization of that right. That in particular, as the first and rather significant prerequisite, may and must relate to avoiding/eliminating imprecise and incompatible legal and other solutions, which, through various interpretations, by disregarding the real *ratio legis* of

the law, as well as the intention behind Annex 7, objectively lead, or may lead to, perhaps even encouragement of the targeted obstruction in the enforcement thereof.

Therefore, it is completely justified to ask the following question: Does the proposed law, especially when bearing in mind the post-war situation, i.e. the change of demographic picture throughout Bosnia and Herzegovina provoked by force and or fear (in a number of earlier decisions of this Constitutional Court the relevant information supporting these allegations were mentioned), ensure the principle of the rule of law (legal certainty) under Article I(2) of the Constitution of BiH in correlation with the right to the freedom of movement and permanent residence under Article II(3)(m) of the Constitution of BiH?! According to my judgment – not so, because the proposed solutions are incompatible and lead to manifest arbitrariness in interpretation and application, which is not in conformity with the mentioned principle.

Further, although it may not be difficult to agree in principle with the position of the Constitutional Court that „… from the standpoint of the destructivity to the vital national interest it is an unacceptable hypothesis (it would be more suitable to put: „perhaps a questionable hypothesis", added by M.Ć.) of Statement Makers in that it reads that unlawful annulments of the registrations of the places of permanent residence by the police authorities in Republika Srpska will take place, because it is based on assumptions relating to the possible future actions of the said authorities", still, can the Constitutional Court, or „the state legislator", disregard, in such and similar cases, or is the Constitutional Court, or „the state legislator", allowed to disregard the question obviously openly through the Statement „the quality of law", that is to say mutual incompatibility and even exclusivity of its individual provisions?! This question particularly comes to the fore when one bears in mind the tendency and the established case-law, which is not difficult to document (the Statement Makers give the example of Foča, Srebrenica – see more detailed allegations in paragraph 3 of the Decision), of the police and other authorities in Republika Srpska whereby, while understanding this Entity as an exclusively „Serb territory", instead of encouraging, or at least „remaining neutral", the real return or the announcement of especially large-scale return of Bosniacs and others (or creating realistic prerequisites for such a process), they experience and qualify it as a threat to the identity and the substance of that Entity. Should not, having learnt from such a practice, the legislator create such legal and other solutions which, not only will refrain from discouraging the return but will make impossible as much as possible its erroneous interpretation and application, especially when one bears in mind the significant responsibilities of the authorities of the Entities/Cantons/Brčko District in these issues.

Although, certainly, legislators at all levels (in accordance with the Constitution and each within the scope of their respective responsibilities) have the discretion to arrange

relations, i.e. to excercise and protect rights guaranteed by the Constitution of BiH, in my opinion, it is the responsibility and the obligation of the Constitutional Court, while recognizing the tendencies that may lead to formal guarantees, while, in reality leading to the real denial of rights (any right), bringing them down to „naked right" – *ius nudus*, to effectively protect and promote, through its respective decisions, the principle of the rule of law (legal certainty) under Article I(2) of the Constitution of BiH. So, these serious anomalies (already expressed) cannot be disregarded despite the assessment by the Constitutional Court that „…the Draft Legislation does not contain a single provision whatsoever placing in a more favorable or unfavorable position any of the constituent peoples", i.e. that the present case concerns only „the improvement of the text of the basic law and the specification of the conditions for the registration and the cancellation of the registration of the permanent and temporary place of residence aimed at preventing abuses of this mechanism", which is, as the Constitutional Court observed, mentioned in the reasons adduced for the Draft Legislation. Even with such assessment the state legislator, in a situation where one essentially brings or may seriously bring into question *ratio legis* of the law itself, instead of pointing to the secured court protection (??!!), should resort to less disputed legal solutions, even in cases where other reasons justify certain existing and/or proposed solutions. The real possibility and (documented) tendency of abuse even of the current solutions when compared, why not say it, with the real suspicion about the abuse of future solutions to the detriment of returnees, must be **resolved in favor of a better, i.e. less risky position of returnees**, Bosniacs in this case, as well as in general (the principle of proportionality, i.e. of the balance of legitimate interests). Because, it turned out that the supervision mechanisms referred to in Article 32 of the existing law were not effective or sufficient to eliminate arbitrariness in the application that the Statement Makers pointed to.

If Bosniacs define their vital national interest, among other things, by way of making efforts for a facilitated new registration of permanent/temporary residence, meaning without an exaggerated ??!! possibility for abuses and/or getting around this right **in an administrative and court procedure**, then the position and consequences of such a position (the legal solution does not contains a single provision whatsoever placing in a more favorable or unfavorable position any of the constituent peoples), at the least, ought to be based on a **careful balance** of needs of the state at all levels to carry out necessary controls and foreseeable consequences of such solutions to the high goal implying a facilitated return of refugees and displaced persons. Aspiration towards the restoration of the pre-war demographic picture of BiH through the return of refugees and displaced Bosniacs, as well as members of other peoples and citizens of BiH (as much as objectively possible) is a legitimate vital goal and interest of the Bosniac people. The fact that others,

possibly, do not define their vital national goals and interests in such a way should not affect the right of Bosniacs to define their „vital national interest" through (in the present case) the facilitated return of all peoples and citizens (individuals who wish so) and make efforts in that context for legal solutions which will, instead of making it more difficult and/or impossible, facilitate the return as much as possible. In the present case that means – the law that will not hinder procedures for the registration of permanent and temporary residence, that is to say the one that will eliminate, in some aspects useful but, in essence, not always necessary administration. Other ways exist too.

So, the Constitutional Court, by considering the mentioned principles, in my opinion, had the basis to consider more broadly the contents of the term of vital national interest (in this case the Bosniac people), precisely in the manner as done in paragraph 19 of the reasoning, instead of stopping half way in its decision and reasoning. There was a failure to strengthen the term „vital interest" as „a functional category" and „the constituent status of peoples", which, as the Constitutional Court itself qualified it „as not being an abstract term" (see paragraph 19 of the reasoning of the decision), by supporting the position that the stricter voting criteria under Article IV(3)(e) of the Constitution of BiH should apply to the voting on this law, that is to say, under the stricter democratic requirements, as the term of parliamentary majority in that case gets another dimension. Of course, for as long as the Constitution of BiH is as it is and for as long as „vital interest" and „constituent peoples" exist as constitutional and/or derived categories in the constitutional system of Bosnia and Herzegovina.

In the end, given that, in accordance with Article VI(3)(1) of the Constitution of BiH, the Constitutional Court is a guardian of the Constitution of Bosnia and Herzegovina, and that it is limited thereby regarding „the functional interpretation", I do not think that the Constitutional Court, by deciding differently, i.e. by establishing that the Draft Legislation Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina number 01.02-02-1-36/13 of 17 July 2013 **violated the vital national interest** of the Bosniac People in Bosnia and Herzegovina, would jeopardize its earlier completely acceptable position that „…the protection of a vital interest must not imperil the state sovereignty and functionality, which is closely associated with the neutral and essential comprehension of the notion of citizenship, as a criterion of affiliation to a „nation", i.e. it must not lead to unnecessary disintegration of a civil society, as a necessary element of modern statehood"). On the contrary.

All of the aforementioned and some other elements outlined in the discussion during the decision-making are the reasons for which I was unable to support the position of the majority and the reason why I voted against the decision.

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Jurisdiction – Article VI(3)(a)
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Case No. U 14/09

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Željko Komšić, the Chairman of the Presidency of Bosnia and Herzegovina at the time of filing of the request, for review of the constitutionality of Article 16 paragraph 1 of the Law on Conflict of Interest of Governmental Institutions of the Federation of Bosnia and Herzegovina

Decision of 30 January 2010

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, Nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. David Feldman

Mr. Krstan Simić

Mr. Mirsad Ćeman

Having deliberated on the request of Mr. **Željko Komšić, the Chairman of the Presidency of Bosnia and Herzegovina at the time of filing the request,** in case no. **U 14/09**, at its session held on 30 January 2010, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Mr. Željko Komšić, the Chairman of the Presidency of Bosnia and Herzegovina at the time of filing a request, for Review of the Constitutionality of Article 16 paragraph 1 of the Law on Conflict of Interest of Governmental Institutions of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 70/08), is hereby dismissed as ill-founded.

It is hereby established that Article 16 paragraph 1 of the Law on Conflict of Interest of Governmental Institutions of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and*

***Herzegovina* no. 70/08) is consistent with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article IX(1) of the Constitution of Bosnia and Herzegovina.**

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

Reasoning

I. Introduction

1. On 23 November 2009, Mr. Željko Komšić, the Chairman of the Presidency of Bosnia and Herzegovina at the time of filing of the request („the applicant"), filed the request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of Article 16 paragraph 1 of the Law on Conflict of Interest of Governmental Institutions of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 70/08, „the Law on Conflict of Interest" – „the challenged provision").

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the House of Peoples and the House of Representatives of the Parliament of the Federation of BiH were requested on 30 November 2009 to submit their replies to the request.

3. The House of Peoples and the House of Representatives of the Parliament of the Federation of BiH failed to submit their replies within the given time limit, which expired on 18 December 2009. However, the House of Representatives of the Parliament of the Federation of BiH notified the Constitutional Court, on 30 November 2009, that they had undertaken activities to have the competent body of that House of the Parliament of FBiH issue their final position in relation to these issues which would be „presented when a deliberation concerning this case is scheduled to be held".

III. Request

a) Allegations in the request

4. The applicant states that the challenged provision is in direct contravention of Article II(2) and Article IX(1) of the Constitution of Bosnia and Herzegovina. As to the alleged inconsistency of the challenged provision with Article II(2) of the Constitution of Bosnia and Herzegovina, the applicant refers to Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), which stipulates the right to free elections, which entails both the right to vote and stand for election. In addition, the applicant refers to an alleged inconsistency of the challenged provision with Article IX(1) of the Constitution of Bosnia and Herzegovina, underlining that the mentioned provision of the Constitution of Bosnia and Herzegovina stipulates that no person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina. According to the applicant, it clearly follows from the cited constitutional provision that the right to stand as a candidate in elections may be subject to limitations only and solely if stipulated by the cited provisions of the Constitution of Bosnia and Herzegovina and the European Convention. Therefore, the applicant holds that, by the challenged provision, the limitations on the right to stand for election have been determined contrary to the constitutional provisions. It follows that the applicant seeks that the Constitutional Court establish that the challenged provision is inconsistent with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 3 of Protocol No. 1 to the European Convention and Article IX(1) of the Constitution of Bosnia and Herzegovina. The applicant sought that the Constitutional Court order the Parliament of the Federation of Bosnia and Herzegovina to bring the challenged provision into line with the Constitution of Bosnia and Herzegovina within 30 days and, in the event that the Parliament of the Federation of BiH fails to do so, that the Constitutional Court of Bosnia and Herzegovina issue an interim measure prohibiting the application of the challenged provision.

IV. Relevant Law

5. The **Constitution of Bosnia and Herzegovina**, in the relevant part, reads**:**

Article II(2)
International Standards

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

Article IX(1)
General Provisions

No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina. The Presidency shall nominate the Chair of the Council of Ministers, who shall take office upon the approval of the House of Representatives. The Chair shall nominate a Foreign Minister, a Minister for Foreign Trade, and other Ministers as may be appropriate, who shall take office upon the approval of the House of Representatives.

6. The **First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the „First Protocol"),** in the relevant part, reads:

Article 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

7. The **Law on the Conflict of Interest in the Governmental Institutions of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 70/08), as relevant, reads:

I. CONFLICT OF INTEREST

Article 1
General provisions

(1) With a view to preventing a conflict of interest, this Law shall govern special obligations of elected officials, executive officeholders, and advisors in the institutions

of government of the Federation of Bosnia and Herzegovina („the Federation of BiH"), cantons and local self-government units in exercising their duties.

(2) A conflict of interest exists where an elected official, executive officeholder and advisor has a private interest that affects or may affect the legality, transparency, objectivity and impartiality as to the exercise of the public duty.

Article 3
Definitions

1. For purpose of this Law on conflict of interest:

[...]

e) Elected officials include:

1. delegates and members of the Parliamentary Assembly of the Federation of Bosnia and Herzegovina (hereinafter: Parliament of the Federation);

2. delegates in the legislative bodies of the canton;

3. city councilors in city and municipal councils;

f) Executive officeholders include President and Vice-Presidents of the Federation, members of the Government of the Federation of Bosnia and Herzegovina (hereinafter: Government of the Federation) and government of the canton, mayors and municipal heads (...);

g) Advisors include the advisors to the elected officials and executive officeholders (...);

[...]

Article 5
Public Enterprises and Privatisation Agencies

(1) Elected officials, executive officeholders and advisors shall not serve on the steering board, supervisory board, assembly board, administration or management, or act in the capacity of an authorised person for a public enterprise. This provision shall apply six months after the elected officials, the executive officeholders and advisors leave office.

(2) Elected officials, executive officeholders and advisors shall not serve on the steering board, supervisory board, or as director of the directorate or a privatisation agency. This provision shall apply six months after the elected officials, the executive officeholders and advisors leave office.

Article 6
Government Investment in Private Enterprise

(1) Elected officials, executive officeholders and advisors shall not serve on the assembly board, supervisory board, administration or management, or act in the capacity of an authorised person for any private enterprise in which the governmental body where the official, officeholder or advisor serves has invested capital in the four (4) years prior to the official, executive officeholder or advisor taking office.

(2) Elected officials, executive officeholders and advisors shall not serve on the assembly board, supervisory board, administration or management, or act in the capacity of an authorised person for any private enterprise that enters into contracts the value of which exceeds five thousand Convertible Marks (5,000 KM) per year with bodies financed from the budget at any level of government.

Article 8
Personal Service Contracts

(1) Elected officials, executive officeholders and advisors shall not enter into a contract with any public enterprise to provide personal services.

(2) Elected officials, executive officeholders and advisors shall not enter into a contract to provide personal services with any private enterprise that contracts, or otherwise does business, with government at any level. This provision shall only apply to private enterprises that are under contract or doing business with government authorities while the elected official, executive officeholder or advisor holds office and only when the value of the contract or the business with government exceeds five thousand (5,000) Convertible Marks per year.

(3) If an elected official, executive officeholder or advisor violates the provisions of this article, the contract of the official or officeholder shall be deemed null and void.

Article 9
The involvement of close relatives

The involvement of close relatives of elected officials, executive officeholders and advisors under the circumstances defined in Articles 4, 5, 6 and 8 of this Law also creates a situation that gives rise to a conflict of interest for the official, officeholder or advisor.

Article 16

(1) If an elected official, executive officeholder or advisor is found to have acted in violation of articles 5, 6, 8 or 9 of this Law, he or she shall be ineligible to stand for any elected office, or for a position in the executive office or for a position of an adviser for a period of four (4) years following the finding of the violation. In addition, the official,

officeholder or advisor may be fined in the amount of no less than one thousand Convertible Marks (1.000 KM) and not more than ten thousand Convertible Marks (10.000 KM).

V. Admissibility

8. The request for review of the constitutionality was submitted by the Chairman of the Presidency of BiH, which means that it was filed by an authorized person as set forth in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

9. The subject matter of the request is the review of constitutionality of Article 16 paragraph 1 of the Law on Conflict of Interest, which was enacted by the Parliament of the Federation of Bosnia and Herzegovina. Pursuant to Article VI(3)(a) of the Constitution of BiH, the Constitutional Court is competent to decide on the review of constitutionality of the challenged Law.

10. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17 of the Rules of Constitutional Court, the Constitutional Court establishes that the request is admissible as it has been filed by an authorized person and there is no single formal reason under Article 17 of the Rules of the Constitutional Court, which would render the request inadmissible.

VI. Merits

Consistency of the challenged provision with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 3 of Protocol No. 1 to the European Convention

11. The applicant holds that the challenged provision is in direct contravention with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 3 of Protocol No. 1 to the European Convention and Article IX(1) of the Constitution of Bosnia and Herzegovina as the right to stand as a candidate in elections, related to those whom the challenged provision refers to, is limited in an unlawful and unconstitutional manner.

12. Article II(2) of the Constitution of Bosnia and Herzegovina stipulates that the rights and freedoms set forth in the European Convention and its Protocols shall apply directly in Bosnia and Herzegovina and that these shall have priority over all other law. Article 3 of Protocol No. 1 to the European Convention stipulates the right to free elections, which comprises the active right to vote and passive right to stand for election in the choice of the legislature.

13. The Constitutional Court points to the position of the European Court of Human Rights („the European Court"), which has underlined in a number of its decisions that the rights safeguarded by Article 3 of Protocol No. 1 to the European Convention are not absolute, and concluded that, in their internal legal orders, the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded. The European Court concluded that the Contracting States have a wide margin of appreciation in this sphere, but it is for the Court to 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* (see ECHR, *Mathieu-Mohin and Clerfayt vs. Belgium*, Judgment of 2 March 1987, paragraph 52). The European Court presented the identical position in case *Gitonas et al. vs. Greece* (Judgment of 1 July 1997). In the Case of *Zdanoka vs. Latvia* (Judgment of 16 March 2006, Application no. 58278/00), the European Court states that the Contracting States must be given a margin of appreciation in this sphere as well as that there are numerous ways of organising and running electoral systems and a wealth of differences in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision (paragraph 103). It follows from the aforementioned that electoral legislation of any Contracting State must be assessed in the light of the political evolution of the country concerned with the result that features unacceptable in the context of one system may be justified in the context of another (paragraph 115c.). In the cited decision, the European Court, as regards the right to stand as a candidate for election, took the position that the Court's competence is limited largely to a check on the absence of arbitrariness in the domestic procedures leading to disqualification of an individual from standing as a candidate (paragraph 115e.).

14. It follows from the aforementioned that Article 3 of Protocol No. 1 to the European Convention implies the subjective rights to vote and to stand for election, and since Article 3 of Protocol No. 1 to the European Convention recognises these rights without setting them forth in express terms, let alone defining them, there is room for *implied limitations* (see e.g. *Labita vs. Italy*, Judgment of 6 April 2000, Application no. 26772/95, paragraph 201), but any limitations should not curtail the very essence of these rights and deprive them of their effectiveness, and have to be imposed in pursuit of a legitimate aim and must be proportionate.

Legitimate aim

15. Bringing the aforementioned principles into connection with the request in question, the Constitutional Court holds that the challenged provision ought to be viewed within

the State's discretion to impose certain limitations on individual rights. The relevant limitations are justified in the light of particular internal organisation and specific historical moment of Bosnia and Herzegovina. Namely, it is indisputable that Bosnia and Herzegovina, as a country in transition, has a dominant tendency to become a part of the general stream of internalisation (primarily to join the European Union), which implies high level of democracy within all segments of society and, in particular, in the sphere of electoral rights, as one of the fundamental rights, which guarantee political pluralism and, thereby, provide the citizens with the possibility to choose amongst several options the most suitable one in their view. From the voters' point of view, this is of particular importance as the legislative authorities actually determine, through the laws they enact, the development of both political and economic systems of a State.

16. The regulations governing the electoral law in Bosnia and Herzegovina, including Article 16 paragraph 1 of the Law on Conflict of Interest, should be viewed in the aforementioned context. Indisputably, the challenged provision of Article 16 paragraph 1 of the Law on Conflict of Interest is restrictive in the sense of curtailing of the „passive right to stand for election", as it imposes limitations on the rights of an elected official. However, the aforementioned provision stipulates the limitations only in the event that an elected official is found to have acted in violation of Articles 5, 6, 8 or 9 of the Law on Conflict of Interest. These provisions stipulate that elected officials, while holding office and six months after ceasing to hold such office, shall not serve on the steering board, supervisory board, assembly board, administration or management, or act in the capacity of an authorised person for a public enterprise, or as director of the directorate or a privatisation agency (Article 5 of the Law on Conflict of Interest). The same applies to private enterprises in which the governmental body, where the elected official serves, has invested capital in the four-year period prior to his taking office, and private enterprises that enter into contracts the value of which exceeds five thousand Convertible Marks per year with bodies financed from the budget at any level of government (Article 6 of the Law on Conflict of Interest). In addition, the Law on Conflict of Interest stipulates that, while holding office, elected officials shall not enter into a contract, to provide personal services, with any public enterprise or private enterprise which contracts, or otherwise does business, with government at any level where the value of the contract or the business with government exceeds five thousand Convertible Marks per year (Article 8 of the Law on Conflict of Interest). The same limitations also apply to elected officials' close relatives if involved in a business (Article 9 of the Law on Conflict of Interest).

17. In the view of the Constitutional Court, the aforementioned limitations undisputedly serve a legitimate aim in the public interest as they are intended to achieve that elected officials carry out their duties transparently, objectively and impartially. This can only be

achieved if their private interest is entirely separated from their public functions. Namely, voters who take part in election have the right to have candidates elected to the legislature, who would carry out their functions independently, professionally and loyally, without assessing certain legal solutions through a prism of personal interest, and who would prevent an abuse of public office for personal gain and advantage. This may only be achieved in a situation where a legal framework is created in such a way that it secures that an elected official acts in the public and not personal interest. Such a legal framework, which excludes primacy of personal interest in favour of public interest so that elected officials carry out their duties responsibly, impartially and transparently, as defined by Article 1 paragraph 2 of the Law on Conflict of Interest, serves a legitimate aim within the meaning of Article 3 of Protocol No. 1 to the European Convention.

Proportionality

18. The Constitutional Court highlights that the European Court in a number of its decisions reiterated that the right to stand as a candidate in an election guaranteed by Article 3 of Protocol No. 1 to the European Convention which is inherent in the concept of a truly democratic regime, would only be illusory if one could be arbitrarily deprived of it at any moment. Consequently, while it is true that the Contracting States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires the finding that this or that candidate has failed to satisfy them, *i.e.* has complied with a number of criteria framed to prevent arbitrary decisions (see, for instance, ECtHR, *Krasnov and Skuratov vs. Russia,* Judgment of 31 March 2008, paragraph 42). In this context, the Constitutional Court underlines that, pursuant to the case-law of the European Court, it is necessary to establish whether the limitation stipulated by the challenged provision is proportionate to the legitimate aim pursued, *i.e.* whether the limitations, as stipulated, curtail the right to stand for election to such an extent as to impair its very essence and deprive it of its effectiveness.

19. Considering the challenged provision in the context of the principle of proportionality under Article 3 of Protocol No. 1 to the European Convention, the Constitutional Court recalls that the challenged provision stipulates that if an elected official or an elected officials' close relative are found to have been involved in a business of any public enterprise or private enterprise contrary to Articles 5, 6, 8 or 9 of this Law, he or she shall be ineligible to stand for any elected office for a period of four years following the finding of the violation. In addition, it is stipulated that fines starting at 1,000.00 (one thousand) Convertible Marks up to 10,000.00 (ten thousand) Convertible Marks may be imposed in such cases.

20. In the opinion of the Constitutional Court, the challenged provision does not curtail the right of a person to stand as a candidate to the legislature, subject to certain conditions. Furthermore, it is evident that the mentioned provision is of a general nature and, as such, it is applied to all candidates registered to stand in elections, and it does not favour by its contents any candidate or political option; however, the responsibility rests with the domestic authorities (the Central Electoral Commission and ordinary courts) to apply the provisions of the Law concerned to each case in an appropriate manner. It is also beyond dispute that the relevant limitations have been imposed with a view to promoting the general public interest and not individual, partial interests of elected candidates; their purpose is to ensure that elected officials carry out their functions independently, responsibly and impartially. Consequently, with the aim of safeguarding their objectivity, elected officials may not be dependant on anyone as they are to act exclusively in the citizens' interest.

21. In the present situation, however, taking into account the general nature of the challenged provision, the Constitutional Court notes that the challenged provision, that is to say the challenged Law, was the subject matter of the parliamentary discussion where the interested subjects, and primarily the political parties, through parliamentary procedure, could present their objections to the legal solutions proposed. As the Law on Conflict of Interest has been adopted, it undisputedly follows that it was supported by a parliamentary majority, which is actually the category of persons to which the mentioned legal solutions apply. With regard to proportionality, the Constitutional Court notes that the Law on Conflict of Interest was published in the *Official Gazette of the Federation of BiH* and entered into force on 6 November 2008, *i.e.* after the local elections held on 5 October 2008, and that the application of the relevant law as well as the limitations concerned will have a particular relevance for the next general election to be held in autumn 2010. This practically means that persons who intend to stand for election to the legislature will have sufficient time to adjust their conduct to the provisions of the Law on Conflict of Interest. As to the aforementioned, one has to take into account that the right to stand as a candidate in elections depends exclusively on candidates themselves, *i.e.* their decision and readiness to act in favour of the public interest in the event that there is any conflict between their personal interest and the public interest. Furthermore, it should be taken into account that the Law on Conflict of Interest, in Article 2 paragraph 9, stipulates that elected officials shall receive salary and allowances for the duty they exercise, whereby their economic position is secure. On the other hand, the Constitutional Court states that the stipulated limitations on the right to stand as a candidate is of a temporary nature as it prohibits the candidacy in elections for the period of four years,

including the possibility to impose the fines, which, in the opinion of the Constitutional Court, are not too high given the possible consequences related to the abuse of office for personal gain. Hence, the Constitutional Court holds that the limitations in question do not curtail the right to stand as a candidate in elections to such an extent as to impair its very essence and deprive it of its effectiveness. Taking into account that the general interest, in terms of the objectivity, independence, impartiality and absolute commitment of an elected official to his/her public duty, has primacy over the private interest of an individual to be elected without limitations to the legislature, while exercising important functions in public or private enterprises, the Constitutional Court holds that the limitations in question meet the proportionality requirements.

22. The Constitutional Court holds that the challenged provision of the Law on Conflict of Interest is not inconsistent with Article II(2) of the Constitution of Bosnia and Herzegovina and Article 3 of Protocol No. 1 to the European Convention as the prescribed limitations serve a legitimate aim pursued in order to prevent the abuse of office for personal gain. In addition, the limitations in question have reasonable justification and do not curtail the right to stand as a candidate in elections to such an extent as to impair its very essence and deprive it of its effectiveness as the limitations are proportionate to the aim of the wider community, which is to ensure transparency of the electoral process as well as objectivity, lawfulness, independence and impartiality of elected officials in the exercise of public duties and functions.

23. In view of the above, the Constitutional Court concludes that the challenged provision is consistent with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 3 of Protocol No. 1 to the European Convention.

Consistency of the challenged provision to Article IX(1) of the Constitution of Bosnia and Herzegovina

24. The applicant holds that the challenged provision curtails the right to stand as a candidate in elections contrary to Article IX(1) of the Constitution of Bosnia and Herzegovina.

25. Article IX(1) of the Constitution of Bosnia and Herzegovina stipulates that no person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina.

26. The Constitutional Court points out that the quoted constitutional provision stipulates the prohibition of the right to stand as a candidate in elections for certain categories of persons connected to the war crimes in Bosnia and Herzegovina and the said provision does not stipulate any limitations on the right to stand for elections for other categories of persons. However, this provision neither stipulates such limitations on the right to stand for elections which are of different nature. In view of the aforementioned and within the context of the present case, the Constitutional Court holds that the provision Article IX(1) of the Constitution of Bosnia and Herzegovina must also be assessed in relation to the provision of Article 3 of Protocol No. 1 to the European Convention, noting that certain limitations imposed by the challenged provision of the Law upon the right to stand as a candidate in elections are of a different character than the limitations contained within the quoted constitutional provision.

27. It follows from the aforementioned, that the quoted constitutional provision can absolutely not be taken as an argument that the right to stand as a candidate in elections may not be limited in other cases since no other provision of the Constitution of Bosnia and Herzegovina excludes such possibility. On the other hand, as stated above in this decision in relation to Article 3 of Protocol No. 1 to the European Convention and pursuant to the case-law of the European Court, there is a possibility that the Contracting States, in their internal legal orders, make the rights to vote and to stand for election subject to conditions which are not in principle precluded, provided that those limitations 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, which is what this particular case is all about, as previously stated in this decision.

28. Having all this in mind, the Constitutional Court holds that the contested provision is consistent with Article IX(1) of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

29. The Constitutional Court concludes that Article 16 paragraph 1 of the Law on Conflict of Interest of Governmental Institutions of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 70/08) is consistent with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 3 of Protocol No. 1 to the European Convention as the stipulated limitations serve a legitimate aim. The legitimate aim being pursued is seeking to ensure that those officials that are elected to the legislature are independent, with a view to promoting the general

interest of the community as a whole and preventing the abuse of public duties for personal gain, as the interest of the community in terms of the lawfulness, transparency, objectivity and impartiality of elected officials exercising the important functions has primacy over an individual's interest to be elected to the legislature, while exercising important functions in public or private enterprises. Furthermore, the Constitutional Court has established that Article 16 paragraph 1 of the Law on Conflict of Interest of Governmental Institutions of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 70/08) is consistent with Article IX(1) of the Constitution of Bosnia and Herzegovina as the mentioned constitutional provision refers to the specific categories of persons whose right to stand for election is thus restricted while, at the same time, the provision does not stipulate any limitation on the right to stand for elections for other categories of persons.

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

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

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

Case No. U 12/09

DECISION ON ADMISSIBILITY AND MERITS

Request of 23 members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and 5 delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for a review of the constitutionality of Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina and Decision of the Council of Ministers on the manner and procedure of realisation of the right to remuneration during maternity leave in the Institutions of Bosnia and Herzegovina

Decision of 28 May 2010

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 63(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. David Feldman,

Mr. Mirsad Ćeman

Having deliberated on the request of **23 members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina** and **5 delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina**, in Case No. **U-12/09,** at its session held 28 May 2010 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of 23 members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and 5 delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for the review of the constitutionality of Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH,* No. 50/08 and 35/09) is hereby granted.

It is hereby established that Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 50/08 and 35/09) is inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of

Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, with Articles 1, 2 and 11 of the UN Convention on the Elimination of All Forms of Discrimination Against Women as well as with Article 26 of the International Covenant on Civil and Political Rights and Article 10 of the International Covenant on Economic, Social and Cultural Rights.

Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 50/08 and 35/09) is hereby quashed, pursuant to Article 63(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The Decision of the Council of Ministers on the Manner and Procedure of Excercising of the Right to Remuneration during Maternity Leave in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 58/09) is hereby quashed, in accordance with Article 63(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina, since following the quashing of Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 50/08 and 35/09) legal grounds for its adoption has ceased to exist.

Quashed Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 50/08 and 35/09) and the Decision of the Council of Ministers on the Manner and Procedure of Excercising of the Right to Remuneration during Maternity Leave in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 58/09) shall cease to be in force as of the date following the date of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*, pursuant to Article 63(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 1 October 2009, 23 members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and 5 delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, („the applicants"), filed a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for a review of the constitutionality of Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, Nos. 50/08 and 35/09 -„the challenged provisions") and Decision of the Council of Ministers on the manner and procedure of excercising of the right to remuneration during maternity leave in the Institutions of Bosnia and Herzegovina (*Official Gazette of BiH*, No. 58/09-„the challenged decision of the Council of Ministers"). The applicants also sought the adoption of an interim measure whereby the Constitutional Court would suspend the application of Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina claiming that this would partially alleviate the difficult financial situation of families and households that were unjustifiably and unlawfully left without income and benefits they are entitled to pending a final decision of the Constitutional Court upon the aforementioned request.

II. Procedure before the Constitutional Court

2. By its decision on interim measure of 22 October 2009, the Constitutional Court dismissed the request for an interim measure as ill-founded.

3. The Constitutional Court did not accept the applicants' proposal to seek, within the meaning of Article 15(3) of the Rules of the Constitutional Court, an expert opinion of the Human Rights Ombudsmen of Bosnia and Herzegovina and concluded that it was sufficient to present the Special Report of Human Rights Ombudsmen of Bosnia and Herzegovina of 12 May 2009, attached to the request.

4. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 7 October 2009, the House of Representatives and the House of Peoples of the Parliamentary Assembly and the Council of Ministers of Bosnia and Herzegovina were requested to submit their respective replies to the request.

5. On 12 and 30 October and on 13 November 2009 the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, the Council of Ministers and the

House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina submitted their respective replies to the request.

6. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were communicated to the applicants on 18 December 2009.

III. Request

a) Statements from the request

7. The applicants claim that the challenged provision and the challenged decision of the Council of Ministers are inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina. They also consider that the challenged provision and the challenged decision are in violation of Article 1 paragraphs 1 and 2 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), the International Covenant on Civil and Political Rights (1966), Optional Protocols (1966 and 1989), the UN Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights and the European Social Charter. In addition, they consider that the challenged law and the Decision are inconsistent with the Law on Prohibition of Discrimination of BiH (*Official Gazette of BiH*, No. 59/09).

8. The applicants allege that, following the entry into force of the challenged law and challenged provision, the Ministry of Finance and Treasury of BiH issued an Instruction to terminate payment of salary reimbursement from the BiH Budget to women employees on maternity leave residing in the Federation of BiH, which until then had been paid on a regular basis. At the same time, salary reimbursement is completely paid from the BiH Budget funds to women employees residing in the Republika Srpska, but at the expense of the Public Fund of the mentioned Entity. In the applicants' opinion, the application of the challenged provision gives rise to discrimination and segregation of women employees within the same institution as employees from the same institution at the same level of authority are prevented from equal enjoyment of the right originating from the labour relations. The employer, the BiH Institutions, pay a salary reimbursement to women employees residing in the RS, while women employees residing in the Federation of BiH do not receive a salary reimbursement or only receive a percentage depending on the respective canton's regulations, as the BiH Institutions interpret this provision so that such women employees (residing in the FBiH) acquire their right to salary reimbursement in accordance with the cantonal regulations.

9. In the applicants' opinion there is discrimination even among women employees who are residents of the FBiH but who live in different cantons, as some cantons in the FBiH do not make any social welfare payment for women on maternity leave and, consequently, they do not pay contributions into the pension fund and health insurance fund. In addition, they have stated that the mentioned provision is in conflict with other provisions of the Law on Salaries and, primarily, in conflict with the provision of Article 4 of that Law. This provision provides that the funds for salaries and other compensations of the employees in the BiH Institutions shall be secured solely from the Budget of the BiH Institutions and this provision relates to all compensations foreseen in and regulated by this Law and by the Labour Law of Bosnia and Herzegovina, which also include reimbursement during maternity leave. They also state that the Council of Ministers, by the challenged Decision, had only worsened the situation and confirmed the differential treatment of employees in the BiH Institutions. Due to the application of the challenged provision, many cantons in the Federation of BiH pay out certain financial means to families with children and those cantons also pay contributions for social and health insurance. However, some cantons do not foresee such payment at all or foresee only a minimum amount for the payment of contributions. This means that contributions for pension and disability insurance and health insurance are not paid for expectant mothers and, therefore, they are not able to obtain access to primary health-care services in those cantons for themselves and their newborn children. Therefore, the applicants have suggested that Jasminka Dzumhur, the Human Rights Ombudsman for BiH, be invited to act as an *amicus curie* in the present case.

b) Reply to the request

10. In its reply to the request, the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina alleges that the Constitutional-Legal Commission of the House of Peoples does not support the mentioned request.

11. In its reply the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina alleges that the Constitutional-Legal Commission of the House of Peoples, upon the discussion resulting in five votes in favour, none against and two abstained, supported the request.

12. In its reply to the request the Council of Ministers alleges that the mentioned legal solution derives from the constitutional stipulation that the issue of direct taxes *i.e.* the exercise of the right to health insurance, social welfare and pension-disability insurance falls under the responsibility of the Entities in BiH. Accordingly, the Entities enacted the laws and established the funds through which the employees in the BiH Institutions, conditional on the place of residence, exercise their right to maternity leave benefits, their

right to sick leave allowance, and the right to pension-disability insurance. Such a legal solution has identified the various current solutions of the competent funds of the Entities as to the manner in which the beneficiaries exercise their rights as well as to the remuneration amount which the legally determined beneficiaries are entitled to. In this regard, the budget beneficiaries differently interpreted the manner in which maternity leave benefits for employees in the institutions of BiH residing in the Federation of BiH have been calculated and paid. Namely, pursuant to Article 90(2) of the Law on Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the FBiH* No. 36/99) all cantons in the Federation of BiH are obliged to enact a law governing the terms, conditions, procedure and financing of the right to reimbursement for maternity leave. However, despite the specific legal obligation, some cantons in the Federation of BiH (for example, the Herzegovina-Neretva Canton) failed to enact such a law and, consequently, an issue has been raised as to the right to reimbursement for maternity leave of persons who reside in the cantons in the Federation of BiH.

13. Furthermore, it is stated that the Council of Ministers, at its 64th session held on 30 October 2008, considered Information regarding the application of the Law on Salaries and Remunerations in the Institutions of BiH. One of the problems underlined in the said Information is the issue related to the calculation and payment of maternity leave benefits. In this context, the Council of Ministers adopted the following conclusion: „The budget beneficiaries and the Ministry of Finance and Treasury are hereby obliged to ensure that the employees on maternity leave have health coverage and social protection at least within the scope of the law applicable at lower levels of government, including the obligation to bring lawsuits against the lower levels of government which do not meet their legal obligations. At the same time, it is recommended that all levels of government improve health protection and maternity protection and protection of the expectant mothers and that the application of the rights throughout BiH be harmonized."

14. In its letter No. 01-08-16-5259-1/09 of 4 November 2008, the Ministry of Finance and Treasury informed all budget beneficiaries about the aforementioned conclusion and obliged the managers of the budget beneficiaries, in cases where the terms, conditions, procedure and financing of the right to reimbursement for maternity leave for employees who reside in the territory of the Federation of BiH are not specified by law at the cantonal level, to compute and pay remuneration to employees on maternity leave residing in the Federation of BiH in the amount commensurate with the lowest cost of labour defined in the General Collective Agreement within the Federation of BiH. Moreover, the institutions are tasked with calculating and paying the taxes and contributions on the mentioned amount as referred to under the relevant regulations.

IV. Relevant Law

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

Article II(2)

Article 2, as relevant, reads:

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

Article II(4)

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The **Convention on the Elimination of All Forms of Discrimination against Women** as relevant reads:

Article I

For the purposes of the present Convention, the term „discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

The **International Covenant on Civil and Political Rights,** as relevant, reads:

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The **International Covenant on Economic, Social and Cultural Rights**, as relevant, reads:

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

The **Law on Salaries and Remunerations in the Institutions of BiH (***Official Gazette of BiH*, No. 50/08 and 35/09)

Article 4
(Securing funds for salaries)

Funds for salaries and other compensations of the employees in the BiH Institutions shall be secured solely from the Budget of the BiH Institutions.

Article 35
(Remuneration during maternity leave)

An employee in the BiH Institutions shall be entitled to remuneration during maternity leave in accordance with the regulations governing this field according to the place of payment of the contributions per each employee.

16. The **Decision on the Manner and Procedure of Realisation of the Right to Remuneration during Maternity Leave in the Institutions of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, No. 58/09), as relevant, reads:

Article 1
(Subject-matter of the Decision)

This Decision shall regulate the manner and procedure of realisation of the right to remuneration during maternity leave of the employees in the Institutions of Bosnia and Herzegovina in accordance with Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina and Article 50(1) of the Law on Labour in the Institutions of BiH.

Article 2
(Amount of Remuneration)

(1) An employee in the Institutions of Bosnia and Herzegovina shall be entitled to remuneration during maternity leave in accordance with the regulations governing this field according to the place of payment of the contributions per each employee of the Institutions of Bosnia and Herzegovina.

(2) In case where the Entities' regulations i.e. the regulations of the Brcko District of Bosnia and Herzegovina do not specifically stipulate the manner and procedure of realisation of the right to remuneration during maternity leave, the calculation and payment of remuneration during maternity leave shall be made in the amount commensurate with the lowest cost of labour as defined by the Entities' general collective agreements i.e. by the general collective agreement of the Brcko District of Bosnia and Herzegovina.

Article 3
(Manner in which an employee has to prove the eligibility for maternity leave)

(1) To acquire the right to remuneration during maternity leave, an employee shall submit a report on temporary incapacity for work issued by a competent medical institution, which shall prove that the employee is on a maternity leave.

(2) The employee shall deliver the report referred to in paragraph 1 of this Article to the competent office of the budget beneficiary no later than the day on which salary calculation commences for the month the employee was on maternity leave.

Article 4
(Calculation and Payment of Remuneration)

The calculation and payment of remuneration during maternity leave for the employees in the institutions of Bosnia and Herzegovina shall be made together with the monthly calculation and payment of salaries to the employees in the institutions of Bosnia and Herzegovina based on the report referred to in paragraph 1 of Article 3 of the present Decision and the ruling on maternity leave issued by the head of the Institution.

Article 5
(Institutions responsible for implementation of the present Decision)

The Institutions of Bosnia and Herzegovina and the Ministry of Finance and Treasury shall be responsible for implementing the present Decision.

Article 6
(Entry into force)

The Decision shall enter into force on the first day following the date of its publication in the Official Gazette of BiH.

V. Admissibility

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

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

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

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

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

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

18. The Constitutional Court finds that the request was submitted by 23 members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and 5 delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, which means that the request was submitted by an authorized person within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

19. Bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Constitutional Court's Rules, the Constitutional Court establishes that the present request is admissible as it was submitted by an authorised person, and that there is no single reason under Article 17(1) of the Constitutional Court's Rules rendering this request inadmissible.

VI. Merits

20. As to the instant case, the applicants consider that the challenged provision and the challenged decision of the Council of Ministers are inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1(1) and (2) of Protocol No. 12 to the European Convention. They also consider that the mentioned provision and the challenged decision of the Council of Ministers are in violation of the following international instruments: 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto, Convention on the Elimination of All Forms of Discrimination against Women, International Covenant on Economic, Social and Cultural Rights, and European Social Charter. In addition, they consider that the challenged law and the Decision are inconsistent with the BiH Law on Prohibition of Discrimination.

21. Article II(4) of the of the Constitution of Bosnia and Herzegovina, as relevant, reads:

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

22. Article 1 of Protocol No. 12 to the European Convention, as relevant, reads:

Article 1
General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

23. The Constitutional Court recalls that Article II(4) of the Constitution of Bosnia and Herzegovina provides that the enjoyment of rights and freedoms provided for under the international agreements listed in Annex I to the Constitution of Bosnia and Herzegovina is granted to all persons without discrimination on any ground. Annex I item 7 to the Constitution of Bosnia and Herzegovina sets out a list of Additional Human Rights Agreements to be applied in Bosnia and Herzegovina. Among these conventions, the applicants invoked the International Covenant on Civil and Political Rights, the International

Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women. The latter Convention establishes that the State Parties to the said Convention condemn discrimination against women in all its forms and the term 'discrimination against women' shall mean any distinction. Article 11 prohibits especially discrimination against women in the field of employment in order to ensure the right to the same employment opportunities. In addition, the State Parties are obliged by this Convention to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women, required for the elimination of such discrimination in all its forms and manifestations. The European Charter of Social Rights being not incorporated in Annex I will not be examined by the Constitutional Court.

24. The Constitutional Court will examine the case at hand under Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 12 to the European Convention as well as with the other mentioned international agreements. According to the case-law of the European Court of Human Rights discrimination exists if a person or group of persons in an analogous situation are differently treated and if there is no objective or reasonable justification for such differential treatment (see, the European Court of Human Rights*, Belgian Linguistic Case*, the judgment of 23 July 1968, Series A, No. 6). It is of no relevance whether discrimination arose from a difference of treatment that is expressly permitted by legislation or from the mere application of laws (see, the European Court of Human Rights, *Ireland vs. the United Kingdom*, judgment of 18 January 1978, Series A, No. 25, paragraph 226). The European Court of Human Rights has applied this approach to questions of discrimination in relation to political participation in Bosnia and Herzegovina under both Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention: see *Sejdić and Finci v. Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06, judgment of 22 December 2009 [GC].

25. The Constitutional Court considers that this approach is equally appropriate in relation to the application of Article II(4) of the Constitution of Bosnia and Herzegovina in combination with Article 26 of the International Covenant on Civil and Political Rights, with Article 10 of the International Covenant on Economic, Social and Cultural Rights and with Articles 1, 2 and 11 of the Convention on the Elimination of All Forms of Discrimination against Women. In accordance with that approach, for a difference in treatment to be objectively and reasonably justified two conditions must be fulfilled - the principle of differential treatment may be applied for the purpose of achieving a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

26. The first question the Constitutional Court has to answer is whether there has been a differential treatment. *Prima facie*, this does not seem to have occurred in the case at hand since Article 35, regulating maternity leave, refers to all women working in State institutions. However, it should be noted that this provision refers to the place of payment of maternity leave benefits. Also, the applicants consider that the women employees in the institutions of Bosnia and Herzegovina who reside in the Federation of Bosnia and Herzegovina are discriminated against on grounds of place of payment when it comes to the enjoyment of their right to maternity leave benefits. Namely, the applicants consider that the women employees in the institutions of Bosnia and Herzegovina whose place of residence is in the Federation of Bosnia and Herzegovina are discriminated against when compared with women employees whose place of residence is in the territory of the Republika Srpska or with those whose place of residence is in the Federation of Bosnia and Herzegovina depending on the canton they reside in.

27. In doing so, the challenged provision refers to the Entities' legislation on social policy. Whereas in the Republika Srpska women are guaranteed to receive their whole salary, in the FBiH, this issue is ruled by the Federation authorities as well as by the cantons or even the municipalities and results in important differences, with some cantons completely lacking any payment of benefits (see also the special report of the BiH Ombudsman of 12 May 2009). Thus it is clear that Article 35 treats differently a group of persons – the women working in State institutions – who, as women employees of a State institution, are in the same legal situation. Therefore, this differential treatment needs to be justified.

28. The second problem to be resolved concerns the legitimate aim pursued by Article 35. The Constitutional Court finds that the challenged provision is contained in the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina and thus aimed at guaranteeing the same social rights to the employees of the same institutions. This objective appears clearly in the light of Article 4 of this law and corresponds namely to the international obligations of BiH as recently specified in the framework Law on Prohibition of Discrimination of BiH (*Official Gazette of BiH*, No. 59/09). The Constitutional Court must examine whether this differential treatment could be justified by the division of responsibilities between the State and the Entities. Namely, the issue of social policy falls under the competence of the Entities and not under the competence of the State of Bosnia and Herzegovina. In this respect, the Constitutional Court holds that the exclusive competence of the Entities does not take into account the fact that maternity leaves are not only a matter of social policy but also part of human rights and their protection.

29. Taking into account the aforementioned, the Constitutional Court recalls that maternity leave concerns especially the right for women not to be discriminated against

and to enjoy decent conditions of work, the right to health, the right to private and family life and the children's rights. Thus the report of Bosnia and Herzegovina of January 2004 addressed to the Committee charged with monitoring the Convention on the Elimination of All Forms of Discrimination against Women asserts that : *According to the applicable laws in the area of labor in Bosnia and Herzegovina, every type of discrimination on the basis of right to labor and employment is forbidden. Bosnia and Herzegovina is the signee of more than 66 Conventions from the area of labor (MOR), so that it had passed new laws in the previous period, harmonizing them for the most part with the MOR Conventions. International labor standards that ensure complete Equality of all persons at work and in the approach to employment have been built into the new legislature, any type of discrimination is forbidden, and rights that are economically and financially sustainable, taking in mind the state of the Bosnia and Herzegovina's economy, are determined. All benefits on the basis of labor are equal for men and women (paragraph* 157). However, these assertions are not yet completely realized as the same report admits: *At the time of pregnancy, birth, and childcare, a woman has the right to maternity leave in the duration of one straight year. At the time she uses her maternity leave, the employee has the right to a salary reimbursement. In RS the reimbursement amounts to the average of the last three received salaries, and in FBiH this amount is determined by the provisions made by the canton, so there are differences in the amounts paid* (paragraph 186).

30. Furthermore, the Constitutional Court recalls that previous maternity benefits were linked to health care and social insurance. The Insurance Agency has competence to harmonize this part of legislative activities of the Entities to meet the requirements for integration into the European Union. The obligation to comply with the requirements needed for integration into the European Union exists also with respect to maternity benefits. Indeed, the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina aims at non discriminatory work conditions pursuant to Article II(4) of the Constitution in conjunction with Article 1 of Protocol No. 12 to the European Convention on Human Rights. Also, the aforementioned Law must also respect the right to free movement of persons according to the European Economic Community Regulation (EEC) No. 1408/71 of 14 June 1971) on the application of social security schemes to employed persons and to members of their families moving within the Community. The Constitutional Court refers to its Decision No. *U-68/02* stating that the substantive contents of a single market (Article I(4) of the Constitution of Bosnia and Herzegovina) were clearly defined by the European Court of Justice, which provided guidelines to the European countries on the constitutional development of this important aspect (see Decision of the Constitutional Court of Bosnia and Herzegovina, *U-68/02* of 25 June 2004, paragraph 41, published in the *Official Gazette of Bosnia and Herzegovina,* No.

38/04). Therefore, the principle of single market, as interpreted by the European Court of Justice, has interpretative power for the constitutional principle of a single market under Article I(4) of the Constitution of Bosnia and Herzegovina. Pursuant to this principle, social benefits like maternity leave for employees of State institutions should not depend on the residence of the person in question given that the idea of a Single Market implies that the State makes an employment opportunity equally attractive to all citizens of Bosnia and Herzegovina, notwithstanding the Entity boundaries, Entity citizenship, or place of residence. Supporting the present scheme as provided for in the challenged provision, the State has made employment opportunities within State institutions more attractive to those citizens who reside in the Entity that provides greater benefits. Furthermore, the free movement of persons, as with the other freedoms contained in the principle of a Single Market, comes under the principle of non-discrimination.

31. Since the remuneration of maternity leave arises from the employment of women in the institution concerned and not from their place of residence, the difference made by the challenged provision pursuant to the place of payment is not a proper way to achieve the highest level of human rights. The Constitutional Court holds that the competence of the Entities to regulate social policy is not appropriate to the aim sought to be achieved with regard to social protection and equal remuneration. Therefore, it must be taken into account that the women concerned are working in a State institution and not in the Entities' institutions and that Article 4 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina provides that *Funds for salaries and other compensations of the employees in the BiH Institutions shall be secured solely from the Budget of the BiH Institutions.* Pursuant to Article I(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.* Thus the State and the Entities have the joint obligation not only to ensure the highest level of protection of human rights but also to guarantee an equal implementation of these rights. According to the observations of the CEDAW-Committee - *15. The Committee is concerned that the adoption of the Law on Gender Equality has not yet led to a harmonization, as required, of existing legislation with this law, although a large number of amendments have been formulated. 16. The Committee recommends that the State party speed up the process of law harmonization in order to comply with its obligations under the Law on Gender Equality (Article 30, paragraph 2), and under all articles of the Convention and that it put in place procedures for the effective implementation and enforcement of these laws.*

32. In view of the above, the Constitutional Court considers that the challenged provision does not pursue a legitimate aim.

33. Thirdly, the Constitutional Court has to answer the question of proportionality. Regarding this principle, the Constitutional Court observes that the same aim (*i.e.*, providing social protection and equal remuneration for maternity leave) could be achieved through other means and not only by strict reliance on local regulations. The Law on Prohibition of Discrimination obliges all competent authorities in the State and in the Entities to harmonise all regulations in order to establish non discriminatory conditions of political, economic and social life in Bosnia and Herzegovina. The Constitutional Court does not see any reason why the State institutions are not able, according to their own financial possibilities, to directly pay this benefit to employees in order to avoid any discriminatory treatment, since the State is obliged to finance, *inter alia*, payments to employees of the institutions of Bosnia and Herzegovina, and since this particular payment has no impact on any other ancillary benefits provided to employees by the Entities.

34. Furthermore, the Constitutional Court points out that, even though Bosnia and Herzegovina has a complex structure (*U-5/98*, paragraph 13) and without classifying its constitutional-legal order, in the Federal states at the European level there is no maternity benefits scheme similar to the one here at issue. In all of the Federal states (*e.g.*, Austria, Germany, Switzerland and Russia), maternity leave is equal for all employees, regardless of their place of residence. The only exception is Switzerland, where employees residing in the Geneva Canton receive two additional weeks of maternity leave as compared to those residing in other Cantons; however, the Federal government has set minimum standards that all Cantons must meet, ensuring that there are no great disparities between employees with regards to maternity benefits. This example typifies the notion that additional rights can be made available at the local level so long as minimum standards are guaranteed by the Federal government (compare *U 3/08*, paragraphs 73 ff). On the one hand, the Constitutional Court respects the particularities of the constitutional order of Bosnia and Herzegovina; however, the common constitutional standards of complex states – especially at the European level – must be taken into account, and deviations therefrom should only occur when there is sufficient justification. In the present case, the Constitutional Court finds no reason for any deviation from common European standards.

35. Therefore, the Constitutional Court holds that the challenged provision is not proportionate to the aim sought by the Law on Salaries and Remuneration in the Institutions of BiH. Considering the difference of remuneration in the Republika Srpska and in the Federation, especially in the cantons where no benefit is accorded for maternity leave, the challenged provision contains a discrimination which is in itself disproportionate, the disproportion being still increased by the differences in the regulations in the FBiH.

36. Given the aforementioned, the Constitutional Court concludes that Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina is discriminatory and in contravention of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 12 to the European Convention, Articles 1, 2 and 11 of the UN Convention on the Elimination of All Forms of Discrimination Against Women as well as Article 26 of the International Covenant on Civil and Political Rights and Article 10 of the International Covenant on Economic, Social and Cultural Rights.

37. While considering the present request regarding the challenged decision of the Council of Ministers, the Constitutional Court finds that Article 1 of the mentioned decision prescribes that it regulates the manner and procedure of realisation of the right to remuneration during maternity leave of the employees in the Institutions of Bosnia and Herzegovina in accordance with Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina and Article 50(1) of the Law on Labour in the Institutions of BiH. Thus it follows that the mentioned decision of the Council of Ministers was adopted also on the basis of the challenged provision of the Law on Salaries and Remunerations in the Institutions of BiH. Since the Constitutional Court has concluded, as stated in the previous paragraphs of this decision, that the challenged provision of the Law on Salaries and Remunerations in the Institutions of BiH is discriminatory, and that it is not consistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction namely with Article 1 of Protocol No. 12 to the European Convention, it follows that once the challenged legal provision ceases to be in effect, the legal grounds for taking the challenged decision of the Council of Ministers ceased to exist.

VII. Conclusion

38. The Constitutional Court holds that the challenged provision of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina is inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 12 to the European Convention, Articles 1, 2 and 11 of the UN Convention on the Elimination of All Forms of Discrimination Against Women as well as Article 26 of the International Covenant on Civil and Political Rights and Article 10 of the International Covenant on Economic, Social and Cultural Rights since it leads to a differential treatment of women employees in the institutions of Bosnia and Herzegovina and the Constitutional Court finds no objective and reasonable justification for such differential treatment. As a result of the aforementioned, the Constitutional Court concludes that the legal grounds for taking the challenged decision of the Council of Ministers ceased to exist as it was adopted

on the basis of the challenged provision of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina.

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

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

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

Case No. U 9/09

DECISION ON ADMISSIBILITY AND MERITS

Request of Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for review of the constitutionality of the provisions of Article 19.1, 19.2, 19.3, 19.4, 19.5, 19.6 and 19.7 of the Election Law of Bosnia and Herzegovina, the provisions of Article VI.C. paragraphs 4 and 7 of Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina, paragraph 1 of the introductory part and paragraph 2 of the Decision of the High Representative for Bosnia and Herzegovina enacting the Statute of the City of Mostar and the provisions of Articles 7, 15, 16, 17, 38, 44 and 45 of the Statute of the City of Mostar

Decision of 26 November 2010

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 17(1) (1), Article 59(2)(2), Article 61(1), (2) and (3) and Article 63(1) and (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, Nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. David Feldman

Mr. Mirsad Ćeman

Having deliberated on the request of **the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina,** in case no. **U 9/09**, at its session held on 26 November 2010, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for review of the constitutionality of the provisions of Article 19.4 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08 and 37/08) and Article 17 of the Statute of the City of Mostar (*Official Gazette of the City of Mostar*, No. 4/04) is hereby partially granted.

It is hereby established that Article 19.4, paragraph 2 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06,

24/06, 32/07, 33/08 and 37/08) and Article 17, paragraph 1 of the Statute of the City of Mostar (*Official Gazette of the City of Mostar*, No. 4/04), in part reading as follows: *Each City area shall elect three (3) City Councillors,* are not consistent with Article 25 of the International Covenant on Civil and Political Rights which makes an integral part of the Constitution of Bosnia and Herzegovina.

It is hereby established that Article 19.2 paragraphs 1 and 3 and Article 19.4 paragraphs 2 to 8 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08 and 37/08) and Article 17, paragraph 1 of the Statute of the City of Mostar (*Official Gazette of the City of Mostar*, No. 4/04), in part reading as follows: *Each City area shall elect three (3) City Councillors,* are not consistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25 of the International Covenant on Civil and Political Rights.

The Parliamentary Assembly of Bosnia and Herzegovina is ordered to amend the unconstitutional provisions of the Election Law of Bosnia and Herzegovina in accordance with this decision within six months following the publication of this decision in the *Official Gazette of Bosnia and Herzegovina*.

It is hereby established that Article 7 paragraphs 1 and 3, Article 15 paragraph 2, Article 17, paragraph 1, and Article 38 paragraph 1 of the Statute of the City of Mostar are not consistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25.b) of the International Covenant on Civil and Political Rights.

The Council of the City of Mostar is ordered to inform the Constitutional Court of the steps it will have taken to bring the Statute of the City of Mostar into line with the Constitution of Bosnia and Herzegovina within three months following the publication in the *Official Gazette of Bosnia and Herzegovina* of amendments made by the Parliamentary Assembly of Bosnia and Herzegovina to bring the Law on Elections of Bosnia and Herzegovina into line with the Constitution of Bosnia and Herzegovina in accordance with this Decision.

Until that time, further proceedings on the request filed by the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for review of the constitutionality of the provisions of Article 7 paragraphs 1 and 3, Article 15 paragraph 2, Article 17, paragraph 1 and Article 38 paragraph 1 of the Statute of the City of Mostar are adjourned.

The request filed by the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for review of the constitutionality of the provisions of Article 19.4, paragraphs 1 and 9 and Article 19.7 of the Election of Bosnia and Herzegovina, the provision of Article VI.C. paragraph 7 of Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina and the provision of Articles (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 9/04) and the provisions of Article 7 paragraphs 2 and 3, Article 15 paragraph 1, Article 16, Article 17, paragraphs 2 and 3, Article 38 paragraphs 2, 3 and 4, and Articles 44 and 45 of the Statute of the City of Mostar is dismissed as ill-founded.

It is hereby established that the provisions of 19.4, paragraphs 1 and 9 and Article 19.7 of the Election of Bosnia and Herzegovina, the provision of Article VI.C. paragraph 7 of Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina, the remaining provisions of Articles 7 and 15, Article 16, the remaining provisions of Articles 17 and 38, and Articles 44 and 45 of the Statute of the City of Mostar are consistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25 of the International Covenant on Civil and Political Rights.

The request filed by the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for review of the constitutionality of paragraph 1 of the introductory part and paragraph 2 of the Decision Enacting the Statute of the City of Mostar issued by the High Representative is hereby rejected as inadmissible, as the Constitutional Court of Bosnia and Herzegovina is not competent to take a decision.

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

Reasoning

I. Introduction

1. On 16 September 2009, the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the applicant"), filed the request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court"), for review of the constitutionality of the provisions of Article 19.1, 19.2, 19.3, 19.4, 19.5, 19.6 and 19.7 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08 and 37/08; „the Election Law"), the provisions of Article VI.C. paragraphs 4 and 7 of Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 9/04; „the Constitution of FBiH"), paragraph 1 of the introductory part and paragraph 2 of the Decision of the High Representative for Bosnia and Herzegovina enacting the Statute of the City of Mostar and the provisions of Articles 7, 15, 16, 17, 38, 44 and 45 of the Statute of the City of Mostar (*Official Gazette of the City of Mostar*, no. 4/04; „the Statute").

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 1 December 2009, the House of Representatives and House of Peoples of the Parliamentary Assembly of BiH were requested to submit their replies to the request.

3. Pursuant to Article 15(3) of the Rules of the Constitutional Court, on 7 December 2009, the Office of the High Representative was invited to submit an expert opinion in writing with regard to the request in question.

4. On 14 December 2009, the House of Representatives submitted the reply to the request, while the House of Peoples did so on 28 December 2009.

5. On 30 December 2009, the Office of the High Representative submitted the expert observations in writing relating to the request in question.

6. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were forwarded to the applicant on 4 January 2010.

7. At a Plenary session held on 28 and 29 May 2010, the Constitutional Court decided to hold a public hearing in the case. That hearing took place on 24 September 2010. Following the hearing, the Venice Commission (European Commission for Democracy through Law) submitted its *amicus curiae* opinion, which was communicated to the parties.

III. Request

a) Statements from the request

8. The applicant holds that the challenged provisions of the Election Law, the Constitution of FBiH and the Statute are inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention of Human Rights and Fundamental Freedoms („the European Convention"), Article 25 of the 1966 International Covenant on Civil and Political Rights, and the 1966 and 1989 Optional Protocols thereto in conjunction with Article 3 of Protocol No. 1 of the European Convention (the applicant's request refers to the International Covenant but this is clearly a slip) and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, which are an integral part of the Constitution of Bosnia and Herzegovina (Annex I to the Constitution of Bosnia and Herzegovina).

9. The applicant holds that paragraph 1 of the introductory part of the Decision Enacting the Statute of the City of Mostar issued by the High Representative for Bosnia and Herzegovina („the High Representative") is inconsistent with the provision of Article II(1) of the Constitution of Bosnia and Herzegovina, as the introduction of the principle of unequal treatment of the units of local self-government and its citizens, in comparison with other units and their citizens, is not a proper way to achieve the highest level of human rights and fundamental freedoms. In addition, the applicant considers that the imposition of the Statute of the City of Mostar is an undemocratic act and that paragraph 2 of the High Representative's Decision, which reads: „the Statute shall be in force on an interim basis until adopted by the City Council of the City of Mostar in due form, without amendments and with no conditions attached", is inconsistent with the provision of Article I(2) of the Constitution of Bosnia and Herzegovina.

10. Furthermore, the applicant holds that Croats are discriminated against by the provisions of Article 19.4, paragraphs 1 and 9 of the Election Law, and Article 16 of the Statute, which stipulate a lower limit and an upper limit on the number of representatives in the City Council from each constituent people. Namely, the applicant states that a minimum limit on the number of representatives in the City Council stipulated as a privilege afforded to the Serb People as the least represented people in Mostar in the specific case, as well as a maximum limit on the number of representatives stipulated as a certain limitation for the people which constitutes the majority, irrespective of the election results, have not been stipulated in any act as a privilege afforded to the Croat People, nor has it been stipulated as a limitation for the Serb and Bosniac Peoples in the cities where they constitute the majority.

11. In the view of the applicant, the provisions of Article 19.4 paragraph 2 of the Election Law, and the provisions of Article 17 paragraph 1 of the Statute, which stipulate that three councillors shall be elected from each of the six electoral constituencies of the City of Mostar, are in violation of the fundamental principle of the Election Law according to which in determining the electoral constituencies one has to observe that the electoral constituencies have equal number of voters. In this context, the applicant states that the electoral constituency of Mostar Southwest has approximately four times more voters than the electoral constituency of Mostar Southeast, and both electoral constituencies elect the same number of councillors.

12. Next, the applicant considers that, by the provisions of Article 19.2 paragraphs 1 and 3 and Article 19.4 paragraph 2 of the Election Law, and the provisions of Articles 15 and 17, paragraph 1 in conjunction with Articles 5 and 7 of the Statute, the citizens of the former Central Zone of the City of Mostar have been discriminated against compared with the citizens of the City of Mostar residing in the other six areas of the City of Mostar. Namely, the applicant states that the challenged provisions stipulate that, in the area of the City as one electoral constituency, seventeen councillors shall be elected by all the citizens of Mostar, while the remaining eighteen councillors shall be elected by the citizens from the six electoral constituencies of the City of Mostar and the citizens of the former Central Zone are prevented from electing their representatives to the City Council.

13. Also, the applicant holds that the citizens of the former Central Zone are discriminated against by the provisions of Article 38 of the Statute, which prescribe that there shall be one Committee of the City Council for each City Area comprised of the three city councillors elected from the territory of the relevant City Area. The applicant states that the Committees for the City Areas decide on distribution of revenues derived from the use of allocated construction land and on the announcement of a referendum in accordance with Article 33 of the Statute, and that the citizens of the former Central Zone can no longer take part in decision-making as they do not belong to any City Area. In addition, the applicant holds that the city councillors have been treated unequally amongst themselves based on the challenged provisions as those councillors who are elected to the city electoral constituency cannot be elected to a Committee of the City Council for specific City Areas; consequently, they cannot take part in decision-making on the aforementioned issues.

14. Furthermore, the applicant considers that the citizens of the City of Mostar have been discriminated against based on the provisions of Article 19.7 of the Election Law, Article VI.C. paragraph 7 of Amendment to the Constitution of FBiH, and Articles 44 and 45 of the Statute, which provide that only councillors elected to the Council of the City shall be elected as Mayor of the City of Mostar and that the Mayor shall be elected or removed

from office by elected councillors. Namely, the applicant states that item 3 of Amendment CIV to the Constitution of FBiH and the relevant provisions of the Election Law stipulate that citizens shall directly elect municipal or city Mayors by secret ballot, and that item 2 of Amendment CI to the Constitution of FBiH stipulates that „the City of Mostar shall have the competencies of a Municipality". Moreover, the applicant underlines that citizens directly elect municipal or city Mayors in all municipalities and in the City of Banja Luka and, therefore, it follows that the citizens of Mostar do not have the same rights as the citizens of the City of Banja Luka. Finally, the applicant states that the citizens of the former Central Zone have been particularly discriminated against by the challenged provisions as they may come to a situation that they cannot be elected for the position of Mayor, as a consequence of the manner in which the councillors to the City Council are elected.

b) Reply to the request

15. In its reply to the request, the House of Representatives states that the Constitutional-Legal Commission of the House of Representatives considered the request in question at its 87th session held on 14 December 2009. Following the deliberation, they decided with three votes in favor, three votes against and no abstentions, not to support the request of the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

16. In the reply of the House of Peoples it is stated that the Constitutional-Legal Commission of the House of Peoples considered the request in question at its 48th session held on 23 December 2009 and, following the deliberation, decided with three votes in favor, no votes against and two abstentions, without the votes of all the three constituent peoples, not to support the request of the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

c) Opinion of the High Representative as *amicus curiae*

17. As to the challenged provisions of Article 19.1, 19.2, 19.3, 19.4 and 19.5 of the Election Law, Article VI.C. paragraph 4 of Amendment CI to the Constitution of FBiH and Articles 7, 15, 16 and 17 of the Statute, in its written observations the High Representative states that as to the allegations related to a possible violation of Article 3 of Protocol No. 1 to the 1966 International Covenant on Civil and Political Rights, it is noted that this Article regulates admissibility procedures for individual communications between the United Nations Human Rights Committee and these are not applicable to the Constitutional Court. The High Representative notes that it appears to be a mistake by the applicant whose intention may have been to refer to Article 3 of Protocol No. 1 to the European

Convention and, should it be the case, the High Representative notes that the said Article is not applicable in the present case as it does not apply to elections of local Government organs, which exercise no legislative power but rather exercise regulatory power delegated by Parliament. Should the applicant still argue that Article 14 of the European Convention is applicable in conjunction with Article 3 of Protocol No. 1 to the European Convention, the High Representative states that it is worth observing that the European Court of Human Rights has made it clear that one cannot derive from the combination of these provisions the right that all votes have an equal weight. Regarding the applicant's claim under Article 25 of the International Covenant on Civil and Political Rights, the High Representative refers to the General Comment of the UN Human Rights Committee where it is stated that any restrictions on the rights in Article 25 of the International Covenant on Civil and Political Rights „should be based on objective and reasonable criteria". Namely, the High Representative notes that the principle of „one person, one vote" and the principle that all votes have an equal weight is not an absolute right and that restriction to that right can be justified based on objective and reasonable criteria. In this context, it is stated that the electoral system in place in the City of Mostar is justified taking into consideration the aims pursued by this system and the historical background of the City. It is furthermore stated that when assessing the justification in the present case, one needs to take into account the difficult history of peace implementation in Mostar and the important role that Mostar plays in the wider context of peace implementation in the Federation of BiH and the entire State. The High Representative submits that respecting the equality of constituent peoples and creating effective power sharing mechanisms, which prevent any one people having majority control in the City Council, are the legitimate aims pursued by the challenged provisions of the Mostar Statute, the Election Law and the Constitution of the Federation of BiH. In addition, the means employed are proportionate to the aims to be achieved.

18. As to the challenged provisions of Article 38 of the Statute, the High Representative considers that neither the Constitution of Bosnia and Herzegovina, the Constitution of the Federation of Bosnia and Herzegovina, nor the international instruments enumerated in the request of the applicant, guarantee „the right of citizens to be elected and/or to take part in decision-making in the Committees of the City Council".

19. With regard to the challenged provisions of Article 19.7 of the Election Law, Article VI.C. paragraph 7 of Amendment CI to the Constitution of FBiH and Articles 44 and 45 of the Statute, the High Representative holds that neither the Constitution of Bosnia and Herzegovina and the Constitution of the Federation of Bosnia and Herzegovina, nor the international instruments enumerated in the request of the applicant require a uniform system of elections/removal of the Mayors of cities/municipalities throughout Bosnia

and Herzegovina. It is further stated that authorities in Bosnia and Herzegovina enjoy a wide margin of appreciation in establishing either direct or indirect system of election and/or in removal of the Mayor of Cities or Municipalities. Next, it is stated that the Constitution of FBiH foresees both direct and indirect election and removals/recalls of Heads of Municipalities/Cities in Bosnia and Herzegovina. Finally, it is stated that Mayor of Sarajevo, Mayor of East Sarajevo and the Mayor of the Brčko District of BiH are indirectly elected or removed as is the case in the City of Mostar.

d) Opinion of the Venice Commission as *amicus curiae*

20. The Venice Commission stated that Articles 19.4 and 19.6 of the Election Law of BiH, which regulate the election of the City Council of Mostar, deviate from the principle of equal weight of each vote by establishing a minimum and a maximum threshold of representation of the three constituent peoples and of the Others. The Venice Commission stated that these provisions aim to guarantee the representation of all constituent peoples and the group of Others, and to prevent the dominance of the Council by one constituent people or the group Others. In this regard, the Venice Commission stated that according to the principles of the case-law of the European Court of Human Rights and of the UN Human Rights Committee, decisive in the assessment of the provisions in question is whether the restrictions on the principle of equal weight can be regarded as reasonable and based on objective criteria. The Venice Commission emphasized that in its opinion on the Election Law of BiH in 2001, the Venice Commission recalled that „the distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement making peace in Bosnia and Herzegovina possible and that in such a context, it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability. The Venice Commission pointed out that although the situation in Bosnia and Herzegovina has evolved in a positive sense, there are still circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups and that it therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups".

21. Also, the Venice Commission referred to the Decision of the Constitutional Court No. *U 4/05* on the electoral system of the City of Sarajevo, wherein the Constitutional Court stated that that „it is necessary for all three constituent peoples to be „given minimum guarantees for the participation on the city council irrespective of the election results since that is the only way to respect the principle of constituent peoples in the entire territory of Bosnia and Herzegovina". Furthermore, the Venice Commission referred to the third

partial decision of the Constitutional Court in Case No. *U 5/98* wherein the Constitutional Court stated that „a consistent application of the democratic principle – one elector one vote, in the existing political circumstances in Bosnia and Herzegovina, is running a risk of creating mono-ethnic authority elected in the areas in which one of the constituent peoples is in majority". Bearing in mind the aforementioned, the Venice Commission stated that given the general circumstances of BiH and specific circumstance in Mostar, guaranteeing the representation in elected bodies of all constituent peoples and the group of Others as well as preventing any of the groups from dominating such bodies remain legitimate aims, although the development should move towards a system giving more weight to electoral results. In this regard, the Venice Commission pointed out that that similar solutions have been adopted in respect of Sarajevo (as appears from the decision of the Constitutional Court No. *U 4/05),* as well as other European cities with similar contexts of multi-ethnic or multi-lingual composition. Belgium in particular is a case in point. In the opinion of the Venice Commission, the deviations from the principle of equal weight of each vote are proportionate to the legitimate aim pursued and, thus, meet the criteria of reasonableness and objectivity, required by Protocol 12 as well as by Article 25 of the ICCPR and the General Comment of the UN Human Rights Committee. The same may be said for the provisions on the organisation and the composition of the Committees of the City Council, which follow the same criteria.

22. As to the former Central Zone, the Venice Commission stated that the people residing in the Central Zone, unlike residents of Mostar who live in any of the six City Areas, only vote for the seventeen councillors elected in a city-wide electoral constituency, and not also for the other eighteen councillors elected at the level of the city-area electoral constituencies. This means that the electoral rights of the residents in the Central Zone are lesser than those of the other inhabitants of Mostar. The ground for this different treatment is a purely geographical one: their actual place of residence within the city. In this regard, the Venice Commission has not been informed of any special reasons pertaining today which may still justify this situation. In the absence of reasonable and objective justifications, this difference in treatment appears as discriminatory, in breach of Protocol 12 to the ECHR. The Venice Commission also stated that the City Council has direct substantial powers in respect of the Central Zone in the fields (the distribution of revenues derived from Land Allocation Compensation within the former Central Zone), which are, in the six City Areas, within the competence of the City Council Committees. The Venice Commission considers that the residents of the Central Zone are therefore deprived, in a discriminatory manner which appears to be lacking any special and objective justification, of their right to regulate and manage autonomously and in their own interest the share of public affairs, and that, therefore, Protocol 12 to the European Convention has been violated.

23. As to the election of mayor, the Venice Commission stated that neither the Constitution of BiH nor the international instruments invoked by the applicants address the election of the Mayor, but allow for both direct and indirect election. The Venice Commission stated that the choice of indirect elections is aimed at obtaining ethnic pacification, which is more difficult to achieve in the context of direct elections and that this aim appears to be legitimate, and the essence of the voting right in question is preserved. In the view of the Venice Commission, therefore, the choice of different treatment appears reasonably and objectively justified when it comes to the election of mayor.

IV. Public hearing

24. Pursuant to Article 46 of the Rules of the Constitutional Court, at its plenary session held on 28 and 29 May 2010, the Constitutional Court decided to hold a public hearing to examine the request in question. The Constitutional Court has, in accordance with Article 47(3) of the Rules of the Constitutional Court, at the plenary session held on 9 July 2010 decided to invite the following parties to attend the public hearing: applicant's representative, representatives of the both houses of the Parliamentary Assembly of Bosnia and Herzegovina, representative of the Council of Europe, representative of the European Union, representative of the OSCE, representative of the OHR, representative of the Venice Commission, president of the Council of the City of Mostar, Mayor of the City of Mostar, representative of the Central Election Commission of Bosnia and Herzegovina and election system experts Prof. Dr Zoran Tomić and Dr Suad Arnautović.

25. The Constitutioanl Court held the public hearing on 24 September 2010 which was attended by the following parties: the applicant's representative, representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, representative of the Bosniac Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, representative of the Office of the Secretariat of the Council of Europe in BiH, representative of the Head of the Mission of the OSCE in BiH, representative of the OHR, president of the Council of the City of Mostar, Mayor of the City of Mostar, representative of the Central Election Commission of Bosnia and Herzegovina and election system experts Prof. Dr Zoran Tomić and Dr Suad Arnautović. In deliberation on the request in question, the following parties took part: the applicant's representative, representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, representative of the Bosniac Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, president of the Council of the City of Mostar, Mayor of the City of Mostar, representative of the Central Election Commission of Bosnia and Herzegovina and election system experts Prof. Dr Zoran Tomić and Dr Suad Arnautović.

V. Relevant Law

26. The **Election Law of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, no. 23/01), as relevant, reads:

Article 12.7

The Mayor may either be elected by an indirect election by the Municipal Council/Assembly or by a direct election by the registered voters in that municipality. If the Entity laws stipulate that there shall be a direct election of the Mayor then the election shall be conducted in accordance with paragraph two of this article. If the Entity laws stipulate that the election of the Mayor shall be elected indirectly by the Municipal Council/Assembly then the election shall be conducted in accordance with paragraph 3 of this article. If the Entity laws do not stipulate how the Mayor shall be elected then the Mayor shall be elected by an indirect election as established in paragraph 3 of this Law.

If the Mayor is directly elected then the Election Commission of Bosnia and Herzegovina shall determine the form of the ballot.

If the Mayor is indirectly elected then he or she shall be elected by a majority vote of the total number of members of the Municipal Council/Assembly. Each member of the Municipal Council/Assembly may nominate a candidate for the position of the. In the event a candidate does not receive a majority vote of the total number of members, a second election shall be conducted. If no candidate receives a majority of votes of the total number of members, a third election shall be conducted. The member that receives the most votes in the third election shall be elected. In the event that there is a tie, the youngest of the tied candidates shall be elected Mayor.

In the event that the indirectly elected Mayor resigns, dies or is removed by the Municipal Council/Assembly, the Municipal Council/Assembly shall elect a new Mayor in accordance with paragraph 3 of this article.

27. The **Law on Amendments to the Election Law of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, no. 20/02)

Article 18

The current Chapters 12, 13, 14, 15, 16, 17 and 18 shall become Chapters 13, 14, 15, 16, 17, 18 and 19.

28. The **Law on Amendments to the Election Law of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, No. 4/04), in the relevant part, reads:

Article 2

A new Chapter 19 will be introduced in the Election Law of Bosnia and Herzegovina (OG BiH, 23/01, 7/02, 9/02, 20/02 and 25/02): after Chapter 18, „District of Brčko", a Chapter entitled „The City of Mostar" will be added and read as follows:

Article 19.1

This law shall govern the elections of the councillors to the Council of the City of Mostar (hereinafter: „the City Council"). The principles outlined in this Chapter will apply to elections in the City of Mostar, notwithstanding Chapter 13 of this Law.

Article 19.2

The City Council shall be composed of 35 members. The councillors in the City Council shall be elected in a city-wide electoral constituency and city area electoral constituencies, in the manner set forth in Article 19.4 hereof.

'A city-wide electoral constituency' shall for the purpose of the preceding paragraph cover the entire territory of the City, as defined in Article 5 of the Statute of the City of Mostar.

For the purpose of paragraph 1 of this Article, „city areas electoral constituencies" shall be the former city municipalities, as defined by Article 7 and 15 of the Statute of the City of Mostar.

Article 19.3

The City of Mostar shall have one Election Commission established in accordance with the provisions of this Law pertaining to Municipal Election Commissions.

Article 19.4

Seventeen (17) councillors shall be elected from a city-wide electoral constituency. A minimum of four (4) councillors of each constituent people and one (1) councillor from the group of „Others" shall be elected from the city-wide electoral constituency.

Three (3) councillors shall be elected from each of the six city area electoral constituencies.

The city area electoral constituency 1 shall consist of the former City-Municipality Mostar North.

The city area electoral constituency 2 shall consist of the former City-Municipality Mostar Stari Grad.

The city area electoral constituency 3 shall consist of the former City-Municipality Mostar Southeast.

The city area electoral constituency 4 shall consist of the former City-Municipality Mostar South.

The city area electoral constituency 5 shall consist of the former City-Municipality Mostar Southwest.

The city area electoral constituency 6 shall consist of the former City-Municipality Mostar West.

Each constituent people or the group of "Others" shall not have more than fifteen (15) representatives in the City Council.

Article 19.5

The mandates to be filled from the city-wide electoral constituency shall first be allocated under the formula set forth in Article 9.6, paragraph 1 of this Law. If the allocation of mandates from the city-wide electoral constituency does not allow minimum representation of any of the constituent peoples and/or of the group of „Others", as provided for under Article 19.4, paragraph 1 of this Law, the following method shall apply:

1. The last mandate(s) to be allocated from the city-wide electoral constituency required to fill the quotas of any of the constituent peoples and/or the group of „Others" shall be allocated to the candidate(s) from the relevant constituent people(s) and/or group of „Others" having received the highest number of votes on the list of the political party, the list of independent candidates or the coalition's list to which the mandate was allocated under Article 9.6, paragraph 1 of this Law. If the mandate would, under the formula set for the in Article 9.6, paragraph 1 of this Law, be allotted to an independent candidate, item 2 of this Article will apply.

2. If the political party, list of independent candidates or coalition to which the mandate(s) was allocated under Article 9.6, paragraph 1 of this Law does not have enough such eligible candidate(s) on its city-wide electoral list or if the mandate would, under Article 9.6 of this Law, be allocated to an independent candidate, the mandate shall be transferred either:

- *to the political party(ies), list(s) of independent candidates or coalition(s) having such candidates left on its list; or*
- *to (an) independent candidate(s) from the relevant constituent people or from the group of „Others", which/whoever ha(s)(ve) the next highest quotient as defined in Article 9.6 of this Law.*

3. If no candidate from the relevant constituent people(s) or the group of „Others" can be found in accordance with items 1 and 2 of this Article, the mandate(s) shall be transferred to either:

- *the political party, list of independent candidates or coalition's list having such candidate(s) left on a list for any city area constituency after the seats filled from the area constituencies have been allocated in accordance with Article 19.6 of this Law; or*
- *the independent candidate(s) from the relevant constituent people or from the group of „Others" running for any city area constituency, which/whoever ha(s) (ve) received the highest quotient as defined in Article 9.6 of this Law.*

Article 9.6, paragraph 2 shall not apply when allocating mandate(s) under this Article.

Article 19.6

The mandates filled from the city areas electoral constituencies are thereafter allocated under the formula set forth in Article 9.6 of this Law. Mandates shall be allocated individually, starting with the highest placed candidate in each city area constituency, and proceeding in similar fashion to fill each available seat from each city area constituency. The sequence of filling the mandate allotted to each city area constituency, for each of the three successive steps, shall be determined by the drawing of lots. The drawing of lots shall be organized by the Election Commission of Bosnia and Herzegovina.

If the allocation of a mandate from the city areas electoral constituency would lead to the representation of a constituent people and/or the group of Others beyond the quota provided for under Article 19.4, paragraph 4 of this Law, the following method shall apply:

1. The mandate shall be re-allocated to the candidate who does not belong to the said constituent people and/or to the group of „Others" having received the highest number of votes on the list of the political party, the list of independent candidates or coalition's list to which the mandate was allocated under Article 9.6, paragraph 1 of this Law. If the mandate would, under the formula set for the in Article 9.6, paragraph 1 of this Law, be allotted to an independent candidate, item 2 of this Article will apply.

2. If there is no such candidate or if the mandate would, under the formula set for the in Article 9.6, paragraph 1 of this Law, be allotted to an independent candidate, the mandate shall be transferred, in the same city area constituency, either:

- *to the party, list of independent candidates or coalition's list having a candidate who does not belong to the said constituent people and/or to the group of „Others" left on its list; or*

- *to the independent candidate(s) who does not belong to the said constituent people and/or to the group of „Others", which/whoever has the next highest quotient as defined in Article 9.6 of this Law.*

3. If no such candidate can be found in accordance with items 1 and 2 of this Article, the mandate(s) shall be transferred to either:

- *the political party, list of independent candidates or coalition's list having such candidate(s) left on a list for any other city area constituency after the seats filled from that city area constituencies have been allocated in accordance with Article 19.6 of this Law; or*
- *the independent candidate(s) from the relevant constituent people or from the group of „Others" running for any city area constituency, which/whoever ha(s) (ve) received the highest quotient as defined in Article 9.6 of this Law.*

Article 19.7

Notwithstanding Article 13.7 of this Law, the Mayor of the City of Mostar will be indirectly elected in accordance with the Constitution of the Federation of Bosnia and Herzegovina.

29. The **Law on Amendments to the Election Law of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, no. 33/08)

Article 57

Article 13.7 is amended to read as follows:

(1) The Municipal Mayor or City Mayor shall each be elected in accordance with this Law, the constitutions, the entity legislation, and Municipal or City statutes respectively.

(2) If the Municipal Mayor or City Mayor are elected directly, the Municipal Mayor or City Mayor shall each be elected by the voters registered in the Central Voter Register of the particular Polling Station in accordance with this Law, the entity legislation, Municipal or City statutes respectively.

(3) In the event that the term of office for an elected Municipal Mayor or City Mayor referred to in paragraph (2) of this Article has terminated as provided by Article 1.10 of this Law or if he/she has been recalled, the Municipal mayor or City Mayor shall each be elected in accordance with this Law, the entity legislation, Municipal or City statutes respectively.

30. The **Amendments to the Constitution of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, no. 13/97):

Amendment XVI

In the Constitution of the Federation of Bosnia and Herzegovina, after Chapter „VI MUNICIPAL AUTHORITIES,,, a new chapter shall be added to reads as follows:

VI. A. CITY AUTHORITIES

(1) For the areas of two or more municipalities which are territorially linked by the everyday needs of citizens, a city shall be formed as a local government and self-government unit, in accordance with Federal legislation.

(2) The city shall be responsible for: a) finances and tax policy, in accordance with Federal and Cantonal legislation;b) joint infrastructure; c) urban planning; d) public transport; e)other responsibilities assigned to the city by the canton or municipalities.

(3) The city shall have a statute which must be in accordance with this Constitution, Cantonal Constitution and Cantonal legislation

(4) The city shall have a city council consisting of an equal number of councilors from each municipality, and the number of councilors, election procedure and duration of mandate shall be specified in the Statute. The City council may not have less than 15 or more than 30 councilors.

(5) The City council shall: a) prepare and by a two-thirds majority vote approve the city statute; b) elect the Mayor; c)approve the city budget; d) enact regulations on the exercise of transferred authorities and carry out other responsibilities specified in the statute.

(6) The Mayor shall be responsible for: a)appointing and removing city officials,b) executing and enforcing city policy and city regulations, c) ensuring the cooperation of city officials with the Ombudsmen, d) reporting on the implementation of city policy to the city council and the public.

(7) The city shall secure revenues by taxation, borrowing and other means, in accordance with law.

31. The **Amendments to the Constitution of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, no. 9/04), in the relevant part, reads:

Amendment CI

A new Article VI.C shall be added and read as follows:

VI. C. Organisation of Mostar

4) The City Areas shall be electoral constituencies. The composition of the City Council and the modalities of election shall be regulated respectively by the Statute and the Election Law of Bosnia and Herzegovina in a manner that may derogate from the requirements prescribed in Article VI.A of this Constitution.

7) Only Councillors elected to the Council of the City may be elected as Mayor of the City of Mostar. The Mayor is elected and removed from office by a majority of two-thirds of elected councillors, in accordance with the Statute of the City of Mostar.

32. The **Decision correcting the translation of the official Decision of the High Representative enacting amendments to the Constitution of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, no. 32/07)

Article 1

In Article VI.C, Paragraph 7 of the Constitution of the Federation of Bosnia and Herzegovina, the first sentence which reads as follows: „Svaki građanin Bosne i Hercegovine koji ispunjava uslove za glasanje u Gradu Mostaru može biti izabran za gradonačelnika Grada Mostara", shall be replaced by the following sentence: „Samo vijećnici izabrani u Gradsko vijeće mogu biti birani za gradonačelnika Grada Mostara".

Article 2

For the avoidance of any doubt, it is hereby specifically declared and provided that, the corrected provision referred to in Article 1 of this Decision is deemed to have been in force as of 15 March 2004.

In the exercise of the powers vested in the High Representative by Article V of Annex 10 (Agreement on Civilian Implementation of the Peace Settlement) to the General Framework Agreement for Peace in Bosnia and Herzegovina, according to 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 by Article II:1(d) of the same Annex which requires the High Representative to facilitate the resolution of any difficulties arising in connection with civilian implementation of the General Framework Agreement for Peace in Bosnia and Herzegovina;

[...]

Noting and bearing in mind all the matters aforesaid, the High Representative hereby issues the following

DECISION

Enacting the Statute of the City of Mostar

The Statute of the City of Mostar set out hereunder forms an integral part of this Decision and shall enter into force on March 15, 2004.

The Statute shall be in force on an interim basis until adopted by the City Council of the City of Mostar in due form, without amendments and with no conditions attached.

[...]

33. The **Statute of the City of Mostar** (*Official Gazette of the City of Mostar, no. 4/04*), in the relevant part, reads:

In accordance with the Constitution of the Federation of Bosnia and Herzegovina and the Constitution of the Herzegovina-Neretva Canton, the City Council of the City of Mostar adopts the following Statute:

Article 5
Territory of the City

The territory of the City encompasses a single, undivided area according to the state of the area delineated by the cadastre lines of the skirting areas on 1st January 1991 as modified by the General Framework Agreement for Peace in Bosnia and Herzegovina signed on 14th December 1995.

Article 7
City Areas

1. In the City, six (6) City areas shall be formed and shall correspond to the former City-Municipalities.

2. Branch offices of the City Administration shall be established in the City areas for the sole purpose of delivering the maximum range of services to the citizens within their own neighborhoods.

3. The City areas of the City are electoral constituencies according to Article 15 of this Statute.

Article 15
Elections for the City Council

1. The Councillors in the City Council shall be elected in electoral constituencies.

2. The electoral constituencies in the City shall be the area of the City and six City areas, as defined in Articles 5 and 7 of this Statute and in the map annexed to the Interim

Statute published in the Official Gazette of the City of Mostar of 20 February 1996 (O.G. City of Mostar, no. 1, 20 February 1996), which forms an integral part of this Statute.

Article 16
Representation in City Council

A minimum of four (4) representatives of each Constituent People and one (1) of the Others shall be represented in the City Council.

No Constituent People shall have more than fifteen (15) Councillors.

Article 17
Allocation of Seats

1. Each City area shall elect three (3) City Councillors. The remaining seventeen (17) Councillors shall be elected in the area of the City as one electoral constituency (hereinafter: the City-wide list).

2. At least four (4) candidates of each Constituent People and one (1) candidate of the Others from the City-wide list shall be elected to the City Council.

3. Allocation of seats in the City Council shall be conducted in accordance with the Election Law of Bosnia and Herzegovina.

Article 28
Competencies of the City Council

The City Council is the highest body of the City and shall be responsible for all matters falling within its competencies in accordance with the Constitutions and the law.

Article 38
Committees for City Areas

1. There shall be one Committee of the City Council for each City Area (Komisija Gradskog Vijeca za Gradska Podrucja). Each Committee of the City Council for City Areas (hereinafter: „Committees for City Areas") shall be comprised of the three City Councillors elected from the territory of the relevant City Area pursuant to Article 17, paragraph 1 of this Statute.

2. The Committees for City Areas shall have the following responsibilities:

- *Deciding on the distribution of revenues derived from allocated construction land, in accordance with Article 56 of this Statute;*
- *Participating in the decision on announcement of a referendum, in accordance with Article 33, paragraph 3 of this Statute.*

CONTENTS

3. Decisions of the Committees for City Areas shall be adopted by simple majority.

4. Article 37, paragraphs 3 through 5 of this Statute will apply to the Committees for City Areas. Issues not regulated by this Statute shall be prescribed by the Rules of Procedure of the City Council in accordance with the general principles set forth in this Statute.

Article 44
Election of the Mayor

1. Only Councillors elected to the City Council may be elected as Mayor.

2. The election of the Mayor shall be carried out at the first session of the City Council after the Elections.

3. Every City Councillor shall be entitled to nominate candidates from amongst elected Councillors.

4. Before the elections, the nominees shall declare in writing that they accept their candidacy.

5. A majority of two-thirds of the elected City Councillors shall be required to elect a Mayor. If none of the candidates receives the necessary votes in the first round, a second round will take place between the two candidates who obtained the largest number of votes in the first round. If, due to a tie between candidates in the first round, it is impossible to determine which two candidates received the highest number of votes, a separate round will be organized between these candidates in order to select the candidate(s) who will qualify for the second round. If none of the remaining two candidates receives a two-third majority in the second round, a third round shall take place. In the third round, a simple majority of the elected City Councillors shall be required to elect a Mayor from the remaining two candidates. If the remaining two candidates obtain the same number of votes in the third round, the younger one of the two shall be elected as Mayor.

6. Immediately after the elections, the elected nominee shall declare whether he/she accepts his/her election. If he/she does not accept it, the elections shall be repeated in accordance with the procedure prescribed in this Article.

Article 45
Removal from Office

1. The Mayor may be removed from office before the end of his/her mandate by a City Council decision.

2. The motion shall require the support of more than half of the elected City Councillors.

3. The decision on the removal of the Mayor shall be passed at a special session of the City Council. A two-third majority of the elected City Councillors is required.

VI. Admissibility

34. The Law Amending the Election Law of Bosnia and Herzegovina was enacted by the Decision of the High Representative for Bosnia and Herzegovina and it was determined that the Decision would enter into force on 1 March 2004 and required no further procedural steps to effect its enactment. Moreover, the Amendments to the FBiH Constitution and the Statute of the City of Mostar were enacted by the Decisions of the High Representative whereby it was determined that they would enter into force on 15 March 2004 and be in force on an interim basis until adopted by the City Council of the City of Mostar in due form, without amendments and with no conditions attached.

Admissibility as to the Decision of the High Representative enacting the Statute of the City of Mostar

35. The applicant is of the opinion that paragraph 1 of the introductory part of the High Representative's Decision enacting the Statute of the City of Mostar is not consistent with Article II(1) of the Constitution of Bosnia and Herzegovina and that paragraph 2 of the Decision in question is not consistent with Article I(2) of the Constitution of Bosnia and Herzegovina.

36. As to the power of the High Representative to enact laws and the competence of the Constitutional Court to take decisions on conformity of such laws with the Constitution of Bosnia and Herzegovina, the Constitutional Court has already expressed its opinion stating that the powers of the High Representative arise from Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina, the relevant resolutions of the UN Security Council and the Bonn Declaration and that neither the powers nor the exercise of those powers are subject to review by the Constitutional Court. However, whenever the High Representative intervenes into the legal system of Bosnia and Herzegovina as a substitute for domestic authorities he acts as an authority of Bosnia and Herzegovina and the laws enacted by him are domestic laws by their nature and must be considered the laws of Bosnia and Herzegovina whose conformity with the Constitution of Bosnia and Herzegovina is subject to review by the Constitutional Court (see, the Constitutional Court, Decision no. *U 9/00* of 3 November 2000, published in the *Official Gazette of Bosnia and Herzegovina*, no. 1/01, Decision no. *U 16/00* of 2 February 2001, published in the *Official Gazette of Bosnia and Herzegovina*, no. 13/01 and Decision no. *U 25/00* of 23 March 2001, published in the *Official Gazette of Bosnia and Herzegovina*, no. 17/01).

37. It follows from the aforementioned that the Constitutional Court is not competent to review the constitutionality of paragraph 1 of the introductory part and paragraph 2 of the Decision of the High Representative enacting the Statute of the City of Mostar since this issue concerns the authorities of the High Representative arising from Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina that are not subject to review by the Constitutional Court as it is stated in the preceding paragraph of the decision.

38. Bearing in mind Article 17(1)(1) of the Rules of the Constitutional Court according to which a request shall be rejected as inadmissible if it is established that the Constitutional Court is not competent to take a decision, the Constitutional Court decided as set out in the enacting clause of the decision insofar as this part of the request is concerned.

Admissibility as to the challenged provisions of the BiH Election Law, the FBiH Constitution and the Statute of the City of Mostar

39. On the other hand, the Constitutional Court notes that the High Representative intervened into the legal system of Bosnia and Herzegovina and enacted the challenged provisions of the BiH Election Law, the FBiH Constitution and the Statute of the City of Mostar substituting for the Parliamentary Assembly of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina and the City Council of the City of Mostar. In view of the aforementioned paragraphs, these acts are considered the domestic acts whose conformity with the Constitution of Bosnia and Herzegovina is subject to review by the Constitutional Court**.**

40. As to the challenged provisions of the FBiH Constitution, the Constitutional Court notes that according to Article VI(3)(a)(2) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall have exclusive jurisdiction to decide whether any provision of an Entity's constitution or law is consistent with this Constitution. Furthermore, the Constitutional Court notes that although Article VI(3)(a) of the Constitution of Bosnia and Herzegovina does not provide for an explicit jurisdiction of the Constitutional Court to review constitutionality of laws or provisions of laws of Bosnia and Herzegovina, a substantive notion of authorities defined under the Constitution of Bosnia and Herzegovina contains within itself the *authority* of the Constitutional Court to conduct such a review of constitutionality, in particular as a body which upholds the Constitution of Bosnia and Herzegovina. The opinion of the Constitutional Court given in its case-law with regards to such cases clearly indicates that the Constitutional Court is competent to review the constitutionality of laws or certain provisions of laws of Bosnia and Herzegovina (see the decision of the Constitutional Court No. *U 1/99* of 14 August 1999, *Official Gazette of Bosnia and Herzegovina,* no.16/99).

41. Further, as to the challenged provisions of the Statute, the Constitutional Court has already elaborated on the issue of its competences under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina in its case-law with regards to a similar situation when the subject of review was the Statute of the City of Sarajevo and concluded that: „as an institution which upholds the Constitution, the Constitutional Court is competent to review the 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", (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 4/05* of 22 April 2005, paragraphs 14 through 17, published in the *Official Gazette of Bosnia and Herzegovina*, no. 32/05). Being guided by the principles from the mentioned decision, the Constitutional Court considers that in the instant case it is competent to review the constitutionality of the Statute since this matter concerns the request for review of constitutionality relating to the issues under the Constitution of Bosnia and Herzegovina and international agreements on protection of human rights, *i.e.* on protection of human rights and right to non-discrimination.

42. Furthermore, the request for review of constitutionality was submitted by the Croat Caucus in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina whereby the requirement under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina has been satisfied according to which a request may be submitted by at least one fourth of the members/delegates from any of the Houses of the Parliamentary Assembly.

43. Having regard to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Constitutional Court's Rules, the Constitutional Court established that this part of the request is admissible for it was submitted by an authorized person and there is no single formal reason under Article 17(1) of the Rules of the Constitutional Court that would render the request inadmissible.

VI. Merits

Discrimination in relation to elections to the City Council contrary to Article 14 of the European Convention taken together with Article 3 of Protocol No. 1 to the European Convention

44. Article 14 of the European Convention, as relevant, reads:

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

45. Article 3 of the Protocol No. 1 to the European Convention reads:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

46. Article 14 of the European Convention applies where a person or group has been treated differently from others on a prohibited ground in relation to another right under the European Convention and its Protocols, and the difference does not have an objective and rational justification. To engage Article 14, a rule, act or omission must therefore fall within the ambit of one of the substantive rights under the European Convention. In the instant case, the applicant submits that challenged provisions fall within the ambit of Article 3 of Protocol No. 1 to the European Convention (the applicant invoked provision of Article 3 of the International Covenant, which is an obvious omission).

47. The obligation imposed on the state by Article 3 of Protocol No. 1 to the European Convention produces both active and passive rights in the population: the active right to vote in elections, and the passive right to offer one's self for election. However, these rights relate only to the 'choice of the legislature'. The European Court of Human Rights has consistently held that the Article applies only in respect of elections to bodies which exercise a significantly legislative function. Whether a particular body exercises sufficient legislative power to be regarded as a legislature for this purpose is a question of judgment to be answered in the light of the role of the body and its contribution to democratic law-making in the context of the constitution as a whole: see for example *Mathieu-Mohin and Clerfayt vs. Belgium*, judgment of 2 March 1987, Series A, No. 113; *Matthews v. United Kingdom*, judgment of 18 February 1999, Reports 1999-I [GC]; *Santoro vs. Italy*, judgment of 1 July 2004, Reports 2004-VI. While a regional council may have sufficient

legislative power to qualify (see *Santoro vs. Italy*, above), a local council typically does not: see for example *Gorizdra vs. Moldova* Application No. 53180/99, admissibility decision of 2 July 2002; *Cherepkov vs. Russia* Application No. 51501/99, admissibility decision of 25 January 2000, Reports 2000-I; *Salleras Llinares vs. Spain* Application No. 52226/99, admissibility decision of 12 October 2000, Reports 2000-XI.

48. Provision of Article 28 of the Statute of the City of Mostar provides that the City Council is the highest body of the City and responsible for all issues under its jurisdiction pursuant to constitution and the laws. Amendments to the Constitution of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 13/97) provide that *the City council shall: a) prepare and by a two-thirds majority vote approve the city statute; b) elect the Mayor; c)approve the city budget; d) enact regulations on the exercise of transferred authorities and carry out other responsibilities specified in the statute.*

49. Considering the very limited extent of legislative power exercised by the Council, the Constitutional Court considers that the Council is mainly an administrative rather than legislative body. Accordingly, elections to the Council do not fall within the ambit of the obligation of Bosnia and Herzegovina under Article 3 of Protocol No. 1 to the European Convention to hold elections which will secure 'the free expression of the opinion of the people in the choice of the legislature.' That being so, no issue arises as to the application of Article 14 of the European Convention in conjunction with Article 3 of Protocol No. 1 to the European Convention. This part of the applicant's request is therefore dismissed as ill-founded.

Discrimination in relation to elections to the City Council in breach of Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25 of the International Covenant on Civil and Political Rights

50. The applicant alleges that the provisions of Article 19.1, 19.2, 19.3, 19.4, 19.5, 19.6 and 19.7 of the Election Law of Bosnia and Herzegovina, the provisions of Article VI.C paragraph 7 of Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina and the provisions of Articles 7, 15, 16, 17, 38, 44 and 45 of the Statute of the City of Mostar are not consistent with Article II (4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25 of the International Covenant on Civil and Political Rights (1966) (Annex I to the Constitution of Bosnia and Herzegovina).

51. **Article II(4) of the Constitution of Bosnia and Herzegovina**, as relevant, reads:

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

52. **Annex I to the Constitution of Bosnia and Herzegovina – Additional Human Rights Agreement to be applied in Bosnia and Herzegovina**

7. International Covenant on Civil and Political Rights (1966) and Optional Protocols (1966 and 1989)

53. **Article 25 of the International Covenant on Civil and Political Rights** (1966) provides:

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

54. The Constitutional Court shall first examine the request within the context of the right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25.b) of the International Covenant on Civil and Political Rights, before considering the allegation of a violation of Article 25.b) taken alone.

55. The Constitutional Court recalls that Article II(4) of the Constitution of Bosnia and Herzegovina provides that the enjoyment of rights and freedoms envisaged under the international agreements listed in Annex I to the Constitution of Bosnia and Herzegovina is granted to all persons without discrimination on any ground. Annex I item 7 to the Constitution of Bosnia and Herzegovina sets out a list of Additional Human Rights Agreements to be applied in Bosnia and Herzegovina which includes, *inter alia*, the International Covenant on Civil and Political Rights (1966). The Constitutional Court recalls the case-law of the European Court of Human Rights according to which discrimination exists if a person or group of persons in an analogous situation are differently treated and there is no objective or reasonable justification for such differential treatment (see,

the European Court of Human Rights*, Belgian Linguistic Case*, the judgment of 23 July 1968, Series A, no. 6). The European Court of Human Rights has applied this approach to questions of discrimination in relation to political participation in Bosnia and Herzegovina under both Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention: see *Sejdić and Finci vs. Bosnia and Herzegovina*, Application nos. 27996/06 and 34836/06, judgment of 22 December 2009 [Grand Chamber]. The Constitutional Court considers that this approach is equally appropriate in relation to the application of Article II(4) of the Constitution of Bosnia and Herzegovina in combination with Article 25 of the International Covenant. In accordance with that approach, for a difference in treatment to be objectively and reasonably justified two conditions must be fulfilled - the principle of differential treatment may be applied for the purpose of achieving a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

56. Article 25 of the International Covenant on Civil and Political Rights guarantees the right of every citizen to take part in the conduct of public affairs, to vote and be elected and the right of access to public services. Unlike Article 3 of Protocol No. 1 to the European Convention, the rights to vote and to be elected under Article 25 of the International Covenant are not restricted to elections to legislatures, but apply generally to those bodies membership of which depends wholly or partly on election. The International Covenant requires the signatory states to enact laws and take other necessary measures in order for the citizens to be given an effective possibility to enjoy the rights guaranteed under this international agreement. The UN Human Rights Committee stated, in its Comment on Article 25.b) of the International Covenant on Civil and Political Rights (adopted at its 57th session of 12 July 1996), as follows: „Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria (...) and the exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable." In the further part of the Comment, the UN Human Rights Committee points to the possible reasonable restrictions on active and passive electoral right, such as setting a minimum age limit for the right to vote, as well as to unacceptable restrictions such as literacy, educational and property requirements, membership of a political party, etc. There are also the conditions under which states should organize elections without any pressure, force or other forms of coercion on electors. The UN Human Rights Committee specifically noted that the International Covenant on Civil and Political Rights does not impose any particular electoral system, but any system operating in a State party must be compatible with the rights protected by Article 25 and must guarantee and give effect to the free expression of the will of the electors. In the Comment it is emphasized that: „the principle

of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely".

57. In the first part of the request the applicant submits that the people of Mostar suffer discrimination as compared with the other inhabitants of Bosnia and Herzegovina in relation to their respective rights to participate in free elections to City Councils (or equivalent institutions). This discrimination is said to result from the provisions of Article 19.4, paragraphs 1 and 9 of the Election Law, and Article 16 of the Statute, which stipulate that a minimum of 4 and a maximum of 15 representatives from each constituent people shall be in the City Council. In order to understand the significance of this, we have to compare the positions of particular constituent peoples relative to each other in Mostar with their relative positions with respect to similar elections in other major municipalities in Bosnia and Herzegovina. The applicant argues that the minimum limit on the number of representatives in the City Council constitutes a privilege afforded to the Serb People, as the least represented people in Mostar in the specific case, whilst the maximum limit on the number of representatives for any one constituent people (or Others) constitutes an artificial limitation on the extent to which free elections can give rise to a majority of Croat representatives in such elections. By contrast, in other municipalities of comparable importance, such as Sarajevo and Banja Luka, where the Croat people forms a minority of the population, the applicant claims that the law does not set an equivalent minimum level or representation for the Croat people, or other minority peoples, nor is the maximum representation of the constituent people which forms a majority of the population restricted (notwithstanding the results of the elections) in such a way as to privilege the Croat People (or other peoples forming a minority in the population), in the cities where the Bosniac or Serb people constitutes a majority. For example, the applicant pointed out that the privilege which is granted to the Serb and Bosniac Peoples to be represented by at least four councillors in the City Council, regardless of the number of voters and election results, is not granted to the Croat People in other areas of Bosnia and Herzegovina, such as Banja Luka, where they constitute a minority.

58. In deciding whether the Croat People has suffered differential treatment as compared with the Serb and Bosniac Peoples, it is necessary to identify the appropriate comparators. In other words, whether there has been differential treatment depends on establishing which persons or groups are in relevantly analogous positions, so that treating them differently would require justification. In the instant case, the applicant complains that

members of the Croat People in Mostar are treated differently from, and less favorably than, members of the Serb people in constituencies where the Serb people form a majority in the population such as Banja Luka, and areas such as Sarajevo where the Bosniac people form a majority. There are two possible bases for comparison. The first is the position of the Croat People in Mostar as compared with the positions of the Bosniac and Serb Peoples and Others in Mostar. On the face of the challenged provisions, Croats, Serbs and Bosniacs are in exactly the same position in elections to the City Council, and Others are less favorably treated but still receive some possible relief against the possibility of election results offering them little or no representation.

59. This does not appear at first sight to be a matter of which the Croat (or Serb or Bosniac) People could complain. However, treating similarly people or groups who are not in a relevantly analogous position may sometimes engage the right to be free of discrimination: like cases should be treated alike, but relevantly different cases should be treated differently. If the Croat people were able to show that they would be significantly under-represented in the Council relative to other constituent peoples and Others bearing in mind their respective numbers in the population of Mostar, the artificial limitation on the numbers of representatives would at least call for justification under Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25 of the International Covenant. However, no up-to-date and reliable statistics are available as to the make-up of the population of Mostar; the most recent are to be found in the results of the census from 1991. At the public hearing, the representative of the Central Election Commission, Mr. Branko Petrić, in response to a question from the Court, confirmed that electoral records exist from which it would be possible to compile statistics concerning the current distribution of members of the Constituent Peoples in the various constituencies of Mostar. However, as yet no such statistics have been compiled. That being so, the Constitutional Court is not in a position to say on this basis that the challenged provisions engage rights under Article II(4) of the Constitution of Bosnia and Herzegovina.

60. The alternative basis for deciding whether there has been differential treatment is to compare the position of the constituent peoples in Mostar with their respective positions in elections to City Councils and similar institutions in other parts of Bosnia and Herzegovina. The issue then becomes whether the special treatment given to voters who are not members of the Croat People in the Mostar area is different from the treatment of voters who are not members of the majority People in Banja Luka or Sarajevo, so that the Croat People in the Mostar area are treated less favorably in terms of their right to vote and their right to participate in public affairs than the Serb People in Banja Luka or the Bosniac People in Sarajevo, because the possible proportion of elected representatives

who may be members of the Croat People in the Mostar area is lower than the equivalent proportion of elected representatives for Sarajevo and Banja Luka who may be members of the Bosniac and Serb Peoples respectively.

61. The Constitutional Court notes that, in relation to the City Council of Sarajevo, the Statute of the City of Sarajevo, Article 22, paragraph 3 provides: 'Bosniacs, Croats and Serbs, as constituent peoples are each guaranteed a minimum of 20 per cent of seats in the City Council, and Others at least two seats, regardless of the election results.' As a result, the Bosniac majority cannot have less than 20 per cent of the seats, or more than 60 per cent of the seats less 2. The Statute of the City of Banja Luka, Article 33 paragraph 2 provides: 'one councillor's seat in the City of Banja Luka Assembly shall be guaranteed to the members of all national minorities.' This means that the Serb majority in Banja Luka could potentially hold no seat at all, or could hold one seat less than 100 per cent of the seats, on the City Assembly of Banja Luka.

62. If one compares that with the position of electoral position of Croats in respect of Mostar City Council, one finds that, under Article 19.4 of the Law on Amendments to the Election Law of Bosnia and Herzegovina, there are to be 35 councillors for the City of Mostar. Of these, 17 are elected from a city-wide constituency. Of these, at least four are elected from each of the three constituent peoples, and at least one is elected from Others. The minimum number of these seats which could be held by Croats is therefore four, and the maximum number is eight. Eighteen further councillors are to be elected (three from each of six constituencies consisting of areas of the city). The Law does not require any particular number of these to be from the constituent peoples or Others, but the ninth paragraph of Article 19.4 specifies that each of the constituent peoples and Others may have no more than 15 representatives. It follows that the Croat people may have any number of representatives on the Council from four (11.43 per cent of the representatives) to 15 (42.86 per cent of the representatives), even if Croat candidates receive far more than 42.86 per cent of the votes cast.

63. It is clear that the greatest possible proportion of Croat representatives in the City of Mostar Council is significantly lower than that of Bosniac representatives in the City Council of Sarajevo, and far less than the maximum possible proportion of Serb representatives in the City Assembly of Banja Luka. The Constitutional Court holds that this differential treatment is potentially inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25 of the International Covenant. The Constitutional Court must therefore decide whether the differences are objectively and rationally justified.

64. In this regard, the Constitutional Court considers it necessary to emphasize that the challenged provisions are incorporated into the Statute of the City of Mostar and Election Law as a result of years-long efforts of both the domestic and international authorities trying to find the most favorable solution for the organization of the City of Mostar, a matter which presented special difficulties in the context of the need to reconstruct the city and facilitate its restoration to a multiethnic community after the war. In connection with this issue, the Constitutional Court recalls that by the Washington Agreement from March 1994, the Framework Agreement for the Federation signed on 1 March 1994 and the Agreement on the Constitution of Federation signed on 18 March 1994, it was agreed that the Mostar City Municipality shall be governed by the Administrator of the European Union for up to two years in order to facilitate the post-war transition, coordinate reconstruction in the destroyed city and initiate the basic development of essential structures in the City in the critical early years. A Memorandum of Understanding, signed in Geneva on 6 April 1994, emphasized the commitment to the development of a unified, multiethnic city, return, freedom of movement and the temporary establishment of the EU Administration. The Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina of 10 November 1995 reaffirmed the agreement on a set of principles for the Interim Statute for the City of Mostar, including support for the unity of the city under an interim structural agreement. Finally, the Interim Statute was adopted on 7 February 1996 as an interim arrangement to ensure the basic administration of the City and government services while a permanent legal structure was negotiated, drafted and adopted. It follows from the aforementioned that the City of Mostar, due to its specific character, had a special status when compared with other cities in Bosnia and Herzegovina. The special problems concerning the reconstruction of the city provided objective and reasonable grounds for making its organization different from those in other cities of Bosnia and Herzegovina.

65. Establishing a satisfactory arrangement turned out to be a long-term project. The Steering Board of the Peace Implementation Council, at its session held in Brussels on 11 December 2003, assumed responsibility for offering full support to the implementation of a solution to the issue of Mostar based on a single, coherent city administration with effective, guaranteed power-sharing mechanisms which prevent any one people having majority control of the City Council. In addition, the Commission for Reforming the City of Mostar („the Commission"), which was established by the Decision of the High Representative No. 160/03 of 17 September 2003, stated, in its Report of 15 December 2003 that in the course of drafting a new Statute of Mostar it was guided by a set of principles as guidelines for its work, outlined by the High Representative in his amicus curiae opinion in the instant case. The guidelines were, *inter alia*, that the composition of the City Administration should reflect the last (1991) census and that the unified council and electoral system should

provide for: representation of all constituent peoples and Others; and representation from all parts of Mostar. To explain the reasons for the arrangements adopted for Mostar, the *amicus curiae* opinion of the High Representative quotes the Venice Commission writing in 2001 to support the proposition that power-sharing between the constituent peoples is an essential part of the Dayton settlement making peace possible in Bosnia and Herzegovina, however problematic it may be for the law of discrimination. The High Representative also quotes from the report of the Commission, which referred to the difficulties experienced in reforming the city authorities of Mostar to increase their effectiveness and efficiency and to put in place a genuinely democratic political system in place of one based on the self-interest of politicians and the politics of fear. The Commission insisted in its report that 'any reform of Mostar must be based not on population numbers, but on commitment to the protection of human rights, and of the rights of the Constituent Peoples and the group of Others, through protection of vital national interests.' The Report presented data concerning the 1991 demographic structure of the pre-war municipality of Mostar - 43,856 Bosniacs (34.6%); 43,037 Croats (34%); 23,864 Serbs (18.8 %); 12,768 Yugoslavs (11.1%) and 3,121 Others (2.5%). The provisions of Article 19.4 paragraphs 1 and 9 of the Election Law and Article 16 of the Statute reflect the last census of the City of Mostar and ensure that there is representation of all constituent peoples and that none of the peoples has an absolute majority on the City Council.

66. If one accepts the premises on which the Report was based, particularly that it was appropriate in 2003 to base the election of a Council on the balance between the constituent peoples and Others at the time of the 1991 census and that the organization of Mostar should therefore be based on power-sharing without representatives of any one constituent people having an absolute majority in the City Council, the upper and lower limits on representation in the City Council of Mostar stipulated by Article 19.4 paragraphs 1 and 9 of the Election Law and Article 16 of the Statute produce a result which is objectively and reasonably justifiable. However, this prompts two further questions: first, whether it was rational in 2003 to base the organization of Mostar on a 1991 census and ignore any changes in the population which might have occurred as a result of the war of 1992-1995 and the subsequent exercise by refugees and displaced persons of their right to return to their homes of origin; secondly, whether it remains rationally justifiable to maintain in 2010 special arrangements which engage Article II(4) of the Constitution of Bosnia and Herzegovina, more than 14 years after the end of the war.

67. In relation to the rationality of using census figures from 1991 as the basis for the organization of Mostar in 2003, the Constitutional Court has already noted that these were the most recent figures available. The Constitutional Court therefore considers that, in the circumstances existing in 2003, using 1991 population figures was less than ideal,

but was a reasonable course bearing in mind the difficulty of establishing more up-to-date figures and the importance of encouraging refugees and displaced persons to return to their former homes in Mostar to create a multiethnic community in a unified city.

68. The Constitutional Court must next consider whether it remains justifiable in 2010 to maintain electoral systems for City Councils which treat members of different peoples differently relative to each other according to the municipality in which the election is taking place. This is a far more difficult issue. A further seven years have passed; the population figures are now 19 years old, and there seems to have been no official attempt to establish a more accurate picture of the population pattern in Mostar today. There is a risk that the effectiveness of Article II(4) of the Constitution of Bosnia and Herzegovina will be undermined in relation to discrimination between constituent peoples *inter se* and between each constituent people and Others unless authorities throughout Bosnia and Herzegovina take steps to establish reliable statistics for the current structure of the population of Bosnia and Herzegovina and its Entities, the Brčko District, cantons, cities and municipalities.

69. The Constitutional Court recalls that the European Court of Human Rights in *Sejdić and Finci vs. Bosnia and Herzegovina*, mentioned above, paragraph 41, decided by a majority that too much time had passed since the end of the war for the special needs of Bosnia and Herzegovina to continue to justify, at the end of 2009, discriminatory provisions in the Constitution of Bosnia and Herzegovina concerning representation of Others in the House of Peoples of the Legislative Assembly of Bosnia and Herzegovina and the Presidency of Bosnia and Herzegovina. While accepting that 'there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule', the European Court observed that 'there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. In this connection, it is recalled that the possibility of alternative means achieving the same end is an important factor in this sphere (see *Glor vs. Switzerland*, no. 13444/04, § 94, 30 April 2009).' (See paragraph 48 of the judgment in *Sejdić and Finci*, above.) Furthermore, the Court regarded it as important that, in 2002, Bosnia and Herzegovina had acceded to the European Convention without reservations and thus had committed itself to meeting the standards of the Convention (paragraph 49).

70. Constitutional Court reminds that in the judgment of the European Court of Human Rights in the case *Sejdić and Finci*, paragraph 44 reads as follows: „In this context, where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable

justification must be interpreted as strictly as possible (see *D.H. and Others*, cited above, § 196). The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (ibid., § 176). That being said, Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct „factual inequalities" between them. Indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article (*Case „relating to certain aspects of the laws on the use of languages in education in Belgium"*, cited above, § 10; *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV; and *D.H. and Others*, cited above, § 175)„. In addition, the Constitutional Court also reminds that in paragraph 48 of the same judgment it is stated that: „In addition, while the Court agrees with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule, the Opinions of the Venice Commission (see paragraph 22 above) clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. In this connection, it is recalled that the possibility of alternative means achieving the same end is an important factor in this sphere (see *Glor v. Switzerland*, no. 13444/04, § 94, 30 April 2009)„. This might seem to indicate that, as a matter of European human rights law, there is now no justification under Article II(4) of the Constitution of Bosnia and Herzegovina for maintaining the challenged provisions. However, for two reasons the Constitutional Court does not consider itself bound to adopt that approach in the present case. First, the judgment of the European Court, like all judgments concerning justification for potentially discriminatory treatment or rules, focused on the particular facts and issues before it. The case of *Sejdić and Finci* concerned arrangements which entirely excluded candidates other than members of the three constituent peoples from offering themselves for election to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina and the Presidency of Bosnia and Herzegovina. By contrast, the provisions challenged in the instant case specifically protect the right of Others to be represented in the City Council of Mostar. Secondly, whilst the European Court is the final authority on the interpretation and application of the European Convention, the Constitutional Court is the final authority on the interpretation and application of the Constitution of Bosnia and Herzegovina, including Article II(4). Whilst the general principles applicable to questions of discrimination are the same under Article II(4) as under the European Convention (as noted in paragraph 41, above), it is for the Constitutional Court to decide whether in each case there is an objective and reasonable justification for the purposes of Article II(4), and for that purpose the Constitutional Court

must have regard to its own knowledge and understanding of the situation within Bosnia and Herzegovina. Being far closer to and more familiar with the social and political conditions of life in Bosnia and Herzegovina today than the European Court, the Constitutional Court is better placed than the European Court to assess the justification for treatment or rules which, if not justifiable, would amount to unconstitutional discrimination. In this connection, the Constitutional Court notes that the Venice Commission (the European Commission for Democracy through Law) in its submission as *amicus curiae* in the present case, accepted that the special position of Mostar might provide an objective and rational justification for its unique electoral arrangements, whilst submitting that the Constitutional Court when assessing possible justifications should take account of any changes in the situation which have occurred over the last fifteen years. The Constitutional Court agrees that this is the appropriate way to approach the issue.

71. That being so, the Constitutional Court considers that the post-war social and political conditions affecting Bosnia and Herzegovina, and the City of Mostar in particular, remain such that it remains reasonable to approach the political organization of the City of Mostar on the basis established in 2003. Applying a test of proportionality, the Constitutional Court concludes that the challenged measures give rise to differences of treatment of constituent peoples between cities, but that difficulties faced in Mostar, as identified by the Commission in its report of December 2003, have been and remain particularly intractable and severe. The measures serve a legitimate aim in that they put in place a power-sharing structure which it is reasonable to hope will gradually improve the quality of the political process in the city. They are rationally related to that legitimate aim. They may result in the City Council being constituted in a way that does not accurately reflect the expression of views of the electorate in elections, and that is a significant disadvantage in terms of the democratic legitimacy of the system. On the other hand, the practical impact of the differences between the ability of Croats in Mostar and of members of other constituent peoples and Others in Sarajevo, Banja Luka and other cities in Bosnia and Herzegovina seems to the Constitutional Court to be likely to be relatively small, at least in comparison with the importance of the legitimate aim for the measures and the risk to all inhabitants of Mostar if the attempt to establish an effective system of representative democracy in Mostar fails. At any rate, on the very sparse information currently available it is not possible to say that the impact is likely to be disproportionate to the importance of the aim.

72. The Constitutional Court therefore concludes that the challenged provisions of Article 19.4, paragraphs 1 and 9 of the Election Law and Article 16 of the Statute do not discriminate against the Croat People in the exercise of their rights under Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25.b) of the International Covenant on Civil and Political Rights.

Alleged violation of the right to elections on the basis of universal and equal suffrage under Article 25.b) of the International Covenant on Civil and Political Rights taken alone in relation to elections to the City Council of Mostar

73. The Constitutional Court must next consider the applicant's assertion that the challenged provisions violate Article 25 of the International Covenant on its own. The applicant argues, in this regard, that the challenged provisions violate the right to elections on the basis of universal and equal suffrage, because Article 19.4 of the Election Law and Article 17 of the Statute of the City of Mostar establish constituencies with significantly different numbers of voters, resulting in the value of individual votes being significantly different. This is said to violate the principle of equal suffrage under Article 25.b) of the International Covenant on Civil and Political Rights.

74. The first question is whether Article 25.b) of the International Covenant on Civil and Political Rights taken alone can be applied by the Constitutional Court when evaluating the constitutionality of a legal norm under Article VI(3)(a) of the Constitution. In that regard, the Constitutional Court indicates that the International Covenant on Civil and Political Rights makes an integral part of the Constitution of Bosnia and Herzegovina. Considering that, the Constitutional Court has competence to decide in this case whether the challenged provisions are in compliance with Article 25.b) of the International Covenant on Civil and Political Rights .

75. The Constitutional Court observes that the requirement of equal suffrage cannot require exact equality in the weight, or effect, of each elector's vote. That would be an unattainable ideal. The essence of the requirement is that each voter should have the same number of votes and that each vote should have roughly the same value, although exact equality of effect may be unachievable under some systems of voting even if the number of electors in each constituency was to be equal; for example, votes may in practice have different weights under some forms of proportional representation, and votes cast for the same party may have different effect in different constituencies in systems using simple majority (or 'first past the post) elections. Exact equality in the number of voters in each constituency is also unattainable in practice. Numerous difficulties affect the drawing of constituency boundaries. Some of these are geographical; others are administrative. All that can be achieved is that there should not be excessive inequalities in the size of electorates and weight attributed to individual votes in different constituencies. This was recognized by the drafters of the International Covenant (see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), p. 448). It has also been accepted by the European Court of Human Rights when interpreting the words 'equal suffrage' in Article 3 of Protocol No. 1 to the European Convention (see *Matthieu-Mohin*

vs. Belgium Series A, No. 113, judgment of 2 March 1987, paragraph 54). The European Court admits implied limitations to the right, and asks itself whether there has been arbitrariness or disproportionality and whether the limitation has interfered with the free expression of the electorate, making the assessment in the light of political conditions in the state in question (see generally *Ždanoka vs. Latvia* Application No. 58278/00, Reports 2006-IV [GC]; *Adamsons vs. Latvia* Application No. 3669/03, judgment of 24 June 2008 at paragraph 111; and *Yumak and Sadak vs. Turkey* Application No. 10226/03, judgment of 8 July 2008 [Grand Chamber] at paragraph 109).

76. It follows from the Central Election Commission's Decision on Determination and Announcement of Voters recorded in the Central Voter Register in the Basic Electoral Constituencies for the 2008 Local Elections (*Official Gazette of BiH*, no. 74/08) that the number of voters in the constituency of Urban Area 1 (the former City Municipality of Mostar South-West) is 8866, the number of voters in the constituency of Urban Area 2 (the former City Municipality of Stari Grad) is 18 977, in the constituency of Urban Area 3 (the former City Municipality of Mostar South-East) is 6869, in the constituency of Urban Area 4 (the former City Municipality of Mostar South) is 6989, in the constituency of Urban Area 5 (the former City Municipality of Mostar South-West) is 29 522 and in the constituency of Urban Area 6 (the former City Municipality of Mostar West) is 17 406. The Constitutional Court observes that the numbers of voters in constituencies in urban areas of Mostar (according to the applicant, whose figures have not been challenged) vary from 29,522 in Mostar South-West to 6,869 voters in Mostar South-East. This is a significant variation: the higher figure is 400 per cent of the lower figure. Yet each constituency elects three members of the Council, so the value of a vote in Mostar South-East is four times the value of a vote in Mostar South-West. It appears from Article 7 of the Statute of the City of Mostar that the boundaries of the constituencies were simply borrowed from the boundaries of the previous municipalities within Mostar, which became city areas (Article 7.1) which, in turn, became electoral constituencies for elections to the City Councils. As Article 17.1 then assigns three representatives to each constituency, historical boundaries become a cause of significant inequality. The Constitutional Court considers that this inequality requires justification if it is not to be unconstitutional.

77. The reasons for the arrangements adopted for Mostar have been noted in paragraphs 58 and 59, above. As stated in paragraph 65 above, the Constitutional Court considers that the need to deal with post-war social and political conditions affecting Bosnia and Herzegovina, and the City of Mostar in particular, continues to represent a legitimate aim which might justify departing from the normal, democratic principle that, so far as possible, each elector's vote should have similar weight. However, the Constitutional Court is not satisfied that the differences between the weights attaching to votes of

electors in different constituencies are proportionate, in the sense of being objectively and rationally related, to the legitimate aim of developing a multiethnic, power-sharing structure which it is reasonable to hope will gradually improve the quality of the political process in the city. The scale of the differences, noted in paragraph 76 above, results directly from two decisions: first, to base the constituency boundaries directly on the boundaries of the former city areas; secondly, to allocate the same number of councilors to each of those constituencies. It seems to the Constitutional Court that both those decisions flowed from a desire for administrative simplicity rather than being necessary, reasonable or proportionate steps to develop a power-sharing structure or a multiethnic community in Mostar. The Constitutional Court therefore holds that a variation on this scale cannot be justified as being necessary or proportionate to any legitimate aim. In addition, the Constitutional Court establishes that the provisions of Article 19.4 paragraph 2 of the Election Law and Article 17 paragraph 1 of the Statute in the part that reads: *Each City area shall elect three (3) City Councillors* are inconsistent with Article 25 of the International Covenant on Civil and Political Rights. It would not be appropriate for the Constitutional Court to quash the relevant legislation with immediate effect, as this would leave the affected constituencies entirely disenfranchised until the legislature passes new legislation to redefine constituency boundaries. The Constitutional Court therefore allows a period of six months following the publication of this decision in the *Official Gazette of Bosnia and Herzegovina* for the appropriate authorities to harmonize the relevant provisions with the Constitution of Bosnia and Herzegovina, in accordance with this decision.

78. The applicant also claimed that Article 19.4 paragraph 2 of the Election Law and Article 17 paragraph 1 of the Statute are in violation of a fundamental principle of the Election Law according to which, in determining the electoral constituencies, one has to observe that the electoral constituencies have equal number of voters, as well a basic principle „one person, one vote", which is inherent in all majority democracies. However, in view of its conclusion in relation to inconsistency with Article 25.b) of the International Covenant on Civil and Political Rights, the Constitutional Court does not consider it necessary to decide whether there is such a fundamental principle in the Election Law or whether, if there were to be such a principle, a provision inconsistent with it could be said to give rise to violate the Constitution of Bosnia and Herzegovina.

Alleged violation of Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25.b) of the International Covenant on Civil and Political Rights in respect of citizens in the former Central Zone of Mostar

79. Next, the applicant considers that by the provisions of Article 19.2 paragraphs 1 and 3, Article 19.4 paragraphs 2 to 8 of the Election Law and the provisions of Articles 15 and

17 paragraph 1 in conjunction with Articles 5 and 7 of the Statute the citizens of the former Central Zone are discriminated against in the enjoyment of their right under Article 25.b) of the International Covenant on Civil and Political Rights as they do not have the same rights as citizens of city areas when electing the councillors to the City Council. Also, the applicant considers that the citizens of the former Central Zone are discriminated against by the provisions of Article 38 of the Statute, as are the councillors to be elected to the city electoral constituency, because they have no possibility to be elected to the Committees for City Areas.

80. The Constitutional Court notes that the provisions of Article 19.2 of the Election Law and provisions of Article 15 in conjunction with Articles 5 and 7 of the Statute provide that the councillors in the City Council shall be elected in a city-wide electoral constituency and city area electoral constituencies that match the former city municipalities. In view of the aforesaid, the Constitutional Court recalls that six municipal areas or „city municipalities" were established through the adoption of the Interim Statute: Mostar South, Mostar South-West, Mostar West and Mostar South-East, Mostar North and Stari Grad (Old Town). Further, the Constitutional Court reminds that according to the Interim Statute, the Central Zone in the middle of the traditional commercial and tourist centre of the city was to be administered directly by a City-wide administration. Accordingly, it follows that the Central Zone did not constitute a „city municipality" according to the Interim Statue nor does it constitute a „city area" according to the new Statute.

81. As a result of this, the residents of the Central Zone of Mostar are entitled to vote only for the 17 councillors who represent the city-wide constituency. Unlike residents of the six City Municipalities, they do not have the opportunity to vote also for three councillors to represent their area of the city on the City Council. In consequence of the manner in which committees of the Council are constituted, the Central Zone is the only area of the city which is not represented on committees.

82. The Constitutional Court considers that this arrangement fails to secure 'equal suffrage' for the voters of Mostar, and is incompatible with Article 25.b) of the International Covenant. Most voters in Mostar can vote for two classes of councilors. Voters in the Central Zone can vote for only one class. This evident inequality cannot be justified, bearing in mind that, as the Constitutional Court has noted earlier, the reason for adopting the arrangement was mainly administrative convenience rather than as a rational way of pursuing the legitimate aim of adapting the electoral system to take account of historical difficulties afflicting the Constituent Peoples in Mostar. It follows that the arrangements also violate the guarantee of protection against discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina. This violation adversely affects a

significant number of people: the International Contact Group Europe Report No. 150, Annex A, indicated that in 2002 there were 1008 residents in the Central Zone, whilst the representative of the Central Election Commission, in his presentation at the public hearing in the present case, suggested that today the number is in the region of 2000.

83. The Constitutional Court therefore established a violation of Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25 of the International Covenant, to order the Parliamentary Assembly of Bosnia and Herzegovina within six months of the publication of this decision in the *Official Gazette of Bosnia and Herzegovina* to amend relevant provisions of the Election Law of Bosnia and Herzegovina to remove the discrimination.

84. When that has been done, it may be necessary (depending on the content of the amendments to the Election Law which the Parliamentary Assembly will have adopted) for the City Council of Mostar to amend some or all of Article 7 paragraphs 1 and 3, Article 15 paragraph 2, Article 17 paragraph 1, and Article 38 paragraph 1 of the Statute of the City of Mostar to bring the Statute into line with the Law on Elections as amended. At present, they produce a result which is incompatible with the Constitution of Bosnia and Herzegovina for the same reasons as those given above in relation to the Election Law, Article 19.2 paragraphs 1 and 3.

85. However, at present it is impossible to foresee whether any such amendments to the Statute of the City of Mostar will be needed or, if needed, what form they should take. The Constitutional Court therefore adjourns this aspect of the request *sine die*, but orders the Council of the City of Mostar to inform the Constitutional Court, within three months of the publication in the *Official Gazette of Bosnia and Herzegovina* of the Parliamentary Assembly's amendments to the Law on Elections of Bosnia and Herzegovina, of the steps it has taken to make the Statute of the City of Mostar consistent with the Constitution of Bosnia and Herzegovina. The Constitutional Court will then decide whether it is necessary to restore this case for further consideration. Therefore, the Constitutional Court has at present partially resolved the applicant's request in this part.

Alleged discrimination against citizens in the City of Mostar in respect of the election of a mayor

86. Next, the applicant submits that the citizens of the City of Mostar have been discriminated against in relation to the method of electing their mayor. The applicant draws attention to the provisions of Article 19.7 of the Election Law, Article VI.C paragraph 7 of Amendment CI to the Constitution of FBiH, and Articles 44 and 45 of the Statute of the City of Mostar, which together provide that the mayor is to be elected from among the

councillors by a vote of two-thirds of the councillors. The applicant compares this with the position of citizens of the City of Banja Luka, who elect and dismiss their mayor directly. In connection with this matter, the Constitutional Court keeps in mind the provisions of Article 13.7 paragraph 1 of the Election Law which provide that the Municipal Mayor or City Mayor shall be elected in accordance with this Law, the Constitutions, the Entity laws, and Municipal or City statutes. Paragraph 2 of the mentioned Article provide that if the Municipal/City Mayor is to be elected directly he/she will be elected by the voters registered in the Central Voter Register of the particular Polling Station in accordance with the Entity laws, Municipal or City Statutes. That is to say that the relevant provisions of the Election Law have defined two ways in which the mayor may be elected – *indirectly* by the citizens and *directly* through the representatives within the city councils – and the choice between these methods is to be finally determined by the Entity Constitutions, Entity Laws and the Statutes of Cities. In view of the aforesaid, the Constitutional Court notes that by the provisions of Article VI.A paragraph 4 of Amendment XVI to the FBiH Constitution it is stipulated that the City Council shall elect the Mayor. On the other hand, Article 100 of the Constitution of the Republika Srpska provides that the territorial organisation shall be regulated by the Law. Provisions of the Article 42 paragraph 1 and Article 60 of the Law on Local Self-government (*Official Gazette of RS*, nos. 101/04, 42/05 and 118/05) provide that the head of municipality/mayor shall be elected by citizens in direct general elections.

87. The method of electing a city mayor falls within the scope of Article 25.b) of the International Covenant. However, that Article does not require or rule out any specific method of selecting a mayor. It is not uncommon for different methods to be in use in the same state depending on the circumstances prevailing in particular cities. For example, in England and Wales the law permits either direct election by voters of the city or indirect election by elected councillors; some mayors are directly elected, although most are indirectly elected. In the view of the Constitutional Court, the issue in each case under Article 25.b) is whether the choice of method is arbitrary, bearing in mind that Article 25.a) recognizes that people may take part in public affairs either directly or indirectly through freely elected representatives. As, in the case of the City of Mostar, the Constitutional Court is satisfied that councillors are freely elected, the principles of democracy which underpin Article 25 as a whole permit the selection of a mayor by the councillors rather than directly by the electors.

88. The difference between methods of electing mayors in Mostar as compared with Banja Luka does, however, give rise differential enjoyment of the right to take part in elections which may engage Article II(4) of the Constitution of Bosnia and Herzegovina

taken together with Article 25.b) of the International Covenant. The questions to be answered are: (a) whether the task of electing a mayor is analogous in different cities; and (b) if it is, whether the different treatment is objectively and reasonably justified.

89. The Constitutional Court considers that the task of electing a mayor for different cities is analogous, since the role of mayor is broadly similar in each city. Turning therefore to the question as to whether it is justifiable to use different methods, the Constitutional Court notes the Constitution of the Federation of Bosnia and Herzegovina, to which Mostar is subject, regulates the matter differently from the Constitution of the Republika Srpska, which governs the matter in Banja Luka. Those differences are not incompatible with the relevant provisions of the Election Law of Bosnia and Herzegovina. Bearing in mind that the Constitution of Bosnia and Herzegovina provides for a significant degree of self-government in each of the Entities, the Constitutional Court considers that a simple difference of this sort is not unjustifiable for the purpose of Article II(4) of the Constitution of Bosnia and Herzegovina unless the choice of one or other method of electing a mayor can be regarded as unreasonable or can be shown to be part of a plan to deprive the people of a particular Entity or city of the essence of their right to participate in public affairs through a democratic political process. Considering the lack of any such evidence, the limited role of mayors in policy-making for the City Council, and the fact that, internationally, both direct and elect methods of electing mayors are regularly found, there is nothing in the instant case which would indicate that the choice of indirect election for the mayor of the City of Mostar amounts to unjustified discrimination when compared with the citizens of the City of Banja Luka. It follows that the citizens of the City of Mostar do not suffer discrimination in the enjoyment of their right under Article 25.b) of the International Covenant contrary to Article II(4) of the Constitution of Bosnia and Herzegovina.

90. Having regard to the aforesaid, the Constitutional Court concludes that the provisions of Articles 19.4, paragraphs 1 and 9 and 19.7 of the Election Law, the provisions of Article VI.C paragraph 7 of Amendment CI to the FBiH Constitution and provisions of Articles 7, 15, 16, 17, paragraph 1 insofar as the reaming part is concerned, paragraphs 2 and 3 and Articles 38 paragraphs 2, 3 and 4, 44 and 45 of the Statute of the City of Mostar are consistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25.b) of the International Covenant on Civil and Political Rights.

Other allegations in the applicant's request

91. The Constitutional Court finds it unnecessary to examine the challenged provisions of Articles 19.1, 19.2, paragraph 2, 19.5 and 19.6 of the Election Law and provisions of Article VI.C paragraph 4 of Amendment CI to the FBiH Constitution, as those allegations

in the applicant's request lack specificity and reasoned arguments, and the request does not state which constitutional provisions or rights under the international instrument are alleged to be violated in this context.

VIII. Conclusion

92. The Constitutional Court concludes that the provisions of Article 19.5 paragraphs 1 and 9 of the Election Law and Article 16 of the Statute, which stipulate a lower limit and an upper limit on the number of representatives from each constituent people within the City Council, do not discriminate against the Croat People in the enjoyment of their rights under Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25.b) of the International Covenant on Civil and Political Rights.

93. On the other hand, the Constitutional Court grants the applicant's requests in respect of (a) the allegation that Article 19.2 paragraphs 1 and 3, and Article 19.4 paragraph 1, as a result of which there are widely varying numbers of electors in constituencies based on former city areas in Mostar, violate Article 25.b) of the International Covenant on Civil and Political Rights, and (b) the allegation that Article 19.2, paragraph 1 and Article 19.4, paragraphs 2 to 8 making it impossible for voters in the Central Zone of Mostar to vote for councillors to represent that Zone, in addition to councillors to represent the city-wide constituency, violate Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25.b) of the International Covenant on Civil and Political Rights.

94. The Constitutional Court decides that Article 7 paragraphs 1 and 3, Article 15 paragraph 2, Article 17 paragraph 1, and Article 38 paragraph 1 of the Statute of the City of Mostar, which make it impossible for voters in the Central Zone of Mostar to vote for councillors to represent that Zone, in addition to councillors to represent the city-wide constituency, violate Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25.b) of the International Covenant on Civil and Political Rights. The Constitutional Court adjourns further proceedings on this part of the request *sine die* pending the amendment of the Law on Elections of Bosnia and Herzegovina in accordance with this decision. The Constitutional Court orders the Council of the City of Mostar, within three months following the publication of an amended version of the Law on Elections, to inform the Constitutional Court of the steps the Council will have taken to bring the Statute of the City of Mostar into line with the Constitution of Bosnia and Herzegovina.

95. Finally, the Constitutional Court considers that the provisions of Article 19.7 of the Election Law, Article VI.C paragraph 7 of the Amendment to the FBiH Constitution and

Articles 44 and 45 of the Statute, according to which the citizens of the City of Mostar elect their mayor in a manner which is different from the one in which the citizens of the City of Banja Luka elect their mayor, are consistent with the rights of the citizens of the City of Mostar safeguarded under Article 25.b) of the International Covenant on Civil and Political Rights, and do not discriminate against the citizens of the City of Mostar in the enjoyment of that right contrary to Article II(4) of the Constitution of Bosnia and Herzegovina.

96. The Constitutional Court found it unnecessary to decide whether Article 19.4 paragraph 2 of the Election Law and Article 17 paragraph 1 of the Statute are in violation of a fundamental principle of the Election Law, or to examine the challenged provisions of Articles 19.1, 19.2, paragraph 2, 19.3, 19.5 and 19.6 of the Election Law and provisions of Article VI.C paragraph 4 of Amendment CI to the F BiH Constitution by reference to the unsupported allegations of the applicant referring to the International Convention on Elimination of All Forms of Racial Discrimination.

97. Having regard to Article 17(1)(1), Article 61(1),(2) and (3) and Article 63(1) and (4) of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause.

98. Within meaning of Article 41 of the Rules of the Constitutional Court, Separate Partially Dissenting Opinions of the Vice-President Valerija Galić and Judges Mato Tadić and Mirsad Ćeman shall make an annex to this Decision.

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

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

Separate Partially Dissenting Opinion of the Vice-President Valerija Galić

Pursuant to Article 41 of the Rules of the Constitutional Court of BiH („Official Gazette of BiH", Nos. 60/05, 64/08 and 51/09), I hereby give my separate opinion partially dissenting from the decision of the majority of judges in the relevant case and the reasons are the following:

I Admissibility

As to the challenged provisions of the Election Law of BiH, the Constitution of F BiH and the Statute of the City of Mostar, I agreed with the opinion of the majority of judges that in this part the request is admissible.

As to the admissibility relating to paragraph 1 of the introductory part and paragraph 2 of the Decision of the High Representative for BiH promulgating the Statute of the City of Mostar, while having great reservations, I agreed that in the mentioned part the request is not admissible due to the lack of jurisdiction of the Constitutional Court to decide this matter and it was solely for the reason that the Constitutional Court had taken a different view in several earlier decisions of the Constitutional Court of BiH, wherein it is stated that the powers of the High Representative for BiH and the exercise of those powers are not subject to the control by the Constitutional Court.

II Merits

My substantial disagreement with the opinion of the majority of judges is related to a part of the Decision whereby it is established that the provisions of 19.4, paragraphs 1 and of the Election of Bosnia and Herzegovina and Article 16 of the Statute of the City of Mostar, **in a part where it is prescribed that „none of the constituent peoples on the City Council of Mostar may have more than fifteen (15) councillors**", are consistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25. b) of the International Covenant on Civil and Political Rights.

The reasons why I disagree with the opinion of the majority of judges are as follows:

1. Taking the approach of the Constitutional Court as a staring point (paragraphs 55 and 56 of the Decision) which relates to the review of the challenged provisions from the aspect of their inconsistency with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25. b) of the International Covenant on Civil and Political Rights and invoking the approach which the European Court of Human Rights applied to the issues of discrimination in connection with co-participation in the political

life of Bosnia and Herzegovina in relation to Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention (see, *Sejdić and Finci vs. Bosnia and Herzegovina*, Applications No. 27996/06 and No. 34836/06, the judgment of 22 December 2009 (Grand Chamber), with reference to the criteria established through the practice of the Strasbourg authorities and General Comments of the UN Human Rights Committee as regards the right to vote which is guaranteed under Article 25. b) of the International Covenant on Civil and Political Rights, I excepted that the Constitutional Court would consistently follow that approach while reviewing the constitutionality of the challenged provisions.

However, as regards the reasoning for the Decision (paragraphs from 57 through 62) I am of the opinion that the Constitutional Court has insufficiently presented the test of comparison and insufficiently determined the relevant criteria for comparison which are inherent in the test of equality in order to answer the question whether the allegations of the applicant are well-founded that there is a differential treatment in the instant case.

2. The Constitutional Court focused its review on the issue of possible proportion of the representation in the City Council of Mostar, i.e. on the representation of councillors from the Croat people in relation to a possible proportion of representation of other constituent peoples (Bosniac and Serb peoples) in other units of local government and self-government wherein those peoples constitute majority, in which case the criterion for comparison was a possible proportion of representation of the Bosniac representatives in the City Council of the City of Sarajevo and the Serb representatives in the Assembly of the City of Banja Luka. The Constitutional Court establishes (paragraph 63 of the reasoning of the Decision) that the greatest possible proportion of Croat representatives in the City of Mostar Council is significantly lower than that of Bosniac representatives in the City Council of Sarajevo, and far less than the maximum possible proportion of Serb representatives in the City Assembly of Banja Luka. The Constitutional Court considers that there is a possibility for this differential treatment to be in contravention of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25. b) of the International Covenant on Civil and Political Rights. I do agree with the conclusion of the majority of judges and, in my opinion, there is no dispute as to the existence of obvious inequality in treatment of the representation of the Croat councillors when compared with the Bosniac and Serb representatives and not only in the City Council of the City of Sarajevo and Assembly of the City of Banja Luka but also in other units of local government and self-government in Bosnia and Herzegovina since there is a number of other comparative indicators that confirm the aforesaid.

The issue of differential treatment as regards the representation of Croat representatives in the units of local government and self-government may be a fundamental aspect of this case. However, I consider that the Constitutional Court failed to examine another important

aspect of this case, which was only marginally mentioned in paragraph 57 of the reasons for the Decision. That issue is related to differential treatment of all three constituent peoples, which means not only the Croat people, when it comes to the representation in the City of Mostar Council (given the provision on upper limit of representation in the City of Mostar Council) in comparison with the representation of all three constituent peoples in the councils or assemblies of other units of local government and self-government in Bosnia and Herzegovina. I am of the opinion that free will of voters becomes limited by determining the upper limit, in other words a deviation is made in respect of the principle of equal weigh of each vote being guaranteed under Article 25(b) of the International Covenant on Civil and Political Rights, which, in my opinion, cannot be regard as reasonable and based on the objective criteria and that the Constitutional Court should have dealt with this aspect as well.

3. I particularly disagree with the opinion of the majority of judges presented in the reasons for the Decision (paragraphs 64 through 72) which is reflecting the position that the existing differential treatment is not discriminatory for the City of Mostar in the sense that there is the objective and rational justification for the existence of such treatment and that by this treatment a legitimate aim is achieved and that there is a justified proportionality between the means employed and the aim sought to be achieved.

Basically, this conclusion of the majority of judges is based on the Report of the Commission for Reforming the City of Mostar of 15 December 2003. The majority of judges consider that the post-war social and political conditions affecting Bosnia and Herzegovina, and the City of Mostar in particular, remain such that it remains reasonable to approach the political organization of the City of Mostar on the basis established in 2003 and that the difficulties faced in Mostar, as identified by the Commission in its report of December 2003, have been and remain particularly intractable and severe.

I am particularly disappointed with a part of the reasons (paragraph 70 of the Decision) where the issue is raised as to the applicability of the positions of the European Court of Human Rights to the decisions of the Constitutional Court of Bosnia and Herzegovina. This is true all the more so if one takes into account that the predominant part of the case-law of the Constitutional Court is based on the principles and standards established through the case-law of the European Court of Human Rights.

Regretfully, the Constitutional Court does not consider as relevant the position of the European Court of Human Rights in the case of *Sejdić and Finci* in respect of which the Court observes significant positive developments in Bosnia and Herzegovina since the signing of the Dayton Peace Agreement and this opinion is based on the reports of the relevant European and other international representatives and organizations for

Bosnia and Herzegovina, and the position of the Constitutional Court is based on the assessment of the Commission for Reforming the City of Mostar presented in the Report of December 2003. I am of the opinion that this report is not sufficient basis for adopting a conclusion that fifteen years after the signing of the Dayton Peace Agreement and seven years after the imposing of the Statute of the City of Mostar the situation in Mostar is still of such nature that there is a justified reason for the organization of the City of Mostar to remain in the form as established by the imposed acts from 2003. In my opinion such conclusion failed to reflect the reality and developmental processes that have taken place in the City of Mostar since the time the challenged acts were imposed. In order to draw a proper conclusion, the Constitutional Court should have conducted a thorough analyses and intensive examination in the light of the current circumstance, but regretfully the Constitutional Court failed to do so.

The historical context and post-war developments in the City of Mostar might have been the justification for certain limitation of the electoral rights in the City of Mostar Council at the time of the imposition of the challenged acts and there still might be a justified reason for setting a minimum of guarantees for the representation in the City of Mostar Council for all three constituent peoples and Others regardless of the election results. However, with due respect for the opinion of the majority of judges, I do not see any argument in the given reasons which would convince me that the provisions on the upper limit of representation of the constituent peoples in the City of Mostar Council are still justified. I consider that those provisions significantly derogate from the democratic principles guaranteed under the relevant international documents which are applied in Bosnia and Herzegovina on the basis of the Constitution of Bosnia and Herzegovina and that the mentioned provisions are in contravention of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25(b) of the International Covenant on Civil and Political Rights.

4. Furthermore, I am of the opinion that this kind of decision of the Constitutional Court is inconsistent with the decision of the majority of judges in part in which the Court established that there are the violations of other challenged provisions of the Election Law of BiH and the Statute of the City of Mostar. Although I agreed with the decision of the majority of judges, I consider that the decision of the Constitutional Court will be hardly enforceable in part in which the Court established that there are violations of other challenged provisions and, in reality, this decision will have no practical significance because of the fact that the provisions of the Election Law of BiH and the provisions of the Statute of the City of Mostar providing for the upper limit of representation of the constituent peoples in the City of Mostar Council remained in force.

Separate Partially Dissenting Opinion of Judge Mato Tadić

1. With regards to the Decision on Admissibility and Merits in case no. U 9/09, I agree with the majority opinion.

2. My disagreement relates to the part of the decision dismissing the request to declare as unconstitutional the provisions of Article 19.4 paragraph 9 of the Election Law and Article 16 paragraph 2 of the Statute of the City of Mostar, in conjunction with Article 25 of the International Covenant on Civil and Political Rights. The challenged provisions provide for the maximum quota so that each constituent people shall not have more than 15 representatives in the City Council.

3. I consider that the majority opinion on this part of our decision does not meet the standards required by the Constitution of BiH with regards to the prohibition of all forms of discrimination, it is not compatible with Article 25 of the International Covenant on Civil and Political Rights and it is unconvincing and partially contradictory to other views taken in this Decision and some other decisions of the Constitutional Court.

4. The Constitutional Court admits that such solutions (obligatory minimum and maximum quota) are not provided for by the Election Law insofar as other towns and municipalities of BiH are concerned, nor are they provided for by the Statute of the Town of Mostar. The Constitutional Court gives the main justification for this in paragraphs 64, 65 and 66 of its Decision, where it points to the post-war developments and pacification in Mostar in the period from 1994 to 2003. I could accept that the major part of these views were justified at the relevant time, but I cannot accept at all that the Constitutional Court expresses the same arguments in 2010 and refers to the Commission's Report relating to the guidelines with regards to the City of Mostar (dated 15 December 2003), which was established by a decision of the High Representative, in order to justify its view in 2010. In my opinion, the Constitutional Court did not give any relevant reasoning in support of this view.

5. In developing the highest standards of the rule of law in its practice and application of democratic principles and elimination all forms of discrimination, as a rule the Constitutional Court refers to the decisions of the European Court of Human Rights, but it does not do it in this specific case but it is having a debate with the European Court of Human Rights by sending a clear message that it does not agree with the decision of the European Court of Human Rights in the *Sejdić and Finci vs. Bosnia and Herzegovina* case (see paragraph 70 of our Decisions).

6. By providing justification for keeping these solutions, the Constitutional Court, in paragraph 71 of our Decision, notes as follows: „the Constitutional Court concludes that the challenged measures give rise to differences of treatment of constituent peoples between cities, but that difficulties faced in Mostar, as identified by the Commission in its report of December 2003, have been and remain particularly intractable." I am not aware of the basis for the majority to draw the conclusion that even today, seven years after the Commission's report, „difficulties (…) have been and remain particularly intractable", since we did not present any evidence, nor did the participants to the proceedings submit any relevant and reasoned facts in support of such allegations. This is the reason why I consider as arbitrary that conclusion of the Constitutional Court.

7. Taking into account the aforesaid, in my opinion, there has been a violation of Article II(4) of the Constitution of BiH, in conjunction with Article 25 of the International Covenant on Civil and Political Rights with regards to the upper limit and *today* such provisions in the Election Law and Statute have no justification, nor do they pursue the legitimate aim, which is the reason why I did not support this part of the Decision.

Separate Partially Dissenting Opinion of Judge Mirsad Ćeman

Pursuant to Article 41, paragraph 2 of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, Nos. 60/05, 64/08 and 51/09), I hereby give my separate opinion partially dissenting from the Decision on Merits of 26 November 2010 in Case No. 2010.

First of all, I would like to emphasize that **I agree with** the decision and reasons expressed in paragraphs 8, 9 and 10 of the operative part of the Decision (be mindful of the order of these paragraphs as they are not marked with numbers).

As to the dismissing part of the decision in paragraphs 8 and 9 of the operative part, the Constitutional Court has given, *inter alia,* the following reasons in paragraph 71 of the reasoning: „(…) the post-war social and political conditions affecting Bosnia and Herzegovina, and the City of Mostar in particular, remain such that it remains reasonable to approach the political organization of the City of Mostar on the basis established in 2003. Applying a test of proportionality, the Constitutional Court concludes that the challenged measures give rise to differences of treatment of constituent peoples between cities, but that difficulties faced in Mostar, as identified by the Commission in its report of December 2003, have been and remain particularly intractable and severe. The measures serve a legitimate aim in that they put in place a power-sharing structure which it is reasonable to hope will gradually improve the quality of the political process in the city. They are rationally related to that legitimate aim. They may result in the City Council being constituted in a way that does not accurately reflect the expression of views of the electorate in elections, and that is a significant disadvantage in terms of the democratic legitimacy of the system. At any rate, on the very sparse information currently available it is not possible to say that the impact is likely to be disproportionate to the importance of the aim."

Unlike the majority opinion, **I consider for the same aforementioned reasons that „the political organization of the City of Mostar"** should not be changed yet. There has been a basis for the Constitutional Court to establish that the challenged provisions of the Election Law of BiH and the Statute of the City of Mostar, referred to in paragraphs 1 through 5 of the operative part of the Decision (be mindful of the order of these paragraphs as they are not marked with numbers), are not incompatible, i.e. are compatible with the relevant provisions of the Constitution of BiH in conjunction with relevant provisions of the International Covenant on Civil and Political Rights. **In particular,** although it would be reasonable and obligatory to rectify the applicable legislation, including those at the

local level (perhaps even in the manner alleged by the applicant of the request for review of constitutionality), after the change for the good and after objective indicators have confirmed it, I do not see any realistic changes which would impose any modification of the challenged provisions of Law and Statute in question for their alleged incompatibility with the Constitution and International Covenant on Civil and Political Rights. In giving a reason why it does not consider that it is obliged to take the identical view in this case as that which the European Court took in the *Sejdić and Finci* case, the Constitutional Court, in paragraph 70 of the Decision, has concluded as follows: „ (...) the Constitutional Court must have regard to its own knowledge and understanding of the situation within Bosnia and Herzegovina. Being far closer to and more familiar with the social and political conditions of life in Bosnia and Herzegovina today than the European Court, the Constitutional Court is better placed than the European Court to assess the justification for treatment or rules which, if not justifiable, would amount to unconstitutional discrimination."

In my opinion, such approach is a creative approach expressed by the majority of the Constitutional Court, which I support as well, in identifying particular conditions and circumstances in the City of Mostar (at an earlier point and at the time of making the decision) and interpreting the constitutional text and international documents in the field of human rights forming its integral part. In my opinion, such approach simultaneously corresponds to the practice of the European Court of Human Rights and „the social and political conditions of life in Bosnia and Herzegovina" which should be taken into account in making a decision in this case.

Although „social and political conditions of life in Bosnia and Herzegovina" and in the City of Mostar are not primary as such or are not at all a „legal category", they objectively (given the methodology of understanding and interpreting the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms) represent the basis for understanding the real capacity and scope of the provisions of the Constitution of BiH and international agreement to which the applicant has referred.

Thus, even if the Court had decided to dismiss the parts of the request in paragraphs 1-5, I do not believe that one could say that in this moment the effect would be disproportional to the importance of the aim incorporated in the package of regulations at the State, Entity and local level regulating the organization of the City of Mostar.

CONTENTS

Case No. U 3/11

DECISION ON ADMISSIBILITY AND MERITS

Request of seventy six (76) representatives of the National Assembly of the Republika Srpska, for review of constitutionality of Article 5 of the Law on Personal Identification Number

Decision of 27 May 2011

CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1), (2) and (3), and Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in the Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Having deliberated on the request of **76 Representatives of the National Assembly of the Republika Srpska** in case no. **U 3/11**, at its session held on 27 May 2011 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of 76 Representatives of the National Assembly of the Republika Srpska is hereby partially granted.

It is hereby established that Article 5 of the Law on Personal Identification Number (*Official Gazette of Bosnia and Herzegovina* nos. 32/01 and 63/08) is not consistent with Article I(2) of the Constitution of Bosnia and Herzegovina.

The Parliamentary Assembly of Bosnia and Herzegovina is ordered to, pursuant to Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, harmonize Article 5 of the Law on Personal Identification Number (*Official Gazette of Bosnia and Herzegovina* nos. 32/01 and 63/08) with the Constitution of Bosnia and Herzegovina, within six months from

the date of publication of this decision in the *Official Gazette of Bosnia and Herzegovina*.

The Parliamentary Assembly of Bosnia and Herzegovina is ordered to, pursuant to Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to inform the Constitutional Court of Bosnia and Herzegovina, within the time limit as ordered in the preceding paragraph, on the measures taken to enforce this Decision.

The request of 76 Representatives in the National Assembly of the Republika Srpska for review of consistency of Article 5 of the Law on Personal Identification Number (*Official Gazette of Bosnia and Herzegovina* nos. 32/01 and 63/08) with Articles I(1), I(3), III(1) and III(3)(a) of the Constitution of Bosnia and Herzegovina is hereby dismissed.

It is hereby established that Article 5 of the Law on Personal Identification Number (*Official Gazette of Bosnia and Herzegovina* nos. 32/01 and 63/08) is consistent with Articles I(1), I(3), III(1) and III(3)(a) of the Constitution of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 25 February 2011, the seventy six (76) representatives of the National Assembly of the Republika Srpska („the applicants„), lodged with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") a request for review of constitutionality of Article 5 of the Law on Personal Identification Number (*Official Gazette of Bosnia and Herzegovina* nos. 32/01 and 63/08).

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 11 March and 18 March 2011, the House of Representatives of the Parliamentary Assembly of

Bosnia and Herzegovina („the House of Representatives") and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the House of Peoples") were requested to submit their reply to the request.

3. The Secretary to the House of Representatives submitted her information concerning request for response on 25 March 2011, while the House of Peoples never submitted any reply to the request for response.

4. Under Article 26(2) of the Rules of the Constitutional Court, the information of the House of Representatives was communicated to the applicants on 14 April 2011.

III. Request

a) Allegations of the Request

5. The applicants consider the provisions of Article 5 of the Law on Personal Identification Number (*Official Gazette of Bosnia and Herzegovina* nos. 32/01 and 63/08) to be inconsistent with Articles I(1), I(3), III(1) and III(3)(a) of the Constitution of Bosnia and Herzegovina.

6. The applicants allege that Article III(1) of the Constitution of Bosnia and Herzegovina regulates the responsibilities of the institutions of Bosnia and Herzegovina which do not include the responsibilities in the area of the territorial organization of the Entities. Therefore, the applicants further allege, in terms of Article III(3)(a) of the Constitution of Bosnia and Herzegovina, the regulation of this issue is the responsibility of the Entities. The applicants further point out that in accordance with the aforementioned constitutional provisions, the National Assembly of the Republika Srpska has enacted the Law on Territorial Organization of the Republika Srpska which was published in the *Official Gazette of the Republika Srpska* no. 69/09. Article 5 of the said Law lists all the municipalities in the Republika Srpska.

7. The applicants stress that the challenged Article 5 of the Law on Personal Identification Number has established ten registration areas for which a register is kept. They further allege that the challenged article of the Law on Personal Identification Number for marking the municipalities in the Republika Srpska stipulates unofficial and/or dual names which do not exist in the Law on Territorial Organization of the Republika Srpska. Thus, the challenged article of the Law, instead of correct municipality names of Gradiška, Jezero, Ribnik, Knezevo, Krupa na Uni, Petrovac, Istočni Drvar, Brod, Šamac, Petrovo, Vukosavlje, Novo Gorazde, Foča, Istočni Mostar, Berkovići, Kozarska Dubica, Novi Grad, Oštra Luka, Istočna Ilidža, Istočno Novo Sarajevo, Istočni Stari

Grad, Pelagićevo, Osmaci, Donji Žabar and Kupres, as established under Article 5 of the Law on Territorial Organization of the Republika Srpska, states dual or even erroneous municipality names as follows: Bosanska Gradiška/Gradiška, Jajce/Jezero, Ključ-Ribnik, Skender Vakuf/Kneževo, Bosanska Krupa/Krupa na Uni, Bosanski Petrovac/Petrovac, Drvar/Srpski Drvar, Bosanski Brod/Srpski Brod, Bosanski Šamac/Šamac, Gračanica/Petrovo, Odžak/Vukosavlje, Goražde/Srpsko Goražde, Foča/Srbinje, Mostar/Srpski Mostar, Stolac/Berkovići, Bosanska Dubica/Kozarska Dubica, Bosanski Novi/Novi Grad, Sanski Most/Srpski Sanski Most, Ilidža/Srpska Ilidža, Novo Sarajevo/Srpsko Novo Sarajevo, Sarajevo-Stari Grad/Srpsko Sarajevo, Gradačac/Pelagićevo, Kalesija/Osmaci, Orašje/Srpsko Orašje, Kupres/Srpski Kupres.

8. Since pursuant to the Constitution of Bosnia and Herzegovina, the territorial organization is the original jurisdiction of the Entities, the applicants hold that the challenged provision of the Law on Personal Identification Number must use the official names of the municipalities as adopted in the Law on Territorial Organization of the Republika Srpska. In addition, the applicants emphasize that the National Assembly of the Republika Srpska, in enacting the Law on Territorial Organization, has complied with the decisions of the Constitutional Court in case no. *U 44/*01 of 27 February and 22 September 2004. They also point out that, in case no. *AP 2821/09*, the Constitutional Court rejected as manifestly (*prima facie*) ill-founded the appeal of the Bosniac Caucus in the Council of Peoples of the Republika Srpska lodged against the Decision of the Council for the Protection of Vital Interest of the Constitutional Court of the Republika Srpska no. UV 2/09 of 8 July 2009, stating that the Law on Territorial Organization of the Republika Srpska had not violated the vital national interests of the Bosniac people.

9. In view of the aforementioned, the applicants requested from the Constitutional Court to declare unconstitutional the challenged article of the Law on Personal Identification Number.

b) Response to the Request

10. In the information concerning the request for response, signed by the Secretary to the House of Representatives, it is stated that in view of the fact that the House of Representatives has neither finalized its session, nor elected the members of the Constitutional Law Commission of the House it is not possible to conduct the procedure prescribed by the Rules of Procedure of the House of Representatives and provide response in respect of the aforementioned request for review of constitutionality of the Law on Personal Identification Number.

IV. Relevant Law

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

Article I(1)
Continuation

The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be „Bosnia and Herzegovina", shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. [...]

Article I(2)
Democratic Principles

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

Article I(3)
Composition

Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter „the Entities").

Article III(1)

Responsibilities of the Institutions of Bosnia and Herzegovina

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

a. Foreign policy.
b. Foreign trade policy.
c. Customs policy.
d. Monetary policy as provided in Article VII.
e. Finances of the institutions and for the international obligations of Bosnia and Herzegovina.
f. Immigration, refugee, and asylum policy and regulation.
g. International and inter-Entity criminal law enforcement, including relations with Interpol.
h. Establishment and operation of common and international communications facilities.

i. Regulation of inter-Entity transportation.

j. Air traffic control.

Article III(3)(a)

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

12. The **Law on Personal Identification Number** (*Official Gazette of BiH* nos. 32/01 and 63/08)

Article 1(1)

This law shall regulate the designation, allocation, registration, storage and use of personal identification number of citizens of Bosnia and Herzegovina and aliens in Bosnia and Herzegovina.

Article 5

The ten registration areas (IV Group) for which the registry is kept are as follows:

(1) Registry number 10 for the registration areas: Banja Luka, Bosanska Gradiška/ Gradiška, Čelinac, Jajce/Jezero, Jajce, Ključ/Ribnik, Kljuc, Kotor Varoš, Laktaši, Mrkonjić Grad, Prnjavor, Dobretići, Skender Vakuf/ Kneževo, Srbac, Šipovo.

(2) Registry number 11 for the registration areas: Bihać, Bosanska Krupa, Bosanska Krupa/Krupa na Uni, Bosanski Petrovac, Bosanski Petrovac/Petrovac, Bosansko Grahovo/Grahovo, Cazin, Drvar/Srpski Drvar, Drvar, Velika Kladuša, Bužim.

(3) Registry number 12 for the registration areas: Doboj – South, Doboj – East, Doboj, Bosanski Brod/Srpski Brod, Bosanski Šamac/Šamac, Domaljevac/Šamac, Derventa, Gračanica, Gračanica/Petrovo, Maglaj, Modriča, Odžak/Vukosavlje, Odžak, Teslić, Tešanj, Usora.

(4) Registry number 13 for the registration areas: Goražde, Goražde/Srpsko Goražde, Čajnice, Foča, Foča/Srbinje, Rudo, Višegrad.

(5) Registry number 14 for the registration areas: Livno, Tomislavgrad, Glamoč.

(6) Registry number 15 for the registration areas: Mostar Central District, Mostar Old Town, Mostar North, Mostar Southeast, Mostar Southwest, Mostar West, Mostar South, Mostar/Srpski Mostar, Bileća, Čapljina, Čitluk, Gacko, Grude, Jablanica, Konjic, Široki Brijeg, Ljubinje, Ljubuški, Neum, Nevesinje, Posušje, Prozor/Prozor-Rama, Stolac/ Berkovići, Stolac, Ravno, Trebinje.

(7) Registry number 16 for the registration areas: Prijedor, Bosanska Dubica/ Kozarska Dubica, Bosanski Novi/Novi Grad, Sanski Most/Srpski Sanski Most, Sanski Most, Kostajnica.

(8) Registry number 17 for the registration areas: Sarajevo-Center, Breza, Fojnica, Hadžići, Han Pijesak, Ilidža (FBiH), Ilidža/Srpska Ilidža, Ilijaš, Kalinovik, Kiseljak, Kreševo, Sarajevo- Novi Grad, Novo Sarajevo, Novo Sarajevo/Srpsko Novo Sarajevo, Olovo, Pale-RS, Pale-FBiH, Rogatica, Sokolac, Sarajevo-Stari Grad/Srpsko Sarajevo, Trnovo-RS, Trnovo-FBiH, Vareš, Visoko, Vogošća.

(9) Registry number 18 for the registration areas: Tuzla, Banovići, Bijeljina, Bratunac, Brčko District, Gradačac, Gradačac/Pelagicevo, Kalesija, Kalesija/Osmaci, Kladanj, Lopare/Čelić, Lopare, Lukavac, Orašje, Orašje/Srpsko Orašje, Srebrenica, Srebrenik, Šekovići, Teočak, Ugljevik, Vlasenica, Sapna, Zvornik, Živinice, Milići.

(10) Registry number 19 for the registration areas: Zenica, Bugojno, Busovača, Donji Vakuf, Gornji Vakuf, Kakanj, Kupres, Kupres/Srpski Kupres, Novi Travnik, Travnik, Vitez, Zavidovići, Žepče.

13. The **Law on Territorial Organization of the Republika Srpska** (*Official Gazette of the Republika Srpska* no. 69/09)

Article 1

This Law regulates the territorial organization of the Republika Srpska as well as the condition and procedure for territorial change.

Article 5

The municipalities in the Republika Srpska are: Bijeljina, Bileća, Berkovići, Bratunac, Brod, Višegrad, Vlasenica, Vukosavlje, Gacko, Gradiška, Derventa, Doboj, Donji Zabar, Zvornik, Istočni Mostar, Istočni Drvar, Istočna Ilidža, Istočno Novo Sarajevo, Istočni Stari Grad, Jezero, Kalinovik, Kneževo, Kozarska Dubica, Kostajnica, Kotor Varoš, Krupa na Uni, Kupres, Laktaši, Lopare, Ljubinje, Milici, Modrića, Mrkonjić Grad, Nevesinje, Novi Grad, Novo Goražde, Osmaci, Oštra Luka, Pale, Pelagićevo, Petrovac, Petrovo, Prijedor, Prnjavor, Rogatica, Rudo, Ribnik, Srbac, Srebrenica, Sokolac, Teslić, Trebinje, Trnovo, Ugljevik, Foča, Han Pijesak, Čajniče, Čelinac, Šamac, Šekovići and Šipovo.

V. Admissibility

14. In examination of the admissibility of the request, the Constitutional Court started from the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

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

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

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

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

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

15. In respect of the challenged provisions of the Law on Personal Identification Number, the Constitutional Court highlights that, although the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina does not stipulate the explicit jurisdiction of the Constitutional Court to review the constitutionality of laws or legal provisions of Bosnia and Herzegovina, the substantial notion of the jurisdiction as specified by the Constitution of Bosnia and Herzegovina contains in itself the title for the Constitutional Court to have such jurisdiction, in particular the role of the Constitutional Court as the body upholding the Constitution of Bosnia and Herzegovina. The aforementioned position of the Constitutional Court in such cases in its previous case-law clearly indicates that the Constitutional Court has jurisdiction to review the constitutionality of the laws or individual provisions of the laws of Bosnia and Herzegovina (see the decision of the Constitutional Court no. *U 14/02* of 30 January 2004, the *Official Gazette of BiH* no. 18/04).

16. Furthermore, the concerned request for review of constitutionality of the challenged provisions of the Law on Personal Identification Number was filed by 76 representatives in the National Assembly of the Republika Srpska which in relation to the total number of 83 representatives as established by the Constitution of the Republika Srpska amounts to more than one fourth of the legislative body of the Republika Srpska. It follows from the aforementioned that the request has been lodged by an authorized applicant under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

17. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17 of the Rules of the Constitutional Court, the Constitutional Court has established that the request for review of constitutionality of the provision of the Law on Personal Identification Number is admissible, having been filed by an authorized person and that there are no other formal reasons which would make it inadmissible under Article 17(1) of the Rules of the Constitutional Court.

VI. Merits

18. The applicants allege that Article 5 of the Law on Personal Identification Number is not consistent with Articles I(1), I(3), III(1) and III(3)(a) of the Constitution of Bosnia and Herzegovina. In the opinion of the applicants, the challenged article of the Law on Personal Identification Number is not consistent with the said provisions of the Constitution of Bosnia and Herzegovina due to the fact that for marking of the municipalities in the Republika Srpska it stipulates unofficial and/or dual names, even erroneous ones, which do not exist in the Law on Territorial Organization of the Republika Srpska.

19. The Constitutional Court notes that the Law on Personal Identification Number has been enacted on 25 October 2001 by the Parliamentary Assembly of Bosnia and Herzegovina pursuant to Article IV(4)(a) of the Constitution of Bosnia and Herzegovina. The aforementioned law entered into force on 29 March 2002. The amendments to the said law, enacted on 30 July 2008, entered into force on 13 August 2008. The Law on Personal Identification Number regulates the issues pertaining to the personal identification number of citizens of Bosnia and Herzegovina and aliens in Bosnia and Herzegovina.

20. The Constitutional Court further highlights that the Republika Srpska has enacted the Law on Territorial Organization of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 69/09, which entered into force on 7 August 2009. Article 5 of the said Law lists individually the 61 municipalities which constitute as basic territorial units the territory of the Republika Srpska. This law has determined the names of municipalities as the present official names of municipalities in the Republika Srpska.

21. The Constitutional Court concludes that the challenged law regulates the issues pertaining to the personal identification number of citizens, therefore, the issues which fall under jurisdiction of Bosnia and Herzegovina. The resulting conclusion is that the challenged law does not regulate the issues which fall under jurisdiction of the Entities' constitutions, such as the territorial organization of the Entities and neither does it determine the names of towns and municipalities in the Entities. Namely, the Constitutional Court holds that the challenged law took over the municipality names in the Republika Srpska from the then applicable Entity law, to which in some cases also earlier names were added (e.g. Ključ/Ribnik) in order to specify the registration areas for which the registers of personal identification numbers of citizens are kept. The challenged law was enacted before the new Law on Territorial Organization of the Republika Srpska dating from August 2009 and it, therefore, contains the names which are not in accordance with the names as established by this Entity law. Therefore, the state-level legislator did not determine the names of towns and municipalities in the challenged article of the law and

neither are those substantive legal issues to be regulated by that law. The Constitutional Court concludes that in the present case the state-level legislator has not interfered with the constitutional powers to which the Republika Srpska as one of the Entities is entitled under Article III(3)(a) of the Constitution of Bosnia and Herzegovina.

22. In view of the aforementioned as well as the fact that the provisions of the Constitution of Bosnia and Herzegovina contained in Articles I(1), I(3), III(1) and III(3)(a) which the applicants hold in the present case to have been violated, relate to continuation and composition of Bosnia and Herzegovina, including the responsibilities of the institutions of Bosnia and Herzegovina and the responsibilities of the Entities, the Constitutional Court concludes that the challenged article of the Law on Personal Identification Number does not violate the provisions of Articles I(1), I(3), III(1) and III(3)(a) of the Constitution of Bosnia and Herzegovina.

23. The Constitutional Court, however, notes that the request seeking the review of constitutionality of the aforementioned law raises constitutional issues under Article I(2) of the Constitution of Bosnia and Herzegovina. The concerned provision of the Constitution of Bosnia and Herzegovina determines the state of Bosnia and Herzegovina as „*a democratic state, which shall operate under the rule of law*„. The Constitutional Court has jurisdiction and a duty to permanently protect the Constitution of Bosnia and Herzegovina (Article VI(3), including one of its fundamental principles of the rule of law under the said constitutional provision. The Constitutional Court will, therefore, examine the appellants' allegations that the challenged provision of the law is unconstitutional with regard to the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina.

24. The Constitutional Court has already highlighted that, by the applicable law, the Republika Srpska established the official names of all the municipalities on its territory. On the other hand, as regards the challenged legal provisions, the Constitutional Court is of the opinion that the state-level legislator has not followed the new legal regulations in the Republika Srpska as concerns the new names of towns and municipalities. In addition, the Constitutional Court notes that items 2, 3, 4, 7, 8, 9 and 10 of Article 5 the Law on Personal Identification Number contain the names of towns and municipalities which ceased being applicable as unconstitutional pursuant to the decisions of the Constitutional Court no. *U 44/01* of 27 February and 22 September 2004 (e.g. Srpski Drvar, Srpski Brod, etc.). In this manner, the state-level legislator has also violated the principle of the rule of law in relation to the challenged legal provision under Article I(2) of the Constitution of Bosnia and Herzegovina. The Constitutional Court points out that legal certainty, which

is an inherent element of the principle of the rule of law, requires that registration areas in the challenged law should be determined exclusively by the current legal names of towns and municipalities, which in the present case have been established by the relevant provisions of the Law on Territorial Organization of the Republika Srpska of 2009. In view of the aforementioned, the Constitutional Court concludes that in the present case there has occurred a violation of the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina, which includes compliance with applicable laws and acting in accordance with them.

VII. Conclusion

25. The Constitutional Court concludes that Article 5 the Law on Personal Identification Number is not consistent with Article I(2) of the Constitution of Bosnia and Herzegovina due to the fact that it contains the names of municipalities in the Republika Srpska which are not in accordance with their names as established by the positive Entity Law on Territorial Organization of the Republika Srpska.

26. The Constitutional Court also concludes that the provisions of Article 5 the Law on Personal Identification Number are consistent with Articles I(1), I(3), III(1) and III(3)(a) of the Constitution of Bosnia and Herzegovina because those provisions did not determine but only took over the names of individual municipalities from the Entity laws which were in force at the time of the enactment of the challenged law. There has, therefore, been no interference with the Entity constitutional jurisdiction to determine the names of municipalities on its territory.

27. In view of the provisions of Article 61(1) and (2) as well as Article 63(4) of the Rules of the Constitutional Court, the Constitutional Court has decided as in the enacting clause of this Decision.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

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Case No. U 5/11

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Nebojša Radmanović, the Chairman of the Presidency of Bosnia and Herzegovina for review of the constitutionality of the Law Amending the Law on Service in the Armed Forces of Bosnia and Herzegovina

Decision of 27 May 2011

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CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Having deliberated on the appeal of Mr. **Nebojša Radmanović, the Chairman of the Presidency of Bosnia and Herzegovina,** in case no. **U 5/11**, at its session held on 27 May 2011 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request for review of the constitutionality of the Law Amending the Law on Service in the Armed Forces of Bosnia and Herzegovina (*Official Gazette of BiH*, no. 74/10), lodged by Mr. Nebojša Radmanović, the Chairman of the Presidency of Bosnia and Herzegovina, is hereby dismissed as ill founded.

It is hereby established that the Law Amending the Law on Service in the Armed Forces of Bosnia and Herzegovina (*Official Gazette of BiH*, no. 74/10) 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*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. Mr. Nebojša Radmanović, the Chairman of the Presidency of Bosnia and Herzegovina („the applicant"), lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of the Law Amending the Law on Service in the Armed Forces of Bosnia and Herzegovina (*Official Gazette of BiH*, no. 74/10; „the challenged law"). The applicant also requested that the Constitutional Court adopts interim measure suspending the application of the challenged law pending the adoption of the final decisions of the Constitutional Court on the request in question.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 23 March 2011 the House of Representatives and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina were requested to submit their replies to the request.

3. No reply to the request has been submitted.

III. Request

a) Statements from the request

4. The applicant considers that there was no legal basis for the enactment of the challenged law and that the Parliamentary Assembly of Bosnia and Herzegovina have regulated the matter which, according to the Constitution of Bosnia and Herzegovina, falls outside the scope of its responsibility. For these reasons, the applicant holds that the challenged law is inconsistent with Articles II(4), III(1), III(3)(a) and (b) and IV(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention for the Protection of Human Rights and Fundamental freedoms („the European Convention"). In the reasoning of the applicant's request it is stated that Article IV(4)(a) of the Constitution of Bosnia and Herzegovina is referred to as the basis for enacting the challenged law, which prescribes that the Parliamentary Assembly of Bosnia and Herzegovina has 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. The applicant underlines that it clearly follows that the aforementioned provision embodies the Parliament's „universal responsibility" in the area of legislative power, but that neither the quoted Article nor any other Article of the Constitution of Bosnia and Herzegovina give the Parliament the mandate to regulate the area of pension and disability insurance.

5. The applicant asserts that the responsibilities of the Institutions of Bosnia and Herzegovina are specified in Article III(1) the Constitution of Bosnia and Herzegovina and that Article III(3)(a) clearly prescribes that all governmental functions and powers not expressly assigned in the Constitution to the Institutions of Bosnia and Herzegovina shall be those of the Entities. As the responsibilities of the Institutions of Bosnia and Herzegovina under Article III(1) do not specifically include the area of pension and disability insurance or „any other form of social security", the applicant holds that the regulation of this area is not within the constitutional responsibility of Bosnia and Herzegovina but within the original responsibility of the Entities. Also, the applicant states that this position is unambiguously confirmed by the Constitution of the Republika Srpska, which stipulates in paragraph 12 of Amendment XXXII to the RS Constitution that the Republika Srpska shall regulate and secure, *inter alia*, social insurance and other forms of social care. In accordance with the aforementioned provision and the Constitution of Bosnia and Herzegovina, the area of social security is fully regulated by the Law on Pension and Disability Insurance of the Republika Srpska („the RS Law on Pension and Disability Insurance"). In view of the above, the applicant considers that the challenged Law is in contravention of Article III(1) and (3)(a) of the BiH Constitution and that that concerns „the unconstitutional transfer of the responsibilities from the Entities to the Institutions of Bosnia and Herzegovina, whereby the constitutional and legal responsibilities of the RS and the Federation of BiH have been derogated".

6. The applicant quotes Article 1 of the challenged Law, which prescribes the terms for early retirement of soldiers, and states that general conditions for old age retirement are prescribed by the Entities' laws and that the RS Law on Pension and Disability Insurance does not contain provisions stipulating the right to pension under favourable conditions and the wider scope thereof as to the general regulations. The applicant further emphasizes that the Republika Srpska has adopted a Pension Reform Strategy which foresees that all privileges will be removed from the pension system. Contrary to the aforementioned, as stated by the applicant, the aforementioned provision includes a separate category of persons who enjoy a privileged position in exercising their rights, *i.e.* it has been made possible that „the conditions applicable to all citizens in the same legal situation, which imply the right to pension, do not apply to them". According to the applicant, it is evident that „in this manner a circle of persons who exercise the right to pension under favourable conditions that are not applied to other citizens has been created" and the aforementioned amounts to a violation of the principle of equality of all citizens. In the applicant's opinion, it follows that the challenged Law is in contravention of Article III(3)(b) of the Constitution of Bosnia and Herzegovina, which, *inter alia*, prescribes that the general principles of international law constitute an integral part of the law of Bosnia and

Herzegovina. As a result, according to the applicant, one category of citizens enjoys a privileged position and status, while other citizens are discriminated against, contrary to Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention and, for these reasons, the challenged Law is unconstitutional, too.

7. The applicant also alleges that „although it is irrelevant in the context of this constitutional-legal dispute", the application of the challenged Law would seriously jeopardize the stability of the existing pension and disability insurance system and „would also encourage many other categories to demand the same rights for themselves". In view of the aforementioned, the applicant proposed that the Constitutional Court establish that the challenged Law is inconsistent with the Constitution of Bosnia and Herzegovina, quash the challenged Law in its entirety, and establish that the challenged Law should become invalid on the day following that of the publication in the Official Gazette of Bosnia and Herzegovina. Furthermore, the applicant proposed that the Constitutional Court issue an interim measure, whereby the application of the challenged Law should be suspended pending a final decision on the applicant's request by the Constitutional Court. The applicant states that it is necessary to order the interim measure because of „the detrimental effect that the application of the challenged Law may have".

IV. Relevant Law

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

Article II

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 III

1. Responsibilities of the Institutions of Bosnia and Herzegovina

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

a) Foreign policy.

b) Foreign trade policy.

c) Customs policy.

d) Monetary policy as provided in Article VII.

e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina.

f) Immigration, refugee, and asylum policy and regulation.

g) International and inter-Entity criminal law enforcement, including relations with Interpol.

h) Establishment and operation of common and international communications facilities.

i) Regulation of inter-Entity transportation.

j) Air traffic control.

[...]

5. Additional Responsibilities

a) Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

Article IV

4. Powers

The Parliamentary Assembly shall have responsibility for:

a) Enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution.

9. The **Law Amending the Law on Service in the Armed Forces of Bosnia and Herzegovina** (*Official Gazette of BiH*, no. 74/10) reads:

Article 1

In the Law on Service in the Armed Forces of Bosnia and Herzegovina (Official Gazette of BiH, nos. 88/05, 53/07 and 59/09) in Article 48 (Exceptions Relating to Early Old-Age Pension), the following paragraph (4) shall be inserted immediately after paragraph (3): „(4) In exceptional cases and upon a request by the BiH Ministry of Defence, the right to early retirement shall be granted to a soldier irrespective of his/

her age and length of service, who until 25 December 1995 spent at least two years as a member of the BiH Army or of the Croatian Defence Council or of the RS Army and who on 1 January 2010 was serving in the military and whose service, due to the impossibility of getting an extension in military service, ended in accordance with this Law."

Article 2

In Article 49 (Pension Rating Base and the Amount of Pension), the following paragraph (3) shall be inserted immediately after paragraph (2): The amount of pension for insured persons in military service referred to in Article 48(4) of this Law shall be assessed from the pension rating base in a percentage determined according to the completed pension qualifying period. The percentage for an insured person in military service with an insurance period of 20 years shall amount to 50% of the pension rating base.

The present paragraph (3) shall become paragraph (4).

Article 3

In Article 53 (Provision of Funds) the following paragraph (2) shall be inserted immediately after paragraph (1): „(2) The difference between the funds that are to be paid to the persons referred to in Article 48(4) and Article 49(3) of this Law shall be provided from the budget of the Institutions of Bosnia and Herzegovina and refunded to the Entities' Pension and Disability Insurance Funds."

Article 4

This Law shall come into effect on the day after the date of its publication in the Official Gazette of BiH and shall apply from 1 January 2010.

10. The **Law on Service in the Armed Forces of Bosnia and Herzegovina** (*Official Gazette of BiH*, nos. 88/05, 53/07 and 59/09), as relevant, reads:

Pursuant to Article III(5)(a) and Article IV(4)(a) of the Constitution of Bosnia and Herzegovina, the Parliamentary Assembly of Bosnia and Herzegovina […] adopted the following

Law on Service in the Armed Forces of Bosnia and Herzegovina

Article 1

This Law shall regulate the following: service in the Armed Forces of Bosnia and Herzegovina („the Armed Forces"), composition of the Armed Forces, entry into military service, rights and obligations of persons serving in the Armed Forces, status of persons serving in the Armed Forces, classification scheme for manpower resources, evaluations, promotions, management of personnel records and career of military members, ranks

and insignias in the Armed Forces, standards of conduct and other status-related issues concerning persons serving in the Armed Forces.

CHAPTER V PENSION AND DISABILITY INSURANCE FOR MILITARY PERSONNEL

Article 44
(Definition of an insured person in military service)

Article 45
(Years of service with augmented duration)

Article 46
(Old-age pension)

(1) An insured person in military service shall acquire the right to old-age pension when he has attained 55 years of age and completed a pension qualifying period of at least 30 years.

(2) An insured person in military service shall acquire the right to old-age pension when he has completed an insurance period of at least 40 years, irrespective of his age.

Article 47
(Early old-age pension)

In the case of rationalisation of work and reduction in the number of Armed Forces, upon a proposal of the BiH Ministry of Defence, the insured person in military service referred to in Article 44 of this Law shall acquire the right to early old-age pension when he has attained 45 years of age and completed a pension qualifying period of at least 20 years.

Article 48
(Exceptions Relating to Early Old-Age Pension)

(1) In exceptional cases and upon a proposal by the BiH Ministry of Defence, a person shall acquire the right to early old-age pension, according to the decision of the Presidency, when he has completed a pension qualifying period of at least 20 years and achieved the rank of brigadier, irrespective of his age.

(2) In exceptional cases and upon a proposal by the BiH Ministry of Defence, a person shall acquire the right to old-age pension, according to the decision of the Presidency, if he has achieved the rank of general, irrespective of his age and years of pension qualifying period.

(3) In exceptional cases and upon a proposal by the BiH Ministry of Defence, a person shall acquire the right to old-age pension, according to the decision of the Presidency, if

he has held the position of brigade commander or has been a high ranking commander for at least 12 months during the war.

Article 49
(Pension Rating Base and the Amount of Pension)

Article 50
(Specific conditions for acquiring the right to old-age pension)

Article 51
(Length of service for retirement)

Article 52
(Disability pension and family pension)

Article 53
(Provision of Funds)

The funds required for the realisation of the rights determined in this Chapter of the Law shall be secured from contributions paid for pension and disability insurance of insured persons in military service in accordance with the applicable legal regulations or from the budget.

Article 54
(Other issues)

The provisions of the Entities' laws on pension and disability insurance shall apply to all pension and insurance issues that are not regulated by this Law.

11. The **Law on Defence of Bosnia and Herzegovina** (*Official Gazette of BiH*, no. 88/05), as relevant, reads:

Article 1

This Law shall govern the common defence system of Bosnia and Herzegovina and shall establish and define the chain of command and role of all the elements in order for Bosnia and Herzegovina to have full capacity in civilian supervision and protection of the sovereignty and territorial integrity of Bosnia and Herzegovina. The Law shall establish rights, obligations and activities of the Institutions of Bosnia and Herzegovina, the Armed Forces of Bosnia and Herzegovina („the Armed Forces") and authorities of the Entities for the protection of sovereignty, territorial integrity, political independence and international personality of Bosnia and Herzegovina and provision of assistance to the civil authorities.

Article 2
(Armed Forces)

The Armed Forces shall be a professional and single military force organised and controlled by Bosnia and Herzegovina. The Armed Force shall consist of active and reserve component units. The Armed Force, as an Institution of Bosnia and Herzegovina, shall be composed of persons belonging to the three constituent peoples and Others, in accordance with the Constitution of Bosnia and Herzegovina. […]

12. The **Law on Pension and Disability Insurance** – Consolidated Text (*the Official Gazette of the Republika Srpska* nos. 106/05 20/07, 33/08, 01/09, 71/09, 106/09 and 118/09), as relevant, reads:

Article 11

[…]

The following persons shall be covered by compulsory pension and disability insurance:

1. employed persons; […]

Article 12

For the purpose of this law, insured persons - employees shall be understood to mean:

[…]

2. career officers or non-commissioned officers and contracted military persons; […]

Article 75

An insured person shall acquire the right to old-age pension when he/she has attained 65 years of age and completed a pension qualifying period of at least 20 years. […]

Article 246

By way of exception to Articles 75 and 77 of this Law, in exceptional cases the Government can grant the right to old-age pension to a person who deserves credit for social, political, economic and cultural development of the Republika Srpska, irrespective of whether or not that person satisfies the conditions for acquisition of the rights under this Law, or the Government can determine the amount of pension that is higher than the amount he/she would receive according to the provisions of this Law.

In exceptional cases the Government can grant the right to family pension to family members of a deceased person referred to in Article 1 of this Article, irrespective of

whether or not the family members satisfy the conditions for acquisition of the rights under this Law, or the Government can determine the amount of pension that is higher than the amount they would receive according to the provisions of this Law.

Family members within the meaning of Article 2 of this Article shall entail the deceased person's spouse, children and parents. […]

13. The **Law on Acquiring the Right to Old-age Pension of Certain Categories of Insured Persons** (*Official Gazette of the Republika Srpska* no. 33/08), as relevant, reads:

Article 1

This Law shall govern the right of members of the former Army of the Republika Srpska and employees of the former Ministry of Defence of the Republika Srpska, who have been made redundant by the defence reform process in Bosnia and Herzegovina, to meet the requirements to be eligible for early old-age pension […]

Article 8

(1) The Republika Srpska shall secure funds to the Pension and Disability Insurance Fund of the Republika Srpska for payment of the pensions in accordance with this Law.

V. Admissibility

14. In examining the admissibility of the request, the Constitutional Court invokes the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

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

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

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

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

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

15. The Constitutional Court notes that the request for review of the constitutionality was lodged by the Chairman of the Presidency of Bosnia and Herzegovina, which means that it was lodged by an authorized person as set forth in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

16. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of Constitutional Court, the Constitutional Court establishes that the request is admissible as it was filed by an authorized person and as there is no single formal reason under Article 17(1) of the Rules of the Constitutional Court, which would render the request inadmissible.

VI. Merits

17. The applicant maintains that the challenged Law is inconsistent with the provisions of Articles II(4), III(1), III(3)(a) and (b) and IV(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention.

a) As to the review of constitutionality relating to Articles III(1), III(3)(a) and IV(4) of the Constitution of Bosnia and Herzegovina

18. The applicant holds that the challenged Law is inconsistent with the aforementioned provisions of the Constitution of Bosnia and Herzegovina for the reason that Bosnia and Herzegovina has no responsibility to regulate the area of social policy and, therefore, it has no responsibility to regulate the area of pension and disability insurance, and for the reason that the challenged Law concerns the unconstitutional transfer of the responsibilities from the Entities to the BiH Institutions.

19. As to the aforementioned allegations of the applicant, the Constitutional Court points out that the defence reform and the reorganisation of the armed forces have been carried out to facilitate the integration of Bosnia and Herzegovina in the Euro-Atlantic processes and Partnership for Peace Programme. As part of this, *inter alia*, the necessary regulations, without which the defence reform would be impossible, have been enacted. Those regulations also include the Law on Defence of Bosnia and Herzegovina, which governs the common defence system of Bosnia and Herzegovina in order for „Bosnia and Herzegovina to have full capacity in civilian supervision and protection of the sovereignty and territorial integrity of Bosnia and Herzegovina." In addition, the Law on Service in Armed Forces of Bosnia and Herzegovina has been enacted. The mentioned Law regulates the issues relating to service in the Armed Forces of Bosnia and Herzegovina, composition of the Armed Forces, entry into military service, rights and obligations of

persons serving in the Armed Forces of BiH, and other issues including „the status-related issues concerning persons serving in the Armed Forces." Both Laws have been enacted on the basis of Articles III(5)(a) and IV(4)(a) of the Constitution of Bosnia and Herzegovina.

20. The Law on Service in Armed Forces of Bosnia and Herzegovina contains, *inter alia*, „Chapter V - Pension and Disability Insurance for Military Personnel", which in Articles 44 through 54 regulates various issues relating to pension and disability insurance; these include the definition of an insured person in military service and the pension rating base and the amount of pension. In Article 47 of the Law on Service in Armed Forces of Bosnia and Herzegovina, the right to early old-age pension in the case of rationalisation of work and reduction in the number of Armed Forces is recognised for those insured person in military service who have attained 45 years of age and completed a pension qualifying period of at least 20 years. Furthermore, Article 48 of the mentioned Law stipulates three exceptions relating to early old-age pension. Thus, in paragraph 1 it is stipulated that in exceptional cases and upon a proposal by the BiH Ministry of Defence, a person shall acquire the right to early old-age pension, according to the decision of the Presidency, when he has completed a pension qualifying period of at least 20 years and achieved the rank of brigadier, irrespective of his age. The exceptions mentioned under paragraphs 2 and 3 of the same Article concern the conditions for old age pension.

21. The Constitutional Court notes that the applicant has not challenged any of the provisions under the aforementioned Chapter of the Law on Service in Armed Forces of Bosnia and Herzegovina, including the provisions of Articles 47 and 48 of that Law, which regulate the right of members of the Armed Forces of Bosnia and Herzegovina to early old-age pension and the exceptions thereto. In fact, the applicant has confined his allegations only to the challenged Law, on the basis of which the basic Law has been amended. In this context and taking into account the provision of Article 32 of the Rules of the Constitutional Court, which stipulates that the Constitutional Court shall examine only those violations that are stated in the request, in the present case the Constitutional Court will not tackle the issues relating to the regulation of pension and disability insurance of military personnel at the state level, but it will confine itself to examining only the allegations contained in the request.

22. In view of the above, the Constitutional Court notes that the applicant has explicitly challenged the constitutionality of the challenged Law, amending the provisions of Articles 48, 49 and 53 of the Law on Service in Armed Forces of Bosnia and Herzegovina. In this regard, the applicant has underlined that the preamble to the challenged Law only refers to Article IV(4) of the Constitution of Bosnia and Herzegovina and that that provision

„embodies the Parliament's universal responsibility in the area of legislative power" and that „it does not give the Parliament the mandate to regulate the area of pension and disability insurance." However, the Constitutional Court highlights that the challenged Law in no way regulates the area of pension and disability insurance, but it only stipulates certain amendments relating to that area, which had already been regulated by the basic Law. As already stated, the basic law was enacted by the Parliamentary Assembly of BiH, which referred to the provision of Article III(5)(a) of the Constitution of Bosnia and Herzegovina regulating the transfer of responsibilities for certain matters, which has not been challenged by the request concerned. Therefore, it cannot be concluded that the reference made in the preamble to the challenged Law only to Article IV(4) of the Constitution of Bosnia and Herzegovina imply in any way the transfer of the responsibilities which were not taken over by the basic Law and, therefore, it cannot be concluded that the challenge Law is unconstitutional in this regard.

23. In addition, the applicant asserts that based on the provisions of the challenged Law „the unconstitutional transfer of the responsibilities from the Entities to the BiH Institutions" in violation of Articles III(1) and III(3)(a) of the Constitution of Bosnia and Herzegovina has been carried out. In this regard, the Constitutional Court notes that Article 47 of the Law on Service in Armed Forces of Bosnia and Herzegovina stipulates the right of military personnel to early old-age pension in the case of rationalisation of work and reduction in the number of Armed Forces, as Article 48(1) of the same Law stipulates the conditions for acquiring the right to early old-age pension for military personnel in exceptional cases. Article 1 of the challenged Law amends the provision of Article 48 of the basic Law in the manner that paragraph 4, stipulating another exception for acquiring the right to early old-age pension, is added. Also, Article 49 of the Law on Service in Armed Forces of Bosnia and Herzegovina regulates the matters relating to the pension rating base and the amount of pension, while Article 2 of the challenged Law amends that provision so that paragraph 3, stipulating the pension rating base and the amount of pension for insured persons in military service referred to in Article 48(4) of the Law on Service in Armed Forces of Bosnia and Herzegovina, is added. Hence, the Constitutional Court cannot conclude that in this case it concerns the transfer of a new responsibility in the manner asserted by the applicant, but it is about the amendment to the Law that was already enacted to regulate the area of pension and disability insurance of persons serving in the Armed Forces of Bosnia and Herzegovina. The same conclusion can be made in respect of Article 3 of the challenged Law, which amends the provisions of Article 53 of the Law on Service in Armed Forces of Bosnia and Herzegovina so that paragraph 2 is added, which stipulates that the difference between the funds that are to be paid to the

persons referred to in Article 48(4) and Article 49(3) of the Law shall be provided from the budget of the Institutions of Bosnia and Herzegovina and refunded to the Entities' Pension and Disability Insurance Funds.

24. As to the applicant's allegations that the challenged Law is inconsistent with Article III(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court notes that these allegations are closely related to the allegations that the challenged Law gives rise to discrimination and, therefore, the Constitutional Court will analyse these allegations separately.

25. In view of the above, the Constitutional Court holds that the challenged Law, amending only certain provisions of the Law on Service in Armed Forces of Bosnia and Herzegovina which relate to the exceptions applicable to the area of pension and disability insurance, which is governed by the Law on Service in Armed Forces of Bosnia and Herzegovina, is not in contravention of Articles III(1), III(3)(a) and IV(4) of the Constitution of Bosnia and Herzegovina.

b) As to the allegations of discrimination – Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with Article III(3)(b) of the Constitution of Bosnia and Herzegovina

26. The applicant also asserts that pension and disability insurance, as a field of social security, is fully regulated by the RS Law on Pension and Disability Insurance, which does not contain provisions stipulating the right to pension under favourable conditions and the wider scope thereof as to the general regulations. In addition, the applicant underlines that the Republika Srpska has adopted a Pension Reform Strategy, which foresees that all privileges will be removed from the pension system. Therefore, the applicant holds that based on the challenged Law a separate category of persons is placed in a privileged position because the conditions applicable to all citizens in the same legal situation relating to the right to pension do not apply to them. In this regard, the applicant refers to Article III(3)(b) of the Constitution of Bosnia and Herzegovina, which prescribes that „the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina."

27. The Constitutional Court notes that the applicant refers to the right not to be discriminated against under Article 14 of the European Convention. In this context, the Constitutional Court underlines Article 14 is of accessory nature and it can only be invoked concerning the enjoyment of rights guaranteed in the European Convention. On the other hand, the European Convention only guarantees civil and political rights and it

does not guaranty social rights and, therefore, the right to pension or the right to equal treatment in terms of pension conditions are not guaranteed in the European Convention. Consequently, the Constitutional Court will not tackle this issue.

28. Furthermore, the applicant refers to the prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina. However, the applicant does not refer specifically to any right or document listed in Annex I to the Constitution of Bosnia and Herzegovina which, in the opinion of the applicant, could be associated with discrimination, based on which it could be held that the challenged Law is unconstitutional. Besides, the Constitutional Court points out that the Republika Srpska has also enacted the Law on acquiring the right to old-age pension of certain categories of insured persons, which stipulates the conditions to be met in order for members of the former Army of the Republika Srpska who have been made redundant by the defence reform process in Bosnia and Herzegovina to apply for early old-age pension. The applicant's allegations of discrimination are solely based on his assertion that no category of persons in the Republika Srpska is entitled to privileges prescribed by the challenged Law in respect of pension and disability insurance and, in this regard, he makes a comparison with „other citizens". In view of the aforementioned, the Constitutional Court holds that the applicant has failed to make that discrimination seems probable, as mentioned in his request. Consequently, the Constitutional Court holds that the applicant's allegations of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina are ill-founded. Moreover, taking into account the aforementioned as well as the allegations of discrimination referred to in the applicant's request, the Constitutional Court holds that in the present case there is nothing that could bring the constitutionality of the challenged Law into question in respect of Article III(3)(b) of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

29. The Constitutional Court concludes that the Law Amending the Law on Service in the Armed Forces of Bosnia and Herzegovina (*Official Gazette of BiH*, no. 74/10), whereby only certain provisions of the Law on Service in Armed Forces of Bosnia and Herzegovina (*Official Gazette of BiH*, nos. 88/05, 53/07 and 59/09) are amended with regard to the exceptions applicable to the area of pension and disability insurance, which is governed by the Law on Service in Armed Forces of Bosnia and Herzegovina, is not in contravention of Articles III(1), III(3)(a) and IV(4) of the Constitution of Bosnia and Herzegovina. Also, the Constitutional Court concludes that the allegations of violations of the right guaranteed under Article II(4) of the Constitution of Bosnia and Herzegovina are ill-founded as, in the present case, the applicant has failed to make that discrimination

seems probable and, in this regard, there is nothing that could bring the constitutionality of the challenged Law into question in respect of Article III(3)(b) of the Constitution of Bosnia and Herzegovina.

30. Pursuant to Article 61(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present decision.

31. In view of the Decision of the Constitutional Court in the present case, it is not necessary to examine separately the applicant's request for interim measures.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 9/11

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Bakir Izetbegović, member of the Presidency of Bosnia and Herzegovina, lodged with the Constitutional Court of Bosnia and Herzegovina a request for review of constitutionality of Articles 17 and 39 of the Law on Citizenship of Bosnia and Herzegovina

Decision of 23 September 2011

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in the Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knežević

Having deliberated on the request of **Mr. Bakir Izetbegović, member of the Presidency of Bosnia and Herzegovina** in case no. **U 9/11**, at its session held on 23 September 2011 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of Mr. Bakir Izetbegovic, member of the Presidency of Bosnia and Herzegovina is hereby granted.

It is hereby established that Article 17 and Article 39(1) of the Law on Citizenship of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 4/97, 13/99, 41/02, 6/03, 14/03, 82/05, 43/09 and 76/09) are not consistent with Article I(7)(b) and (d) of the Constitution of Bosnia and Herzegovina.

Pursuant to Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Parliamentary Assembly of Bosnia and Herzegovina is ordered to harmonize Article 17 and Article 39(1) of the

Law on Citizenship of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 4/97, 13/99, 41/02, 6/03, 14/03, 82/05, 43/09 and 76/09) with Article I(7)(b) and (d) of the Constitution of Bosnia and Herzegovina, within six months from submission of this decision.

Pursuant to Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Parliamentary Assembly of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within the time limit as ordered in the previous paragraph, on the measures taken to enforce this Decision.

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

Reasoning

I. Introduction

1. On 25 May 2011, Mr. Bakir Izetbegović, member of the Presidency of Bosnia and Herzegovina („the applicant„), lodged with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") a request for review of constitutionality of Articles 17 and 39 of the Law on Citizenship of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 4/97, 13/99, 41/02, 6/03, 14/03, 82/05, 43/09 and 76/09; hereinafter: „the Law on Citizenship„).

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 3 June 2011 the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina („the House of Representatives") and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the House of Peoples") were requested to submit their respective replies to the request.

3. On 22 July 2011, the House of Representatives communicated their opinion on the request for review of constitutionality of Articles 17 and 39 of the Law on Citizenship, while the House of Peoples communicated their opinion on 29 July 2011.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the respective opinions of the House of Representatives and the House of Peoples were communicated to the applicant on 23 July 2011.

III. Request

a) Allegations of the Request

5. The applicant holds that the provisions of Articles 17 and 39 of the Law on Citizenship are not consistent with Article I(7) of the Constitution of Bosnia and Herzegovina, Article II(4) in conjunction with Article II(3)(f) of the Constitution of Bosnia and Herzegovina, Article 14 in conjunction with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and Article 1 of Protocol No. 12 to the European Convention.

6. The applicant alleges that as to the guarantees under Article I(7) of the Constitution of Bosnia and Herzegovina, the intention of the framer of the BiH Constitution is clear, that is to ensure protection of acquired citizenship of Bosnia and Herzegovina, as determined in Article I(7)(b), which explicitly states that no person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless. He also points out that it is further guaranteed by the same article that no person shall be deprived of Bosnia and Herzegovina or Entity citizenship on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The aforementioned constitutional provision, the applicant highlights, prohibits deprivation of BiH citizenship as well as discrimination on any ground, and it includes the notion „other status", which, in the present case, must and can only be seen in the light of the fact relating to the existence of another citizenship and of a different legal status of BiH citizens living in the neighboring countries when compared to those BiH citizens who live in countries that are not neighboring countries to Bosnia and Herzegovina. The notion „other status", it is further stated by the applicant, can also be seen in relation to BiH citizens living in Bosnia and Herzegovina, but who acquired citizenship of another country which is not a neighboring country of Bosnia and Herzegovina.

7. The applicant stresses that Article I(7)(d) of the Constitution of Bosnia and Herzegovina determines that „Citizens of Bosnia and Herzegovina may hold the citizenship of another state, provided that there is a bilateral agreement, approved by the Parliamentary Assembly in accordance with Article IV(4)(d), between Bosnia and Herzegovina and that state governing this matter". In other words, it is further stated, this

provision does not stipulate a possibility of deprivation of BiH citizenship in the event of acquisition of another citizenship, but to the contrary. The applicant emphasizes that given the inviolability of BiH citizenship, as determined in Article I(7)(b), it is possible to restrict the possibility of acquiring another citizenship, except for the original citizenship of Bosnia and Herzegovina, but the provision of Article I(7)(d) must not be construed as the possibility of deprivation of BiH citizenship in the event of acquisition of another citizenship, as this provision has to be viewed in the context of the provision of Article I(7)(b) and it should not be viewed separately, neglecting the imperative norm of Article I(7)(b) of the Constitution of Bosnia and Herzegovina. The possibility of deprivation of BiH citizenship, in accordance with the text of the provision of Article I(7), could possibly be applicable to deprivation of subsequently acquired BiH citizenship in cases where there is no bilateral agreement, *i.e.* as in cases of acquisition of civil rights in which there is an original or derivative manner of acquiring these rights. By applying these principles to the present case, the applicant alleges, it can be concluded that it is possible to withdraw citizenship only if it was acquired in a „derivative" manner and if no bilateral agreement exists, but it is in no way possible, by applying Article I(7)(b) which explicitly prohibits it, to withdraw original citizenship or BiH citizenship which has been acquired first.

8. In the opinion of the applicant, in view of the aforementioned, the challenged provisions of the Law on Citizenship are inconsistent with Article I(7) of the Constitution of Bosnia and Herzegovina as they provide the possibility of deprivation of BiH citizenship in an arbitrary manner, contrary to the constitutional guarantees. The aforementioned constitutional guarantees can only been construed so as to say that the Constitution of Bosnia and Herzegovina contains a clear position as to the protection of BiH citizens and that it is possible to restrict other rights such as the right to acquire another citizenship on condition that a bilateral agreement exists. Any other interpretation of the mentioned article would give rise to a violation of the constitutional rights of BiH citizens. In view of the above, the applicant holds that the challenged articles of the Law on Citizenship, contrary to the Constitution of Bosnia and Herzegovina, stipulate the possibility of deprivation of BiH citizenship in an unconstitutional manner and, thereby, violate in an unconstitutional manner Article I(7)(b) of the Constitution of Bosnia and Herzegovina.

9. The applicant further alleges that the challenged articles of the Law on Citizenship define at least two types of activities of the State relating to individuals in respect of their citizenship. The first situation concerns the persons who can keep dual citizenship in cases where there is a bilateral agreement between Bosnia and Herzegovina and other countries (mainly the neighboring countries of BiH). The other situation relates to the persons who, pursuant to Articles 17 and 39, could not keep the BiH citizenship, *i.e.* they would lose their citizenship of Bosnia and Herzegovina under the force of law, in spite of their will

to keep their original citizenship, *i.e.* the citizenship of Bosnia and Herzegovina. In the applicant's opinion, by such legal arrangements it was probably assumed that persons who acquired other citizenships were no longer interested in keeping their original citizenship. However, taking into account that the relevant group of persons opposes it, this is a completely erroneous and arbitrary assumption.

10. On the other hand, in spite of a clearly expressed interest of their citizens, the applicant alleges, the BiH authorities have failed to take activities with a view to entering into bilateral agreements with the countries where a large number of BiH citizens acquired another citizenship, and in order to make it possible for those BiH citizens to keep their citizenship of Bosnia and Herzegovina. In addition, it is further stressed, one has to bear in mind that those citizens left Bosnia and Herzegovina due to the 1990s war activities and that they, by obtaining another citizenship, tried to gain some status and to provide sustenance for themselves and their families in the countries where they settled. Some of those citizens have returned to Bosnia and Herzegovina but they gained citizenship of another country, wherein they acquired certain rights in accordance with their acquired citizenship status. For these reasons, in the applicant's opinion, the intention and motive of the legislator to take away the BiH citizenship from citizens who, in the meantime, obtained another citizenship remains completely unclear.

11. In the present situation, concludes the applicant, it is obvious that by adopting the contested articles of the Law on Citizenship, the citizens/nationals of Bosnia and Herzegovina who live in the countries with which BiH has no bilateral agreements concluded or the citizens/nationals of Bosnia and Herzegovina who live in Bosnia and Herzegovina but acquired citizenship of a country that is not a neighboring country to BiH, have been brought into an unfavorable position when compared to the citizens/nationals of Bosnia and Herzegovina who acquired citizenship of any country with which Bosnia and Herzegovina has entered into such agreements. Such conduct clearly indicates, in the opinion of the applicant that this group of citizens is in an analogous situation and has been subject to differential treatment, given the inactivity of the competent state authorities who have not entered into bilateral agreements with other countries in which BiH citizens live and to whom the challenged provisions refer.

12. The applicant alleges that according to the data of the BiH Ministry of Human Rights and Refugees, more than 1,350,000 persons from Bosnia and Herzegovina live abroad, which, compared to the number of people living in Bosnia and Herzegovina, represents one-third of its entire population. At the same time, it is stressed, according to a World Bank estimate, in 2005 there were 1,471,594 emigrants from Bosnia and Herzegovina, *i.e.* 37.7% of the total population of Bosnia and Herzegovina. If the Kingdom of Sweden,

Serbia, Montenegro and the Republic of Croatia (although a bilateral agreement has not been entered into with the Republic of Croatia) are taken out of the aforementioned list, this figure would fall by circa 250,000 citizens of Bosnia and Herzegovina. However, concludes the applicant, it is certain that at least 1,000.000 BiH citizens would be affected by the application of the challenged provisions.

13. The applicant holds that the Council of Ministers has not been effective in taking actions to conclude bilateral agreements, given the fact that Bosnia and Herzegovina has entered into one bilateral agreement with countries that are not neighboring countries to BiH (the Kingdom of Sweden), with a view to creating the conditions that would ensure the protection of BiH citizens in accordance with the Constitution of BiH. Furthermore, it must be noted that the Council of Ministers, contrary to its legal obligation, has not yet entered into a bilateral agreement even with the Republic of Croatia, as a neighboring country; this demonstrates that the state authorities have been inactive in protecting one-third of its citizens and in complying with the laws enacted by the competent legislative body. Finally, in the opinion of the applicant, a question arises as to the reasons for which the competent bodies in BiH have failed to start activities with a view to entering into bilateral agreements with the aforementioned countries in accordance with the citizens' interest, while, by the Law on Citizenship, more precisely, by Article 39(2) thereof, they establish an obligation according to which bilateral agreements should be only entered into with neighboring countries within 6 months. In this manner, the applicant opines, the Law on Citizenship has deferential treatment of the BiH citizens living in the neighboring countries when compared to those who live in other countries or those who live in Bosnia and Herzegovina but hold citizenship of a country that is not a neighboring country to BiH. Such conduct of the authorities, including the application of the challenged provisions of the law, concludes the applicant, will result in circa 1,000,000 BiH citizens losing their BiH citizenship on 1 January 2013.

14. The applicant points out those arguments for enacting such Law on Citizenship, including the challenged provisions, boil down to the particularities of Bosnia and Herzegovina and its ethnic composition. Taking into account the ethnic composition of the BiH citizens, those, who are of the same ethnic origin as the majority population in neighboring countries, are given the possibility of keeping dual citizenship, while other citizens are *de facto* deprived of that right due to the inactivity of the Council of Ministers. The applicant considers that such measures, which are undoubtedly based on ethnic origin, cannot be viewed within scope of the notion of objective and reasonable justification.

15. Finally, the applicant further alleges, it would be fully reasonable and acceptable that a country, in which a BiH citizen has acquired another citizenship, stipulates conditions

for acquiring its citizenship, either by renouncing or by being released from their original citizenship. As a result, BiH citizens could decide which citizenship to keep (as, for example, is the case in Germany). However, in the appellant's opinion, it is completely unacceptable and discriminatory that the State of Bosnia and Herzegovina does not allow BiH citizens, who wish to keep their original citizenship, to keep their BiH citizenship if another country, where they acquired another citizenship, does not require BiH citizens to renounce their original citizenship. By such conduct, Bosnia and Herzegovina discriminates its citizens who do not hold citizenship of neighboring countries but who have acquired citizenship of another country, which is not a neighboring country of Bosnia and Herzegovina, which is contrary to Article 1 of Protocol No. 12 to the European Convention, Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 14 in conjunction with Article 8 of the European Convention. The applicant holds that in view of the fact that the majority of BiH citizens who have acquired another citizenship of a country that is not a neighboring country of Bosnia and Herzegovina, if they decided to return to Bosnia and Herzegovina and to keep their BiH citizenship, could not enjoy the rights stemming from the right to a family life and they would practically be in a situation to lose their status and rights stemming from citizenship of the country in which they presently live together with their families. In this way, an excessive burden has been placed upon them for which there is no reasonable and objective justification.

b) Response to the Request

16. The House of Representatives stated in their communicated opinion that after a discussion about the request in question, the Constitutional Law Commission of the House of Representatives maintained the positions of the Law on Citizenship with two votes in favor, three votes against and two abstentions. It is also stated that the members of the aforementioned commission Mr. Šefik Džaferović and Mr. Saša Magazinović voted in favor of the request for review of constitutionality of Articles 17 and 39 of the Law on Citizenship and separated their dissenting opinion.

17. The House of Peoples stated in their opinion that the Constitutional Law Commission of the House of Peoples, after a discussion about the request in question, had not reached any decisions because two members voted in favor of maintaining the positions of the Law on Citizenship, one member voted against and two members abstained, while in respect of the decision supporting the request for review of constitutionality of Articles 17 and 39 of the Law on Citizenship, one member voted in favor, two members against and two abstained. It was further highlighted that the said commission unanimously issued a conclusion to order the Council of Ministers of BiH to take steps to resolve the issues

contained in the concerned request for review of constitutionality of Articles 17 and 39 of the Law on Citizenship.

IV. Relevant Law

18. The **Constitution of Bosnia and Herzegovina,** in its relevant part, reads:

Preamble

...Inspired by the Universal Declaration of Human Rights…

Article I(7)
Citizenship

There shall be a citizenship of Bosnia and Herzegovina, to be regulated by the Parliamentary Assembly, and a citizenship of each Entity, to be regulated by each Entity, provided that:

b. No person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless. No person shall be deprived of Bosnia and Herzegovina or Entity citizenship on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

d. Citizens of Bosnia and Herzegovina may hold the citizenship of another state, provided that there is a bilateral agreement, approved by the Parliamentary Assembly in accordance with Article IV(4)(d), between Bosnia and Herzegovina and that state governing this matter. Persons with dual citizenship may vote in Bosnia and Herzegovina and the Entities only if Bosnia and Herzegovina is their country of residence.

Article II(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 VI(3)
Jurisdiction

The Constitutional Court shall uphold this Constitution.

19. The **Universal Declaration of Human Rights** (*Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 19*48) in its relevant part reads:

Article 15

Everyone has the right to a nationality.

No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

20. The **European Convention on Nationality** (Decision on ratification of the European Convention on Nationality, Strasbourg 6 November 1997, the *Official Gazette of Bosnia and Herzegovina – International Contracts* no. 2/08) in its relevant part reads:

Article 1 – Object of the Convention

This Convention establishes principles and rules relating to the nationality of natural persons and rules regulating military obligations in cases of multiple nationality, to which the internal law of States Parties shall conform.

Article 7 – Loss of nationality ex lege or at the initiative of a State Party

1. A State Party may not provide in its internal law for the loss of its nationality ex lege or at the initiative of the State Party except in the following cases:

a. voluntary acquisition of another nationality; [...]

Article 15 – Other possible cases of multiple nationality

The provisions of this Convention shall not limit the right of a State Party to determine in its internal law whether:

a. its nationals who acquire or possess the nationality of another State retain its nationality or lose it;

b. the acquisition or retention of its nationality is subject to the renunciation or loss of another nationality.

Article 16 – Conservation of previous nationality

A State Party shall not make the renunciation or loss of another nationality a condition for the acquisition or retention of its nationality where such renunciation or loss is not possible or cannot reasonably be required.

21. The **Law on Citizenship of Bosnia and Herzegovina** (*Official Gazette of BiH* nos. 4/97, 13/99, 41/02, 6/03, 14/03, 82/05, 43/09 and 76/09) in its relevant part, reads:

Article 1

This Law determines the conditions for the acquisition and loss of citizenship of Bosnia and Herzegovina [...] in accordance with the Constitution of Bosnia and Herzegovina. [...]

Article 5

Citizenship of BiH is acquired in accordance with the provisions of this law:

1. *by descent*
2. *by birth on the BH territory*
3. *by adoption*
4. *by naturalization*
5. *by international agreement.*

Article 9

A foreigner who has submitted a request for acquisition of the citizenship of BiH may acquire it by naturalization if he or she fulfils the following conditions:

6. he or she renounces or otherwise loses his or her former citizenship upon the acquisition of the citizenship of BiH, unless a bilateral agreement as referred to in Article 14 provides otherwise. The renunciation or loss of the former citizenship is not required if this is not permitted or cannot be reasonably required.

Article 16

Citizenship of BiH is lost:

a. *by operation of law*
b. *by renunciation*
c. *by release*
d. *by withdrawal*
e. *by international agreement.*

Loss by operation of Law

Article 17

Citizenship of BiH is lost by the voluntary acquisition of another citizenship, unless a bilateral agreement between BiH and that State, approved by the Parliamentary Assembly in accordance with Article IV (4)(d) of the Constitution provides otherwise.

Article 39

1. All persons who before the entry into force of this law voluntarily acquired another citizenship lose the citizenship of BiH, if they do not, within 15 years from the date this Law enters into force, renounce the other citizenship, unless a bilateral agreement provides otherwise. The renunciation of the other citizenship is not required if this is not permitted or cannot be reasonably required.

2. The Council of Ministers of Bosnia and Herzegovina shall propose to the Presidency to conclude bilateral agreements referred to in paragraph 1 with neighboring countries within 6 months after this law enters into force.

V. Admissibility

22. In examination of the admissibility of the request, the Constitutional Court started from the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

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

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

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

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

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

23. In respect of the challenged provisions of the Law on Citizenship, the Constitutional Court highlights that, although the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina does not stipulate the explicit jurisdiction of the Constitutional Court to review the constitutionality of laws or legal provisions of Bosnia and Herzegovina, the substantial notion of the jurisdiction as specified by the Constitution of Bosnia and Herzegovina contains in itself the title for the Constitutional Court to have such jurisdiction,

particularly in the role of the Constitutional Court as the body upholding the Constitution of Bosnia and Herzegovina. The aforementioned position of the Constitutional Court in such cases in its previous case-law clearly indicates that the Constitutional Court has jurisdiction to review the constitutionality of the laws or individual provisions of the laws of Bosnia and Herzegovina (see the decision of the Constitutional Court no. *U 14/02* of 30 January 2004, the *Official Gazette of BiH* no. 18/04).

24. Furthermore, the concerned request for review of constitutionality of the challenged provisions of the Law on Citizenship was filed by a member of the Presidency of Bosnia and Herzegovina. It follows from the aforementioned that the request has been lodged by an authorized applicant under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

25. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17 of the Rules of the Constitutional Court, the Constitutional Court has established that the request for review of constitutionality of the provisions of the Law on Citizenship is admissible, having been filed by an authorized person and that there are no other formal reasons which would make it inadmissible under Article 17(1) of the Rules of the Constitutional Court.

VI. Merits

26. The applicant alleges that Articles 17 and 39 of the Law on Citizenship are not consistent with Article I(7) of the Constitution of Bosnia and Herzegovina, Article II(4) in conjunction with Article II(3)(f) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention in conjunction with Article 8 of the European Convention and Article 1 of Protocol No. 12 to the European Convention. In the applicant's opinion, the challenged articles of the Law on Citizenship are not consistent with the aforementioned provisions of the Constitution of Bosnia and Herzegovina because they stipulate the loss of citizenship of Bosnia and Herzegovina in cases where there is no bilateral agreement on dual citizenship with the country whose citizenship has been acquired. In addition, the applicant considers that the challenged provisions of the Law on Citizenship violate the right to general prohibition of discrimination under the aforementioned Protocol No. 12 to the European Convention as well as the right not to be discriminated against in relation to the right to family life of the citizens of Bosnia and Herzegovina who have acquired citizenship of another country with which BiH has no bilateral agreement on dual citizenship in comparison with those citizens who have acquired citizenship of another country with which there is such agreement.

27. Within the context of review of constitutionality of the challenged provisions of Articles 17 and 39 of the Law on Citizenship, the Constitutional Court holds that it is necessary to indicate some principles of the international law on citizenship. In that regard, the Constitutional Court notes that one of the most significant sources concerning the international principles of citizenship is the Universal Declaration of Human Rights from 1948, referred to also in the Preamble of the Constitution of Bosnia and Herzegovina. The aforementioned declaration proclaims that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

28. Pursuant to the international principles, it is understood that the issues of citizenship fall under the internal (exclusive) jurisdiction of a state. Citizenship is a legal relationship under public law between a natural person and a sovereign state pursuant to which that person has the status of citizen, *i.e.* it is a legal connection that binds a person to a state. Every state has the right to determine by way of its constitution and laws who is entitled to its citizenship. A state is free to grant its citizenship to whom it chooses, without being limited by the international law. Thus, every state in determining whether a person is its citizen does so pursuant to its regulations on citizenship and, *vice versa*, it may not determine the connection between a natural person and a foreign state pursuant to its legal rules on citizenship. Although the international law does not accept the doctrine of the so-called „unbreakable allegiance" preventing a state to release a person from its citizenship contrary to that person's will, states are permitted as a rule in exceptional cases to take away their citizenship from their citizens against their will.

29. Regarding the issue of acquisition and loss of citizenship, there is no uniform case law in that respect in internal law of states. There are, however, some fundamental principles: 1) that every state has a discretionary right to determine who is entitled to its citizenship; 2) that a state may stipulate through its laws the various conditions for granting its citizenship; and 3) that a state may not take away its citizenship from a person against his or her will. Some states with numerous emigrants or having their ethnic members in the neighboring countries allow acquisition of their citizenship on purpose by way of their laws without placing any obligation upon them to be released from their previous citizenship. Furthermore, in regulating relations of successor states arising from the dissolution of a predecessor state dual citizenship is allowed to some persons in some cases as a political solution of other problems.

30. The Constitutional Court notes that the European Convention on Nationality (Decision on ratification of the aforementioned Convention entered into force on 10 March

2008) has established the principles and rules relating to the citizenship of natural persons and rules regulating military service in cases of multiple citizenship and the internal law of the member states has to be harmonized with them. The said convention affirmed the international rule that it is exclusive right of a state to determine who their citizens are. Article 7(1)(a) of the aforementioned convention regulates that a State Party may not provide in its internal law for the loss of its nationality *ex lege* except in case of voluntary acquisition of another nationality. On the other hand, Article 16 of the said convention stipulates that a State Party shall not make the renunciation or loss of another nationality a condition for the acquisition or retention of its nationality where such renunciation or loss is not possible or cannot reasonably be required.

31. The Constitutional Court will examine the consistency of the challenged provisions of the Law on Citizenship primarily in relation to the relevant provisions of the Constitution of Bosnia and Herzegovina, having in mind its constitutional responsibilities, in particular the first sentence of Article VI(3) of the Constitution of Bosnia and Herzegovina which reads: „The Constitutional Court shall uphold this Constitution."

32. The first sentence of Article I(7)(b) of the Constitution of Bosnia and Herzegovina stipulates that no person shall be arbitrarily deprived of Bosnia and Herzegovina citizenship. The second sentence of Article I(7)(b) of the Constitution of Bosnia and Herzegovina prescribes grounds which prohibit arbitrary deprivation of the citizenship of Bosnia and Herzegovina (sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth). However, the Constitutional Court notes that the list of the aforementioned grounds is not thereby exhausted because the above sentence in the Constitution of Bosnia and Herzegovina ends with the phrase: „or other status". The first sentence of Article I(7)(d) of the Constitution of Bosnia and Herzegovina stipulates that citizens of Bosnia and Herzegovina may hold the citizenship of another state, provided that there is a bilateral agreement between Bosnia and Herzegovina and that state governing this matter. The second sentence of Article I(7)(d) of the Constitution of Bosnia and Herzegovina prescribes that persons with dual citizenship may vote in Bosnia and Herzegovina only if Bosnia and Herzegovina is their country of residence.

33. The Constitutional Court recalls the fact that there are a large number of BiH citizens who have acquired the citizenship of another country, regardless of the fact whether a bilateral agreement on dual citizenship has been concluded. It is beyond dispute that the BiH citizens managed to acquire the citizenship of another country because it was possible to do that under the legislation of that other country, which is in accordance with

the international principles on citizenship that a state may not determine the connection between a natural person and a foreign state pursuant to its legal rules on citizenship.

34. The Constitutional Court highlights that the challenged legal provisions (once their application commences on 1 January 2013) will impose upon the BiH citizens who have the citizenship of another state the condition to renounce this other citizenship if they wish to keep the BiH citizenship. The aforementioned condition will not be imposed only if a bilateral agreement has been concluded on dual citizenship between Bosnia and Herzegovina and that other country.

35. Being guided by the constitutional principle under which it „shall uphold this Constitution", the Constitutional Court holds it to be beyond dispute that it is the interest of Bosnia and Herzegovina to keep the bond with its citizens to whom it is the state of the so-called „parent or original" citizenship. In the opinion of the Constitutional Court, the challenged legal provisions are in collision with the aforementioned interest of Bosnia and Herzegovina. The Constitutional Court notes that the Constitution of Bosnia and Herzegovina does not provide for the citizens of Bosnia and Herzegovina who acquired the citizenship of another country to have to renounce the citizenship of that other country if they wish to keep (also) the citizenship of Bosnia and Herzegovina. It is true that the Constitution of Bosnia and Herzegovina stipulates that the citizens of Bosnia and Herzegovina may hold the citizenship of another state provided that there is a bilateral agreement between Bosnia and Herzegovina and that state. However, the Constitution of Bosnia and Herzegovina, more precisely Article I(7)(d), does not contain a provision stipulating that the citizens of Bosnia and Herzegovina who hold the citizenship of another country shall have to renounce the citizenship of that other country unless a bilateral agreement has been concluded between Bosnia and Herzegovina and that state if they wish to keep (also) the citizenship of Bosnia and Herzegovina. That is exactly what the challenged legal provisions prescribe, thereby imposing upon the citizens of Bosnia and Herzegovina who hold the citizenship of another country a condition over which they have no influence (for example: if the legislation of some state does not allow the conclusion of bilateral agreement on dual citizenship or there exists no intention and activity by the bodies of Bosnia and Herzegovina competent for conclusion of a bilateral agreement). As indicated in the preceding part of the reasoning, the citizens of Bosnia and Herzegovina have acquired the citizenship of another country based upon the regulations of that state and „regardless of the fact whether a bilateral agreement on dual citizenship has been concluded" (the most prominent example being the Republic of Croatia).

36. The Constitutional Court highlights that the Constitution of Bosnia and Herzegovina has been enacted in specific historical circumstances. The enactment of the Constitution

of Bosnia and Herzegovina (which is one of the annexes to the international General Framework Agreement for Peace in Bosnia and Herzegovina) coincides with end of the war activities in Bosnia and Herzegovina. The war in Bosnia and Herzegovina was the underlying cause for a great number of BiH citizens to leave and become refugees in other countries (according to the data supplied by the Ministry of Human Rights and Refugees of Bosnia and Herzegovina the number of refugees currently living abroad is equal to one third of its prewar population). It is, therefore, beyond dispute that Bosnia and Herzegovina is a state with a large portion of prewar population living in other countries where they had arrived (mostly) as war refugees. The fact is that the refugees from Bosnia and Herzegovina applied for citizenship of the country to which they fled primarily in order to resolve the issues of personal and existential nature. It is beyond dispute that the application of the challenged legal provisions would exceptionally aggravate the return of this category of refugees to Bosnia and Herzegovina because the revoking of their BiH citizenship would make them foreign nationals in their parent state. The Constitutional Court as the institution „that shall uphold this Constitution„is absolutely certain that it was not the will of the framer of the Constitution to render it more difficult for the refugees to return to their country. Therefore, the Constitutional Court finds that Article I(7) of the Constitution of Bosnia and Herzegovina must be interpreted together with Article II(5) of the Constitution of Bosnia and Herzegovina that provides that all refugees and displaced person shall have the right to freely return to their homes pursuant to guarantees of the right under Annex 7 of the General Framework Agreement for Peace in BiH, that *inter alia*, for the purpose of safe and voluntary return of refugees or displaced persons, obligates all parties to this Agreement to repeal of domestic legislation and administrative practices with discriminatory intent or effect (Article 1. 3.a of Annex 7).

37. The Constitutional Court holds that it is not the will of the framers of the Constitution in regard to the citizens of Bosnia and Herzegovina who hold the citizenship of another state and live in Bosnia and Herzegovina or throughout the world to condition the holding of the citizenship of Bosnia and Herzegovina by renouncing their citizenship of another state or by the existence of a bilateral agreement between Bosnia and Herzegovina and that state. As already noted, it is the undisputable interest of Bosnia and Herzegovina to keep a certain bond with its citizens to whom it is the state of the so-called „parent or original" citizenship. Accordingly, the Constitutional Court does not see any reason to impose by the challenged legal provisions any conditions for keeping the BiH citizenship upon the citizens of Bosnia and Herzegovina who hold the citizenship of another state (by way of renouncing their citizenship of another state or by the existence of a bilateral agreement) because such conditions are neither an expression of the will of the framers of

the Constitution nor are they prescribed by the relevant provisions of the Constitution of Bosnia and Herzegovina. The Constitutional Court notes that the Constitution of Bosnia and Herzegovina does not contest the right of the relevant authorities of Bosnia and Herzegovina (as referred to in Article I(7) of the Constitution of Bosnia and Herzegovina) to regulate (prescribe) conditions relating to the citizenship including deprivation or loss of BiH citizenship. However, the Constitutional Court holds in the present case that the conditions as prescribed by the challenged legal provisions for keeping the citizenship of Bosnia and Herzegovina (renunciation of the citizenship of another country or the existence of a bilateral agreement) are not consistent with the relevant provisions of the Constitution of Bosnia and Herzegovina for the reasons as stated in the reasoning part of this decision.

38. In view of the aforementioned, the Constitutional Court concludes that Article 17 and Article 39(1) of the Law on Citizenship are not consistent with the provisions of Article I(7)(b) and (d) of the Constitution of Bosnia and Herzegovina.

39. In view of the fact that the challenged law itself has postponed the application of the aforementioned unconstitutional provisions, the Constitutional Court has decided not to revoke them but to leave an appropriate period, in terms of Article 63(4) of the Rules of the Constitutional Court, within which the legislator shall be obligated to remove the established unconstitutionality.

Remaining Assertions from the Requests

40. In the light of the conclusion of the Constitutional Court concerning the inconsistency of the provisions of Articles 17 and 39(1) of the Law on Citizenship of Bosnia and Herzegovina with the provisions of Article I(7)(b) and (d) of the Constitution of Bosnia and Herzegovina, the Constitutional Court deems it unnecessary to examine the applicant's allegations about the challenged provisions of the Law on Citizenship being not consistent with Article II(4) in conjunction with Article II(3)(f) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention in conjunction with Article 8 of the European Convention and Article 1 of Protocol No. 12 to the European Convention.

VII. Conclusion

41. The provisions of Article 17 and Article 39(1) of the Law on Citizenship are not consistent with Article I(7)(b) and (d) of the Constitution of Bosnia and Herzegovina because those constitutional provisions have not established that the citizens of Bosnia and Herzegovina will be deprived of their citizenship if they hold the citizenship of another

state and have not renounced it until the date set by the challenged law, *i.e.* if Bosnia and Herzegovina has not concluded a bilateral agreement on dual citizenship with that state.

42. In view of the provision of Article 61(1) and (2) and Article 63(4) of the Rules of the Constitutional Court, the Constitutional Court has decided as in the enacting clause of this Decision.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 1/11

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Sulejman Tihić, the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request, for review of the constitutionality of the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban

Decision of 13 July 2012

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2), and, Article 63(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić

Mr. Constance Grewe

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knežević

Having deliberated on the request of Mr. **Sulejman Tihić, the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request**, in case no. **U 1/11**, at its session held on 13 July 2012, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Mr. Sulejman Tihić, the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request, is hereby granted.

It is hereby established that the Republika Srpska lacks a constitutional competence to regulate the legal subject-matter of the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban (*the Official Gazette of the Republika Srpska*, no. 135/10), as this, pursuant to Article I(1), Article III(1)(b) and Article IV(4) (e) of the Constitution of BiH, falls within the responsibility of Bosnia and Herzegovina.

Pursuant to Article 63(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court of BiH shall render ineffective the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban (*the Official Gazette of the Republika Srpska*, no. 135/10).

Pursuant to Article 63(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban (*the Official Gazette of the Republika Srpska*, no. 135/10) shall cease to be effective the day following the date on which the present Decision of the Constitutional Court of BiH has been published in the *Official Gazette of Bosnia and Herzegovina*.

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

Reasoning

I. Introduction

1. On 6 January 2011, Mr. Sulejman Tihić, the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request, („the applicant"), lodged the request for review of the constitutionality of the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban (*the Official Gazette of the Republika Srpska*, no. 135/10; „the challenged Law"), for:

a) the lack of constitutional basis for the National Assembly of the Republika Srpska („the National Assembly") to enact the challenged Law;

b) the incompatibility of the challenged Law with lines 2 and 6 of the Preamble of the Constitution of Bosnia and Herzegovina („the Constitution of BiH"), Articles I(1) and III(3)(b) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention").

2. The applicant also requested that the Constitutional Court order an interim measure whereby it would suspend the application of the challenged Law pending a final decision on the request. In his request, the applicant stated the following: *The issuance of the interim measure is necessary in order to prevent the detrimental consequences which Bosnia and Herzegovina might suffer as a result of the application of this law, such as: this law would allow the Republika Srpska to register, i.e. to make an entry into the land registry books, the state property located in the territory of that Entity and under the disposal ban. This would enable the authorities of the Republika Srpska to dispose of that property, which would cause irreparable damages. The application of this Law would be in direct violation of a ban on the disposal of state property imposed by the High Representative and thereby in direct violation of the High Representative's powers under Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina, which would amount to a flagrant violation of the Dayton Peace Agreement. This would aggravate the process of resolving the issue of state property, which is of great importance for further negotiations with the European Commission in the process of Bosnia and Herzegovina's application to receive EU candidate status. The State would be deprived of its property on the territory of the Republika Srpska, which would endanger its sovereignty and territorial integrity as well as the execution of its obligations under international law*.

II. Procedure before the Constitutional Court

3. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 17 January 2011 the National Assembly was requested to submit its reply to the request.

4. Pursuant to Article 15(3) of the Rules of the Constitutional Court, the Office of the High Representative for Bosnia and Herzegovina („the Office of the High Representative„), the European Commission for Democracy through Law („the Venice Commission"), the Faculty of Law in Sarajevo, the Faculty of Law in Banja Luka, the Faculty of Law in Mostar, the Federal Administration for Geodetic and Property-Legal Affairs in Sarajevo, and the Republic Administration for Geodetic and Property-Legal Affairs in Banja Luka („the Republic Administration"), between 14 March and 22 July 2011, were invited to submit their expert opinion in writing in respect of the request in question.

5. On 14 February 2011, the National Assembly submitted its reply to the request.

6. On 26 April 2011, the Office of the High Representative submitted its written observations on the request in question.

7. On 18 October 2011, the Venice Commission submitted its written expert opinion in respect of the relevant request.

8. On 30 September 2011, the Republic Administration submitted its written expert opinion.

9. The Faculty of Law in Sarajevo, the Faculty of Law in Banja Luka, the Faculty of Law in Mostar, the Federal Administration for Geodetic and Property-Legal Affairs in Sarajevo failed to submit their respective opinions.

10. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were forwarded to the applicant on 26 September 2011.

11. At its plenary session of 27 May 2011, the Constitutional Court decided to hold a public hearing in the present case. The public hearing took place on 18 November 2011.

12. Prof Dr Edin Šarčević and Mr. Mustafa Begić submitted their written expert opinions on 16 and 29 November 2011, respectively.

13. On 24 November 2011, the Constitutional Court forwarded the written opinion of the Office of the High Representative, the written opinion of the Venice Commission, the written opinion of the Republic Administration, the written opinion of Prof Dr. Edin Šarčević and the written opinion of Mr. Mustafa Begić to the applicant and the National Assembly.

14. On 5 December 2011, the Constitutional Court forwarded the aforementioned opinions to the Office of the High Representative, for possibly making a supplement to its opinion.

15. Pursuant to Article 93(3) of the Rules of the Constitutional Court, the Constitutional Court dismissed a request for exemption of Ms. Seada Palavrić, the Vice-President of the Constitutional Court, and Mr. Mirsad Ćeman, the Judge of the Constitutional Court, as they did not participate in the enactment of the challenged Law, which is the subject-matter of the present dispute.

III. Request

a) Statements from the request

16. In the reasoning of the first part of the request, where it is stated that the National Assembly has no constitutional basis to enact the challenged Law, the applicant underlines that the National Assembly enacted the challenged Law at its session held on 14 September 2010 and that it referred to Amendment XXXII paragraph 1 item 6 to the Constitution of the Republika Srpska, as the constitutional basis for enacting the challenged Law,

which reads: *The Republic shall regulate and ensure property and obligation relations and protection of all forms of property...* However, Amendment XXXII amending Article 68 of the Constitution of the Republika Srpska in its paragraph 1 item 6, as a whole, reads: *The Republic shall regulate and ensure property and obligation relations and protection of all forms of property, legal status of enterprises and other organizations, their associations and chambers, economic relations with foreign countries, which have not been transferred to institutions of Bosnia and Herzegovina, market and planning.* In this regard, the applicant holds that the aforementioned Article of the Constitution of the Republika Srpska does not constitute a constitutional basis for enacting the challenged Law by the National Assembly. Pursuant to Article I(1) of the Constitution of BiH, the first sentence, Bosnia and Herzegovina („BiH"), from the standpoint of international law, is not a new creation, *i.e.* it, as a state, continues the international legal personality of the Republic of Bosnia and Herzegovina within the outer borders which were recognized at the moment of the adoption of the Constitution in accordance with international law. This means that it is not about a legal successor, but BiH is the same State which came into existence following the dissolution of Yugoslavia and which was recognized in 1992 as an independent state. To corroborate the aforementioned, the applicant emphasizes that the interim provisions of Articles 2 through 5 of Annex II to the Constitution of BiH foresee the continuity of the „former" law, the continuation or transfer of the judicial and administrative procedures, the destiny of international treaties, as well as the continuity of the existence of the BiH institutions until they are replaced.

17. The applicant also states that on 28 November 2001, the Presidency of BiH passed its Decision on Ratification of the Agreement on the Succession Issues („the Succession Agreement"), and both Houses of the Parliamentary Assembly of BiH gave their consent to the ratification thereof. According to the Succession Agreement, *the movable and immovable State property of the Federation constituted as the SFRY („State property") shall pass to the successor States in accordance with the provisions of the following Articles of this Annex i.e. immovable State property of the SFRY which was located within the territory of the SFRY shall pass to the successor State on whose territory that property is situated,* and *where pursuant to this Annex property passes to one of the successor States, its title to and rights in respect of that property shall be treated as having arisen on the date on which it proclaimed independence, and any other successor State's title to and rights in respect of the property shall be treated as extinguished from that date.* It follows from the aforementioned that BiH is a legal owner of the immovable property of the former SFRY which, after the dissolution of the former SFRY, was located in the territory of Bosnia and Herzegovina. Hence, BiH is a signatory to the international agreement - Succession Agreement and pursuant to Article III(3)(b) of the Constitution of BiH, the

general principles of international law constitute an integral part of the law of Bosnia and Herzegovina and the Entities. BiH has already decided on the property passed to it under the Succession Agreement, *i.e.* in 2002 BiH passed the Law on Purpose and Utilization of the Portion of Property obtained by Bosnia and Herzegovina Under the Succession Agreement. In addition, on 22 February 2005, the Parliamentary Assembly of BiH passed the decision to sell to the United States of America part of the „Maršal Tito" Barracks in Sarajevo, which it acquired based on the Succession Agreement. In view of the above, it follows that BiH has already disposed of the movable and immovable property obtained under the Succession Agreement. Furthermore, another confirmation that BiH has a legitimate right to register the immovable property obtained under the Succession Agreement is a Ruling of the Municipal Court in Mostar, allowing the registration of the right of ownership, in favour of the State of BiH, over two buildings which used to be the property of the Federal Directorate of Industrial Products Reserves Belgrade. Moreover, the Court of BiH passed a decision establishing that the Federation of BiH violated the integrity and legal continuity of the property of BiH by entering into possession of the immovable property located in Sarajevo. Finally, the Law on the Transformation of Socially Owned Property prescribes that *the Republic of Bosnia and Herzegovina shall become a holder of the right to socially owned property of which the Federation of BiH has no right of disposal, such as: natural resources and public property, assets over which local communities have the right of disposal and management…* The applicant also underlines that the provisions of the mentioned law are in effect in accordance with the constitutional provision of paragraph 2 of Annex II to the Constitution of BiH.

18. The applicant further states that simultaneously with the enactment of the state Law on the Temporary Ban of Disposal of State Property of Bosnia and Herzegovina, the High Representative also declared two Entity laws prohibiting the disposal of state property in the territory of the Federation of BiH, *i.e.* in the territory of the Republika Srpska, and that the Council of Ministers formed the Commission for State Property, Identification and Distribution of State Property, Specification of Rights and Obligations of Bosnia and Herzegovina, the Entities and the Brčko District of BiH in the Management of State Property, which has failed to achieve an agreement on the key provisions of the Law on State Property at the level of Bosnia and Herzegovina. It follows from the above stated that the State of Bosnia and Herzegovina, *i.e.* the Parliamentary Assembly of Bosnia and Herzegovina, pursuant to Article IV(4)(e) of the Constitution of Bosnia and Herzegovina, is competent to resolve the issues of state property and that Amendment XXXII, which amended Article 68 of the Constitution of the Republika Srpska, lacks the constitutional basis which may entitle the Republika Srpska, as one of the Entities constituting the state of Bosnia and Herzegovina, to unilaterally decide upon the status of state property located

in the territory of the Republika Srpska and under the disposal ban. By enacting the challenged Law, the National Assembly usurped the responsibility of the Parliamentary Assembly of Bosnia and Herzegovina, and, at the same time, it violated the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina as well as the Law on the Temporary Ban of Disposal of State Property of the Republika Srpska, declared by the High Representative in BiH in accordance with his constitutional powers.

19. In the reasoning of the second part of his request, alleging that the challenged Law is incompatible with lines 2 and 6 of the Preamble of the Constitution of BiH, Articles I(1) and III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, the applicant asserts as follows: *The provisions of the Law are incompatible with lines 2 and 6 of the Preamble to the Constitution of BiH because the unilateral imposition of solutions by the Republika Srpska, without agreeing on a common solution, does not contribute to achievement of justice and tolerance in society and the imposition of such legal solutions negates the sovereignty of the State of Bosnia and Herzegovina as accorded with international law because the state property in the territory of the Republika Srpska is being seized by a unilateral act of one of the Entities thereby depriving the State of its intabulated right of disposal/management over that property. The regulations which governed this area and which remained in force in accordance with the constitutional provision of Annex II of the Constitution of BiH on the continuation of laws are being derogated from. This negates the laws of the High Representative on the disposal ban over state property which shall remain in effect until entry into force of the law regulating the implementation of criteria to be used for identification of property owned by Bosnia and Herzegovina, the Federation of BiH, Republika Srpska and Brčko District of BiH and specifying the rights of ownership and management of State Property, which shall be enacted upon the recommendations of the Commission or until either an acceptable and sustainable resolution of the issue of apportionment of State Property has been endorsed. Furthermore, the challenged Law is inconsistent with Article I(1) of the Constitution of BiH, as the issue of the legal continuity of the State entails the legal continuity of the property for which the right of disposal, management and use belonged to the State. The challenged Law is also incompatible with Article III(3)(b) of the Constitution of BiH because the general principles of international law are an integral part of the law of Bosnia and Herzegovina, and the Entities and the State of BiH are under obligation to comply with all ratified international agreements, including the Succession Agreement. In addition to the* pacta sunt servanda *principle which is being violated by enacting this Entity law, the* nemo plus iuris ad allium transferre potest quam ipse habet *principle has been violated as well, since a question may be posed here as to how anyone who is not the title holder of ownership rights over property may*

transfer rights it does not have. The applicant further states that the challenged Law is also incompatible with Article 1 of Protocol No. 1 to the European Convention, since the State of BiH has property, including legitimate expectations from the property that passed to it pursuant to the Succession Agreement, whereas the enactment of the Entity Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban gave rise to the interference with the right of the State to peaceful enjoyment of property. Namely, the challenged Law prescribes, *inter alia*, that property located in the territory of the Republika Srpska is owned by the Republika Srpska, that the ownership right over the property shall be registered in the land registry books or any other public registers in favour of the Republika Srpska pursuant to a decision by a body competent for property law affairs or a court decision, that the Attorney's Office of the Republika Srpska shall file a request to conduct proceedings and establish the criteria for meeting the conditions to establish the ownership right over the property in favour of the Republika Srpska to the competent administrative body for property law affairs, and that the Attorney's Office of the Republika Srpska shall, within six months from the date this law becomes effective, initiate proceedings to register the ownership right over the property, which is the subject matter of the challenged Law, in the land registry books or any other public registers in favour it of the Republika Srpska. The interference of the Entity Republika Srpska with the right of the State to peaceful enjoyment of property is not lawful because it is inconsistent with the laws of the High Representative, which prescribe that *notwithstanding the provisions of any other law or regulation, State Property may be disposed of only in accordance with the provisions of this Law. Any decision, act, contract, or other legal instrument, disposing of property referred to in Article 1 of this Law concluded contrary to provisions of this Law, after its entry into force, shall be null and void.* This means that the challenged Law is null and void. Furthermore, pursuant to Article 4 of the Law on the Temporary Prohibition of Disposal of State Property of BiH, the temporary prohibition of disposal of state property in accordance with this Law shall be in effect until entry into force of the law regulating the implementation of criteria to be used for identification of property owned by Bosnia and Herzegovina, the Federation of BiH, Republika Srpska and Brčko District of BiH, and specifying the rights of ownership and management of state property, which shall be enacted upon the recommendations of the Commission or until either an acceptable and sustainable resolution of the issue of distribution of the state property has been endorsed. The applicant alleges that the interference is unlawful because it is inconsistent with the principle of sovereignty of the State and constitutional continuity of statehood, *i.e.* that there has been a violation of the State's right to property under Article 1 of Protocol No. 1 to the European Convention because the Entity law deprives the state of its legitimate right to peaceful enjoyment of property protected by the mentioned Article.

b) Reply to the request

20. The National Assembly alleged that the general elections in Bosnia and Herzegovina had been conducted on 3 October 2010 and the Presidency of Bosnia and Herzegovina and the House of Representatives of the Parliamentary Assembly of BiH were constituted in accordance with the results of the elections, so that it must be deemed that the mandate of the earlier House of Peoples of the Parliamentary Assembly of BiH ceased. As the legislative body cannot be composed of the two Houses out of which one is composed of members from the previous assembly, it follows that the applicant is not authorized to initiate a dispute, so that the National Assembly proposed that the request be rejected.

21. As to this part of the request, *i.e.* the lack of constitutional basis for enacting the challenged Law, the National Assembly alleges as follows: *The Constitutional Court of Bosnia and Herzegovina decided the issue of responsibility for regulating this matter in its Second Partial Decision no. U 5/98 of 18 and 19 February 2000 with regards to the review of compatibility of the Constitutions of the Entities with the Constitution of Bosnia and Herzegovina, in which it found that Article 68, as amended by Amendment XXXII, item 6 (which was the constitutional basis for enacting the challenged law), was not inconsistent with the Constitution of Bosnia and Herzegovina. The Constitutional Court decided that Republika Srpska had this responsibility, which explicitly followed from the enacting clause and reasons for the Decision, where it is stated as follows: 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. […]. Article 68, item 6 is 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*. The National Assembly alleges that according to the fundamental legal principles the same matter cannot be deliberated and decided twice and, accordingly, this part of the request is irrelevant. Furthermore, it alleges that the only court which is competent to deal with this issue is the Constitutional Court of the Republika Srpska, which had already deliberated on this issue with regards to the deliberations on a violation of the vital national interest of the Bosniac people and which made decision no. Uv-6/10 of 10 December 2010, concluding that the Law in question was enacted in accordance with the Constitution of the Republika Srpska. The applicant refers to the Decision on Ratification of the Agreement on Succession Issues, the Law on the Purpose and Utilization of the Part of Property Passed to Bosnia and Herzegovina by Succession Agreement, the Law on the Temporary Prohibition of Disposal of State Property of BiH and other laws. However, as the only standard of review in such disputes, in terms of

Article VI(3)(a) of the Constitution of BiH, is the Constitution of BiH, which regulates the distribution of responsibilities between the Entities and the institutions of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina is not competent to decide on the compatibility of the Entities' laws (as to their constitutional basis) with the laws of Bosnia and Herzegovina, decisions of the Parliamentary Assembly of Bosnia and Herzegovina, rulings and judgments of the ordinary courts or laws imposed by the High Representative for Bosnia and Herzegovina. The National Assembly alleges that the first part of the request should be rejected as *res iudicata.*

22. As to the second part of the request, asserting that the challenged Law is not compatible with lines 2 and 6 of the Preamble of the Constitution of Bosnia and Herzegovina, Articles I(1) and III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, the National Assembly alleges as the following: *The applicant has not specified the articles of the law, which would be unconstitutional in his opinion, but he quotes the law as a whole, which is not in accordance with the Rules of the Constitutional Court of Bosnia and Herzegovina so that it can be considered that he challenges the whole law within the substantive meaning. Although this part of the request relates to the substantive aspect of the Law, according to the applicant, it follows from the reasons that the case relates to challenging responsibilities of the Republika Srpska to enact such law, which constitutes the formal aspect thereof, which the Constitutional Court of Bosnia and Herzegovina already decided in case no. U 5/98. The challenged Law was enacted in accordance with Articles I(1), I(3), III(1) and III(3)(a) of the Constitution of Bosnia and Herzegovina, i.e. the case relates to a matter which does not fall within the scope of the responsibilities of the institutions of Bosnia and Herzegovina unless the Entities entered into an agreement on it in accordance with Article III(5)(a) of the Constitution. As there is no such agreement, i.e. as the Republika Srpska did not transfer this responsibility to the institutions of Bosnia and Herzegovina, the National Assembly did not endanger in any way peace, justice, tolerance, reconciliation, sovereignty, territorial integrity and political independence of Bosnia and Herzegovina*.

23. As to the allegations about the violation of Article I(1) of the Constitution of Bosnia and Herzegovina, the National Assembly outlines that the present case relates to the constitutional basis which was previously elaborated. The National Assembly outlined that the applicant disregards the fact that the aforementioned Article prescribes that Bosnia and Herzegovina *shall continue its legal existence under international law as a state, with its internal structure modified as provided herein (...)*, which means in practice that the consequence of legal continuity of international personality of Bosnia and Herzegovina is not the legal continuity of the same form of property. In this connection, this Article cannot

be considered or interpreted without being connected to Article I(3) of the Constitution, which regulates that Bosnia and Herzegovina shall consist of two Entities: Federation of Bosnia and Herzegovina and Republika Srpska, and without being connected to Articles III(1) and III(3)(a) of the Constitution regulating distributions of responsibilities between the Entities and institutions of BiH. Furthermore, the challenged Law is based on the original principles of the Dayton Peace Agreement, since the Inter-Entity Boundary Line clearly regulates the boundary line between the Entities, i.e. the territory where Republika Srpska exercises in full capacity its legislative, executive and judicial powers in accordance with the distribution of responsibilities between Bosnia and Herzegovina and Entities. According to the same constitutional basis, the National Assembly of the Republika Srpska adopted the Law on Real Rights as a systemic law regulating the acquisition, use, disposal, protection and cessation of the ownership rights. One of the reasons for enacting this Law is the fact that the Brčko District of BiH, according to the same principles, enacted the Law on Public Property of the Brčko District, with the supervision of the OHR. The challenged Law rests on territorial/functional principle and in the best possible manner regulates the status of property under the disposal ban. This practically means that all property on the territory of the Republika Srpska is the ownership of the Republika Srpska and that according to the functional principle the Republika Srpska may cede a part of that property for use to the institutions of Bosnia and Herzegovina in order for the institutions of Bosnia and Herzegovina to exercise its powers. The challenged Law does not resolve the status of property under the disposal ban and is located beyond the boundaries of Bosnia and Herzegovina as the territorial principle could not apply to this property and this principle must be regulated in a special law.

24. As to the allegations relating to the violation of Article III(3)(b) of the Constitution, the National Assembly stated that it is not clear why the applicant holds that the enactment of this Law deprives BiH of the possibility to enact the regulation for implementation in accordance with Article 8 of the Agreement on Succession, since, by enacting that Law, the Republika Srpska actually contributed to the fulfilment of the obligation referred to in Article 8 of the mentioned Agreement, that it prevents in no way the institutions of BiH, if there is a political will, from adopting a Law at the state level to regulate the remaining issues (the property of BiH beyond BiH borders, that is beyond the territory of the Entities). The National Assembly stated that the Constitutional Court articulated the following in the Decision U 5/98: *Nevertheless, the Constitutional Court finds that the Framework Law on Privatization of Enterprises and Banks in BiH (Official Gazette of Bosnia and Herzegovina, no. 14/98) entered into force on 4 August 1998. The goal of this law actually was to harmonize the Entities' legislation in this area and to include all persons in the privatization process in a non-discriminatory manner (...), while, at*

the same time, the legislative responsibility of the Entities was, in principle, recognized (Article 2 of the Framework Law). The National Assembly outlined the fact that the Agreement on Succession was signed by the then Federal Republic of Yugoslavia, that the Constitutional Charter of the State Union of Serbia and Montenegro defines Serbia and Montenegro as a single personality in the international law, however Article 59 of the Charter prescribes that *the property of the Federal Republic of Yugoslavia required for the operation of the institutions of Serbia and Montenegro shall be the property of Serbia and Montenegro*… As to the violation of the principle *nemo plus iuris ad allium transfere potest quam ipse habet*, pointed out by the applicant, the National Assembly also stated that the basis for the aforementioned allegations are not clear if one takes into account the Decision of the Constitutional Court no. *U 5/98*. Namely, if that is not the property of the Republika Srpska which, in addition to the Federation of BiH, makes up BiH, then the question arises as to whose property it is, whether it is a property of some other state of BiH? In support of the aforementioned, we refer to Article VIII(3) of the Constitution of BiH wherefrom it follows that BiH does not have its own revenues, nor does it have its own property from which it could collect revenues.

25. As to the applicant's allegations relating to the violation of the right to property under Article 1 of Protocol No. 1 to the European Convention, the National Assembly stated that the European Convention protects human rights against interventions of the state, and not the rights of the state against its Entity, that is there is no human right of the state to peaceful enjoyment of property. The right to peaceful enjoyment of property relates to private property of physical and legal persons, which may be observed from a series of judgments of the European Court of Human Rights. Furthermore, as to the unlawful interference of the Republika Srpska with this on the grounds that it is inconsistent with the laws of the High Representative, the National Assembly stated that the right of the State to the peaceful enjoyment of property is a nonsense, so that any further comment is unnecessary. The Constitutional Court is not competent to consider whether the laws of the Entities are compatible with the laws imposed by the High Representative, thus a law cannot be null and void but only unconstitutional. As to the allegations stated in the request relating to the continuity of legal acts, the National Assembly outlined that the applicant in the aforementioned decision no. *U 5/98* had the same arguments, which the Constitutional Court did not accept.

26. The National Assembly stated that the request is unfounded and that it ought to be dismissed along with the request for adoption of an interim measure. Furthermore, taking into account the fact that the applicant indicated as a standard of control of constitutionality of the challenged Law the Law on Destination and Use of a Part of the Property, which

BiH acquired in accordance with the Agreement on Succession, as well as the Decision of the Parliamentary Assembly of BiH, although that is not what these acts are, the National Assembly requested exemption of the Vice-President of the Constitutional Court, Ms. Seada Palavrić and Judge Mr. Mirsad Ćeman who, during the period from 2002-2006, were members of the House of Representatives of the Parliamentary Assembly of BiH and participated in the enactment of the aforementioned acts. In addition, it is necessary that this request be discussed and decided at the sessions of the Constitutional Court in full composition, and not by five out of nine judges, whereby four other judges have no opportunity whatsoever to voice their respective opinion (the so-called Chamber of the Constitutional Court of BiH is not recognized by the Constitution of BiH), which has become the practice of the Constitutional Court and is inconsistent with the BiH Constitution. In addition, the Republika Srpska still has not filled one of the two seats, and, according to the Rules of the Constitutional Court, the four judges from the Federation of BiH and only one judge from the Republika Srpska can make any decision of the Constitutional Court. The National Assembly stated that, if a decision is made to deliberate on the merits of the request, that a public hearing be held in accordance with Article VI(2) (b) of the Constitution of Bosnia and Herzegovina.

c) Opinions given in the capacity of *amicus curiae*

27. The High Representative stated that the Constitution of Bosnia and Herzegovina contains no express provisions on how state property must be shared among different levels of government and that there is no agreement between the State and the Entities as to what their respective rights to use, manage and dispose of such assets are, including assets over which the SFRY held the right of disposal and assets which BiH got under the Agreement on Succession. In December 2004, the Council of Ministers of BiH established the Commission for State Property comprised of representatives of the State, the Entities and the Brčko District, which ought to draft criteria for identifying which property is owned by the state, the Entities and the Brčko District, and the legislation on the rights of ownership and management of state property. The High Representative said that he enacted the Law on the Temporary Prohibition of the Disposal of State Property at the levels of BiH and the Entities. Although the mentioned ban was introduced for a period of one year, it was extended numerous times, so that it was extended up until the entry into force of the law on state property, that is up until „acceptable and sustainable" solution of the apportionment of state property. Further, in the period of over five years the Commission for State Property failed to reach an agreement on criteria for identifying which property is owned by the State, the Entities and the Brčko District, or on draft legislation specifying their respective individual rights. During negotiations two theories emerged as to how to establish the

aforementioned, namely the theory of territorial distribution and the legal continuity. In addition, „the *functional-territorial" apportionment emerged within the Commission as a third „compromise" theory for the identification of property that is respectively owned by the State, the Entities, or the Brčko District. The National Assembly adopted the challenged Law, which unilaterally imposes Republika Srpska's vision regarding the division of state property on a purely territorial basis, which jeopardizes the possibility of a negotiated settlement.* As a result of the aforementioned, the High Representative stated that on 6 January 2011 he issued the Order Suspending the Application of the challenged Law, which shall remain in effect pending a final decision of the Constitutional Court on the challenged Law entering into force.

28. As to the arguments presented by the National Assembly in support of the territorial principle drawn from Annex II to the General Framework Agreement, the High Representative stated that Annex II to the General Framework Agreement *provides for territorial delineation between the two Entities and not between the Entities and the State, the latter being impossible.* It was emphasized that *issues arising under the General Framework Agreement and its Annexes concerning the territorial delineation between the two Entities do not in any manner affect the exercise of responsibilities on the part of BiH on its territory and the ability of the BiH institutions to own property situated on the territory of either Entity.* To conclude, *it is submitted that a strictly territorial division of state property would imply that the State is a creation of the Entities, which enjoys only those competencies and means expressly transferred to it by the Entities as sovereign states.* As to the allegations of the applicant that the Succession Agreement has itself resolved the distribution of state property, i.e. that the Entities are owners of the entire property which BiH got, the High Representative pointed to the attached Opinion of the Legal Department of the Office of the High Representative dated 12 December 2005, wherefrom it follows that the *Succession Agreement cannot be construed as regulating the respective individual rights of the institutions of BiH, the Entities and the Brčko District, to assets derived under the agreement. The agreement operates exclusively in order to establish normative rights of Successor States with respect to their mutual relations...* In support of the principle of functionality regarding the territorial principle, the High Representative referred to the Law on Defence, which was adopted pursuant to Article III(5)(a) of the Constitution of BiH, which in Articles 71 to 74 provides for the finalization of disposal of all rights to property that will continue to serve defence purposes and bans any disposal whatsoever of such assets until the finalization of the disposal of property rights. As to the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina („the Framework Law on Privatization"), the High Representative stated that this law precisely constitutes an example of a functional apportionment of

public assets, as by adopting this law BiH created a legal environment for privatization of banks and enterprises while simultaneously recognizing that privatization is a matter falling primarily within the responsibilities of the Entities under the Constitution. As such the law enables the Entities to enact further legislation and to privatize non-privately-owned enterprises and banks (the Preamble of the Framework Law on Privatization was mentioned in support of the aforementioned).

29. As to the applicant's allegations that the challenged Law violates the Law on the Temporary Prohibition of Disposal of State Property of BiH, or the allegations of the National Assembly that the Constitutional Court is not competent to appreciate whether the Entity laws are in accordance with the laws imposed by the High Representative, and that a law cannot be null and void but only unconstitutional, the High Representative stated *three disposal bans were introduced at both the State and Entity levels to ensure that all property falls within the scope of the disposal ban, regardless of who has possession over this property and regardless of who will ultimately be recognized as the owner of such property*. The challenged Law raises questions under Articles 2 and 4 of the Law of the Temporary Prohibition. Should the Constitutional Court decide that the institutions of BiH are the owners of certain property covered by the challenged Law, or that BiH is otherwise responsible to regulate all or part of these assets under the Constitution, the Constitutional Court would be competent to determine whether violations of Articles 2 and 4 of the Law on Temporary Prohibition of Disposal of State Property of BiH interfere with the Constitution of BiH, in particular with the first sentence of Article III(3)(b) thereof. As to the allegations of the National Assembly that BiH has no legislative competence over state property issues, the High Representative said *we note that the issue of legislative competencies over State Property is not central to the case at stake. Instead, as noted above, the dispute relates to the ownership of State Property situated on the territory of the Republika Srpska and the ability of the State to legislate with respect to those assets, as a consequence of its ownership interests. In other words, we submit that, should the Court recognize that BiH owns state property that falls within the scope of the challenged Law, it would belong exclusively to the institutions of BiH to regulate that property.*

30. The Venice Commission stated that the Constitution of BiH contains no explicit provisions on the distribution of state property among the levels of government. The State and the Entities failed to reach an agreement regarding their respective rights to use, manage and dispose of state property. *It is said, in Federal States, the distribution of state property between the central state and the federated entities is usually regulated by an explicit constitutional provision. When this is not done, the issue of state property may be regulated on the basis of the rule on incidental powers. Indeed, public authorities, unlike*

private individuals, in principle only own those assets which are necessary to provide public services or possibly to earn revenues; state property may thus be seen as an issue of incidental powers.

31. Furthermore, pursuant to Article VI(3)(a) of the Constitution of BiH, *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.* Therefore, normative criteria that should be applied in this case are prescribed by the Constitution of Bosnia and Herzegovina. Article VI(3)(a) of the Constitution of BiH clearly indicates that the legislative bodies of the Entities must perform their legislative competencies in the manner compatible with the Constitution of BiH. It is stressed that under Articles I(1) and I(3) of the Constitution of BiH, both, the Republika Srpska and the Federation of BiH are Entities of Bosnia and Herzegovina *which shall continue its legal existence under international law as a state, with its internal structure modified as provided by this Constitution*… meaning that the Entities are part of the internal structure of BiH and cannot be sovereign states on their own. The division of responsibilities between the Institutions of BiH and the Entities has been regulated by Article III of the Constitution, paragraph 1 of which lists the exclusive responsibilities if the Institutions of BiH and paragraph 2 the responsibilities of the Entities. Paragraph 3 awards the incidental powers to the Entities: *All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.* Moreover, paragraph 5 prescribes the additional responsibilities of the state of Bosnia and Herzegovina and especially the possibility of transfer of responsibilities from the Entities to Bosnia and Herzegovina by the agreement. *Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities*. The Venice Commission further stresses that under the Succession Agreement, ownership over state property in the territory of BiH has been passed to the state of BiH. Two opposite claims have been made in this respect by the appellant and the National Assembly. According to the applicant, Bosnia and Herzegovina has continued the international legal personality of the Republic of Bosnia and Herzegovina and is the title holder to all state property but the Entities and other levels of government may use or own those assets necessary for the exercise of their respective competences insofar as may be authorized by legislation adopted by the Parliamentary Assembly of Bosnia and Herzegovina. According to the National Assembly of the RS, Bosnia and Herzegovina does not exist without or beyond Entities; all state property in existence at the moment of entry into force of Annex 4 to the GFAP is owned by the Entity where situated and the joint institutions of Bosnia

and Herzegovina may use property needed for the exercise of its constitutional and legal responsibilities, insofar as the Entities may authorize by law. In the view of the Venice Commission, neither claim is well-founded. It is obvious that, in order to carry out its primary functions, the State of Bosnia and Herzegovina must own and dispose of (some) state property. And so do the entities. As concerns the first claim, the Constitution of BiH clearly indicates the distinct legal existence of the state of Bosnia and Herzegovina under both international law and domestic legal order, *i.e.*, an existence which is not reducible to that of the Entities. The principle of legal continuation (in international law) needs to be combined with the rules of distribution of powers set out in the federal constitution. The division of state property is substantively a constitutional issue. As such, in principle it should have been regulated in the constitution of the State of BiH, but due to historical reasons this was not done, so that there is a lack of explicit constitutional law. The issue of ownership and concomitant legislative competence must be resolved on the basis of the constitution, in a way which is in harmony with the distribution of constitutional powers. This essentially constitutional issue is necessarily to be decided by the State of BiH in such manner that the property must be allocated to each level so as to enable every component of the State to carry out its constitutional functions. In a subsidiary manner, territorial and historical criteria may also be used in the allocation of state property.

32. The Venice Commission concluded that the challenged Law *violates the fundamental principle that, in federal states, issues of distribution of powers (state property may be seen as an issue of incidental powers) between the central state and the federated entities must be settled at the federal level, either in the federal constitution or through federal legislation taken pursuant to such constitution. The basic principle on which such distribution needs to be based is that property must be distributed to each level so as to enable every component of the State to carry out its constitutional functions. In a subsidiary manner, territorial and historical criteria may also be used in the distribution of state property.* The challenged Law, *therefore, arrogates powers which may not belong to a federated entity because they deal with distribution of powers and are thus intrinsically federal.* The challenged Law *also violates the functional principle of distribution of property in a federal state. It encroaches on the autonomy of Bosnia and Herzegovina by providing that the Republika Srpska may enter into an agreement with the Council of Ministers of BiH „on transfer of usage of the part of property required by the institutions of BiH for conduct of affairs within their competence. The usage of such property belongs, ipso iure, to the State and cannot depend on a possible agreement by the Republika Srpska.*

33. The Republic Administration points out that *the Dayton-Paris Agreements (intentionally in plural because of the basic agreement and 12 annexes thereto), determined*

Bosnia and Herzegovina as the state where two entities concluded an agreement, giving only to the entities the right to be the parties in some future amendments of what had been concluded on 14 December 1995. That is also confirmed by Articles I(3), III(4), III(5) (a) and (b), IV(4)(e) and V(3)(i). It is alleged that Article I(1) of the Constitution of BiH is clearly and precisely determined in three segments as follows: „under international law as a state„ within „its internationally recognized borders„ and „it shall remain a Member State of the United Nations„ all of the above in the internal structure modified as provided for by the Constitution of Bosnia and Herzegovina. Not in a single provision, the International Agreement has provided for the internal continuance of Bosnia and Herzegovina, which does not exist in the political, constitutional or any legal sense, so that any referral to the internal continuity has no legal grounds in the International Agreement under which the present Bosnia and Herzegovina came into being and was determined. The Republic Administration further states that Article I(3) of the Constitution of Bosnia and Herzegovina provides for Bosnia and Herzegovina to consist of two entities. No Article of the Constitution gives right to Bosnia and Herzegovina to any property. The Constitution of Bosnia and Herzegovina or any other Annex to the Dayton Agreement does not contain legal grounds by which the right of Bosnia and Herzegovina to have the property would be established. Therefore, Article III(3)(a) of the Constitution of Bosnia and Herzegovina allocates the right to property to the entities exclusively. Also, *the Constitution of Bosnia and Herzegovina does not contain grounds for the adoption of the Law on Division of State Property on the level of Bosnia and Herzegovina since the exclusive competence for the adoption of such legislation is on the Entity level.* Furthermore, the Constitution of BiH that Bosnia and Herzegovina, as a State, has responsibilities only towards outside, in relation to other states, and everything else is the issue for the Entities and the organization of government as provided by the constitutions of Entities. In that manner the Constitution of BiH defined the Entities as holders of government on the territory of Bosnia and Herzegovina and has not determined any other Ministry on the level of Bosnia and Herzegovina that would have competencies or responsibilities for exercising powers within Bosnia and Herzegovina.

34. The Republic Administration points out that it is indisputable that Bosnia and Herzegovina, pursuant to the International Agreement on Succession Issues, acquired certain property and it is also indisputable that on the basis of Article I(1) of the Constitution of BiH it continued its legal existence under international law as a state but with its internal structure modified, *i.e.*, it is a complex state union (confederation or loose federation). The High Representative by his decisions of 2005, imposed three Laws the aim of which was to secure an appropriate property for the joined institutions

of Bosnia and Herzegovina as necessary for exercising its functions. After considering the Information on the State Property Inventory prepared by the OHR, the Government of the Republika Srpska concluded that the Inventory does not correspond to the realistic state of affairs and invited the Council of Ministers to state within 60 days its needs for the property located in the territory of the Republika Srpska. As the aforementioned time limit has not been complied with, the National Assembly of the Republika Srpska passed the challenged Law based upon the general principles of civil law which recognizes the institute of legal unity of a land and a building, i.e., under this principle all immovable property (facilities and other structures) located in the surface or below the ground, and are intended for permanently stay thereon, are sharing a legal destiny of the land. Furthermore*, the territory of the Republika Srpska has been determined by the Dayton Agreement, it is divided by the inter-entity boundary line, and as a territory it belongs to the Republika Srpska. Under the same principle all the construction and other facilities that are located in the territory of the Republika Srpska are the property of the Republika Srpska. Under the same principle, under the supervision of the OHR, the Law on Public Property of the Brčko District is adopted providing for all the property located in the territory of the Brčko District is the property of the Brčko District and the logical conclusion imposes that such principle should be applied also when the property located in the entities' territory is concerned.* The Republic Administration stresses that the Constitution of BiH does not give to Bosnia and Herzegovina the explicit right to property, so that Bosnia and Herzegovina has no property, and the immovable property located outside the territory of Bosnia and Herzegovina, diplomatic and consular buildings, could become the property of Bosnia and Herzegovina while all other immovable property (official apartments, resorts, hotels, etc.) would be subject-matter of division between the Entities and Bosnia and Herzegovina. The Republic Administration indicates that it expects the Constitutional Court of Bosnia and Herzegovina to reject the request, as it cannot modify or amend the constitutional provisions and as its obligation is to protect the Constitution as a part of the International Agreement and to determine the right of BiH to property would be contrary to the International Law and the Vienna Convention on the Law of Treaties.

35. The Republic Administration refers to Article 1 Section 8 of the US Constitution under which the Congress shall have power *to exercise exclusive legislation in all cases whatsoever, over such District as may, by cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States (note: Washington DC), and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall…* Moreover, *the Switzerland is composed of 27 Cantons and the Cantons are owners of immovable property on their territory…*

IV. Public Hearing

36. Pursuant to Article 46 of the Rules of the Constitutional Court, at its plenary session held on 27 May 2011, the Constitutional Court decided to hold a public hearing on which it would discuss on the present request. Pursuant to Article 47(3) of its Rules, on the Plenary session held on 15 July 2011, the Constitutional Court decided to summon the following to the public hearing: the applicant's representative, the representative of the National Assembly, Prof Robert Badinter, the President of the Arbitration Commission for the former SFRY, Prof Dr Joseph Marko, the former Judge of the Constitutional Court, Mr. Zvonimir Kutleša, the Chair of the Commission for State Property, Prof Dr Edin Šarčević, Associate Professor on the Law School in Leipzig and Mr. Mustafa Begić, lawyer and geodesic engineer.

37. On 18 November 2011, the Constitutional Court held the Public Hearing attended by: the applicant's representative, the representative of the National Assembly, Mr. Zvonimir Kutleša, the Chair of the Commission for State Property, Prof Dr Edin Šarčević, Associate Professor on the Law School in Leipzig and Mr. Mustafa Begić, lawyer and geodesic engineer.

38. The applicant's representative briefly presented the subject-matter of the request, mainly within the scope of the lodged request. The National Assembly presented the arguments in favour of the adoption of the challenged Law, mostly within the scope of the reply thereto.

39. Mr. Zvonimir Kutleša, the Chair of the Commission for State Property, amongst other things, stressed that the Commission had been established seven years ago, that in the course of its operations the adjustment of positions occurred; for example, that the Succession Agreement cannot represent the legal grounds for the registration of ownership right in favour of Bosnia and Herzegovina, as the state property is internal issue that should be resolved by the adoption of the law; that all levels of government must possess their own property; and that the future law could not be applied retroactively because of the protection of acquired rights. During its operations, the Commission was faced with a misunderstanding of a term the state property; some of the members of the Commission held that the public property, i.e., publically used property and natural resources represented the state property. However, the State cannot possess the ownership right over such property but only the right of exploitation. Although some adjustments of positions occurred, the Commission did not succeed to establish criteria and to draft the Law on State Property that would be placed on the Agenda of the Parliamentary Assembly of Bosnia and Herzegovina. Furthermore, Article 1 of the Law on Temporary Disposal Ban over the State Property regulates what is the property the status of which needs to

be solved, and Article 4 of the same Law provides for the temporary disposal ban over the state property shall remain in effect until the moment of enactment of the Law on State Property that shall be passed upon the proposal set forth by the Commission. Mr. Kutleša pointed out that this indicated that it is within the jurisdiction of the Parliamentary Assembly of BiH to pass the Law on State Property, which was also confirmed by the decision on the establishment of the Commission, and the National Assembly had already adopted the challenged Law. The state property is the internal issue of a state and Bosnia and Herzegovina should resolve it in such a manner that all the levels of government would have their own property.

40. Among other things, Prof Dr Edin Šarčević noted the following: *Regulation of the state property matter by an Entity law is inconsistent with the Constitution of BiH because taking over of the state property matter into the exclusive responsibility of the Entities violates the principle of continuity under Article I(1) of the Constitution in conjunction with the regulations on responsibility of the institutions of BiH under Article III(1)(a) and (e) and the regulations on powers of the Parliamentary Assembly of BiH*....therefore, the challenged Law is unconstitutional for formal reasons. Furthermore: *Regulation of the issue of state property by the Entity law is inconsistent with the Constitution of BiH because it regulates, on entity level, the disposal of the state property contrary to the explicit provisions of the state law. In this case the principle of normative hierarchy under Article III(3)(b)- the first sentence of the Constitution, has been violated.* Also, by *enacting the entity law on state property, which is the subject to be regulated by the state law and is under the disposal ban, the constitutional law has been violated, i.e. the principle of the rule of law under Article I(2) of the Constitution,* and, therefore, the challenged Law is unconstitutional for formal reasons. In the event that the enactment of the challenged Law would not be considered unconstitutional for any of the mentioned reasons, then its formal unconstitutionality will be reflected in the violation of an unwritten constitutional principle – *the principle on obligation of pro-federal comity or loyalty, which follows from the systematic conjunction of Articles III (5), III(2) (d), III(3) (b), the second, third and sixth line of the Preamble and Article 1(1) of the Constitution of BiH…* As to the issue of violation of the right to property, Prof Dr Edin Šarčević noted that the state lacks the standing to sue as it does not belong to the group of persons that may refer to violation of Article 1 of Protocol No. 1 to the European Convention. The state is not prevented from regulating the issue of usage of state property by law or some other legal act, so that it may dispose of the owned property by way of regulating it. Therefore, Article 1 of Protocol No. 1 to the European Convention has not been not violated.

41. Mr. Mustafa Begić, *inter alia*, stated that all treaties, apart from the Dayton Peace Agreement, were signed by the guardians of BiH**,** while no norm relating to its interest

(for example, compensation for war damages, ownership, and suchlike) was ever satisfied. The BiH Archives do not have a single copy of the mentioned treaties, as they were never ratified in BiH. Nevertheless, Bosnia and Herzegovina, at all stages of its development, has had the appropriate legislation on land records, suitable for the time. Furthermore, two years ago, through a wide-ranging administrative action, *the OHR established that there were solely 979 facilities in state ownership in BiH, although in reality there are around 16,972, materials on which were packed in 14 big boxes. A number of the most distinguished intellectuals, whose reputation is indisputable, contest the Dayton norms as well as the norms of the OHR, a protector of BiH. It has never been scientifically explained, although it is essential, what was a legal basis for dividing the territory of Bosnia and Herzegovina into the two „so called" entities, which, throughout its history, never existed*. Mr. Begić noted that there is no constitutional provision giving the power to the National Assembly of the Republika Srpska to enact the law, by way of which the acquired and administrative ownership right over real properties is being altered. The National Assembly of the Republika Srpska unlawfully embarked upon the enactment of the challenged Law, it effected „the acquisition without grounds"**,** because it disposes with much real estate unlawfully and it engages in „running someone else's business contrary to the ban". Also**,** *the territory of BiH, symbolically speaking, has been „carved up" for over 300 years already, to be precise since the Karlovac Peace (1699); bribe and corruption of statesmen played a significant role in unlawful expropriation of the territory of Bosnia, as the Serbian historians openly wrote. The enactment of the challenged Law is contrary to the norms banning the disposal of the state property, and the norm of the Law on Obligations, agreements on succession issues and law on land books. In view of the aforementioned, the suggestion of the applicant denying the constitutionality of the challenged Law ought to be accepted.*

V. Relevant Laws

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

Preamble

[...]

Dedicated to peace, justice, tolerance, and reconciliation,

[...]

Committed to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international law,

[...]

Article I(1)
Continuation

The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be „Bosnia and Herzegovina," shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. [...]

Article I(3)
Composition

Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter „the Entities").

Article III(1)
Responsibilities of the Institutions of Bosnia and Herzegovina

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

a) Foreign policy.

b) Foreign trade policy.

c) Customs policy.

d) Monetary policy as provided in Article VII.

e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina.

f) Immigration, refugee, and asylum policy and regulation.

g) International and inter-Entity criminal law enforcement, including relations with Interpol.

h) Establishment and operation of common and international communications facilities.

i) Regulation of inter-Entity transportation.

j) Air traffic control.

Article III(3)
Law and Responsibilities of the Entities and the Institutions

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

b) The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the

constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.

Article III(5)(a)

a) Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

[...]

Article IV(4)(e)

The Parliamentary Assembly shall have responsibility for:

[...]

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

43. The **Annex II to the Constitution of Bosnia and Herzegovina**

[...]

2. Continuation of Laws

All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina.

3. Judicial and Administrative Proceedings

All proceedings in courts or administrative agencies functioning within the territory of Bosnia and Herzegovina when the Constitution enters into force shall continue in or be transferred to other courts or agencies in Bosnia and Herzegovina in accordance with any legislation governing the competence of such courts or agencies.

4. Offices

Until superseded by applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law.

5. Treaties

Any treaty ratified by the Republic of Bosnia and Herzegovina between January 1, 1992 and the entry into force of this Constitution shall be disclosed to Members of the Presidency within 15 days of their assuming office; any such treaty not disclosed shall be denounced. Within six months after the Parliamentary Assembly is first convened, at the request of any member of the Presidency, the Parliamentary Assembly shall consider whether to denounce any other such treaty.

44. The **Constitution of the Republika Srpska**, as relevant, reads:

Article 68 has been replaced by Amendment XXXII (*the Official Gazette of RS* no. 28/94), reading as follows:

The Republic shall regulate and ensure:

[...]

6. property and obligation relations and protection of all forms of property, 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, market and planning;

[...]

45. The **Law on Status of the State Property Located in the Territory of the Republika Srpska and Under the Disposal Ban** *(the Official Gazette of Republika Srpska no. 135/10*, hereinafter: challenged Law), as relevant, reads:

Article 1

This law shall regulate the issue of the status of state property located in the territory of the Republika Srpska and under disposal ban.

Article 2

The property located in the territory of the Republika Srpska and under disposal ban is considered to be:

a) Immovable property which passed to Bosnia and Herzegovina pursuant to the international Agreement on the Succession Issues and is considered to be either owned or possessed by any level of governmental body or public organization in the Republika Srpska and

b) Immovable property for which the right of disposal and management belonged to the former Socialist Republic of Bosnia and Herzegovina before 31 December 1991,

which is considered to be either owned or possessed by any level of governmental body, public organization or any other body in the Republika Srpska.

Article 3

(1) In terms of this law, the property located in the territory of the Republika Srpska and under disposal ban is owned by the Republika Srpska.

(2) The ownership right over the property referred to in Article 2 of this law shall be evidenced in the land registers or any other public registers in favour of the Republika Srpska pursuant to a decision by a body competent for property law affairs or a court decision.

(3) The Attorney's Office of the Republika Srpska shall file a request to conduct proceedings and establish the criteria for meeting the conditions to establish the ownership right over the property referred to in Article 2 of this law in favour of the Republika Srpska to the competent administrative body for property law affairs.

(4) Subsequent to the issuance of a ruling of the body referred to in paragraph 3 of this article, the Attorney's Office of the Republika Srpska shall initiate proceedings to evidence the ownership right over the property which is the subject of this law in the land registers or any other public registers in favour it of the Republika Srpska.

(5) The Attorney's Office of the Republika Srpska shall, within six months from the date this law becomes effective, initiate proceedings to establish and evidence the ownership right over the property which is the subject of this law in the land registers or any other public registers in favour of the Republika Srpska.

Article 4

(1) The property referred to in Article 2 of this law shall be under management and disposal of the Government of the Republika Srpska (the „Government").

(2) The right of disposal and management, in terms of this law, shall be considered to be sale, exchange, transfer of usage, lease, establishment of easement, establishment of the right to build, establishment of concession, establishment of mortgage and other forms of disposal in accordance with the applicable regulations.

Article 5

The Government may conclude with the Council of Ministers of BiH an agreement on transfer of usage of the part of property required by the institutions of Bosnia and Herzegovina for conduct of affairs within their competence.

Article 6

The usage of property transferred to the institutions of Bosnia and Herzegovina shall involve the possibility for the user, as investor, to build, reconstruct, remodel or rehabilitate facilities and infrastructure on the transferred property or to put the land to purpose in accordance with the nature of its business.

Article 7

(1) After the need of the institutions of Bosnia and Herzegovina to use the transferred property ceases, the possession of the said property shall be returned to the competent bodies of the Republika Srpska in the condition as found.

(2) When the property referred to in paragraph 1 of this article is repossessed, the user shall not be entitled to any compensation for conceivable investments in remodelling of the immovable property.

Article 8

The Government referred to in Article 2 of this law may transfer ownership or usage of property to the units of local self-government, public institutions and public companies founded by the Government.

Article 9

The Government shall, by a separate agreement with the Council of Ministers of BiH and the Government of the Federation of BiH, regulate the issue of perspective military property, required by the Armed Forces of Bosnia and Herzegovina.

Article 10

The proprietary rights over the property referred to in Article 2 of this law, acquired on a legal basis and in a valid manner, shall undergo no changes.

Article 11

This law shall enter into force on the 8th day from the day of its publication in the Official Gazette of the Republika Srpska.

VI. Admissibility

46. In examining the admissibility of the present request, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

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.

47. The applicant seeks that the Constitutional Court establish that there is no constitutional basis for the National Assembly to enact the challenged Law and that the challenged Law is not compatible with lines 2 and 6 of the Preamble of the Constitution of Bosnia and Herzegovina and Articles I(1) and III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. In its reply the National Assembly stated that the general elections in Bosnia and Herzegovina had been conducted on 3 October 2010 and that the Presidency of Bosnia and Herzegovina and the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina were established in accordance with the results of the elections and that it must be deemed that the mandate of the then composition of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ceased. As the legislative body cannot be composed of the two Houses out of which the House of Peoples is composed of the members from the previous assembly, the applicant is not authorized to submit the request, and therefore the National Assembly proposed that the request be rejected. Furthermore, it stated that the Constitutional Court of Bosnia and Herzegovina is not competent to decide on the compatibility of the Entities' laws (as to the constitutional basis) with the laws of Bosnia and Herzegovina, decisions of the Parliamentary Assembly of Bosnia and Herzegovina, rulings and judgments of the ordinary courts or laws imposed by the High Representative for Bosnia and Herzegovina.

VI.1. Standing to sue

48. As to the allegation that the applicant Mr. Sulejman Tihić, the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at

the time of lodging the request was not authorized to submit the relevant request, the Constitutional Court recalls that in its the Decision on Admissibility and Merits *U 2/11* (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 2/11* of 27 May 2011, available at the website of the Constitutional Court www.ustavnisud.ba), it considered the same allegation and concluded that it was not well-founded taking into account the provisions of Article 1.3.a, 1.8 and 1.10 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08 and 32/10). According to the aforesaid provisions, the rights and obligations will commence on the day when the representative body has been constituted and when the elected holder of the mandate that has been elected in the direct and indirect elections has signed a declaration by which he/she will refuse or accept the mandate. As to the present case, it is undisputable that at the time of filing the request the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, being constituted by indirect elections, was not constituted in accordance with the results of general elections held on 3 October 2010 and that its mandate, having started on 14 of March 2007, was running until the 14 of March 2011 unless the new House of Peoples was constituted until that date.

49. This provision aims at securing the continuity of government and the permanence of the Parliamentary Assembly in the State, as the fact that bodies cannot be constituted after the elections should not affect the ability to exercise power and thus affect the functionality of the state. Furthermore, the applicant is not a simple delegate to the House of Peoples but he fulfilled the very official function of deputy chair which is referred to „the continuity of the functioning of the state" and thus to the right of action of persons authorized under Article VI(3)(a) of the Constitution of BiH. Namely, the Constitutional Court emphasizes that the constitutional task of authorized parties is not only „the authorization" to initiate proceedings for a review of constitutionality pursuant to the above referenced article but also implies a „constitutional task" to do so. Indeed, the Constitution of BiH has entrusted these subjects, as the representatives of the highest state and entity authorities, a task to initiate an institutional mechanism that safeguards constitutionality, given that the Constitutional Court cannot *ex officio* perform this duty, as it acts exclusively on „a principle of request". Should these subjects be denied the right to do so in the period from new elections until the constituting of the relevant authority, it is obvious that there would be a gap in the protection of constitutionality, and it was certainly not the intention of the framers of the Constitution.

50. Consequently, this objection is unfounded.

VI.2. *Res iudicata*

51. In response to the request, the National Assembly has made an objection that the present case has already been adjudicated and that it constitutes *res iudicata* (page 10, the second last paragraph). The Constitutional Court of BiH emphasizes that it has examined in the second partial decision no. *U 5/98* (of 18 and 19 February 2000, paragraphs 26 and 27) the constitutionality of the provisions of Article 68(6) of the Constitution of RS in the form of Amendment XXXII. However, in the instant case, the Constitutional Court has a task to examine the request for review of conformity of the disputed law with the Constitution of BiH, which is, for the first time, the subject of an abstract review of constitutionality before the Constitutional Court of BiH. These involve two different cases and there is no possibility for the challenged Law to share legal fate of the decision in the above referenced case *U 5/98-II,* because these two requests are not identical.

52. Consequently, this objection is unfounded.

VI.3. Objection as to jurisdiction *ratione materiae* in part relating to the examination of the constitutional basis for the enactment of the challenged Law

53. In respect of the objection that the Constitutional Court has no jurisdiction to decide whether the entity law, „in terms of constitutional grounds, is in compliance with the laws of Bosnia and Herzegovina, the decisions of the Parliamentary Assembly of Bosnia and Herzegovina, rulings and judgments of regular courts or laws imposed by the High Representative", the Constitutional Court reiterates that the present case concerns the proceedings of an abstract review of constitutionality under Article VI(3)(a) of the Constitution of BiH, *i.e.* the Constitutional Court emphasizes that the consideration of the existence or absence of a „constitutional basis" is *par excellence* jurisdiction of the Constitutional Court. Namely, the basic principle of constitutionality, which is inherent in the rule of law principle under Article I(2) of the Constitution of BiH, implies that any law has its basis in the Constitution. Indeed, the term „constitution", from the point of view of the Constitutional Court of BiH, implies the Constitution of BiH, as it is the standard of review of constitutionality. Therefore, the standard of review of constitutionality cannot be any other legal act at the level of BiH nor the Constitutional Court of BiH may review conformity of the entity laws with the constitutions of the Entities (compare, Decision *AP 724/07* of 14 October 2009, paragraph 51).

54. However, in the instant case, the Constitutional Court of BiH notes that the applicant does not seek a review of the compatibility of the challenged Law with other laws or legal acts of BiH, but argues that the Republika Srpska has no constitutional basis for

enacting the challenged Law (page 10 of the request, the last paragraph). It is true that the applicant analyzes the compatibility of the disputed Law with „the laws of the High Representative" (page 10, second paragraph); however, it follows from the Constitution of BiH (Article III(3)(b) and Article VI(3)(c)) that the Entities must comply with the decisions of the institutions and the laws of Bosnia and Herzegovina according to the principles of constitutionality of all legal acts and the rule of law.

55. Consequently, this objection is ill-founded, as well.

VI.4. As to the objection *ratione personae* in relation to the right to property

56. In response to the request of 15 February 2011, the National Assembly has noted that the applicant cannot invoke the constitutional right to property under Article II(3) k of the Constitution of BiH and 1 Protocol No. 1 to the European Convention, for it is *ratione personae* incompatible. The National Assembly is of the opinion that the State, as a public-law person, does not enjoy the protection under this Article but that this is an exclusive right of private natural and legal persons.

57. The Constitutional Court emphasizes that in the case *AP 39/03* (of 27 February 2004, paragraph 15), it has changed its previous position *vis à vis* the right of action of public and legal persons, which also include certain administrative-territorial levels of government (state, entities, cantons, *etc*.), in terms of the enjoyment of constitutional rights and freedoms. On that occasion, the Constitutional Court of BiH stressed that the European Convention affords a minimum level of protection in terms of human rights and fundamental freedoms, while the Constitution of BiH affords a much broader level of protection. Guided by this conclusion, the Constitutional Court has extended the enjoyment of constitutional rights and freedoms so as to include the public-law legal persons, finding that there is reasonable justification to treat this protection at the international level differently from the protection within the constitutional law context.

58. The Constitutional Court of BiH concludes that the State, as an administrative-territorial level of government, may enjoy the right to property. However, whether in the present case the State has a protected right to property and whether there has been a violation of the mentioned right, the Constitutional Court will consider it on the merits of the case.

59. Consequently, this objection is ill-founded, as well.

VI.5 Conclusion as to the Admissibility of the case

60. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Constitutional Court's Rules, the Constitutional Court establishes that the request is admissible as it has been submitted by an authorized person and as there is no reason under Article 17(1) of the Rules of the Constitutional Court for rendering the request inadmissible.

VII. Merits

61. The applicant considers that there is no constitutional basis for the enactment of the challenged Law by the National Assembly, since the challenged Law is not compatible with lines 2 and 6 of the Preamble of the Constitution of Bosnia and Herzegovina and Article I(1) and Article III(b) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

62. State property, although similar in its structure to civil-legal private property, is a specific legal concept enjoying a special status for this reason. State property is characterized by the public law nature of the the relationship between the subjects and the use of that property as well as its title holder. It includes, first of all, movable and immovable objects in the hands of public authorities and can include furthermore a „public good" (sea water and seabed, river water and river beds, lakes, mountains and other natural resources, public transport networks, traffic infrastructure, *etc*.). It, by its nature, primarily serves all people in the country. As such, the „public good" may be exempted from legal transaction (*res extra commercium)* due to its importance, as it is the only way to preserve and protect it.

63. In other words, state property is a means of exercising public authority and is therefore closely related to the territorial and substantial competences of the public bodies, namely to the territorial integrity and the sovereignty of the state. Although the Constitution of Bosnia and Herzegovina distributes the responsibilities between the state and the entities it does not entail any provision related to state property.

64. Given the aforementioned, the Constitutional Court concludes that the question of whether the challenged law has a constitutional basis requires examining the whole Constitution as well as its context. Indeed, the complexity of the constitutional order of BiH indicates a *sui generis* system. Therefore, it appears impossible to deduce any regulation competence, such as in the *amicus curiae* opinion of the Venice Commission, from the form of the State and furthermore the comparison with other countries should be taken into account with great caution. In the light of the distribution of competences

resulting from this analysis, the Court will examine the challenged Law. This will allow answering the questions of the title holder of the competence to regulate the state property and of the extent or the proportion of this competence.

VII.1. The complex distribution of responsibilities in the Constitution of BiH

65. Article I(3) of the Constitution of BiH defines the structure of BiH, as a State composed of the two Entities. In addition, the Brčko District of BiH exists as a separate unit of the local self-government. The basic distribution of responsibilities between BiH and its Entities is stipulated in Article III(1) and Article III(3)(a) of the Constitution of BiH, which enumerates the State responsibilities, while the residual competencies are prescribed in favour of the Entities.

VII.1.1. Article III

66. The Constitutional Court reiterates that Article III of the Constitution of BiH regulates the issue of responsibilities and relations between the Institutions of Bosnia and Herzegovina and the Entities and specifies that paragraph 1 of this Article prescribes the responsibilities of the Institutions of Bosnia and Herzegovina, which include foreign policy, foreign trade policy, customs policy, monetary policy, 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. These are the exclusive responsibilities of the Institutions of Bosnia and Herzegovina. Paragraph 2 of this Article prescribes the responsibilities of the Entities, which include also the right to establish special parallel relationships with neighbouring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina, as well as the right of each Entity to enter into agreements with states and international organizations with the consent of the Parliamentary Assembly, though the Parliamentary Assembly may provide by law that certain types of agreements do not require such consent. The aforementioned paragraph also prescribes an obligation of the Entities to provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honour the international obligations of Bosnia and Herzegovina and to provide a safe and secure environment for all persons in their respective jurisdictions. This paragraph does not contain any other list of exclusive responsibilities of the Entities. However, the third paragraph of this Article prescribes that all governmental functions and powers not expressly assigned in this Constitution to the Institutions of Bosnia and Herzegovina will be those of the Entities.

67. In its further analysis of the provisions of Article III of the Constitution of BiH, the Constitutional Court notes that, although paragraph 3 of Article III of the Constitution of BiH prescribes that all governmental functions and powers not expressly assigned in this Constitution to the Institutions of Bosnia and Herzegovina will be those of the Entities, it establishes also a clear normative hierarchy: Article III(3)(b) prescribes that the Entities and any subdivisions thereof will comply fully with the 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. Thus, there is a hierarchy between the state constitution and legal systems of the entities. From this relation arises a system of derogation, starting from the very constitution of the entity, which the Constitutional Court of BiH clearly demonstrated in the case no. *U 5/98*: constitutional provisions of the entity cannot be inconsistent with the provisions of the Constitution of BiH. Also, each level of government has its own competence, determined or determinable by the Constitution of BiH. The Constitution of BiH, and not the entity's constitution, is a guarantor of the relation of distribution of responsibilities between the State, on the one hand, and the entities, on the other hand. Such a relation can only be amended in a way as stipulated by the Constitution of BiH *(inter alia*, the provisions of Article III(5) and Article X of the Constitution of BiH). The legal system of the entities, including their constitutions, can treat just those competences conferred upon them by the Constitution of BiH.

68. Specifically, for the abstract review of constitutionality of an entity law it is not important whether or not such a law was enacted on the basis of certain entity constitutional grounds, even provided that such a constitutional norm has already been examined before the Constitutional Court of BiH in terms of an abstract review of its constitutionality. Certainly, this refers to the provision of Article 68 of the RS Constitution, in the wording of Amendment XXXII, which was the constitutional basis for the National Assembly of RS to enact the challenged Law. The Constitutional Court has concluded, in its decision *U 5/98-II* (of 18 and 19 February 2000, paragraphs 26 and 27) - in the context considered - that this provision is in compliance with the Constitution of Bosnia and Herzegovina, which is emphasized by the National Assembly of RS. However, the obligations of the entity legislative and executive authority (executive and judicial authorities) are, on the one hand, to secure that the entity legal norms are not applied arbitrarily, and that the standards under the Constitution of BiH are taken into account when interpreting the entity norms, including the interpretation of the norms of the Constitution of RS. Accordingly, an entity constitutional norm can formally be constitutional in one context but not in other. Moreover, the constitutional entity provision may be concretized in unconstitutional law if the superior standards under the Constitution of BiH (or other

governmental act, which in this case is superior) are not taken into account when applying and interpreting it. A similar conclusion holds true when it comes to the implementation of a specific act: a constitutional law can be implemented in an unconstitutional manner. Otherwise, the jurisdiction of the Constitutional Court of BiH for the purpose of Article VI(3)(a) of the Constitution of BiH to control the constitutionality of entity legal acts of the lower legal force compared to the entity constitutions would be superfluous („Whether any provision of the Entity's constitution or law is consistent with this Constitution"). Based on the foregoing, one can clearly conclude that an entity law must be declared unconstitutional if that law normatively regulates an issue which does not belong to that entity under the Constitution of BiH, regardless of the fact that the entity has invoked certain constitutional basis under its constitution. In that event, there is no „constitutional basis" for the enactment of the law in terms of competence of the entities which is an essential element of the so-called formal constitutionality of laws. In such cases, it is pointless to argue about the constitutionality of certain constitutional provisions, given that the entire matter falls outside the competence of the legislative body of the entity (in this regard, compare, for example, Judgment of the Constitutional Court of FBiH, no. *U 26/08* of 14 April 2009). If, however, there is a competence of the entities, then the task of the Constitutional Court of BiH is to review the substantive constitutionality, *i.e.* whether the incorporated normative solutions are consistent with substantive-legal standards under the Constitution of BiH. Indeed, the legal situation is much more complicated in the substantive-legal areas in which there is a common framework or competitive competence of the state and entities. In such cases, the task of the Constitutional Court of BiH is to clarify the extent to which the State and the entity have the right to derive their powers from the respective constitutional competence. Consequently, the residual competencies of the entities must be interpreted in the light of this hierarchy. In addition, paragraph 5(a) entitles Bosnia and Herzegovina to assume „additional responsibilities". According to the interpretation by the Constitutional Court, there are three situations in which the responsibilities can be taken over, as follows: the responsibilities for (1) such matters that are agreed by the Entities; (2) such matters that are provided for in Annexes 5 through 8 to the General Framework Agreement; and (3) such matters that are necessary to preserve the sovereignty, territorial integrity, political independence and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the Institutions of Bosnia and Herzegovina according to Articles III(3) and III(5) of the Constitution of Bosnia and Herzegovina (see, Constitutional Court, Decision no. *U 26/01* of 28 September 2001, published in the *Official Gazette of BiH* no. 4/02).

69. Having in mind the aforementioned, the list of exclusive responsibilities of the Institutions of BiH under Article III(1) of the Constitution of BiH, *i.e.* the responsibilities

assigned to the Entities under Article III(3)(a) of the Constitution of BiH, cannot be construed independently of other constitutional provisions. The Constitutional Court recalls its position that Article III(1) of the Constitution of Bosnia and Herzegovina does not contain a complete catalogue of the responsibilities of the Institutions of Bosnia and Herzegovina, but there are responsibilities of the Institutions of Bosnia and Herzegovina in other regulations of the Constitution as well, in particular in connection with Article IV(4)(e) and V(3), *i.e.* that Article IV(4)(e) of the Constitution of Bosnia and Herzegovina may encompass a broader scope of responsibilities than those enumerated in Article III(1) of the Constitution of Bosnia and Herzegovina (in this regard, see, Constitutional Court, Decision no. *U 25/00* of 23 March 2001).

VII.1.2. Other relevant provisions

70. There is a number of other constitutional norms which also regulate the responsibilities of the state institutions and the entities [*e.g.* Articles I(4), I(7), II(1), II(6), and III(4) of the Constitution of BiH, *etc*; see, in this regard, Decision of the Constitutional Court of BiH no. *U 5/98-II*, paragraph 12]. Furthermore, the provision of Article IV(4) of the Constitution of BiH prescribes the powers of the Parliamentary Assembly to enact legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution and to decide upon the sources and amounts of revenues for the operations of the Institutions of Bosnia and Herzegovina and to approve a budget for the institutions of Bosnia and Herzegovina and to decide whether to consent to the ratification of treaties and such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.

71. In the opinion of the Constitutional Court, this list must be completed by the provision of Article I(1): „The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be „Bosnia and Herzegovina," shall continue its legal existence under international law as a state, (…)". The term „Bosnia and Herzegovina", under the Constitution, implies the entire state as a subject of international law. This conclusion is clearly corroborated by line 6 of the Preamble of the Constitution of Bosnia and Herzegovina and Articles I(1), II(7) and VIII(1) of the Constitution of Bosnia and Herzegovina. The State of Bosnia and Herzegovina, as a subject of international law, is represented by the state level of government in functional terms, first and foremost through the responsibilities of the Presidency of Bosnia and Herzegovina for „foreign and foreign trade policy" [Article V(3) in conjunction with Article III(1)(a) and (b) of the Constitution of BiH], the responsibility of the Parliamentary Assembly to ratify international agreements [Article IV(4)(d) of the Constitution of BiH], and the role of the Constitutional Court

as the guardian of the international subjectivity and territorial integrity of BiH (Article VI(3), the first sentence, the Constitution of BiH). The Constitution of Bosnia and Herzegovina treats „Bosnia and Herzegovina" in terms of the state and legal continuity with respect to the Republic of Bosnia and Herzegovina. That is not visible solely from the explicit provision of Article I(1) of the Constitution of Bosnia and Herzegovina, but also from Article I(7)(c) of the Constitution of Bosnia and Herzegovina and also from the declaration given in the name of the Republic of Bosnia and Herzegovina, which approves the Constitution of Bosnia and Herzegovina. This continuity is confirmed in the case-law of the Constitutional Court (see Decision *U 5/98-III*, paragraph 29).

72. In view of the aforementioned, it is clear that the term „Bosnia and Herzegovina" under the Constitution of Bosnia and Herzegovina, includes several meanings: the highest level of government in Bosnia and Herzegovina, called „the government at the level of Bosnia and Herzegovina", Bosnia and Herzegovina, as a subject of international law, *i.e.* as a sovereign state overall, and as the legal successor of the (S) Republic of Bosnia and Herzegovina. Moreover, the term „Bosnia and Herzegovina" designates sometimes the state as a whole, the global system comprising the central institutions and the entities (for instance in Article I(1)), and sometimes the higher level of government opposed to the lower ones represented by the entities. However, the Constitution does not foresee different organs to act in behalf of the two functions of the state institutions; they are both unified in the same institutions. This idea of the existence of „three levels" in federal states or of the double function of the central level has been highlighted namely by Hans Kelsen and Georges Scelle. It can be helpful in the case at hand as it explains that the identity and the continuity between the Republic of Bosnia and Herzegovina and the former SFRY with Bosnia and Herzegovina leads to the conclusion that pursuant to the Succession Agreement the State of Bosnia and Herzegovina has been conferred with the state property mentioned in this agreement, *i.e.* it is the title holder of that property.

73. The Constitutional Court reminds in this regard the aforementioned characteristics of state property as a means of exercising public authority and as closely related to the territorial and substantial competences of the public bodies, namely to the territorial integrity and the sovereignty of the state. Yet, territorial integrity and sovereignty are clearly state attributes as it results from line 6 of the Preamble in conjunction with Article III(2)a and III(5)a. According to these provisions, the state property reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina. Therefore it forms an integral part of the constitutional attributes and powers of the state.

74. This is the context in which the Constitutional Court has to examine the challenged law in a next step.

VII.2. *Materia legis* of the challenged Law and the question of the property title holder

75. The challenged Law regulates the issue of state property located in the territory of Republika Srpska and under the disposal ban. The property located in the territory of the Republika Srpska and under disposal ban is considered to be*: a) immovable property which passed to Bosnia and Herzegovina pursuant to the international Agreement on Succession Issues and is considered to be either owned or possessed by any level of governmental body or public organization in the Republika Srpska, and b) immovable property for which the right of disposal and management belonged to the former Socialist Republic of Bosnia and Herzegovina before 31 December 1991, which is considered to be either owned or possessed by any level of governmental body, public organization or any other body in the Republika Srpska"* (Article 2). The exception to this property is *perspective military property, required by the Armed Forces of Bosnia and Herzegovina* (Article 9 of the Law).

76. Pursuant to Article 3(1) of the challenged Law, the previously mentioned property will be owned by the RS, which means that the law regulates the change of the title holder from BiH and the former SRBiH to the RS. The real rights over the mentioned property, acquired on the legal grounds and in a valid manner, are exempt from the transfer of ownership. Paragraph 2 and onwards of this Article regulates the procedural competence of the RS authorities to initiate the procedure of the registration of the right of ownership and the entry into books of the same right in favour of the RS. Article 4 defines the scope of the right to manage and dispose of the registered property and determines this notion in functional terms as well (the RS Government). Articles 5 through 7 of the challenged Law represent in a certain manner the provision *specialis* with regard to Article 4, as it grants the right to the RS Government to cede certain property to the government at the state level and prescribes the rights and obligations arising from that relationship. Article 8 allows the Government to cede ownership of a property or to grant the right to dispose of a property to a unit of local government founded by the Government of the RS.

77. In view of the aforementioned provisions, it follows that the subject-matter regulated by the challenged Law is „the immovable property which Bosnia and Herzegovina got on the basis of the International Agreement on Succession Issues„ and „the immovable property over which the former SRBiH had the right to manage and to dispose of"; therefore, challenged Law regulates the state property of which „Bosnia and Herzegovina" and „the former SRBiH" are title holders transferring it to the RS.

78. According to the analysis of the challenged Law, it follows that the RS took over the responsibility to regulate, on the one hand, the issue of denying „Bosnia and Herzegovina" the right of ownership over „the state property", and the legal transformation thereof into the Entity property, and, on the other hand, the right to protection of property, the ceding of the right to property and the use of that property. In its reply to the request, the RS National Assembly stated that the Constitution of BiH does not provide for the responsibility of BiH to regulate the issue of state property and, given the residual nature of the Entities' responsibilities, such responsibility then belongs to the RS. As claimed, that is precisely for this reason that the RS has incorporated the constitutional provision of Article 68(1) (6) of the Constitution of RS. Furthermore, it is stated that the responsibility of BiH for regulating this issue cannot be derived from any other act but the Constitution of BiH. On the other hand, the Office of the High Representative and the Venice Commission hold that there is no *expressis verbis* constitutional norm that regulates the issue of responsibility for the distribution of property in BiH and/or the very distribution of property.

79. The Constitutional Court of BiH agrees with the opinion of the RS National Assembly that the Constitution of BiH does not contain an explicit provision establishing the responsibility of BiH to regulate the issue of state property which belongs to BiH within the meaning of Article 2 of the challenged Law. In that sense, the Constitutional Court of BiH supports the opinion of the Office of the High Representative and the Venice Commission.

80. However, the Constitutional Court of BiH cannot support the position of the RS National Assembly for this issue to automatically fall within the so-called residual competencies of the Entities. In this regard, reference is made to the above mentioned position that Article III(1) of the Constitution of BiH does not contain a complete catalogue of the responsibilities of the Institutions of Bosnia and Herzegovina, but there are responsibilities of the Institutions of Bosnia and Herzegovina also in other provisions of the Constitution. Namely, on the basis of the previous reasoning about the continuity between the (S) Republic of Bosnia and Herzegovina and Bosnia and Herzegovina, it is clear that BiH is the title holder of this property. Pursuant to Article I(1) of the Constitution of BiH, BiH is entitled to continue to regulate „the state property" of which it is the title holder, meaning all the issues related to the notion of „the state property", both in terms of civil law and public law. This conclusion is the sole possible logical and substantive content of the notion of „identity and continuity" under the quoted provision. In addition, the Constitutional Court reiterates that though any level of government enjoys constitutional autonomy, the Entities' constitutional competence is subordinated to the obligation to be in compliance with the Constitution and „the decisions of the Institutions

of BiH." This clearly arises from the provisions of Article III(3)(b) of the Constitution of BiH. Furthermore, the right of the State of BiH to regulate the issue of state property also stems from the provisions of Article IV(4)(e) of the Constitution of Bosnia and Herzegovina. Therefore, taking into account all the conclusions reached above, primarily that the State of BiH is entitled to continue to regulate the state property, *i.e.* that the State of BiH is the title holder of the state property, and that the provisions of Article IV(4)(e) of the Constitution of Bosnia and Herzegovina prescribe that the Parliamentary Assembly will be responsible for regulating such other matters as necessary to carry out its duties and that the state property reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina, it is undisputed that the aforementioned provision gives the State of BiH, *i.e.* the Parliamentary Assembly, competence to regulate the issue of state property. Therefore, this concerns the exclusive responsibility of BiH derived from Article I(1), Article III (3)(b) and Article IV(4)(e) of the Constitution of BiH.

81. Taking into account the aforementioned, the Constitutional Court concludes that the Republika Srpska enacted the challenged Law contrary to both Article I(1) of the Constitution of BiH and Article III(3)(b) of the Constitution of BiH, which reflects the principle of constitutionality, and Article IV(4)(e) of the Constitution of BiH, which gives the Parliamentary Assembly competence to regulate such other matters as necessary to carry out the duties of the State, as the matter falls under the exclusive responsibility of BiH to regulate the issue of property referred to in Article 2 of the challenged Law. For the aforesaid reasons, the challenged Law is unconstitutional. The whole law cannot remain in force. This conclusion cannot be affected by the fact that the Brčko District of Bosnia and Herzegovina enacted the Law on Public Property of the Brčko District of Bosnia and Herzegovina, with its specific arrangements. This law is not challenged before the Constitutional Court of BiH nor is it the subject of constitutional review. Therefore, the Constitutional Court is not called upon to conduct an examination as to the competence for enacting this law. Any contrary approach may be considered as prejudging the mentioned issue and would be in contravention of the method of work of the Constitutional Court of BiH, which requires „the submission of requests".

VII.3. The proportions of the state property and the positive obligation of the State of BiH

82. The Constitutional Court reiterates that the state property has a special status that encompasses, on the one hand, movable and immovable objects in the hands of public authorities used to exercise that authority and, on the other hand, the state property can include a public good, which, by its nature, primarily serves all people in the country

(running water, protection of climate-related living conditions and protection of other natural resources such as forests and state infrastructural networks within the meaning of Annex 9 to the General Framework Agreement for Peace in BiH, *etc.*). Such property reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina. Furthermore, the interest of BiH should not be disregarded when it comes to preserving its „public good", as a part of the state property serving all citizens of BiH and as a part which is not essential in order for specific competence of certain administrative-territorial level of government to be effectively exercised in the state. In addition, this property may serve as „another means for financing the expenses necessary for performing the operations of the Institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina„ within the meaning of Article IV(4)(b) in conjunction with Article VIII(3) of the Constitution of Bosnia and Herzegovina (in this regard, see the Decision of the Constitutional Court of BiH no. *U 1/08* of 25 January 2008, paragraph 15).

83. The Constitutional Court does not support the position of the applicant that the exclusive responsibility of BiH to regulate the issue of immovable property (*„immovable property passed over to* […] *on the basis of international Agreement on Succession Issues and „immovable property over which former SRBiH had the right of disposal and management until 31 December 1991)* may be exercised without taking into account the whole normative context of the Constitution of BiH, as an essential factor when interpreting the Constitution of BiH and the responsibilities of BiH in connection with this problem, even in the case where the need of BiH to posses the state property is taken into consideration as stated in the present Decision. Namely, according to the opinion of the Constitutional Court of BiH, there is a positive obligation of the State of BiH to take into consideration, when exercising these responsibilities, the whole constitutional order of BiH. A positive obligation exists in the case where BiH takes over international obligations and also in the case where BiH regulates the issues related to the property of former SRBiH, as the functionality of BiH, in its capacity as a state, is not a simple sum of functionalities of territorial-administrative levels of government and competencies thereof but rather the harmony of all levels of government being reflected, *inter alia*, in the normative hierarchy, which the Constitution of BiH, *expressis verbis,* establishes in Article III(3)(b) of the Constitution of BiH and in Article XII(2) of the Constitution of BiH. It incorporates, *inter alia*, the principle of cooperation, coordination and mutual comprehension amounting to „justice and tolerance" in the best possible way (the second line of the Preamble), „peaceful relations" (the third line of the Preamble), promotion of the general welfare and economic growth (the fourth line of the Preamble), and preservation of the sovereignty, territorial integrity, and political independence (the sixth line of the

Preamble). The prerequisite for the aforesaid is the compliance with the competencies of the Entities and protection thereof, given the fact that the Constitution of BiH, as it has already been stated, is the one to protect the competencies of both the State and the Entities and to support the concept of effective exercise of the mentioned competencies. For this very reason and pursuant to the basic provision of Article III and other provisions of the BiH Constitution prescribing the Entities' competencies (for instance, Article I(4), Article I(7), Article II(1)…*etc*. of the Constitution of BiH in conjunction with Article I(3) and Article III(3)(b) of the Constitution of BiH - the first sentence), Bosnia and Herzegovina, in exercising the responsibilities relating to the property the title holder of which is BiH, is obliged to take into consideration the interests and needs of the Entities, so that they can also effectively exercise their public powers which are connected with their competencies. For, „the state property" is one of the essential means for the public powers to be exercised. At the same time, the State and the Entities must take into account the principle of proportionality, as an important factor for resolving this issue.

84. Furthermore, the Constitutional Court is aware of the fact that the State tried to resolve this issue by the Decision of the BiH Council of Ministers of December 2004 on the formation of the State Property Commission. The aforementioned Commission was tasked to select the criteria for the purpose of establishing which property is owned by the State and which property is owned by the Entities and the Brčko District of BiH. In addition, the State Property Commission was tasked with preparing the path leading to the legislation on the state level and legislation on the lower administrative-territorial level regarding the ownership rights, management and other issues related to the state property. Moreover, the High Representative, in order to help this process, passed the relevant laws on the temporary prohibition of the disposal of state property. This is a positive step as a state expert body was established, so that both the Entities and the Brčko District of BiH may articulate their respective interests. Nevertheless, this issue has not been resolved yet. This issue was neither resolved at the time of the establishment of the mentioned Commission nor at the time of the entry into force of the Constitution of BiH, *i.e.* on 14 December 1995. Therefore, there is a true necessity and positive obligation of BiH to resolve this issue as soon as possible.

VII.4. Allegations with regard to the right to property

85. Taking into account the preceding conclusions, the Constitutional Court considers that it is not necessary to deal with the issue of violation of other norms referred to in the request.

VIII. Conclusion

86. In view of the aforementioned, the Constitutional Court of BiH concludes that the Republika Srpska enacted the challenged Law on Status of State Property located in the territory of Republika Srpska and is under the Disposal Ban contrary to Article I(1), Article III(3)(b) and Article IV(4)(e) of the Constitution of BiH, as the matter falls under the exclusive responsibility of BiH to regulate the issue of property referred to in disputable Article 2 of the challenged Law. For these reasons, the challenged Law is unconstitutional. The whole law cannot remain in effect.

87. Having regard to Article 61(1) and (2) and Article 63(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

88. Considering the Decision of the Constitutional Court in this case, the Constitutional Court will not examine separately the request for an interim measures.

89. Pursuant to Article 41 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of Judge Zlatko M. Knežević shall make annex to this decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

Seperate Dissenting Opinion of Judge Zlatko M. Knežević

I

By its decision, the Constitutional Court of Bosnia and Herzegovina, granted the request for the review of constitutionality lodged by Mr. Sulejman Tihić, purportedly the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request, stating as follows:

- It is hereby established that the Republika Srpska lacks a constitutional competence to regulate the legal subject-matter of the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban (*the Official Gazette of the Republika Srpska*, no. 135/10), as this, pursuant to Article I(1), Article III(1)(b) and Article IV(4)(e) of the Constitution of BiH, falls within the responsibility of Bosnia and Herzegovina.
- that, pursuant to the provisions of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Law on the Status of State Property Located in the Territory of the Republika Srpska shall cease to be effective, as already stated in the decision.

II

Regretfully I must note that I had disagreed with the majority when it comes to the decision-making on the lodged request and with the final decision as well, for the reasons mentioned, in principle, in this Separate Dissenting Opinion, as I had presented them in detail at the sessions of the sessions of the Constitutional Court of Bosnia and Herzegovina on a number of occasions.

Applying logic, my arguments for dissenting opinion can be brought down to the following reasons:

- the applicant's standing to sue;
- lack of power in the Constitution of Bosnia and Herzegovina by way of which the Constitutional Court may embark on distributing constitutional responsibilities between the state of Bosnia and Herzegovina and the Entities, if such distribution of responsibilities has not been specified in the text of the Constitution;
- absence of powers in the text of the Constitution of Bosnia and Herzegovina on the part of the state of Bosnia and Herzegovina to regulate the legal status of property and property rights;

- the previous decision of the Constitutional Court of Bosnia and Herzegovina which confirmed the responsibility of the Entities to regulate legal status of property and property rights in the territory of the Entities; and
- failure to consider different (even discriminatory) manners of regulating the same subject-matter in other areas of Bosnia and Herzegovina, of lower level than the Entities (in particular the Brčko District of Bosnia and Herzegovina).

III

1. As to the standing to sue (the right of one to institute a dispute) in the case at hand, it is quite easy to distinguish the presence or absence of the applicant's standing to sue.

Namely, the Constitution of Bosnia and Herzegovina, in this type of request, recognizes as an authorized applicant also the Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. So, the only question here is whether Mr. Sulejman Tihić had held that function at the time of lodging the request.

Through brief analysis we note the following: Mr. Sulejman Tihić had lodged the request on 6 January 2011. The general elections in Bosnia and Herzegovina (in addition to the Entities and the election of the authorities at the state level – the Presidency of Bosnia and Herzegovina and the House of Representatives) had been conducted on 3 October 2010. Thus, the mandate of the representative bodies had ceased at least one day before 3 October 2010. The Presidency and the House of Representatives had been constituted before 6 January 2011. The House of Peoples, under the principle of delegation, is constituted under special procedure and by indirect elections. The claim that the mandate of Mr. Tihić had existed on 6 January 2011 is, to say the least, surprising – we have the House of Representatives of newly elected representatives who had received their respective mandates at the General Elections and the purportedly existing House of Peoples constituted indirectly by the convocations of the Entities' Assemblies which mandates had ceased and new ones had been elected?! This is clearly related also in the Election Law of Bosnia and Herzegovina, Article 1.3.a.(2), which reads: „Mandate of the members of the representative bodies elected in the regular elections shall be four years and shall commence from the day of the publication of the election results in *the Official Gazette of BiH*." All far-fetched interpretations regarding „the continuity of the functioning of the state" do not relate to the representative bodies because the Election Law prohibited the length of the mandate exceeding four year. Otherwise, we would be facing a legally unsustainable situation whereby one chamber (the House of Representatives) has legitimacy obtained on the basis of „the new" elections, and the other indirect one (the House of Peoples) neither has „the new" legitimacy nor do the convocations of the Assemblies which had elected it exist?!

In all other cases, the Constitutional Court is extremely mindful of the issue of the standing to sue. The Constitutional Court strictly scrutinizes real life problems of citizens who address it with appeals, in terms of whether an applicant is authorized to lodge an appeal, and if not, then it reviews it uncompromisingly on an admissibility basis.

As to this request, the approach is not the same.

According to my deep belief, when it comes to examining admissibility through formal elements of the initial act, there is no difference between a citizen who lodges an appeal and an official who files a request for review of constitutionality; they are all subject to the same rules. Unless they are not, as is the case here!

2. As to the lack of jurisdiction of the Constitutional Court to decide on the distribution of the constitutional responsibilities between the state and the entities (if the Constitution does not specify the responsibility), in particular, without excessive need for argumentation, I refer to the provision of Article VI(3)(a) line 2, which vests the power in the Constitutional Court to decide *whether any provision of an Entity's constitution or law is consistent with this Constitution*.

So, the Constitutional Court may have decided whether some article/articles, and even a law in its entirety, is consistent with the Constitution of Bosnia and Herzegovina.

However, it may not have done so as such a power does not exist in the Constitution, that is, for it (the Constitutional Court) to distribute constitutional responsibility or to adopt (it decision by way of which it (the Constitutional Court) would establish distribution of the competence of different constitutional categories.

Therefore I find it acceptable (regardless of whether I agree or disagree with the decision) to declare inconsistent with the Constitution an article/articles or an entire law, which is challenged, but not that the Constitutional Court assumes a role of a legislator and amends the explicit provision of the Constitution on what competences belong to the state and what (everything else) to the Entities.

This very dangerous tendency, according to which the Constitutional Court, through decisions of nine judges, takes the liberty to interpret the text of the Constitution, while simultaneously not only forming but essentially adopting new provisions of the Constitution, casts a serious doubt on the legitimacy of the representatives obtained at the General Elections and who are the only ones entitled to amend the Constitution.

3. The Constitution of Bosnia and Herzegovina does not contain a provision bestowing upon any body of the state of Bosnia and Herzegovina the competence to regulate, through legislative or other normative activity, property, property rights and the protection of property or property rights. Differing interpretations are solely interpretations derived from some other provisions of the Constitution.

4. Further, I also refer to the Decision of the Constitutional Court no. U 5/98 (the second partial decision) upholding the competence (power) of an Entity (in particular the Republika Srpska), which reads that Article 68 of the Constitution of the Republika Srpska, as amended by Amendment XXXII item 6, is! in compliance with the Constitution of Bosnia and Herzegovina. That article served as the constitutional basis for the enactment of this law, and it reads, among other things, as follows: „[...] the Republika Srpska shall regulate, *inter alia*, property and obligation relations and protection of all forms of property [...]". This Decision (*U 5/98* – the second partial decision) upholds the constitutional basis for the enactment of the law and overthrows hypothesis that the Republika Srpska has no competence to enact this law. At the same time, they may have decided about whether individual provisions of law are consistent with the Constitution of Bosnia and Herzegovina, but I have already spoken on that matter.

5. And to conclude these principled remarks, I am particularly concerned about discrimination in the legislative activity, as to property as the subject-matter of this constitutional dispute, being completely tolerated in other territorial-political categories as is the Brčko District of Bosnia and Herzegovina. Namely, the Property Law of the Brčko District of Bosnia and Herzegovina exclusively applies the territorial principle and all property! even including the property acquired in this manner (through the Succession Agreement), which is located in the territory of the District, belongs to the District! By the way, with the direct participation of OHR, as the Deputy High Representative is at the same time the Supervisor of the Brčko District of Bosnia and Herzegovina.

Finally, I am saddened that the issue of a constitutional gap, with its serious consequences for the citizens of Bosnia and Herzegovina and its constitutional system (and the constitutional system of Bosnia and Herzegovina is, in addition to the Constitution of Bosnia and Herzegovina, made up of the Constitutions of the Entities, including some other constitutional sources of domestic and international nature), has not been resolved in a way, which, according to my deep belief, is Bosnia-Herzegovina's way.

In accordance with the Constitution of Bosnia and Herzegovina, and if there is no constitutional provision, then through the distribution of rights and competencies between the state and the Entities, or to paraphrase the opinion of the Venice Commission, [...] the state and the entities shall have the right to property in accordance with their respective needs and the territorial-functional principle.

As in discussions, so will I repeat now the opinion of the American Professor of Constitutional Law Mark A. Graber who, in his brilliant essay *Dred Scott and the Problem of Constitutional Evil*, which is my guide on how one should not to behave when interpreting the constitutional norms, noted the following:

„Constitutional theorists of all political persuasions often display less interest in determining what is constitutional than in making arguments that they believe will help the social movements they favor achieve desired ends constitutionally."

The task of the Constitutional Court is to interpret the Constitution and not to stretch the membrane of constitutionality to where it does not belong.

For these, as well as for other reasons of minor importance, I was against the decision of the majority of the Constitutional Court of Bosnia and Herzegovina.

Case No. U 9/12

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Milorad Živković, the Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request, for review of constitutionality of Article 18(d)(4) of the Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children

Decision of 31 January 2013

CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following Judges:

Ms. Valerija Galić, President

Mr. Miodrag Simović, Vice-President

Mr. Tudor Pantiru, Vice-President

Ms. Seada Palavrić, Vice-President

Ms. Constance Grewe,

Mr. Mato Tadić,

Mr. Mirsad Ćeman,

Ms. Margarita Tsatsa-Nikolovska,

Mr. Zlatko M. Knežević,

Having deliberated on the request of **Mr. Milorad Živković**, the Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request, in case no. **U 9/12**, at its session held on 30 January 2013, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request for review of compatibility of Article 18(d)(4) of the Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of BiH* no. 14/09) lodged by Mr. Milorad Živković, the Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request, is hereby granted.

It is hereby established that the provision of Article 18(d)(4) of the Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official*

Gazette of the Federation of BiH **no. 14/09) is not in conformity with Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with the provisions of Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.**

The Parliament of the Federation of Bosnia and Herzegovina is ordered, in accordance with Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to bring in line the provision of Article 18(d)(4) of the Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of BiH* no. 14/09) with the provisions of Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with the provisions of Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, within six months at the latest from the date of the delivery of this decision.

The Parliament of the Federation of Bosnia and Herzegovina is ordered, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to inform the Constitutional Court of Bosnia and Herzegovina of the measures taken with the aim to enforce this decision, within the time limit referred to in the previous paragraph.

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

Reasoning

I. Introduction

1. On 5 June 2012, Mr. Milorad Živković, the Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of lodging the request, („the applicant"), lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of constitutionality of Article 18(d)(4) of the Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of BiH* no. 14/09).

II. Procedure before the Constitutional Court

2. Ms. Dobrila Jurić, who in the procedure before the competent bodies of the Federation of BiH had lost the right to care and assistance by another person since her disability occurred after the age of 65 irrespective of the fact that she is a 100% disabled person, presented a petition to the Constitutional Court asking to participate in the proceedings. In connection with the aforementioned, the Constitutional Court recalls that the provision of Article 15(1) of the Rules of the Constitutional Court of BiH prescribes the participants to the proceedings before the Constitutional Court. Article 15(2) of the Rules of the Constitutional Court of BiH prescribes that the Constitutional Court may, in each particular case, designate other participants in respect of whom the principle of adversarial procedure shall be applied. Taking into account the aforementioned, as well as the fact that this concerns the case requiring an abstract review of constitutionality of the disputed provision pursuant to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court holds that there are no reasons in the particular case to designate *other participants* under the provisions of Article 15(2) of the Rules of the Constitutional Court of BiH.

3. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the Parliament of the Federation of Bosnia and Herzegovina, the House of Representatives and the House of Peoples („the Parliament of FBiH") were requested on 25 July 2012 to submit their replies to the request.

4. The House of Peoples of the Parliament of FBiH requested on 27 August 2012 from the Constitutional Court an extension of a deadline for the submission of its reply to the request. By its letter of 7 September 2012, the Constitutional Court granted the mentioned request. The Parliament of FBiH failed to submit its reply to the request.

5. Pursuant to Article 33 of the Rules of the Constitutional Court, the Ministry of Labor and Social Policy of the Federation of Bosnia and Herzegovina („the Federal Ministry") was requested on 18 October 2012 to submit a reply as to the reasons and purpose sought to be achieved by means of the provision of Article 18(d)(4) of the Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of BiH* no. 14/09). The Federal Ministry submitted the mentioned information to the Constitutional Court on 6 November 2012.

6. The information of the Federal Ministry was communicated to the applicant on 13 December 2012.

III. Request

a) Allegations from the Request

7. The applicant seeks from the Constitutional Court the review of compatibility of Article 18(d)(4) of the Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of BiH* no. 14/09). The applicant holds that the mentioned provision is discriminatory, and that it puts in an unequal position the persons with disabilities and more particularly whose disabilities occurred after the age of 65. According to the applicant, the mentioned persons should have been better protected, as one cannot influence the occurrence of disability, and they are the persons to whom assistance is unquestionable. The applicant holds that the disputed provision is in contravention of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"). Also, the applicant holds that the mentioned provision is in contravention of the European Social Charter, particularly the Chapter relating to persons with disabilities. The applicant refers to the provision of Article II(2) of the Constitution of Bosnia and Herzegovina, under which the rights and freedoms set forth in the European Convention shall have priority over all other law. He proposes that the Constitutional Court of Bosnia and Herzegovina finds that the disputed provision is unconstitutional.

b) Information of the Federal Ministry

8. In its information, the Federal Ministry stated that the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of BiH* no. 54/04) made it possible for the first time for the persons with disabilities to exercise rights to personal disability allowance, allowance for care and assistance by another person and orthopedic allowance. It was said that the Law had many deficiencies starting with the lack of a definition of disability, the imprecision in defining a beneficiary of the right, the nonexistence of a distinction between a disease or old age and the status of disability. Its application resulted in the introduction of a large number of beneficiaries, through the overflowing of the hitherto beneficiaries under the cantonal regulations onto the FBiH level, inadequate protection of persons with disability who needed the assistance the most. Amendments to the mentioned law in 2009 were aimed at achieving the goal of protecting in the best way possible the persons with disabilities with the highest level of damage to their respective systems, of separating illness and old age from disability, and of ensuring to the portion of the hitherto beneficiaries the protection at the cantonal level, given that the social protection area is a matter of a divided responsibility between the Cantons and the FBiH. In the opinion of the Ministry the provision of Article 18(d)(4) of the mentioned law does not lead to

discrimination of persons with disability, rather it is on the contrary, the intention of the amended law was to abide by the Constitution with respect to the divided responsibility.

IV. Relevant Law

9. The **Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children** (*Official Gazette of the Federation of BiH* no. 14/09), in its relevant part reads:

Article 18(d)(4)

The persons with disabilities acquired after the age of 65 and regarding whom, in accordance with the Institute assessment, the need is established to exercise the right to allowance for care and assistance by another person, shall exercise this right under the cantonal regulations.

V. Admissibility

10. In examining the admissibility of the request the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

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

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

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

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

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

11. Bearing in mind that the request for review of constitutionality of an Entity law was lodged by the Chairman of the House of Representatives of the Parliamentary Assembly of BiH, the Constitutional Court notes that the request was filed by an authorized entity within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

12. Bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of the Constitutional Court, the Constitutional Court establishes that the present request is admissible as it was lodged by an authorized entity, and that there is no single reason under Article 17(1) of the Rules of the Constitutional Court rendering this request inadmissible.

VI. Merits

13. The applicant stated that Article 18(d)(4) of the Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of BiH* no. 14/09) is inconsistent with Article 14 of the European Convention in connection with the European Social Charter.

Article II(2) of the Constitution of Bosnia and Herzegovina reads as follows:

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

Article 1 of Protocol No. 12 to the European Convention reads as follows:

General prohibition of discrimination

1. The enjoyment of any right set forth by law 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.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

14. The Constitutional Court notes that the applicant pointed out that the provision of Article 18(d)(4) of the Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of BiH* no. 14/09) is in contravention of the European Social Charter. In that respect the Constitutional Court observes that the Presidency of Bosnia and Herzegovina had adopted a decision on 16 July 2008 ratifying the revised European Social Charter of 3 May 1996. In the opinion of the Constitutional Court, the act of ratification made the European Social Charter an integral part of the legal system in Bosnia and Herzegovina. However, it has not been listed among the documents in Annex I to the Constitution of Bosnia and Herzegovina, or the act of ratification has not made it automatically (also) a part of the Constitution of Bosnia and Herzegovina. Therefore, the constitutionality of the challenged

legal provision will be examined *in accordance with this Constitution* as prescribed by the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

15. The Constitutional Court observes that the applicant essentially refers to discrimination under the law itself. In this respect, the Constitutional Court recalls that Article 1 of Protocol No. 12 to the European Convention comprises a general principle of the prohibition of discrimination and guarantees the enjoyment of all rights set forth by law 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. Further, the provisions of Protocol No. 12 to the European Convention imply that public authorities cannot discriminate on any ground, that is to say that the basic principle of non-discrimination has been extended to domestic laws as well, and not solely to the rights guaranteed by the European Convention as provided for by Article 14 of the European Convention which the applicant refers to. Therefore, the Constitutional Court will examine whether the provision of Article 18(d)(4) of the Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of BiH* no. 14/09) is in contravention of Article 1 of Protocol No. 12 to the European Convention. In that respect, the Constitutional Court emphasizes that under Article II(2) of the Constitution of Bosnia and Herzegovina the rights and freedoms set forth in the European Convention and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law. Therefore, the Constitutional Court emphasizes that Article 1 of Protocol No. 12 to the European Convention is a part of the Constitution of Bosnia and Herzegovina, and hence given its general character it is not necessary to examine it in relation to some of the rights under the European Convention and the Constitution of Bosnia and Herzegovina, but independently.

16. In its Decision no. *U 7/11* of 30 March 2012, the Constitutional Court noted that no significant case-law of either the European Court of Human Rights („the European Court"), or of the Constitutional Court, exists as yet in relation to the interpretation of the provisions of Protocol No. 12 to the European Convention. Therefore, the following was noted in that decision, *the Constitutional Court finds relevant the interpretation which the European Court offered in the decision it had adopted in the case of Sejdić and Finci v. Bosnia and Herzegovina (see, the European Court, Sejdić and Finci v. Bosnia and Herzegovina, judgment of 22 December 2009, Applications nos. 27996/06 and 34836/06). In that decision, the European Court stated the following: „The notion of discrimination has been interpreted consistently in the Court's jurisprudence concerning Article 14 of the Convention. In particular, this jurisprudence has made it clear that „discrimination" means treating differently, without an objective and reasonable justification, persons in similar*

situations (see paragraphs 42-44 above and the authorities cited therein). The authors used the same term, discrimination, in Article 1 of Protocol No. 12. Notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see the Explanatory Report to Protocol No. 12, § 18). The Court does not therefore see any reason to depart from the settled interpretation of „discrimination", noted above, in applying the same term under Article 1 of Protocol No. 12". The European Court concluded in the mentioned case that the right referred to in Article 1 of Protocol No. 12 to the European Convention was violated, almost entirely referring to its respective conclusions in the same decision regarding the violation of Article 14 of the European Convention in conjunction with Article 3 of Protocol No. 1 to the European Convention. (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 7/11* dated 30 March 2012, paragraph 21, published in *the Official Gazette of Bosnia and Herzegovina* no. 36/12).

17. Bearing in mind the aforementioned, the Constitutional Court recalls that under the jurisprudence of the European Court, discrimination occurs if a person or a group of persons who are in analogous situations are treated differently on the ground of sex, race, color, language, religion (…) with respect to the enjoyment of rights under the European Convention, without an objective and reasonable justification for such treatment or the use of means towards a desired goal which are not proportionate (see, the European Court, *Belgian Linguistic Case*, judgment of 9 February 1967, Series A, no. 6, paragraph 10). Thereby it is irrelevant whether the discrimination is a consequence of a differential treatment or of the application of the law itself (see, the European Court, *Ireland v. The Great Britain*, judgment of 18 January 1978, Series A, no. 25, paragraph 226).

18. Furthermore, according to the jurisprudence of the Constitutional Court and the European Court, an act or regulation is discriminatory if it treats differently individuals or groups, who are in a similar situation, and if that differential treatment does not involve an objective and reasonable justification, or if there is no reasonable proportionality between the means used and goals sought to be achieved. However, according to the jurisprudence of the European Court the state bodies have a certain margin of appreciation when deciding whether and to what extent differences in otherwise similar situations justify differential treatment under the law. The scope of that margin of appreciation varies contingent upon the circumstances of the case itself and the background of that case (see, the European Court, *Rasmunssen v. Denmark*, judgment of 28 November 1984, Series A, no. 87, paragraph 40). For instance, the European Court allowed considerable margin of appreciation in relation to the wording and implementation of decisions in the area of taxation policy (see, the European Court, *National and Provincial Building Society and Others v. The United Kingdom*, judgment of 3 October 1997, Reports on Judgments and Decisions 1997-VII, paragraph 80).

19. In the case at hand the applicant holds that the disputed provision discriminated against persons with disability whose disability was acquired after the age of 65. The applicant points out that the disputed provision placed the mentioned persons in an unequal position although they were supposed to be protected since one cannot have effect on the occurrence of disability. Also, he points out that they are the persons who need assistance. On the basis of the aforementioned it follows that the applicant refers to the discrimination on the ground of age. Although Article 1 of Protocol No. 12 does not state explicitly the prohibition of discrimination on the ground of age, the mentioned article prescribes *the enjoyment of any right set forth by law* that is the general prohibition of discrimination under the law in relation to *other status*. So, according to the opinion of the Constitutional Court, on the basis of the wording of the mentioned article, the enumeration of the grounds for differential treatment amounting to discrimination has not been exhausted, thus the prohibition of discrimination on the ground of age could be subsumed under the notion *other status* within the meaning of the mentioned article.

20. The Constitutional Court notes that the international law recognizes three grounds for securing adequate standard of living: property, labor and social insurance. The right to social insurance in the broadest of terms implies the right to social insurance and the right to social assistance. Social insurance implies the allocation of funds by workers, so that they and their family members may have the right to certain compensation in the event of illness, injuries sustained at work or in the event of retirement. Social assistance constitutes monetary allocations from state funds on the grounds of tax or other sources for threatened categories such as the persons with disabilities and unemployed persons. In terms of the international protection the persons with disabilities are entitled to all basic (general) human rights and freedoms, as equally as other people. Due to their objectively given special needs they, however, have some additional rights. These do not amount to their preferential treatment (discrimination against others), rather they are a necessary condition to secure their real equality with other people in the same manner in which other threatened categories of people are being protected through adequate measures, such as children, aged persons, minorities etc.

21. The Constitutional Court observes, without giving any sort of definition of disability thereby, that the term a disabled person is a usual name for a person who, due to innate or acquired physical handicap (due to illness, injury, wounding and such like), is partly or completely incapacitated for work and, in some cases, for looking after themselves. Depending on how the disability occurred, they are usually divided into wartime, peacetime and work-related disabilities, with further divisions being possible (e.g. wartime disabled veterans, peacetime disabled veterans etc.).

22. The Constitutional Court recalls that Bosnia and Herzegovina is a state which, in its Constitution, has opted for the respect for human rights and fundamental freedoms. Already in the Preamble to the Constitution of Bosnia and Herzegovina there is reference to the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The integral part of the Constitution of Bosnia and Herzegovina are fifteen international agreements on human rights enumerated in Annex I to the Constitution of Bosnia and Herzegovina, and the enjoyment of rights and freedoms referred to in the international agreements is secured to all persons in Bosnia and Herzegovina without discrimination, as prescribed by Article II(4) of the Constitution of Bosnia and Herzegovina.

23. However, the Constitutional Court recalls that the issues concerning social policy and the issues of persons with disabilities are within the jurisdiction of the Entities and Cantons. The aforesaid, as a result, brings about different legal solutions in that area.

24. With the aim to improve the situation in the area of disability, the Constitutional Court observes that the Council of Ministers of Bosnia and Herzegovina had adopted on 8 May 2008 the Policy in the Area of Disability in Bosnia and Herzegovina, published in *the Official Gazette of BiH* no. 76/08. The said document stated that *the goal of this Policy of Bosnia and Herzegovina, its Entities, the Federation of Bosnia and Herzegovina and Republika Srpska, and the Brcko District is to enable all persons with disabilities to attain the highest quality of life potential, respect and dignity, independence, productivity and equal participation in society in the most productive and as accessible as possible environment. Laws, bylaws and programs enabling the persons with disabilities to achieve these goals ought to be initiated, funded and implemented by the governmental institutions, private and non-governmental sectors and individuals. Further, it was noted that discrimination against persons with disabilities is frequent in everyday life, regardless of the existence of certain laws prohibiting discrimination on the ground of disability. The most illustrative example of discrimination is that pecuniary compensations on the ground of disability for the same degree and type of disability range from KM 41 to KM 1700*. The Policy has 14 goals, the first being the ratification of the UN Convention on the Rights of Persons with Disabilities and other international documents.

25. After the adoption of the mentioned Policy, strategies were drafted in the area of disability in both entities as follows: „the Strategy for Promoting the Social Status of Persons with Disabilities 2010-2015 in Republika Srpska" and „the Strategy for the Equalization of Opportunities for Persons with Disabilities 2011-2015 in the Federation of Bosnia and Herzegovina". The Strategy for the Equalization of Opportunities for Persons

with Disabilities 2011-2015 in the Federation of Bosnia and Herzegovina noted that the international legal instruments which Bosnia and Herzegovina had ratified and which make up an integral part of the Constitution of Bosnia and Herzegovina, constitutions of the entities and cantons, and some are above domestic laws by their legal force, make up a part of the normative legal system relevant for the issue of disability. It was noted that the fundamental principle of the international instruments is the principle of non-discrimination, which means that the persons with disabilities are entitled to all the rights prescribed by the international documents on equal terms as any citizen. Therefore, in addition to the obligation to harmonize the domestic legislation with the international norms which it has accepted, the state has the obligation, in practice, to be mindful of the degree to which vulnerable groups, such as the persons with disabilities, have been integrated into the system and how much of the prescribed rights are actually accessible to them. It was noted that by adopting the international regulations Bosnia and Herzegovina showed commitment to comply with the democracy principles and respect for human rights. The principles of non-discrimination have been incorporated into many laws of interest to the persons with disabilities. However, it was noted that some laws did not identify in an appropriate manner the needs of persons with disabilities.

26. Bearing in mind the aforementioned, the Constitutional Court must answer whether the disputed provision points to a differential treatment of persons with disabilities who are in the same situation. In this respect, the Constitutional Court recalls that the disputed provision prescribes that the persons with disabilities acquired after the age of 65 and regarding whom, in accordance with the Institute assessment, the need is established to exercise the right to allowance for care and assistance by another person, shall exercise this right under the cantonal regulations. According to the Constitutional Court, on the basis of the aforementioned, it follows that the mentioned provision makes a difference between the persons with disabilities on the ground of age. Namely, this provision made a difference between the persons with disabilities whose disability occurred after the age of 65 and the persons whose disability occurred before the age of 65. Therefore, in the opinion of the Constitutional Court the disputed provision in itself makes a difference between the persons with disability on the ground of their age group from the aspect of the occurrence of disability.

27. Further, the Constitutional Court must consider whether this differential treatment of persons with disability has a reasonable and objective justification. Namely, a question arises for the Constitutional Court as to why the persons whose disability occurred after the age of 65 must exercise their respective rights in accordance with the cantonal regulations, and the persons whose disability occurred before the age of 65 can still continue to exercise their respective rights in accordance with the regulations of the Federation of BiH. The

Constitutional Court emphasizes that the author of the disputed law failed to communicate to the Constitutional Court a reply on the basis of which one could conclude what the *ratio* behind the disputed provision was. Therefore, the Constitutional Court requested the information from the Federal Ministry, which has the responsibility for the issues of social policy, and was the one proposing the disputed provision. On the basis of the information of the Federal Ministry it follows that the application of the Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of BiH* no. 54/04) resulted in the increase in the number of the insurance beneficiaries in a manner that the hitherto beneficiaries were transferred pursuant to the cantonal regulations to the level of the FBiH to exercise the respective rights. The Federal Ministry justified the reason for the restitution of the mentioned persons to the cantonal level in that it is the best possible way to protect the persons with disabilities with the highest degree of damage to the their system. Namely, according to the opinion of the Federal Ministry it is necessary to separate the illness and old age from the disability with the highest degree. The Federal Ministry concluded that the disputed provision does not amount to discrimination; rather they wanted to comply with the Constitution of the Federation of Bosnia and Herzegovina in respect of the division of responsibilities between the Federation of BiH and the Cantons.

28. In view of the aforementioned, the Constitutional Court will examine whether the differential treatment of persons with disability can be justified by means of the division of responsibilities between the Federation of BiH and the Cantons. In that respect the Constitutional Court emphasizes that the issue of social policy under Article III(2) of the Constitution of the Federation of Bosnia and Herzegovina falls under the jurisdiction of the Governments of the Federation of BiH and the Cantons. Article III(3)(1) of the Constitution of the Federation of Bosnia and Herzegovina prescribes that the responsibilities referred to in Article III(2), including the social policy, are being exercised jointly or separately by the Cantons as coordinated by the Government of the Federation of BiH. Next, under Article III(3)(2) of the Constitution of the Federation of Bosnia and Herzegovina, the Cantons and the Government of the Federation of BiH shall consult one another on an ongoing basis with regard to these responsibilities.

29. By putting the aforementioned in the context of the social policy, according to the opinion of the Constitutional Court, this constitutional division of responsibilities cannot be the answer to such a differential treatment of persons with disabilities. Thereby the Constitutional Court emphasizes, without interpreting the provisions of the Constitution of the Federation of Bosnia and Herzegovina, that the division of responsibilities between the Cantons and the Government of the Federation of BiH suggests that the Government of the Federation of BiH and the Cantons consult one another on the manner of implementing

the social policy, which should not be to the detriment of the beneficiaries. According to the Constitutional Court, that policy should lead more towards the equalization and increase in the rights of the persons with disabilities, and not towards their differential treatment and decrease in their rights. What is more, the priority should be the fulfillment of the international obligations to the largest possible extent, which the state of Bosnia and Herzegovina has assumed and its Entities consequently, in exercising the rights of persons with disabilities as the most vulnerable population category.

30. Therefore, in the opinion of the Constitutional Court the division of responsibilities cannot be a reasonable and objective justification for such a differential treatment of persons with disabilities on the ground of the years of age, as stated by the Federal Ministry in its respective information. The Constitutional Court observes that the Ministry of FBiH failed to provide an answer in its information to the question why the persons whose disability occurred after the age of 65 were referred to exercise their respective rights under the cantonal regulations, whereas the persons whose disability occurred before the age of 65 were left to exercise their rights in accordance with the regulations of FBiH respectively. The Constitutional Court emphasizes that the disputed provision in itself undisputedly makes a difference between the persons with disabilities according to their years of age. According to the opinion of the Constitutional Court, the aforementioned is sufficient for one to conclude that the disputed provision is discriminatory without considering the conditions and amounts which these beneficiaries would get to receive in accordance with the cantonal regulations, which they were advised to do in the disputed provision. Thereby, the Constitutional Court recalls that the Federation of BiH is composed of 10 Cantons, and the legal solutions need not be identical regarding the social policy in every Canton. The Constitutional Court observes that it follows from the report on the status in the area of disability in BiH from March 2012, drafted by a group composed of the representatives of organizations of the members of the Network of Organizations of Persons with Disabilities of Bosnia and Herzegovina, that solely the Sarajevo Canton, Tuzla Canton and Zenica-Doboj Canton, in the implementation of the disputed provision, have so far regulated the right to allowance for care and assistance by another person, and that the application of the disputed provision in practice has started only in the Sarajevo Canton.

31. The Constitutional Court emphasizes that the persons with disabilities have the right to participate completely and equally in the society and to improve the quality of their life. On the other hand, it is the obligation of the state to make it possible for them to achieve the highest quality of life potential, respect and dignity, independence, productivity and equal participation in the society in the most productive and as accessible as possible environment. Thus, the goal of each society should be to facilitate for these categories of population the everyday life, and not to marginalize them. According to the opinion of

the Constitutional Court, it is up to the state to aspire to such a social policy concerning the persons with disabilities so that there are no differences regarding the exercise of their respective rights or that they are brought down to a minimum. In view of the aforementioned, the Constitutional Court holds that the disputed provision does not meet these requirements. Moreover, the disputed provision is discriminatory in itself, because it makes a difference between the persons with disabilities on the ground of their years of age. Thereby, the legislator failed to submit a reasonable and objective justification for this difference, and the Constitutional Court was unable to infer it from the information it received from the Federal Ministry.

32. In view of the aforementioned, and as it established that there is no reasonable and objective justification for this differential treatment of persons with disabilities on the ground of their years of age, the Constitutional Court holds that the provision of Article 18(d)(4) of the Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of BiH* no. 14/09) is discriminatory and consequently contrary to Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 12 to the European Convention.

VII. Conclusion

33. The Constitutional Court concludes that the provision of Article 18(d)(4) of the Law on Amendments to the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children (*Official Gazette of the Federation of BiH* no. 14/09) is in contravention of Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 12 to the European Convention, as it itself points to a differential treatment of persons with disabilities for which no reasonable and objective justification exists.

34. Pursuant to Article 61(1) and (2) and Article 63(4) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

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

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CONTENTS

Case No. U 16/11

DECISION ON ADMISSIBILITY AND MERITS

Request of the Basic Court in Teslić for review of compatibility of Article 4 of the Law on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms

Decision of 13 July 2012

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 63(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić

Ms. Constance Grewe

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knežević

Having deliberated on the request of **the Basic Court in Teslić** in the case no. **U 16/11,** at its session held on 13 July 2012, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by the Basic Court in Teslić is hereby granted.

It is hereby established that the Law on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 71/10) is incompatible with the provisions of Article III(1)(e), Article III(3)(b), Article IV(4)(b) and Article V(4)(a) of the Constitution of Bosnia and Herzegovina in full.

Pursuant to Article 63(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Law on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 71/10) shall be rendered ineffective.

Pursuant to Article 63(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Law on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 71/10) shall be rendered ineffective on the day following the day of the 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*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 19 September 2011, the Basic Court in Teslić („the applicant") lodged with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") a request for review of compatibility of Article 4 of the Law on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 71/10) with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms („the European Convention").

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska was requested to submit a reply to request on 29 September 2011.

3. On 14 October 2011, the National Assembly of the Republika Srpska submitted its reply to the request.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply of the National Assembly of the Republika Srpska was communicated to the appellant on 21 October 2011.

5. Pursuant to the conclusion reached at its plenary session held on 30 March 2012, the Constitutional Court sent a letter to the Council of Ministers of BiH on 12 April 2012,

requesting the Council of Ministers to communicate its observations on the request in question. It was also requested that the Council of Ministers communicate the information on reciprocity of the application of Annex „G" of the Agreement on Succession Issues between Bosnia and Herzegovina and other successor states of the former SRFY and also whether any concrete activities were being taken by Bosnia and Herzegovina and other successor states of the former SRFY in relation to the conclusion of bilateral agreements in accordance with Articles 4 and 5 of Annex „G" of the Agreement on Succession Issues.

6. The Council of Ministers of BiH communicated its reply on 28 May 2012.

7. On 4 June 2012, the reply by the Council of Ministers of BiH was transmitted to the applicant.

III. Request

a) Facts arising from the case file no. 87 0 Ip 006536 10 Ip submitted by the applicant

8. By the Judgment no. 85 0 Ps 001481 08 Ps of 14 October 2009 the Basic Court in Doboj established that the plaintiff „Borovo" Stock Company Vukovar, the Republic of Croatia, as a legal successor of „Borovo" Yugoslav Rubber and Footwear Industry, Vukovar, was the owner and possessor of the business premises located in Teslić, as specified more closely in the operative part of the judgment. The same judgment ordered the Republic Administration for Geodetic and Property Affairs of the Republika Srpska in Banjaluka, Teslić Field Office, and the Land Registry Office of the Basic Court in Teslić, to modify the ownership holder in the respective land registers so as to enter the plaintiff „Borovo" Stock Company Vukovar as the owner instead of the defendant „Bonel" Stock Company Banjaluka. Also, the mentioned judgment obligated the defendant „Bonel" Stock Company Banjaluka to hand over the possession of the respective business premises to the plaintiff „Borovo" Stock Company Vukovar for use.

9. On 12 February 2010, the Basic Court in Doboj incorporated into the mentioned judgment of 14 October 2009 a legal validity clause and on 27 March 2010 an enforceability clause. After that „Borovo" Stock Company Vukovar („the enforcement seeker") submitted on 11 June 2010 to the applicant as a competent court the proposal for enforcement on the basis of the legally binding judgment of the Basic Court in Doboj of 14 October 2009 for the handover of the possession of the respective business premises to the enforcement seeker. By the Ruling no. 87 0 Ip 006536 10 Ip of 23 August 2010 the applicant allowed the proposed enforcement. The „Bonel" Stock Company Banjaluka („the enforcement debtor") appealed against the mentioned ruling.

10. By its Ruling no. 87 0 Ip 006536 10 Ip of 18 October 2010, the applicant dismissed in full the complaint of the enforcement debtor against the mentioned ruling allowing the enforcement. The reasoning of the ruling reads that in the present enforcement procedure the court did not resolve the property and legal relations on the respective business premises as the subject-matter of the concrete enforcement, nor was the particular enforcement procedure one of the stages of the procedure within the meaning of Article 4 of the Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska, rather it carried out the forcible exercise of the claim on the basis of an enforceable act, namely the Judgment of the Basic Court in Doboj of 14 October 2009. The applicant held that, as an enforcement court, it has responsibility to enforce the legally binding court decisions and that it is not called upon to review the contents of the enforceable act which it is related to.

11. By its Ruling no. 87 0 Ip 006536 10 Pž of 29 December 2010, the County Court in Doboj („the County Court") granted the appeal of the enforcement debtor against the ruling of the applicant of 18 October 2010, quashed the challenged ruling and referred back the case to the first-instance court for renewed proceeding. In the reasoning of the ruling, the County Court stated that although the applicant in the first-instance proceedings had found correctly that in the enforcement procedure the court solely carries out the enforcement on the basis of the legally binding enforceable act, in the present case, while deciding the complaint of the enforcement debtor, it had to be mindful of the provision of Article 4(1) of the Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska, which the enforcement debtor had referred to in the complaint.

12. By its ruling no. 87 0 Ip 006536 10 Ip of 22 February 2011, the applicant, in the renewed proceeding, dismissed in full the enforcement debtor's complaint against the ruling permitting the enforcement dated 23 August 2010, and rejected as inadmissible the complaint of the Public Attorney's Office of RS as a third person, dated 5 November 2010. In the reasoning of the ruling, the applicant stated that it held that the enforcement procedure ought not to be stayed in the present case as the enforcement seeker has a legally binding court judgment, and a failure to enforce such a decision constitutes a violation of the right to a fair trial. Further, it stated that it expects that the County Court, if deeming it necessary in the present legal situation, stays the respective proceeding. Another solution, in the applicant's opinion, is for one of the courts to transmit the decision on the present legal issue to the Constitutional Court, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, for obviously the decision in the case at hand shall depend on the answer to the question as to whether the Law on Implementation

of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska is compatible with the Constitution of BiH and the European Convention.

13. By the Ruling no. 87 0 Ip 006536 11 Pž 2 of 7 September 2011, the County Court granted the appeals lodged by the enforcement debtor and the Republika Srpska represented by the RS Public Attorney's Office as a third person, against the ruling of the enforcement seeker of 22 February 2011, quashed the challenged ruling and referred back the case to the applicant for renewed proceeding and decision-making. According to the County Court, the allegations stated in the appeal by the enforcement debtor and the third person raised justified suspicion as to the regularity and lawfulness of the challenged ruling, because the applicant failed to proceed in accordance with the instructions given in the ruling of the County Court of 29 December 2010, which it was obligated to do within the meaning of the provision of Article 228 of the Law on Civil Procedure in conjunction with Article 21(1) of the Law on Enforcement Procedure. As to the conclusion of the applicant that the procedure in the case at hand ought not to be stayed and that, on the contrary, that ought to be done by the County Court, in the opinion of the County Court, those allegations are unacceptable given that, within the meaning of Article 233 of the Law on Civil Procedure, an appeal may be lodged against a ruling of the first-instance court, thus the issuance of a ruling on the stay of the proceeding by the County Court would result in establishing the second-instance competence of the RS Supreme Court for decision-making on an appeal lodged against that ruling, and the RS Supreme Court is called upon to decide an appeal against decisions of the county courts in such matters in which those courts act as the first-instance courts – recognizing foreign court decisions.

b) Allegations stated in the request

14. The applicant stated that by the Ruling. No. 87 0 Ip 006536 10 Pž of 29 December 2010, the County Court quashed the ruling of the applicant no. 87 0 Ip 006536 Ip of 18 October 2010 with a reasoning that the procedure in the case at hand conducted before the applicant ought to be stayed in accordance with the provisions of Article 4 of the Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska. The applicant emphasized that the provisions of Article 4(1) of the Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska were not in compliance with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, which followed from the case-law of the Constitutional Court in the decisions nos. *AP 288/03*, *AP 158/06* and *AP 96/06*. The applicant issued a Ruling no. 87 0 Ip 006536 10 Ip of 22 February 2011 wherein it stated the reasons for which it held that the enforcement procedure ought not to be stayed in the case at hand. Regarding the appeal against the mentioned ruling,

the County Court quashed the applicant's ruling and provided a reasoning that it cannot on its own stay the procedure in the case at hand within the meaning of the provisions of Article 233 of the Law on Civil Procedure, which means that it remained supportive of the position that the procedure in the present case ought to be stayed by the applicant as a first-instance court. Given the aforementioned, the applicant holds that conditions were met for the Constitutional Court to give its opinion, in accordance with Article VI(3) (c) of the Constitution of Bosnia and Herzegovina, regarding the compatibility of the provisions of Article 4 of the Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, in order to clear up various interpretations by courts on whether the enforcement of court decisions should be stayed, in accordance with the mentioned provision of the Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska, or whether the procedure should be continued, bearing in mind the position of the County Court that it will not stay the proceeding on its own, that is that the proceeding should be stayed by the applicant as a first-instance court, despite the fact that the applicant holds that no conditions exist for the stay of the proceeding.

c) Reply by the National Assembly of the Republika Srpska to the request

15. In the reply to the request, the National Assembly of the Republika Srpska stated that the allegations made by the applicant were ill-founded, whereby they read that Article 4 of the Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska was inconsistent with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention. Further it was said that, when adopting the Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska, the Republika Srpska availed itself of the powers referred to in Amendment XXXII to Article 68 items 6 and 18 of the Constitution of the Republika Srpska, under which the Republika Srpska, among other things, shall regulate property and obligations relations and the protection of all types of property, market and planning and other relations of interest to the Republika Srpska. They stated next that it was the right and obligation of the legislator to specify the legal framework for the procedures of the legal entities, namely courts in the present case, as it did by way of Article 4 of the Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska. They stated that a well-organized society implies a balanced operation on the part of the institutions, including the judicial institutions, within the framework clearly specified beforehand. This framework is specified by a legislator who is guided by the public interest and purposefulness. The

Law on Civil Procedure, as further stated, clearly defines the reasons for the stay of a judicial proceeding, stipulating that it can be stipulated by other laws as well. As stated, this law provides for the stay of certain judicial proceedings, but it presumes in no way a decision of a court in such proceedings. The Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska provides a basis for the regulation of the issues for the protection of property of legal persons who had acquired their property in the privatization procedure, and which users were socially-owned enterprises with seats in some of the former republics of SFRY, and which are presently subject to judicial proceedings. Although that property has a special status which, under the Agreement on Succession Issues („the Agreement"), namely Annex „G" to the Agreement, ought to be resolved on the basis of reciprocity, that is by way of concluding bilateral agreements between the successor states of SFRY, there is no uniform and clear position about that in our legal and judicial case-law. Actually it happens that domestic courts „disregard" the existence of the Agreement and lack of bilateral agreements and go on to uphold in their respective judgments as legally valid the contracts on the real properties sales, which were concluded after 31 December 1990, between the legal persons with a seat in other states (former socially-owned enterprises) and domestic legal and physical persons. The fact that this property, formerly the property of legal persons with seats in some of the former Yugoslav republics, was the subject of privatization, which was acquired by enterprises registered in the Republika Srpska and was registered as property under the privatization balance sheet, additionally complicates matters. The reply further mentions that Article 4 of Annex „G" prescribes that „the successor states shall undertake such actions that may be required under the general principles of law and that are appropriate for the provision of efficient application of the principles stated in that annex, as is the conclusion of bilateral agreements and the notifying of courts and other competent authorities".

16. The reply further reads that the Council of Ministers of Bosnia and Herzegovina adopted a Decision on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of BiH (*Official Gazette of BiH* no. 2/04) and the Decision on the Obligation to Protect State Property, Financial Claims and Debts of Legal Persons from BiH in other States of the former SFRY (*Official Gazette of BiH* no. 14/98). The Decision on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of Bosnia and Herzegovina (in order to protect private property and the acquired rights of citizens and legal persons from the successor states of the former SFRY) prescribes that the said persons should address the Ministry for Economic Relations and Coordination, for the territory of the Republika Srpska, with a request in writing for the restitution of the mentioned right into the previous condition along with appropriate

documentation. Although the said decision was adopted, in practice it failed to redress administrative inconsistencies and barriers, as a matter of fact, it failed to take hold in practice. The Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska prescribes the stay of the proceedings at „the stage which they are currently at", with a clear stipulation of a moment of their respective resumption, which is related to the conclusion of appropriate contracts regulating property-legal relations between Bosnia and Herzegovina and the states that had come into existence upon the dissolution of the SFRY. This is not about annulment of actions undertaken by judicial instances or about the quashing of their respective acts, rather this is about the discontinuation in the work of courts in the cases relating to the clearly specified matter with a clear specification of the conditions for their future resumption. The reply also reads that the applicant completely inadequately referred to the case-law of the Constitutional Court in the mentioned cases. Namely, as further stated, starting from the view that the enforcement procedure, within the context of Article 6(1) of the European Convention, constitutes an integral part of a trial, the Constitutional Court held that there existed a violation of the respective article of the Convention and Article II(3)(e) of the Constitution of Bosnia and Herzegovina in the mentioned cases, finding that the authorities of the Republika Srpska failed to enforce the legally binding court judgments. Next they mentioned that the Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska does not generate conditions for the creation of a normative atmosphere similar to that in the mentioned cases. What is more, these are completely different and incomparable matters for regulation and completely different legal and social circumstances, which resulted in a positive legislative framework. Therefore, as concluded in the reply to the request, it is not justified to call on the Constitutional Court to decide this request, by applying the respective case-law, by way of analogy principle. They noted that they did not find a justification for the allegations regarding a violation of Article 6(1) of the European Convention. If one would, nevertheless, consider the challenged law from the aspect of the interference with the property rights of individuals or legal persons, although the applicant did not mention it explicitly, but situations in active cases lead to such a form of discussion, they note that this interference does not exist. It is an undisputed right of the Republika Srpska, upon assessing the reasons of purposefulness, to adopt the challenged legislation. Likewise, the legislator has an undisputed right and obligation to intervene in this area with the aim to protect the public interest. Considering the aims, such intervention is completely legitimate and meets the requirements of proportionality between the interest of an individual and the public interest. They note that it is not the competence of the Constitutional Court to assess the purposefulness and justification of positive legislative policy.

17. The reply further reads that Article 4(2) of the challenged Law clearly prescribes that the proceedings shall be suspended „pending the conclusion of appropriate contracts on the regulation of property and legal relations between Bosnia and Herzegovina and the states which came into existence after the breakup of SFRY". By defining the legal conditions which imply the occurrence of a future certain fact, an individual is given assurance that a legally binding decision will be made in his/her case. Republika Srpska is also given guarantees that its interests and the interests of its citizens will be secured through synchronized resolution of this issue at the regional level. When it comes to the proceedings which are not at the enforcement stage, that is which do not imply a legally binding decision of a competent authority, they recalled that the European Court of Human Rights clearly took a position that the right to property shall not exist up until the moment a person's right to property has been established. This is to say that the right to property does not imply the right to acquire property (the European Court of Human Rights, *Marckx v. Belgium,* judgment of 13 June 1979). They held that there was a completely justified interest to stay the proceedings in such cases. Given that no decision on merits existed in such cases as yet, that is that the property had not been acquired yet, one cannot talk about violations of the rights protected under Article 1 of Protocol No. 1 to the European Convention. This standardization does not interfere with the acquired rights, but instead, with the aim to prevent possible future irregularities, it gives space for the suspension of the proceeding pending the formation of a safe and normatively clearly well-defined environment, regarding the issue of succession of the property of the former SFRY. Considering the aforementioned, they held that by adopting and applying the challenged Law, no violation of Article 6(1) of the European Convention or Article II(3)(e) of the Constitution of Bosnia and Herzegovina occurred. In view of the aforementioned, they held that the request for review of constitutionality was not based on the Constitution of Bosnia and Herzegovina, i.e. that it is ill-founded, and that it should be dismissed as such.

d) Reply by the Council of Ministers of Bosnia and Herzegovina to the request

18. It is highlighted in the reply by the Council of Ministers that Annex „G" established a normative legal framework for the protection of the rights that have the character of acquired rights in the manner as they existed on 31 December 1990. Invoking the provisions of Articles 26, 27 and 29 of the Vienna Convention on the Law of Treaties and also the fact that the State Parties to the Agreement on Succession Issues accepted the principle that all issues are to be resolved in accordance with the principles of justice and international law pursuant to the principles of the United Nations, to create the conditions necessary for the preservation of justice and compliance with the obligations under international contracts as well as Article II(2) of the Constitution of BiH, it is pointed

out in the reply that the provisions of domestic laws of successor states may not derogate the provisions of the Agreement on Succession Issues which has the international legal force in the protection of acquired rights of natural and legal persons. The Agreement itself did not leave any possibility of obstruction by the successor states, which in case of certain conditioning and obstruction in the implementation of the provisions of the Agreement would mean putting at risk the international reputation and violation of the United Nations Charter. It was further pointed out that the Council of Ministers of BiH, in view of achievements and significance of the specific issue and its repercussions on the international position of the state of Bosnia and Herzegovina as well as its responsibility for the implementation of the international conventions and contracts regulating specific issues with a view to specifying the obligations of the competent authorities, issued the Decision on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of Bosnia and Herzegovina. Bosnia and Herzegovina, thereby, it is further stated, confirmed its responsibility for the assumed obligations, leaving no dilemma in respect of the application of the provisions of Annex „G".

19. Regarding the issue of reciprocity, it is stated in the reply that given the character of acquired rights nominated to subjects with capacity to sue, citizens and other legal persons, it is practically impossible to limit the rights of subjects with capacity to sue, invoking reciprocity, particularly because this legal mechanism is defined in the Agreement as the mechanism of active access to administrative and judicial tribunals with a view to implementing Annex „G" of the Agreement. This particularly because Article 10 of the Agreement on Succession Issues unambiguously specifies that no limitations may be placed upon the Agreement. It is further stated that it follows from the reply obtained from the Ministry of Justice of the Federation of BiH that they have not records on reciprocity issues, i.e. that competent courts have records thereof for every individual case. Likewise, subjects with capacity to sue which initiated court proceedings for the protection of their rights informed the Council of Ministers that the courts in other successor states have been interrupting court proceedings invoking reciprocity. Moreover, it is stated that the Standing Joint Committee, formed on the basis of Article 4 of the Agreement on Succession Issues at a meeting in Belgrade on 18 September 2009 issued a Recommendation no. 5 on effective implementation of Annex „G", whereby all successor states confirmed unconditional implementation of Annex „G". In respect of bilateral contracts, it is stated in the reply that the interpretation of Articles 4 and 7 of Annex „G" may not lead to a conclusion regarding the intention of the contracting parties - successor states for concluding a bilateral agreement. Entering into a bilateral agreement is only a possibility for the successor states to do that but not their legal obligation or an explicitly expressed intention to do that. Therefore, the conclusion of bilateral agreements may, but

does not have to, occur. In addition, such agreement may only be concluded with one or two successor states, not with all of them. Even in anticipation of such agreements to be concluded the court and administrative tribunals when resolving property claims of citizens and other legal persons have a duty to apply positive regulations, specifically the provisions of Annex „G". In the opinion of the Council of Ministers of BiH, the implementation of Annex „G" is not a condition for concluding bilateral contracts between successor states, but only a possibility for a more effective implementation of Annex „G". Pursuant to the information of the Ministry of Justice of BiH, which is authorized to conclude bilateral agreements, those activities are under way, while the dynamics of conclusion of those contracts is rather questionable. In addition, those contracts provide for defining of those issues that had not been regulated by the Agreement on Succession Issues. Such is the case with the Draft Contract on Property Law Relations between Bosnia and Herzegovina and Republic of Croatia. In the opinion of the Council of Ministers of BiH, the provisions of Annex „G" are so specific that there is no need for any additional standardization and they ought to be directly applied. Naturally, the states may conclude bilateral contracts and until such contracts are concluded Annex „G" has to be applied. In the opinion of the Council of Ministers of BiH, the provisions of Article 4 of the Law on Implementation are not compatible with the Agreement on Succession Issues.

IV. Relevant Law

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

Article III(1)(e)

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

Finances of the institutions and for the international obligations of Bosnia and Herzegovina.

Article III(3)(a) and (b)

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

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

Article IV(4)(b)

Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.

Article V(4)(a)

Together the Chair and the Ministers shall constitute the Council of Ministers, with responsibility for carrying out the policies and decisions of Bosnia and Herzegovina in the fields referred to in Article III(1), (4), and (5) and reporting to the Parliamentary Assembly (including, at least annually, on expenditures by Bosnia and Herzegovina).

21. The **Law on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska** (*Official Gazette of the Republika Srpska* no. 71/10)

Article 1

This Law shal regulate the implementation of Annex „G" of the Agreement on Succession Issues (Official Gazette of BiH – the International Treaties no. 10/01) („the Agreement") in the territory of the Republika Srpska, the protection of property of legal persons who had acquired property in the privatization process, on which the socially-owned enterprises with a seat in one of the former republics of the Socialist Federal Republic of Yugoslavia („the SFRY") had had the right of use and management, as well as the status of proceedings, which subject-matter relates to the resolution of property and legal relations over the property of enterprises with seats in the territory of one of the states which came into existence following the breakup of SFRY.

Article 2

The legal persons referred to in Article 1 of this law, who had acquired the right to property in the privatization process, shall be entitled to protection of their respective property in accordance with Article 8 of the Agreement and Article 7 of Annex „G" of the Agreement.

Article 3

The legal persons who had acquired property as prescribed in Article 1 of this law, in the proceedings before the competent authorities of the Republika Srpska, shall be ensured equal protection of their respective property, pending the regulation of the status of that property by bilateral agreements, to be concluded by Bosnia and Herzegovina and states which came into existence following the breakup of SFRY, in accordance with Article 4 of Annex „G" of the Agreement.

Article 4

(1) Judicial and other proceedings, which subject-matter relates to the resolution of property and legal relations over the property of legal persons with seats in the territory of one of the states which came into existence following the breakup of SFRY, which is located in the territory of the Republika Srpska, shall be stayed at all stages.

(2) The proceedings referred to in paragraph 1 of this article will be suspended pending the conclusion of appropriate contracts on the regulation of property and legal relations between Bosnia and Herzegovina and the states which came into existence after the breakup of SFRY.

Article 5

This law shall enter into force on the eight day from the date of its publishing in the Official Gazette of the Republika Srpska.

22. The **Agreement on Succession Issues** (Decision on Ratification of the Agreement on Succession Issues, *Official Gazette of BiH* – International Treaties, nos. 43/01 and 8/09 - correction)

Article 7

This agreement, together with any subsequent agreements called for in implementation of the Annexes to this Agreement, finally settles the mutual rights and obligations of the successors States in respect of succession issues covered by this Agreement. The fact that it does not deal with certain other non-succession matters is without prejudice to the rights and obligations of the States parties to this Agreement in relation to those other matters.

Article 8

Each successor State, on the basis of reciprocity, shall take the necessary measures in accordance with its internal law to ensure that the provisions of this Agreement are recognized and effective in its courts, administrative tribunals and agencies, and that the other successor States and their nationals have access to those courts, tribunals and agencies to secure the implementation of this Agreement.

Article 9

This Agreement shall be implemented by the successor States in good faith in conformity with the Charter of the United Nations and in accordance with international law.

Article 10

No reservations may be made to this Agreement.

Annex G

Private Property and Acquired Rights

Article 1

Private property and acquired rights of citizens and other legal persons of the SFRY shall be protected by successor States in accordance with the provisions of this Annex.

Article 2

(1) (a) The rights to movable and immovable property located in a successor State and to which citizens or other legal persons of the SFRY were entitled on 31 December 1990 shall be recognized, and protected and restored by that State in accordance with established standards and norms of international law and irrespective of the nationality, citizenship, residence or domicile of those persons. This shall include persons who, after 31 December 1990, acquired the citizenship of or established domicile or residence in a State other than a successor State. Persons unable to realize such rights shall be entitled to compensation in accordance with civil and international legal norms.

(b) Any purported transfer of rights to movable or immovable property made after 31 December 1990 and concluded under duress or contrary to subparagraph (a) of this article shall be null and void.

(2) All contracts concluded by citizens or other legal persons of the SFRY as of 31 December 1990, including those concluded by public enterprises, shall be respected on a non-discriminatory basis. The successor States shall provide for the carrying out of obligations under such contracts, where the performance of such contracts was prevented by the break-up of the SFRY.

Article 3

All successor States shall respect and protect rights of all natural and juridical persons of the SFRY to intellectual property to, including patents, trade marks, copyrights, and other allied rights (e.g. royalties) and shall comply with international conventions in that regard.

Article 4

The successor States shall take such action as may be required by general principles of law and otherwise appropriate to ensure the effective application of the principles set out in this Annex, such as concluding bilateral agreements and notifying their courts and other competent authorities.

Article 5

Nothing in the foregoing provisions of this Annex shall derogate from the provisions of bilateral agreements concluded on the same matter between successor States which, in particular areas, may be conclusive as between those States.

Article 6

Domestic legislation of each successor state concerning dwelling rights („stanarsko pravo/stanovanjska pravica/stanarsko pravo") shall be applied to persons who were citizens of the SFRY and who had such rights, without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 7

All natural and legal persons from each successor State shall, on the basis of reciprocity, have the same right of access to the courts, administrative tribunals and agencies, of that State and of the other successor States for the purpose of realizing the protection of their rights.

Article 8

The foregoing provisions of this Annex are without prejudice to any guarantees of non-discrimination related to private property and acquired rights that exist in the domestic legislation of the successor States.

Article 9

This decision shall be published in the Official Gazette of Bosnia and Herzegovina in Bosnian, Croat and Serb languages and shall enter into force on the date of its publishing.

23. The **Decision on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of Bosnia and Herzegovina** (*Official Gazette of BiH* no. 2/04)

Article 1

With the aim to protect private property and acquired rights of citizens and legal persons from the successor States of the former SFRY, signatories to the Agreement on Succession Issues („the [„Agreement")".] this decision shall determine the manner and procedure of restitution into the previous condition of the right to movable and immovable property, which is located in the territory of Bosnia and Herzegovina.

Article 2

Citizens and other legal persons from the successor States of the former SFRY who were entitled to movable and immovable property, which is located in the territory of Bosnia and Herzegovina, in accordance with the provisions of Article 2 of Annex „G" of the Agreement, shall address, for the territory of the Federation of Bosnia and Herzegovina to the BiH – Canton or– i.e. Municipality where the property is located, for the territory of the Republika Srpska, the Ministry for Economic Relations and Coordination of the Republika Srpska and for the territory of the Brcko District of Bosnia and Herzegovina to the major („the competent bodies"), with a request in writing for the restitution of the mentioned right into the previous condition.

Article 3

Together with the request in writing referred to in Article 2 it is necessary to attach appropriate documentation that would serve as undisputable proof the existence of the property right, i.e. acquired rights to property in accordance with the provisions of Article 1 and 2 of Annex „G" of the Agreement.

Article 4

Pursuant to the documentation prescribed in Article 3 of this decision the competent authority in charge of settling issues related to the status of property, shall establish the well-foundedness of a request and adopt a ruling establishing the existence of the right to property or the right to compensation in accordance with the provisions of Article 2 of Annex „G" of the Agreement, as sought in the request as a whole or in part.

Article 5

Where a competent authority establishes that it is not possible to establish the existence of the property right and acquired rights to property, pursuant to the documentation referred to in Article 3 of this decision, it shall dismiss the request by a ruling.

Article 6

An appeal may be lodged against the ruling referred to in Articles 4 and 5 of this decision as follows: for the territory of Federation with the Government of the Federation of Bosnia and Herzegovina, for the territory of the Republika Srpska, with the Government of the Republika Srpska and for the territory of the Brcko District of Bosnia and Herzegovina to the Government of Brcko District, within 15 days time limit as of the date of receipt of the ruling.

An administrative dispute may be instituted with a competent Entity court or Brcko District of Bosnia and Herzegovina court against a decision on the appeal referred to in Article 6.

Article 7

This decision shall enter into force in accordance with the provisions of Article 12(1) of the Agreement on succession issues, i.e. 30 day subsequent to disposal of the fifth document on ratification and shall be published in the Official Gazette of Bosnia and Herzegovina.

V. Admissibility

25. The request was filed in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, which reads as follows:

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.

26. The request for the review of constitutionality was filed by the Basic Court in Teslić, which means that the request was filed by an authorized person under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 5/10* of 26 November 2010, paragraphs 7-14, published in the *Official Gazette of Bosnia and Herzegovina* no. 37/11). Bearing in mind the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of the Constitutional Court, the Constitutional Court deems that the present request is admissible as it was filed by an authorized entity, and that there is no single formal reason under Article 17(1) of the Rules of the Constitutional Court rendering this request inadmissible.

27. Bearing in mind the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of the Constitutional Court, the Constitutional Court establishes that the present request is admissible as it was filed by an authorized entity, and that there is no single formal reason under Article 17(1) of the Rules of the Constitutional Court rendering this request inadmissible.

VI. Merits

28. The applicant holds that the provisions of Article 4 of the Law on Implementation are not in compliance with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention. It stated that the application of the challenged provision would result in the stay of the enforcement procedures of the legally binding court decisions, and the failure to enforce the legally binding court decisions constitutes a violation of the right to a fair trial.

29. Although the applicant has not explicitly raised the issue of the constitutional competence of the Republika Srpska for enactment of the law in question, the Constitutional Court is of the opinion that this issue has to be considered in the present case. Namely, the fact is that on 15 December 2003, before the enactment of the challenged law, the Council of Ministers of Bosnia and Herzegovina as the Institution of Bosnia and Herzegovina adopted the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina. Thus, two regulations were adopted by the legislative bodies of different level, the title and contents of which indicate that they regulate the same matter. That indicates that the Constitutional Court cannot exclusively restrict itself to the allegations of the request, that is, to review the constitutionally of some provisions of the Law on Implementation of Annex G of the Agreement on Succession Issues on the Territory of the Republika Srpska without previous consideration of the constitutional competence of the Entity for the adoption of this law. In addition, in the context of the stipulated provision of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, under which the Constitutional Court shall have jurisdiction over issues whether „a law […] is compatible with this Constitution", the Constitutional Court is inevitably faced with, as s preliminary issue, the issue of the constitutional jurisdiction of the enactor of the law in question, under the Constitution of BiH. This constitutional provision, as interpreted by the Constitutional Court, in the procedure of actual review of constitutionality allows for a wider range of possibilities for the Constitutional Court to review the entire text of the law as well as constitutional grounds for its adoption. The challenged provision of some law cannot exist independently out of the context of the entire text of the law for which the Constitutional Court has competence to examine the constitutional grounds for its adoption. The Constitutional Court observes that in its case-law it took a position that not only individual provisions but also the entire law may be the subject of constitutional review (see decision of the Constitutional Court no. *U 1/99* of 14 August 1999, item 2 and ff). In addition, the Constitutional Court has in several cases reviewed constitutionality of the law within a wider constitutional context but not limiting itself to the provisions of the Constitution of BiH referred to in the request (see

the Decision of the Constitutional Court no. *U 11/08* of 30 January 2009, paragraph 19 and decision of the Constitutional Court no. *U 6/06* of 29 March 2008, paragraph 21). Bearing in mind the aforesaid, in the instant case, the Constitutional Court shall examine the request in question within „a wider constitutional context".

30. The Constitutional Court points out that the issue of division of responsibilities between Bosnia and Herzegovina and its Entities is a complex issue which the Constitutional Court encountered on a number of occasions when deciding on the basis of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In the opinion of the Constitutional Court, the text of the Constitution of Bosnia and Herzegovina itself entails a significant number of issues relating to the division of responsibilities between Bosnia and Herzegovina and Entities (see the Decisions: *U 5/ 98-I* of 20 January 2000, *U 5/98-II* of 18 February 2000, *U 5/98-IV* of 18 August 2000, *U 9/00* of 3 November 2000, the Law on the State Customs Service of Bosnia and Herzegovina, *U 25/00* of 23 March 2001, Decision Amending the Law on Travel Documents of Bosnia and Herzegovina, *U 26/01* of 28 September 2001, the Law on Court of Bosnia and Herzegovina, *U 42/01* of 26 March 2004, The Agreement on the Establishment of Special Relations between the SRY and the Republika Srpska, *U 42/03* of 17 December 2004, the Law on the Basis of Public Broadcasting System and Public Broadcasting Service of Bosnia and Herzegovina, *U 14/04* of 29 October 2004, the Law Amending the Law on Goods and Services Turnover Tax, *U 14/05* of 2 December 2005, the Law on Determination and Manner of Settlement of Internal Obligations of the Federation of BiH, the Law on Determination and Manner of Settlement of Internal Debt of the Republika Srpska and the Law on Settlement of Obligations on the Basis of Old Foreign Currency Savings of the Brcko district of Bosnia and Herzegovina, *U 17/05* of 26 May 2006, the Law on the Foundation of the Company for Electric Currency Transfer and *U 11/08* of 30 January 2009, the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina).

31. Although the issue of division of responsibilities between Bosnia and Herzegovina and the Entities has been considered in a number of cases, the Constitutional Court holds that it is not possible to take a general position to be applied in all the cases regarding this issue but this issue (when there is a dilemma as to the division of responsibilities) should be considered in each individual case.

32. In the present case the issue that arises and to which the Constitutional Court should reply is: whether the Republika Srpska has the constitutional competence to adopt the law relating to the implementation of the International Agreement (Annex G of the Succession Agreement) which was entered into by Bosnia and Herzegovina and for the

implementation of which Bosnia and Herzegovina is responsible? The Constitutional Court stresses that this decision shall not contain general positions on the basis of which would be possible, in any situation, to answer to the question whether the Entities or any other of the administrative units in Bosnia and Herzegovina have the constitutional competence to enact the regulations relating to the implementation of the International Agreements entered into by Bosnia and Herzegovina and for the implementation of which Bosnia and Herzegovina is obliged. This decision shall exclusively deal with the examination of the competencies of the Republika Srpska to adopt, in the particular case, the Law on Implementation of Annex G of the Agreement on Succession Issues on the Territory of the Republika Srpska within the context of relevant provisions of the Constitution of Bosnia and Herzegovina, relevant provisions of the Agreement on Succession Issues and in the context of the Decision (of the Council of Ministers of Bosnia and Herzegovina) on Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina.

33. The text of Article II(1) (responsibilities of the Institutions of Bosnia and Herzegovina) item (e) of the Constitution of Bosnia and Herzegovina reads: *The following matters are the responsibility of the institutions of Bosnia and Herzegovina… Finances of the institutions and for the international obligations of Bosnia and Herzegovina,* while the text of Article IV(4)(b) of the Constitution of Bosnia and Herzegovina reads: *The Parliamentary Assembly shall have responsibility for... Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.* The Constitutional Court is of the opinion that the quoted provisions of the Constitution of Bosnia and Herzegovina clearly prescribe the obligation and responsibility of Bosnia and Herzegovina to fulfill the international obligations of Bosnia and Herzegovina. Such conclusion follows the clear text of Article III(1)(e) of the Constitution of Bosnia and Herzegovina pursuant to which the responsibility of the institutions of Bosnia and Herzegovina is to finance for the international obligations of Bosnia and Herzegovina, while pursuant to the text of Article IV(4)(b) of the Constitution of Bosnia and Herzegovina, the Parliamentary Assembly is responsible to decide upon the sources and amounts of revenues for the international obligations of Bosnia and Herzegovina.

34. In the opinion of the Constitutional Court, and given that the Constitution of Bosnia and Herzegovina prescribes the obligation and responsibility of Bosnia and Herzegovina to implement the international obligations of Bosnia and Herzegovina, the logical conclusion follows that the Constitution of Bosnia and Herzegovina implies that Bosnia and Herzegovina (also) has the responsibilities to decide on modalities for the implementation

of the international obligations of Bosnia and Herzegovina. The Constitutional Court bases such conclusion on the fact that certain provisions of the Constitution of Bosnia and Herzegovina (IV(4)(b)) give such competence to the Parliamentary Assembly of Bosnia and Herzegovina to decide on the sources and amounts of revenues for the international obligations of Bosnia and Herzegovina. The Constitutional Court bases its conclusion that Bosnia and Herzegovina has the responsibilities to decide on modalities for the implementation of the international obligations of Bosnia and Herzegovina (also) on the fact that Article V(4)(a) of the Constitution of Bosnia and Herzegovina provides for the following: *Together the Chair and the Ministers shall constitute the Council of Ministers, with responsibility for carrying out the policies and decisions of Bosnia and Herzegovina in the fields referred to in Article III(1), (4), and (5)*[1]. This constitutional provision (V(4)(a)) should be brought into connection with Article III(1)(e) of the Constitution of Bosnia and Herzegovina which grants the responsibility to the institutions of Bosnia and Herzegovina in the field of international obligations of Bosnia and Herzegovina and on the basis of which it follows that the Council of Ministers of Bosnia and Herzegovina is one of institutions of Bosnia and Herzegovina which, in the opinion of the Constitutional Court, has the competence to (also) ensure the implementation of international obligations of Bosnia and Herzegovina.

35. Bosnia and Herzegovina, therefore, pursuant to the relevant provisions of the Constitution of Bosnia and Herzegovina has the obligation and responsibility to implement the international obligations of Bosnia and Herzegovina, and within that scope it also has the competence to decide on the manner of implementation of international obligations of Bosnia and Herzegovina.

36. The next issue which arises is whether Bosnia and Herzegovina obliged itself, by signing or adopting the decision to ratify the Agreement on Succession Issues (including the relevant Annexes thereto) to the implementation of international obligations. That issue, in the opinion of the Constitutional Court, should not be reasoned any further. There is no dilemma whatsoever for the Constitutional Court that Bosnia and Herzegovina took the obligation to implement its international obligations by the signing or ratification of the Agreement on Succession Issues with all relevant Annexes thereto. In this respect, and having regard to the reasoning of the previous part of the present Decision, the Constitutional Court holds that Bosnia and Herzegovina is responsible for the implementation of international obligations arising from the Agreement on Succession Issues and relevant Annexes thereto, within the scope of which Bosnia and Herzegovina

1 It is obvious that Article III(1), (4), and (5) imply the provisions of the Constitution of Bosnia and Herzegovina.

(also) has the authority to decide on the manner of implementation of the international obligations arising from the Agreement on Succession Issues and relevant Annexes thereto.

37. In relation to the implementation of obligations arising from the Agreement on Succession Issues and Annex G thereto, the Constitutional Court notes that the international agreement at issue neither contains any detailed provisions on the manner of its implementation nor it prevents the successor states to adopt their internal regulations to regulate this issue in detail, nor it determines who (within the successor states) may or should adopt such regulations, which is entirely logical when any such international agreement is concerned.

38. When the issue of implementation of Annex G of the Agreement on Succession Issues is concerned, the Constitutional Court notes that Bosnia and Herzegovina, that is, the Council of Ministers of Bosnia and Herzegovina, on 15 December 2003, enacted the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina. In this respect, the Constitutional Court refers to the reply of the Council of Ministers of Bosnia and Herzegovina which underlines that it adopted the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina having regard to the scope and importance of the particular issue and its repercussions to the international position of the State of Bosnia and Herzegovina, as well as its responsibility for the implementation of international conventions and agreements, with the aim of specifying the obligations of the competent bodies in the course of implementation of Annex G of the Agreement on Succession Issues. The Council of Ministers of Bosnia and Herzegovina stressed that in this manner (by the enactment of the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina) Bosnia and Herzegovina confirmed its responsibility for the obligations undertaken and left no dilemma in the implementation of the provisions of Annex G of the Agreement on Succession Issues.

39. Bosnia and Herzegovina, therefore, enacted the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina with the aim of implementing the international obligations taken (in the particular case, those are the obligations on the basis of Annex G of the Agreement on Succession Issues) and using its constitutional responsibilities to decide on the modalities of implementation thereof.

40. On the basis of Article 1 of the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina it appears

that, with the aim to protect private property and acquired rights of citizens and legal persons from the successor States of the former SFRY (signatories of the Agreement on Succession Issues) that decision determines the manner and procedure of restitution into the previous condition of the right to movable and immovable property, which is located in the territory of Bosnia and Herzegovina. It follows from Article 2 of the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina (which is especially important having regard to the circumstances of the present case) that citizens and legal persons from the successor States of the former SFRY who were entitled to movable and immovable property, which is located in the territory of Bosnia and Herzegovina, address, for the territory of the Republika Srpska, the Ministry for Economic Relations and Coordination of the Republika Srpska, with a request in writing for the restitution of the mentioned right into the previous condition. It follows from Article 3 of the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina that together with the request in writing referred to in Article 2 it is necessary to attach appropriate documentation that would serve as undisputable proof the existence of the property right, while the same Article provides for the appropriate documentation to consist of the excerpts from land books, cadastral books, binding judicial decisions, contracts or other legally valid documents. It appears on the basis of Article 4 of the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina that the competent authority in charge of settling issues related to the status of property, shall establish the well-foundedness of a request and adopt a ruling establishing the existence of the right to property or the right to compensation as sought in the request as a whole or in part. Article 5 of the same Decision provides that where a competent authority establishes that it is not possible to establish the existence of the property right and acquired rights to property, pursuant to the documentation, it shall dismiss the request by a ruling. Article 6 of the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina stipulates that an appeal may be lodged against the ruling referred to in Articles 4 and 5 of this decision (which is especially important given the circumstances of the present case) as follows: for the territory of the Republika Srpska, with the Government of the Republika Srpska, while paragraph 2 of the same Article provides that an administrative dispute may be instituted with a competent Entity court (in the particular case it is obvious that it would be the competent court for the administrative disputes on the territory of the Republika Srpska) against a decision on the appeal referred to in Article 6.

41. By the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina Bosnia and Herzegovina, therefore,

regulated in its entirety the manner (procedure) of implementation of international obligations taken over by Annex G of the Agreement. What is important to emphasize, having regard to the circumstances of the present case, is that the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina does not contain provisions on the basis of which it could be concluded that the Entities (in the particular case it would be the Republika Srpska) are responsible/competent to enact the additional regulations relating to the procedure of implementation of Annex G of the Agreement on the Succession Issues on the territory of entities (Republika Srpska). In the opinion of the Constitutional Court, it is indisputable that the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina is the „decision of the institutions of Bosnia and Herzegovina" under Article III(3)(b) of the Constitution of Bosnia and Herzegovina pursuant to which constitutional provision the Entities and any subdivisions thereof shall comply fully with this Constitution... and with the decisions of the institutions of Bosnia and Herzegovina.

42. Although the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina Bosnia and Herzegovina does not provide for the possibility for the entities to enact the additional regulations relating to the implementation of Annex G on their territory, the Constitutional Court holds it necessary (given the circumstances of the present case) to make the comparison of the provisions of the Law on Implementation of Annex G of the Agreement on Succession Issues in the Territory of the Republika Srpska.

43. On 6 July 2010, the Republika Srpska enacted the Law on Implementation of Annex G of the Agreement on Succession Issues in the Territory of the Republika Srpska. Under Article 1 of the Law at issue, this Law shall regulate the implementation of Annex „G" of the Agreement on Succession Issues in the territory of the Republika Srpska, the protection of property of legal persons who had acquired property in the privatization process, on which the socially-owned enterprises with a seat in one of the former republics of the SFRY had had the right of use and management, as well as the status of proceedings, which subject-matter relates to the resolution of property and legal relations over the property of enterprises with seats in the territory of one of the states which came into existence following the breakup of SFRY. Therefore, the above Law is adopted with the aim of the protection of property of legal persons (obviously, the legal persons imply the legal persons with the seat in the territory of the Republika Srpska) who had acquired property in the privatization process, on which the socially-owned enterprises with a seat in one of the former republics of the SFRY (in the opinion of the Constitutional Court, it is obvious

that those are the enterprises to which the Decision of the Council of Ministers of Bosnia and Herzegovina relates) as well as the status of proceedings, which subject-matter relates to the resolution of property and legal relations over the property of enterprises with seats in the territory of one of the states which came into existence following the breakup of SFRY (again, those are the enterprises to which the Decision of the Council of Ministers of Bosnia and Herzegovina relates). In the opinion of the Constitutional Court, it is obvious that the subject-matter of the Law on Implementation of Annex G of the Agreement on Succession Issues in the Territory of the Republika Srpska is completely contrary to the subject-matter of the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina Bosnia and Herzegovina.

44. Articles 2 and 3 of the Law on Implementation of Annex G of the Agreement on Succession Issues in the Territory of the Republika Srpska follow Article 1 of the above Law, and they additionally emphasize the protection of property of enterprises with the seat in the territory of the Republika Srpska that acquired their property in the privatization process.

45. Last but one, Article 4 of the Law on Implementation of Annex G of the Agreement on Succession Issues in the Territory of the Republika Srpska prescribes that judicial and other proceedings, which subject-matter relates to the resolution of property and legal relations over the property of legal persons with seats in the territory of one of the states which came into existence following the breakup of SFRY (which property is located in the territory of the Republika Srpska) shall be stayed at all stages and the proceedings will be suspended pending the conclusion of appropriate contracts on the regulation of property and legal relations between Bosnia and Herzegovina and the states which came into existence after the breakup of SFRY. The Constitutional Court notes that on the basis of the above provision of the Law on Implementation of Annex G of the Agreement on Succession Issues in the Territory of the Republika Srpska (also) all the proceedings might be suspended that are conducted before the administrative bodies or courts competent to decide in the administrative disputes, which proceedings are pending (or might be initiated) on the basis of the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina Bosnia and Herzegovina. It is obvious that such a possibility (suspension of proceedings before the administrative or judicial bodies) has not been provided for by the Decision on the Implementation of Annex G of the Agreement on Succession Issues on the Territory of Bosnia and Herzegovina Bosnia and Herzegovina.

46. Thus, the Republika Srpska, regardless of the existence of the Decision by Bosnia and Herzegovina on the Implementation of Annex „G" of the Agreement on Succession

Issues in the Territory of Bosnia and Herzegovina, enacted the law on implementation off the aforementioned annex in the territory of the Republika Srpska, without having any foothold to enact such a law in the previously enacted implementation regulation of Bosnia and Herzegovina, including the provisions that are in apparent contravention of the provisions contained in the cited implementation regulation of Bosnia and Herzegovina.

47. The Constitutional Court recalls that the National Assembly of the Republika Srpska stated in its reply to the request that although the said decision was adopted (meaning the Decision on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of Bosnia and Herzegovina), in practice it failed to redress administrative inconsistencies and barriers, as a matter of fact, it failed to take hold in practice. In that regard, the Constitutional Court highlights that any conceivable problems in the implementation of the aforementioned regulation enacted by Bosnia and Herzegovina may not be resolved by the Republika Srpska enacting a law that would *de facto* derogate the regulation of Bosnia and Herzegovina. Such situation, in the opinion of the Constitutional Court, leads to the violation of the Constitution of Bosnia and Herzegovina. In connection to this, the Constitutional Court highlights that there exist established procedures and possibilities for amending regulation as enacted by the bodies of Bosnia and Herzegovina (including the concrete decisions by the Council of Ministers) which may and ought to be used in such and similar situations.

48. Even if the Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska would be construed in the manner that it exclusively prescribes proceedings before regular courts and authorities in the territory of the Republika Srpska, for which the Republika Srpska has constitutional jurisdiction beyond any doubt, the Republika Srpska may not use its indisputable jurisdiction in the present case because the procedure of implementation of Annex „G" of the Agreement on Succession Issues before administrative bodies and regular courts (including the administrative bodies and regular courts in the Territory of the Republika Srpska) has been already regulated by regulations of Bosnia and Herzegovina, i.e. the Decision on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of Bosnia and Herzegovina adopted by the Council of Ministers.

49. Furthermore, the Constitutional Court, in spite of the fact that it decided (as stated in item 29) to consider the applicant's request as an issue of constitutional jurisdiction of the Republika Srpska to enact the instant law (thus not only the constitutionality of Article 4), is of the opinion that it would be useful, having in mind the previous case-law on this court as well as the case-law of the European Court of Human Rights, to address even the basic

aspects within the context of the lodged request and the application of the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina, and then also the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention through enforcement procedure which, in the present case, is the legal situation, i.e. phase before regular-enforcement court.

50. Regarding the application of the challenged provision of Article 4 of the Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska through enforcement procedure, the Constitutional Court highlights that the state, in principle, may not enact laws which will stay the enforcement of legally valid court decisions because it would be in contravention of the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina, but also the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention (see the Constitutional Court Decision no. *AP 969/04* of 23 March 2005, published in the *Official Gazette of Bosnia and Herzegovina* no. 27/05).

51. The Constitutional Court also recalls, *mutatis mutandis*, the Decision of the European Court of Human Rights *Čolić and Others v. Bosnia and Herzegovina*, in which it is stated that „the present case concerns, as in Jeličić case, the statutory suspension of the enforcement of an entire category of final judgments on account of the size of public debt arising from these judgments. (...) While a situation where a significant number of war-related civil claims are pending may call for their replacement by a general compensation scheme, this is of no relevance to the obligation of the respondent State to enforce judgments which became final before the creation of such a scheme„ (see of the European Court of Human Rights, *Čolić and Others v. Bosnia and Herzegovina*, judgment of 10 November 2009, application no. 1218/07 and others, paragraph 15).

52. The Constitutional Court emphasizes that the enforcement proceedings involve the existence of enforcement document, including final judgment which has already established a specific property right. The stay of such enforcement proceedings suspend the right to enforcement of final decisions obtained by legal persons from successor states which is guaranteed by Article 6(1) of the European Convention. The duration of such interruption has not been determined by a specific occurrence or time limit. The European Court of Human Rights held that the enforcement of final judgment might be exceptionally postponed, i.e. justified on the basis of a general compensation scheme by the Government, but that this could not call into question the obligation of the state to enforce judgments which became final before the creation of such a scheme (op. cit., *Čolić and Others v. Bosnia and Herzegovina*, paragraph 15). Therefore, the Constitutional Court

holds that interference by the legislator with the enforcement of final decisions in the manner as prescribed by Article 4 of the Law on Implementation amounts to a violation of the right to enforcement of court decisions which violates the essence of the right to a fair trial as protected under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

53. Finally, given that this involves a constitutional obligation of Bosnia and Herzegovina to enforce an international obligation of Bosnia and Herzegovina, the Constitutional Court highlights that the Decision on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of Bosnia and Herzegovina has to be complied with and applied in practice, which particularly relates to regular courts which, pursuant to the relevant legal provisions, have to pay attention *ex officio* whether they have subject matter jurisdiction to deal with concrete disputes and, particularly, as the possibility even previously existed, when they are deciding about every individual case, to check as an issue of facts whether the reciprocity requirement has been met in regard to the involved successor state of SFRY. This particularly having in mind the case-law of regular courts of the States parties to the Succession Agreement as stated in the reply by the Council of Ministers of Bosnia and Herzegovina pursuant to which „…subjects with capacity to sue which initiated court proceedings for the protection of their rights informed the Council of Ministers that the courts in other successor states have been interrupting court proceedings invoking reciprocity". Namely, the Succession Agreement and Annexes thereto obligate equally all the States parties and, in the opinion of the Constitutional Court, the application of the principle of reciprocity is, if not an obligation (the Constitutional Court did not deem it necessary in the present case to address the issue of either obligatory quality or merely possibility of conclusion of separate bilateral agreements in accordance with Article 4 and 5 of Annex „G" including the reciprocity issue), then certainly an opportunity to protect the interest of subject from Bosnia and Herzegovina in all phases of proceedings before regular courts and/or other competent authorities.

54. In view of the aforementioned, the Constitutional Court holds that the Republika Srpska did not have constitutional jurisdiction to enact the Law on Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska in the Territory of the Republika Srpska and therefore the aforementioned law in its entirety is unconstitutional pursuant to the provisions of Article III(1)(e), Article III(3)(b), Article IV(4)(b) and Article V(4)(a) of the Constitution of Bosnia and Herzegovina.

VII. Conclusion

55. The Constitutional Court concludes that the Law on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska is not in compliance with the provisions of Article III(1)(e), Article III(3)(b), Article IV(4)(b) and Article V(4)(a) of the Constitution of Bosnia and Herzegovina.

56. In accordance with the established standards and norms of international law as well as the Succession Agreement and the relevant Annexes thereto, the competent authorities in Bosnia and Herzegovina including regular courts may use those instruments which, depending on the conduct of other States parties to the Succession Agreement, will effectively protect the acquired rights or secure the exercise of the rights which are the subject of the Succession Agreement and Annexes thereto. This involves an active role and necessary coordination and/or subordination in accordance with the distribution of responsibilities among the authorities and institutions in Bosnia and Herzegovina.

57. Pursuant to Article 61(1) and (2) and Article 63(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

58. Under Article 41 of the Rules of the Constitutional Court, Separate Dissenting Opinions of Vice-President Miodrag Simović and Judge Zlatko M. Knežević shall make annex to this Decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of Vice-President Miodrag Simović

I disagree with the majority opinion in case no. *U 16/11* of 13 July 2012. I disagree for the following reasons:

1. The Constitutional Court should have confined itself to the allegations in the request, i.e. it should have examined only the constitutionality of Article 4 of the Law on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska, i.e. the request in question „should not have been examined in „wider constitutional context" (paragraph 29 of the Decision). The Court should have dealt only with the content of the request for review of constitutionality of the mentioned Article 4 and should not have considered what was not sought in the request even when it established that there were other violations of the constitutional rights in the Law on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska. Therefore, the subject-matter is to be determined by the applicant, not the Constitutional Court, and the Constitutional Court can only grant or dismiss the request. The Constitutional Court cannot resolve the disputes which are not referred to by an authorized person.

2. In the present case, the Constitutional Court, by calling into question the fact that it is bound by the Constitution, interfered with the scope of responsibilities of other state authorities, and, thus, assessed the political opportuneness and comprehensiveness (instead of constitutionality) of the Law in question and even its economic and social value. This raises an issue whether the Constitutional Court always acts with caution and moderate restraint, i.e. „positive judicial activism" and as a credible interpreter of the Constitution of BiH.

3. I am committed to „restraint and moderation" by the Constitutional Court and the adoption of the presumption of constitutionality of the law, whereby the *benefit of the doubt* is given to the law. In particular, a law must not be declared unconstitutional only for a doubt on its constitutionality but the unconstitutionality must rather be obvious. In particular, leaving the law in force, which is inconsistent with the Constitution to the insignificant extent, does less harm than declaring unconstitutional the law which is actually constitutional.

4. The question is whether the constitutional courts in the countries in transition could take the path of unrestrained judicial activism, i.e. „new judicial activism" and to which

extent and how much the present situation of such courts is compatible with the role and mission of the constitutional institutions as independent state authorities in modern societies. More precisely, to which extent one can accept the increasing process in which the political institutions „rely" on the constitutional courts, i.e. where the limits of meeting expectations of political power actors are, i.e. taking over and resolving, by these courts, the most important and very complex conflicts in this country by invoking the Constitution and law, i.e. disputes with explicit political content (for example, those relating to privatization, election system etc.) and without jeopardizing their own position as independent and politically neutral guardians of the Constitution, which must not be in the shadow of what the political power or general public expect them to do. Furthermore, one should not forget that it is not uncommon, due to undeveloped democratic constitutional order, for these courts to act as controllers that are not been limited by anything whatsoever, although the constitutional function, by its nature, can never be absolutely free, even less arbitrary, as the performer thereof must be subject to the Constitution. Thus, there must be a clear boundary determined on the basis of the constitutional practice, in addition to that which is determined in the Constitution, within which the actions of the Constitutional Court can be taken while examining constitutionality so that the acts of the Constitutional Court that go beyond, i.e. across its mission, cannot further jeopardize democratic legitimacy of political institutions in such countries, which is at any rate fragile, and cannot establish the rule of constitutional judges instead of the rule of the Constitution (law) (see, Dr Bosa Nenadić, *O jemstvima nezavisnosti ustavnih sudova*, Beograd, 2012, pp. 23-38).

Separate Dissenting Opinion of Judge Zlatko M. Knežević

Regretfully, I disagree with the majority opinion in this case for the following reasons:

1. With due respect and understanding, I join the reasons enounced in the separate dissenting opinion of Vice-President Miodrag Simović, which also represent my standpoint on the jurisdiction and actions taken by the Constitutional Court, all the more so given a complex constitutional community such as ours.

2. I would like to emphasize that I oppose, with all my experience and integrity, the ambiguous and, in my opinion, extremely dangerous rejection of the Rules of the Constitutional Court with regards to the scope of the request for review of constitutionality (or appeal), which is exclusively determined by the applicant (or the appellant).

3. The procedure (the provisions determining the procedural rules of adjudication in a certain legal process) is the essence and the basis for every fair decision, and if the applicant limited his/her request (appeal), then not only that the Constitutional Court cannot presume that the applicant would also want the Constitutional Court to go beyond the request but also it must not violate the Rules (which could be considered to have the force of the procedural law). In the case such as the present one, where the Constitutional Court allows itself to act contrary to the rules, we are clearly sliding into an „abys of non-law", as described in the lifelike manner by academician Slobodan Perović.

4. The Constitutional Court is the ultimate guarantor of „law" and „non-law". Regretfully, in the present decision, it did what it does not allow to be done by others, i.e. it overstepped the rules which it imposed to itself.

5. Such a domination over equality of all, including the Constitutional Court, over the procedural rules or, more precisely, over the procedural provisions overshadows all other reasons for accepting the merits of the request for review of constitutionality.

6. Thus, I could not accept the majority opinion in this case.

Case No. U 8/12

DECISION ON ADMISSIBILITY AND MERITS

Request of the Municipal Court in Sarajevo (the Judge of the Municipal Court in Sarajevo, Ms. Silvana Brković-Mujagić,) for review of compatibility of Article 4 of the Law on the Court Fees of the Sarajevo Canton and Article 384 of the Law on Civil Procedure of the Federation of BiH with Article II(3) (e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms

Decision of 23 November 2012

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1), (2) and (3) and Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić

Ms. Constance Grewe

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knežević

Having deliberated on the request of **the Municipal Court in Sarajevo (the Judge of the Municipal Court in Sarajevo, Silvana Brković-Mujagić)** in the case no. **U 8/12,** at its session held on 23 November 2012 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by the Municipal Court in Sarajevo (the Judge of the Municipal Court in Sarajevo, Silvana Brković-Mujagić) is partly granted.

It is hereby established that the provision of Article 4 of the Law on the Court Fees of the Sarajevo Canton (*Official Gazette of the Sarajevo Canton*, nos. 21/09, 29/09 and 14/11) is not in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Sarajevo Canton Assembly is ordered, in accordance with Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to bring in line the provision of Article 4 of the Law on the Court Fees of

the Sarajevo Canton (*Official Gazette of the Sarajevo Canton*, nos. 21/09, 29/09 and 14/11) with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, within six months from the date of the publication of this decision in the *Official Gazette of Bosnia and Herzegovina* at the latest.

The Sarajevo Canton Assembly is ordered, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to inform the Constitutional Court of Bosnia and Herzegovina of the measures taken with the aim to enforce this decision.

The request lodged by the Municipal Court in Sarajevo (the Judge of the Municipal Court in Sarajevo, Silvana Brković-Mujagić) for review of constitutionality of Article 384 of the Law on Civil Procedure of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, nos. 53/03, 73/05 and 19/06), in relation to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is dismissed.

It is established that Article 384 of the Law on Civil Procedure of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, nos. 53/03, 73/05 and 19/06) is in conformity with the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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

Reasoning

I. Introduction

1. On 18 May 2012, the Municipal Court in Sarajevo (the Judge of the Municipal Court in Sarajevo, Ms. Silvana Brković-Mujagić, „the applicant") filed with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") a request for review of compatibility of Article 4 of the Law on the Court Fees of the Sarajevo Canton (*Official*

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Gazette of the Sarajevo Canton, nos. 21/09, 29/09 and 14/11; „the Law on the Court Fees") and Article 384 of the Law on Civil Procedure of the Federation of BiH (*Official Gazette of the Federation of BiH*, nos. 53/03, 73/05 and 19/06) with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention").

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the House of Representatives and the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina („the Parliament of FBiH"), and the Sarajevo Canton Assembly („the SC Assembly") were requested on 31 May 2012 to submit their respective replies to the request within 30 days.

3. The Parliament of FBiH and the SC Assembly failed to submit their respective replies to the request.

III. Request

a) Allegations stated in the request

4. The applicant stated that Article 4 of the Law on the Court Fees determines that a court will not undertake any actions whatsoever if a taxpayer failed to pay the fee prescribed by that law. Next, the same provision prescribes that the court will, in the event of lodging a submission without a proof of fee payment, call on the party or the attorney to pay the fee within eight days „with a caution that the submission will be sent back". If the party fails to comply with the court order within the given time limit, the court will send back the submission to that party as a result of the failure to pay the court fee and „will consider it as if it has never been submitted". The applicant also mentions that the challenged provision prescribes the same conduct in the case where the court dismisses the request for the exemption from fees payment. Exceptionally, as further prescribed by law, the court will act „upon the lodging of an ordinary or extraordinary legal remedy without a previously paid court fee, but will collect the fee under coercion then". The applicant also stated that Article 384 of the Law on Civil Procedure stipulates that each party shall cover the costs they incurred through their respective actions.

5. The applicant stated that, while proceeding in the case no. 65 0 P 194758 11 P, the ruling dated 8 June 2011 dismissed the request for the exemption of Ms. Mia Komljenović and Mr. Stefan Komljenović („the plaintiffs") from the costs of the proceedings, and

ordered the plaintiffs to note in the lawsuit the value of dispute, and to pay the court fees accordingly. Also, the mentioned ruling, as the applicant stated, read that if the plaintiffs fail to comply with the order, the lawsuit will be referred back and will be considered as if it has never been filed. The applicant further stated that the Cantonal Court in Sarajevo („the Cantonal Court"), by the ruling dated 16 November 2011, granted partly the plaintiffs' appeal against the mentioned first-instance ruling so as to quash it in the part reading that in the case of failure to comply with the first-instance ruling the lawsuit will be referred back and considered as if it has never been filed. The applicant stated that, following the adoption of the second-instance ruling, it called once again on the plaintiffs to pay the court fees, which they failed to do. Therefore, the applicant stated that considering the challenged provision of the challenged law „it cannot act upon the lawsuit", and considering the decision of the Cantonal Court, „the plaintiff's lawsuit cannot be referred back and considered as if it has never been filed". Therefore, the applicant halted its work on the mentioned case pending the answer of the Constitutional Court to the question whether the provisions of Article 4 of the Law on the Court Fees and Article 384 of the Law on Civil Procedure are in contravention of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention „in relation to the segment of that right which guarantees the right of access to court".

b) Facts of the case regarding which the request was filed

6. On 25 April 2011, the plaintiffs filed a lawsuit against Mr. Nikola Komljenović for the establishment of unfitness to inherit, and on 4 May 2011 they filed a request for a security measure. Along with the lawsuit, the plaintiffs also submitted the request for the exemption from the costs of the proceedings, thereby providing a reasoning that „the mother of the plaintiff is unemployed, that the second plaintiff is unemployed, that only the first plaintiff is employed and that her monthly salary that they all subsist on is KM 1,510.00". By the ruling no. 65 0 P 194758 11 P of 8 June 2011 the applicant dismissed the plaintiffs' request for the exemption from the costs of the proceedings, ordered them to specify the value of the dispute in the lawsuit and in the proposal for a security measure, and to pay, in accordance with the challenged law, the court fee according to the value of the dispute and to submit the proof thereof to the Court. Paragraph 3 of the enacting clause of the first-instance ruling reads that unless the plaintiffs comply with these orders, the court will refer back the lawsuit along with the proposal for a security measure to the plaintiffs and will consider it „as if they have never been lodged". In the reasoning of the ruling, the applicant, among other things, reasoned why the plaintiffs' request for the exemption from the costs of the proceedings was dismissed, as well as that the plaintiffs were obliged, in accordance with the provision of Article 23 of the Law on the Court Fees,

to undertake necessary actions to establish the value of the dispute, and then to submit the proof of the payment of the court fees, „under the Tariff 1, paragraphs 1 and 7 of the Tariff of Court Fees".

7. By its Ruling no. 65 0 P 194758 11 Gž of 16 November 2011, the Cantonal Court partly granted the plaintiffs' appeal thereby quashing the mentioned paragraph 3 of the first-instance ruling, and upheld the remainder of that ruling. In the reasoning of its decision, the Cantonal Court stated that the provision of Article 11 paragraph 1 of the Law on the Court Fees prescribes „a possibility to exempt a taxpayer from the payment of a fee, if the fee payment, considering the amount of the funds which are used to sustain the taxpayer and members of his/her household, would result in the reduction of those funds to such an extent so as to jeopardize their existence". Paragraph 2 of the same article, as further stated by the Cantonal Court, prescribes that the court will assess all circumstances, „and particularly the value relevant for the fee collection, the total income and property of the taxpayer and of the members of his/her household that are his/her dependants". The Cantonal Court also referred to Article 12 of the Law on the Court Fees which stipulates evidence which the court may assess prior to taking a decision on the exemption from the fee payment, thus in view of that it concluded that the first-instance court correctly assessed that „the plaintiffs are not and cannot fall in the category of persons at social risk", and that „the presented general means of the plaintiffs does not indicate that they cannot cover those costs without damage to their necessary sustenance". The Cantonal Court did not accept either the complaint that the plaintiffs are unable to determine the value of the dispute, because the portions of inheritance have not been determined, stating that the plaintiffs ought to „determine the value of the dispute according to the value of the legacy itself or a portion of the legacy which they consider to belong to them and to fulfill the obligation of the fee payment".

8. However, the Cantonal Court concluded that the decision regarding the referring back of the lawsuit and of the proposal for a security measure is contrary to the provision of Article 321(2) of the Law on Civil Procedure, due to the obligation on the part of the court „to determine the value of the dispute itself if the plaintiff has specified a too high or too low value of the dispute, which leaves a possibility to carry on with the proceedings at the value of the dispute set by the court itself". Further, the Cantonal Court stated that the provision of Article 53(1) of the Law on Civil Procedure prescribes that the civil procedure shall be instituted by way of lodging a lawsuit, which generates „consequences relevant for the civil procedure, such as, for instance, the termination of the statute of limitations, the acquiring of the right to an interest, the establishment of a two-party legal relation between the plaintiff and the court etc., and therefore, irrespective of the legal

obligation of the court, not to undertake any actions whatsoever until the taxpayer pays the prescribed fee under [the challenged law] […] the first-instance court cannot refer back the lawsuit to the plaintiffs and hold that it has not been filed, as the legal consequences had already taken place upon the filing of a lawsuit and they cannot cease as a result of the failure to pay the court fees".

IV. Relevant Law

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

Article II(2) - International Standards

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

Article II(3) – Enumeration of Rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

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

Article II(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.

10. The **Law on the Court Fees of the Sarajevo Canton** (*Official Gazette of the Sarajevo Canton*, nos. 21/09, 29/09 and 14/11), in its relevant part, reads as follows:

Article 3
(Compulsory communication of proof of fees payment)

(1) Along with the submission (lawsuit, proposal, legal remedy etc.) one is obliged to submit a proof of the fee payment. [...]

Article 4
(Reciprocity of fee payment and the undertaking of actions in a procedure)

(1) A Court will not undertake any actions whatsoever if a taxpayer has failed to pay the fee prescribed by this law. In the event of lodging a submission without a proof of fee

payment, the court will call on the party, or their attorney, to pay the fee within 8 days, with a caution that the submission will be sent back. If the party fails to meet the given time limit, the court will send back the submission with a notice that it has been sent back as a result of the failure to pay the court fee and will be considered as if it has never been submitted.

(2) A Court will proceed in the manner set forth in paragraph 1 of this article and in the event it dismisses a request for the exemption from fee payment.

(3) Under the Law on Civil Procedure the time limits shall not start to run until the fee has been paid or until the court has resolved a request for exemption from fee payment.

(4) With exception to paragraph (1) of this article, if a taxpayer fails to comply with the order of a court and fails to pay the fee for the ordinary or extraordinary legal remedy within the given time limit, the submission will not be sent back, rather the procedure upon the lodged legal remedy will carry on, and the coercive collection of court fee will be carried out in accordance with the provisions of this law.

Article 5
(The time of the occurrence of the obligation of fee payment)

Unless provided for otherwise by this law, the fee obligation shall occur:

a) regarding submissions – on the day of the lodging thereof; […]

Article 8
(Statute of limitations on the collection of fee)

The right to collect fee shall be barred by the statute of limitations within five (5) years from the day the fee obligation has occurred.

Article 11
(Eligibility for exemption from the obligation to pay a fee)

(1) A Court may exempt a taxpayer from the payment of a fee, if the fee payment, considering the amount of the funds which are used to sustain the taxpayer and members of his/her household, would result in the reduction of those funds to such an extent so as to jeopardize their existence.

(2) A decision referred to in paragraph 1 of this article shall be adopted by a court upon a request in writing lodged by a taxpayer. Prior to adopting a decision, a court will assess all circumstances, and will particularly take into account the value relevant for the collection of a fee, the total income and property of a taxpayer and members of his/her household who are his/her dependants. […]

Article 12
(Evidence for exempting one from the obligation to pay a fee)

(1) The income amount of a taxpayer and members of his/her household shall be proven on the basis of an attestation by a competent social work center, or other evidence in writing which a taxpayer is obliged to submit regarding his/her means.

(2) The attestation referred to in paragraph 1 of this article shall serve as evidence to exempt one from fee payment only if no longer than six months have elapsed from the day of the issuing thereof to the day of lodging a request for exemption.

(3) When necessary, a court may, ex officio, obtain necessary data and notifications on the means of a taxpayer and members of his/her household, and can hear the opposing party regarding the same.

(4) No special appeal may be lodged against a court decision granting a proposal for the exemption from fee payment.

Article 20
(Establishing the value of a dispute in a civil procedure)

(1) In a civil procedure a fee shall be paid according to the value of the subject-matter of the dispute.

(2) Unless otherwise provided for by this law, the provisions of regulations on civil procedure, on which basis a value of the dispute shall be established, shall be applied also when determining the value of the dispute for the fee payment.

Article 23
(Establishing the value of a subject-matter of a dispute in disputes arising from inheritance law)

If the subject-matter of a dispute is the right to the entire inheritance, one shall take as the value of the subject-matter of a dispute the value of the real inheritance, and if the subject-matter of a dispute concerns solely one portion of the inheritance or a certain item of the inheritance, one shall take as the value of the subject-matter of a dispute the real value of that portion, or item.

Article 31
(Coercive collection of unpaid fee)

(1) A taxpayer shall be obliged to pay the fees, which amount shall be determined at the end of the proceedings, within eight days from the day of receiving the ruling referred to in Article 19 of this law. If a taxpayer fails to pay the fee within the given time limit, a court shall request from the competent Tax Administration of the Federation of Bosnia

and Herzegovina („the competent office") in which territory a tax payer has permanent or temporary residence, that the collection of the fees due be carried out by way of coercion.

11. The **Civil Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, nos. 53/03, 73/05 and 19/06), in its relevant part, reads as follows:

Article 53

(1) A civil procedure shall be instituted by way of filing a lawsuit. […]

Article 384

Each party shall bear in advance the costs they have brought about through their own actions.

V. Admissibility

12. In examining the admissibility of the request, the Constitutional Court invoked the provision of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina.

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

c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

13. The request for the review of constitutionality was filed by the Municipal Court in Sarajevo (the Judge of the Municipal Court in Sarajevo Ms. Silvana Brković-Mujagić), which means that the request was filed by an authorized person under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 5/10* of 26 November 2010, paragraphs 7-14, published in the *Official Gazette of Bosnia and Herzegovina,* no. 37/11). Bearing in mind the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of the Constitutional Court, the Constitutional Court deems that the present request is admissible as it was filed by an authorized entity, and that there is no single formal reason under Article 17(1) of the Rules of the Constitutional Court rendering this request inadmissible.

VI. Merits

14. The applicant demanded that the Constitutional Court decides on the compatibility of Article 4 of the Law on the Court Fees and Article 384 of the Law on Civil Procedure with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, which guarantee the right of access to court as an inseparable part of the right to a fair trial.

a) Relevant principles in relation to the right of access to court

15. Article 6(1) of the European Convention, in its relevant part, reads as follows:

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

16. As consistently indicated by the European Court and the Constitutional Court in their respective jurisprudence, the right to a fair trial under Article 6(1) of the European Convention ensures, among other things, the right for everyone to present their respective request in relation to civil rights and obligations before a court or „a tribunal". In this way, this provision contains „the right to court" although it is not explicitly stated in the provision of Article 6(1) of the European Convention, and „the right of access to court" is but one element of that right, without which it would not be possible to enjoy other guarantees prescribed by the mentioned provision. Namely, the principles of equity, publicity and expeditiousness of a court procedure would have no value whatsoever if a court procedure could not be instituted. Besides, it would be difficult to envisage the rule of law, as a fundamental principle of the right to a fair trial, without a possibility to institute a procedure before a court or „a tribunal", thus one will not consider the right of access to court to be effective if there are procedural hindrances in the national law, which, *de facto*, make it impossible for a person to file a lawsuit with a court (see the European Court of Human Rights, *Kreuz vs. Poland,* judgment of 19 June 2001, Application no. 28249/95, paragraph 52 with further references and, the Constitutional Court, Decision on Admissibility and Merits no. *U-6/12* of 13 July 2012, paragraph 26, published in the *Official Gazette of BiH,* no. 75/12).

17. However, the right to court is not absolute. It can be subject to certain restrictions, since this right, by its nature, requires to be regulated in an appropriate manner. By guaranteeing individuals the right to an effective access to court for the purpose of deciding on their respective civil rights and obligations, Article 6(1) of the European Convention leaves to the states a free choice of instruments they are to use in that direction, thus the member

states have a certain degree of margin of appreciation in that respect. Still, a decision on it cannot be to the detriment of the rights guaranteed by the European Convention (see the European Court of Human Rights, *Kreuz vs. Poland,* judgment of 19 June 2001, Application no. 28249/95, paragraphs 52-53 with further references).

18. The Constitutional Court indicates that the European Court, in its case-law, has never ruled out a possibility that the interests of a fair procedure can justify the imposing of financial restrictions on the right of access to court. In this respect, the European Court concluded that the obligation of guaranteeing an effective right of access to court does not mean solely the absence of interference, rather it can require from the state to undertake various forms of positive action, but that one cannot deduce from it that each and every person must be ensured the right to a procedure before a court free of charge, or the right to a legal assistance free of charge. Bearing that in mind, the European Court concluded that the request for the payment of a court fee, when requesting from the court to decide on a civil right, cannot be *per se* considered incompatible with Article 6(1) of the European Convention. However, the amount of the fee, including the ability of a party to the proceeding to pay that fee, and the stage of the proceeding at which such a restriction on access to court is imposed, are the factors to be taken into account when taking a decision on whether or not a person has the right of access to court (ibid., *Kreuz vs. Poland,* paragraphs 59-60).

19. Further, when assessing whether the right of access to court has been violated, the European Court assesses whether the imposed restrictions are such that they diminish the very essence of the right to a fair trial. In that respect, the European Court particularly emphasizes that the restrictions on the right of access to a court or tribunal will not be in conformity with Article 6(1) of the European Convention if they do not have the legitimate aim and if there is no proportionality between the instruments of restricting that right and the aim sought to be achieved (ibid., *Kreuz vs. Poland,* paragraph 55). The aim of such analysis is based on the principle that the European Convention guarantees the rights which are practical and effective, and not theoretical and illusory, which has a special significance for the right of access to court given the prominent place that the right to a fair trial has in a democratic society (idem., *Kreuz vs. Poland,* paragraph 57 with further references).

b) Application of the relevant principles and the issue of constitutionality of Article 4 of the challenged law

20. In the case at hand, the Constitutional Court indicates that the challenged Article 4 of the Law on the Court Fees prescribes „the reciprocity of the court fee payment and the undertaking of actions in a procedure" so as to explicitly prescribe in paragraph 1 of the

mentioned article that „a Court will not undertake any actions whatsoever if a taxpayer has failed to pay the fee prescribed by this law". Further, this provision also prescribes that the court will call on the party to pay the fee within 8 days, with a caution that the submission will be sent back, if the party „fails to meet the given time limit, the court will send back the submission with a notice that it has been sent back as a result of the failure to pay the court fee and will be considered as if it has never been submitted". On the basis of such a provision it follows that the Law on the Court Fees explicitly thwarts the proceeding of a court following submissions, including lawsuits, if no proof of the fees paid in advance has been attached thereto, and the party has not been exempted from paying the costs of the proceeding.

21. While analyzing the question as to whether such a provision is in conformity with the right of access to court, the Constitutional Court, first and foremost, observes that the court fees prescribed by the Law on the Court Fees constitute public revenues to be paid to the account of the Sarajevo Canton budget, by a person at whose request or in whose interest actions are being taken in a proceeding. On the basis of the Law on the Court Fees, it follows that the legislator took into consideration a variety of situations related to a taxpayer (means and social status and such like), and that, accordingly, it envisaged, under certain conditions, a possibility to exempt one from paying court fees. Also, the Law on the Court Fees prescribed, in certain cases stipulated by Article 4(4), a possibility to collect court fees coercively, which constitutes a certain type of a sanction for a failure to fulfill this obligation. However, by the challenged provision of Article 4 of the Law on the Court Fees the legislator prescribed „the reciprocity of the court fee payment and the undertaking of actions in a procedure", by making the conduct of a court proceeding, following a lawsuit filed, conditional upon the payment of a court fee, which also constitutes a sort of a sanction resulting from a failure to pay the prescribed court fee. In that respect, the Constitutional Court notes that collecting public revenues for the budget, namely court fees in the case at hand, and the compliance with the regulations in that respect, constitutes a legitimate goal that the legislator pursues. However, a question arises as to whether, by prescribing the restriction on the right of access to court so as to make it impossible for a party to have a court proceeding resulting from a failure to pay a court fee at the time of lodging a submission, or a lawsuit with a court, a proportionality has been stricken between a legitimate goal sought to be achieved and the right of access to court of an individual.

22. The Constitutional Court notes that the Human Rights Chamber considered in its case-law the issue relating to the right of access to court, exclusively though in respect of the amount of a court fee that a party to the proceeding had to pay and the dismissal of the

request for exemption from court fee payment, being a possible factor of restricting the right of access to court. However, in that case, the relevant law, which had been applied at the time, prescribed that „a court may not dismiss registration and processing of a civil suit only on the account of the failure of the party launching a suit to pay the court fee" (see, Human Rights Chamber, Decision on Admissibility and Merits no. CH/98/1297 D.B. and *J.B. vs. Bosnia and Herzegovina and the Federation of BiH*, dated 2 September 2003, published on http://www.hrc.ba/commission/bos/default.htm). In the case at hand, however, the situation is, as already mentioned, different with respect to the legal regulation.

23. In that respect, the Constitutional Court emphasizes that the regulation of the court fees payment as public revenues has to be in conformity with the constitutional principles of the protection of human rights and freedoms, which means, among other things, that the prescription of the manner of fulfillment of an obligation by citizens to pay court fees must not derogate the court protection of the constitutional rights and freedoms. In the case at hand, the Constitutional Court notes that, under Article 53 of the Law on Civil Procedure, a civil procedure shall be instituted by way of filing a lawsuit, which generates certain procedural and substantive consequences for a party to the proceeding: the preclusive time limits for lodging a lawsuit are terminated; the statutes of limitations on claims and maturity of obligations are terminated; the right to select an alternative obligation which the plaintiff is entitled to shall be exhausted upon the filing of a lawsuit; the competence of a court shall be determined according to the facts which existed at the time of filing a lawsuit, etc. In such cases, the referring back of a lawsuit to the party and considering it as if that lawsuit had not been filed at all, as prescribed by the provisions of Article 4 of the Law on the Court Fees, can lead to the loss of rights prescribed by other laws, which would undoubtedly generate for the party to the proceedings irreparable detrimental consequences and make the court protection of the recognized rights impossible. In that manner, according to the opinion of the Constitutional Court, the very essence of the right of access to court, or the right to a fair trial under Article 6(1) of the European Convention, is brought into question. This conclusion is neither altered by the fact that Article 4(3) of the Law on the Court Fees prescribes that „under the Law on Civil Procedure the time limits shall not start to run until the fee has been paid or until the court has resolved a request for exemption from fee payment", since this provision does not relate to the mentioned preclusive time limits or the statutes of limitations on claims which are not prescribed by the Law on Civil Procedure, but by other corresponding laws.

24. Further, as already mentioned, Article 4(4) of the Law on the Court Fees prescribes that the submission will not be sent back in the case of a failure to pay a fee, but only in relation to „the lodged ordinary or extraordinary legal remedy", in which case the

procedure will carry on, and the fee will be collected coercively in accordance with the provisions of the Law on the Court Fees. The Constitutional Court observes that it is unclear as to why the legislator decided that only fees on the lodged legal remedies can be collected coercively, and why such a mechanism has not been prescribed as an instrument to achieve a legitimate goal in the event of a failure to pay the fee on submissions, or lawsuit, instead of making it impossible to conduct a proceeding in such cases. The Constitutional Court also indicates that the competent legislator, the Sarajevo Canton Assembly, failed to give its opinion in that respect, as it failed to submit a reply to the request, and the Constitutional Court cannot find any reasonable justification for such a normative choice, all the more so because obviously there is a possibility and mechanisms for coercive payment, and considering the fact that the right of a public authority to collect court fees becomes barred by the statute of limitations within a rather lengthy time limit of five years from the day the fee obligation occurred, as prescribed by Article 8 of the Law on the Court Fees.

25. In view of the aforementioned, the Constitutional Court holds that the restriction of the right of access to court, which the legislator had opted for, aimed at the regular and timely collection of court fees as public revenues – making it impossible to conduct a proceeding upon a filed lawsuit as a result of a failure to pay a court fee in advance, cannot be considered an instrument which is proportional to the achievement of a legitimate goal. On the contrary, this standardization violates the very essence of the right of access to court as an inseparable part of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

26. On account of the aforementioned, the Constitutional Court holds that the provision of Article 4 of the Law on the Court Fees is in contravention of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

27. Also, the Constitutional Court observes that the applicant stated that the Law on the Court Fees makes it impossible for courts to proceed on the filed lawsuit as a result of a failure to pay a fee, and the decision of the Cantonal Court makes it impossible for an applicant to refer back the lawsuit and to consider it as if it has never been filed, and that as a result of all the aforesaid „it cannot proceed on the lawsuit". In relation to these allegations, the Constitutional Court emphasizes that it is not called upon to give instructions to the applicant on how to conduct a proceeding. However, the Constitutional Court notes that Article II(6) of the Constitution of Bosnia and Herzegovina prescribes an obligation, among other things, of each and every court in Bosnia and Herzegovina to apply the European Convention directly, which, within the meaning of Article II(2) of

the Constitution of BiH, shall have priority over all other law, including the Law on the Court Fees.

c) The issue of constitutionality of Article 384 of the Law on Civil Procedure

28. Also, the applicant seeks that the Constitutional Court examines the constitutionality of the provision of Article 384 of the Law on Civil Procedure which prescribes that each party „shall bear in advance the costs they brought about through their own actions". In relation to this request, the Constitutional Court observes that this provision relates both to the plaintiff and the defendant, as well as to other parties to the proceedings: an intervener, the public attorney (Article 395 of the Law on Civil Procedure) and the Ombudsman (Article 394 of the Law on Civil Procedure), for instance, and it covers all costs of the civil procedure, such as, among other things, the costs of presenting the proposed evidence, the lawyer's representation fees, the costs of the preparation of legal remedies and such like. Also, the Constitutional Court observes that the challenged provision establishes a general principle in relation to all costs of the civil procedure, and in no way whatsoever, not even implicitly, does it prescribe an impossibility to conduct a civil procedure in the manner prescribed by the provision of Article 4 of the Law on the Court Fees. Therefore, the Constitutional Court holds that the provision of Article 384 of the Law on Civil Procedure does not bring into question the right of access to court referred to in Article 6(1) of the European Convention.

29. In view of the aforementioned, the Constitutional Court holds that the provision of Article 384 of the Law on Civil Procedure is not in contravention of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

VII. Conclusion

30. The Constitutional Court concludes that the provision of Article 4 of the Law on the Court Fees is in contravention of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, because rendering it impossible for a court to conduct a proceeding, if no court fee has been paid beforehand on a submission, including a lawsuit, does not constitute an instrument which is reasonably proportional to the achievement of a legitimate goal, as that completely restricts the right of access to court and a possibility to conduct such a court proceeding, which can lead to irreparable detrimental consequences for a party to the proceeding, which is contrary to the very essence of the right to a fair trial under Article 6(1) of the European Convention.

31. The Constitutional Court concludes that the provision of Article 384 of the Law on Civil Procedure is in conformity with the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, since that provision does not thwart the conduct of a proceeding, rather it prescribes a general principle in relation to the costs of a civil procedure.

32. Pursuant to Article 61(1), (2) and (3) and Article 64(3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

33. Pursuant to Article 41 of the Rules of the Constitutional Court, Separate Dissenting Opinion of the Vice-President Tudor Pantiru Joined by the Vice-President Miodrag Simović makes annex to this decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of Judge Tudor Pantiru Joined by Judge Miodrag Simović

By its Decision of 23 November 2012 in the mentioned case, the Constitutional Court of Bosnia and Herzegovina decided to partially grant the request lodged by the Municipal Court of Sarajevo (Judge Ms. Silvana Brković-Mujagić) and

„…**established that the provision of Article 4 of the Law on the Court Fees of the Sarajevo Canton (*Official Gazette of the Sarajevo Canton, nos. 21/09, 29/09 and 14/11*) is not in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms**".

The request in part seeking to declare unconstitutional Article 384 of the Law on Civil Procedure of the Federation of Bosnia and Herzegovina in relation to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms was dismissed.

While I agree with the decision of the majority in respect of the constitutionality of Article 384 of the Law on Civil Procedure of the Federation of Bosnia and Herzegovina, I respectfully disagree with the decision in the part establishing the unconstitutionality of Article 4 of the Law on Court Fees of the Sarajevo Canton.

In Chapter VII of its decision „… the Constitutional Court concludes that the provision of Article 4 of the Law on the Court Fees is in contravention of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, because rendering it impossible for a court to conduct proceedings, if no court fee has been paid beforehand in respect of a submission, including a lawsuit, does not constitute an instrument which is reasonably proportional to the achievement of a legitimate goal, as it completely restricts the right of access to court and the possibility to conduct such court proceedings, which can lead to irreparable detrimental consequences for a party to the proceedings, which is contrary to the very essence of the right to a fair trial under Article 6(1) of the European Convention''.

It has to be noted that Article 4 of the Law on Court Fees consists of several provisions and not of a single provision as stated in the Decision of the Constitutional Court and in the enacting clause as well. Indeed, if read separately the provision from Article 4(1) of the Law {„ *A Court will not undertake any actions whatsoever if a taxpayer has failed to pay the fee prescribed by this law. In the event of lodging a submission without a proof of fee* payment*, the court will call on the party, or their attorney, to pay the fee within 8 days, with a caution that the submission will be sent back. If the party fails to meet the given*

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time limit, the court will send back the submission with a notice that it has been sent back as a result of the failure to pay the court fee and will be considered as if it has never been submitted"} leaves the impression of an absolute impossibility to access the court without paying the fee**.**

However, when reading the provision from Article 4(2) of the Law on Court Fees {„***A Court will proceed in the manner set*** *forth* ***in paragraph 1 of this article and in the event it dismisses a request for the exemption from fee payment"}*** together with the provisions of Article 11 of the same Law {***(1) A Court may exempt a taxpayer from the payment of a fee, if the fee payment, considering the amount of the funds which are used to sustain the taxpayer and members of his/her household, would result in the reduction of those funds to such an extent so as to jeopardize their existence.(2) A decision referred to in paragraph 1 of this article shall be adopted by a court upon a request in writing lodged by a taxpayer. Prior to adopting a decision, a court will assess all circumstances, and will particularly take into account the value relevant for the collection of a fee, the total income and property of a taxpayer and members of his/her household who are his/her dependants"}*** it becomes clear that the court may exempt certain claimants from the payment of a fee and that the provision from paragraph 1 of Article 4 does not impose a blanket and categorical prohibition to access a court without paying court fees.

The present case is in itself an example proving the possibility to have access to a court without paying court fees because the appellant did not pay the fees but instead submitted together with the claim a request of exemption from the obligation to pay the fee. It is irrelevant that after considering the evidence presented by the claimant the courts dismissed the request and concluded that he could afford paying the fee.

It should be mentioned that the ECtHR has ruled in some cases that various limitations, including financial ones, may be placed on the individual's access to a „court" or „tribunal" (see, for instance, *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, § 33, and *Tolstoy-Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, §§ 61 et seq.).

In *Clionov v. Moldova* (no. 13229/04, § 41, 9 October 2007), a case in which the problem of access to court and court fees were at issue, the ECtHR held that „... a blanket prohibition on granting court fee waivers... raises of itself an issue under Article 6 § 1 of the Convention". Since in the present case, Article 4 of the Law on Court Fees does not impose a blanket prohibition on granting court fee waivers, as was the case in *Clionov*, I consider that this provision is in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and with Article 6(1) of the European Convention Human Rights and Fundamental Freedoms.

Case No. U 7/12

DECISION ON ADMISSIBILITY AND MERITS

Request of the Court of Bosnia and Herzegovina (Judge Šahbaz Džihanović) for the review of the compatibility of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (the *Official Gazette of BiH* nos. 90/05 and 32/07) with the provisions of Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), Article 1 of Protocol No. 12 to the European Convention and Article 26 of the International Covenant on Civil and Political Rights

Decision of 31 January 2013

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić

Ms. Constance Grewe

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knežević

Having deliberated on the request of the **Court of Bosnia and Herzegovina (Judge Šahbaz Džihanović)** in case no. **U 7/12**, at its session held on 30 January 2013, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by the Court of Bosnia and Herzegovina (Judge Šahbaz Džihanović) for a review of the compatibility of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*the Official Gazette of BiH* nos. 90/05 and 32/07) is hereby granted.

It is hereby established that the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*the Official Gazette of BiH* nos. 90/05 and 32/07) is incompatible with the provisions of Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 of Protocol No. 12 to the European Convention for

the Protection of Human Rights and Fundamental Freedoms and Article 26 of the International Covenant on Civil and Political Rights as it does not contain provisions in relation to compensation of travel expenses, meal allowance and family separation allowance.

The Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered, pursuant to Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to bring, within six months from the date of delivery of the present Decision, the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*the Official Gazette of BiH* nos. 90/05 and 32/07) in relation to compensation of travel expenses, meal allowance and family separation allowance, into line with the provisions of Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 26 of the International Covenant on Civil and Political Rights.

The Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within the time limit referred to in the previous paragraph, about the measures taken to enforce this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 30 April 2012, the Court of Bosnia and Herzegovina (Judge Šahbaz Džihanović; „applicant"), in the case no. S1 3 P 008980 12 U of 29 April 2012 relating to a lawsuit filed by plaintiffs with regard to compensation of travel expenses, meal allowance and family separation allowance, lodged the request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for the review of the compatibility of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the

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Level of Bosnia and Herzegovina (*the Official Gazette of BiH* nos. 90/05 and 32/07) with the provisions of Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), Article 1 of Protocol No. 12 to the European Convention and Article 26 of the International Covenant on Civil and Political Rights. In addition, the applicant considers that the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina is incompatible with the international principles contained in the documents as follows: United Nations Basic Principles on the Independence of the Judiciary of November 1995, Recommendation No. 94(12) of the Committee of Ministers of the Council of Europe of 13 October 1994, the Conclusion under item 4 of the multilateral meeting of Member States of the Council of Europe, held in Budapest in May 1998, on the Guarantee of the Independence of the Judiciary; European Charter on the Statute for Judges („European Charter"), Strasbourg 1998 and Universal Charter of the Judge, Taipei (Taiwan) of November 1999, as well as with the Law on Prohibition of Discrimination (the *Official Gazette of BiH* no. 59/09).

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 9 May 2012 the Parliamentary Assembly of Bosnia and Herzegovina („the Parliamentary Assembly of BiH") was requested to submit its reply to the request.

3. On 6 and 21 June 2012, the House of Representatives and the House of Peoples of the Parliamentary Assembly of BiH submitted their replies to the request.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were forwarded to the applicant on 19 June and 5 July 2012.

III. Request

a) Allegations from the request

5. The applicant requested that the Constitutional Court carry out the review of the compatibility of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*the Official Gazette of BiH* nos. 90/05 and 32/07) with the provisions of Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article

26 of the International Covenant on Civil and Political Rights. In addition, the applicant considered that the aforementioned Law was incompatible with the international principles contained in the documents as follows: United Nations Basic Principles on the Independence of the Judiciary of November 1995, Recommendation No. 94(12) of the Committee of Ministers of the Council of Europe of 13 October 1994, the Conclusion under item 4 of the multilateral meeting of Member States of the Council of Europe, held in Budapest in May 1998, on the Guarantee of the Independence of the Judiciary; European Charter, Strasbourg 1998 and Universal Charter of the Judge, Taipei (Taiwan) of November 1999, as well as with the Law on Prohibition of Discrimination (the *Official Gazette of BiH* no. 59/09).

6. The applicant alleged that civil proceedings had been instituted before the Court of BiH on the lawsuit filed by 98 plaintiffs-judges and other employees of that Court for the protection from discrimination in employment and for the compensation of travel expenses, meal allowance and family separation allowance. According to the applicant, the value of the dispute was BAM 799,500.00. It was pointed out that, according to the reasons presented in the lawsuit, salaries and other compensations and certain material rights of all the plaintiffs were regulated by the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*the Official Gazette of BiH* no. 90/05), which had entered into force on 1 January 2006 and had not been amended ever since its entry into force. The said Law did not determine the plaintiffs' right to a meal allowance while at work, compensation of travel expenses and family separation allowance, although these were one of the basic rights acquired by all employees either in private or public sector and at any level of the territorial-political communities in Bosnia and Herzegovina. On the other hand, the payment of compensation was foreseen by the General Collective Agreement for the Territory of the Federation of BiH (*the Official Gazette of the Federation of BiH* nos. 54/05 and 62/08), governing the rights and obligations of all employers and employees and applicable to all employers regardless of capital structure, administrative bodies and administrative services, police, public institutions and other legal entities. In addition, the General Collective Agreement for the territory of the Republika Srpska (*the Official Gazette of RS* no. 40/10) also stipulated that any employer should pay the employee the aforementioned compensations.

7. Furthermore, the applicant stated that at the level of Bosnia and Herzegovina, pursuant to the Law on Salaries and other Compensations in the Institutions of Bosnia and Herzegovina (*the Official Gazette of BiH* nos. 50/08, 35/09 and 75/09), civil servants, employees, elected officials and all other employees enjoyed all the rights arising out of their employment. In view of the aforementioned, the judges, prosecutors and other staff working at the judicial institutions of Bosnia and Herzegovina were the only category of employees in the territory of Bosnia and Herzegovina that was not entitled to be

compensated for travel expenses incurred for travel between their place of residence and their place of work, meal allowance and family separation allowance, which amounted to discrimination that could not be justified by any „objective or reasonable" action of the legislator. Also, the plaintiffs considered that, by reducing the number of the compensations from nine, that all other employees in Bosnia and Herzegovina enjoyed, to three, the judicial office-holders had been discriminated against compared to employees of the legislative branch and the executive branch, including elected officials, civil servants and employees. By the said action of the legislative branch of government, the principle of separation of power was violated and, if the judicial branch of government was not sufficiently funded or if its finances depended on the will of other branches of government, its independence and effectiveness would be reduced and the material status of judges was not only unprotected from unfavorable economic movements but also completely dependent on the legislative branch and the executive branch, contrary to international standards.

8. In view of the aforementioned, the plaintiffs held that the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina was in contradiction with the international principles contained in the following documents: United Nations Basic Principles on the Independence of the Judiciary of November 1995, Recommendation No. 94(12) of the Committee of Ministers of the Council of Europe of 13 October 1994, the Conclusion under item 4 of the multilateral meeting of Member States of the Council of Europe, held in Budapest in 1998, on the Guarantee of the Independence of the Judiciary; European Charter, Strasbourg 1998, and Universal Charter of the Judges, Taipei (Taiwan) of November 1999. According to the aforementioned documents, the purpose of all of the particularities relating to the salaries of judges was to ensure an independent and autonomous judiciary, an efficient performance of judicial duties and to protect the dignity, integrity and financial independence of judges, as well as to ensure the incorruptibility of judges in the eyes of the parties and general public. Therefore, it undisputedly followed that the plaintiffs had been directly discriminated against on the ground of their choice of profession and work position, contrary to the provisions of Article 2(2) in conjunction with Article 6(1) (a) of the Law on Prohibition of Discrimination (*the Official Gazette of BiH* no. 59/09).

9. The applicant stated that the aforementioned international standards started from the specificity of the judicial service and they all prescribed and concluded that the reasonable purpose of all particularities of judicial salaries was to ensure judicial independence and autonomy within the system of separation of powers as a whole and the effective performance of judicial duties, the protection of dignity, integrity and material independence of judges, objective judges' incorruptibility in the public eye and in general.

10. The applicant recalled the judgment of the Constitutional Court of the Federation of Bosnia and Herzegovina („the Constitutional Court of the FBiH") in case no. *U 28/11* of 24 January 2012. In the said judgment, the Constitutional Court of the FBiH established that the Law on Salaries and Other Compensations of Judges and Prosecutors in the FBiH was inconsistent with the Constitution of the FBiH in the part relating to the payment of compensation to judges, prosecutors and judicial associates. In the same judgment, the Parliament of the FBiH was ordered to amend, within 6 months from the date of publication of the said judgment in the *Official Gazette of the Federation of BiH*, the Law referred to in paragraph 1 of the said judgment in accordance with the constitutional principle of equality before the law and to regulate the right of judges, prosecutors and judicial associates to reimbursement of travel expenses, meal allowance, payment for overtime, payment for work during non-working days, night work and public holidays, reimbursement in the event of illness or injury, compensation in case of death, serious illness or disability, payment of maternity benefits and severance pay for retirement, by applying the regulations governing the payment of compensations to other budget beneficiaries. The part of the request was dismissed with regard to family separation allowance, payment of residential moving and related expenses and jubilee awards. It was decided that in case that the Parliament of the F BiH failed to comply with the order of the Constitutional Court of the FBiH and failed to amend the Law referred to in paragraph 1 of the said judgment within the specified time limit, the right of judges, prosecutors and judicial associates to receive compensation would be solved by applying the regulations governing the payment of compensations to elected officials, the holders of executive functions and advisors in the legislative branch and the executive branch of government in the Federation of BiH, the civil servants and state employees of the Federation of BiH, public attorneys, judicial police officers, prison officers and guards in correctional institutions in the Federation of BiH.

b) Reply to the request

11. In its reply to the request, the House of Representatives of the Parliamentary Assembly of BiH stated that the Constitutional and Legal Affairs Commission, after the deliberation, had decided with 2 votes in favor, 2 against and 3 abstentions not to support the request in question.

12. In its reply to the request, the House of Peoples of the Parliamentary Assembly of BiH stated that the Constitutional and Legal Affairs Commission, after the deliberation, had decided with 1 vote in favor, 2 against and 1 abstention not to support the request in question.

IV. Relevant Laws

13. The **Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina** (*the Official Gazette of BiH* nos. 90/05 and 32/07), as relevant, reads:

Article 1
Scope of this Law

This Law regulates the salary, compensations and certain material rights of Judges, Prosecutors and certain categories of professional staff in judicial institutions at the level of Bosnia and Herzegovina.

Article 3
Basic Monthly Salary of Judges of the Court of Bosnia and Herzegovina

The Basic Monthly Salary shall be as follows:

(c) For Judges of the Court of Bosnia and Herzegovina: 3,800 KM

(d) For Heads of Departments of the Court of Bosnia and Herzegovina: 4,000 KM.

(e) For the President of the Court of Bosnia and Herzegovina: 4,400 KM.

Article 4
Basic Monthly Salary of Prosecutors of the Prosecutor's Office of Bosnia and Herzegovina

The Basic Monthly Salary shall be as follows:

a) For Prosecutors of the Prosecutor's Office of Bosnia and Herzegovina: 3,800 KM.

b) For Heads of Sections of the Prosecutor's Office of Bosnia and Herzegovina: 4,000 KM.

c) For the Chief Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina: 4,400 KM.

Article 5
Supplement for Experience

The Basic Monthly Salary for each category of Judge and Prosecutor under Articles 2, 3 and 4 of this Law shall be supplemented by 0.5% for each complete year of work experience up to a maximum of 40 years.

Article 8
Annual Paid Leave and Leave for Religious Purposes

1. Judges and Prosecutors shall be entitled to 30 working days of paid annual leave.

3. All Judges and Prosecutors shall be entitled to a net holiday allowance amounting to 50% of the Basic Monthly Salary stipulated in item a) of Article 2 of this Law.[…]

Article 11
Compensation when Retiring

Judges and Prosecutors are entitled to one Basic Monthly Salary, as stipulated under Article 2, 3 and 4 of this Law respectively as compensation when retiring.

Article 14
Travel Costs

Regulations shall be promulgated by the High Judicial and Prosecutorial Council in cooperation with the Ministry of Justice of Bosnia and Herzegovina in respect of the circumstances in which a Judge or Prosecutor shall be entitled to compensation for costs incurred for travel undertaken in the course of carrying out their official duties (per diem, transport and accommodation expenses) and the amount of such compensation. For the Constitutional Court of Bosnia and Herzegovina such regulations shall be promulgated by the Constitutional Court of Bosnia and Herzegovina in cooperation with the Ministry of Justice of Bosnia and Herzegovina.

Article 16
Compensation for Assignment with or without Consent

In the event that a judge is assigned to perform judicial service at another court in accordance with Article 50 or Article 51 of the Law on the High Judicial and Prosecutorial Council, he/she shall be entitled to compensation for his/her expenses in accordance with regulations promulgated by the High Judicial and Prosecutorial Council in cooperation with the Ministry of Justice of Bosnia and Herzegovina.

14. The **Law on Salaries and Other Compensations in the Institutions of Bosnia and Herzegovina** (*Official Gazette of BiH* no. 50/08, 35/09, 75/09, 32/12, 42/12 and 50/12) in the relevant part reads:

Article 2
(Definitions)

The terms used in this law have the following meaning:

a) An institution of Bosnia and Herzegovina, in terms of this law, is a budget user, financed from the budget of the institutions of Bosnia and Herzegovina and the international

obligations of Bosnia and Herzegovina in accordance with the Law on Financing of the Institutions of Bosnia and Herzegovina;

[...]

Article 30
(Compensation Types)

a) annual leave and paid leave;
b) meal allowance;
c) vacation allowance;
d) sick leave;
e) maternity leave;
f) overtime work, work on non-working days, night work and work on public holidays;
g) right to accommodation costs, family separation allowance and temporary placement compensation;
h) performing tasks and assignment of another post;
i) work in management boards, supervisory and other bodies;
j) business trips;
k) transportation to and from work;
l) case of severe work-related injury of employee, serious illness or disability of employee or a member of employee's immediate family or death of a member of employee's immediate family;
m) case of death of employee;
n) education and professional training;
o) anniversary awards;
p) severance retirement pay;
r) case of redundancy;
s) time extending legal status of elected and appointed officials.
[...]

15. The **Magna Carta of Judges (Fundamental Principles)** Consultative Council of European Judges, Strasbourg, November 2010, as relevant reads:

Rule of law and justice

1. The judiciary is one of the three powers of any democratic state. Its mission is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.

Judicial Independence

2. Judicial independence and impartiality are essential prerequisites for the operation of justice.

3. Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.

4. Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.

Guarantees of independence

7. Following consultation with the judiciary, the State shall ensure the human, material and financial resources necessary to the proper operation of the justice system. In order to avoid undue influence, judges shall receive appropriate remuneration and be provided with an adequate pension scheme, to be established by law.

International courts

23. These principles shall apply mutatis mutandis to judges of all European and international courts.

16. The **1998 European Charter on the Statute for Judges,** as relevant, reads:

1. General principles

1.1. The statute for judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence and such impartiality. The present Charter is composed hereafter of the provisions which are best able to guarantee the achievement of those objectives. Its provisions aim at raising the level of guarantees in the various European States. They cannot justify modifications in national statutes tending to decrease the level of guarantees already achieved in the countries concerned.

V. Admissibility

17. In examining the admissibility of the present request, the Constitutional Court invoked the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina.

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

c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

18. The request for review of the compatibility of the Law concerned was submitted by the Court of BiH (Judge Šahbaz Džihanović), which means that the request was filed by an authorized person pursuant to Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (see Constitutional Court, Decision on the Admissibility and Merits no. *U 5/10* of 26 November 2010, paragraphs 7 through 14, published in the *Official Gazette of Bosnia and Herzegovina* no. 37/11). Bearing in mind the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Constitutional Court's Rules, the Constitutional Court establishes that the present request is admissible as it was submitted by an authorized person and because there is no single reason under Article 17(1) of the Constitutional Court's Rules rendering this request inadmissible.

VI. Merits

19. The applicant requested the review of compatibility of the Law on Salaries and other Compensations in the Institutions of Bosnia and Herzegovina with the provisions of Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 26 of the International Covenant on Civil and Political Rights. In addition, he requested the review of its compatibility with the international documents as follows: United Nations Basic Principles on the Independence of the Judiciary of November 1995, Recommendation No. 94(12) of the Committee of Ministers of the Council of Europe of 13 October 1994, the Conclusion under item 4 of the multilateral meeting of Member States of the Council of Europe, held in Budapest in May 1998, on the Guarantee of the Independence of the Judiciary; European Charter, Strasbourg 1998, and Universal Charter of the Judge, Taipei (Taiwan) of November 1999, as well as with the Law on Prohibition of Discrimination (the *Official Gazette of BiH* no. 59/09).

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

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

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

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 of the European Convention reads:

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

Article 1 of Protocol No. 12 to the European Convention reads:

Article 1
General prohibition of discrimination

1. The enjoyment of any right set forth by law 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.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

20. The **International Covenant on Civil and Political Rights of 16 December 1996**, as relevant, reads:

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

21. The Constitutional Court observes that the applicant requests that it be evaluated whether the judges, prosecutors and other employees of the Court of BiH are discriminated

against due to the lack of relevant provisions in the Law on Salaries and other Compensations in the Institutions of Bosnia and Herzegovina regulating compensation of travel expenses, meal allowance and family separation allowance. In that regard, the applicant refers to employees in executive and legislative branch of government who enjoy the right to these compensations. In addition to this, the applicant refers to the judgment of the Constitutional Court of F BiH no. *U 28/11* of 24 January 2012 in which the Court decided that the judges, prosecutors and other judicial associates at the level of the Federation of BiH were entitled to compensation of travel expenses and meal allowance. Therefore, the applicant indicates serious violations of the constitutional right to non-discrimination under Article II(4) of the Constitution of BiH in conjunction with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 26 of the International Covenant on Civil and Political Rights.

22. In addition to these allegations on discrimination, the applicant also requests an evaluation as to whether the lack of relevant provisions regulating compensation of travel expenses, meal allowance and family separation allowance is in violation of the principle of independence of judiciary which is an integral part of the principle of the rule of law proclaimed in Article I(2) of the Constitution of Bosnia and Herzegovina.

23. Considering the above, the Constitutional Court will examine in this decision the compatibility of the Law on Salaries and Other Compensation in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina in relation to the principle of independence of judiciary and discrimination.

a) Allegations in relation to the principle of the independence of judiciary

24. The Constitutional Court shall first examine whether the challenged law, by failing to stipulate mentioned compensations, infringes upon the principle of independence of judiciary which is an integral part of the principle of rule of law proclaimed in Article I(2) of the Constitution of Bosnia and Herzegovina.

25. In order to examine the aforementioned, the Constitutional Court will determine what the reason behind the challenged law was. In this regard, the Constitutional Court recalls that Bosnia and Herzegovina is a state with a complex state system. A result of its complex state structure is the existence of different legal solutions that are possible and in accordance with the constitutional organization of Bosnia and Herzegovina, both at the same level of government and at the different levels of government. Therefore, a legislator at the same or different levels of government in Bosnia and Herzegovina, in accordance with its competencies, passes laws, which are not necessarily identical. In the

present case, the Constitutional Court notes that the legislator at the „state level", by the challenged Law, regulated salaries and other compensations in judicial and prosecutorial institutions at the level of Bosnia and Herzegovina by a separate law. Hence, the intention of the legislator was to regulate the issue of salaries and compensations for these judicial office-holders by a separate law as *lex specialis*. In addition, it is important to state that the challenged law was passed by the High Representative and that it entered into force on 1 January 2006. Subsequently, it was adopted in identical text by the Parliamentary Assembly of BiH at its session held on 30 March 2007.

26. The Constitutional Court observes that the essence of the challenged Law is explained in its preamble. It follows from the preamble of the challenged Law that the legislator took into account a „critical" financial situation within the judiciary and the prosecution at all levels in Bosnia and Herzegovina and concluded that such a situation was unsustainable and could lead to a collapse of the judiciary in Bosnia and Herzegovina. With the aim of improving the aforementioned situation, the legislator took into account the position taken by the Steering Board of the Peace Implementation Council of 3 December 2004, where the Steering Board underlined that the efficient administration of justice, a core plank of Bosnia and Herzegovina's postwar rehabilitation, depended on a properly functioning and appropriately remunerated judiciary. In this regard, the Steering Board fully supported the urgent need to review judicial salaries in order to ensure the proper allocation of funds to enable the judicial system to work effectively. Because of the situation as such and in order to avoid its further deterioration, the High Representative froze judicial salaries in the Entities in December 2004 and established a Working Group, consisting of the representatives from the ministries of justice at Entity and Bosnia and Herzegovina levels, Brčko District Judicial Commission, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina as well as judges and prosecutors associations in both Entities, to review judicial salaries and to draft new legislation. It is further stated that the recommendations of the Working Group were accepted that salaries for judges and prosecutors should be harmonized between the Entities, that the benefits that had been eliminated by the Entity Parliaments in 2003 should not be reinstated, that salaries for judges and prosecutors should be modestly reduced, that the existing salaries should continue to be frozen until the average salary in Bosnia and Herzegovina has reached a certain level, that when the salaries again start to increase they should increase with the same percentage as the average salary in Bosnia and Herzegovina thus securing a fixed ratio between the average salary in Bosnia and Herzegovina and judicial salaries as well as continued harmonization between the Entities. In addition to the aforementioned, the position of the Steering Board of the Peace Implementation Council of 24 June 2005 was taken into account, by which it had been indicated that the Steering Board of the Peace Implementation Council had remained

worried over the fiscal sustainability challenge faced by Bosnia and Herzegovina's governments, especially at the level of the Entities.

27. Therefore, the motives of the legislator in passing the challenged law was to improve the situation within the judiciary in Bosnia and Herzegovina and, thus, to secure the highest level of judicial independence and efficiency at the level of Bosnia and Herzegovina. The intention of the legislator was to deny the right to reimbursement of travel expenses, meal allowance and family separation allowance of judicial office-holders at the level of the State of BiH, because of „appropriately remunerated judiciary" provided for by the law, as stated in the preamble of the challenged Law in respect of the Communiqué by the Steering Board of the Peace Implementation Council of 3 December 2004 and based on the recommendations of the Working Group suggested after its review of judicial salaries.

28. In order to determine whether the motives of the challenged law satisfy the principle of independence of judiciary, the Constitutional Court will firstly comment this very important segment of the rule of law. In that regard, the Constitutional Court emphasizes that the principle of the rule of law contained in Article I(2) of the Constitution of BiH implies that the state of Bosnia and Herzegovina operates in accordance with the existing laws and primarily in accordance with the Constitution of Bosnia and Herzegovina. This obligation relates equally to legislative, executive and judicial powers of Bosnia and Herzegovina. In addition, internal system of Bosnia and Herzegovina is founded, *inter alia*, on the principle of separation of powers which is a crucial element of the concept of the rule of law, with an emphasis on the independence of courts where the principle of the check and balances of political power is exercised through law.

29. The Constitutional Court notes that the principle of independence of the judiciary, though it is not explicitly enunciated in the Constitution of Bosnia and Herzegovina, represents a general principle which must be complied with, since it is inseparable from the principle of the rule of law laid down in Article I(2) of the Constitution of Bosnia and Herzegovina. However, the principle of the rule of law and independence of judiciary, as its inseparable part, and, in particular, the principle of separation of powers, by no means imply that the legislator cannot regulate the issues important for functioning of the State institutions, even when relating to the courts, though only as provided for by and in accordance with the Constitution of Bosnia and Herzegovina (see, Decision of the Constitutional Court, Decision on Admissibility and Merits no. *U 6/06* of 29 March 2008, paragraphs 22 and 23, published in *Official Gazette of Bosnia and Herzegovina* no. 40/08).

30. Therefore, the rule of law rests on two very crucial features and those are equality of all before the law and tripartite system of government. Independence of judiciary is the foundation of the separation of powers and judiciary is one of the three branches of

government in every democratic country. It holds special and significant role in every democratic society. The Constitutional Court emphasizes that the judiciary is not only in equal position with other two branches of government (executive and legislative) but it is also a separate branch for the reason it controls decisions of the other two branches of government. Furthermore, the independence of judiciary is the foundation of guarantees of the rule of law, democracy and compliance with the human rights. Exercised degree of independence of judicial system represents a key indicator of the attained level of the rule of law in the democratic society.

31. The judicial system has a very important role in the protection of human rights and freedoms wherein the principle of independence of the courts has the key role. This principle is guaranteed by the provision of Article 6 of the European Convention that requires that every decision must be taken by an independent and impartial tribunal established by law. To that relates the requirement of the European Court of Human rights that a *tribunal must be independent of the executive and also of the parties* (see European Court of Human Rights, *Ringeisen vs. Austria* of 16 July 1971, paragraph 95*)*. In addition, the Constitutional Court notes that the Basic Principles of the United Nations on the Independence of the Judiciary of 1985 stipulates that the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to comply with the independence of the judiciary.

32. The issue of the independence of judiciary was the subject-matter of the opinion of the European Commission for Democracy through Law (Venice Commission) on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina of 15-16 July 2012) („Opinion"). The Opinion was prepared upon request of the European Commission in the context of the Structured Dialogue of the European Union and Bosnia and Herzegovina on the work of the judiciary. In the Opinion it was emphasized that in its Report on the Rule of Law, the Venice Commission underlined that the principle of legal certainty plays an essential role in upholding trust in the judicial system and the rule of law. The existence of legal certainty (or lack of it) therefore has an important economic impact. It should be promoted by all three branches of state power. It urges the legislature to ensure the good quality of laws and other legal instruments that it adopts. Venice Commission notes that legal certainty requires the executive to respect it when it implements these legal instruments and in making decisions in general or on individual matters. Judicial power has to adhere to this principle when it applies legal instruments to concrete cases and in interpreting legal provisions.

33. In the said Opinion it was noted that the independence of the judiciary can be seen as having two forms: institutional and individual independence. Institutional independence

refers to the separation of powers in the state and the ability of the judiciary to act free of any pressure from either the legislature or the executive. Institutional judicial independence focuses on the independence of the judiciary from the other branches of state power (external institutional independence). The relationship between courts within the same judicial system should also be taken into account (internal institutional independence). Institutional independence can be assessed by four criteria. One of the criterions is that the judiciary should be independent in financial matters. The judiciary must be granted sufficient funds to properly carry out its functions and must have a role in deciding how these funds are allocated. Individual judicial independence refers to the independence enjoyed by individual judges in carrying out their professional duties. Judges must be independent and impartial. These requirements are an integral part of the fundamental democratic principle of the separation of powers: judges should not be subject to political influence and the judiciary should always be impartial. This requirement has many aspects and one of them is the security of tenure and financial security.

34. It follows that the crucial prerequisite for the independence of the judiciary is indeed financial independence of the judiciary in general as well as financial security of a judge as an individual. In that regard, the Constitutional Court refers to the Recommendation of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities, of 17 November 2010, which in its paragraph 11 reads: *The external independence of judges is not a prerogative or privilege granted in judges' own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law. Judges' impartiality and independence are essential to guarantee the equality of parties before the courts.* Further, in paragraph 33 of the Recommendation it is stated that *each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently.*

35. Therefore, the Constitutional Court notes that it is undisputable that the financial independence of the judiciary represents prerequisite for the judicial independence in general. The Constitutional Court notes that the judicial branch of government is financed from the budget decided by other two branches of government – legislative and executive without participation of the judicial branch. On the other hand, insufficient funds and restrictions on financial funds allocated to the judiciary can bring into question the very principle of independence of judiciary. This is pointed out in the Magna Carta of Judges in its paragraph 4 that stipulates that *judicial independence shall be guaranteed in respect of financing of the judiciary as well.* In addition, the Constitutional Court notes that the

Basic Principles of the United Nations on the Independence of the Judiciary (UN 1985) establishes it is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

36. Furthermore, the Constitutional Court notes that the European Charter, referred to by the applicant, in its preamble states that the purpose of the said Charter is the promotion of judicial independence, necessary for the strengthening of the pre-eminence of law and for the protection of individual liberties within democratic states, made more effective. The European Charter, *inter alia*, states as follows: *[...] Conscious of the necessity that provisions calculated to ensure the best guarantees of the competence, independence and impartiality of judges should be specified in a formal document intended for all European States; Desiring to see the judges' statutes of the different European States take into account these provisions in order to ensure in concrete terms the best level of guarantees [...]*. Accordingly, the objective of the European Charter is the promotion of the status of judges, aimed at ensuring the best guarantees of the competence, independence and impartiality of judges. According to the general principles laid down in the European Charter, it follows that its provisions cannot be used as justification for modifications in national statutes tending to decrease the level of guarantees already achieved in the countries concerned.

37. In examining the instant case in the context of the aforesaid, the Constitutional Court notes that the by the challenged law, the legislative branch of government limited the right of judges, prosecutors and other employees of the Court of BiH to reimbursement for travel expenses, meal allowance and family separation allowance. The Constitutional Court also emphasizes that the financial foundation is at the same time the foundation for preservation of the independence of judiciary indicated to by numerous international documents. In the opinion of the Constitutional Court, the legislative power affects the structure of financial foundation and compensations by limiting the rights of judges, prosecutors and other employees in the Court of BiH to enjoy these compensations when no independent judicial and prosecutorial budgets are present thus affecting the role of judiciary it holds in every democratic society. In addition, the Constitutional Court emphasizes that the principle of independence of judiciary is the foundation and basis for development of every country and that there is no democratic society and the rule of law without independence of judiciary. Modernization and effectiveness of judiciary ought to be a priority for every democratic state. Failure to provide the disputable compensations for the judges represents a manifest regression in guarantees of individual independence of judges and prosecutors and a strong attack on civil service which serves the citizens and whose position should be strengthened, not weakened in these times. It is, therefore, of great importance not to allow marginalization and condemnation of

judiciary in any manner. In particular, the Constitutional Court wished to draw attention to the need to provide for judicial office-holders the family separation allowance in order to satisfy the principle of appropriate ethnic representation of judges and prosecutors in judicial institutions. Namely, in the opinion of the Constitutional Court, given the social and political system of Bosnia and Herzegovina and taking onto account the recent war, resulting in, *inter alia*, a changed structure of the population in Bosnia and Herzegovina, there exists the need to ensure the appropriate representation of the constituent peoples and others. Providing of the aforesaid allowance leads to providing the appropriate representation of the constituent peoples and others in the judiciary which, in the opinion of the Constitutional Court, strengthens the trust and reputation of judiciary in the public eye, i.e. in the eyes of the citizens of Bosnia and Herzegovina. The aforementioned is, in the opinion of the Constitutional Court, in accordance with the provision of Article 43(2) of the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina (*Official Gazette of BiH* nos. 25/04, 93/05, 32/07, 48/07 and 15/08), prescribing criteria for appointing judges and prosecutors. That provision stipulates that *the Council shall implement relevant constitutional provisions regulating the equal rights and representation of constituent peoples and others*.

38. Accordingly, the Constitutional Court finds that by failing to stipulate the compensations for travel expenses, meal allowance and family separation allowance for judges, prosecutors and other employees in the Court of BiH in the Law on Salaries and Other Compensations in the Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina, legislative power infringes upon the principle of independence of judiciary as guarantor of the rule of law. It follows, therefore, that the reason behind the challenged law is inconsistent with the principle of the independence of judiciary as the guarantor of the rule of law contained in Article I(2) of the Constitution of Bosnia and Herzegovina.

39. Based on aforesaid, the Constitutional Court finds that the Law on Salaries and Other Compensations in the Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina is inconsistent with the Article I(2) of the Constitution of Bosnia and Herzegovina on the account of failure to regulate the right of judges, prosecutors and other employees in the Court of BiH for compensations for travel expenses, meal allowance and family separation allowance.

b) Allegations relative to discrimination

40. In the further text of the decision, the Constitutional Court shall examine the compatibility of the challenged law in relation to discrimination. The applicant requests it to be evaluated whether the prosecutors and other employees in the Court of BiH are

discriminated against due to lack of relevant provisions in the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina regulating the issue of compensations for travel expenses, meal allowance and family separation allowance. The applicant indicates a possible violation of the constitutional right not to be discriminated against under Article II(4) of the Constitution of BiH in conjunction with Article 14 of the European Convention as well as Article 1 of Protocol No. 12 to the European Convention in conjunction with Article 26 of International Covenant on Civil and Political Rights.

41. Examining the aforementioned, the Constitutional Court underlines that Article 1 of Protocol No. 12 to the European Convention lays down a general prohibition of discrimination and guarantees the enjoyment of any right set forth by law, 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. In addition, the provisions of Protocol No. 12 to the European Convention stipulate that no one shall be discriminated against by any public authority on any ground such as those mentioned above and, therefore, the principle of general prohibition of discrimination is broadened to domestic legislation and not only to include the rights guaranteed by the European Convention, as stipulated by Article 14 thereof.

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

43. Furthermore, the Constitutional Court recalls that not every difference of treatment amounts to discrimination, this means that it has to have objective and reasonable justification. In this regard, the European Court of Human Rights pointed out in several judgments that the Contracting States also enjoy a certain „margin of appreciation" in assessing whether and to what extent differences in otherwise similar situations justify

a different treatment in law (see European Court of Human Rights, *Case „Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, Judgment of 23 July 1968, Series A, No. 6, page 35, paragraph 10; *National Union of Belgian Police v. Belgium*, Judgment of 27 October 1975, Series A, No. 19, page 47, paragraph 20, and pages 21-22, paragraph 49; *Swedish Engine Driver's Union v. Sweden*, Judgment of 6 February 1976, Series A, No. 209, page 17, paragraph 72; and *Ireland v. the United Kingdom*, Judgment of 18 January 1978, Series A, No. 25, page 87, paragraph 229). The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, *mutatis mutandis*, *the Sunday Times* judgment of 26 April 1979, Series A no. 30, page 36, paragraph 59).

44. The European Court of Human Rights explicates this discretion by its position as follows: „Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'." Thus, the European Court of Human Rights concludes that it „will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation (see European Court of Human Rights *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A, no. 98, p. 46).

45. Therefore, a difference of treatment has objective and reasonable justification if it meets the two requirements as follows: a) it must pursue a legitimate aim, and b) there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized.

46. However, the Constitutional Court must first identify „injured persons", i.e. a group of people for whom the applicant contends that their rights have been violated by the challenged law, and then the Constitutional Court will answer the question as to whether these persons have been subjected to a differential treatment.

47. The Constitutional Court notes that „the injured persons", according to the applicant's allegations, are the judges, prosecutors and other employees of the Court of BiH. The applicant contends that the aforementioned persons have been discriminated against compared to the employees of the legislative and executive branches of government, as well as elected officials, civil servants and employees who are entitled to reimbursement of travel expenses, meal allowance and family separation allowance. In addition, the applicant refers to the judgment no. *U 28/11* of 24 January 2012 passed by the Constitutional Court of the Federation of BiH, in which the Court decided that the judges, prosecutors and

other staff at the „level of the Federation of BiH" were entitled to reimbursement of travel expenses and meal allowance. In view of the aforementioned, it follows that the applicant holds that judicial office-holders at the „level of the state of BiH" are discriminated against with regard to the said compensations compared to the judges, prosecutors and judicial associates at the „level of the Federation of BiH".

48. Based on the aforesaid, in the opinion of the Constitutional Court, the „injured persons" whose rights have been endangered by the challenged law are prosecutors, judges and other employees of the Court of BiH.

49. Considering that the Constitutional Court has identified the category of „injured persons", the next question to be answered by the Constitutional Court is whether this category of „injured persons" has been treated differently from other persons who are in an analogous situation, *i.e.* if a difference in treatment has occurred and whether that treatment can be objectively and reasonably justified.

50. The Constitutional Court has already established in this decision the motives of the legislator in passing the challenged law was to improve the situation within the judiciary in Bosnia and Herzegovina and, thus, to secure the highest level of judicial independence and efficiency at the level of Bosnia and Herzegovina. The legislator's intention was to deny the right to reimbursement of travel expenses, meal allowance and family separation allowance of judicial office-holders at the level of the State of BiH, because of „appropriately remunerated judiciary" provided for by the law.

51. In view of the above, the Constitutional Court establishes that the differential treatment pursues a legitimate aim. However, the question arises before the Constitutional Court as to whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized. In order for the Constitutional Court to answer this question, it recalls that the challenged Law entered into force on 1 January 2006 and that it has never been amended. Therefore, from 2006 up until now, almost six years after its entry into force, the said Law has not been updated in terms of economic and financial trends within the country.

52. The Constitutional Court notes that the judges, prosecutors and other expert staff of the category of employees in judicial institutions at the level of Bosnia and Herzegovina from the challenged law do not have the same types of compensations as elected officials, civil servants and other employees in the legislative and executive branch at the level of Bosnia and Herzegovina. At the level of Bosnia and Herzegovina, the issue of these compensations are regulated by the Law on Salaries and other Compensations in the

Institutions of Bosnia and Herzegovina (*the Official Gazette of BiH* nos. 50/08, 35/09, 75/09, 32/12, 42/12 and 50/12). Constitutional Court reiterates the particularity and social significance of these categories from the challenged law for every state which rests on democratic principles. Legislator must be aware that their independent position cannot be compared to any other categories. Constitutional Court recalls of the Magna Charta of Judges by which the state is obligated to secure human, substantive and financial resources to secure independence of judiciary.

53. In addition, the Constitutional Court cannot find in the challenged Law any justification for such differential treatment and, in particular, given the fact that the challenged Law was passed almost six years ago and has never been amended or updated in terms of economic and financial trends within the country. Therefore, the Constitutional Court holds that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized by adopting the challenged Law. Moreover, it may be concluded that a failure to provide for these compensations for this category of budgetary beneficiaries by the challenged Law, amounts to discrimination as it violates the constitutional principle of equality under provision of Article II(4) of the Constitution of BIH. In addition, the Constitutional Court respects the discretionary power of the legislator to regulate certain areas as it deems appropriate. In this regard, in its Decision no. *U 12/09*, the Constitutional Court stated as follows: *The Constitutional Court respects the particularities of the constitutional order of Bosnia and Herzegovina; however, the common constitutional standards of complex states – especially at the European level – must be taken into account, and deviations therefrom should only occur when there is sufficient justification* (see Constitutional Court, Decision no. *U 12/09* of 28 May 2010, paragraph 34). However, the Constitutional Court highlights that the earnings of the judicial office-holders have to be at an appropriate level in order to ensure effectiveness and independence of judiciary.

54. Therefore, taking into account the standards established by the international instruments, referred to by the applicant, relating to the status of judges and aimed at ensuring that the judicial system is at the highest level, and given the fact that the Constitutional Court has not found in the challenged Law any reasonable or objective justification for the differential treatment relating to the issue of the structure of earnings in question, nor has the legislator offered such justification in its reply to the request, this Court is of the opinion that the challenged Law is disproportionate to the aim sought to be realized. In addition, the challenged Law is disproportionate to the European standards established with regard to the status of judges.

55. Pursuant to the aforementioned, the Constitutional Court concludes that the challenged law is incompatible with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention as well as Article 1 of Protocol No. 12 to the European Convention and Article 26 of the International Covenant on Civil and Political Rights.

56. In view of the aforementioned conclusions, the Constitutional Court will not consider the applicant's allegations on discrimination with regard to other international instruments and the BiH Law on the Prohibition of Discrimination, as the applicant's allegations have been examined in the present Decision through Article 1 of Protocol No. 12 to the European Convention, which comprises the principle of general prohibition of discrimination.

VII. Conclusion

57. The Constitutional Court concludes that the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*the Official Gazette of BiH* nos. 90/05 and 32/07) is incompatible with the provisions of Articles I(2) of the Constitution of Bosnia and Herzegovina as it violates the principle of independence of the judiciary as the fundamental guarantee of the rule of law.

58. Constitutional Court concludes that the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina (*the Official Gazette of BiH* nos. 90/05 and 32/07) is incompatible with the provisions of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention, Article 1 of Protocol No. 12 to the European Convention and Article 26 of the International Covenant on Civil and Political Rights.

59. Having regard to Article 61(1) and (2) and Article 63(4) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

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Jurisdiction – Article VI(3)(b)
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Case No. AP 2843/07

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Muharem Avdić against the Judgment of the County Court in Trebinje no. U-116/05 of 4 October 2007, the Ruling of the Pension and Disability Insurance Fund of Republika Srpska in Bijeljina – Second-Instance Ruling Department in Banja Luka no. 3013228719 of 21 November 2005 and the Ruling of the Pension and Disability Insurance Fund of Republika Srpska – Trebinje Branch Office no. 3013228719 of 13 July 2005

Decision of 12 January 2010

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/07 and 51/09), in Grand Chamber and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić

Mr. Krstan Simić

Having deliberated on the appeal of **Mr. Muharem Avdić,** in case no. **AP 2843/07**, at its session held on 12 January 2010, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Muharem Avdić is hereby granted.

A violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Judgment of the County Court in Trebinje no. U-116/05 of 4 October 2007, the Ruling of the Pension and Disability Insurance Fund of Republika Srpska in Bijeljina – Second-Instance Ruling Department in Banja Luka no. 3013228719 of 21 November 2005 and the Ruling of the Pension and Disability Insurance Fund of Republika Srpska – Trebinje Branch Office no. 3013228719 of 13 July 2005 are hereby quashed.

The Pension and Disability Insurance Fund of Republika Srpska – Trebinje Branch Office is ordered to take a new decision in an expedited procedure in the Case no. 3013228719, in accordance with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol

No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The decision shall be communicated to the Republika Srpska Government, which is obliged to undertake measures ensuring the compliance of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Pension and Disability Insurance Fund of Republika Srpska – Trebinje Branch Office is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 60 days as from the date of the delivery of this Decision, of the measures taken with a view to enforcing this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 26 October 2007, Mr. Muharem Avdić („the appellant") from Mostar, represented by Mehmed Pozo, a lawyer practicing in Mostar, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court"). The appellant lodged an appeal against the Judgment of the County Court in Trebinje („the County Court") no. U-116/05 of 4 October 2007, the Ruling of the Pension and Disability Insurance Fund of Republika Srpska in Bijeljina – Second-Instance Ruling Department in Banja Luka („the Second-Instance Ruling Department in Banja Luka") no. 3013228719 of 21 November 2005 and the Ruling of the Pension and Disability Insurance Fund of Republika Srpska – Trebinje Branch Office („the Pension and Disability Insurance Fund") no. 3013228719 of 13 July 2005.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the County Court and the Pension and Disability Insurance Fund were requested on 13 January 2009 to submit their respective replies to the appeal. The Republika Srpska National Assembly („the RS National Assembly") and the Republika Srpska Government („the RS Government") were requested on 8 October 2009 to submit their respective replies to the appeal.

3. The Pension and Disability Insurance Fund submitted its reply to the appeal on 13 February 2009, the County Court did so on 3 March 2009, whereas the RS National Assembly and the RS Government submitted their replies on 23 and 26 October 2009 respectively.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies of the Pension and Disability Insurance Fund and of the County Court were communicated to the appellant on 23 September 2009, and the replies of the RS National Assembly and the RS Government were communicated to the appellant on 1 December 2009.

III. Facts of the Case

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

6. The Ruling of the Pension and Disability Insurance Fund – Trebinje Branch Office no. 3013228719 of 13 July 2005 determined a proportionate portion of a disability pension for the appellant starting from 16 June 2005 in the amount of BAM 152.15 per month. Also, it was established that the amount of pension so determined would be harmonized on a monthly basis according to the funds designated for the payment of pensions in the Republika Srpska Pension and Disability Insurance Fund. The ruling, also, stated that the pension would be paid in the current month for the previous month, and that the payment of a pension would be discontinued if reasons for which a pension is not to be paid, occur.

7. The appellant lodged an appeal against the mentioned ruling with the Second-Instance Ruling Department in Banja Luka, which dismissed the appeal as ill-founded by the Ruling no. 3013228719 of 21 November 2005. The appellant requested in the appeal the retroactive payment of back pensions from 1992 to June 2005, since during the said period he had been a refugee, due to the wartime developments, so his pensions had not been paid. The reasoning of the ruling of the Second-Instance Ruling Department in Banja Luka read that upon the inspection of the case-file it was established that the it recognized the appellant's right to a proportionate portion of a disability pension starting from 22 July

1986 and that the pension had been paid to the address in Bileća, and then the payment had been suspended in 1992, because the appellant had not been staying at the registered address and failed to register any change of address. Further, it was established that, after the appellant had reported again to the Republika Srpska Pension and Disability Insurance Fund and submitted the new address and the life certificate, conditions were met to resume the payment of pension, thus the challenged ruling of the Pension and Disability Insurance Fund – Trebinje Branch Office reestablished the payment starting from 16 June 2005. In addition, the ruling reads that Article 148(2) and Article 151 of the Law on Pension and Disability Insurance (*Official Gazette of RS*, nos. 32/00, 40/00, 37/01, 32/02, 40/02, 47/02, 110/03, 67/05, 106/05, 20/07, 33/08 and 1/09; „the Law") stipulates that „the due income referred to in paragraph 1 of this Article, which could not have been paid due to the circumstances caused by the income beneficiary, cannot be paid subsequently", that is to say that „the beneficiary of the right arising from the pension and disability insurance was obliged to register within eight days any fact affecting the use and scope of the right". Considering the mentioned legal provisions, and the fact that the appellant's temporary residence from 16 June 1992 to 16 June 2005 had not been unknown, and that the appellant had had a chance already since 1996 to register with the Republika Srpska Pension and Disability Insurance Fund a new address and to request the resumption of the payment of pension, the Second-Instance Ruling Department in Banja Luka dismissed the appellant's appeal as ill-founded.

8. Thereafter, the appellant instituted an administrative dispute by filing a lawsuit before the County Court, which dismissed the lawsuit as ill-founded by issuing the Judgment no. U-116/05 of 4 October 2007. In the reasoning of the judgment the County Court stated that the administrative bodies had correctly applied the substantive law to the completely and correctly established facts of the case, as the provisions of the Law prescribe that the income from the Pension and Disability Insurance would not be paid to the beneficiaries who themselves cause the circumstances preventing the continuation of the payment, i.e. who fail to register within eight days the changes affecting the use and scope of rights arising from the Pension and Disability Insurance, and that the amounts of pension which were not paid due to such circumstances cannot be paid retroactively. As the appellant had a possibility in the case at hand, immediately upon the cessation of the war conflict, i.e. in 1996, to register the new address of temporary residence, which he failed to do, and he also failed to submit the life certificate under the provisions of the Law, the administrative bodies correctly acted in adopting the rulings reestablishing the payment of the proportionate portion of the appellant's disability pension since 16 June 2005, i.e. from the day when the appellant reported to the Republika Srpska Pension and Disability Insurance Fund.

IV. Appeal

a) Allegations stated in the appeal

9. The appellant holds that the challenged decisions violated his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. The appellant holds that the competent bodies should have taken into account that war is a *vis major*, and that reporting anew is only a proof where to pay the due and unpaid pensions. The appellant also holds that his pensions should have been deposited in a special account and that they should have been paid out to him once conditions were met for payment. Namely, the appellant holds that a decision suspending his right to pension had never been adopted, and that such a conduct of the competent bodies of the Republika Srpska resulted in the suspension of his right to pension.

b) Reply to appeal

10. In its reply to the appeal, the RS National Assembly emphasized that, first and foremost, the requests for the review of conformity of an Entity's law with the Constitution of BiH may be filed only by the members of the Presidency, Chair of the Council of Ministers, chair or chairs of one of the houses of the Parliamentary Assembly of BiH or one quarter of the representatives of the legislative bodies of the Entities, and not citizens individually. On the other hand, the RS National Assembly pointed out that individuals may lodge an appeal against a final judgment of any court in BiH within 60 days from the reception thereof. In that respect, the RS National Assembly stated that in the case at hand an appeal was lodged against the judgment of the County Court, and that it was not clear what was the basis on which the Constitutional Court considered the RS National Assembly to be the party to the proceedings, and that the RS National Assembly is not obligated to interpret Article 148(2) and Article 151 of the Law. However, the RS National Assembly stated nevertheless that the Law went into force on 30 September 2000 and that the provisions thereof were valid from that moment onwards, that is, that they had no retroactive effect. In that respect, the RS National Assembly holds that the war as *vis major*, due to which the appellant was unable to use his rights arising from the pension and disability insurance, which the appellant referred to, cannot apply to the period of validity of that law since the law went into force after the end of the war conflicts and did not cover the wartime period. In addition, the RS National Assembly stated that legal solutions referred to in the disputed Articles of the Law were adopted so that the beneficiaries could

properly exercise their rights and for the purpose of the realization of legal certainty as the most important legal values, as well as the public interest of other beneficiaries of rights arising from pension and disability insurance who contribute their funds to this fund. Furthermore, the RS National Assembly stated that the challenged provisions were adopted in accordance with the state powers referred to in Article 1 of Protocol No. 1 to the European Convention, which bestowed upon the states a possibility to apply laws they find necessary to regulate the use of property in accordance with general interests. In the case at hand, the general interest of the state, in this case of an Entity, is for all the rights, including those arising from pension and disability insurance, to be exercised properly. Therefore, the lack of exercise of rights over the failure to fulfill legal obligations referred to in Articles 148 and 151 of the Law is in service thereof. Finally, the RS National Assembly pointed out that, as the appeal was lodged against the judgment of the County Court, the RS National Assembly cannot comment on the respective decision, since it did not participate in the adoption thereof.

11. In its reply to the appeal, the RS Government outlined that the challenged legal provisions were adopted in accordance with Article 1 of Protocol No. 1 to the European Convention, because the state has the right to deprive a person of property in the public interest and under conditions provided for by law and the general principles of the international law. In that respect, the RS Government pointed out that it is indisputable that the state of war is an objective circumstance preventing one from seeking protection of one's rights, however the threat of war in the territory of RS had been lifted on 19 June 1996 and the appellant had the obligation immediately thereafter to address the defendant seeking protection of his rights as arising under pension and disability insurance, and the appellant did so only in 2005. In that way, in the opinion of the RS Government, the appellant showed lack of interest and activity when it comes to the protection of his rights. Moreover, the RS Government holds that the appellant was deprived of his property in accordance with the law, in the public interest for the purpose of preserving a legal certainty, as he failed to comply with the deadlines prescribed by the law. Otherwise, the RS Government holds that, if there was a possibility for retroactive payment of unpaid funds it would endanger the liquidity of the Pension and Disability Insurance Fund, which lacks funds anyway, which would be contrary to the public interest. In that respect, the RS Government holds that the appellant's deprivation of property was proportionate since no exaggerated burden was placed on the appellant when compared to other participants in the legal transactions.

12. The County Court stated in the reply to the appeal that it holds the appeal as ill-founded.

13. In its reply to the appeal, the Pension and Disability Insurance Fund stated that the proceedings in this case were correctly conducted and that the substantive law was correctly applied, and that, therefore, the appeal should be dismissed.

V. Relevant Law

14. The **Law on Pension and Disability Insurance** (*Official Gazette of RS,* nos. 32/00, 40/00, 37/01, 32/02, 40/02, 47/02, 110/03, 67/05, 106/05, 20/07, 33/08 and 1/09), in its relevant part reads as follows:

Article 148, paragraph 2

The income due referred to in paragraph 1 of this article, which could not have been paid due to the circumstances caused by the income beneficiary, cannot be paid subsequently.

Article 151

The beneficiary of the rights arising from the pension and disability insurance is obliged to register, within eight days, any fact affecting the use or the scope of rights.

VI. Admissibility

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

16. In accordance with Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

17. In the present case, the subject-matter challenged by the appeal is the Judgment of the County Court no. U-116/05 of 4 October 2007, against which there are no other effective remedies available under the law. Next, the appellant received the challenged judgment on 15 October 2007, and the appeal was lodged on 26 October 2007, i.e. within a time limit of 60 days as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court, for it is not manifestly (*prima facie*) ill-founded, nor is there any other formal reason rendering the appeal inadmissible.

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

VII. Merits

19. The appellant challenges the mentioned decisions claiming that the said decisions violate his rights under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, and Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

Right to property

20. Article II(3) of the Constitution of Bosnia and Herzegovina, in the relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[…]

k) The right to property.

21. Article 1 of Protocol No. 1 to the European Convention, in the relevant part, reads:

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

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

22. According to the case-law of the European Court of Human Rights („the European Court"), the notion „possessions" in Article 1 of Protocol No. 1 to the European Convention has an autonomous meaning which is certainly not limited to ownership or possession of physical goods. Also, certain other rights and interests constituting assets can also be regarded as „property rights", and thus as „possessions", for the purposes of this provision (see the European Court, *Gasus Dosier- und Fördertechnik GmbH v. The Netherlands*, Judgment of 23 February 1995, Series A, no. 306-B, page 46, paragraph 53). According to the position of the Constitutional Court adopted earlier, the right to pension

for a certain period constitutes property within the meaning of Article 1 of Protocol No. 1 to the European Convention (see, the Constitutional Court, *Decision on Merits no. AP 639/04* of 23 September 2005, paragraph 20).

23. Thus, the appellant indisputably has property which enjoys the protection of Article 1 of Protocol No. 1 to the European Convention, because his right to a proportionate portion of a disability pension had been recognized in 1986, since he fulfilled legal conditions for the exercise of that right. In view of the aforementioned, the Constitutional Court holds that the challenged decisions interfered with the appellant's right to property under Article 1 of Protocol No. 1 to the European Convention.

24. Article 1 of Protocol No. 1 to the European Convention comprises three distinct rules. The first rule, to be found in the first sentence, is the general principle that everyone is entitled to peaceful enjoyment of their property. The second rule, in the second sentence, provides that a person may only be deprived of their possessions under certain conditions. The third rule, the third sentence, means that the Contracting States' right to control the use of property is also subject to certain conditions. 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 they should be construed within the framework of the general principle of the first rule (see, the European Court of Human Rights *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982, Series A no. 52, paragraph 61).

25. In the reply to the question which of the mentioned rules is applicable in the case at hand, the Constitutional Court indicates that the essential object of Article 1 of Protocol No. 1 to the European Convention is to protect a person against unjustified interference with the peaceful enjoyment of his or her possessions. However, as indicated by the European Court, by virtue of Article 1 of the European Convention, each Contracting Party „shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention". The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the European Convention. In the context of Article 1 of Protocol No. 1 to the European Convention, those positive obligations may require the State to take the measures necessary to protect the right of property (see, the European Court, *Broniowski v. Poland*, Judgment of 22 June 2004, Application no. 31443/96, published in ECHR 2002-X, paragraph 143 et seq.). However, the boundaries between the positive and negative obligations do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analyzed in terms of a positive duty of the State or in terms of an interference by a public authority which needs to be justified, the criteria to be applied do not differ in substance.

In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole. It also holds true that the aims mentioned in that provision may be of some relevance in assessing whether a balance between the demands of the public interest involved and the applicant's fundamental right of property has been struck. In both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the European Convention (*idem, Broniowski*, paragraph 144).

26. In the case at hand, the appellant refers to Article 1 of Protocol No. 1 to the European Convention and states that, after his right to pension had been recognized, the implementation of the Law on Pension and Disability Insurance made it impossible for him to receive the unpaid amounts of pension for the given period. The appellant holds that the peaceful enjoyment of property, which he had already acquired the right to, was brought into question. On the other hand, the RS Government holds that the property was deprived in accordance with the law. The RS National Assembly indicated that it concerned the control of the use of property „in accordance with general interests". However, the Constitutional Court holds that the facts of this case can be considered in terms of the interference of effective enjoyment of the acquired right to property or in terms of the failure of the State to ensure the implementation of that right without unjustified restrictions. Therefore, the Constitutional Court holds that it is not necessary to strictly determine whether the present case would be considered in connection with the positive obligations of the state or in connection with the negative obligations to refrain from unjustified interference with the right to peaceful enjoyment of property. The Constitutional Court will decide whether the conduct of the public authorities, irrespective of whether it concerns a failure or interference or the combination of the two, was justified in the light of the applicable principles, namely: a) the principle of legality; b) the principle of legitimate aim in the public interest; and c) the principle of „a fair balance".

a) Principle of lawfulness

27. The Constitutional Court recalls that, according to the case-law of the European Court, the first and most important requirement of Article 1 of Protocol No. 1 to the European Convention is that any interference by a public authority with the peaceful enjoyment of possessions should be „lawful". Namely, the second sentence of the first paragraph of Article 1 of Protocol No. 1 authorizes a deprivation of possessions only „subject to the conditions provided for by law" and the second paragraph of Article 1 recognizes that the States have the right to control the use of property by enforcing „laws". The principle of legal certainty is present throughout the entire European Convention and

must be complied with irrespective of which of the three rules referred to in Article 1 of Protocol No. 1 is being applied. This principle entails the existence of and the compliance with the adequately accessible and sufficiently precise domestic laws, which satisfy basic requirements of the notion of „law" (see, the European Court, *Iatridis v. Greece*, Judgment of 25 March 1999, Reports on Judgments and Decisions 1999-II, paragraph 58). Only once this requirement has been satisfied, it is possible to consider whether a fair balance has been struck between the requirement of the general or public interest and the requirement for the protection of an individual right to property.

28. The Constitutional Court recalls that the cited relevant provisions of the Law on Pension and Disability Insurance prescribe that the beneficiary shall be obligated to report within eight days any fact affecting the use and scope of rights and that the income due, which could not have been paid due to the circumstances caused by the income beneficiary, could not be paid subsequently. In that respect, the Constitutional Court emphasizes that the respective law was published in the *Official Gazette of RS*, and that it went into force eight days after the publication thereof thereby becoming accessible. Further, the Constitutional Court recalls that after the drafting of the revised text of the Law on Pension and Disability Insurance, which was published in the *Official Gazette of RS* no. 106/05, Article 148 became Article 180, and Article 151 became Article 183, and that thereafter, upon the enactment of amendments to the Law, the respective articles were moved. The appellant holds that the time limit, prescribed by the mentioned articles of the Law on Pension and Disability Insurance, is too restrictive and that it is directly contrary to the obligation of the state to ensure the enjoyment of the already acquired right, all the more so because it did not take into account „the existence of special circumstances as was the war". On the other hand, the RS Government and the RS National Assembly do not hold that this concerned any „illegality" but the implementation of the law in the public interest.

29. The Constitutional Court observes that the relevant law prescribes the restriction of the appellant's right to pension under certain conditions. However, the Constitutional Court holds that the consequences that this provision has, from the aspect of conformity with Article 1 of Protocol No. 1 to the European Convention, constitute material consideration to be taken into account when deciding on whether the public authorities had stricken a fair balance between different interest when applying the prescribed measures or failing to do so (*ibid, Broniowski*, paragraph 154). Therefore, the Constitutional Court will continue with the analysis while accepting that actions or failures to act on the part of the public authorities, to the extent to which they constitute the interference with or restriction of the appellant's right to peaceful enjoyment of property, were „provided for by law" within the meaning of Article 1 of Protocol No. 1 to the European Convention.

b) Principle of legitimate aim in the public interest

30. The Constitutional Court observes that it follows from the replies of the RS National Assembly and the RS Government that the public interest, which was taken into account during the enactment of the Law on Pension and Disability Insurance, and particularly of the challenged provisions of Article 148(2) and Article 151 of that Law, was the provision of legal certainty and the protection of the pension funds liquidity. The Constitutional Court holds that it is legitimate for the public authority to undertake measures designed to achieve these aims in the public interest of the community.

c) Principle of „a fair balance" between the public interest of the community and the appellant's right to a peaceful enjoyment of property

31. The appellant holds that „the war is *vis major* and that re-registration is only a proof where to pay the due and unpaid pensions", and that „his pensions should have been deposited in a special account" and be paid to him once conditions to do so were met, especially because his right to pension had never been suspended. On the other hand, the RS National Assembly and the RS Government hold that the pension beneficiaries are obliged to observe time limits prescribed by law and, if that is not the case, they cannot exercise their right over the failure to fulfill obligations prescribed by law. The RS National Assembly stated that the Law on Pension and Disability Insurance entered into force in 2000 and the provisions thereof do not have retroactive effect, therefore the war as *vis major* that the appellant referred to cannot apply to the period of the applicability of that law. The RS Government stated that it is indisputable that the state of war is an objective circumstance, but that the threat of war in the territory of Republika Srpska had been lifted on 19 June 1996 and that the appellant was obliged then to report henceforth for the purpose of protecting his right to pension, which is not a too excessive burden in terms of „a fair balance", which the appellant failed to do.

32. The Constitutional Court recalls that the Law on Pension and Disability Insurance prescribes the conditions which a person ought to fulfill in order to acquire the right to pension, and that the right to pension is acquired on the basis of a mandatory or voluntary insurance. That means that a portion of funds were earmarked to the pension fund for each and every beneficiary throughout their work life up until the moment they fulfilled the condition to retire. Thereby, the Constitutional Court takes into account that in the case at hand the appellant's right to a proportionate portion of a disability pension had been recognized since 1986 and that, throughout all these years, namely from the day of the adoption of this decision, that right has never been brought into question or rendered ineffective. Besides, the Constitutional Court observes that the respective payment was

had been made to the appellant on a regular basis up until 1992, that is until the outset of the war conflict in BiH when the payment had been discontinued, and that it resumed again in 2005, after the appellant had filed a request for the resumption of payment. Further, the Constitutional Court observes that it follows from the disputed provisions of the Law on Pension and Disability Insurance that if a beneficiary fails to register the change of address of temporary/permanent residence within eight days, he/she shall lose the right to income due. This acquits in entirety the Pension and Disability Insurance Fund of its obligation for a certain period of time, although the beneficiary has not lost the right to pension itself.

33. The Constitutional Court observes that the pension insurance represents mandatory insurance of all employees, which implies a legal obligation of an employer to pay each time when paying an employee's salary the funds in the Pension and Disability Insurance Fund at a certain percentage of the salary. That means that, according to the applicable pension system, the funds in the pension fund are accumulated over one month after which payments are being made to the Pension and Disability Insurance Fund beneficiaries who have acquired the right to pension, in the amount established in decisions for each beneficiary individually. In that respect, the Constitutional Court observes that such a way of paying funds in the pension fund represents a sort of solidary payment of funds paid during the active life of an individual. This creates an obligation of the pension fund to pay to that individual, after the fulfilment of conditions for retirement, a pension from the funds that it continues to collect according to the same system. In the meantime, before such conditions are met, the paid funds are being used to pay the pension from the Pension and Disability Insurance Fund to beneficiaries who had already acquired the right to pension. Further, the Constitutional Court observes that during the entire appellant's active life funds were paid in the mentioned manner to the Pension and Disability Insurance Fund, and the same system is still in effect today.

34. Further, the Constitutional Court bears in mind that the appellant's pension had been paid on a regular basis up until 1992, when the payment had been suspended due to the war operations. The payments resumed in 2005, because the appellant's temporary, i.e. permanent residence was unknown to the Pension and Disability Insurance Fund. In that respect, the Constitutional Court recalls that the mentioned war circumstances in Bosnia and Herzegovina were the cause for „geographical" shifts of its citizens, both within Bosnia and Herzegovina and outside its borders. The situation in which Bosnia-Herzegovina's citizens had found themselves in had brought about a series of unresolved issues, in particular the problems in the area of economic and social rights, which exercise and enjoyment had been, as a rule, always linked directly to their permanent or temporary residence. One of those issues was the exercise as well as the continuation to use the rights

already acquired under the pension and disability insurance (see, the Constitutional Court, *Decision no. AP 2213/06* of 10 January 2008, published in the *Official Gazette of BiH* no. 27/08, paragraph 25).

35. In the context of the aforementioned, the Constitutional Court observes that the Law on Pension and Disability Insurance, unlike the Law on Voluntary Pension Insurance, does not contain provisions regulating the issue of what happens with the pecuniary amounts which beneficiaries are undoubtedly entitled to and which were not paid because of unknown temporary or permanent residence of a beneficiary. Namely, the Constitutional Court observes that it follows from the provisions of the Law on Voluntary Pension Insurance that, when an individual has acquired the right to pension on the basis of a private/voluntary contract of insurance, contributions for this type of insurance never go to waste, not even in cases when a contact address of a beneficiary is unknown for years, since a special account is open for each beneficiary where paid funds are being deposited which a beneficiary can dispose of on the basis of the contract on voluntary insurance. In view of the aforementioned, the Constitutional Court holds that the solution under the Law on Pension and Disability Insurance is imprecise and unspecified since it leaves room for arbitrary application with respect to the management of unpaid pecuniary funds. Also, the Constitutional Court holds that the realization of a legitimate aim – the provision of legal certainty and the preservation of liquidity of the pension fund – cannot be a justification for the total loss of the already acquired right of an individual in a given period. Therefore, such a legal solution cannot, in the opinion of the Constitutional Court, strike a fair balance between a requirement of a general or public interest and a requirement to protect the right of an individual to property, instead it constitutes an excessive burden for a beneficiary, which is the reason why the principle of proportionality under Article 1 of Protocol No. 1 to the European Convention has not been met.

36. In that respect, the Constitutional Court recalls that it had concluded in its earlier jurisprudence that it has jurisdiction in a procedure from within the appellate jurisdiction to examine the quality of law to the extent to which it affects the issue of the exercise of the rights of individuals under the European Convention (see, e.g. the Constitutional Court, Decision no. *AP 2271/05* of 21 December 2006; Decision no. *AP 774/04* of 20 December 2005). In so doing, the Constitutional Court emphasizes in particular that the Constitution of Bosnia and Herzegovina is the highest form of a general act of a state and that it has priority over all other law which is not in conformity with it, that the European Convention, in accordance with Article II(2) of the Constitution of Bosnia and Herzegovina, has precedence over any domestic law, and that the authorities in Bosnia and Herzegovina, under Article II(6) of the Constitution of Bosnia and Herzegovina, are obliged to apply the rights guaranteed under the European Convention. In the case

at hand, the Constitutional Court accepted that the principle of „legality" was satisfied, because the measure concerned was provided for by law. However, the Constitutional Court concluded that the principle of „a fair balance" has not been satisfied, and that the violation of the right to property exists. Bearing in mind that such a measure, which is prescribed by the Law on Pension and Disability Insurance, is applied to all the pension beneficiaries and not to the appellant only, and in all circumstances and not only in those that may be considered special for whatever reason, the Constitutional Court holds that it is necessary to examine the quality of this legal solution in the case at hand.

37. The Constitutional Court bears in mind that the RS National Assembly and the RS Government, by providing an answer related to the disputed articles of the Law on Pension and Disability Insurance, reasoned that it concerned „the standardization of an obligation of a beneficiary to inform, within a short time, namely eight days, the Pension and Disability Insurance Fund of the facts affecting the use or the scope of rights, because they concern periodic payments with a rather short maturity period, which possible retroactive payment would affect the current liquidity of the Fund, which has been stretched thin due to the great number of beneficiaries and the lack of funds, which is a notorious fact". However, the Constitutional Court holds that the loss of right established by law to the pensions due and unpaid to beneficiaries only because they failed to register the change of address within too short period cannot be justified by reasons as are the legal certainty, possible lack of liquidity of the fund or the lack of funds.

38. Moreover, as already said, the beneficiary (the appellant) had exercised and enjoyed for a prolonged period of time his right to pension from the Fund securing funds on the basis of solidary payments. That is how the funds for the disputed period had been secured and the only reason they had not been paid was the unknown address of the beneficiary. The public authority had to establish for such situations an appropriate way of depositing funds that had been secured and not paid so that the beneficiary would not be prevented from exercising subsequently his acquired rights. The Constitutional Court holds that such a conduct would not run contrary to the interest of legal certainty, and could not in any way endanger the liquidity of the Fund or negatively affect the funds of the Fund, and the legislator failed to offer to that end convincing and acceptable reasoning. Also, the Constitutional Court observes that the legal time limit of eight days is one of the most restrictive deadlines in the legal system, which entails the loss, for a certain period of time, of the very right that had been recognized beforehand.

39. The Constitutional Court accepts by all means that the public authorities enjoy a wide margin of appreciation in selecting measures to secure the enjoyment of economic and social rights, as well as in determining conditions under which to exercise those

rights, since the said rights have a significant impact on the country as a whole. The selection of such measures may involve decisions restricting economic and social rights, and the striking of a fair balance between rights is an extremely hard task. This margin of appreciation, no matter how important, is not unlimited nevertheless, and the modification thereof, even in the context of the most complex reform, cannot entail consequences that run contrary to the standards of the European Convention (see, European Court, *James et al. v. The United Kingdom,* Judgment of 21 February 1986, Series A, No. 98, paragraph 37). However, the Constitutional Court observes that in the area of pension insurance no fundamental and radical reform had occurred that could have justified such a restrictive measure. Legal solutions concerning conditions under which the right to pension is exercised and the same time limit of eight days for the registration of all changes with the pension beneficiary had been established in the Law on Pension and Disability Insurance from 1993 (*Official Gazette of RS* no. 27/93), and were retained in the Law on Pension and Disability Insurance from 2000, that is to say even after the entry into force of the European Convention in Bosnia and Herzegovina, regarding which the public authorities, in the opinion of the Constitutional Court, failed to provide satisfactory reasons.

40. In view of all the aforementioned, the Constitutional Court holds that the respective legal provisions do not meet the necessary legal quality to the extent required for the observance of standards referred to in Article 1 of Protocol No. 1 to the European Convention, which is contrary to the principle of the rule of law referred to in Article I(2) of the Constitution of Bosnia and Herzegovina. The Constitutional Court emphasizes that it is not called upon to determine which specific measures need to be taken by the legislator in the area of pension insurance. However, taking into account the conclusions of the Constitutional Court in this decision, the Constitutional Court holds that it is necessary to undertake appropriate legislative measures to make sure that any restriction of the right to pension as „property" within the meaning of Article 1 of Protocol No. 1 to the European Convention , which the legislator may consider to be justified within the meaning of the Law on Pension and Disability Insurance, meets the principle of „a fair balance", as already reasoned by the Constitutional Court.

41. The Constitutional Court, therefore, concludes that in the case at hand the appellant's right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention was violated.

42. The Constitutional Court holds that for the purpose of efficient protection of the appellant's right to property it is necessary to quash all the challenged decisions and to order the Pension and Disability Insurance Fund - Trebinje Branch Office, to adopt a new

decision, which will not violate the appellant's human rights. Thereby, the Constitutional Court recalls again that all the public authorities of Bosnia and Herzegovina are obliged within their respective jurisdiction to apply directly the standards of fundamental human rights and freedoms under the Constitution of Bosnia and Herzegovina and the European Convention, which have supremacy over all other laws. Also, the Constitutional Court holds that it is necessary to order the RS Government to undertake appropriate measures to ensure the respect of the constitutional right to property within the meaning of this decision and in all other relevant cases.

Other allegations

43. With respect to the appellant's allegations as to the violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, and bearing in mind the conclusion on the violation of the right to property, the Constitutional Court holds that it is not necessary to consider them separately.

VIII. Conclusion

44. The Constitutional Court concludes that there is a violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention in the event where the law failed to strike „a fair balance" between the requirement of a general or public interest and the requirement to protect the right of an individual to property. In addition, the law applied in the case at hand does not meet the legal quality to the extent required for the respect of standards under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

45. Pursuant to Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

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CONTENTS

Case No. AP 575/07

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Halid Dedić for failure to adopt a decision in the judicial proceedings which he instituted before the Municipal Court in Bihać for the purpose of his reinstatement to the work and reinstatement of other employment rights.

Decision of 30 January 2010

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2) line 2, Article 61(1) and (2) and Article 76(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina *(Official Gazette of Bosnia and Herzegovina*, Nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Mr. David Feldman,

Mr. Krstan Simić,

Mr. Mirsad Ćeman,

Having deliberated on the appeal of Mr. **Halid Dedić** in case no. **AP-575/07** at its session held on 30 January 2010, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. Halid Dedić is hereby granted.

A violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established in relation to the right to a decision within a reasonable time in the proceedings conducted before the Municipal Court in Bihać upon the lawsuit of 14 February 1994 in case no. P-2139/07.

The Municipal Court in Bihać is hereby ordered to urgently conclude the proceedings in case no. P-2139/07 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 Unsko-Sanski Canton is hereby ordered to pay the amount of 3,900.00 KM to Mr. Halid Dedić as a compensation for non-pecuniary damage sustained due to the failure to adopt a decision within a reasonable time, in accordance with Article 76(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina. The payment is to be made within 90 days from the day of delivery of this decision.

The Municipal Court in Bihać and the Government of the Unsko-Sanski Canton are hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 90 days as from the date of delivery of this Decision, about the measures taken to enforce this Decision in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 12 February 2007, Mr. Halid Dedić („the appellant") from Bihać lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for failure to adopt a decision in the judicial proceedings which he instituted before the Municipal Court in Bihać („the Municipal Court") for the purpose of his reinstatement to the work and reinstatement of other employment rights. At the time of filing the appeal with the Constitutional Court, the appellant's claim was partially successful (in the part where the court established that his employment had been terminated unlawfully and the order was issued to reinstate the appellant to work) while the proceedings were still pending before the Cantonal Court in Bihać („the Cantonal Court") which was to decide the appeal against the judgment of the Municipal Court, no. 407/02 of 6 February 2004. The appellant supplemented his appeal on 8 February 2008.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 20 February and then on 20 August 2007 respectively the Cantonal Court in Bihać („the Cantonal Court")

was requested to submit its reply to the appeal. On 27 August 2007, the Cantonal Court submitted its reply to the appeal.

3. The Constitutional Court requested the Municipal Court to submit its reply to the appeal and the entire case-file. On 27 July 2008, the Municipal Court informed the Constitutional Court that upon filing a revision appeal the case-file had been forwarded to the Supreme Court of the Federation of Bosnia and Herzegovina („the Supreme Court").

4. On 29 September 2009, the Constitutional Court requested the Supreme Court to submit its reply to the appeal as well as the entire case-file. The Supreme Court sent a part of the case-file relating to the decision-making procedure following the revision appeal.

5. Upon the repeated request of the Constitutional Court of 14 October 2009, the Municipal Court submitted the entire case-file on 23 October 2009.

6. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the Cantonal Court's reply to the appeal was submitted to the appellant on 29 January 2008.

III. Facts of the case

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

8. The appellant initiated judicial proceedings on 3 February 1994 against the Republic of Bosnia and Herzegovina, the County Prison of Bihać („the defendant") for the purpose of determining unlawfulness of the termination of the appellant's employment and reinstating the appellant to work. On 30 March 1994 the Basic Court in Bihać rendered judgment no. Pr-5/94 of 30 March 1994 whereby the appellant's claim was partially granted and the defendant's ruling was partially quashed. Furthermore, by this judgment the defendant was ordered to reinstate the appellant to work. The remainder of the appellant's claim was dismissed. The appellant lodged an appeal against the judgment of the first instance court. The Higher Court in Bihać rendered judgment Gž-52/94 of 31 May 1995 whereby the appeal was partially granted and, consequently, the part of the first instance judgment granting the appellant's claim was quashed. The remainder of the appeal (the dismissing part of the first instance judgment) was dismissed as ill-founded and the first instance judgment was upheld.

9. The Basic Court in Bihać adopted ruling no. Pr-11/95 of 1 December 1995, whereby the proceedings were put on hold as of 30 November 1995. In his submission of 31 January 1996 the appellant sought the resumption of the proceedings. The Court scheduled hearings

for 14 April and 15 May 1996. None of the hearings were held due to the failure of the defendant's lawyer to attend and due to the fact that the court did not have a panel. The next hearing was scheduled for 24 May 1996 but the defendant's lawyer informed the court, in his submission, that he was not to appear in the court and that he was supportive of his statements and proposals so far presented in the proceedings. The next hearing scheduled by the court was to take place on 14 May 1997 with regards to the appellant's case which was given a new number Pr-17/05 and that hearing was held in the absence of the defendant who notified the court that he was not going to attend the hearing. The court scheduled and held hearings on 29 May, 18 June and 25 June 1997 and on 4 February 1998.

10. The Municipal Court rendered judgment no. PR-17/97 of 4 February 1998, whereby it was established that the defendant's order terminating the appellant's employment was unlawful, and this order was annulled as such. The defendant was obliged to reinstate the appellant to work. The defendant was also obliged to compensate the appellant for the costs of the civil proceedings.

11. Both the appellant and the defendant filed appeals against the judgment of the Municipal Court of 4 February 1998. Upon the appellant's proposal from his reply to the appeal, the Supreme Court adopted a ruling no.112/99 of 20 October 1999, whereby the appellant's proposal to determine another territorially competent court was dismissed. The Cantonal Court rendered a judgment no. Gž-447/99 of 8 May 2000 whereby the appeal was granted, the first instance judgment quashed and the case was referred back for renewed proceedings.

12. As to the case which was given a new number PR-856/00, the hearing was scheduled for 27 September 2000, which was postponed at the request of the defendant. The new hearing was scheduled for 25 December 2000, but it was not held since the court failed to ensure a panel in charge of taking a decision. A new hearing was scheduled for 8 January 2001. At the hearing of 8 January 2001, upon the proposal of the defendant the court joined case no. PR-856/00 with case no. PR-45/98 (in his lawsuit of 13 April 1998 the appellant initiated proceedings against the defendant for the purpose of being compensated for the damage he sustained) and therefore the court decided to conduct further proceedings under number 45/98. The appellant stood by his statements and the court decided to seek additional information. The hearing was postponed for 19 February 2001, but it was not held at that time due to the fact that there was no panel of the court. The court scheduled the hearings which were held on 7 and 27 March 2001 respectively.

13. The Municipal Court rendered a judgment no. PR-45/98 of 27 March 2001 whereby it was established that the defendant's order terminating the appellant's employment was

unlawful and that it was annulled as such. The defendant was ordered to reinstate the appellant to work. The defendant was also ordered to pay the appellant, as a compensation for pecuniary damage (unpaid salaries), the amount of KM 4,818.50, including the statutory default interest and the compensation for the costs of the civil proceedings, while the remainder of the claim was dismissed. Furthermore, the Municipal Court dismissed the appellant's claim in which he sought to be awarded the compensation for damage caused by the loss of meal allowance and annual leave allowance, as well as the appellant's claim in which he sought his pension and disability insurance contributions to be paid, and the reason for the court's dismissal was the appellant's lack of standing to sue in this matter.

14. Both the appellant and defendant lodged their respective appeals against the judgment of the Municipal Court of 27 March 2001. The Cantonal Court rendered a judgment RSŽ-143/2001 of 25 January 2002, whereby the appeals of the appellant and defendant were partially granted. Furthermore, the court quashed the first instance judgment in part in which the defendant was ordered to pay the appellant the compensation for pecuniary damages and in part in which the remainder of the appellant's claim was dismissed. Then, the Cantonal Court referred the case back to the court of first instance to conduct renewed proceedings. As to the remaining part, the Cantonal Court dismissed the appeals and upheld the first instance judgment.

15. In the course of the renewed proceedings in case no. Rs-407/02, the Municipal Court held a hearing on 30 April 2002. The defendant filed a counter-lawsuit on 8 May 2002 in which he sought the court orders the appellant to pay the defendant the amount of KM 13,263. The next hearing was held on 19 June 2002. The Municipal Court postponed the hearing for unlimited period of time for the purpose of obtaining additional documents. The Municipal Court adopted a ruling Rs: 407/02 of 28 August 2002, whereby it was decided that an expert examination would be conducted in case no. PR-407/02. This examination was to be conducted by financial expert Mr. Jasminko Dervišević. At the hearing of 17 February 2003, the Court concluded that the expert had refused to conduct the examination and the court appointed another expert. The Municipal Court held the hearings on 25 August and 30 September 2003 respectively, while the hearing scheduled for 23 October 2003 was postponed due to the justified absence of the defendant while the hearing scheduled for 11 November 2003 was cancelled. On 8 December 2003, the Municipal Court scheduled and held the preliminary hearing and the main hearing was scheduled for 23 December 2003, but it was cancelled. The main hearing was scheduled and held on 8 January 2004 and at that time the main trial was concluded.

16. The Municipal Court rendered judgment no. Rs-407/02 of 6 February 2004, whereby the defendant was ordered to pay the appellant the amount of KM 1,187.92 as a

compensation for pecuniary damage caused by the loss of earnings in the period specified in the judgment, including the statutory default interest. In paragraph 2 of the judgment's enacting clause the court dismissed the remainder of the appellant's claim. In paragraph 3 of the enacting clause the court ordered the defendant to pay the appellant the amount of KM 10,000 as a compensation for non-pecuniary damage. The Court also ordered the defendant to compensate the appellant for the costs of the civil proceedings. The court dismissed the defendant's (the counter-plaintiff's) claim as ill-founded in which he sought to be paid the amount of KM 11,562.40, as well as his claim to be paid KM 1,700.60 for the lack of standing to be sued. The Court dismissed the appellant's request for an interim measure in which he sought that the defendant be obliged to register the appellant with the Pension and Disability Insurance and the Health Care Insurance Administration.

17. The appellant filed an appeal against the judgment of the Municipal Court (on 17 February 2004) as did the defendant (on 11 February 2004). On 21 September 2006, the Cantonal Court sent a letter to the Municipal Court to remove the defects from the appeals. The Cantonal Court rendered a judgment 001-0-Gž-07-000095 of 31 October 2007, whereby the appeals were partially granted and the part of the first instance judgment was quashed. A part of the decision on the claim for payment of non-pecuniary damage was quashed both in the awarding and dismissing part, as well as in the part of the decision on the claim for payment of pecuniary damage for the loss of the appellant's earnings and in this part the case was referred back for the renewed proceedings. As for the remainder, the appeals of the appellant and defendant were dismissed as ill-founded and the first instance judgment was upheld.

18. The appellant filed a revision appeal on 3 January and the defendant submitted his reply to the revision-appeal on 23 January 2008.

19. The Supreme Court rendered judgment no. 070-0-Rev-08-000174 of 9 June 2009, whereby the revision appeal was dismissed.

IV. Appeal

a) The statements from the appeal

20. The appellant complains that due to the failure to adopt a final decision his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") was violated, as well as his right to private life under Article II (3)(f) of the Constitution of Bosnia and Herzegovina and

Article 8 of the European Convention, his right to effective legal remedy under Article 13 of the European Convention, his right to non-discrimination under Article 1 of Protocol No. 12 to the European Convention, Articles 10 and 11 of the International Covenant on Economic, Social and Cultural Rights and Article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The appellant points out that he was addressing a number of institutions for the purpose of conclusion of his dispute and he also stated that he had intervened to speed up the proceedings in his case but nothing helped and the proceedings have been pending for 13 years (at the moment of filing the appeal). In his letter dated 8 February 2008 the appellant sought the compensation for damage caused by the violation of Articles 6 and 13 of the European Convention and he also stated that his case was partially resolved but that the proceedings continued and it is the fifth time that his case has been referred back to the court of first instance for renewed proceedings.

b) Reply to the appeal

21. In the reply to the appeal, the Cantonal Court presented the chronological course of events in the appellant's case. The Cantonal Court reiterated that the proceedings have been pending for a long period of time but the reason for it is the fact that the appellant was amending his claim for several times, that he requested that another court be designated and other things, which may have an effect on the course of the proceedings and their length. Moreover, the Cantonal Court has stated that the court's case load must be taken into consideration, as well as the legal priority to which some cases are entitled and the fact that the Cantonal Court determines a work schedule on an annual basis with the measures to resolving the pending cases.

22. The Supreme Court and Municipal Court failed to give their opinions on the allegations stated in the appeal.

V. Relevant Law

23. The relevant provisions of the **Civil Procedure Code** (*Official Gazette of the Federation of Bosnia and Herzegovina,* Nos. 53/03, 73/05, 53/06) read as follows:

Article 10

The Court shall be bound to conduct the proceedings without delay and with the least possible expenses, as well as to prevent any abuse of the rights of any participant in the civil proceedings.

VI. Admissibility

24. 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.

25. Pursuant to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him/her.

26. Pursuant to Article 16(3) of the Rules of the Constitutional Court, the Constitutional Court may, exceptionally, examine an appeal when there is no decision of a competent court if the appeal indicates a grave violation of the rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina or by the international documents applied in Bosnia and Herzegovina. In the instant case the appellant refers to his right under Article 6(1) of the European Convention, which also contains the right to „the proceedings within a reasonable time" for the reason that the ordinary court has not managed to adopt a decision on the appellant's lawsuit for a long period of time.

27. The Constitutional Court observes that the appellant filed the appeal with the Constitutional Court on 12 February 2007 during the time when, in the proceedings before the Municipal Court, the appellant's claim was partially decided in the part relating to the appellant's reinstatement to work. As to the other part relating to the compensation for salaries and other employment-related rights, the Court rendered judgment Rs-407/04 of 6 February 2004 against which the appellant filed a complaint and, at the time when the appeal was filed, there was no decision taken by the Cantonal Court on the mentioned complaint.

28. In view of the aforementioned, the appellant complained about impossibility to obtain a final decision in a long period of time, and considering the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(1),(2),(3) and (4) of the Rules of the Constitutional Court, the Constitutional Court has concluded that the present appeal, in relation to adopting a decision within a reasonable time under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention meets the admissibility requirements.

VII. Merits

29. The appellant complains of the failure to have a final decision adopted in his case on the legal action that is employment-related claiming that the proceedings took unjustifiably long time and that, after 14 years, the case has only been partially solved. Therefore, he complains about a violation of the right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention. Also, the appellant states that he urged the adoption of a final decision, but that effective legal remedy did not exist. He also alleged a violation of Article 13 of the European Convention.

VII.1. The right to a fair trial within a reasonable time

30. Article II(3) of the Constitution of Bosnia and Herzegovina reads in its relevant part 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.

31. Article 6 paragraph 1 of the European Convention, in its relevant part, reads as follows:

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

a) Relevant principles

32. According to the consistent case-law of the European Court of Human Rights and the Constitutional Court, the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what is at stake for the applicant in the litigation (see the European Court of Human Rights, *Mikulić v. Croatia,* Application no. 53176/99 of 7 February 2002, Report no. 2002-I, paragraph 38).

33. In addition, according to the case-law of the European Court of Human Rights and the Constitutional Court, a large number of cases pending cannot justify an excessive

length of proceedings, whereas constant referring of the decision back for retrial may suggest that there are serious shortcomings in the organization of judicial system (see the European Court of Human Rights, *Probstmeier v. Germany,* Judgment of 1 July 1997, paragraph 64, Reports 1997-IV).

34. Finally, the European Court of Human Rights emphasized that special diligence of the competent authorities was needed in all cases concerning personal status and capacity, and that this requirement was especially important in states where domestic law stipulates that certain judicial proceedings are of urgent nature (see the European Court of Human Rights, *Borgese v. Italy,* Judgment of 26 February 1992, Series A no. 228-B, paragraph 18).

b) Period considered

35. The present proceedings were instituted on 3 February 1994, however, the period which, *ratione temporis*, falls within the jurisdiction of the Constitutional Court does not commence back then but on 14 December 1995, as the date when the Constitution of Bosnia and Herzegovina entered into force. However, in assessing the reasonableness of the proceedings that the appellant complained about, the Constitutional Court will take into account the stage which the proceedings reached by 14 December 1995 (*loc. cit.*, the *Mikulić* Judgment, paragraph 37). Furthermore, the Constitutional Court observes that the proceedings were not fully completed, and that, according to the latest information, they have been pending before the first instance court. Thus, the entire proceedings on the appellant's claim have lasted for 15 years and nine months, and from the day of establishing the jurisdiction of the Constitutional Court, for almost 13 years, and have not been completed as yet.

c) Complexity of the case

36. The complexity of the proceedings must be considered within the scope of factual and legal aspects of the contentious proceedings, i.e. evidence that the court ought to present and assess within the scope of legal nature of the dispute. In the instant case, the appellant sought that unlawfulness of the termination of his employment, reinstatement to work and other employment-related rights be established. In this respect, the Constitutional Court holds that this does not concern particularly complex factual and legal issues that the court ought to have considered.

d) Analysis of reasonableness of the length of the proceedings

37. The Constitutional Court established that the proceedings were at a standstill before the Municipal Court (the Basic Court in Bihać at the time), after the establishment of the jurisdiction of the Constitutional Court (14 December 1995), and the appellant sought the resumption of the proceedings on 31 January 1996. The first instance court scheduled the first hearing for 14 April 1996, which was not held, and neither were the majority of scheduled hearings, resulting from the defendant's failure to attend, or because the court failed to put in place a panel necessary for the decision-making in the case. In addition, it follows from the case file that the first instance court had not taken any action in the period from 15 May 1996 to May 1997. The first instance judgment was adopted on 4 February 1998, that is two years after the resumption of the proceedings, and the decision on the appeal was adopted two years and three months thereafter, and the case was referred back for retrial. In the renewed proceedings the first instance court adopted a decision within the time period of less than a year. However, the scheduled hearings were not held for the reason that the court failed to put a panel in place. The Cantonal Court decided on the appeal against the first instance judgment within 10 months time, but the case was referred back for a retrial in one part. The renewed proceedings took two years before the first instance court, and the discussion was postponed for an indefinite period of time in order to collect necessary evidence. The proceedings on the appeal against the first instance judgment of 6 February 2004 took three years. Two years and seven months after the parties lodged an appeal, the Cantonal Court requested that the appeals be specified, whereby it made a final decision on the appeal on 31 October 2007, that is three years and eight months after the adoption of the first instance judgment, with a part of the claim being referred back to the first instance court. The Supreme Court decided on the revision-appeal within one year and five months, which may not be an excessively long period for decision-making. However, in view of the overall length of the proceedings, the Constitutional Court observes that the Supreme Court should have reacted more promptly and prevented further postponement in the settlement of the case.

38. The Constitutional Court observes that the Municipal and Supreme Courts did not give their respective replies to the appeal, and that the Cantonal Court failed to offer arguments which might be deemed a reasonable and objective justification for such lengthy proceedings. The Cantonal Court stated that the conduct of the appellant affected the length of the proceedings due to the modification of the claim, and that one should keep in mind a large number of cases and number of court judges they had at disposal, as well as program of work prepared by the Cantonal Court. However, the Constitutional Court observes that the very nature of the dispute (e.g. claiming salaries) was such

that it required the modification of the claim the longer the proceedings took. Besides, the Constitutional Court notes that the parties may dispose of their requests, and that possible expansion and modification of the claim, being procedural actions provided for by law, cannot be blamed on the appellant as bringing about such lengthy proceedings. The Cantonal Court did not state and the Constitutional Court did not establish that the appellant failed to possibly meet some order of the court or that he obstructed any sort of action taken by the court. Besides, the appellant filed submission urging the court to start working on the case. Also, the Constitutional Court observes that the appellant urged, through submissions, that the case be dealt with, without success though. Therefore, in the instant case, the Constitutional Court cannot establish the appellant's responsibility for the length of the proceedings in the present case.

39. In its reply the Cantonal Court has stated that it deals with a large number of cases, that one should bear in mind the number of judges working on cases, the legal priority given to cases depending on their nature, as well as the fact that a large number of scheduled hearings was not held for the reason that no panel was in place. With regards to these allegations the Constitutional Court notes that the overload of judiciary, in general, cannot be accepted as a justification the Convention places a duty on the Contracting States to organize their legal systems so as to allow the courts to comply with the requirements of Article 6 of the European Convention. Nonetheless, a temporary backlog of business does not involve liability on the part of the Contracting States provided that they take, with the requisite promptness, remedial action to deal with an exceptional situation of this kind (see the European Court of Human Rights, *Zimmermann and Steiner v. Switzerland*, Judgment of 13 July 1983, Series A, no. 66, paragraphs 25-32; see decisions of the Constitutional Court, no. *AP 600/04* of 17 February 2005, paragraph 25, and no. *AP 505/04* of 15 June 2005, paragraph 31). In the instant case the court failed to reason the time period since when and the manner in which the backlog in solving cases occurred, and the measures which the court undertook in order to improve administration of justice. The Constitutional Court cannot accept arbitrary allegation as to the large number of cases, without noticing a good will and concrete work of the competent authority in the fight against such problems.

40. In addition to the aforementioned, the Constitutional Court notes that the appellant's claim was only partially solved, and that the case was again for the fourth time referred back to the first instance court for retrial. The Constitutional Court must emphasize that the conduct of the proceedings within a reasonable time is of fundamental importance for the legal system, for any unnecessary postponement, and referring back the case from a higher-instance to a lower-instance court, oftentimes leads to, *de facto*, deprivation of individual's rights and the loss of effectiveness and confidence in the legal system.

41. While assessing the aforementioned, as well as criteria stated in this decision, including the conclusion on the complexity of cases, its status as at 14 December 1995, that is the total length of the proceedings of 15 years, as well as the conduct of the ordinary courts, in particular of the Municipal and Cantonal Courts, the Constitutional Court holds that the length of the proceedings in the instant case does not meet the requirement of „reasonableness" under Article 6 paragraph 1 of the European Convention.

42. Therefore, the Constitutional Court holds that in the present case there is a violation of the right to trial within a reasonable time, as one of the elements 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.

Issue of compensation for non-pecuniary damage

43. The appellant requested a compensation for damage resulting from the length of the contentious proceedings. Under Article 76(2) of the Rules of the Constitutional Court, the Constitutional Court may, exceptionally, at the appellant's request, determine a compensation for non-pecuniary damage. However, the Constitutional Court recalls that, unlike in the proceedings before the ordinary courts, the compensation for non-pecuniary damage is determined in the amount commensurate to the established violation of human rights and is calculated under a criterion laid down by the European Court of Human Rights and adjusted to the economic situation in BiH.

44. When deciding the appellant's request for the compensation for non-pecuniary damages, the Constitutional Court refers to the earlier established principle of determining the amount of the compensation in such cases (see the Constitutional Court, Decision no. *AP 938/04*, published in the *Official Gazette of Bosnia and Herzegovina* no. 20/06, paragraphs 48-51). Under the established principle, the appellant was supposed to be paid for each year of postponement of adoption of a decision approximately BAM 150.00, and if it concerned urgent proceedings the amount of BAM 300.00 for each year. In view of the fact that a part of the contentious proceedings following the appellant's lawsuit, which *ratione temporis* falls within the scope of the jurisdiction of the Constitutional Court, has taken 13 years, the appellant is awarded a compensation in the amount of BAM 3,900, and the Government of the Unsko-Sanski Canton is obliged to pay this amount to the appellant.

Other allegations

45. The Constitutional Court observes that the appellant complains about the violation of his right to private life under Article II(3)(f) of the Constitution of Bosnia

and Herzegovina and Article 8 of the European Convention, the right to prohibition of discrimination under Article 1 of Protocol No. 12 to European Convention, Article 10 and 11 of the International Covenant on Economic, Social and Cultural Rights and Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, were violated, but failed to corroborate his allegations and failed to state what amounted to violation. It follows from the contents of the appeal that the appellant sees these violations in the fact that his case was not decided on. In the light of the established violation regarding the right to a fair trial within a reasonable time, under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention, the Constitutional Court does not find it necessary to consider separately the remainder of the appellant's allegations.

46. Furthermore, the Constitutional Court notes that the appellant complains about the violation of the right to an effective legal remedy under Article 13 of the European Convention, since his case was not decided before the national courts within a reasonable time. As to the appellant's allegations that his right to an effective legal remedy under Article 13 of the European Convention has been violated, the Constitutional Court notes that given the Court's conclusion that the appellant's right to a fair trial within a reasonable time under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention has been violated, the Constitutional Court does not find necessary to separately consider these allegations. However, the Constitutional Court notes that the national legal system of Bosnia and Herzegovina does not ensure protection before the ordinary courts insofar as the unreasonable length of the proceedings is concerned. As to the proceedings upon the appeal filed for failure to adopt a decision within a reasonable time limit, the Constitutional Court secures a subsidiary protection. Taking into account the situation before the ordinary courts and length of the proceedings which often exceeds the limits of „reasonable time limit", the Constitutional Court finds necessary to submit this Decision to all relevant authorities on the territory of Bosnia and Herzegovina. In this connection, the Constitutional Court refers to Article II(6) of the Constitution of Bosnia and Herzegovina, which provides *that 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*. For all the aforementioned reasons, the Constitutional Court shall, in accordance with Article II(6) of the Constitution of Bosnia and Herzegovina, deliver this Decision to all relevant authorities on the territory of Bosnia and Herzegovina in order to make it possible for them to undertake all necessary steps to protect and secure an effective legal remedy with regards to the unreasonable length of the proceedings before the ordinary courts within the national legal system of Bosnia and Herzegovina.

VIII. Conclusion

47. The Constitutional Court concludes that the length of the proceedings, more than 15 years, has not met the requirement of „reasonableness" under Article 6 paragraph 1 of the European Convention, since the Cantonal Court failed to provide a reasonable and satisfactory reasoning for such a lengthy proceedings, particularly for the repeated referrals of the case from higher instance to lower instance courts. Hence, there is a violation of the right referred to in Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

48. Having regard to Article 61(1) and (2) and Article 76(2) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this Decision.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP 3376/07

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Ms. Vajka Lugonjić claiming that the search of her home, which was conducted by the Police of the Brčko District on the basis of the search warrant issued by the Basic Court of the Brčko District no. 096-0-Kpp-06-000062 of 29 March 2007, was unlawful

Decision of 28 April 2010

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16 (4)(9), Article 59(2)(2) and Article 61(1) and (2) of the Rules of the Constitutional Court of Bosnia and Herzegovina - Revised text (*Official Gazette of Bosnia and Herzegovina,* nos. 60/05, 64/08 and 51/09), as a Grand Chamber and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Seada Palavrić, Vice-President

Mr. Valerija Galić, Vice-President

Mr. Mato Tadić,

Mr. Mirsad Ćeman,

Having deliberated on the appeal of Ms. **Vajka Lugonjić** in case no. **AP 3376/07**, at its session held on 28 April 2010 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Ms. Vajka Lugonjić is hereby partially granted.

A violation of the right to respect for home 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 is hereby established with regards to the execution of a warrant to search an apartment issued by the Basic Court of the Brčko District no. 096-0-Kpp-06-000062 of 29 March 2007.

The appeal of Ms. Vajka Lugonjić lodged with regards to the proceeding of execution of a warrant to search an apartment issued by the Basic Court of the Brčko District no. 096-0-Kpp-06-000062 of 29 March 2007 in relation to Article II (3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and International Covenant on Civil and Political Rights is rejected as inadmissible for the reason that it is *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 17 December 2007, Ms. Vajka Lugonjić („the appellant"), residing in Brčko, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") claiming that the search of her home, which was conducted by the Police of the Brčko District on the basis of the search warrant issued by the Basic Court of the Brčko District no. 096-0-Kpp-06-000062 of 29 March 2007, was unlawful.

2. On 27 December 2007, the appellant was requested to supplement her appeal, i.e. to state which final decision she is challenging and to attach it to the appeal and, if such a decision is not attached, she is requested to state the reasons for lodging the appeal. Also, the appellant was requested to inform the Constitutional Court whether she was a party to the proceeding before ordinary courts prior to addressing the Constitutional Court.

3. On 9 January 2008, the appellant submitted the supplemented appeal.

II. Procedure before the Constitutional Court

4. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 23 January 2008 the Prosecutor's Office of the Brčko District was requested to submit its response to the appeal.

5. The response of the Prosecutor's Office of the Brčko District was submitted on 7 February 2008.

6. Pursuant to Article 26 (2) of the Rules of the Constitutional Court, the response of the Prosecutor's Office of the Brčko District was submitted to the appellant on 24 March 2010.

III. Facts of the Case

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

8. Pursuant to the Supervisory Order of the Brčko District of 23 March 2007, a number of officials of the Government of the Brčko District was removed and, among them, O.L, the wife of the appellant's son M.L. In the Supervisory Order it has been stated, *inter alia*, that there is the possibility that one or more public officials in the District have committed criminal offenses, and, therefore, the decision was rendered to refer this matter to the District Prosecutor, along with the evidence in the Supervisor's possession, so that his office may take such further action that he may consider appropriate in accordance with the law.

9. On 29 March 2007, pursuant to Articles 51, 53 and 54 of the Criminal Procedure Code of the Brčko District („the Criminal Procedure Code"), the Police of the Brčko District sought the consent of the authorized prosecutor for issuance of the warrant to search the premises and for temporary confiscation of items with regards to several persons, including O.L. As to the reasons for this request, it was stated that in the Supervisory Order of the Brčko District it had been pointed to a number of failures and unlawful acts of several persons, including O.L. and that, for the purpose of evidence collection, it was necessary to conduct the search of the apartments and other premises used by the mentioned persons. The following items relating to the commission of the criminal offence could be found in the mentioned premises: computers and memory disks such as USB sticks, CD disks, floppy disks and other documentation related to the jobs they perform and private correspondence and a large sum of cash. On the same day, the Public Prosecutor's Office gave its consent for conducting the search. Finally, the Judge of the Basic Court considered that there is a reasonable doubt that the removed officials, including O.L, have committed criminal offences and, therefore, pursuant to Article 57 of the Criminal Procedure Code, he issued the search warrant for the apartment of O.L. located at the designated address.

10. On 29 March 2007, the Police of the Brčko District established, upon the inspection of the scene, that O.L. does not live in the apartment at the address designated in the warrant of the Basic Court. The Police of the Brčko District, through the operative work on the ground, obtained the telephone number of the husband of O.L, who informed them about the exact address of the apartment in which he and his wife live and he said that they also use the family house in Gornje Dubravice bb. Based on this information, on the same day, the Police of the Brčko District supplemented the request for issuance of a warrant to search an apartment at a new address, which included the family house at the mentioned address.

11. The Basic Court issued the search warrant no. 096-0-Kpp-06-000062 of 29 March 2007 in order to conduct the search of the apartment used by O.L. at the designated address

in Brčko and family house in Gornje Dubravice bb due to a well-founded suspicion that in the mentioned premises the items could be found that are related to the commission of criminal offence (the computers, other memory disks, floppy disks, CD disks, USB sticks and other items, all documentation relating to the job O.L. was performing, her private correspondence - daily planners, notes, etc., including a large sum of money - more than 50,000.00 KM). Furthermore, the authorized official persons of the Police of the Brčko District are designated (13 of them) in the search warrant and they were supposed to conduct the search of the apartment and the search was to be conducted at latest within 15 days from the day of issuance of the search warrant at any hour of the day or night and without any previous announcement as there is a well-founded suspicion that the items sought would be relocated or destroyed if the warrant is not executed immediately. Furthermore, it is stated in the warrant that the authorized official person, after temporarily confiscating the items, will write and sign the receipt in which the confiscated items will be listed, including the name of the court which issued the warrant and that the warrant had to be delivered to the owner or the tenant. Finally, it is stated in the search warrant that „the suspect have the right to inform the defense counsel and the search may be conducted without the presence of the defense counsel as it is required by extraordinary circumstances."

12. In the record on the search of the apartment no. 14-02-230-16/07 of 29 March 2007 written by the Police of the Brčko District it was stated that the search began at 10.30 hrs in the appellant's apartment and other premises, that the search was conducted by the three authorized officials persons and that the appellant (the owner of the apartment) and two witnesses were present during the search. Prior to the search, the appellant was informed about the capacity of the authorized official and the reasons for his coming. During the search of the appellant's house one hard disk was found and the receipt was issued after that the hard disk had been confiscated. No objections of the persons present during the search were recorded. The search ended at 20.40 hrs. After the record had been read before the present persons and after they had stated that they had no objections, the record was signed by the authorized official person, two witnesses, appellant and recording secretary. The receipt on temporary confiscated items was delivered to the appellant. In the receipt it was stated that the temporary confiscated items had been confiscated upon the issuance of an undated and unnumbered order of the Basic Court and they will be stored at this court.

13. On 19 April 2007, the appellant's son filed a verbal criminal charge with the Prosecutor's Office of the Brčko District against the judge of the Basic Court who had issued the search warrant and 13 authorized official persons of the Police of the Brčko District for the reason that a legally unjustified and unlawful search of the house in Gornje Dubravice, which is owned by the appellant, was conducted during the search of the apartment and the house used by O.L. As to the charge, it is stated that the lack of lawfulness is reflected

in the fact that the police officers of the Police of the Brčko District, according to the order of the Prosecutor's Office of the Brčko District, came to the appellant's house and said that they were looking for O.L. and then they started to search the house despite the fact that they were informed that O.L. does not live in the appellant's house, that O.L. is not the owner of the house and that O.L. was not present during the search. In the supplement to the charge sheet filed on 23 April 2007, the appellant's son pointed out that the search of the appellant's house could not have been conducted without the search warrant related to the appellant's name and the appellant's house, which means that the search could not have been conducted according to the search warrant addressed to O.L.

14. The Prosecutor's Office of the Brčko District submitted the notification letter no. Kta-81/07 of 15 November 2007 to the appellant's son in which it is stated that the Prosecutor' Office would not act upon his criminal charge as it follows from the criminal charge and collected evidence that there is no well-founded suspicion that the persons against whom the criminal charge was filed committed the criminal offence.

15. The appellant's son filed the complaint against this notification letter and the Prosecutor's Office of the Brčko District sent him the response to the complaint no. Kta-81/07 of 23 November 2007. The Prosecutor's Office of the Brčko District pointed out that upon receiving the charge sheet it issued the order to conduct certain investigative actions (collection of documents related to the issuance of the search warrant, the documentation relating to the search procedure, the items found on that occasion) based on which the conclusion could not be made that the criminal offence was committed during the search of the appellant's house. Furthermore, as regards the allegations that the search of the appellant's house could not be conducted as she was not the suspect, the Prosecutor's Office noted that Article 51 of the Criminal Procedure Code provides that the search of the apartment of the suspect and of other persons may be conducted only when there are sufficient grounds for suspicion that the items relevant to the criminal proceedings might be found there. In this connection, the conclusion was drawn that O.L. used the family house that was owned by the appellant and this fact offered the sufficient doubt that the items relevant to the proceedings might be found there. Therefore, the order was issued in accordance with the mentioned law provision. As regards the allegations that the search procedure was conducted in an unlawful manner, the Prosecutor's Office of the Brčko District, based on the record on the search of the apartment and receipt on temporary confiscated items, concluded that the search was conducted by the authorized official persons and that the appellant and two witnesses were present during the search and that the appellant was informed about the reason for the search and that the requirements were met for the lawful search in accordance with the relevant law provisions.

IV. Appeal

a) Allegations in the appeal

16. The appellant complains that because of the unlawful search of her house her rights were violated, as follows: the right not to be subjected to torture, inhuman treatment and punishment 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, the rights to liberty and security of person under Article (3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention, the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention, the right to respect for someone's private and family life, his home and his correspondence under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the right to an effective legal remedy under Article 13 of the European Convention, the right to property under Article II (3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No.1 to the European Convention and the right to freedom of movement and residence under Article II(3)(m) of the Constitution of Bosnia and Herzegovina. Finally, the appellant points out that Articles 16 and 17 of the International Covenant on Civil and Political Rights whereby the rights to legal personality and protection from arbitrary interference with someone's privacy, family, home and correspondence are guaranteed. A violation of the mentioned rights, in the appellant's opinion, is reflected in the fact that the search of her family house was conducted without the valid court order, which means that there was no search warrant containing his name and the search of the house owned by the appellant was conducted. In this connection, the appellant points out that in its response to the complaint the Prosecutor's Office of the Brčko District describes her as „another person" although she has her own first and last name, she has her property, which means she is the holder of the right having the status she is entitled to. Furthermore, the appellant claims that during the search she was not presented or handed the search warrant, which means that she was not given a copy of the transcript on the conducted search. During the search not a single document was found containing the name of O.L. The appellant claims that the authorised official persons forced her to all actions undertaken during the search. The appellant claims that during the search she was deprived of her right to a lawyer, that the search was conducted contrary to the obligation to protect personal data as the inspection of the following of her items was carried out: her documentation, photo albums, refrigerator, potato baskets, etc. and that the search of non-housing premises was conducted (garage and boiler room, etc.). Finally, as regards her complaint of 30 March 2007 filed due to the manner of work and acting of authorised official persons, the appellant points out that the Unit for Professional Standards of the Police of the Brčko

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District replied that there were no unlawful actions during the search of her home. Also, the Prosecutor's Office of the Brčko District informed the interested parties that there are no circumstances indicating that there is a well-founded suspicion that during the search of her home the criminal offence was committed upon the criminal charge filed by her son.

Response to the appeal

17. In its response to the appeal, the Prosecutor's Office of the Brčko District pointed out that the warrant to search the apartment was issued in accordance with Article 51 of the Criminal Procedure Code which, in paragraph 1, regulates that the a search of dwellings and other premises of the suspect, accused or other persons, as well as his personal property outside the dwelling may be conducted only when there are sufficient grounds for suspicion that the perpetrator, the accessory, traces of a criminal offense or objects relevant to the criminal proceedings might be found there. Pursuant to the quoted provisions, the search may be conducted in the premises of other persons and not only in the premises owned by the suspect, but there must be sufficient ground for suspicion that the items relevant to the proceedings may be found there. Taking into account that the husband O.L, the appellant's son, stated that O.L. stays in the apartment with the residence address in Brčko and in the family house in Gornje Dubravice and it was realistically to be expected that in the family house the items relevant to the proceedings may be found. Based on the aforesaid, the Prosecutor's Office of the Brčko District found that the request for search and the search warrant are completely based on the law. Also, the Prosecutor's Office of the Brčko District pointed out that through the analysis of the case-file it was established that the appellant, in her capacity as owner of the house, was informed about the search, that two adult witnesses were present during the search and that the appellant signed the receipt on temporary confiscated items found during the search.

V. Relevant Law

18. The **Criminal Procedure Code of the Brčko District** (*the Official Gazette of the Brčko District* nos. 10/03, 48/04, 6/05, 14/07, 19/07 and 21/07), as relevant, reads:

Article 58

A search warrant shall contain:

(...)

f) a description of the dwelling or other premises or person to be searched, by indicating the address, ownership, name or any other means essential for identification with certainty;

g) a direction that the warrant be executed between hours of 6:00 A.M. and 9:00 P.M., or, where the Court has specifically so determined, an authorization for execution thereof at any time of the day;

h) an authorization, where the Court has specifically determined, for the executing authorized official to enter the premises to be searched without giving prior notice;

i) a direction that the warrant and any property seized pursuant thereto be delivered to the Court without delay;

j) an instruction that the suspect is entitled to notify the defense counsel and that the search may be executed without the presence of the defense counsel if required by the extraordinary circumstances.

Article 60
Procedure of the Execution of a Search Warrant

(1) Prior to the commencement of a search an authorized official must give notice of his authority and of the purpose of his arrival and show the warrant to the person whose property is to be searched or who himself is to be searched. If the authorized official is not thereafter admitted, he may resort to use of force in accordance with the law.

VI. Admissibility

19. 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.

20. Pursuant to Article 16(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

Admissibility with regards to Article II(3)(e) of the Constitution of Bosnia and Hercegovina and Article 6(1) of the European Convention, and International Covenant on Civil and Political Rights

21. The Constitutional Court reminds that pursuant to Article 16(4) of the Rules of Constitutional Court, the appeal shall be inadmissible if it is incompatible *ratione materiae* with the Constitution of Bosnia and Herzegovina.

22. As to the instant case, the appellant complains that due to the unlawful search her right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Hercegovina and Article 6(1) of the European Convention was violated.

23. The Constitutional Court recalls that Article 6 of the European Convention the appellant refers to guarantees a fair trial in „the determination of civil rights and obligations or of any criminal charge against him„. Taking into account the fact that as regards the instant case the appellant complains about the unlawful search of her home which was conducted based on the search warrant issued by the competent court, it is obvious that there was no determination of the civil rights and obligations or of any criminal charge within the meaning of Article 6 of the European Convention.

24. Therefore, it follows that the appeal is incompatible *ratione materiae* with the Constitution of Bosnia and Herzegovina with regards to the alleged violations of the rights under Article II (3) (e) of the Constitution of Bosnia and Hercegovina and Article 6 (1) of the European Convention.

25. Furthermore, the appellant considers that her rights guaranteed under the International Covenant on Civil and Political Rights were violated. In connection with these allegations, the Constitutional Court points out that its appellate jurisdiction relates to the rights guaranteed under the Constitution of Bosnia and Herzegovina and European Convention, which, according to Article II(2) of the Constitution of Bosnia and Herzegovina, is directly applied in Bosnia and Herzegovina. On the other hand, in Annex I (8) of the Constitution of Bosnia and Herzegovina – Additional Agreement on Human Rights to be applied in Bosnia and Herzegovina, the International Covenant on Civil and Political Rights was, inter alia, mentioned. However, the Constitutional Court has already indicated that the enjoyment of these rights is not guaranteed separately but only in connection with Article II(4) of the Constitution of Bosnia and Hercegovina – „Non-discrimination" (see, for example, the Constitutional Court, Decision no. AP 1994/06 of 5 April 2007, available at www.ustavnisud.ba).

26. Given the aforesaid, the Constitutional Court considers that the appeal, in part where it is stated that there was a violation of the rights under the International Covenant on Civil and Political Rights, without making reference to discrimination regarding those rights, is inadmissible as it is incompatible *raitone materiae* with the Constitution of Bosnia and Herzegovina.

27. Bearing in mind Article 16(4)(9) of the Rules of the Constitutional Court, according to which the appeal shall be rejected as inadmissible if it is incompatible *ratione materiae*

with the Constitution of Bosnia and Herzegovina, the Constitutional Court decided as set out in the enacting clause with regards to this part of the appeal.

The admissibility with regards to a violation of the right that no person shall be subjected to torture, inhuman and degrading treatment and punishment under Article (3)(b) of the Constitution of Bosnia and Hercegovina and Article 3 of the European Convention, the rights to liberty and security of person under Article (3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention, the right to respect for someone's private and family life, his home and his correspondence under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the right to an effective legal remedy under Article 13 of the European Convention, the right to property under Article II (3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No.1 to the European Convention and the right to freedom of movement and residence under Article II(3)(m) of the Constitution of Bosnia and Herzegovina.

28. As to the instant case, the appellant considers that the mentioned rights of hers were violated by the unlawful search of the house owned by her.

29. The Constitutional Court points to Article 16(3) of the Rules of the Constitutional Court, according to which, exceptionally, the Constitutional Court may examine an appeal where there is no decision of a competent court, if the appeal indicates a grave violation of the rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina or by the international documents applied in Bosnia and Herzegovina. Given that the appeal in question points to grave violations of the rights under the Constitution of Bosnia and Herzegovina and European Convention, the appeal is, pursuant to the case-law of the Constitutional Court, admissible within the meaning of Article 16(3) (see, the Constitutional Court, Decision on Admissibility and Merits no. AP 1248/07 of 11 November 2009, the decision is available at the webpage of the Constitutional Court www.ustavnisud.ba).

30. Finally, this part of the appeal meets the requirements under Article 16(2)(4) of the Constitutional Court as it is neither manifestly (*prima faciae*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

31. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16 (1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that this part of the appeal meets the admissibility requirements.

VII. Merits

32. The appellant complains that due to the unlawful search of her house her right to home under Article II(3)(f) of the Constitution of Bosnia and Hercegovina and Article 8 of the European Convention was violated.

Right to home

33. Article II(3)(f) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads:

3. Enumeration of Rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

f) The right to private and family life, home, and correspondence

34. Article 8 of the European Convention reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic 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

35. The Constitutional Court emphasizes that the basic aim of Article 8 of the European Convention is to protect individuals from the authorities' arbitrary interference with their rights guaranteed under Article 8 of the European Convention (see the European Court of Human Rights, *Kroon vs. the Netherlands*, judgment of 27 October 1994, Series A, 297-C). Article 8 of the European Convention protects the right of individual to respect for his home and provides that there shall be no interference by a public authority with the exercise of this right except in cases referred to in paragraph 2 of this Article.

36. In the determination whether the instant case concerns a violation of Article 8 of the European Convention it must be primarily determined whether the apartment in dispute constitutes the appellant's „home" within the meaning of Article 8 (1) of the European

Convention and whether the search of the appellant's home constitutes the „interference" by public authorities with the right for respect of the appellant's „home". Secondly, in order for „interference" to be justified it (a) has to be provided for by the law; (b) has to serve a legitimate aim in the public or general interest and (c) has to be in accordance with the principle of proportionality in a democratic society. This condition, within the meaning of terms of the European Convention, consists of several elements: (a) the interference has to be based upon national or international law; (b) the law concerned must be widely available thus enabling an individual to be familiarized with the circumstances of the law that could be applied in the case concerned; (c) the law also has to be formulated with the adequate accuracy and clarity to allow an individual to adjust his/her actions in accordance therewith (see ECtHR, *Sunday Times v. The United Kingdom*, judgment of 26 April 1979, Series A, no. 30, paragraph. 49).

37. If it is established that the interference of public authorities was in accordance with the law it must be also established whether the interference was a necessary measure in democratic society and whether the interference was connected with one of the goals stated under paragraph 2 of Article 8 of the European Convention. In that context, it should be considered whether the decision of public authorities pursued a legitimate aim and whether it constitutes a measure necessary in a democratic society. Necessary in this context means that the „interference" corresponds to the „social needs" and there is a reasonable proportion between the interference and the legitimate aim pursued (see the European Court of Human Rights, the *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251).

38. The Constitutional Court considers it indisputable that the appellant's house which was the object of search and which is owned by her constitutes her „home" within the meaning of Article 8 of the European Convention as there were no arguments to challenge this fact the appellant referred to.

39. Pursuant to the case-law of the European Court of Human Rights, someone's' right to privacy is always violated by search of the apartment, which means that a violation of the right to respect for home and interference with someone's privacy occur (see the European Court of Human Rights, the *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, p. 33). In the present case, the search of the appellant's home conducted by authorised persons of the Police of Brčko District constitutes the interference by the public authorities with the appellant's right to home. In this connection, the answer should be given to the question whether this interference was lawful, and whether it was in accordance with Article 8 (2) of the European Convention. According to the case-law of

the European Court of Human Rights, the expression „in accordance with law", within the meaning of Article 8 of the European Convention, in the context of searching someone's home, refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see the European Court of Human Rights, *Elci and others vs. Turkey,* Application nos. 23145/93 and 25091/94 of 13 November 2003). The failure of national authorities to comply with the rules of domestic legislation on the procedure of undertaking search action will result in unlawfulness of such an action, within the meaning of Article 8 of the European Convention (see ECtHR, *Panteleyenko vs. Ukraine*, Application no. 11901/02 of 29 July 2006, pp.50-53).

40. The Criminal Procedure Code stipulates that a search of dwellings and other premises of the suspect, accused or other persons, as well as their personal property outside the dwelling may be conducted only when there are sufficient grounds for suspicion that the perpetrator, the accomplice, traces of a criminal offense or objects relevant to the criminal proceedings might be found there. A search warrant may be issued if it is likely that the person has committed a criminal offense or that through a search some objects or traces relevant to the criminal proceedings may be found. Furthermore, the law stipulates that the search warrant, under the conditions provided for by the law, may be issued by a Court upon the justified request of the Prosecutor or authorized official person. The elements that such a request has to contain have been also provided by law. If the pre-trial judge concludes that the request for issuance of the search warrant is justified he shall issue that search warrant with the content prescribed by law. The Law also prescribes the time when the search warrant may be executed, the procedure of the execution of the search warrant, the obligations and authorizations of the official person regarding the execution of the search warrant, the obligation to compose the record with the proper content on the conducted search and on temporarily confiscated times according to the search warrant.

41. As to the present case, the Police of the Brčko District filed the request for issuance of a search warrant against O.L, with an explanation that the Police of the Brčko District received the order of the Supervisor for the Brčko District whereby several officials were removed, including O.L. and in this order it was pointed to a number of failures and unlawful acts of those persons. Therefore, with the aim of collecting the evidence, it is necessary to conduct search of the apartments and other premises used by the removed officials. The pre-trial judge considered that there was a reasonable suspicion that in the apartment used by O.L. in Brčko and in the family house in Gornje Dubravice bb, the items relevant to the commission of the criminal offence could be found and these items have been listed and described in the order. So, at the time of issuance of the order there was likeliness that the criminal offence was committed and there were sufficient grounds

for suspicion that in the apartment used by O.L. and in the family house the items relevant to the criminal proceedings might be found. Furthermore, the authorized official may execute the warrant without prior presentation of the warrant, when there is grounded suspicion to believe that the property sought might be hidden or destroyed. Finally, it was concluded that the suspects have the right to inform their respective defense counsels and that the search may be conducted without the presence of the defense counsel as it is required by extraordinary circumstances. However, the extraordinary circumstances relating to the instant case because of which the search might be conducted without the presence of the defense counsel have not been state din the order.

42. The appellant is of the opinion that the search of her home was conducted on the basis of the unlawful search warrant as her name was not indicated on it, which means that there was name of O.L. on it and that the search was conducted at her home although O.L. does not live there and although she has no registered residence at that address. In this connection, the Constitutional Court notes that the search of the appellant's home was determined on the basis of Article 51 of the Criminal Procedure Code, which stipulates that the search of „other person's premises" may also be ordered. The term other person may imply the person known to the suspect, i.e. the accused, and also a person unknown to him. In this regard, the search may be conducted at places of persons released of duty to be witnesses because of family relation or because of other close relations with the suspect, i.e. the accused. The search warrant for searching the premises of other persons has to be preceded by likeliness that a criminal offense has been committed and that there are sufficient grounds for suspicion that the perpetrator, the accomplice, traces of a criminal offense or objects relevant to the criminal proceedings might be found there. Furthermore, the apartment, other premises and movables and objects of search may be either owned by the suspect, the accused or other person or may be in their possession or in other form related to real and legal affairs or property and legal relations. Finally, it follows from Article 58 of the Criminal Procedure Code, which prescribes the content of the search warrant, that the search warrant has to contain a description of the dwellings, premises or person to be searched, indicating the address, ownership, name or any other data essential for identification. As to the instant case, the issuance of search warrant was preceded by the request for search submitted by the Police of the Brčko District and the grounds for request were considered by the pre-trial judge of the Basic Court. In other words, there was likeliness that the criminal offence was committed and there were sufficient grounds that the traces of a criminal offense or objects relevant to the criminal proceedings might be found there. Furthermore, pursuant to the issued search warrant, the search should be conducted in the apartment used by O.L. and in the family house in Gornje Dubravice, which is used by O.L. The Police of the Brčko District was informed

by the appellant's son and the husband O.L. about both addresses and given the fact that the family house was designated by the husband O.L. and appellant's son as a house used by O.L, it was not necessary to establish who the owner of the house was for the reason that it follows from Article 58 of the Criminal Procedure Code that, as regards the place of search, it is sufficient that the data are given based on which that place may be identified and those data include the address, ownership, etc. Finally, given that the search of the premises of other person may be conducted even when the person because of whom the search is conducted is unknown, it is irrelevant information whether that person lives in the premises of other person being searched, i.e. whether that person is registered on that address. In view of the aforesaid, the Constitutional Court concludes that the requirement of lawfulness of interference with the appellant's right to respect for home has been met in this context.

43. Furthermore, the appellant points out that she was prevented from calling her lawyer to be present during the search. In this connection, the Constitutional Court notes that Article 58 of the Criminal Procedure Code stipulates that there is an element of the warrant search containing the instruction for the suspect that he/she is entitled to notify his defence counsel and that the search may be executed without the presence of the defence counsel if the extraordinary circumstances require so. However, the Criminal Procedure Code does not contain a provision granting „another person", and that is the appellant in this case, the right that the defence counsel may be present during the search of her house. Given that the search warrant contained the instruction for the suspect that she can inform her defense counsel about the search and that the search may be conducted without his presence and bearing in mind that the Criminal Procedure Code does not guarantee the right of another person to call his/her lawyer during the search conducted at his/her house, the Constitutional Court concludes that the appellant's allegations are ill-founded in this regard.

44. The appellant also points out that she was not handed the record on the conducted search. In this connection, the Constitutional Court notes that such an obligation for the official person under whose supervision the search procedure is conducted does not follow from the relevant provisions of the Criminal Procedure Code. Furthermore, pursuant to the obligation determined by law, the appellant was issued the receipt on temporarily confiscated items. Therefore, the Constitutional Court concludes that the appellant's allegations are ill-founded in this regard.

45. Furthermore, the appellant points out that the search was conducted in contravention of the obligation to protect personal data as the content of her personal documentation was inspected, including the photo albums, refrigerator, potato baskets, etc. and that the search

of non-housing premises was conducted (garage and boiler room, etc.). In connection with these allegations, the Constitutional Court notes that the term „apartment" implies that there are residential premises (for instance, housing units, family house, etc.), various auxiliary premises connected (not necessarily physically) with the apartment (for example, the basements, attics, washrooms). The search of an apartment and other premises include the inspection and examination of the respective apartment and other premises, and it also includes the search of movables therein. As to the instant case, it was stated in the search warrant that the object of the commission of criminal offences to be looked for during the search was the entire documentation relating to the job performed by O.L, private correspondence – daily planners, notes, etc. Taking into account the aforesaid, the Constitutional Court finds that the inspection of the appellant's documentation was required in order to establish whether it is the documentation related to the job performed by O.L. Thus, the inspection of the appellant's documentation conducted by the authorised official persons cannot be considered a violation of the obligation to protect personal data, as the appellant has failed to state a single personal information which was revealed because of the inspection. In view of the aforesaid, neither can the search of other movables, including the auxiliary premises, be considered unlawful.

46. Finally, the appellant claims that prior to the search of her home she was not presented the search warrant based on which the search was to be conducted. In this connection, the Constitutional Court refers to Article 60 of the Criminal Procedure Code, whereby the procedure of execution of the search warrant has been defined. Pursuant to the mentioned provision, prior to the commencement of a search, an authorized official must present his credentials and the purpose of his arrival and show the warrant to the person whose property is to be searched or who himself is to be searched. In its reply to the appeal the Prosecutor's Office of the Brčko District did not challenge this allegation, i.e. it did not present its opinion about this allegation at all. It follows from the record on search of 29 March 2007 that the appellant, prior to the commencement of a search, was informed about the capacity of the official person and the reasons for his coming. However, it is not possible to conclude, based on the record, whether she was presented the search warrant prior the commencement of search. Bearing in mind the explicit law provision, whereby the obligation of presenting the search warrant prior to the commencement of search is defined, and given the appellant's statement that it was not done and given that that fact was not challenged by the Prosecutor's office of the Brčko District either, and being guided by the principles under Article 8 of the European Convention presented in this decision, the Constitutional Court holds that the interference with the appellants' right to respect for home occurred because of the failure of the official authorities to undertake the aforementioned action.

47. The Constitutional Court notes that the search of an apartment may represent an investigative action by which public authorities restrict the rights to privacy and inviolability of the apartment in the interest of the efficiency of the relevant criminal proceedings. Taking into account that this action is undertaken during the early stage of criminal proceedings when the suspicion that a criminal offence was committed was the smallest and that it constitutes a measure of coercion, whereby the presence of the suspect is ensured, i.e. whereby the traces or objects of a criminal offense are ensured, the public authorities are obligated to ensure that there are the guarantees that the action of search will be undertaken and executed only under the conditions and in a manner prescribed by law. As to the instant case, the search warrant was issued in accordance with the relevant provisions of the Criminal Procedure Code, whereby the conditions and the procedure for the issuance of search warrant are stipulated. Furthermore, given the aforesaid, the Constitutional Court finds that the search had the legitimate aim, which was reflected in the collection of traces of criminal offence in respect of which there was likeliness that the criminal offence was committed. However, in order for an action to represent the „interference" in accordance with law, within the meaning of Article 8 (2) of the European Convention, it is necessary that the mentioned action is undertaken in a manner and in a procedure explicitly defined under Article 60 of the Criminal Procedure Code. Therefore, the imperative legal norm was not complied with as that norm regulates the procedure of undertaking the search-related actions and it is a condition for the lawfulness of the undertaken action in a situation where the search warrant has been issued. In view of the aforesaid, the search action did not satisfy the criterion of „interference" in accordance with law, within the meaning of Article 8 (2) of the European Convention, (see the decision that has been already quoted - *Panteleyenko*, paragraphs 50-53).

48. Having regard to the aforesaid, the Constitutional Court concludes that in the instant case the procedure of search of the appellant's home failed to satisfy the criterion of „interference in accordance with law" under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. Namely, the procedure of execution of the search warrant was not conducted in accordance with the procedure prescribed by law as the authorized official person had failed to hand over the search warrant prior to the commencement of the search of the appellant's home in accordance with the explicit law provision. Therefore, the Constitutional Court finds that the appellant's right to respect for home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention was violated.

Other allegations

49. Taking into account the findings about a violation of the right to home, the Constitutional Court considers that there is no need for separately examining the appellant's allegations about a violation of other rights she referred to in her appeal.

VIII. Conclusion

50. The Constitutional Court concludes that there is a violation of the appellant's right to home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention in the case where the authorised official person, in the procedure of the execution of the warrant to search an apartment, contrary to the explicit law provision, fails to present the search warrant, prior to the commencement of the search, to the person at whose place the search is to be conducted.

51. Pursuant to Article 16(4)(9) and Article 61 (1) and (2) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 2130/09

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Mithad Novalić for a failure to adopt a decision within a reasonable time in the procedure of investigation conducted before the Prosecutor's Office of Bosnia and Herzegovina in case no. KT-RZ 170/2005

Decision of 28 May 2010

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 60/05, 64/08 and 51/09), in Plenary and composed of the following Judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. David Feldman

Mr. Mirsad Ćeman

Having deliberated on the appeal of **Mr. Mithad Novalić** in case no. **AP 2130/09**, at its session held on 28 May 2010 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Mithad Novalić is hereby granted.

A violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established in relation to the right to a decision within a reasonable time in Case No. KT-RZ 170/2005 of the Prosecutor's Office of Bosnia and Herzegovina.

The Prosecutor's Office of Bosnia and Herzegovina is hereby ordered to take the measures prescribed by law to complete the proceedings in case no. KT-RZ 170/2005 without delay, in accordance with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Prosecutor's Office of Bosnia and Herzegovina is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 6 July 2009, Mr. Mithad Novalić from Konjic („the appellant") who is represented by Kadrija Kolić, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for a failure to adopt a decision within a reasonable time in the procedure of investigation conducted before the Prosecutor's Office of Bosnia and Herzegovina („the BiH Prosecutor's Office") in case no. KT-RZ 170/2005. The appellant supplemented the appeal on 3 March 2010.

II. Procedure before the Constitutional Court

2. Having regard to Article 22(1) and (2) of the Rules of the Constitutional Court, on 22 October 2009 the Constitutional Court requested that the Court of Bosnia and Herzegovina („the Court of BiH") and the BiH Prosecutor's Office submit their replies to the appeal.

3. The Court of BiH submitted its reply to the appeal on 4 November 2009. The BiH Prosecutor's Office submitted did so on 6 November 2009.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court the reply to the appeal was communicated to the appellant on 8 April 2010.

III. Facts of the Case

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

6. The appellant was deprived of liberty based on the order of the BiH Prosecutor's Office dated 28 December 2005. On 29 December 2005 the BiH Prosecutor's Office filed a motion with the Court of BiH for custody against the appellant for the reasons defined under Article 132 paragraph 2, items a), b) and d) of the Criminal Procedure Code of Bosnia and Herzegovina („the BiH CPC") due to a reasonable suspicion that he committed a criminal offence „war crime against civilians" under Article 173 paragraph 1, item c) in conjunction with Article 180 paragraph 1 of the Criminal Code of Bosnia and Herzegovina („the BiH Criminal Code"). It was stated that there is a reasonable suspicion that on 12 July 1992 the appellant participated in the murder of nine persons in the place called Savina Poda, Repovci in the Konjic Municipality.

7. Upon the completion of the public hearing the preliminary proceedings judge of the Court of BiH issued a decision No. X-KRN-05/167 of 29 December 2005 whereby the custody was determined against the appellant and the appellant was supposed to stay in custody not later than 28 January 2006, or until the issuance of a new decision by the court. The Court made a conclusion on the existence of reasonable suspicion on the basis of evidence which were attached to the motion submitted by the BiH Prosecutor's Office, as follows: the statements of the interrogated witnesses, the official reports and notes of the competent authorities, the findings of the Transfusion Medicine Institute of the Federation of BiH dated 28 December 2005, the orthopaedic findings following physical examination of the appellant according to which it was established that there are several post-wounding scars on the body of the appellant, as well as other material evidence submitted. Furthermore, given the fact that the appellant resides with his family in Germany and that he has unlimited stay visa in that country and in connection with the definite knowledge that the criminal proceedings are conducted against him, the Court of BiH concluded that there is a threat that he may flee within the meaning of Article 132 paragraph 1 item a) of the BiH Criminal Procedure Code. It was concluded that there is a threat that the appellant's being at large may interfere with the criminal proceedings given the fact that in the commission of the mentioned offence several persons took part in their capacity as givers of orders and given the fact that the BiH Prosecutor's Office intends to hear additional number of 50 witnesses most of whom live in the area of municipality of Konjic for which reason the conclusion was made that the requirements had been met for determination of custody under Article 132 paragraph 1 item b) of the BiH Criminal Procedure Code. Finally, it was concluded that the requirement for determination of custody under Article 132 paragraph 1 time d) was also met for the purpose of ensuring public safety given the prescribed long lasting prison sentence, the manner of commission of criminal offence (cruel ambush murder after which the victims were shot in the back of head, as well as serious consequences which were caused (death of several persons).

8. By its decision No. X-KRN-05/167 of 24 February 2006 the Court of BiH dismissed the appellant's proposal for examination of his bodily injuries for the purpose of judicial provision of evidence. It was noted in the reasoning that the issue was not about the evidence within the meaning of Article 223 paragraph 3 of the Criminal Procedure Code which may disappear or may not be presented at the main trial. Moreover, it was noted that on 24 February 2006, the Court of BiH, while acting upon the motion of the Prosecutor's Office, issued an order on physical examination of the appellant to be carried out by the expert of forensic medicine to be hired by the BiH Prosecutor's Office.

9. After the public hearing, the Court of BiH issued a decision No. X-KRN /05/167 of 23 May 2006 dismissing the appellant's motion for termination of custody as ill-founded. In the reasoning for this decision it is stated that there is still a reasonable suspicion that the appellant committed a criminal offence he is charged with on the basis of evidence listed in the decision dated 29 December 2005, including the existence of special reasons for determination of custody under Article 132 paragraph 1 items a), b) and c) of the BiH Criminal Procedure Code and that the defence failed to offer a single new fact which would justify termination of the custody.

10. By its decision No. X-KRN/05/167 of 23 May 2006, after the public hearing, the Court of BiH dismissed as ill-founded the appellant's motion for determination of a measure of prohibition of the abandonment of residence and measure of bail. As to the existence of a reasonable suspicion, the reasons from the ruling dismissing the motion for termination of custody were repeated. Furthermore, it is noted that there is still a threat of flight and that the appellant's custody was determined not only for the reason of threat of flight but also for the reasons defined under Article 132 paragraph 1 items b) and d) of the Criminal Procedure Code of BiH, and bail may be determined when the custody is determined only for the reasons of threat of flight. Further, given that the custody is not determined only for the reason of threat of flight, in other words, given that the investigation is conducted against several persons and that the BiH Prosecutor's Office is about to hear a number of witnesses, it was inferred that the requirements under Article 126 paragraph 2 of the BiH Criminal Procedure Code were not met and that the aim of unimpeded conduct of the criminal proceedings cannot be ensured by a measure of prohibition of the abandonment of residence. As to the grounds for determining custody under Article 132 paragraph 1 item d) of the BiH Criminal Procedure Code the reasons stated in the decision of 29 December 2005 were repeated.

11. On 29 March 2006, the appellant filed a motion with the Court of BiH suggesting that the Prosecutor's Office be obliged to submit the DNA findings to him, given that the

BiH Prosecutor's Office has already obtained those findings after a throat swab sample was taken from him on 28 December 2005, *i.e.* on the day when he was deprived of liberty. At the hearing for extension of custody held on 27 March 2006 it was pointed out that the BiH Prosecutor's Office falsely stated that this piece of evidence is about to be obtained.

12. On 23 May 2006 the appellant filed a motion for termination of custody. The allegations that the DNA analysis was performed have been repeated in the motion, as well as the statement that this piece of evidence was unlawfully obtained because no order was issued by the Court of BiH in this regard, and it was also stated that the BiH Prosecutor's Office was hiding that piece of evidence. The proposal for posting bail was also repeated, including the promise of suspect that he would respond to any summons by the court or prosecutor's office.

13. On 26 May 2006 the appellant filed a motion for release without delay. In the motion it was stated that the BiH Prosecutor's Office disregarded, *i.e.* explicitly refused to act in accordance with verbal Order of the Court of BiH dated 27 March 2006 to conduct a physical examination of the appellant for the purpose of establishing a type and cause of two injuries on his body, as well as to conduct a DNA analysis of traces found on the spot where the criminal offence was committed, including the analysis of the appellant's DNA. Taking into account that the BiH Prosecutor's Office failed to comply with the order in respect of which it has never lodged a complaint, the appellant considered that the BiH Prosecutor' Office committed a criminal offence against judiciary under Article 239 of the BiH Criminal Code.

14. By its decision No. X-KRN/05/167 of 26 May 2006, the Court of BiH extended the appellant's custody for additional 15 days, which means that his custody could last until 12 June 2006. The existence of reasonable suspicion and grounds for pre-trial custody under Article 132 paragraph 1 item a), *i.e.* the threat of flight, are based on the identical reasons referred to in the previous decisions. The Court concluded that the requirements relating to the reasons for ordering custody under Article 132 paragraph 1 items b) and d) of the BiH Criminal Procedure Court were not met since even the BiH Prosecutor's Office pointed out that it had interrogated all the witnesses, which means that it did not offer reasons for justifying an opinion that the public safety would be threatened upon the appellant's release from custody.

15. On 26 May 2006, the Court of BiH sent a letter to the appellant's counsel in connection with the expressed willingness to offer bail in the event that the custody is extended and requested that the motion for posting of bail be specified, in other words the contents of bail to be determined as well as who will pay the bail, in which case the

appellant's residence address at which he will reside until the end of criminal proceedings is to be stated.

16. On 29 May 2006 the appellant filed a complaint against the decision on extension of custody dated 26 May 2006, as well as the complaint against the decision on dismissal of motion for ordering custody dated 26 May 2006.

17. On 30 May 2006, the appellant filed a motion for termination of custody and posting of bail, as well as for pronouncement of one of the measures envisaged under Article 126 of the BiH Criminal Procedure Code.

18. By its decision No. X-KRN-05/167 of 7 June 2006 the Appellate Division of the Court of BiH dismissed as ill-founded the appellant's complaint against the decision on extension of custody of 26 May 2006. The existence of reasonable suspicion was assessed on the basis of the evidence listed in the decision on determination of custody dated 29 December 2005 based on which the existence of reasonable suspicion was established even in the challenged decision and the related reasons were also accepted by the Appellate Division. The existence of special pre-trial custody reasons under Article 132 paragraph 1 item a) of the BiH Criminal Procedure Code was also examined on the basis of the evidence listed in the decision of 29 December 2005.

19. By its decision No. X-KRN/05/167 of 7 June 2006 the Court of BiH dismissed as ill-founded the appellant's complaint against the decision of 26 May 2006 whereby his motion for posting a bail was dismissed. It is noted in the decisions' reasoning that on 27 March 2006 the appellant's custody was extended not only for the reason of a possibility of flight due to which a bail could be determined, but also for the reasons determined under Article 132 paragraph 1 items b) and d) of the BiH Criminal Procedure Code and therefore, as far as the appellant's case is concerned, no conditions have been met for replacing custody with bail.

20. Pursuant to the instructions of the Court of BiH from the letter dated 26 May 2007, on 8 June 2006, the appellant submitted a specified motion for termination of custody and posting of bail as well as for the pronouncement of one of the measures envisaged under Article 126 of the BiH Criminal Procedure Code, along with the appellant's residence address at which he will reside until the end of criminal proceedings.

21. By its decision No. X-KRN/05/167 of 9 June 2006, the Court of BiH posted a bail by placing a mortgage on the real properties stated in the enacting clause of the decision, over which the appellants' father is registered as the owner and value of the said property is estimated to be the amount of 140,140.00 KM. In the decision's reasoning it is noted

that, according to the last decision on extension of custody, the custody was extended due to the threat of flight and that the court reached a conclusion that the appellant's presence may be ensured by posting of bail and the prosecutor has agreed upon with that.

22. By his letter dated 14 June 2006, the appellant informed the Court of BiH and the BiH Prosecutor's Office that the mortgage procedure was conducted and the decisions on registration of mortgage were attached and after that the appellant was released from custody.

23. On 20 June 2006, the appellant submitted a request with attached order and questions for the expert who was supposed to conduct physical examination of the appellant's bodily injuries and he also attached the findings of the Bethesd Hospital in Stuttgart as a piece of evidence on a bodily injury which should have been the subject of expert examination and which, according to the attached findings, was inflicted in 2003.

24. On 5 July 2006, the appellant submitted the request for termination of investigation to the Court of BiH and BiH Prosecutor's Office. In the request it was noted that the investigation, according to the submissions to the BiH Prosecutor's Office, commenced more than 6 months ago and the BiH Prosecutor's Office had sufficient time to investigate the relatively simple facts which could make or justify the grounds of suspicion that he committed the criminal offence he is charged with. Furthermore, upon the expiry of the period of 6 months no indictment was filed and he was released from custody. The appellant pointed out that the Prosecutor's Office has a legal and moral obligation to terminate the investigation. In this connection, it was noted that according to Article 225 paragraph 3 of the BiH Criminal Procedure Code, if additional evidence is obtained the prosecutor may, at a later date, reopen the investigation which was closed for the lack of evidence.

25. On 11 August 2006 the appellant submitted the motion with the Court of BiH for issuance of a decision on termination of bail ordered by decision No. X-KRN/05/167 of 9 June 2006.

26. By its decision No. X-KRN/05/167 of 22 August 2006, the Court of BiH dismissed as ill-founded the appellant's motion for termination of bail ordered by the Court of BiH No. X-KRN/05/167 of 9 June 2006. In the reasoning for the decision it is concluded that based on the inspection of the case-file it was established that the investigation in the case at hand was not completed, that the proceedings were not terminated and that the reasons for posting of bail or the threat of flight did not change, neither did the defence indicate that the situation that existed previously has changed.

27. By its decision No. X-KRN/05/167 of 15 September 2006, the Panel of the Court of BiH dismissed as ill-founded the appellant's complaint against the decision on dismissal of the motion for termination of bail. In the reasoning behind the decision it is stated that the court of first instance correctly assessed that there is still a threat of flight since the appellant is in the possession of visa granting him unlimited stay in the Federal Republic of Germany and he is suspected of a criminal offence for which he may be pronounced a prison sentence of 10 years or a long term prison sentence and, since there are no other forms of his connection with BiH, there is a real threat of his flight. As to the allegations stated in the complaint that the investigation took too much time, which applies to the bail as well, it was noted that the bail is a guarantee for the presence of suspect until a legally binding decision concluding the criminal proceedings is adopted, and therefore it is not connected with the moment of completion of the investigation. Furthermore, „reasonableness of time-limit" is assessed, *inter alia*, in respect of the complexity of case, the conduct of prosecution authorities and conduct of complainants. Based on the results obtained from the inspection of the case-file it was concluded that it was a complex case, that the BiH Prosecutor's Office was actively conducting the investigation during the previous period of time since it interrogated eighty-nine persons and that the reply of the BiH Prosecutor's Office to the motion for termination of bail indicates that in the forthcoming period this office intends to hear additional number of thirty witnesses and that the collection of substantive evidence is being in progress. Given the mentioned circumstances and the fact that the BiH Prosecutor's Office did not indicate when the completion of the investigation is to be expected, the conclusion was made that, when it comes to the duration of investigation, the reasonableness of the time limit has not been brought into question yet.

28. In his requests submitted to the Court of BiH and BiH Prosecutor's Office on 31 January 2007, 28 June 2007 and 15 August 2007 the appellant sought that investigation be terminated. The requests are based on the allegations presented in the request which is the same as the one submitted on 5 July 2006. The findings of the expert for forensic medicine issued by the Institute of the University in Tübingen, Germany, were attached to the last request.

29. On 31 October 2008, the appellant submitted the motion for termination of bail ordered by the decision No. X-KRN/05/167 of 9 June 2006.

30. By its decision of X-KRN/05/167 of 13 November 2008, the Court of BiH dismissed as ill-founded the appellant's motion for termination of bail. In the reasoning for the decision it was stated that the circumstance did not change which indicate that there is a threat of flight due to which the appellant was ordered a prison sentence for several times

and this prison sentence was also extended for several times. The allegations about the length of investigation were assessed as ill-founded, which also applies to the ordered measure of bail. It was also pointed to the complexity of the case, the conduct of the BiH Prosecutor's Office and the suspect, which are the factors that may have effect on the assessment of the length of proceedings. The conclusion was made that the bail may be in force until the time the proceeding are concluded with a legally binding decision or by the time the BiH Prosecutor's Office issues an order on termination of investigation.

31. On 29 November 2009 the appellant submitted a request with the Court of BiH seeking information on whether the BiH Prosecutor's Office acted in accordance with the orders of the Court of BiH from the hearing held on 27 March 2006 with regards to the extension of custody. On 10 December 2009 the Court of BiH submitted the reply of the BiH Prosecutor's Office to the appellant. The relevant provisions of the Law on the BiH Prosecutor's Office were listed in the reply, as well as the provisions of the BiH Criminal Procedure Code which served as a basis for making a conclusion that the order of the Court of BiH No. X-KRN/05/1 of 27 March 2006 (*physical examination and expert examination of the injuries on the appellant's body, DNA analyses*) is not based on the provisions of the BiH Criminal Procedure Code and it does not oblige the BiH Prosecutor's Office to act accordingly. Finally, it was noted that the BiH Prosecutor's Office was informed by the Institute for Genetic Engineering and Biotechnology in Sarajevo that, in accordance with applicable regulations, the blood samples are preserved for two years and in exceptional cases for five years. To be more precise, during the commission of the criminal offence in question one of the perpetrators was wounded and he was transported to the hospital in Konjic and on that occasion his blood sample was taken. However, this blood sample was not preserved in order for it to be compared with the blood sample found on the spot where the criminal offence was committed.

32. In his request dated 24 November 2009 the appellant sought that the BiH Prosecutor's Office inform him whether the Collegium of Prosecutors of the Prosecutor's Office made a decision on the extension of investigation into his case. The BiH Prosecutor's Office failed to reply to this request.

IV. Appeal

a) Statements from the appeal

33. The appellant considers that the investigation into his case has taken unreasonable amount of time due to which his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention for the

Protection of Human Rights and Fundamental Freedoms („the European Convention") has been violated. The chronology of the proceedings was in detail presented in the appeal, as well as in the part of this decision titled „Facts of the Case". The appellant considers that the investigation against him commenced as early as in August 2005, which was indicated by the facts presented and acknowledged by the BiH Prosecutor's Office although, in his opinion, the investigation commenced much earlier which made him to conclude that the BiH Prosecutor's Office had more than enough time to investigate the relatively simple facts which could justify the grounds of suspicion that he had committed the criminal offence he is charged with. Given that the BiH Prosecutor's Office, based on the investigation conducted so far in the course of which he was to serve the prison sentence from 29 December 2005 to 12 June 2006, failed to establish the well-foundedness of the suspicion and file an indictment, the appellant considers that the BiH Prosecutor's Office has „a legal and ethical obligation" to terminate the investigation in accordance with Article 224 paragraph 1 item b) of the BiH Criminal Procedure Code. In support of this statement the appellant points out that paragraph 3 of the mentioned article regulates that the completion of investigation does not prevent the Prosecutor from reopening the investigation which was closed in accordance with the mentioned regulation if, at a later date, additional information is obtained and such information provide sufficient reasons to believe that the suspect committed the criminal offence. The appellant is of the opinion that the BiH Criminal Procedure Code does not provide for unlimited duration of investigation and that it provides for the guarantees that a suspect shall not be subject to unlimited uncertainty as to whether and when he will be accused. In this connection, the appellant points out that upon the expiry of 6 months from the day of the initiation of investigation, in the event that an indictment is not filed, the Collegium of the BiH Prosecutor's Office shall undertake necessary measures for termination of investigation. As to his case, the investigation has lasted for more than 4 years and, according to his information, the Collegium of the BiH Prosecutor's Office has failed to act in accordance with its legal obligation and order a measure for completion of investigation. Furthermore, the appellant states that he is discriminated against with regards to his right of access to court under Article 6 paragraph 1 of the European Convention since the court, in other cases (two cases of the Court of BiH are referred to) regularly examines the security measures the appellant is pronounced for the sake of the successful conduct of criminal proceedings given that in his case the bail was ordered. The appellant concludes that in the investigation conducted so far the BiH Prosecutor's Office collected evidence that the criminal offence he is charged with was committed but that it has no evidence to prove his connection with this offence. The appellant points out that he and his family were exposed to uncertainty concerning their future, that he spent five months in custody and that the prolongation of this situation is unconstitutional, and that it is unlawful and unethical.

34. In the supplement to the appeal of 3 March 2010, the appellant pointed out that on 24 November 2009 he sought from the BiH Prosecutor's Office to submit to him the statement of the Prosecutor who is assigned to his case and the decision of the Collegium of the BiH Prosecutor's Office on the measures that should be undertaken for the completion of the investigation. The BiH Persecutor's Office submitted to him only the opinion of the Prosecutor assigned to his case from which it follows that he refuses to comply with the order of the Court of BiH No. X-KRN-05/1 of 27 March 2006 (physical examination of the appellant was ordered) and non-compliance with this order is also tolerated by the Court of BiH.

b) Reply to the appeal

35. In its reply to the appeal, the Court of BiH pointed out that it may only give its opinion with regards to the lawfulness of the decision adopted by this court and that the issue of the length of investigation, the manner and the conduct of the procedure fall within the exclusive competence of the BiH Prosecutor's Office. As to the determination and extension of custody, the decisions that were issued with regards to the appellant's case have been listed and the conclusion was made that on that occasion the existence of the reasonable suspicion was considered within the scope of the stage of investigation. Furthermore, it was noted that the arguments that had been already considered by this court were used in the appeal and in this connection it was emphasized that the proceedings against the appellant have not been completed yet by issuance of a legally binding decision and that the BiH Prosecutor's Office failed to issue an order on termination of investigation and that the bail is not connected with the completion of investigation but with the legal reason for which it was ordered and that reason still exists. Finally, it was noted in the reply that in the course of making a decision on the motions for termination of bail the allegations on the length of the proceedings were not considered since there are no legal authorizations providing for the assessment of this circumstance, which means that the length of the investigation is an issue that falls within an exclusive competence of the BiH Prosecutor's Office.

36. In its reply to the appeal the BiH Prosecutor's Office found that the allegations that it had enough time to conduct investigation and that it had a legal and ethical obligation to terminate the investigation upon the release of the appellant from custody and failure to file an indictment are extremely unfounded. In this connection it was noted that the Court of BiH issued a decision on ordering, *i.e.* on extending the custody based on the fact that the BiH Prosecutor's Office proved that there is a reasonable suspicion that the criminal offence was committed within the meaning of Article 132 of the BiH Criminal Procedure Code, in other words that it proved the existence of special reasons defined by the mentioned

article. As to the allegations from the appeal on the completion of investigation, the BiH Prosecutor's Office noted that Article 225 of the BiH Criminal Procedure Code stipulates that the Prosecutor shall order a completion of investigation after he concludes that the status of the case is sufficiently clarified as to allow the bringing of charges, in other words that it is not regulated how long the investigation may take upon the expiry of 6 months. In this regard a possibility is given to the Collegium of the BiH Prosecutor's Office to undertake necessary measures in order to complete investigation, but that undertaking of measures which are defined in this manner is not connected with the time/limit. Further, the BiH Prosecutor's Office emphasised that the appellant, by obtaining the findings of the expert for forensic medicine on his physical examination in an arbitrary manner, violated Article 108 and Article 109 of the BiH Criminal Procedure Code, which explicitly regulates that a physical examination of the suspect shall be ordered by the Court, and if the delay poses a risk then it shall be ordered by the Prosecutor, and in the event that actions are taken contrary to the provisions of this Article, the decision of the Court may not be based on the evidence obtained in this manner. Finally, the BiH Prosecutor's Office concluded that the appeal is manifestly ill-founded because it is unclear and imprecise and that it is premature since it cannot be established by which action of the Court of BiH some of the rights safeguarded under Article 6 of the European Convention were allegedly violated. In conclusion, given the aforesaid reason, the BiH Prosecutor's Office inferred that appeal unjustifiably refers to incorrect actions of the BiH Prosecutor's Office.

V. Relevant Law

37. The **Criminal Procedure Code of Bosnia and Herzegovina** (*Official Gazette of BiH*, Nos. 3/03, 85/03, 32&03, 26/ 04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 53/07, 76/07, 15/08, 58/08), in the relevant part, reads:

Article 2
Principle of Legality

The rules set forth in this Code shall provide for an innocent person to be acquitted...

Article 13
Right to Trial without Delay

The suspect or accused shall be entitled to be brought before the Court in the shortest reasonable time period and to be tried without delay.

The Court shall also be bound to conduct the proceedings without delay and to prevent any abuse of the rights of any participant in the criminal proceedings.

(...)

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Article 14
Equality of Arms

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

Article 16
Accusatory Principle

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

Article 17
Principle of Legality of Prosecution

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

Article 35
Rights and Duties

The basic right and the basic duty of the Prosecutor shall be the detection and prosecution of perpetrators of criminal offences falling within the jurisdiction of the Court.

The Prosecutor shall have the following rights and duties:

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

b) to perform an investigation in accordance with this Code;

(...)

Article 225
Completion of Investigation

The Prosecutor shall order a completion of investigation after he concludes that the status is sufficiently clarified to allow the bringing of charges. Completion of the investigation shall be noted in the file.

(...)

If the investigation has not been completed within six (6) months after the order on its conducting has been issued, the Collegium of the Prosecutor's Office shall undertake necessary measures in order to complete the investigation.

VI. Admissibility

38. 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.

39. Pursuant to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective legal remedies available under the law against a judgment/decision challenged by the appeal are exhausted and if the appeal was lodged within a time-limit of 60 days as from the date on which the decision on the last effective legal remedy used by the appellant was served on him/her.

40. Pursuant to Article 16(3) of the Constitutional Court's Rules, the Constitutional Court may examine an appeal when there is no decision of a competent court if the appeal indicates a grave violation of the rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina or by the international documents applied in Bosnia and Herzegovina.

41. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court established that the respective appeal meets the admissibility requirements with regards to the right under Article II (3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

VII. Merits

42. The appellant complains that his right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention was violated, alleging that the BiH Prosecutor's Office failed to complete the investigation within a reasonable time

Right to a fair trial

43. Article II (3)(e) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and freedoms referred to in paragraph 2 above; these include:

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

44. Article 6 paragraph 1 of the European Convention, in its relevant part, reads:

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

45. The Constitutional Court notes that the proceedings in question relate to the criminal proceedings which were initiated against the appellant due to a reasonable suspicion that the appellant committed a criminal offence of war crime against civilian population under Article 173 paragraphs 1 item c) in conjunction with Article 180 paragraph 1 of the BiH Criminal Code. In this regard a question is posed as to the applicability of Article 6 of the European Convention to the case at hand.

Applicability of Article 6 paragraph 1 of the European Convention

46. The European Court of Human Rights („European Convention") considers that a „charge", for the purposes of Article 6, paragraph 1 of the European Convention, exists from the moment when the state takes measures implying that some person has committed a criminal offence, which „may substantially affect the situation of the suspect" (see, European Court of Human Rights, *Foti and Others vs. Italy*, judgment of 10 December 1982, series A, No. 56). Accordingly, from that moment a person against whom a charge has been filed must be provided with all guarantees relating to the right to a fair trial.

47. In the case a hand the investigation was initiated against the appellant due to the reasonable suspicion that he committed a criminal offence and based on the order of the BiH Prosecutor's Office of 28 December 2005 he was deprived of liberty, in other words based on the ruling of the Court of BiH of 29 December 2005 he was sentenced to custody, which was extended for two times. Finally, the custody was replaced by posting of bail as a guarantee that his presence will be ensured until the completion of criminal proceedings by issuance of a legally binding decision and the said bail is still in force. It follows from the aforesaid that the measures were undertaken against the appellant implying that he had committed a criminal offence and this implication has a significant effect on his situation. The mentioned measures were undertaken against the appellant during the investigative procedure which, at the moment the appeal was filed, has been in progress for 4 years,

which means that it is still pending. In view of the aforesaid, the Constitutional Court concludes that the a „charge", for the purposes of Article 6, paragraph 1 of the European Convention, exists in the appellant's case and that he must be provided with the guaranties of the right to a fair trial, including the right to have a decision adopted within a reasonable time in the criminal proceedings.

a) Relevant principles

48. According to the consistent case-law of the European Court of Human Rights and the Constitutional Court, the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the case-law of the European Court of Human Rights, in particular the complexity of the case, the conduct of the parties to the proceedings and of the relevant authorities, and the importance of what is at stake for the appellant in the litigation (see, *Mikulić vs. Croatia,* Application no. 53176/99 of 7 February 2002, Report No. 2002-I, paragraph 38).

b) Period to be taken into consideration

49. According to the consistent case-law of the European Court of Human Rights, the beginning of the relevant period in criminal matters, as regards the period to be taken into consideration, is related to the moment at which a person in question became aware that he/she is suspected of the criminal offence since from that moment he/she has interest in a decision to be adopted by the court as to the existence of this suspicion. Such a determination of the relevant period is obvious in cases where the arrest preceded a formal indictment (see, the European Court of Human Rights, *Wemhoff vs. Germany*, judgment No. 2122/64 of 27 June 1968, paragraph 19; *Dobbertin vs. France*, judgment 13089/87 of 25 February 1993, paragraphs 9 and 138). Further, a moment at which uncertainty ended concerning the legal position of the person concerned is considered as the end of the relevant period. In this regard, the European Court of Human Rights applies equal criteria both in criminal and civil matters. When it comes to the criminal proceedings, the decision on filing an indictment or a decision on acquittal of accusation or a decision on refusal of indictment must be final. Finally, a final decision on indictment may also constitute a waiver of further conduct of criminal proceedings (see, *Wemhoff*, paragraph 18).

50. From the submissions to the Constitutional Court, it follows that the first measure, which implied that the appellant committed the criminal offence in question, was taken on 28 December 2005 when the appellant was deprived of liberty upon the order of the BiH Prosecutor's Office. The BiH Prosecutor's Office issued the order during the investigative proceedings due to a reasonable suspicion that he committed a criminal offence he is

charged with and, given that the investigation is still in progress, the Constitutional Court concludes that the relevant period in the case at hand is 4 years.

c) Analysis of the reasonableness of the proceedings

51. Being led by the criteria established by the case-law of the European Court of Human Rights, in examining the reasonableness of the proceedings, the Constitutional Court will first examine the complexity of the case.

52. In the case at hand the appellant is suspected of a criminal offence of war crime. The criminal offence in question was committed on 12 July 1992 and the investigation against the appellant was initiated in 2005, *i.e.* 13 years after the event had occurred. Given the gravity of the criminal offence and the time since its commission, it is obvious that it was difficult to collect evidence with which the grounds of suspicion would be substantiated that the appellant committed the criminal offence. Furthermore, from the submission to the Constitutional Court it follows that for that purpose most of the substantive evidence was collected from the various authorities which, at the time the offence had been committed and later on, were undertaking the actions aimed at provision of evidence. Also, during the proceedings a considerable number of witnesses were interrogated. Namely, it follows from the decision on extension of custody dated 26 May 2006 that the BiH Prosecutor's Office interrogated all the witnesses it intended to interrogate during the investigation. However, given the decision of 15 September 2006 whereby the appellant's complaint against the decision on dismissal of motion for termination of bail was dismissed, it follows that during the investigation 80 witnesses were interrogated and that the BiH Prosecutor's Office intends to interrogate additional 30 witnesses and that the collection of additional substantive evidence is in progress. Although the BiH Prosecutor's Office did not give its opinion with regards to the difficulties it has faced during the collection of evidence, the number of evidence indicates that the investigative procedure is complex and that the BiH Prosecutor's Office was actively engaged in undertaking necessary actions concerning the collection of evidence material. Furthermore, from the submissions to the Constitutional Court it follows that the investigation in regards to the same event was conducted not only against the appellant but also against several persons who are suspected of the mentioned criminal offence. In view of the aforesaid, the Constitutional Court considers that this is an extremely complex case.

53. The next criterion to be examined by the Constitutional Court is the conduct of parties to the proceedings, and the first to be examined are the Court of BiH and BiH Prosecutor's Office. In this regard, the Constitutional Court primarily notes that Article 6 of the European Convention commands that judicial proceedings be expeditious, but it

also lays down the more general principle of the proper administration of justice. As to whether the conduct of the authorities was consistent with the fair balance which has to be struck between the various aspects of this fundamental requirement (see, the European Court of Human Rights, *Boddaert vs. Belgium,* judgment no. 12919/87 of 22 September 1992, paragraph 39).

54. From the submissions to the Constitutional Court it follows that, in accordance with the authorities vested in the BiH Prosecutor's Office, this office issued an order based on which the appellant was deprived of liberty, in other words this office filed a motion for determination or extension of custody against the appellant. Further, after the motion for termination of custody and determination of bail had been filed, the BiH Prosecutor's Office consented to this motion. The presumption for determination of bail is a custody which was ordered due to the reasonable suspicion that the appellant committed a criminal offence, as well as the existence of threat that he may flee. Based on the submissions to the Constitutional Court a conclusion may be made that in the instant case both the reasonable suspicion and risk of flight ceased to exist and the appeal does not offer any evidence in this regard either. Moreover, the BiH Criminal Procedure Code determines pursuant to the accusatorial principle that a decision on initiation, termination and completion of investigation falls within the exclusive competence of the prosecutor. In addition, the competent prosecutor has a legal obligation to undertake criminal prosecution if there is evidence that a crime has been committed and he is to be mindful of clarifying the facts that place burden on the suspect, as well as of those that goes in his favour. Finally, Article 225, paragraph 3 of the BiH Criminal Procedure Code regulates that the Collegium of the BiH Prosecutor's Office shall take necessary measures in order to complete the investigation if it has not been completed within six months after the order on its conducting has been issued. In the present case, the Constitutional Court primarily notes that, based on the aforementioned, it cannot infer the point in time when the BiH Prosecutor's Office issued the order to conduct the investigation against the appellant, but it follows from the motion on determination of custody dated 29 December 2005 that the BiH Prosecutor's Office „has been conducting the investigation against the appellant and others". This leads to obvious conclusion that the investigation against the appellant was initiated before his arrest on 28 December 2005. In view of the above, the Constitutional Court concludes that the six-month time limit referred to in Article 225, paragraph 3 of the BiH Criminal Procedure Code expired and that is the time period in which the Collegium of the BiH Prosecutor's Office is to take necessary measures in order to complete the investigation. However, according to the facts presented, the Constitutional Court cannot conclude that the Collegium of the BiH Prosecutor's Office took any measures in accordance with law. The Constitutional Court observes that the BiH Criminal Procedure Code does not

provide that an investigation must be completed within the six-month time limit, nor does it specify the maximum time limit for completing the investigation. Finally, the law does not stipulate a time limit within which the investigation can be conducted, *i.e.* a time limit within which the investigation must be completed in case when the Collegium of the BiH Prosecutor's Office takes necessary measures and activities in terms of Article 225, paragraph 1 of the BiH Criminal Procedure Code. However, the interpretation of the mentioned legal provisions in such a way that the BiH Prosecutor's Office may carry out its investigation for an indefinite period of time would be contrary to one of the fundamental rights of the suspect, *i.e.* accused, determined in Article 13 of the BiH Criminal Procedure Code, which regulates that the suspect or accused shall be entitled to be brought before the Court in the shortest reasonable time period and to be tried without delay. The Constitutional Court has already concluded that the present case raises complex factual and legal issues. Considering the complexity of the investigation at issue, based on the facts presented to the Constitutional Court, it cannot be concluded why the Collegium of the BiH Prosecutor's Office failed to take necessary measures and activities for completing the investigation. Furthermore, given the facts presented to the Constitutional Court, it cannot be concluded whether the BiH Prosecutor's Office heard other 30 witnesses and collected the substantive evidence referred to in September 2006. Finally, based on the facts presented to the Constitutional Court, it cannot be concluded whether the BiH Prosecutor's Office took measures and actions an, if so, which measures and actions did it take to complete the investigation in question. In its reply to the appeal, the BiH Prosecutor's Office failed to offer a single reason for the failure of the Collegium of the BiH Prosecutor's Office to take measures and actions for completing the investigation, nor did it mention any potential difficulty that might possibly occurred in the present case. Namely, there is no single allegation that would lead to a conclusion that the BiH Prosecutor's Office takes legal actions with a view to completing the investigation in the present case. In its reply, the BiH Prosecutor's Office primarily indicates the prosecutor's legal powers during the investigation phase, which are, as already stated in the present decision, undisputed, but which in no way entitle the prosecutor to conduct the investigation for an indefinite time period. Also, it is irrelevant to emphasize that the appellant violated Article 108 and Article 109 of the BiH Criminal Procedure Code by obtaining the findings of the expert for forensic medicine on his physical examination in an arbitrary manner, given that in this phase of the criminal proceedings the court primarily assesses the lawfulness of evidence and it is unclear in which manner this fact possibly affected the length of the investigative proceedings in the present case. The Constitutional Court fully acknowledges the prosecutor's legal right and obligation to institute an investigation where there are sufficient grounds to suspect that a criminal offence has been

carried out, as well as the obligation and powers to clarify all the circumstances of a case and to assess as to whether the circumstances of the case have been sufficiently clarified in order to suspend, *i.e.* complete the investigation. In addition, the Constitutional Court bears in mind the complexity of the investigative proceedings in the present case but the lack of any reasoning by the BiH Prosecutor's Office which would justify the duration of the relevant investigative proceedings leads to the conclusion that there are no reasonable grounds for conducting the four-year investigation in the appellant's case.

55. Furthermore, given that the proceedings are in the stage of investigation, the Court of BiH is not authorized to undertake or to order the undertaking of any actions in this stage of proceedings. From the submissions to the Constitutional Court it follows that the Court of BiH acted in a timely manner and in accordance with law when it comes to the motions of both the BiH Prosecutor's Office and appellant which have been so far presented. In view of the aforesaid, the Constitutional Court could not infer that the appellant's allegations on the failure of the court to review the pronounced measure of bail are justified. This becomes even truer after taking into consideration the provisions of the Criminal Procedure Code of BiH from which it follows that bail, which is determined as a guarantee of the suspect's presence during the criminal proceedings, shall be valid until the completion of criminal proceedings by issuance of a legally binding decision. The appellant is entitled to file motions for termination of bail for unlimited number of times, in which case he may present evidence that the circumstances requiring posting of bail ceased to exist. Given that the posted bail shall be valid until the completion of the criminal proceedings with a legally binding decision, the existence of bail or possible termination of bail are in no way connected with the length of the investigative proceedings. Finally, given the accusatorial principle, *i.e.* that a decision on initiation, termination and completion of investigation falls within the exclusive competence of the prosecutor, the Court of BiH has no legal possibility to influence the length of the investigative proceedings.

56. The Constitutional Court could not infer that that the appellant' conduct in any way contributed to the length of the investigative proceedings. In addition, the Constitutional Court notes that the investigation that is underway may raise an issue of a reasonable time in terms of the right to a fair trail, but the current legal arrangements do not stipulate the possibility that a suspect can raise this issue within the investigative proceedings before the ordinary courts. In this regard, an appeal lodged with the Constitutional Court is an effective legal remedy.

57. Finally, it is undisputable that this case is related to a matter which is of importance to the appellant. Namely, the appellant is suspected of taking part in the murder of nine persons, which was qualified as a criminal offence of war crime against civilian population

for which a 10-year prison sentence or long-term imprisonment are prescribed. Given the gravity of the criminal offence, it is undisputable that the appellant has interest that the uncertainty he is subject to due to possible filing of indictment or pronouncement of the mentioned sentence be removed as soon as possible. On the other hand, the obligation of the court and the prosecutor's office, including all other parties to the proceedings, is to ensure that the justice is administered properly, particularly that a correct and fair proceeding is ensured which provides guarantees that no innocent person will be convicted. In doing so, the authorities participating in the proceeding must protect a general interest that a perpetrator of criminal offence should be brought before the court and punished when the conditions prescribed by law require that. It has been already pointed out in this decision that possible suspension of investigation due to the lack of evidence could not be considered a final decision on filing indictment, in other words it would not mean the end of uncertainty the appellant is subject to. Furthermore, a possible decision on conclusion of investigation and filing of indictment would change the appellant's position from that of being a suspect to the one of being an indicted in the event that the indictment is confirmed, which implies a higher degree of suspicion that the appellant committed the criminal offence in question. Moreover, it is not stated in the appeal in which manner the uncertainty the appellant is subject to has an effect on his day-to-day life activities and it neither points to the consequences he is exposed to due to the mentioned uncertainty. In this regard the appellant does not state in which manner the bail which has been placed on the property of his father had effect on him. Namely, the property of the appellant's father is posted on bail and, given the character of this mechanism, it constitutes a free expression of will of both the appellant and his father when it comes to undertaking such an obligation that includes the consequences arising from such an obligation, which two of them must have been aware of. However, given that it has been already stated in the present decision that the BiH Prosecutor's Office failed to offer any valid reason, *i.e.* that from the submissions to the Constitutional Court it cannot be concluded whether the measures and actions for completion of the investigation have been undertaken, particularly taking into account that, in this regard, the activity of the Collegium of the BiH Prosecutor's Office within the meaning of Article 225 of the Civil Procedure Code did not take place, the Constitutional Court holds that the uncertainty the appellant is subject to is an excessive burden which cannot be justified in terms of ensuring the proper administration of justice.

58. Taking into account that the investigation in the present case has lasted more than four years and that the BiH Prosecutor's Office has failed to offer any valid reason or reasoning which could be considered to be acceptable or justified as to the length of the proceedings, and that from the statements made by of the BiH Prosecutor's Office and all submissions presented it cannot be concluded what measures and actions has the BiH Prosecutor's

Office been undertaking for completion of the relevant proceedings, the Constitutional Court holds that the investigation in the present case, irrespective of the fact that this is an extremely complex case and the importance of this matter to the appellant, has disrupted the balance between the demands of the efficient and expedient proceedings and the proper administration of justice, *i.e.* that the investigation, which has been pending for four years, has failed to satisfy the requirement of trial within 'a reasonable time' under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

VIII. Conclusion

59. The Constitutional Court concludes that there is a violation of the right to a decision within a reasonable time under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention where the competent prosecutor's office has been conducting the investigation for more than four years against several persons in the case which is qualified as an extremely complex case and of particular importance to the appellant, without offering any reason which could be considered to be acceptable or justified as to the length of the proceedings and where it has failed to take, in accordance with law, the measures and actions aimed at completing the investigation.

60. Pursuant to Article 61(1) and (2) of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 1307/08

DECISION ON ADMISSIBILITY AND MERITS

Appeal of CAPING doo Gračanica because of non-enforcement of the Ruling of the Municipal Court in Sarajevo no. 065-0-Ip-0600 0635 of 4 July 2006.

Decision of 9 July 2010

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CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. David Feldman

Mr. Mirsad Ćeman

Having deliberated on the appeal of **CAPING doo Gračanica**, in case no. **AP 1307/08**, at its session held on 9 July 2010, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of CAPING doo Gračanica is hereby granted.

A violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established due to the failure to enforce the final Judgment of the Municipal Court in Sarajevo no. Ps-422/00 of 16 January 2002.

The Government of the Federation of Bosnia and Herzegovina is hereby ordered to carry out its constitutional obligations and ensure compliance with the protection of human rights by taking measures with a view to letting the creditors in possession of the enforceable judicial decisions against the budget funds of the Federation of Bosnia and Herzegovina settle their claims within reasonable time limit.

The Government of the Federation of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina within six months from the date of serving of this decision on the measures taken in order to enforce this decision in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. CAPING doo Gračanica („the appellant"), represented by Mr. Avdo Škaljić, attorney from Sarajevo, filed on 5 August 2008 an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") because of non-enforcement of the Ruling of the Municipal Court in Sarajevo („the Municipal Court") no. 065-0-Ip-0600 0635 of 4 July 2006.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 12 May 2008 the Municipal Court was requested to submit its reply to the appeal, while on 10 June 2009 it was requested that the concerned case file be also communicated.

3. On 9 April 2010, it was requested from the Government of the Federation of Bosnia and Herzegovina („the Government of the Federation") to respond to the appeal. On 6 June 2008, the reply to the appeal was submitted by the Municipal Court, while the Government of the Federation submitted its reply to the appeal to the Constitutional Court on 27 April 2010.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply by the Municipal Court was transmitted to the appellant on 18 June 2008, while, on 30 June 2009, the concerned case file was returned to the Municipal Court. The reply of the Government of the Federation was transmitted to the appellant on 7 June 2010.

III. The Facts of the Case

5. The facts of the case as following from the appellant's allegations and the documents presented to the Constitutional Court may be summarized as follows.

6. The appellant has a claim against the Federation of BiH – the Federal Ministry of Defense („the Federation") for a sum of KM 1,352,952.91 plus the costs of civil proceedings in the amount of KM 57.700 awarded by the legally binding judgment of the Municipal Court in Sarajevo no. Ps-422/00 of 16 January 2002, for a debt incurred in 1994 based on an Agreement on production and delivery of arms and military equipment.

7. On 19 April 2006, the appellant submitted a motion for enforcement to the Municipal Court. By its Ruling on enforcement no. 065-0-Ip-0600 0635 of 4 July 2006, the Municipal Court allowed the proposed enforcement against the funds of the Federation deposited in its transaction account in the UPI Bank d.d. Sarajevo, („the UPI Bank"). On 19 July 2006, the Ruling on enforcement was sent to the UPI Bank for implementation. The Bank was ordered to transfer the funds from the transaction account of the Federation to the transaction account of the appellant, which included the principal amount established in the enforcement document, the costs of the civil proceedings including the statutory default interest as of 16 January 2002 until the settlement in full, including the costs of enforcement.

8. On 24 December 2007, the UPI Bank notified the Municipal Court that the relevant ruling on enforcement could not be effectuated as internal debts categories are specified in the Law on Determining of and Manner for Settlement of Internal Debts of the Federation of BiH (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 66/04). The Bank further states that the said Law also stipulates that the FBiH Government shall pass bylaws, within 30 days from the date of the entry into force of the Law, for determining the category of priority debt for settling the claims. On the basis of this law, the Government of the Federation passed a Decision determining the priority in payment of the claims no. 96/05 of 24 February 2005 (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 13/05) and the Decision no. 157/06 of 6 April 2006 (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 21/06), whereby it was established that an order of payments against the budget funds should be determined by the FBiH Ministry of Finance, which would submit a payment schedule on a monthly basis. The UPI Bank underlined that Article 27 of the Law on Treasury (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 58/02) stipulates that the Ministry of Finance shall have a sole jurisdiction over single treasury account and no other person or institution shall be entitled to manage this account. It is further stated that the Law Amending the Law on Enforcement Procedure (*Official Gazette of the Federation of Bosnia and Herzegovina*

no. 33/06) establishes that the enforcements against the budgetary funds shall be carried out in the amount specified in the relevant budget position in accordance with the Law on Budget Execution. The UPI Bank stated that there were more than 4,000 enforceable judicial decisions payable in accordance with a list and a payment order established by the Ministry of Finance for each decision, and submitted to the Bank. For these reasons, the UPI Bank stated that no payment from the budgetary funds could be made without a payment order by the Ministry of Finance and, consequently, no payment could be made in case of an individual judicial decision. Next, on 31 December 2007, the UPI Bank notified the Municipal Court that it registered the relevant ruling in accordance with Articles 166 through 176 of the Law on Enforcement Procedure (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 32/03) in conjunction with Article 1 of the Law Amending the Law on Enforcement Procedure. In addition, the Bank informed the Municipal Court that the relevant ruling would be enforced after the enforcement of the rulings submitted to the Bank before the relevant ruling.

9. In its conclusion of 23 June 2008, the Municipal Court accepted a motion for enforcement of 17 June 2008, as supplemented and specified. The reason for submitting the specified motion was that the Federation, in the meantime, had changed its transaction account *i.e.* its commercial bank. The appellant submitted to the court the transaction accounts opened by the Federation with four commercial banks. In accordance with the motion submitted to it, the Municipal Court, in non-contentious proceedings, issued a conclusion, whereby it determined that the ruling on enforcement of 4 July 2006 was to be enforced by means of seizure of funds from accounts opened with the following banks: the UniCredit Bank d.d. Mostar, Raiffeisen Bank d.d. BiH Sarajevo, Hypo Alpe Adria Bank d.d. Mostar and Nova Bank d.d. Banja Luka. The Municipal Court issued an order to the commercial banks to put into effect the ruling on enforcement in accordance with the powers conferred by the provisions of Articles 166 through 176 the Law on Enforcement Procedure. On 15 August 2008, the Municipal Court submitted to the UniCredit Bank d.d. Mostar the conclusion of 23 June 2008 including the documentation returned by the UPI Bank. On 3 October 2008, the UniCredit Bank d.d. Mostar notified the Municipal Court that the ruling ordering the enforcement states a deposit account of the Federation for collection of public revenue. On 7 October 2008, the Municipal Court informed the UniCredit Bank d.d. Mostar that the appellant had indicated a new transaction account of the Federation opened with that bank. On 8 January 2009, the ruling on correction including validation clause was submitted to the UniCredit Bank d.d. Mostar.

10. The relevant ruling on enforcement was not effectuated until the date of the appeal *i.e.* no funds were transferred to the appellant's transaction account from the transaction accounts of the Federation.

IV. Appeal

a) Allegations in the appeal

11. The appellant finds that there was a violation of its right to fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), as well as the right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention. The appellant sees the violation of these rights in the fact that the enforcement in question cannot be effectuated since even two years after the adoption of the ruling on enforcement and its submission to the UPI bank, where Federation holds its transaction account, the bank neither blocked the account of the Federation nor made the transfer of the funds for the awarded enforcement. The appellant emphasizes that its right to fair trial would be illusory if the legal system would allow the enforceable judicial decisions to remain unenforced to the detriment of only one party.

b) Reply to the appeal

12. The Municipal Court emphasizes that on 25 December 2007 it warned the UPI Bank (after its reply that the Ministry of Finances is the only party competent to set a payment schedule against the budget funds *i.e.* that the Government of the Federation adopted the Decision determining the priority in payment of the claims and that it shall, in accordance with that decision of the Ministry, submit each month a payment schedule for each individual case to the bank) of the binding decisions of the Constitutional Court according to which no person outside the judicial authority can amend or suspend enforcement of court judgments to the detriment of individuals. On that occasion the bank was ordered to act according to the ruling on enforcement while informing the appellant's representative on this. After that, the UPI Bank submitted, on 31 December 2007, information that it had, pursuant to the provisions of Article 166-176 of the Law on Enforcement Proceedings and in conjunction with the provisions of Article 1 of the Law on Amendments to the Law on Enforcement Proceedings, recorded the concerned ruling on enforcement into the schedule of payments to be made out after the payment of previously received rulings. On 15 January 2008, the appellant's representative was informed on this, while the UPI Bank was requested again, on 10 January 2008, to submit the report on enforcement of the ruling in question.

13. In its reply to the appeal, the Government of the Federation emphasized that the manner to effectuate enforceable judicial decisions based on „war-related civil„ claims is regulated by the Law on Establishing and Manner of Settling Internal Debts of the

Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* nos. 66/04, 49/05, 35/06, 31/08, 32/09 and 65/09, hereinafter: the Law on Establishing and Manner of Settling Internal Debts). Article 3 of the Law on Establishing and Manner of Settling Internal Debts provides that „*... all obligations that make up internal debt defined by the provisions of this law based on enforceable decisions taken in judicial and administrative proceedings shall be made in a manner as stipulated by the provisions of this law…*". Pursuant to Article 20 of the Law on Establishing and Manner of Settling Internal Debt stipulates *inter alia* that „*...upon completion of process of registration of enforceable decisions referred to in Article 17(2) of the Law and upon completion of process of verification of war-related civil claims under Article 18(2) of that Law, the Government of the Federation shall begin with issuance of bonds for war-related civil claims…*„. In accordance with these provisions and aimed at settling debts based on war-related civil claims, the Government of the Federation issued the Decision on Issuing Bonds of FBiH on the Basis of the War-related Civil Claims of Individuals and Legal Entities (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 47/09 of 22 July 2009, hereinafter: the „Decision on Issuing Bonds of FBiH on the Basis of the War-related Civil Claims"). The relevant provisions of the Decision on Issuing Bonds of FBiH on the Basis of the War-related Civil Claims provide that, aimed at settling claims on those grounds, the bonds shall be issued in the total amount of BAM 500,000,000 which is the amount established by the Law on Establishing and Manner of Settling Internal Debts. The amount of issued bonds of the first installment (tranche) is BAM 190,665,648. The amount, date and conditions for issuing other installments (tranche) shall be established by a separate decision of the Government of the Federation. The maturity date for bonds of the first installment (tranche) is 14 years i.e. until 30 June 2023 with the 9-year grace period while the owners of the bonds shall, within the grace period, be paid out statutory default interest on the yearly basis in the amount of 2,5% calculated on the total amount of the principal sum as of 30 June 2010. Upon expiration of the grace period i.e. as of 30 June 2019, the bond owners shall be entitled to a part of the principal amount and part of the statutory default interest calculated on the remaining part of the principal amount. According to the payment schedule, the principal amount shall be paid out to the bond owners as follows: on 30 June 2019; 30 June 2020; 30 June 2021, 30 June 2022 and 30 June 2023. The bond owners shall be allowed to trade on a stock exchange market considering that the bonds are listed on the official stock exchange market SASE (Sarajevo Stock Exchange).

14. In respect of the appellant's claims, it was emphasized that after inspecting the documentation, available to the Federal Ministry of Finances, it was established that the Commission for Final Verification of the War-related Civil Claims had, according

to the legally binding judgment of the Municipal Court no. Ps-422-00 of 16 January 2002, registered claims for the legal entity Caping doo Gračanica in the amount of KM 1,352,952.91 and the claims of this legal entity were included into the first installment of the bonds pursuant to the Decision on Issuing Bonds on the Basis of War-related Civil Claims. It was emphasized that the costs of the court proceedings in regards to the war-related civil claims are not settled by issuing bonds but by way of cash payment. The appellant was thus paid out the costs of the court proceedings on 28 May 2009 pursuant to the Ruling on Enforcement no. 065-0-Ip-0600 0635 of 4 July and 20 September 2006 in the amount of BAM 57,700.00 plus costs of enforcement in the amount of BAM 10,694.98 plus statutory default interest in the amount of KM 50,731.17 which all comes to a total of BAM 119,126.15. It was stated that the Constitutional Court in its previous decisions relating to the issue of enforcement of legally binding court decisions, had not contested the enforcement of those decisions through issuance of bonds and that it had, *inter alia*, emphasized that it would not deny the right of the legislator to find adequate *modus operandi* for enforcement of legally binding decisions. Finding the appropriate mode by which the appellants would not be deprived of their right acknowledged by legally binding judgments, is primarily a task of the legislator who is in better position to decide, considering the circumstances and free margin of appreciation it enjoys, on the manner to resolve this issue. Therefore, the Government of the Federation proposed that the appeal in question should be dismissed as ill-founded or rejected as inadmissible as the Constitutional Court had already decided in its Decision no. *AP 1777/07* of 17 December 2009.

V. Relevant Law

15. The **Law on Enforcement Procedure** (*Official Gazette of the Federation of Bosnia and Herzegovina* nos. 32/03, 52/03, 33/06, 39/06 and 39/09)

Article 65

Enforcement to satisfy a monetary claim shall be decided and enforced for the amount necessary to discharge the claim.

Article 66

Several judgment creditors who are satisfying their claims against the same judgment debtor and on the same object of enforcement shall be paid in the order they acquired the right to settlement from that object, unless otherwise provided by law.

Article 138(3) and (5)
Restrictions of the Enforcement

(3) The enforcement against the budget funds of the Federation of Bosnia and Herzegovina and Cantons shall be carried out in the amount specified in the relevant budget position in accordance with the Law on Budget Execution.

(5) Several judgment creditors who are satisfying their claims against the budget funds shall be paid in the order they acquired the right to settlement from that budget, and the statute of limitations shall not run until the judgment creditor's claim is satisfied.

Article 167
(Order of Payment)

(1) Bank shall perform payment by the sequence in accordance with time of serving decision on enforcement, unless otherwise prescribed by the law.

(2) Bank keeps record on the sequences of the decision on enforcement by the date and hour of delivery and issue to the judgment creditor, on his/her request, the affirmation of the place of his/her claim in that sequence.

(3) Bank shall not execute order of the judgment debtor before paying out the claim established by the decision on enforcement, unless separate law prescribes otherwise.

(4) Document for which special law says so shall be deemed equal with decision on enforcement.

Article 169
Procedure in Cases when there are no Funds on the Account

(1) If there are no funds on the account designated in the decision on enforcement, a bank shall effectuate the transfer of an appropriate amount of the judgment debtor's funds for the benefit of such account from other accounts in that bank pursuant to the order determined by the judgment creditor.

(2) If a bank is not able to collect the enforceable claim due to lack of funds in the account, the bank shall keep a separate record of the decision on enforcement and shall effectuate the transfer when funds become available in the account, unless stated otherwise in the decision on enforcement.

(3) The bank shall inform the court promptly that no funds are available in the account and shall provide the court with the transaction history pursuant to Paragraph 5 of Article 166 of this Law.

16. The **Decree on Adoption of the Budget of the Federation of Bosnia and Herzegovina for 2008** (Official Gazette of the Federation of Bosnia and Herzegovina no. 97/07)

614800	Enforcement of judgments and rulings on enforcement	12.000.000 KM
614800	Decisions of the Human Rights Chamber	2.000.000 KM
823400	Unpaid salaries and allowances of the FBiH Army	11.000.000 KM
823400	Payment of internal debt-debts towards suppliers	5.000.000 KM
823400	Payment of internal debt-old foreign currency savings	45.000.000 KM

17. The **Decree on Adoption of the Budget of the Federation of Bosnia and Herzegovina for 2009** (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 87/08)

614800	Enforcement of judgments and rulings on enforcement	10.800.000 KM
614800	Decisions of the Human Rights Chamber	500.000 KM
823400	Unpaid salaries and allowances of the FBiH Army	2.000.000 KM
823400	Payment of internal debt-debts towards suppliers	1.000.000 KM
823400	Payment of internal debt-old foreign currency savings	10.000.000 KM
823400	Liabilities based on the old foreign currency savings-court Judgments related to capital sums	18.000.000 KM
823400	Liabilities based on the old foreign currency savings-bonds related to capital sums	50.000.000 KM
823400	Liabilities based on the old foreign currency savings-bonds related to the interest	11.000.000 KM
823400	Various claims (bonds related to the interest)	5.500.000 KM

VI. Admissibility

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

19. Pursuant to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may consider an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the

appeal is filed within a time-limit of 60 days as from the date on which the decision on the last effective remedy used by the appellant was served on him/her.

20. In the context of the appellate jurisdiction of the Constitutional Court under Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the term „judgment" has to be interpreted in a broad sense. That term ought to include not only all kinds of decisions and rulings but also the failure to issue a decision when such failure is established to be unconstitutional (see Decision no. U 23/00 of 2 February 2001, published in the *Official Gazette of Bosnia and Herzegovina* no. 10/01). The Constitutional Court highlights that, pursuant to Article II(1) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina and both its Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms, and that, pursuant to Article II(2) of the Constitution of Bosnia and Herzegovina, the rights and freedoms set forth in the European Convention and its Protocols shall apply directly in Bosnia and Herzegovina.

21. The Constitutional Court notes that in its earlier case-law it rejected such appeals as manifestly (*prima facie*) ill-founded, i.e. on account of altered legal circumstances (see the Constitutional Court, Decisions no. *AP 552/04* of 28 June 2005 and no. *AP 1777/07*, available on www.ustavnisud.ba). However, following the issuance of the judgment of the European Court of Human Rights in case *Čolić et al. vs. Bosnia and Herzegovina* (see the Judgment of the European Court of Human Rights of 10 November 2009, application no. 1218/07 *et seq*.), the Constitutional Court concluded that it had to review its earlier case-law.

22. Therefore, the Constitutional Court shall interpret the appeal as the appellant invoking its right under Article 6(1) of the European Convention, containing the right to have access to court.

23. The Constitutional Court, in view of the case-law of the European Court of Human Rights relating to the exhaustion of remedies, wishes to emphasize that in application of the provisions of Article 16(1), (2) and (4) of the Rules of the Constitutional Court that rule has to be applied with a certain degree of flexibility and without excessive formalism (see the European Court of Human Rights, *Cardot vs. France*, judgment of 19 March 1991, Series A no. 200, paragraph 34). The Constitutional Court highlights that the rule referring to exhaustion of remedies available under the law is neither absolute, nor it may be applied automatically, while in examining whether it had been complied with, it is essential to take into account specific circumstances of every individual case (see the European Court of Human Rights, *Van Osterwijek vs. Belgium*, judgment of 6 December 1980; Series A no. 40, paragraph 35). This, *inter alia*, means that not only the existence of

formal remedies in a legal system must be taken into account but also the overall legal and political context as well as the appellant's personal circumstances.

24. Having in mind the aforesaid circumstances, the Constitutional Court holds that in Bosnia and Herzegovina, in the present case in the Federation of BiH, there are no effective remedies in existence which would make it possible for appellants to appeal because of non-enforcement of the legally binding judgments, *i.e.* the factual non-enforcement of enforcement rulings issued in the enforcement proceedings. The Constitutional Court holds that the defects in the organization of the legal system in the Entities, *i.e.* the state, must affect neither the respect of individual rights and freedoms set forth in the Constitution of Bosnia and Herzegovina nor the requirements and guarantees under Article 6 of the European Convention.

25. The Constitutional Court wishes to emphasize that excessive burden may not be solely imposed upon an individual to discover the most effective way to realize his or her rights. Also, one of the fundamental postulates of the European Convention is that the remedies available to an individual have to be easily accessible and comprehensible, so that the defects in the organization of the legal order and judicial system of the state, endangering individual rights, may not be attributed to the individual. In addition, it is the duty of a state to organize its legal system in such a way as to enable the courts to comply with the requirements and conditions of the European Convention (see the European Court of Human Rights, *Zanghi vs. Italy*, judgment of 19 February 1991; Series A no. 194, paragraph 21).

26. In the present case, the Constitutional Court considers this to be factual non-enforcement of the enforcement ruling issued in the enforcement proceedings on the basis of the legally binding judgment, including the fact that the appellant does not have available remedy to effectuate the requested enforcement.

27. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that the concerned appeal meets the conditions in respect of the admissibility.

VII. Merits

28. The appellant holds that, due to the factual non-enforcement of Ruling on Enforcement no. 065-0-Ip-0600 0635 of 4 July 2006, there was a violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of

the European Convention as well as of his right not to be discriminated against under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention.

Right to a fair trial

29. Article II(3)(e) of the Constitution of Bosnia and Herzegovina reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

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

Article 6(1) of the European Convention, in the relevant part, reads:

In 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 and independent and impartial tribunal established by law.

30. The Constitutional Court notes that in the present case the enforcement proceedings before the court were finalized and the ruling on enforcement communicated to the bank for execution. The appellant had no objections as to the course of the enforcement proceedings conducted by the Municipal Court. The problems appeared when the enforcement ruling was transmitted to the bank because there were no funds on the transaction account of the enforcement debtor (the Federation) for the enforcement to be carried out. Several thousand claims (4000 rulings on enforcement according to the information by UPI Bank) were registered before the appellant's claim. It follows from the appeal's case file that the appellant was informed that he would settle his claim when the enforcement debtor has available funds on the account, *i.e.* when the creditors whose enforcement rulings have been registered before the appellant's are settled, all in accordance with the relevant provisions of laws and bylaws.

31. The Constitutional Court, therefore, finds that the main issue raised in the present case relates to failure by the appellant to enforce a legally binding court decision. Pursuant to the well-established case-law of the Constitutional Court, „enforcement of a judgment issued by any court must be observed as an integral part of adjudication in terms of Article 6 of the European Convention„ (see the leading decisions of the Constitutional Court: *AP 288/03* of 17 December 2004, paragraph 28, published in the *Official Gazette of Bosnia and Herzegovina* no. 8/05, and *AP 464/04* of 17 February 2005, paragraph 27, published in the

Official Gazette of Bosnia and Herzegovina no. 40/05). In that regard, the Constitutional Court is of the opinion that the appellant, in this case, enjoys all the guarantees to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention. The Constitutional Court highlights that right to access to court is inherent to Article 6(1) of the European Convention, which right „… lasts until the established civil right is realized. If that is not the case, the effective procedure in determination of civil rights and obligations would be illusory if that right cannot be realized in the subsequent enforcement procedure...„ (see the decision of the Constitutional Court *AP 552/04* of 28 June 2005, paragraph 9, published at the Constitutional Court's web page: www.ustavnisud.ba). Therefore, the Constitutional Court is of the opinion that it is necessary to examine whether the aforementioned right has been brought into question in the present case.

32. The Constitutional Court highlights that, pursuant to Article I(2) of the Constitution of Bosnia and Herzegovina as well as Article 1 of the European Convention, all levels of power in Bosnia and Herzegovina shall secure respect for individual human rights including the right to enforcement of legally binding court decisions under Article 6(1) of the European Convention. Such obligation may not be reduced by the fact that, in the present case, the enforcement must be made against the budgetary funds of one of the Entities and that, due to a great number of creditors, there are no funds available for the enforcement to be carried out. In regard of the aforesaid, the Constitutional Court recalls the position of the European Court of Human Rights, adopted in case *Jeličić vs. Bosnia and Herzegovina* (see the judgment of 31 October 2006, paragraph 39), referred to by the European Court of Human Rights in another case of this kind against our state (*Čolić et al. vs. Bosnia and Herzegovina*, see the judgment of 10 November 2009), according to which „the Court reiterates that it cannot accept that the state authorities mention lack of funds as an excuse for non-compliance with the obligations arising from a judgment. The postponement in enforcement of a judgment, though, may be justified by special circumstances, but postponement may not be such as to violate the essence of the rights protected under Article 6(1) (see *Burdov vs. Russia*, no. 59498/00, paragraph 35, ECHR 2002-III and *Teteriny vs. Russia*, no. 11931/03, paragraph 41, of 30 June 2005).

33. The Constitutional Court supports the aforementioned position of the European Court that the lack of funds may not be an excuse for non-compliance with the obligations arising from a judgment, although the Constitutional Court is aware that the global economic crisis must inevitably affect Bosnia and Herzegovina. It emphasized in particular the not-so-long-ago war past and, related to that, enormous damage inflicted upon human and economic resources, which resulted in a great number of claims which exist, on the basis

of legally binding court decisions, against all levels of power in Bosnia and Herzegovina. In view of the aforesaid, the Constitutional Court holds that „special circumstances" do exist in Bosnia and Herzegovina, which could justify certain postponement in enforcement of legally binding court decisions. The Constitutional Court notes that, in the present case, the Federation undertook steps in order to enforce legally binding court decisions in that it adopted amendments to the Law on Enforcement Procedure. In the relevant part of the aforementioned Law (Article 138(3) and (5)) it is stipulated that the enforcement against the budgetary funds of the Federation shall be carried out „in the amount specified in the relevant budget position in accordance with the Law on Budget Execution", and that „several judgment creditors who are satisfying their claims against the budget funds shall be paid in the order they acquired the right to settlement from that budget, and the statute of limitations shall not run until the judgment creditor's claim is satisfied." It may be seen from the Federation budgets adopted for 2008 and 2009 that the Federation allocated BAM 12,000,000 (2008) and BAM 10,800,000 (2009) for the enforcement of judgments and rulings on enforcement.

34. In addition, the Federation issued the Decision on Issuing Bonds on the Basis of the War-related Civil Claims, stipulating that, aimed at settling claims on those grounds, the bonds shall be issued in the total amount of BAM 500,000,000 which is the amount established by the Law on Establishing and Manner of Settling Internal Debts. The amount of issued bonds of the first installment (tranche) is BAM 190,665,648. The amount, date and conditions for issuing other installments (tranche) shall be established by a separate decision of the Government of the Federation. The maturity date for bonds of the first installment (tranche) is 14 years i.e. until 30 June 2023 with the 9-year grace period while the owners of the bonds shall, within the grace period, be paid out statutory default interest on the yearly basis in the amount of 2,5% calculated on the total amount of the principal amount as of 30 June 2010. Upon expiration of the grace period i.e. as of 30 June 2019, the bond owners shall be entitled to a part of the principal amount and part of the statutory default interest calculated on the remaining part of the principal sum. According to the payment schedule, the principal amount shall be paid out to the bond owners as follows: on 30 June 2019; 30 June 2020; 30 June 2021, 30 June 2022 and 30 June 2023. The bond owners shall be allowed to trade on a stock exchange market considering that the bonds are listed on the official stock exchange market SASE (Sarajevo Stock Exchange).

35. The steps taken by the Federation by adoption of the aforementioned amendments to the Law on Enforcement Procedure and the Decision on Issuing Bonds on the Basis of the War-related Civil Claims are positive in the opinion of the Constitutional Court because it, in a manner, introduces the obligatory nature of budgetary funds allocated for payments

to the creditors in possession of legally binding court decisions, while also introducing the order of payments depending on the date of obtaining the right and guaranteeing full settlement in accordance with the court's decision and excluding the possibility of statute of limitation. In the described manner a certain postponement in enforcing of legally binding court decisions has been prescribed which might be justified from the general aspect of the protection of public interest because by simultaneous disbursements related to all legally binding court decisions the financing of other budgetary users would be brought into question as well as the functioning of the Federation as one level of power in Bosnia and Herzegovina. That postponement shall, pursuant to the Decision on Issuing Bonds on the Basis of the War-related Civil Claims, last for 14 years. In the opinion of the Constitutional Court, the manner in which, in the present case, the enforcement of legally binding court decisions was postponed does not satisfy the standards of Article 6(1) of the European Convention. Moreover, it could be stated that „… the essence of the right protected by Article 6(1) has been violated…" (see the quoted paragraph 39 of the judgment of the European Court of Human Rights in case *Jeličić vs. BiH*).

36. First of all, the Constitutional Court recalls its previous case-law in its decision *U 1/09* of 29 May 2009 (decision accessible on the Constitutional Court's web page: www.ustavnisud.ba), in which there was considered the constitutionality of the Federation bylaws relating to the verification of the claims and cash payments related to the old foreign currency savings accounts. In the aforementioned decision it has been emphasized that „…the BiH Council of Ministers enacted the Decision on the procedure and manner of issuance of BiH bonds for settling the debts arising from the old foreign currency savings accounts (*Official Gazette of Bosnia and Herzegovina* no. 28/08), on the basis of which it also enacted the Decision on a schedule of BiH bonds' maturity dates, for bonds to be issued with the aim of settling the debts arising from the old foreign currency savings accounts for the Federation of BiH and the Brcko District of BiH (*Official Gazette of Bosnia and Herzegovina* no. 29/08). Based on the said Decision, the nine-year time limit for maturity of bonds (as stipulated under the Law on Settlement of Debts) has been reduced to 7 years and the FBiH Government has given its consent to it as the funds for settlement of the obligations are to be secured by the Entities…" (see item 7 of the said decision). In addition, it was stated in the said decision that „…the Constitutional Court does not see any reason why the challenged acts would raise the issue of violation of human rights and fundaments freedoms…" (see item 15 of the said decision). In the opinion of the Constitutional Court, the manner of resolving the issue of old foreign currency savings illustrates the best the so-much-better position of the holders of the verified (recognized) claim related to the old foreign currency savings when compared to

the creditors in possession of a legally binding court decision, although the claims of those latter have been established by legally binding court decisions which entails the obligation to enforce under Article 6(1) of the European Convention.

37. The Constitutional Court emphasizes that the Federation, having adopted the amendments to the Law on Enforcement Procedure and, particularly, the Decision on Issuing Bonds on the Basis of the War-related Civil Claims, is on the right track to finally deal with the issue of enforcement of the legally binding court decisions based on war-related civil claims. However, in the opinion of the Constitutional Court, there still remains the problem of enforcement of such decisions within „reasonable time" as referred to in Article 6(1) of the European Convention. The Constitutional Court reiterates its earlier position that the legislator is entitled to find adequate *modus operandi* for enforcement of legally binding decisions. The Constitutional Court has, however, the jurisdiction to evaluate whether the solution chosen by the legislator shall ensure respect for human rights. In spite of all the difficulties encountered, without doubt, by the public authorities in the Federation in their endeavors to ensure the enforcement of the legally binding court decisions based on war-related civil claims, the Constitutional Court cannot hold that the Federation has complied with its positive obligation and ensured the enforcement of the aforesaid court decisions within reasonable time by adopting the amendments to the Law on Enforcement Procedure and the Decision on Issuing Bonds on the Basis of the War-related Civil Claims. In adopting the Decision on Issuing Bonds on the Basis of the War-related Civil Claims, the Federation has prescribed that the creditors in possession of legally binding court decisions shall settle their claim within 14 years with the 9-year grace period and statutory default interest on the yearly basis in the amount of 2,5% calculated on the amount as established by judgment, following which the awarded amount should be paid in four equal installments on specific dates within the remaining four years. The example mentioned by the Constitutional Court in relation to the verified „old foreign currency savings" is only one of the arguments showing that the legislator may, by way of legal solutions, ensure the respect of the creditors' rights in a significantly shorter period of time (by this is meant: the holders of „old foreign currency savings" in comparison with the holders of legally binding court decisions). In the opinion of the Constitutional Court, it is unacceptable that the creditors who, in principal, have been involved in long-lasting proceedings which resulted in legally binding court decisions awarding them war-related claims mostly related to the rendered services, sold goods, damage incurred etc., now have to wait for the enforcement for another 14 years, entailing a very realistic question of whether they would live long enough to be paid their claims which are, in the opinion of the Constitutional Court, of utmost significance to the creditors. In the opinion of the

Constitutional Court, an excessive burden is imposed in this way upon the creditors, which is not in accordance with the requirement of Article 6(1) of the European Convention that legally binding court decisions must be enforced within reasonable time.

38. In view of the above, the Constitutional Court concludes that, in the present case, there was a violation of the right to fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention in relation to the right to enforcement of the legally binding court decision within reasonable time.

39. The Constitutional Court finds the appellant's invoking of the violation of the right not to be discriminated against under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention to be ill-founded because the appellant did not offer any relevant allegations and evidence in support of its claims of violation of the aforementioned right, given that all the allegations in the appeal are exclusively related to the violation of the right to a fair trial.

VIII. Conclusion

40. The Constitutional Court concludes that there has been a violation of the appellant's right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina as well as of Article 6(1) of the European Convention because there are no guarantees that the appellant will be able, as the holder of the enforceable court document, to settle its claims against the Federation within reasonable time.

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

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

CONTENTS

Case No. AP 619/08

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. E.R. against the Judgment of the Cantonal Court in Mostar no. 007-0-U-06-000 638 of 17 December 2007

Decision of 24 September 2010

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(4)(9), Article 59(2)(2), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina n*os. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović, President,

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. David Feldman

Mr. Mirsad Ćeman

Having deliberated on the appeal of **Mr. E.R.**, in case no. **AP 619/08**, at its session held on 25 September 2010, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. E.R. is partially granted.

It is hereby established that 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 have been violated.

The Judgment of the Cantonal Court in Mostar number 007-0-U-06-000 638 of 17 December 2007 is hereby annulled.

The case shall be referred back to the Cantonal Court in Mostar which shall be under obligation to issue a new decision in urgent proceedings pursuant to Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Cantonal Court in Mostar is ordered to inform the Constitutional Court of Bosnia and Herzegovina within three months from the date this decision has been served about the measures taken in order to enforce this decision in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal of Mr. E.R. filed against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina number 070-0-Uvp-08-000046 of 27 January 2010 is rejected as inadmissible for being *ratione materiae* **incompatible with the Constitution of Bosnia and Herzegovina.**

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

Reasoning

I. Introduction

1. Mr. E.R. („the appellant") from Sarajevo, represented by Mr. Sadudin Zaklan, attorney at law practicing in Mostar, lodged on 25 February 2008 an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Judgment of the Cantonal Court in Mostar („the Cantonal Court") no. 007-0-U-06-000 638 of 17 December 2007. On 10 May 2010, the appellant lodged another appeal against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina („the Supreme Court") no. 070-0-Uvp-08-000046 of 27 January 2010.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 5 March 2008 it was requested from the Cantonal Court, the Federal Ministry of Physical Planning and Environment („the Federal Ministry") and from Ms. J.R. (the occupancy right holder over the apartment at issue) to submit their respective responses to the appeal.

3. The Cantonal Court, the Federal Ministry and Ms. J.R. submitted their respective responses on 14, 19 and 26 March 2008.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the responses by the Cantonal Court, the Federal Ministry and Ms. J.R. were transmitted to the appellant on 24 April 2008.

III. The Facts of the Case

5. The facts of the case as following from the appellant's allegations and the documents presented to the Constitutional Court may be summarized as follows.

6. The appellant has full ownership over real property marked as cadastral lot („c.l.") 58/16, registered in the land registry entry no. 6729 of the Cadastral Municipality („C.M.") Mostar, consisting of a ground floor, one floor and high attic. After World War II, the appellant's deceased father's relatives moved into the apartment situated on the first floor (123.50 m^2 of floor space) as co-tenants. They were Ms. J.R.'s parents. In 1963, the competent administrative authorities allocated to them occupancy right over that apartment („apartment at issue"), which remained „owned by citizens" (occupancy rights could be acquired over socially-owned apartments and apartments owned by citizens). After the death of her parents, Ms. J.R. became the occupancy right holder over the apartment at issue.

7. On 12 November 2003, the appellant submitted a request to the Ministry of Civil Engineering, Physical Planning and Environment of the Hercegovačko-neretvanski Canton („the first instance body") for removal of Ms. J. R. from the apartment at issue and her moving into another apartment situated in the high attic, 69.97 m^2 of floor space. In his request, the appellant invoked Article 56 of the Law on Housing Relations.

8. The first instance body issued a Ruling no. UP-09-25-03-473/03 of 4 April 2005, confirming that the appellant had full ownership over the house specifically described in the enacting clause of the ruling and that Ms. J. R. was using the apartment of 123.50 m^2 floor space, situated on the first floor. The first instance body ordered Ms. J. R. to move out of the apartment at issue and surrender her keys to the appellant, while it ordered the appellant to deliver Ms. J. R. the possession of the apartment of 69.97 m^2 floor space situated in the attic. The first instance body stated that it had taken the decision on the basis of Article 56 of the Law on Housing Relations.

9. Acting upon the appeal of Ms. J. R., the Federal Ministry issued a Ruling no. UPII/05-23-5-101/04 of 9 September 2005, annulling the first instance ruling and returning the case for renewed proceedings. In the reasoning part, the Federal Ministry gave its instruction to the first instance body as to what measures it ought to take in order to resolve the concerned request of the appellant.

10. In renewed proceedings, the first instance body issued the Ruling no. UP-09-25-03-473/03 of 4 January 2006, dismissing the appellant's request as ill-founded. It was stated in the reasoning part that there were no longer any legal possibilities for acquisition of occupancy right over the apartment offered by the appellant.

11. The Federal Ministry issued the Ruling no. UPII/05-23-5-101/04 of 19 September 2006 dismissing the appellant's appeal against the first instance ruling as ill-founded. In the reasoning part, the Federal Ministry stated that, pursuant to Article 46(1) of the Law on Sale of Apartments with Occupancy Rights („the Law on Sale of Apartments") there were no longer any legal possibilities for acquisition of occupancy right subsequent to 6 December 2000 because, after that date, all contracts on use of apartments ceased to be valid. The Federal Ministry, therefore, concluded that, in spite of the fact that the appellant was in position to offer Ms. J.R. as the occupancy right holder an adequate apartment or apartment suited to her needs, it had no bearing on the possibility of acquiring occupancy right over the apartment at issue. Therefore, the appellant's request for removal of Ms. J.R., under Article 56(2) of the Law on Housing Relations, from the apartment at issue and allocating her another, adequate apartment, was ill-founded.

12. The appellant initiated an administrative dispute by filing action before the Cantonal Court against the second instance ruling. In his action, he stated that the administrative bodies could not apply Article 46(1) of the Law on Sale of Apartments on the basis of which the acquisition of occupancy rights had been rendered out of force subsequent to 6 December 2000, because the case referred to in Article 56 of the Law on Housing Relations did not involve the acquisition of occupancy right but it was a specific kind of exchange of apartments. The appellant also claimed that such interpretation of Article 56 of the Law on Housing Relations violated his right to property because his proprietary right was thereby disproportionately burdened in relation to the occupancy right of Ms. J.R. The Cantonal Court issued the Judgment no. 007-0-U-06-000 638 of 17 December 2007, dismissing the appellant's action as ill-founded. In the reasoning of that judgment, the Court stated that the application of Article 56 of the Law on Housing Relations would involve the acquisition of a new occupancy right, which, pursuant to Article 46(1) of the Law on Sale of Apartments, was not allowed after 12 December 2000. The Court, further, concluded that there had been no violation of the appellant's right to property because the appellant's right was restricted by the provisions of the Law on Housing Relations in public interest, for the protection of the occupancy right holders.

13. Against this judgment, the appellant filed a request for extraordinary review of the judgment of the Cantonal Court in Mostar. The Supreme Court of the Federation of Bosnia

and Herzegovina issued the Judgment no. 070-0-Uvp-08-000046 of 27 January 2010, dismissing the request as ill-founded.

IV. Appeal

a) Allegations in the appeal

14. The appellant complains that the challenged judgments violated his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), as well as his right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. The appellant highlighted that the administrative bodies and courts had arbitrarily interpreted Article 56 of the Law on Housing Relations because it was not about acquisition of a new occupancy right but about exchange of the existing occupancy right. He states that the meaning of Article 56(2) of the Law on Housing Relations was to protect from abuse the private owner who lost possession of apartment after World War II, i.e. that the occupancy right holders may not utilize private apartments outside of their real housing needs. The appellant also alleged that in cases where an apartment was in private ownership but burdened with the occupancy right it was „illusory to apply Article 46(1) of the Law on Sale of Apartments" because the aim of this law and this provision was privatization of socially-owned apartments and gradual termination of occupancy rights, while his apartment was already privately-owned.

15. The appellant further alleged that if the Constitutional Court considered the interpretation of Article 56(2) of the Law on Housing Relations had not been arbitrary in his specific situation, then the impossibility of application of this article due to the application of Article 46(1) of the Law on Sale of Apartments was unconstitutional because his right of ownership was restricted in an disproportional manner. Namely, the appellant is of the opinion that it is not proportional that Ms. J.R. lives alone in the apartment of 123.50 m^2 floor space while he, as the owner of that apartment, in spite of the fact that he is offering her adequate apartment, must live in the apartment of 69.97 m^2 floor space with the other two members of his household. The appellant invoked the decision of the European Court of Human Rights (the „European Court") *Schirmer vs. Poland*.

b) Response to the appeal

16. The Cantonal Court emphasized that it maintained the position taken in its judgment and the reasons stated in it and that the appellant's constitutional rights and freedoms had not been violated by the issued judgment.

17. The Federal Ministry stated that Ms. J.R. was the occupancy right holder. If another apartment was allocated to Ms. J.R., it would be impossible for her to realize her rights under Article 8 of the Law on Return, Allocation and Sale of Apartments with Occupancy Rights.

18. Ms. J.R. considers the appeal to be ill-founded and holds that the contested judgment has been issued in accordance with the Constitution of Bosnia and Herzegovina and the European Convention. She opines that the restriction of the appellant's ownership right is provided by law, in public interest, which is the protection of the occupancy right holder. In addition, Ms. J.R. highlighted that she has been living in the apartment at issue for nearly 60 years, i.e. as a cotenant since 1949, and, since 1963, as a member of the family household of the occupancy right holder.

V. Relevant Law

19. The **Law on Housing Relations** (*Official Gazette of SR BiH* nos. 13/74, 23/76, 34/83, 12/87 and 36/89, and *Official Gazette of FBiH* nos. 11/98 and 19/99) in its relevant part reads as follows:

Article 1

Rights and responsibilities of an owner of the apartment and citizens using a socially or privately owned apartment shall be regulated by this law.

Article 2

[...]

A citizen who has acquired occupancy right to the apartment in a family house in other words in a separate part of the building (hereinafter refers to as: the privately owned apartment) by the effective date of the Law on Housing Relations (Official Gazette of the SRBH no. 13/74), has all rights and responsibilities stipulated by this law for the occupancy right holder and his family members in other words users of the apartment, if not otherwise regulated.

[...]

Article 55

The owner of the apartment has the right to move into that apartment after termination of the occupancy right on an apartment owned by citizens.

Article 56

The owner of the apartment can seek from the housing body to move into his/her apartment or a part of the apartment if the occupancy right's holder is offered an appropriate apartment as a replacement.

The person who owned that apartment before 1 January 1959 can ask from the housing body to move into his/her apartment or a part of the apartment if as a replacement the holder of occupancy right is offered an apartment that suits his/her real needs.

The person who owned that apartment before l January 1959 can ask from the housing body to move into his/her apartment or a part of the apartment in case when as a replacement the holder of occupancy right is offered an apartment that is proportional in size and equipment to the part of the apartment really used by the holder of occupancy right with the members of his/her family household, if he/she rents a part of the apartment to co-occupants or rents a part of the apartment in business purposes.

Pursuant to the regulation of the Municipal Assembly, it shall be determined whether the offered apartment suits to the real needs of the holder of occupancy right, or whether it is proportional to the part of the apartment that he has been actually using.

Right to move into the apartment, according to provisions of Items 2 and 3 of this article, has the owner of the apartment who gained that apartment by inheriting it from the deceased owner before 1 January 1959.

The owner of the apartment, who moves into his/her apartment or a part of the apartment, pursuant to the provisions of Items 2, 3 and 5 of this article, cannot exchange or transfer it within the period of five years from the day of moving into it.

In all the cases of this article, the owner of the apartment shall bear the expenses of moving of the occupancy right's holder. If parties do not reach an agreement on moving expenses, their cost shall be determined by the housing body.

20. The **Law on Sale of Apartments with Occupancy Right** (*Official Gazette of FBiH* nos. 77/97, 11/98, 22/99, 27/99, 7/00, 32/01, 61/01, 36/06, 51/07 and 72/08) in its relevant part reads as follows:

Article 1

This Law shall regulate conditions and method of sale of apartments with occupancy right together with the common parts and facilities of the building, as well as the method of determining the price of the apartment and cessation of occupancy right.

[...]

Article 46

Contracts on the use of apartment which were concluded under the Law on Housing Relations by the day of the entry into force of this Law, shall cease to be valid at latest within three years from the date of the entry into force of this Law.

[...]

Article 47

(1) Provisions of this Law shall not be applied to the sale of privately owned apartments which have not been subject to nationalisation, on which the occupancy right has been acquired.

[...]

21. The **Law on Return, Allocation and Sale of Apartments** (*Official Gazette of FBiH* no. 28/05) in its relevant part reads as follows:

Article 6

The competent housing body shall ex officio conduct the proceedings if the holder of the occupancy right is a company which has been privatized.

If in the proceedings referred to in paragraph 1 of this article the housing body establishes that the conditions as referred to in the provision of Article 4 of this Law have been met, it shall by way of issuing a ruling place such apartment at the disposal of the municipality on whose territory the apartment is situated.

Article 8

Municipality disposes of apartments referred to in Article 6(2) of this Law by allocating apartments to persons whose right has been established by the special law on restitution, to the occupancy right holders over privately owned apartments, to the employees of the holder of allocation right - company which had been privatized [...].

Priority order for allocation of apartments to the categories of persons referred to in paragraph 1 of this article shall be established by cantonal regulations.

The holder of the occupancy right over privately owned apartment shall be entitled to be allocated an apartment in case:

a) he or she has no housing facility in their ownership on the territory of the same municipality or

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b) a member of his immediate family who lived with him or her in the concerned apartment has no housing facility in their ownership on the territory of the same municipality.

[...]

22. The **Law on Administrative Disputes** (*Official Gazette of FBiH* no. 9/05) in its relevant part reads as follows:

Article 41

The request for extraordinary review of a court's decision (the „request for extraordinary review") taken in an administrative dispute may be lodged by a party against a final decision of a cantonal court with the Supreme Court of the Federation or to the cantonal court.

A request for extraordinary review may be lodged with the Supreme Court of the Federation by a party for violation of a federal law or another federal regulation or a breach of the rules of federal law on procedure which might have affected resolving of the matter through cantonal court.

[...]

A request for extraordinary review may not be lodged for a breach of the rules of procedure relating to erroneously or incompletely established facts.

Article 46

Court of competent jurisdiction shall dismiss of grant the request referred to in Article 41 of this Law.

By reaching the judgment upholding the request referred to in paragraph 1, the court may overturn or revise the court decision against which the request is lodged.

Should the Supreme Court of the Federation overturn the court decision, the case shall be remanded to the cantonal court the decision of which has been overturned. Should the cantonal court overturn the court decision, the case shall be remanded to the panel referred to in paragraph 3 of Article 42 of this Law, i.e. to the single judge whose decision has been overturned. Such court or panel or single judge must perform all procedural actions and discuss the issues indicated to the court by the court of competent jurisdiction and thereafter make an appropriate decision.

23. The **Judgment of the Constitutional Court of the Federation of Bosnia and Herzegovina** no. *U 33/05* of 19 July 2006 (*Official Gazette of FBiH* no. 55/06) in its relevant part reads as follows:

It is hereby established that Article 47(1) of the Law on Sale of Apartments with Occupancy Right is not incompatible with the Constitution of the Federation of Bosnia and Herzegovina. […]

VI. Admissibility

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

25. Pursuant to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may consider an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last effective remedy used by the appellant was served on him/her.

Admissibility in relation to the Judgment of the Supreme Court no. 070-0-Uvp-08-000046 of 27 January 2010

26. The appellant is appealing against the Judgment of the Supreme Court no. 070-0-Uvp-08-000046 of 27 January 2010 which dismissed his request for extraordinary review of the Judgment of the Cantonal Court no. 007-0-U-06-000 638 of 17 December 2007. In that respect, the Constitutional Court holds that it is necessary to address the issue whether the relevant proceedings concern determination of the appellant's civil rights and obligations in terms of Article 6(1) of the European Convention. In respect of the request for extraordinary review of a final judgment, the European Court established on several occasions that the proceedings seeking extraordinary review of finalized cases were not effective remedies, since in those cases there existed a judgment finalizing the concerned proceedings on the merits of the appellant's request which gained the force of *res iudicata* (see *mutatis mutandis* the decision on admissibility of the former European Human Rights Commission, *X vs. Austria*, application number 1760/63, Yearbook IX (1966), pg. 166 (174)), application number E 10431/83 of 16 December 1983, Decisions and Reports (DR) 35, pg. 243). In view of the aforementioned, the Constitutional Court finds that the concerned proceedings to decide about the request for extraordinary review of the judgment of the Cantonal Court which led to the finalization of the administrative proceedings deciding about the merits of the appellant's request do not concern the determination of his civil rights and obligations in terms of Article 6(1) of the European Convention but that they exclusively concern the determination of the existence of legal requirements for extraordinary review of the final judgment. Accordingly, the

Constitutional Court concludes that the concerned proceedings processing the request for extraordinary review of the judgment were not conducted in order to determine the appellant's rights under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention or under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. It follows that the appeal is in this part incompatible *rationae materiae* with the Constitution of Bosnia and Herzegovina and the European Convention.

27. In view of the aforementioned and having in mind the provision of Article 16(4)(9) of the Rules of the Constitutional Court, pursuant to which an appeal shall be rejected as inadmissible if it is *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina, the Constitutional Court has decided as in the enacting clause of this decision.

Admissibility in relation to the Judgment of the Cantonal Court no. 007-0-06-000 638 of 17 December 2007

28. In the present case, the subject of the appeal is also the Judgment of the Cantonal Court no. 007-0-U-06-000 638 of 17 December 2007, against which there are no further effective remedies available under the law. In addition, the appellant received the challenged judgment on 27 December 2007, while the appeal was lodged on 25 February 2008, i.e. within 60 days, as stipulated by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal, in this part, also meets the conditions of Article 16(2) and (4) of the Rules of the Constitutional Court, as it is neither manifestly (*prima facie*) ill-founded, nor there are any other formal reasons on account of which the appeal would be inadmissible.

29. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that the concerned appeal meets the conditions in respect of admissibility.

VII. Merits

30. The appellant holds that the challenged decision has violated his right to a fair trial and his right to property under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention and under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

Right to property

31. Article II(3)(k) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

k) The right to property.

32. Article 1 of Protocol No. 1 to the European Convention, in the relevant part, reads:

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

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

33. In respect of the appellant's allegations that his right to property has been violated, the Constitutional Court notes that the apartment at issue is a part of the real property entered into the land registry as the property of the appellant as stipulated by law and that, beyond any doubt, it represents his „property" in terms of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

34. The Constitutional Court, further, recalls that the right to property contains three distinct rules. First rule, contained within the first sentence of the first paragraph, is of general nature specifying the principle of the peaceful enjoyment of possession. Second rule, contained within the second sentence of the same paragraph, relates to deprivation of possessions subjecting it to certain conditions. Third rule, contained within paragraph 2 of the same article, specifies the right of a State to, *inter alia*, control the use of property in accordance with the general interest. These three rules are interconnected and not in contradiction amongst themselves: the second and third rules relate to specific cases of interference by the state with the right to peaceful enjoyment of possession and should be interpreted within the general principle specified in the first rule (see the European Court, *Sporrong and Lönnorth vs. Sweden*, judgment of 23 September 1982, Series A, no. 52, paragraph 61). In the present case, the Constitutional Court notes that the challenged judgment amounts to interference with the appellant's property in terms of the third rule contained in paragraph 2 of Article 1 of Protocol No. 1 to the European Convention.

35. The Constitutional Court recalls that any interference, pursuant to the second and third rules, must be provided by the law, serve a legitimate aim, and strike a fair balance between the holder of a right and the public and general interest (the principle of proportionality). In other words, justified interference may not only be imposed by a legal provision meeting the requirements of the rule of law and serving a legitimate aim in public interest but it also has to maintain a reasonable relationship of proportionality between the means employed and the aims sought to be realized. Interference must not go further than necessary in order to achieve the legitimate aim, while the holders of the right must not be subjected to arbitrary treatment or forced to bear excessive burden in pursuance of the legitimate aim (see the judgments of the European Court of Human Rights, *Sunday Times* of 26 April 1979 Series A, no. 30, paragraph 49, and *Malone* of 2 August 1984, Series A, no. 82, paragraphs 67 and 89).

36. In the present case, the appellant alleges violation of his right to property because it was made impossible for him to enter the possession of the apartment at issue over which he has ownership right although he has met all the legal conditions to do so because he provided another apartment to the holder of the occupancy right which suits her real housing needs. The appellant holds this interference to be unlawful because his request was dismissed by invoking Article 46(1) of the Law on Sale of Apartments which is not applicable to the present situation.

37. As to the question whether the interference with the appellant's right was provided by law, the Constitutional Court notes that Article 56(2) of the Law on Housing Relations stipulates that the person who owned an apartment before 1 January 1959 can ask from the housing body to move into his/her apartment or a part of the apartment if as a replacement the holder of occupancy right is offered an apartment that suits his/her real needs. It is, therefore, beyond any doubt that pursuant to this provision the owner of the apartment is entitled, under certain conditions provided by the law, to enter the possession of his apartment over which another person has the occupancy right. A question arises in the present case whether this right of the owner of the apartment has been derogated in any way by another law, as concluded by the Cantonal Court and the administrative bodies.

38. In response to that question, the Constitutional Court firstly wishes to point out that the transitional regime of gradual revoking of certain rights which existed after World War II and which, *inter alia*, burdened private ownership may be in accordance with the market economy based upon private ownership. It is similar with the transitional regime of gradual revoking of public control over private property (see the European Court, *Schirmer vs. Poland*, judgment of 21 September 2004, application no. 68880/01,

paragraph 38). However, the European Court highlighted in the cited judgment *Schirmer vs. Poland* that the difficulties which might arise for the Member States in removal of the consequences of the former socialist regime do not exempt the Member States from complying with the standards of the European Convention (*idem*).

39. In the present case, the Constitutional Court notes that the Cantonal Court and the administrative bodies construed that the appellant's right under Article 56 of the Law on Housing Relations had been derogated by Article 46(1) of the Law on Sale of Apartments, according to which it was impossible to acquire occupancy right after 6 December 2000. In that regard, the Constitutional Court emphasizes that the Law on Sale of Apartments was enacted in order to meet two socially significant interests: the finalization of the privatization process of socially (state)-owned apartments, including the category of nationalized and confiscated apartments, as well as the prohibition of any further acquisition of occupancy rights as a special, socialist *quasi*-property right *in rem*. The aim of the Law on Sale of Apartments is privatization of socially (state)-owned property, which includes the right to privatization of property which became socially (state)-owned through nationalization or confiscation after World War II. This law was also aimed at establishing of time-limits for acquiring occupancy rights in this manner, following which any further acquisitions of new occupancy rights over such property was prohibited in order to conduct effective process of privatization of socially (state)-owned apartments and resolving the status of the occupancy right holders over such apartments.

40. Furthermore, the Constitutional Court holds that the aim of the Law on Sale of Apartments was not making it possible for the occupancy right holders over apartments which had been and remained in private ownership to purchase such apartments. The Constitutional Court highlights that the explicit provision of Article 47(1) of the Law on Sale of Apartments stipulates that „provisions of this Law shall not be applied to the sale of privately owned apartments which have not been subject to nationalisation, on which the occupancy right has been acquired". Also, the Constitutional Court recalls that the decision of the Constitutional Court of the Federation of Bosnia and Herzegovina established that the above mentioned article was not incompatible with the Constitution of the Federation of Bosnia and Herzegovina (see, the Constitutional Court of FBiH, judgment no. *U 33/05* of 19 July 2006, available at www.ustavnisudfbih.ba.)

41. On the other hand, the Law on Housing Relations regulates the rights of the occupancy right holders over apartments which remained privately owned after World War II, which is a separate category of occupancy right holders which used to be called „protected tenants". The Law on Housing Relations is still applicable in the part in which

its provisions have not been derogated by entry into force of other laws. It follows from this analysis that such derogation is not present in the Law on Sale of Apartments which was invoked by the ordinary court and administrative bodies. This standpoint is not affected by Article 46(1) of the Law on Sale of Apartments stipulating that after 6 December 2000 all occupancy rights cease to be valid, since the provisions of that law, as already stated, do not relate to the situation at issue. Even if the „protected tenant" could not use adequate replacement apartment as the holder of occupancy right, the owner of the apartment would not lose the right to move into his apartment. In which capacity would the occupancy right holder use that apartment is not the issue relevant to this particular dispute, but it is an issue to be dealt with by a competent legislator in an appropriate manner. However, the Constitutional Court highlights that even failure, if any, by the competent legislator to enact such regulations does not derogate or diminish the right of the owner to request to move into his apartment, and neither does it derogate or diminish the right of the „protected tenant" to have the owner in such case provide him with adequate apartment in terms of the Law on Housing Relations.

42. In view of the above, the Constitutional Court concludes that, in the present case, the Cantonal Court and administrative bodies, by applying the Law on Sale of Apartments which does not relate in any way to the present legal situation, have interfered with the appellant's right to property in the manner not „provided by the law" and that, therefore, the appellant's right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention has been violated.

Other allegations

43. In view of the conclusion in relation to the violation of the right under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, the Constitutional Court finds that it is not necessary to examine the allegations from the appeal related to the violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

VIII. Conclusion

44. The Constitutional Court finds that there has been a violation of the appellant's right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, when the Cantonal Court and administrative bodies, by applying the Law on Sale of Apartments to the situation regulated exclusively by the Law on Housing Relations, unlawfully interfered with the

appellant's right to peaceful enjoyment of property, thereby making it impossible for the appellant to realize his right under Article 56 of the Law on Housing Relations after meeting the proscribed conditions.

45. Pursuant to Article 16(4)(9), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as in the enacting clause of this decision.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 1676/10

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Društvo za upravljanje fondovima „Bosinvest" d.o.o. Sarajevo – „Bosinvest" Asset Management Ltd. Sarajevo, against the Ruling of the Cantonal Court in Sarajevo, no. 09 0 U 006568 10 U of 19 April 2010

Decision of 27 November 2010

CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in plenary and composed of the following judges:

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Mr. David Feldman,

Mr. Mirsad Ćeman

Having deliberated on the appeal of **Društvo za upravljanje fondovima „Bosinvest" d.o.o. Sarajevo – „Bosinvest" Asset Management Ltd. Sarajevo**, at its session held on 27 November 2010 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Društvo za upravljanje fondovima „Bosinvest" d.o.o. Sarajevo – „Bosinvest" Asset Management Ltd. Sarajevo against the Ruling of the Cantonal Court in Sarajevo, no. 09 0 U 006568 10 U of 19 April 2010 is dismissed as ill-founded.

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

Reasoning

I. Introduction

1. On 11 May 2010, Društvo za upravljanje fondovima „Bosinvest" d.o.o. Sarajevo – „Bosinvest" Asset Management Ltd. Sarajevo, represented by Mr. Branko Marić, a lawyer practicing in Sarajevo filed an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Ruling of the Cantonal Court in Sarajevo („the Cantonal Court"), no. 09 0 U 006568 10 U of 19 April 2010. The appellant also filed a request for interim measure whereby the Constitutional Court would suspend the enforcement of the Ruling of the Securities Commission of the Federation of Bosnia and Herzegovina („the Commission"), no. 05/2-19-81/10 of 9 March 2010, pending the administrative dispute before the Cantonal Court, no. 09 0 U 005668 10 U, for the annulment of the ruling of the Commission dated 9 March 2010.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 19 May 2010 the Cantonal Court and the Commission were requested to submit their replies to the appeal.

3. The Cantonal Court submitted its reply to the appeal on 27 May 2010, and the Commission submitted its reply on 31 May 2010.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies of the Cantonal Court and the Commission were communicated to the appellant on 16 September 2010.

III. Facts of the Case

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

6. By Ruling no. 05/2-19-81/10 of 9 March 2010, the Commission revoked the appellant's license to manage the property of a Closed-End Investment Fund. The appellant was banned from disposing of the property of the Closed-End Investment Fund with Public Offering „Bosfin" d.d. Sarajevo. It was determined that the securities purchase and sales orders, which the appellant gave on behalf of and for the Closed-End Investment Fund with Public Offering „Bosfin" d.d. Sarajevo and on which basis no transactions had been concluded until the date of adoption of the ruling in question, were stopped, and no

transactions could be effectuated based on them, or transfers made within the Registry of Securities of the Federation of BiH.

7. According to the Ruling, the Register of Securities of the Federation of BiH was ordered to ban the transfer of shares owned by the Closed-End Investment Fund with Public Offering „Bosfin" d.d. Sarajevo as of the date of receipt of the Ruling.

8. Furthermore, the appellant was ordered to make it possible for Raiffeisen BANK d.d. Bosna i Hercegovina which, as depositary of the Closed-End Investment Fund with Public Offering „BOSFIN" d.d. Sarajevo, was entrusted with the task of taking over the documentation of the Fund and safeguarding the entire property of the Fund against further disposal until such time the management activities are transferred to another management company.

9. The Supervisory Board of the Closed-End Investment Fund with Public Offering „BOSFIN" d.d. Sarajevo was obliged to convene the Fund's assembly to make a decision on the transfer of management activities to another management company with which the Supervisory Board of the Fund would conclude a contract.

10. It was stated that the Ruling enters into force on the date of its rendering and that it will be published in the *Official Gazette of the Federation of Bosnia and Herzegovina*. An appeal against the Ruling is not admissible.

11. On 9 April 2010 the appellant brought an action against the Commission for the annulment of the Commission's Ruling dated 9 March 2010. In its action, the appellant put forward a motion to postpone the enforcement of the challenged Ruling pending the completion of the administrative dispute. By Ruling no. 09 0 U 006568 10 U of 12 April 2010, the Cantonal Court rejected the aforementioned motion, since the procedural requirements under Article 17 of the Law on Administrative Disputes (*Official Gazette of the Federation of BiH*, no. 9/05) were not met.

12. By a submission dated 15 April 2010, the appellant requested anew the postponement of enforcement of the Commission's Ruling dated 9 March 2001. By Ruling no. 09 0 U 00 6568 10 U of 19 April 2010, the Cantonal Court dismissed the motion.

13. According to the reasoning for the Ruling, Article 17 paragraphs 2 and 3 of the Law on Administrative Disputes provide that upon a request of the appellant, the authority competent for enforcement of the challenged administrative act shall delay the enforcement pending the final court decision if the enforcement would inflict damage on the appellant which could be difficult to mend, and if a delay is not contrary to the public interest, or

would not cause an irreparable damage to the opposite party, and for other reasons, if the public interest allows so. Paragraph 4 of the aforementioned Article provides that the competent Court, before which an action is brought under paragraphs 2 and 3 of this Article, may also decide on delay of the enforcement of the administrative act against which an action is brought, if the appellant requests so in writing and provided that the appellant did not previously request the competent administrative authority to postpone the enforcement of the ruling.

14. It was established that on 25 March 2010, the appellant requested the Commission to issue a certificate confirming that it had not previously addressed the Commission as the competent authority with an action for the postponement of the enforcement of the challenged ruling until the completion of the dispute in question. Taking into account that on 14 April 2010 the appellant urged the Commission to issue such a certificate by referring to its previous phone calls, and the Commission's reply dated 15 April 2010 to the appellant's request, the Cantonal Court considered as fulfilled the procedural requirement under Article 17 paragraph 4 of the Law on Administrative Dispute for the court to decide on the motion for the postponement of enforcement of the challenged ruling, since the appellant had not previously addressed the defendant as the competent body with such a motion.

15. While examining the existence of requirements prescribed by Article 17 paragraphs 2 and 3 of the Law on Administrative Disputes for the postponement of enforcement of the challenged ruling pending the completion of administrative dispute, the Cantonal Court found that such requirements did not exist. In this respect, the Cantonal Court stated that the Commission issued the challenged act while carrying out the supervision, within the meaning of the provision of Article 12, items 1 and 10 of the Law on Securities Commission (*Official Gazette of the Federation of BiH*, nos. 39/98, 36/99 and 33/04), which provides that the Commission, in the interest of the investor and the public, shall supervise the application of laws and other regulations relating to issuance and trade of securities and shall carry out the supervision and control of management of the funds' property, and in the event that such activities threaten these interests, it shall suspend the issuance and trade. Therefore, as the provision of Article 17, paragraph 2 of the Law on Administrative Disputes stipulates that the condition to postpone the enforcement is that it is not contrary to the public interest, according to the court, it is obvious that that the requirement for the postponement was not met but, quite the opposite, the postponement would be contrary to the public interest.

16. In this connection, it is alleged that it is in the public interest that the appellant's activity, i.e. the management of investment fund be performed fully in accordance with

the legal provisions regulating that activity, all the more so since the appellant itself alleges that the value of the fund's property is huge, which is the reason why the sought postponement is contrary to the public interest. Furthermore, in the court's opinion, the enforcement of the challenged ruling before the completion of the administrative dispute would not result in irreparable damage for the appellant. The appellant manages the fund and earns the management fee based on the contract dated 22 April 2009. According to the 2010 Business Plan, the planned management fee amounted to BAM 100,000.00 per month, i.e. BAM 1,200,000.00 per annum, so that the prospective damage is measurable and, in the court's opinion, the aforementioned damage is not hard to compensate, that is to say it is not irreparable. According to the Cantonal Court's opinion, the postponement would cause more substantial irreparable damage to the respondent party, i.e. to the fund itself, the property of which is of huge value, as also stated by the appellant itself. Therefore, as none of the requirements to postpone the enforcement of the challenged ruling pending the administrative dispute were met, the Cantonal Court decided as stated in the enacting clause of the ruling in accordance with Articles 17 and 36(7) of the Law on Administrative Disputes.

IV. Appeal

a) Statements from the appeal

17. The appellant complains that the challenged decision is in violation of its 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 („the European Convention"), the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention and the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. The appellant claims that it is a fund management company registered at the Municipal Court in Sarajevo under the Activity Code 67.120 - securities brokerage. The appellant is therefore of the opinion that the rendering of the challenged decision dismissing its motion for the postponement of enforcement prevents the appellant from continuing performing its core business until the moment the administrative dispute is finally resolved. Taking into account the usual duration of administrative disputes, this means that the appellant as a commercial company would close down, since the Fund managed by the appellant has to have a specialized company so that the consequence of the Commission's administrative act would be the fact that the Fund would choose a new management company, whereby the appellant's existence would lose its purpose. In the appellant's opinion, the Cantonal Court did not

consider the situation in question but it took as a starting point the assumption that the Commission was infallible. The appellant claims that such decision of the court gives rise to the issue of what the purpose of an administrative dispute is and who will provide the party with protection in case of unlawful conduct by the one who is in charge of implementing the law, if the court itself decides by taking as a starting point the assumption that such authorities are infallible without assessing the facts in each particular case. The appellant further claims that the enforcement of the challenged ruling would result not only in damage consisting of profit loss, i.e. pecuniary damage, but also in closing down the company's business, closing all job positions and the loss of all that has been invested in the company. If the court does not consider the aforementioned to be an irreparable damage, the question arises as to know when one can consider that damage has occurred. Although the adoption of the challenged decision does not imply that the merits of the case has been decided, the appellant is of the opinion that it is obvious that for the appellant the challenged ruling ended the proceedings, since the appellant would cease to exist through the enforcement of the challenged ruling and taking into account the length of the administrative dispute. The appellant also points out that one needs to take into account that the Closed-End Investment Fund with Public Offering „BOSFIN" d.d. Sarajevo will conclude a new contract on transfer of management activities to another management company (whereby the manner in which it would be restored to the appellant in the event the appellant succeeds in the administrative dispute is not defined).

18. As to the reason for adoption of an interim measure by the Constitutional Court, the appellant alleges that the revocation of its management license will result in the cessation of its right to engage in its core and sole registered activity, which will ultimately lead to the liquidation of the appellant along with all consequences arising therefrom. Furthermore, the appellant alleges that the revocation of its management license would cause a direct pecuniary damage both for the appellant itself and for the founders who have invested significant pecuniary funds. The appellant outlines that the monthly amount of pecuniary damage is estimated to be BAM 100,000.00 that is BAM 1,200,000.00 annually, which is the planned revenue from the management fee in 2010, whereas indirect damages cannot even be qualified. The appellant earns income by performing its core activity based on the Management Contract no. 244/09 concluded on 22 April 2009 with the Closed-End Investment Fund with Public Offering „Bosfin" d.d. Sarajevo and has no other revenues. If the enforcement of the ruling dated 9 March 2010 is not postponed and the Closed-End Investment Fund with Public Offering „Bosfin" d.d. Sarajevo concludes a contract with another fund management company, the appellant will suffer irreparable damage, since the manner in which the Fund is to be restored to the company, which management

license has been revoked, was not defined. Furthermore, the revocation of license and cancellation of the management contract will result in the termination of employment for five of the appellant's employees. Taking into account the aforesaid, the appellant is of the opinion that the enforcement of the ruling of 9 March 2010 would result in discontinuation of the appellant's business and the total termination, that is liquidation, thereby causing irreparable damage, which would be hard to redress.

b) Response to the appeal

19. In its reply to the appeal, the Cantonal Court alleges that the challenged ruling is not in violation of the appellant's constitutional rights and that it remains fully supportive of the reasons stated in its ruling.

20. In its reply to the appeal, the Commission alleges that the challenged decision is not in violation of the appellant's constitutional rights and proposes that the appeal be rejected, and if the Court finds that the appeal is admissible, then it proposes that the appeal be dismissed. In this connection, the Commission alleges *inter alia* that the appellant and similar companies manage closed-end investment funds which constitute the form of collective investment and have thousands, even tens of thousands of shareholders. These shareholders have entrusted the appellant with the management of their property. If the appellant does not perform its activity in accordance with the regulations, the public interest, which constitutes the confidence in collective investment and market economy in general, shall be undermined and damage shall be caused to the investment fund. In the instant case, it is beyond any doubt that the appellant caused damage to the investment fund and to its shareholders consequently. This precisely reflects the Commission's competencies under Articles 11 and 12 of the Law on Commission, since these competencies are conferred on the Commission to protect the confidence in the market, investors and all interested parties, which is the public interest. In addition to the aforementioned, the administrative acts of the Commission are final and the law provisions do not provide for an appeal against them, which is an identical situation with the solutions where an appeal is allowed but does not postpone the enforcement of the ruling. In such cases the courts voiced their view that the postponement of enforcement of a ruling would be contrary to the public interest. Furthermore, the Commission alleges that the challenged ruling of the Commission constitutes the protection of the property of the investment fund against poor management, which implies that the present case relates to the fund's property, and not to the appellant's property.

V. Relevant Law

21. The **Law on Administrative Disputes** (*Official Gazette of the Federation of BiH* no. 9/05)

Article 17

As a rule, an action shall not operate to delay enforcement of the disputed final administrative act, unless otherwise specified by law.

Upon the request of the plaintiff the institution competent for enforcement of the disputed final administrative act shall delay enforcement until the final court decision if the enforcement would inflict to the plaintiff damage which could be difficult to mend and if a delay is not contrary to public interest nor it would cause an irreparable damage to the opposite party. The evidence on filed action must be attached to the request for delay of enforcement. The competent institution shall have to issue decision in respect to each request not later than three days from the day of receipt of the request for delay of enforcement.

The competent institution referred to in paragraph 2 of this Article may also, for other reasons, delay the enforcement of the disputed final administrative act until the final court decision, if allowed so by public interest.

Under the conditions referred to in paragraphs 2 and 3 of this Article the competent Court before which the action is filed may also decide on delay of enforcement on delay of enforcement of the final administrative act against which the action is filed, if required by the plaintiff in writing. The plaintiff may file this request only if he/she/it did not previously request the institution referred to in paragraph 2 of this Article to delay enforcement of the ruling.

VI. Admissibility

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

23. Pursuant to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective legal remedies available under the law against a judgment/decision challenged by the appeal are exhausted and if the appeal was lodged within a time-limit of 60 days as from the date on which the decision on the last effective legal remedy used by the appellant was served on him/her.

24. Pursuant to Article 16(2) of the Rules of the Constitutional Court, the Constitutional Court shall reject an appeal as being manifestly (*prima facie*) ill-founded when it establishes that the request of the party to the proceedings is not justified or when the presented facts do not in any way justify the allegation of a violation of the rights safeguarded by the Constitution and/or when the Constitutional Court establishes that the party to the proceedings does not suffer the consequences of a violation of the rights safeguarded by the Constitution, so that the examination of the merits of the appeal is unnecessary.

25. In the present case, the Constitutional Court finds that the subject challenged by the appeal is the Ruling of the Cantonal Court no. 09 0 U 006568 10 U of 19 April 2010, which dismissed the appellant's motion for the postponement of enforcement of the ruling of the Commission dated 9 March 2001. The challenged decision was adopted in the administrative dispute which the appellant initiated by bringing an action against the Commission for annulment of the ruling dated 9 March 2010. Therefore, a final decision was not rendered in the proceedings instituted by the appellant' action, but the subject challenged by the appeal is the ruling which dealt with the appellant's motion for the postponement of enforcement of the ruling dated 9 March 2010. The aforementioned motion of the appellant is considered as a request for an interim measure according to the national law so that a decision upon the motion is considered a decision on interim measure.

26. According to its hitherto case-law and the case-law of the European Court of Human Rights („the European Court"), the Constitutional Court has held that appeals filed against decisions dealing with an interim measures are not admissible on the grounds that they are incompatible *ratione materiae* with the Constitution of Bosnia and Herzegovina (see Decision of the Constitutional Court no. AP-1918/05 of 13 October 2005, paragraph 13; no. AP-2087/05 of 17 November 2005, paragraph 8; and AP 2944/09 of 22 October 2009, published at: www.ustavnisud.ba). The reasoning which the Constitutional Court has given for this is that the ordinary court's rulings dealing with the well-foundedness of interim measures did not determine new or special rights of the appellants.

27. However, as to the applicability of the guarantees under Article 6 of the European Convention to the proceedings relating to the interim measures, the Constitutional Court finds that the European Court, in the judgement rendered on 15 October 2009 in the case of *Micallef vs. Malta,* has changed its case-law. Having explained a need for a development of the case-law in relation to the applicability of the guarantees under Article 6 of the European Convention to interim measures, the European Court has noted in the aforementioned decision that there is a widespread consensus amongst Council of

Europe Member States, which, either implicitly or explicitly, provide for the applicability of guarantees of Article 6 to interim measures, including injunction proceedings. It is also noted that the European Court of Justice considers that provisional measures must be subject to the guarantees of a fair trial, particularly to the right to be heard. In the European Court's opinion, the exclusion of interim measures from the ambit of Article 6 has so far been justified by the fact that those measures do not in principle determine civil rights and obligations. However, in a situation where many Contracting States face considerable backlogs in their overburdened justice systems leading to excessively lengthy proceedings, a judge's decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently, interim and main proceedings decide the same „civil rights or obligations" which result in far-reaching and permanent consequences.

28. The European Court has further noted that, considering the background of the case at hand, it no longer finds it justified to automatically characterise injunction proceedings as not determining civil rights or obligations. It was also noted that the European Court is not convinced that deficiencies in such proceedings could be remedied at a later stage, namely, in proceedings on the merits of the case governed by Article 6, since any prejudice suffered in the meantime may by then become irreversible and with little realistic opportunity to redress the damage caused, except perhaps for the possibility of pecuniary compensation.

29. The European Court of Human Rights thus found that a change in the case-law is necessary with respect to the applicability of Article 6 of the European Convention in these proceedings. To this end, it added that it is in the interest of legal certainty, foreseeability of the proceedings and equality of the parties before the court that the Court should not depart, without a good reason, from its earlier case-law laid down in previous cases, but that a failure by the Court to maintain a dynamic and evolutive approach could lead to blocking reform and progress (see, *mutatis mutandis, Mamatkulov and Askarov vs. Turkey* [GC], nos. 46827/99 and 46951/99, paragraph 121, ECHR 2005-I; and *Vilho Eskelinen* [GC], cited above, paragraph 56). It is also underlined that it must be remembered that the Convention is designed so as to „guarantee not rights that are theoretical or illusory but rights that are practical and efficient" (see, *inter alia*, *Folgerø and Others vs. Norway* [GC], no. 15472/02, paragraph 100, ECHR 2007-...; and *Salduz vs. Turkey* [GC], no. 36391/02, paragraph 51, 27 November 2008).

30. Further, the European Court recalled that Article 6 of the European Convention, that is its part relating to civil matters, applies only to proceedings determining civil rights and obligations. Thereby the European Court recalled that not all interim measures determine

such rights and obligations and the applicability of Article 6 will depend on whether certain conditions have been fulfilled.

31. In this regard, the European Court states, first of all, that the right at stake in both the main and the injunction proceedings should be „civil" within the autonomous meaning of that notion under Article 6 of the Convention (see, *inter alia, Stran Greek Refineries and Stratis Andreadis vs. Greece*, 9 December 1994, paragraph 39, Series A no. 301-B; *König vs. Germany*, 28 June 1978, paragraphs 89-90, Series A, no. 27; *Ferrazzini vs. Italy* [GC], no. 44759/98, paragraphs 24-31, ECHR 2001-VII; and *Roche vs. the United Kingdom* [GC], no. 32555/96, paragraph 119, ECHR 2005-X). Second, the very nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure effectively determines a civil right or obligation, irrespective of the time period of its applicability, Article 6 will apply.

32. It is stated that the European Court accepts that in extraordinary cases in which, for example, the effectiveness of a required measure depends on the speed of the process of adoption of a decision it may be hard to immediately comply with the requirements of Article 6 of the European Convention. Therefore, in such special cases, although independence and neutrality of the court or of a judge are irreplaceable and represent an absolute protection in such proceedings, other protective measures may be applied only to an extent in which they are compatible with the nature and goal of the procedure of adoption of interim measure. In each proceeding before the court, when it comes to the goal of the proceedings concerned, the Government shall be tasked with establishing that one or several special procedural protective measure cannot be applied without prejudging the goal sought to be achieved by the relevant interim measure.

33. While deciding on the applicability of Article 6 of the European Convention in the case at hand, the European Court found that the substance of the right in the main proceedings concerned the enjoyment of property rights in accordance with Maltese law, and that therefore that right is of a civil character according to both domestic law and the case-law of the European Court. The aim of the injunction was to determine, albeit for a limited period of time, the same right as the one being challenged in the main proceedings, and which was immediately enforceable. It follows that the injunction proceedings in the present case fulfil the criteria for Article 6 to be applicable and that the Government did not establish any reasons whatsoever that would limit the scope of its application in any respect.

34. By applying the mentioned positions of the European Court in the case at hand, the Constitutional Court finds that during the main proceedings, i.e. in the administrative

dispute, in his lawsuit the appellant sought the protection of his property rights through a request to establish that the decision of the Commission of 9 March 2010 is unlawful, which revoked the appellant's management license and banned the disposal of the property of the Closed-End Investment Fund. Accordingly, the Constitutional Court finds that the appellant manages the fund based on the contract of 22 April 2009 and collects a management commission in the monthly amount of BAM 100,000.00 or BAM 1,200,000.00 annually. It follows that the purpose of the appellant's lawsuit in the administrative dispute is the protection of the appellant's property interests which are interfered with by the decision of the Commission dated 9 March 2010. The purpose and objective of the appellant's request for the postponement of the enforcement of the Commission's decision dated 9 March 2010 were also the protection of the appellant's property interest which would come into question by the enforcement of the Commission's decision of 9 March 2010, which lawfulness is challenged by the appellant during the main proceedings. Therefore, it follows that the proceedings for adoption of the challenged decision was decisive for the effective exercise of the appellant's civil rights. Accordingly, the Constitutional Court, while taking into its consideration the criteria established by the European Court, considers that the guarantees of Article 6 of the European Convention apply to the proceedings of adoption of the challenged decision.

35. In view of the above and considering the new approach in the proceedings on interim measures taken by the European Court, which is supported by the Constitutional Court, this Court will depart from its hitherto case-law and will not reject the present appeal as *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina, within the meaning of Article 16(4)(9) of the Rules of the Constitutional Court.

36. Furthermore, the Constitutional Court will examine the admissibility of the appeal as to Article 16(1), (2) and (4) of the Rules of the Constitutional Court. In this regard, the Constitutional Court finds that the subject matter challenged by the appeal in the present case is the Ruling of the Cantonal Court no. 09 0 U 006568 10 U of 19 April 2010, against which there are no other effective legal remedies available under law, and the appeal was lodged with the Constitutional Court on 26 January 2008, *i.e.* within the 60 days time limit as stipulated in Article 16(1) of the Rules of the Constitutional Court.

37. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court, because it is not manifestly (*prima facie*) ill-founded nor is there any other formal reason that would render the appeal inadmissible.

VII. Merits

38. The appellant states that the challenged ruling is in violation of his right to life under Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention, 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 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.

39. Article II(3) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include: e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.

Article 6(1) of the European Convention, as relevant, reads:

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

40. The Constitutional Court recalls that according to the consistent case-law of the Constitutional Court and the European Court, Article 6(1) of the European Convention is applicable to the proceedings where the outcome of the proceedings is decisive for the determination of civil rights and obligations. The Constitutional Court has already established in the present decision that Article 6 of the European Convention is applicable to the present case. Therefore, the Constitutional Court, taking into account the nature and purpose of the relevant proceedings, will examine whether the fundamental requirements under Article 6(1) of the European Convention have been met.

41. In considering the appellant's complaints about a violation of the right to a fair trial relating to arbitrary application of the substantive and procedural law, the Constitutional Court recalls the consistent case-law of the European Court and the Constitutional Court according to which it is not the task of these Courts to review ordinary courts' findings related to facts and application of the substantive law (see European Court, *Pronina vs. Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01). Namely, the Constitutional Court is not called upon to substitute ordinary courts in the assessment of facts or evidence, but, in general, it is the task of ordinary courts to assess the presented facts and evidence (see European Court, *Thomas vs. United Kingdom*, Judgment of 10 May 2005, Application no. 19354/02). It is the Constitutional Court's task to examine whether

the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective remedy, *etc*.) have been violated or disregarded, and whether the application of a law was, possibly, arbitrary or discriminatory. Therefore, within its appellate jurisdiction, the Constitutional Court deals exclusively with the issue of a possible violation of the constitutional rights or the rights safeguarded by the European Convention in proceedings before the ordinary courts. In the case at hand, the Constitutional Court will examine whether the proceedings as a whole were fair as required by Article 6(1) of the European Convention (see Constitutional Court, Decision no. *AP 20/05* of 18 May 2005, published in the *Official Gazette of BiH* no. 58/05).

42. In view of the above, the Constitutional Court finds that the Cantonal Court, in considering the appellant's motion to postpone the enforcement, took into account the relevant provision of Article 17 of the Law on Administrative Disputes and found that the delay would be contrary to the public interest and that, given the monthly, *i.e.* annual amount of management commission collected by the appellant, the enforcement would not result in irreparable damage for the appellant. In addition, the Cantonal Court found that by granting the appellant's motion, the opposite party, *i.e.* the Fund managed by the appellant, could suffer greater damage, which property has immense value. In the opinion of the Constitutional Court, the Cantonal Court, in the challenged ruling, provided clear and precise reasoning, which do not seem to lead to the conclusion that the substantive law and procedural law were applied in an arbitrary manner, as claimed by the appellant. Furthermore, the Constitutional Court holds that the reasoning given by the Cantonal Court satisfy the standards set forth in Article 6(1) of the European Convention and that the appellant was not denied any procedural right during the relevant proceedings. It follows from the allegations stated in the appeal and the reasoning offered in the challenged decisions that the appellant was not denied the right to a hearing (which, according to the new case-law of the European Court in the quoted case, is the fundamental requirement in order for a decision of the court on interim measures to be consistent with Article 6(1) of the European Convention), the appellant was represented by a professional (a lawyer), and the ordinary court considered the appellant's proposals of evidence and allegations in a manner that cannot be deemed to be arbitrary, and based its decision on interim measure on the applicable legal provision (Article 17 of the Law on Administrative Disputes), which does not manifestly (*prima facie*) lead to a conclusion that it imposed an excessive burden on anyone.

43. Therefore, the Constitutional Court holds that the appeal is ill-founded and that there is no violation of the appellant's right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

44. Having regard to the conclusion in relation to the violation of the rights safeguarded by Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, the Constitutional Court holds that it is not necessary to examine other statements from the appeal relating to the violation of the appellant's right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, as it concerns, in essence, the same allegations as those relating to Article 6(1) of the European Convention and the Constitutional Court has already given its reasoning behind it.

Right to life

45. Article II(3) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

Right to life.

Article 2 of the European Convention reads:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

46. The Constitutional Court finds that Article 2 of the European Convention imposes upon the governmental authorities an obligation to protect everyone's right to life, wherefrom follows a prohibition of intentional deprivation of life. Therefore, the mentioned article, in essence, safeguards the right to physical integrity of a physical person. In the present case, it is undisputed that the appellant is a legal person and, consequently, it cannot enjoy the guarantees prescribed by Article 2 of the European Convention.

47. Therefore, it follows that the appellant's allegations relating to the violation of the right to life under Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention are ill-founded in the present case, and that the appeal, in respect of those allegations, is also ill-founded.

VIII. Conclusion

48. The Constitutional Court concludes that Article 6 of the European Convention is applicable to the proceedings completed by the challenged ruling, which is, by its nature, an interim measure, as the goal and nature of such interim measure had a decisive impact upon the effective exercise of the appellant's civil rights. However, the Constitutional Court has established that the challenged ruling is not in violation of the appellant's right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, as the Constitutional Court has not found in the reasoning of the challenged decisions that the substantive law and procedural law were applied in an arbitrary manner or that the appellant was denied in the relevant proceedings any procedural right prescribed by Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention. Also, the Constitutional Court holds that the appellant's allegations relating to the violation of the right to life under Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention are ill-founded, as the mentioned right, in essence, safeguards the right to physical integrity of a physical person and the appellant is a legal person.

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

50. Having regard to the decision of the Constitutional Court in the present case, it is not necessary to examine separately the appellant's request for interim measure.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 828/08

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Ms. Dragana Kalajdžić against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, no. Už-152/04 of 15 November 2007, the Judgment of the Cantonal Court in Sarajevo, no. U-299/02 of 22 August 2003, the Ruling of the Ministry of Housing Affairs of Sarajevo Canton, no. 27/02-23-3099/01 of 5 February 2002 and the Ruling of the Sarajevo Canton Administration for Housing Affairs no. 23/6-372-P-3711/98 of 13 December 2000

Decision of 21 January 2011

CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in the plenary, composed of the following judges:

Miodrag Simović, President,

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Mr. Mirsad Ćeman

Having deliberated on the appeal of Mrs. **Dragana Kalajdžić** in case no. **AP 828/08**, at its session held on 21 January 2011 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mrs. Dragana Kalajdžić is hereby granted.

A violation of the right to respect for home 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 is hereby established.

The Judgment of the Supreme Court of the Federation of BiH no. Už-152/04 of 15 November 2007 is hereby quashed.

The case shall be referred back to the Supreme Court of the Federation of BiH, which is obligated to employ an expedited procedure and take a new decision in line with Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Supreme Court of the Federation of BiH is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of delivery of this Decision, on the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 17 March 2008, Ms. Dragana Kalajdžić („the appellant") from Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina („the Supreme Court„), no. Už-152/04 of 15 November 2007, the Judgment of the Cantonal Court in Sarajevo („the Cantonal Court"), no. U-299/02 of 22 August 2003, the Ruling of the Ministry of Housing Affairs of Sarajevo Canton („the Ministry„), no. 27/02-23-3099/01 of 5 February 2002 and the Ruling of the Sarajevo Canton Administration for Housing Affairs ("the Administration") no. 23/6-372-P-3711/98 of 13 December 2000.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 21 March 2008, the Supreme Court, the Cantonal Court, the Ministry and the Administration were requested to submit their respective replies to the appeal.

3. The Supreme Court and the Administration submitted their respective replies on 4 April 2008, whereas the Cantonal Court submitted its reply to the appeal on 11 April 2008.

4. Having regard to Article 26(2) of the Rules of the Constitutional Court, the replies of the Supreme Court, the Cantonal Court, the Ministry and the Administration were transmitted to the appellant on 16 July 2008.

III. Facts of the Case

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

6. The Ruling of the Administration no. 23/6-372-P-3711/98 of 13 December 2000, which was upheld by the Ruling of the Ministry no. 27/02-23-3099/01 of 5 February 2002, dismissed as ill-founded the request of the appellant's mother for the repossession of apartment in Sarajevo located in Ferde Hauptmana no. 40/VI („the respective apartment").

7. The reasoning of the ruling of the Administration reads that the appellant's mother was the occupancy right holder over the apartment according to the Contract on use of apartment no. 05-VZ-1-3361/81 of 30 September 1981. The Administration further established that the appellant's mother stopped using the apartment in 1987, because she married S.J. and moved to live in the apartment located in Franje Kluza no. 7 in Rajlovac, over which the husband of the appellant's mother was the occupancy right holder. The Administration concluded that the claim of the appellant's mother for the repossession of the apartment was ill-founded, as condition under Article 3 of the Law on Cessation of the Application of the Law on Abandoned Apartments („the Law on Cessation"), according to which the occupancy right holder over the apartment which was declared abandoned or a member of his/her household have the right to repossession.

8. The reasoning of the Ministry's ruling reads that the appellant's mother and the appellant, as the person with legal interest, lodged appeals against the first-instance ruling. The appellants stated that the appellant's mother's occupancy right over the apartment did not cease to exist after her marriage, and that the appellant had lived in the apartment as a member of the family household of her mother in terms of Article 6 of the Law on Housing Relations until the outbreak of the war. On the basis of the presented evidence, the Ministry concluded that the appellant had used the apartment as the occupant of apartment, but she cannot be considered a person referred to in Article 6(2) of the Law on Housing Relations, since „[…] the occupancy right holder's leaving the apartment resulted in the termination of the permanent cohabitation union" between the appellant and her mother as a prerequisite for the appellant to be considered a member of the family household and, thus, to exercise the right to repossession of apartment in accordance with Article 3(1) and (2) of the Law on Cessation.

9. The appellant and her mother filed lawsuit thereby initiating administrative dispute before the Cantonal Court against the ruling of the Ministry. While deciding on the lawsuit the Cantonal Court adopted the judgment no. U-299/02 of 22 August 2003, dismissing

the lawsuit as ill-founded. In the reasoning of its judgment the Cantonal Court stated that it separately assessed the fact that the claim for the repossession of the apartment was submitted by the appellant's mother, and not the appellant as the occupant of apartment. The Cantonal Court further established that on 30 April 1991 „the home" of the appellant's mother, within the meaning of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") had been in Rajlovac in Franje Kluza no. 7, where the appellant's mother had the registered permanent residence (and not a temporary one). The occupancy right holder over the apartment located at the mentioned address was the husband of the appellant's mother, thus the appellant's mother was accordingly considered to be a co-holder of the occupancy right over that apartment, which she is entitled to repossess. The Cantonal Court concluded that the appellant's mother had the right to repossess the apartment in Rajlovac and not the apartment at issue. On the basis of the established facts, the Cantonal Court further established that the administrative authorities correctly concluded that the appellant did not form a part of the her mother's family household within the meaning of Article 6(2) of the Law on Housing Relations, and therefore the appeal of the appellant, as the interested party, was dismissed in the present legal matter. In addition, the Cantonal Court stated that in the present case where the appellant as the apartment occupant failed to submit a claim for the repossession of the apartment, the administrative authority was able to decide her appeal only with respect to the claim filed by the appellant's mother.

10. The appellant and her mother lodged an appeal with the Supreme Court against the mentioned judgment of the Cantonal Court. The Supreme Court dismissed the appeal as ill-founded by its judgment no. Už-152/04 of 15 November 2007. In the reasoning of the judgment the Supreme Court stated that the appellant's complaints stated in the appeal, that she has the permanent right of use of the apartment at issue as she continued living in that apartment after her mother left it, are ill-founded. The Supreme Court reasoned that on the basis of the claim for the repossession of the apartment at issue dated 24 August 1998 it follows that the claim had been filed by the appellant's mother in her name and that she failed to state that she claimed the repossession of the apartment also in the name of the appellant as her daughter. Further, the Supreme Court established that the appellant's complaints stated in the appeal that she had the permanent right to use the apartment in which she continued living even after her mother left it. The Supreme Court reasoned that under the provision of Article 21(2) of the Law on Housing Relations the members of the family household have the right to use the apartment permanently and without hindrance even after the occupancy right holder ceases to use the apartment permanently. In the present case, however, the Supreme Court concluded that the appellant could not be considered a member of the family household of the occupancy right holder, as the appellant's mother

„ceased to be the occupancy right holder" over the apartment at issue which resulted in the termination of the permanent cohabitation union, as the appellant does not live together with her, which is a condition for the person to be considered a member of the family household of the occupancy right holder. Therefore, as the Supreme Court concludes, the appellant has no right to use the apartment at issue permanently and undisturbed.

IV. Appeal

a) Allegations stated in the appeal

11. The appellant complains of a violation of the right to private and finally life and home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, as well as of a violation of the right to life under Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention. The appellant states that her mother is the occupancy right holder over the apartment at issue which is why she lodged a claim for the repossession of the apartment in her name. She further states that she has lived in the apartment at issue since her birth up until the war conflict in BiH. She states that after the divorce of her parents she was given into the care of her mother by a court decision and the occupancy right over the apartment at issue was allocated to her mother as well. After that, on 30 September 1981, her mother had entered into a contract on the use of the apartment at issue with the Sarajevo City Housing Authority. Also, she stated that her mother, in her claim for the repossession of the respective apartment filed on 24 August 1998, registered the return of 3 members, namely of the appellant and her child. The appellant holds that the apartment at issue should be restored to her as she has no other place to live in and to accommodate herself and her child.

b) Reply to the appeal

12. The reply of the Supreme Court reads that the judgment of that court is based on the correct application of the substantive law, that is, application of the provisions of the laws that were cited in the judgment and the application of which was reasoned, and that the appellant's human rights have not been violated by the said judgment.

13. In the reply to the appeal the Cantonal Court stated that the judgment of that court had not amounted to a violation of the appellants' right as referred to in the appeal, and that they maintained the reasoning offered in the judgment.

14. In their respective replies to the appeal the Ministry and the Administration stated that the appellant's allegations about the violation of human rights were ill-founded, as she had failed to meet conditions under Article 6(2) of the Law on Housing Affairs in order

to be considered a member of the family household of the occupancy right holder over the apartment at issue. Therefore, the appellant is not entitled to the right to repossess the apartment at issue under Article 3(1) and (2) of the Law on Cessation. It was further stated that the appellant's mother, who had been the occupancy right holder over the said apartment on the basis of the contract on the use of apartment dated 30 September 1981 had stopped using the apartment in 1987 when she entered into marriage with S.J. and moved into the apartment of her husband. By doing so, as further stated in the replies, the permanent living and co-habitation union between the appellant and her mother was terminated, as a legal prerequisite for the appellant to be considered a member of the family household of her mother, which would enable her to exercise the right to repossession of the said apartment.

V. Relevant Law

15. The **Law on the Cessation of the Application of the Law on Abandoned Apartments** (*Official Gazette of FBiH,* nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 37/01, 56/01, 15/02, 24/03 and 29/03) as far as relevant reads:

Article 3, paragraphs 1 and 2

The occupancy right holder of an apartment declared abandoned or a member of his/her household as defined in Article 6 of the ZOSO (hereinafter the „occupancy right holder") 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 Annex 7, Article 1 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.

The **Law on Housing Relations** (Official *Gazette of SR BiH,* nos. 14/84, 12/87, 36/89 and 2/93, *Official Gazette of the Federation of BiH,* nos. 11/98, 38/98 and 19/99), in its relevant provisions reads as follows:

Article 21

The apartment users (Article 6, paragraph 1) who live together with the holder of occupancy right have the right to permanent and free use of the apartment, under the conditions stipulated by this law.

The family household members (Article 6, paragraph 2) shall also acquire the right from the preceding paragraph after death of occupancy right holder, as well in cases when the occupancy right holder stops using the apartment permanently for some other reasons, unless he or she stopped using the apartment based on the cancellation of the contract on the apartment use or on the basis of the contract on the apartment exchange, as well as in the case when he or she acquired the occupancy right over another apartment allocated to him/her and to his/her members of the family household and in the cases specified in Article 13 of the said law.

Article 50

Notice of the cancellation of the contract on the use of apartment shall be given to a holder of the occupancy right by way of a lawsuit to be filed with the competent court.

VI. Admissibility

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

17. In accordance with Article 16(1) of the Rules of the Constitutional Court, the Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

18. In the present case, the subject challenged by the appeal is the judgment of the Supreme Court no. Už-152/04 of 15 November 2007, against which there are no other effective remedies available under the law. The appellant received the challenged judgment on 17 January 2008. The appeal was filed on 17 March 2008, that is, within the 60 days time-limit as provided for under Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court as neither being manifestly (*prima facie*) ill-founded nor inadmissible for any other formal reason.

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

VII. Merits

20. The appellant complains that the challenged decisions are in violation of her right to home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

The right to respect of home

21. Article II(3)(f) of the Constitution of Bosnia and Herzegovina, in the relevant part, reads:

Enumeration of rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

f) The right to private and family life, home, and correspondence.

22. Article 8 of the European Convention, in its relevant part, reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

23. The fundamental purpose of Article 8 of the European Convention is to protect individuals from arbitrary interference of authority with their rights guaranteed by Article 8 of the European Convention.

24. In the present case, the Constitutional Court must first establish whether the apartment at issue may be considered „home" in terms of Article 8 of the European Convention and, if so, whether the measures taken amount to „interference" with her right to respect for home and whether that interference is justified under Article 8(2) of the European Convention.

25. Under the case-law of the European Court of Human Rights, the notion of „home" entails both leased home and privately owned home (see European Court of Human

Rights, *Gillow vs. the United Kingdom*, Judgment of 24 November 1986, Series A, no. 109, paragraph 46 f; *Kroon vs. Holland*, Judgment of 27 October 1994, Series A, no. 297-C, paragraph 31). In accordance with this interpretation, the Constitutional Court has extended the scope of Article 8 of the European Convention to the apartments used on the basis of an occupancy right (see Constitutional Court, Decision no. *U 8/99* of 11 May 1999, published in the *Official Gazette of Bosnia and Herzegovina* no. 24/99).

26. The European Court of Human Rights, in its respective case-law, in a case of a house where the applicants lived, which was owned by them, assessed in particular how strong or permanent the intention and attitude of the applicants towards the house before and after the return was. The key element here was the fact that they returned to their house with the intention to stay there permanently once formal conditions were met. Also, the fact that the applicants did not found their home elsewhere was important (see, *mutatis mutandis*, the mentioned judgment of the European Court of Human Rights, *Gillow vs. the United Kingdom).* The Constitutional Court also concluded in its respective decisions that „home" is a factual status which does not require the existence of legal basis (see the Decision of Constitutional Court no. *AP 323/04*, *Official Gazette of Bosnia and Herzegovina* no. 34/05).

27. As to the question whether the apartment at issue can be considered the appellant's „home" for the purposes of Article 8 of the European Convention, the Constitutional Court first observes that the appellant had left the apartment at issue due to war conflict in Bosnia and Herzegovina, and that her and her mother's return into the apartment at issue should be considered within the context of the rights of refugees and displaced persons to return to their homes, as provided for by Article II(5) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 item 1 of Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina („the General Framework Agreement"). With respect to the aforementioned, the Constitutional Court recalls its already presented position that one of the fundamental goals of the General Framework Agreement is the return of people to their place of residence they had had up until 1991, and that the factual status found as of 30 April 1991 should be the starting point with respect to which all legal disputes arising after the measures taken by the competent authorities of both Entities and of Bosnia and Herzegovina (within the scope of their respective competencies) will be considered with the aim of restoring the property to their pre-war occupants (see*, mutatis mutandis*, Constitutional Court, Decision no. *U 14/00* of 4 May 2001, *Official Gazette of Bosnia and Herzegovina* no. 33/01, paragraph 20).

28. The Constitutional Court observes that it was undisputedly established in the conducted administrative procedure and in the procedure of administrative dispute that

the appellant had lived in the apartment at issue. The appellant was born in the mentioned apartment, lived in it together with her parents, and then after 30 September 1981 she lived in the apartment with her mother as the occupancy right holder, and after the marriage of her mother in 1987 she lived in the apartment at issue up until the breakout of the war in BiH. After that, the appellant lived in the Republic of Serbia as a refugee, with the intention to return to her home once conditions were met. In addition, the appellant did not establish her home elsewhere, thereby showing the intent to return with her child to the apartment at issue. The Constitutional Court concludes that the appellant, having lived in the apartment at issue for many years before the war in BiH, had built strong ties with the apartment at issue as her home, and that after the war she showed the intention to return to it as her home, which is why the mentioned apartment should be considered the appellant's home in terms of Article 8 of the European Convention.

29. Further, the Constitutional Court must establish whether the challenged judgment of the Supreme Court amounted to the interference of the public authority with the appellant's right to respect for home, and, if so, whether that interference was justified. The Constitutional Court holds that the challenged judgment dismissing the claim of the appellant's mother for the repossession of the apartment at issue resulted in the interference of the public authority with the appellant's right to respect for home within the meaning of Article 8(1) of the European Convention, affecting her and two family members.

30. Next, the Constitutional Court must establish the justification of this interference within the meaning of Article 8(2) of the European Convention, that is, whether it was in accordance with the law. An interference, which is in accordance with the law, must at the same time be a necessary measure in a democratic society with the purpose of achieving legitimate goals under Article 8(2) of the European Convention. „Necessary" in this context means that the interference matches „pressures related to social needs" and that there is a reasonable proportion between the interference and the legitimate goal sought to be achieved (see European Court of Human Rights, *Niemietz vs. Germany*, Judgment of 16 December 1992, Series A, no. 251).

31. The Constitutional Court emphasizes that the appellant in the present case indicates primarily the breach of the right to home, in fact, she does not claim that she has been the occupancy right holder but claims that the apartment at issue has been her home and the home of her child. Unlike other bodies which dealt with the issue of the right for repossession of the apartment, the Constitutional Court holds that in the particular case it should have been decided on the appellant's right to respect of her home. Furthermore, in the present case the administrative body and the courts had not differentiated between

the right to possession of the apartment and the right to appellant's home. Moreover, they accepted the appellant as an interested party in the proceedings but had not discussed her right to home.

32. The Constitutional Court notes that the Supreme Court stated in the challenged judgment that the appellant's mother „[…] stopped being the occupancy right holder over the apartment at issue in 1987 after she got married and moved into the apartment of her husband". The Constitutional Court observes that, on the basis of the valid contract on the use of apartment dated 30 September 1981, it indisputably follows that the appellant's mother is the occupancy right holder over the respective apartment. The legal validity of the mentioned contract was not challenged in any way whatsoever on the grounds specified in the Law on Housing Relations and in the procedure prescribed by law, thus, it is not possible to conclude that the appellant's occupancy right over the apartment at issue stopped in such a manner as prescribed by law. Next, the Constitutional Court observes that Article 3(1) and (2) of the Law on Cessation prescribes that the occupancy right holder is entitled to return in accordance with the General Framework Agreement. The Constitutional Court also notes that the relevant Law in the conducted proceedings was the Law on Cessation, the goal of which is to establish the factual status as of 30 April 1991, as a starting point with respect to which all legal disputes are to be considered. The Constitutional Court holds that the administrative authorities and courts did not have competence in the present case to establish whether the appellant's mother ceased being the occupancy right holder over the apartment at issue under the Law on Housing Relations while a legally valid contract on the use of apartment declaring the appellant's mother as an undisputed occupancy right holder is in force. Whether legal conditions for the mentioned occupancy right to be terminated and for the contract on the use of apartment to be cancelled were met in the present case, and what are the appellant's rights as the user of the apartment, can only be subject of possible other judicial proceedings in accordance with the Law on Housing Relations. Therefore, the Constitutional Court concludes that the administrative authorities and courts have applied the substantive law arbitrarily by dismissing the claim of the appellant's mother for the repossession of the apartment at issue over which she is the occupancy right holder under the valid contract on the use of the respective apartment.

33. In view of the aforementioned, the Constitutional Court concludes that the interference of public authorities with the appellant's right to home was not in accordance with the law, thus it will not carry out further examinations whether the interference was a necessary measure in a democratic society aimed at achieving legitimate goals under Article 8(2) of the European Convention.

34. Therefore, the Constitutional Court concludes that the appellant's right to respect for home under Article 8 of the European Convention has been violated in the present case.

Other allegations

35. In the light of the conclusions about the violation of the right to respect for home, the Constitutional Court holds that there is no need to examine separately the allegations on the violation of the right to home under Article II(3)(a) of the Constitution of Bosnia and Herzegovina and Article 2 of the European Convention.

VIII. Conclusion

36. The Constitutional Court has concluded that administrative and judicial authorities have applied Article 3(1) and (2) of the Law on Cessation arbitrarily by dismissing the claim of the appellant's mother, as the occupancy right holder under the contract on the use of apartment, for the repossession of the apartment at issue, thus resulting in the violation of the appellant's right to home as a pre-war user of the apartment at issue.

37. Pursuant to Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

38. Within the meaning of the Article 41 of the Rules of the Constitutional Court, Separate Dissenting Opinion of Vice-President Seada Palavrić is annexed to the present Decision.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of Vice-President Seada Palavrić

1. In the present case the Constitutional Court is of the opinion that the appeal lodged by Ms. **Dragana Kalajdžić** („the appellant") is admissible and well-founded on the merits in relation to the violation of the right to respect of home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention").

2. I agree with the Constitutional Court regarding the admissibility of the case. However, with due respect to the majority decision of my respected colleagues, I do not agree with the decision or reasoning of the decision in the merits in a part in which the appeal has been granted and the violation of the appellant's right to respect of home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention has been established.

3. Namely, the Constitutional Court in paragraph 27 of the Decision, while replying to the question whether the apartment at issue may be considered the appellant's „home" in terms of Article 8 of the European Convention, *inter alia*, „[…] observes that the appellant had left the apartment at issue due to war in Bosnia and Herzegovina, and that her and her mother's return into the apartment at issue should be considered within the context of the rights of refugees and displaced persons to return to their homes, as provided for by Article II(5) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 item 1 of Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina". Then the Constitutional Court recalls its previously presented position that one of the main goals of the General Framework Agreement „[…] is the return of people to their place of residence they had had up until 1991, **and that the factual status found as of 30 April 1991** should be the starting point with respect to which all legal disputes arising after the measures taken by the competent authorities of both Entities and of Bosnia and Herzegovina (within the scope of their respective competencies) will be considered with the aim of restoring the property to their pre-war occupants". In paragraph 28, the Constitutional Court „[…] concludes that the appellant, having lived in the apartment at issue for many years before the war in BiH, had built strong ties with the apartment at issue as her home, and that after the war she showed the intention to return to it as her home, which is why the mentioned apartment should be considered the appellant's home in terms of Article 8 of the European Convention".

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4. I agree with the conclusion of the Constitutional Court that the apartment at issue presents the appellant's home. However, I agree with that only because of the ties the appellant had built with the apartment at issue before the war in BiH, i.e., before 30 April 1991, and not because of her intention to return to it after the war as I hold that such intention by the appellant failed. In any case, notwithstanding the reasons, the apartment at issue should be considered the appellant's home in my opinion as well. I also agree with the conclusion of the Constitutional Court in paragraph 29 that the challenged decision of the Supreme Court, dismissing the claim of the appellant's mother for the repossession of the apartment at issue resulted in the interference of the public authority with the appellant's right to respect for home within the meaning of Article 8(1) of the European Convention.

5. With regard to the positions of the Constitutional Court presented in paragraphs 30 to 32, I, as well, agree with the statement that: „An interference, which is in accordance with the law, must at the same time be a necessary measure in a democratic society with the purpose of achieving legitimate goals under Article 8(2) of the European Convention. „Necessary" in this context means that the interference matches „pressures related to social needs" and that there is a reasonable proportion between the interference and the legitimate goal sought to be achieved". Also, it is indisputable for me that Article 3(1) and (2) of the Law on Cessation prescribes that the occupancy right holder is entitled to return in accordance with the General Framework Agreement and that the relevant Law in the conducted proceedings was the Law on Cessation, the goal of which is to establish the factual status as of 30 April 1991, as a starting point with respect to which all legal disputes are to be considered.

6. I do not agree with other positions of the Constitutional Court expressed in paragraph 32 regarding both, the facts and the law. Namely, contrary to the position of the Constitutional Court, I hold it necessary to recall the fact **that the proceedings at issue have been conducted upon the appellant's mother's request for reinstatement into possession of the respective apartment**. The proceedings have not been conducted with the aim of establishing the termination of the occupancy right of the appellant's mother, and that issue has not been considered, but what is the most important of all – it has not been decided upon. None of the enacting clauses of the decisions issued by administrative bodies or courts contain the decision under which the occupancy right of the appellant's mother over the apartment at issue ceased. The request of the appellant's mother for the **reinstatement into possession of the apartment**, for which the administrative bodies undisputedly established that the appellant's mother left it in 1987 when she married S.J. and started to live in the apartment of her husband, so that on 30 April 1991 that apartment

was not her home, has been dismissed by the Administration as the appellant's mother was not a person that have the right to repossess the apartment pursuant to Article 3 of the Law on Cessation, for the reason that she had left the apartment earlier and in no connection to the war conflicts, and that the granting of the appellant's mother's request would not lead to re-establishment of the factual situation that existed on 30 April 1991, which is, as already stated, the aim of the Constitutional Court.

7. I note that both the administrative bodies and the ordinary courts established that the factual situation on 30 April 1991 was such that the respective apartment had been used by the appellant as the user who, pursuant to Article 21 of the Law on Housing Relations, could remain in the apartment over which her mother acquired the occupancy right as the apartment of the spouse of the appellant's mother, over which her mother acquired the title of co-holder of occupancy right, was not also allocated to the appellant as the member of her mother's family household at the time. Thus, the appellant, and not her mother, was in factual possession of the apartment at issue on 30 April 1991. And, as such user, under the relevant provisions of the Law on Cessation, she had the right to submit the request for reinstatement into possession of the apartment at issue within given time limit. The appellant has not done that within the prescribed time limit. Therefore, the provisions of the Law on Cessation are applicable in her case the same way as they are applicable for all other occupancy right holders or members of their households over a particular apartment who had not timely lodged their requests for reinstatement into the possession of apartment, and that, pursuant to Article 5(2) of the Law on Cessation means *ex lege* loss of the occupancy right over the apartment at issue even if the appellant had possessed it. The request was filed by the appellant's mother in her name only and not in the name of the appellant, the appellant did not lodge it herself and the request was not lodged with her assistance. Therefore, the request was lodged by an unauthorized person and should be considered as not have been lodged at all.

8. The appellant appeared only in the appellate proceedings before the second instance body, again only joining to the request of her mother, and only after 13 December 2000 which was after the expiry of the time limit for the submission of requests for repossession of apartments. She claimed, together with her mother, that the first instance body correctly established that the appellant's mother was the occupancy right holder over the apartment at issue and that the said right had not ceased after she married S.J. Thus, both, the appellant and her mother hold that, while deciding, the first instance body erroneously applied provisions of Article 7 of the Law on Cessation to dismiss the request of the appellant's mother for reinstatement into possession of apartment. As a person with legal interest, the appellant challenged the first instance ruling stressing that it was clear that she

as a daughter of the occupancy right holder, the member of her family household, within the meaning of Article 6 of the Law on Housing Relations had lived in the apartment at issue until the outbreak of war. Dismissing the appeal of the occupancy right holder (who had not lived in the apartment on 30 April 1991) and the appellant, the second instance body concluded that the appellant used the said apartment in the role of user but could not be considered a person under Article 6(2) of the Law on Housing Relations. Namely, by the fact that the appellant's mother, as the occupancy right holder, had left the apartment, the permanent life and cohabitation community between the appellant and her mother was terminated because, under Article 6 of the Law on Housing Relations, children are considered as the members of household of their parents only under the condition that they permanently live together and occupy an apartment. Therefore, a precondition for the appellant to be held a member of family household of her mother and to realize the right to repossession of the apartment pursuant to Article 3(1) and (2) of the Law on Cessation has not been met.

9. Dismissing the appellant's and her mother's complaint in the administrative dispute, the Cantonal Court reasoned its decision, *inter alia*, by stating that both the first instance and the second instance administrative body had correctly applied the law when they dismissed the request of the appellant's mother for the reinstatement into possession of apartment from which she had officially signed off on 12 August 1987 when she registered her residence at the address of the apartment over which the occupancy right holder was her spouse. With regard to the appellant, the Cantonal Court emphasized that she did not file a request for repossession of the apartment at issue but that she, together with her mother, submitted an appeal against the first instance ruling dismissing as ill-founded her mother's request. The Cantonal Court reasoned that, when deciding on the complaint of the appellant and her mother, it especially evaluated the fact that the request for repossession of apartment was lodged by the appellant's mother, and not the appellant as the user of the apartment, and that within the meaning of Article 8 of the European Convention and Article 1 of Annex VII to the General Framework Agreement, the appellant's mother's „home" on 30 April 1991 was in Franje Kluza no. 7 in Rajlovac, where she had registered permanent residence (and not a temporary one) from which she fled in 1992, and over which her spouse S.J. had been the occupancy right holder. In that manner the named is considered the co-holder of the occupancy right over the respective apartment and has the right to reinstatement into possession of the apartment in Rajlovac and not the apartment at issue. The conclusion reached by the second instance body that the appellant had not been a member of family household of her mother within the meaning of Article 6(2) of the Law on Housing Relations was, therefore, evaluated as correct. It also dismissed her

appeal, correctly treating her as the interested party in this legal matter having regard to the fact that in the particular situation (when she did not lodge a request for repossession of the disputed apartment) the body could decide on her appeal only in relation to the request lodged by her mother.

10. Deciding upon the appeal of the appellant and her mother against the first instance judgement, in which they stated that the first instance court and administrative bodies did not have in the view the fact that the appellant's mother lodged the request for repossession of the apartment at issue in her name and in the name of the appellant, as legal user of the apartment and her mother's family household member, and that the first instance body was familiar with the fact that the appellant had been interested in the repossession of apartment even in 1998 and 1999, and that the body should have summoned her to state whether she accepts the request for repossession of apartment lodged by her mother in her own name as well as in the appellant's name; and the first instance court and the administrative bodes have not assessed the fact that the appellant continued to use the apartment after her mother got married and left the apartment and that she possessed the right of permanent and unhindered use of apartment within the meaning of Article 21 of the Law on Housing Relations. The Supreme Court dismissed the appeal as ill-founded. It reasoned that the first instance judgement had been adopted on the basis of the facts correctly and completely established in the administrative proceedings and, as such, could serve for lawful and correct issuance of the challenged legal act.

11. The Supreme Court repeated the finding of the administrative bodies and the first instance court and it also stressed, *inter alia*, that by the fact that the appellant's mother had left the apartment, the permanent community of life and residing with the appellant had been terminated and the appellant could not be considered a person under Article 6(2) of the Law on Housing Relations, i.e., the member of family household, **the person who had not lodged a request for repossession of the apartment either**, and thus had not realised the right for reinstatement into possession of the apartment in accordance with Article 3(1) and (2) of the Law on Cessation. On all of the above they gave valid reasons which were also accepted as correct by the first instance court. The Supreme Court also evaluated as ill-founded the claim of the appeal that the appellant's mother lodged the request for repossession of the apartment at issue in her name and in the name of the appellant, *as it is obvious on the basis of the request for repossession of the apartment of 24 August 1998 that the appellant's mother lodged the request in her name and that she did not state that she requested repossession in the name of her daughter as well (in the name of the appellant.*

12. Although, in my opinion, it entirely clearly reasoned why neither the appellant nor her mother have right to repossession of the apartment at issue (the appellant has not filed the request for reinstatement into possession of apartment and her mother did not live in the respective apartment on 30 April 1991), which had been the only issue decided upon before the administrative bodies and courts, I note that the Supreme Court, with no need whatsoever, assessed that *ill-founded are also the allegations in the appeal that the appellant has the right of permanent use of the apartment in which she continued living after her mother had left the apartment. This because, pursuant to the provision of Article 21 of the Law on Housing Relations, the family household members (Article 6(2)) shall also acquire the right of permanent and undisturbed use of the apartment when the holder of occupancy right permanently stops using the apartment, while in the present case the appellant may not be regarded as the member of the occupancy right holder's household, i.e. the appellant's mother, because she stopped being the occupancy right holder over the apartment in question and the permanent life community was severed as appellant is not permanently living with her, which is the condition for a person to be regarded as a member of family household of the occupancy right holder, and, therefore she has no right of permanent and undisturbed use of the apartment in question*.

13. Because of the above presented part of the reasoning of the Supreme Court's judgement, I note that the Constitutional Court in paragraph 32 presented the position under which it holds: „[…] that the administrative authorities and courts did not have competence in the present case to establish whether the appellant's mother ceased being the occupancy right holder over the apartment at issue under the Law on Housing Relations while a legally valid contract on the use of apartment declaring the appellant's mother as an undisputed occupancy right holder is in force. Whether legal conditions for the mentioned occupancy right to be terminated and for the contract on the use of apartment to be cancelled were met in the present case, and what are the appellant's rights as the user of the apartment, can only be subject of possible other judicial proceedings in accordance with the Law on Housing Relations". I fully agree with this position! However, contrary to the majority's decision, I hold that the administrative bodies and courts, in fact, have not been deciding or decided on the issues that they should not have decided upon, and for which reason the Constitutional Court has established the violation of the appellant's right for respect of her home, *since the proceedings regarding the appellant's mother's request from the very beginning have been conducted for the reinstatement into possession of the apartment and that request has been dismissed as ill-founded,* starting all the way from the first instance body to the Supreme Court. There had been no consideration of other issues and no decision has been reached! Therefore, I reiterate my position that the concerned

part of the reasoning of the Supreme Court's judgement is completely unnecessary as the administrative bodies and courts, in the proceedings conducted before them, in fact, had not decided on the termination of the occupancy right of the appellant's mother or the appellant's right as the user of the apartment in terms of Article 21 of the Law on Housing Relations.

14. I note that the aforementioned part of the reasoning of the Supreme Court induced the *Constitutional Court to conclude that the administrative authorities and courts arbitrarily applied the substantive law by dismissing the claim of the appellant's mother for the repossession of the apartment at issue over which she is the occupancy right holder under the valid contract on the use of the said apartment.* However, with due respect towards the Constitutional Court's majority decision, I cannot agree with such a conclusion. First of all, I recall that the Constitutional Court in a large number of its decisions interpreted the Law on Cessation in a manner that for the reinstatement into possession of apartment, especially when the application of Article 8 of the European Convention was concerned, the legal grounds on the basis of which the person requesting repossession has been in possession of the apartment or used it on the date of 30 April 1991, was of no relevance. Moreover, in the large number of its decisions the Constitutional Court dismissed or rejected the appeals when the request for repossession was filed out of the given time limit or not submitted at all. In that way, when rejecting the appeal as *prima facie* ill-founded in the situation where the appellant lodged a request for repossession of apartment outside of the time limit prescribed by Article 5 of the Law on Cessation, the Constitutional Court reasoned its decision in the case no. **AP 1802/05** of 9 November 2006 in its paragraph 13 by the following position: „The Constitutional Court notes that the ordinary courts and administrative bodies applied relevant legal provisions and established that the appellant lodged the request for the reinstatement into possession of the apartment outside of the given legal time limits, and for that reason his request has been rejected by the administrative bodes as untimely. For the abovementioned, it is obvious that in the appellant's case the administrative bodies and the court have applied the applicable substantive-legal provisions in the manner which has not been arbitrary. Namely, the prescribed time limits have a preclusive character as the failure to comply with them results not only in the loss of the right to have decision on merits of the request for repossession but also in the loss of occupancy right. The time limit given for the submission of request for repossession of the apartment has been determined in the public interest which reflects in the efficient functioning of the legal system and legal certainty. Therefore, in the opinion of the Constitutional Court, the appellant's referral to the arbitrariness in the application of positive-legal provisions is ill-founded. The

Constitutional Court holds that there is nothing that would indicate the violation of the right to property in the appellant's case as safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention but it represents the appellant's failure to adjust his behaviour to the applicable provisions and time limits provided for by the Law in the case at hand". Furthermore, in the Decision no. **AP 1297/06** of 5 April 2007, by which the Constitutional Court also dismissed the appeal as *prima facie* ill-founded, I submit that the Constitutional Court reasoned its decision, *inter alia*, by the position stated in paragraph 11, as follows: „The challenged judgement of the Cantonal Court is based on the provisions of the Law on Administrative Disputes (*Official Gazette of FBiH,* no. 9/05) and the Law Amending the Law on Cessation of the Application of the Law on Abandoned Apartments (*Official Gazette of FBiH,* nos. 27/99 and 56/01). These regulations were published and available to everybody, fully understandable and adopted with the aim of legal certainty and equality before the law. The Cantonal Court concluded that the appellant lodged his request for repossession of the apartment after the expiration of the preclusive time limit as prescribed by Articles 5(2) and 18(e) of the Law on Amendments of the Law on Cessation of the Application of the Law on Abandoned Apartments. The appellant, therefore, had not acted in accordance with the provisions on the basis of which he requested repossession of his apartment or proved in the legal dispute that he timely submitted his request for repossession of the apartment for which reason his characteristic of occupancy right holder over the apartment at issue ceased".

15. On the basis of the above presented reasons it is clear that the Constitutional Court has not evaluated at all whether the acts of public authorities by which the request for repossession of the apartment lodged outside of the preclusive time limit had been dismissed or rejected and especially if it was lawful, in public interest or proportionate in the democratic society even in the cases where the appeals were lodged by the appellants to whom the occupancy right *ex lege* ceased, *unlike the appellant who had no occupancy right over the apartment at issue and whose relation to that apartment has not been established by a single act in accordance with the Law on Housing Relations,* except that she has only *de facto* used the apartment at issue on 30 April 1991, **but did not file the request for reinstatement into possession thereof.**

16. Therefore, there is no way in which I could conclude that the present case is different, i.e., that the public authorities unlawfully interfered with the appellant's right to home. Moreover, the position of the Constitutional Court: „[…] that administrative authorities arbitrarily applied Article 3(1) and (2) of the Law on Cessation by dismissing the claim of the appellant's mother, as the occupancy right holder under the contract on the use of apartment, for the repossession of the apartment at issue, thus resulting in the violation

of the appellant's right to home as a pre-war user of the apartment at issue,,, is absolutely unacceptable for me. From such position it could be concluded, contrary to numerous decisions of the Constitutional Court, that for the reinstatement into possession of apartment pursuant to the Law on Cessation it is only necessary for the appellant to be „the occupancy right holder under the contract on use of apartment" irrespective of the fact whether on 30 April 1991 the concerned occupancy right holder had been in the possession of the apartment the repossession of which is requested, whether the apartment was left with no connection to the war conflict or whether the apartment represented his/her home. The Constitutional Court completely neglected the provisions of Article 3(1) and (2) of the Law on Cessation to which the public authorities referred when dismissing the appellant's mother's request pursuant to which: *"(1) The occupancy right holder of an apartment declared abandoned or a member of his/her household as defined in Article 6 of the ZOSO (hereinafter the „occupancy right holder") shall have the right to return in accordance with Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina. (2)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 Annex 7, Article 1 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.*

17. Therefore, to exercise the right to repossession of the apartment at issue, the appellant's mother as the occupancy right holder must have been in the possession of that apartment on 30 April 1991. It is undisputable that it was established in the proceedings before the administrative bodies and courts that the appellant's mother had left the apartment at issue in 1987 unrelated to the war conflict and, with regard to the apartment at issue, she could not be considered a refugee or displaced person; that by entry into apartment of her spouse in 1987 she had become the occupancy right co-holder over that apartment and that she occupied that apartment on 30 April 1991 and not the apartment at issue, and, pursuant to the aforesaid Law, she has no right whatsoever to repossess the apartment at issue. On the other hand, the appellant had not been the member of the family household of her mother after 1987, thus, also on 30 April 1991, but under Article 21 of the Law on Housing Relations she could remain in the apartment at issue as she *de facto* did, but she did not *de iure* harmonize her actions with the Law on Housing Relations. Furthermore, it is indisputably established that the appellant was not the member of her mother's family household in terms of Article 6(2) of the Law on Housing Relations even on the date on which her mother submitted the request for repossession of the apartment at issue

as her mother did not request repossession of apartment in the name of the appellant as well. Notwithstanding the abovementioned circumstances, as on 30 April 1991 the appellant was in *de facto* possession of the apartment at issue, i.e., that on 30 April 1991 the apartment at issue was her home. I hold that the appellant, unlike her mother, had the right to submit the request for reinstatement into possession of the respective apartment. However, she did not do so. In that case, I see no reason to place the appellant in the privileged position, in the situation where she did not submit the request for repossession of the respective apartment, and not to loose the right to repossession of the apartment at issue as any other person in the same position. Therefore, irrespective of the unnecessary part of the reasoning of the decisions of the Supreme Court and Cantonal Court who only created the illusion of deciding on the occupancy right of the appellant's mother, i.e., on the appellant's right under Article 21 of the Law on Housing Relations, I hold that the reasoning given by the Constitutional Court for the finding of the violation of the appellant's right to respect of her home is entirely unacceptable in the present case.

It follows that I am absolutely not in the position to agree with the conclusion adopted by the majority of the judges of the Constitutional Court in relation to this issue. With due respect, on this occasion, I express my dissent.

Case No. AP 2549/09

DECISION ON ADMISSIBILITY AND MERITS

Appeal of the Pension and Disability Insurance Fund of the Republika Srpska, Bijeljina against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. 58 0 Ps 902182 08 Rev of 14 May 2009, the judgment of the Cantonal Court in Mostar no. 58 0 Ps 902182 08 Pz of 8 April 20087, and the judgment of the Municipal Court in Mostar no. 07 58 Ps 902182 05 Ps of 20 November 2007

Decision of 25 March 2011

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in the Plenary and composed of the following Judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Having deliberated on the appeal of **the Pension and Disability Insurance Fund of the Republika Srpska, Bijeljina,** in case no. **AP 2549/09**, at its session held on 25 March 2011 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of the Pension and Disability Insurance Fund of the Republika Srpska, Bijeljina, lodged against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. 58 0 Ps 902182 08 Rev of 14 May 2009, the Judgment of the Cantonal Court in Mostar no. 58 0 Ps 902182 08 Pž of 8 April 2008 and the Judgment of the Municipal Court in Mostar no. 07 58 Ps 902182 05 Ps of 20 November 2007 is hereby dismissed as ill-founded.

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

Reasoning

I. Introduction

1. On 10 August 2009 the Pension and Disability Insurance Fund of the Republika Srpska, Bijeljina („the appellant"), represented by Mr. Slobodan Govedarica, a lawyer practicing in Bijeljina, filed an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina („the Supreme Court") no. 58 0 Ps 902182 08 Rev of 14 May 2009, the judgment of the Cantonal Court in Mostar („the Cantonal Court") no. 58 0 Ps 902182 08 Pz of 8 April 20087, and the judgment of the Municipal Court in Mostar („the Municipal Court") no. 07 58 Ps 902182 05 Ps of 20 November 2007.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 21 December 2009 the Supreme Court, the Cantonal Court, the Municipal Court and the Pension and Disability Insurance Fund of the Federation of BiH, Mostar („the defendant"), were requested to submit their replies to the appeal.

3. The Supreme Court, the Cantonal Court and the Municipal Court submitted their replies on 25 and 28 December 2009 respectively. The defendant submitted its reply on 6 January 2010.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, on 13 January 2010 the replies to the appeal were communicated to the appellant.

III. Facts of the Case

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

6. By the judgment no. 07 58 Ps 902182 05 Ps of 20 November 2007, which was upheld by the Cantonal Court's judgment no. 58 0 Ps 902182 08 Pz of 8 April 20087, the Municipal Court found the appellant's statement of claim ill-founded and dismissed it. In its statement of claim the appellant requested that the defendant be obliged to take over, as of 30 November 2006, all pension beneficiaries receiving their pension payments from the appellant and to continue paying pensions to all beneficiaries who had been insured and acquired their right to a pension before 30 April 1992 in what is today the Federation of BiH, and who had received, according to the data of the defendant, a ruling

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determining the pension rights from the SIZ (*Self-management community of interests*) Pension and Disability Insurance Fund of BiH Sarajevo, and whose pensions were paid by the appellant. In addition, the appellant requested that the defendant be obliged to pay the appellant the total amount of BAM 175,587,316.13 as compensation for the pensions paid to the pensioners who had been insured and who had realised their right to a pension in what is today the Federation of BiH before 30 April 1992 and who were receiving the pension payments from the appellant with effect from 1 October 2003 to 30 November 2006, and that the defendant be obliged to pay the statutory default interest staring to run from 1 October 2004 until the settlement in full as well as all amounts paid by the appellant until the date of the last calculation of pensions until the pensioners have been taken over, and that the defendant be obliged to pay the costs of the proceedings. It was determined that each party should bear its costs of the proceedings.

7. In the reasoning of the first instance judgment it is stated that it follows from the Agreement on Mutual Rights and Obligations in the Implementation of Pension and Disability Insurance („the Pension Agreement") no. 03-300/00 of 25 May 2000 that it was entered into by the Public Pension and Disability Insurance Fund of the Republika Srpska, the Social Fund of Pension and Disability Insurance of Bosnia and Herzegovina and the Bureau of Pension and Disability Insurance Mostar, as contractual parties and insurers, and that it was signed by the Insurers' Directors and approved by the RS Government and the FBiH Government.

8. It is underlined that Article 19 of the Pension Agreement stipulates that the Pension Agreement shall enter into force on the date of signing thereof and shall be published in the Official Gazettes of the Federation of Bosnia and Herzegovina and the Republika Srpska. In addition, it is stated that the provisions of Article 2 of the Pension Agreement prescribe that the insurer paying a pension to a pension beneficiary on the date of which the Agreement has entered into force shall continue to make the payment irrespective of the pension beneficiary's temporary or permanent place of residence. Article 2(2) of the Pension Agreement prescribes that a pension beneficiary who started receiving pension payments as of April 1992, but whose pension payments have been terminated before the entry into force of the Pension Agreement, will be paid by the insurer which made the last pension payment to the pension beneficiary.

9. The provision of Article 1 of the Pension Agreement regulates the subject-matter of the Agreement, *i.e.* it regulates the manner in which the pension payment obligations are divided, the length of service for retirement in the procedure of realisation of the right to a pension, the determination of proportionate pension, the realisation of the right to

disability pension and family pension, the responsibility for deciding on the right to divide the burden of paying for the pensions realised after the entry into force of the Pension Agreement, the exchange of documentation and data as well as other issues relating to the implementation of pension and disability insurance and the Pension Agreement itself.

10. It is further stated that it follows from the Preamble of the Pension Agreement that the Agreement was concluded on the basis of Article 205(2) of the RS Law on Pension and Disability Insurance (*the RS Official Gazette* nos. 27/93, 14/94 and 10/95) and Article 82(2) of the FBiH Law on Pension and Disability Insurance (*the Official Gazette of the Federation of BiH* no. 29/98). Therefore, it can be concluded that the Pension Agreement concerned was concluded based on the legal regulations applicable in the Federation of BiH and the Republika Srpska before the conclusion of the Pension Agreement.

11. Having examined the provisions of the Pension Agreement and the intention of the parties thereto and, particularly, given the fact that the mentioned Agreement had been entered into by mutual consent of the RS Government and the FBiH Government, the Municipal Court found that the purpose of the Pension Agreement was the division of pension beneficiaries in a manner which would regulate the pension payment obligations so that the insurer which had been paying the pensions before the entry into force of the Pension Agreement continued to pay them in the future.

12. It is highlighted that the present case concerns the Pension Agreement which contains elements of a legal transaction and that it is a three-party contract and that the purpose of the contract is prescribed in the provision of Article 1 of the Pension Agreement. Therefore, as the Court accepts and considers that no other purpose stems from the Pension Agreement (contract), nor it has been expressed in any other way, the Pension Agreement concluded in such a manner is binding for each party to the Pension Agreement (each contractual party) and for its entire area. Also, the conclusion of the Pension Agreement (contract) has its effect on the parties to the Pension Agreement as well as its effect in time and space.

13. According to the Municipal Court, the appellant groundlessly claims that it unilaterally terminated the Pension Agreement by the Decision of the RS Government of 13 February 2002, given the undisputed fact that the appellant continued to make pension payments to the pension beneficiaries previously recognised as its beneficiaries, as confirmed in the course of proceedings. The same is confirmed in the appellant's action and the defendant's allegations as well as in the findings of the expert in the field of finance, who was also heard as a witness at the main hearing and who confirmed that until that day pension payments under the Pension Agreement concluded in May 2000 were made by both insurers *i.e.* by the appellant and defendant.

14. Furthermore, the aforementioned is confirmed by the statements given by the defendant's legal representative, who was present during the conclusion of the Pension Agreement, and witness B.S., the appellant's employee, who gave a detailed description of the subject-matter of the 2000 Pension Agreement and the manner of taking over the obligations between the then insurer and the parties to the Pension Agreement as well as the manner of resolving the issues of pension and disability insurance among the parties to the Pension Agreement. According to the statement of the mentioned witness, under the concluded Pension Agreement, no one could acquire the rights but the pension rights acquired before 30 April 1992 were retained.

15. According to the Municipal Court, the appellant groundlessly indicates that the principle applied to international agreements should be also applied to the present case, as the present legal matter concerns the internal relationships and the division of obligations between the FBiH Pension and Disability Insurance Fund and the RS Pension and Disability Insurance Fund within the State of BiH in respect of pension payments, *i.e.* the regulation of the right to a pension and the right to a pension payment in accordance with the laws governing that matter, *i.e.* the laws that regulated that matter in the former SR BiH after the outbreak of war.

16. The Municipal Court also states that irrespective of the decisions passed in individual cases by the Human Rights Chamber for BiH („the Chamber") and the decisions passed by the Human Rights Commission within the Constitutional Court of BiH („the Commission"), as referred to by the appellant, those decisions have no effect as to the well-foundedness of the appellant's claim, wherein the appellant requested that the defendant be obliged to take over the pension beneficiaries with effect from 30 November 2006 and to pay their pensions in the Federation of Bosnia and Herzegovina and to compensate the appellant for damages in the amount of KM 175,587,316.13, plus the statutory default interest running from 1 January 2004 until the settlement in full.

17. It is also stated that in the course of proceedings and based on the evidence presented before the court and particularly taking into account the statement given by the defendant's legal representative and the findings of the expert in the field of finance, who established that the two Pension and Disability Insurance Funds had been applying the Pension Agreement, and given the provisions of the Pension Agreement, the Municipal Court found that the appellant failed to prove that it had sustained damages and that the defendant would be obligated to compensate the appellant for the amount requested in the action. It is underlined that if the appellant unilaterally stopped making the pension payments in accordance with the 2000 Pension Agreement, it would cause damages to the defendant, *i.e.* the appellant would disturb the purpose and objectives of the 2000 Pension Agreement.

18. The Municipal Court points out that it would be possible to terminate the Pension Agreement with the approval of the contractual parties and their governments, in the same way as it was concluded, *i.e.* that the parties are obliged to apply the Pension Agreement until it has been amended in the same manner as it was concluded.

19. In the reasoning of the second instance judgment it is stated that the parties concluded the Pension Agreement *i.e.* the Contract within the meaning of the provision of Article 25 of the Law on Obligations. Pursuant to the provision of Article 17 of the Law on Obligations, parties to an obligatory relationship are obliged to fulfil their obligation and are responsible for its realization (paragraph 1). Obligation can cease to exist only through the agreement of wills of parties to the obligatory relationship or on the basis of law (paragraph 2).

20. It is also stated that the Pension Agreement did not cease to exist through the parties' agreement of wills or termination, but the Cantonal Court accepts the Decision of the RS Government published in the official gazette and the appellant's notification of cancellation of the Pension Agreement sent to the defendant as the termination of the contract under Article 358(1) and (4) of the Law on Obligations. Therefore, according to the Cantonal Court, the position of the First Instance Court that the Pension Agreement cannot be terminated, as it does not contain a clause stipulating the termination thereof, is incorrect. This is logical as no one can be compelled to be a party to an obligatory relationship for an indefinite time period.

21. In the view of the Cantonal Court, the contracting party, *i.e.* the appellant, by its unilateral termination of the Pension Agreement, revoked its obligations under the Pension Agreement towards the pensioners, but it entered with each pensioner into a new pension contract (the appellant passed the relevant rulings) and determined the amount of pension in accordance with the RS regulations; this means that the pensioners, who had not filed appeals against the rulings, accepted the newly-established obligatory relationship directly with the appellant.

22. The Cantonal Court found that by the termination of the Pension Agreement, any obligation of the defendant towards the appellant had ceased to exist and the new obligatory relationship between the Republika Srpska and pensioners had been established. As a result, according to the Cantonal Court, the allegations stated by the appellant's authorised representative are correct where it is stated that the appellant makes pension payments in accordance with its regulations but it is obvious that the appellant, given the aforementioned, reached an incorrect conclusion that a new obligation arose for the defendant. It is underlined that as of the moment the Pension Agreement was terminated,

the parties to the dispute were no longer involved in any obligatory relationship and, if there was no obligatory relationship between the parties, it follows that no rights or obligations could arise from it. The appellant actually based its statement of claim on a non-existent obligation as it declared „somebody else's pensioners" to be its and, as already stated, paid their pensions in accordance with its regulations and the defendant did not in any way take part in the appellant's arrangement. In addition, the Cantonal Court referred to the decision of the European Court of Human Rights in the case of *Karanović* and presented its opinion about the differences and similarities between the case of *Karanović* and the case of FBiH Pension and Disability Insurance Fund. In this context, the Cantonal Court stated that the mentioned decision, as well as all other decisions of the European Court of Human Rights, connects the particular participants in dispute. It is also stated that no violation of national or international law by the defendant towards the Republika Srpska and its bodies, *i.e.* the appellant, does stem from the aforementioned judgment, even in its most extensive interpretation. It is also stated that under the regulation of domestic law, the appellant, under the mentioned Pension Agreement and based on the termination thereof, has no rights towards the defendant, nor does such obligations arise from the mentioned decision or any decision cited therein. According to the Cantonal Court, it cannot be deemed that the appellant is an injured party or that it has any right in that context or that it has been discriminated against. In particular, the Cantonal Court holds that the appellant's allegations stated in its submission of 24 March 2007 are incorrect, wherein the appellant claims that „the decision of the Court in Strasbourg is practically the basis of the appellant's request and that the dispute can be resolved in the appellant's favour by directly applying the provisions of the European Convention and its Protocols, as those documents have priority over all other law." In the opinion of the Cantonal Court, the appellant failed to present a similar case where the aforementioned had been established, and the Cantonal Court also could not find such a decision among a number of decisions examined by it.

23. The appellant filed a revision-appeal against the second instance judgment and the Supreme Court, by its judgment no. 58 0 Ps 902182 08 Rev of 14 May 2009, dismissed it.

24. In the reasoning of the judgment passed upon the revision-appeal, it is stated that the Second Instance Court correctly applied the substantive law to the established facts, *i.e.* it correctly applied the provisions of Articles 210, 211 and 213 of the Law on Obligations, whereby the Second Instance Court dismissed the appellant's appeal and upheld the first instance judgment. It is also stated that the Supreme Court fully accepted the reasons given in the aforementioned judgments, as the Supreme Court held that the actions of the defendant did not contain the grounds under Article 210 of the Law on Obligations and, consequently, it would not be possible to state that the defendant had been unlawfully

enriched. In the opinion of the Supreme Court, even if it were accepted that the requirements under Article 210 of the Law on Obligations were met, the principle of restitution of value would not apply in case where an absolute impediment to its application occurred. Namely, Article 211 of the Law on Obligations stipulates that whoever makes a payment „knowing that he/she is not obliged to pay" shall not be entitled to request a refund, unless he/she has retained the right to request a refund or has made the payment in order to avoid coercion. However, the aforementioned is not applicable to the present case. In addition, the Supreme Court considers that the objection stated in the revision appeal, according to which the appellant paid the pensions because of a difficult social situation of the pensioners, does not hold, since even in that case the appellant is not entitled to request a refund (Article 213 of the Law on Obligations).

25. Furthermore, due to the appellant's lack of standing to sue for the reasons stated in the Cantonal Court's judgment, the Supreme Court holds that the substantive law has been correctly applied where the first part of the statement of claim to take over responsibility for making the pension payments to the pensioners who realised their right to a pension before 30 April 1992 in the territory of the Federation of BiH has been dismissed. In this context, the Supreme Court underlines that the appellant, as to this part of the statement of claim, has no substantive legal relationship with the defendant, since the appellant is not an authorised representative of the pensioners and, accordingly, the appellant cannot file on their behalf the action to take over pensioners and pension payments, as this regards the individual rights of pensioners.

26. In the opinion of the Supreme Court, the objection in the revision-appeal is ill-founded where it is stated that the lower instance courts failed to identify the status of the Pension Agreement and to find that it was unilaterally terminated. The Supreme Court assesses that the lower instance courts correctly inferred that the Pension Agreement entered into between the parties to the civil proceedings has no force of an international contract, as it was entered into between the legal entities within one country based on the RS Law on Pension and Disability Insurance and the FBiH Law on Pension and Disability Insurance and, consequently, the Pension Agreement should be deemed to be a contract concluded in accordance with the general rules of the Law on Obligations by which the contracting parties agreed on their rights and obligations towards the pensioners. The Supreme Court further states that the conclusion of the lower courts is correct where they found that the Pension Agreement (contract) was not terminated in accordance with Articles 124 through 128 of the Law on Obligations nor can it be considered that the Pension Agreement was terminated when the appellant verbally notified the defendant that it was pulling out of the contract in accordance with Article 358(1) and (4) of the Law on Obligations. In this

context, the Supreme Court states that Article 358(5) of the Law on Obligations stipulates that the parties can agree that their debt relationship shall cease to exist at any time by sending a notice of termination; however, this was not agreed by the Pension Agreement. Finally, it cannot be deemed that the requirements were met to terminate the Pension Agreement under Article 358 of the Law on Obligations based on the Decision of the RS Government to grant consent to the appellant to terminate the Pension Agreement and the appellant's verbal notice of termination, while the appellant has continued to meet its obligations under the Pension Agreement.

27. The objection in the revision-appeal is also ill-founded where the appellant's objection relates to an erroneous application of the substantive law due to the court's failure to make a decision based on the provisions of RS Law on Pension and Disability Insurance and FBiH Law on Pension and Disability Insurance, as these laws regulate the procedure for the determination of pension beneficiaries' rights and obligations of insurers and they do not contain provisions governing the right to compensation for damages based on unjust enrichment. Accordingly, this court holds that the lower courts, in dismissing the appellant's statement of claim for compensation for damages based on unjust enrichment, correctly applied the provisions of the Law on Obligations.

28. It is further stated that the objections in the revision-appeal are well founded where it is stated that the Second Instance Court incorrectly referred in its decision to the provisions of Articles 154 and 155 of the Law on Obligations, which regulate the basis of liabilities and damages, and the provisions of Articles 149 and 150 of the same Law, which regulate a contract in credit of a third person, which is not applicable to the present case. Furthermore, as to the objections in the revision appeal for which the Supreme Court found that they were the same as those presented in the appeal (that the appellant was discriminated against, that the court, in deciding on the case in question, did not take into consideration the decision of the European Court in Strasburg in the case of *Karanović,* and the international agreements), it is underlined that the Second Instance Court assessed the mentioned objections and provided the correct, complete and thorough reasons for its decision to dismiss those objections as ill founded.

IV. Appeal

a) Allegations from the appeal

29. The appellant claims that the challenged decisions are in violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental

Freedoms („the European Convention"), the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No.1 to the European Convention, the right to an effective legal remedy under Article 13 of the European Convention, as well as the right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention. As to the right to a fair trial, the appellant holds that there is a violation of the right of access to a court. In essence, the appellant considers that the courts established the facts in an arbitrary manner and that the substantive law and procedural law were erroneously applied. As to the violation of the right to property, the appellant alleges the BAM 6-7 million reduction of its property on a monthly basis. With regard to the right to non-discrimination, the appellant states that the pensioners are discriminated against through the activities carried out by the defendant as well as by the relevant courts, as the pensions should be paid by the defendant and not by the appellant. In the opinion of the appellant, its claim is justified where it is sought that the defendant should take over all pensioners who realised their pension right before 1992 in what is today the Federation of BiH. The appellant considers that the lower courts failed to provide the clear and thorough reasons for their decisions by applying the relevant provisions of procedural law and, as a result, there are formal flaws in the judgments that may raise doubts about the fairness of the proceedings. In the appellant's view, the lower courts violated the procedure, as stated in the appellant's appeal and revision-appeal. The appellant holds that the Second Instance Court failed to assess all claims under the provisions of Article 231 of the Civil Procedure Code, which were of decisive importance, and it failed to provide the specific reasons for holding that these claims were ill-founded. In addition, the appellant asserts that the Second Instance Court generally stated the reasons for which it did not accept the appellant's allegations. According to the appellant, the Supreme Court acted in the same manner and, therefore, the appellant has doubts that the civil proceedings as a whole were unfair and that the application of procedural law and substantive law was manifestly arbitrary and detrimental to the appellant. Furthermore, the appellant holds that all the facts having decisive importance were not established and stated (rejection of the appellant's proposal that R.R., the witness representing the RS Pensioners Association, be heard as to the objection to the appellant's standing to sue, the proposal that the main hearing be postponed due to a failure to submit the expert findings and the expert himself requested that the main hearing be postponed, the court's failure, as underlined in the appeal, that all witnesses for the appellant and defendant be heard at the same hearing because of the different testimonies relating to the essential circumstances, the different positions taken by the lower courts as to the legal status of the Pension Agreement, the authority of and obligation to apply the legal positions given in the decisions of the Commission and the European Court with regard to discrimination).

30. In addition, the appellant states that it follows from the reasoning of the judgment passed upon the revision-appeal that the court frivolously and insufficiently assessed the procedural material and part of the allegations stated in the submissions of the parties to the civil proceedings with regard to the status of the Pension Agreement, which is different according to the lower courts. The appellant underlines that the issue related to the status of the Pension Agreement is important only as to the application of the provision of Article 2 related to the returnees, which is enacted in respect of the pensioners retired before 1992 in what is today the Federation of BiH, and not as to the entire text of the Pension Agreement, the provisions of which are still applicable. According to the appellant, this fact is not mentioned by any of the courts although this fact is of decisive importance and relevant in assessing discrimination in individual cases dealt with by the Human Rights Chamber and the Commission as well as in the decision passed in the case of *Karanović*. The appellant asserts that, by applying the mentioned provision of the Pension Agreement, it has been confirmed that the pensioners, for whom the appellant seeks that they should be taken over by the defendant, are discriminated against under Article 9 of the International Covenant on Economic, Social and Cultural Rights.

31. The appellant also points out that the manner in which the evidence was obtained and which the courts deemed to be decisive and which the court singled out of the procedural material and construed in favour of one of the parties, though it was not proved, indicates arbitrariness and procedural unfairness detrimental to the appellant.

32. In the opinion of the appellant, the Pension and Disability Insurance Fund is a party to the material-legal relationship resulting in the action – it makes pension payments to the pensioners who acquired their right to a pension before 1992, which is the defendant's obligation and, thereby, the appellant suffers pecuniary damages and the defendant is obliged to take over the pensioners whose right has been recognised by the decision made in the case of *Karanović*. As to the *Karanović* case, the appellant highlights that the Supreme Court does not provide the reasons in respect of the positions stated in the appeal and revision appeal but it refers to the reasoning offered by the Second Instance Court. The appellant highlights that the *Karanović* judgment is legally binding for all relevant authorities and legal persons and, consequently, the mention judgment relates also to the appellant as it has been suffering damages to the amount of KM 6-7 million per month, which should be paid by the defendant in accordance with the principle of „the last place of beneficiary's residence where he/she earned the pension". Furthermore, the appellant refers to paragraphs 24, 27 and 28 of the Decision of the European Court of Human Rights.

b) Reply to the appeal

33. In reply to the appeal, the Supreme Court alleges that the appellant's constitutional rights have not been violated in the relevant proceedings.

34. The Cantonal Court states in its reply to the appeal that it correctly applied the substantive law in the relevant proceedings. In the opinion of the Cantonal Court, the appellant has no standing to sue in respect of its allegations relating to the pensioners. As to the *Karanović* judgment, the Cantonal Court states that the case-law is not a source of law and cannot constitute a basis for making court decisions. The case-law may be used as an argument that a certain regulation has a consequence and that it, in that context, has been applied in a number of same or similar cases. With regard to the appellant's allegations that both categories of pensioners, as a consequence of the application of the Pension Agreement, are discriminated against since they do not receive their pensions in the places where they earned them, the Cantonal Court states that the appellant entered into the Pension Agreement without making a sufficient assessment as to how many pensioners „would belong" to him and how many „would belong" to the defendant, who would benefit from it and who would not and, as a result, the appellant tried to remove those failures first through the termination of the Pension Agreement and then through the proceedings in question and, in the view of the Cantonal Court, the appellant has been unsuccessful. According to the Cantonal Court, the decisions of the Human Rights Chamber and the Human Rights Commission are legally binding for all courts in the territory of both Entities. However, this relates to the pension beneficiaries who have proved their right in separate proceedings and it does not automatically include each pensioner or anyone that might be connected with such pensioners.

35. In reply to the appeal, the Municipal Court alleges that the appellant's constitutional rights were not violated in the relevant proceedings, nor did the Municipal Court misapply the law. The Municipal Court maintains that the appellant availed itself of its substantive and procedural rights in the relevant proceedings.

36. The defendant states in its reply to the appeal that in April 1992 the appellant, as a newly established Fund, took over all pensioners who were residing in what is today the Republika Srpska as well as those who came to that territory from other parts of Bosnia and Herzegovina and what is today the Federation of Bosnia and Herzegovina and stopped paying the pensions to the persons who had left, either as refugees or displaced persons, the territory of what is today the Republika Srpska. Together with the pensioners taken over on its own initiative, the appellant also took over pension and disability insurance contributions of all persons who were employed in what is today the Republika Srpska,

out of which it has continued, based on the principle of intergenerational solidarity, to pay the pensions to the pensioners residing in its territory, *i.e.* it has continued to make pension payments as one of the legal successors of the State Fund. In addition, the defendant, as the second legal successor of the State Fund, has continued to pay pensions to all those persons who found themselves in what is today the Federation of Bosnia and Herzegovina and to collect pension and disability insurance contributions from all persons who have been employed in what is today the Federation of Bosnia and Herzegovina. It is also underlined that the appellant and defendant have continued the function of the State Fund, so that the appellant has continued to function as a *de facto* Fund of what is today the Republika Srpska and the defendant as a *de facto* Fund of what is today the Federation of Bosnia and Herzegovina.

37. In addition, the defendant states that the appellant and defendant had no official communication until 2000. In 2000, the appellant and the defendant, in accordance with the Entities' laws on pension and disability insurance, started negotiations and achieved the Pension Agreement, which entered into force on 18 May 2000. By the entry into force of the Pension Agreement, the appellant took over circa two-thirds of the pensioners and the appellant took over circa one-third of the pensioners who had acquired their right to a pension before 6 April 1992, irrespective of the number of employees in the territory covered either by the appellant or defendant. Duration of the Pension Agreement concluded between the appellant and defendant was not stipulated, which means, according to the defendant, that it was concluded for an indefinite period. The defendant further states that on 13 February 2002 the RS Government gave its consent to the termination of the Pension Agreement and the appellant verbally notified the defendant that it would pull out of the Pension Agreement.

38. Furthermore, the defendant points out that the appellant is fully aware that contributions of the persons who acquired the pension rights were spent long time ago, as both the appellant and defendant have been paying their pensions out of contributions collected from present employees, in the same manner as their contributions were formerly used to fund pensions of the pensioners who were receiving their pensions at the time when the pensioners referred to by the appellant had been paying pension contributions. Until 1992 pension and disability insurance in BiH, same as today, was based on intergenerational solidarity so that the funds were not deposited. This means that the persons who are presently insured and who pay pension and disability insurance contributions do not pay the funds for covering their future pension rights, but they cover the current obligations for the current pensioners. The defendant reiterates that it is undisputed that the State Fund never had any capitalised funds (savings) that could be presently used for covering the pension obligations (the years of service) originating before April 1992.

39. In the opinion of the defendant, it is unacceptable that the appellant seeks that the defendant should now take over new obligations of paying the pensions to all persons who acquired their right to a pension before 6 April 1992 (based on the data relating to the payment address on that date) and that the appellant retains the rights relating to the collection of proportional share of overall contributions to the pension and disability insurance fund. The defendant also stated that the appellant requested that the defendant pay pensions to the pensioners who have never been paid by the defendant, nor has it ever been the defendant's obligation or right.

40. Furthermore, the defendant underlines that there is no document or act determining that the defendant is a universal successor of the then Social Fund of Pension and Disability Insurance of the SR BiH, *i.e.* of the R BiH, as a sole insurer in the SR BiH *i.e.* R BiH and, therefore, the defendant can not be imposed the obligations requested by the appellant. Furthermore, the defendant recalls that no issue was raised as to the balance of payments division or any other division when the 2000 Pension Agreement was concluded between the appellant and defendant as two equal insurers in BiH. In the opinion of the defendant, both the appellant and defendant are *de facto* and *de iure* two equal successors of the State Fund of Pension and Disability Insurance.

V. Relevant Law

41. The **Law on Obligations** (*the Official Gazette of SFRY* nos. 29/78, 39/85, 45/89 and 57/89*, the Official Gazette of the R* BiH nos. 2/92, 13/93 and 13/94, and *the Official Gazette of the Federation of Bosnia and Herzegovina* no. 29/03), as relevant, reads:

Article 124

In bilateral contracts, when one party does not fulfill his/her obligation, the other party can request fulfilling of obligations, unless something else is prescribed, or can cancel the contract by simple statement, under conditions envisioned by the following articles, unless cancellation of the contract ensues from the law itself. In either event the other party is entitled to damage compensation.

Article 125

1) If the fulfillment of the obligation within the set deadline is essential part of the contract and the debtor does not fulfill his/her obligation within the deadline, the contract is to be cancelled in accordance with the law.

2) However, the creditor can keep the contract in effect if, upon the expiry of the deadline, without delay, notifies the debtor of his/her request for contract fulfillment.

3) If the creditor requested fulfilling of the contract and it did not happen within the reasonable deadline, he/she can declare that the contract will be cancelled.

4) These regulations shall be valid both if the contractual parties envisioned that the contract would be considered as cancelled if not fulfilled within the set deadline and if fulfilling the contract within set deadline is essential part of the contract due to the nature of the legal transaction.

Article 126

1) When fulfilling obligation within set deadline is not essential part of the contract, the debtor can keep the right to fulfill his/her obligation even after the expiry of the deadline and the creditor can request that the obligation be fulfilled.

2) However, if the creditor wants to cancel the contract he/she has to leave an adequate subsequent deadline for the debtor to fulfill the obligation.

3) If the debtor does not fulfill his/her obligation within the later deadline, the same consequences apply as in the case when the deadline is essential part of the contract.

Article 127

The creditor can cancel the contract without leaving the later deadline for the debtor if it is obvious from the debtor's conduct that he/she will not fulfill his/her obligation within the later deadline.

Article 128

When it is obvious that one contractual party will not fulfill his/her obligation from the contract prior to the expiry of the deadline, another party can cancel the contract and request the damage compensation.

Article 210

(1) If social resources managed by workers i.e. employees in a socially owned legal person have been transferred in any manner to social resources managed by workers i.e. employees in another socially owned legal person, or have become in any manner part of the property of another person, and that transfer is not based on a self-management agreement or a legal transaction or law, the acquirer is obliged to return it. When it is not possible, the acquirer shall be obliged to compensate the value of material gain.

(2) The provision of the preceding paragraph shall also apply in case that part of the property of a person has been transferred in any manner to social resources managed by workers i.e. employees in a socially owned legal person or has become in any manner the property of another person, and that transfer is not based on a self-management agreement or a legal transaction or law.

(3) The transfer of social resources i.e. property also implies material gain acquired by carrying out an action.

(4) The obligation to give back i.e. to compensate the value of material gain shall also arise in case that something has been received on the basis of something that has not materialised or something that is no longer applicable.

Article 211

Whoever makes a payment knowing that he/she is not obliged to pay shall not be entitled to a refund, unless he/she has retained the right to request a refund or made the payment in order to avoid coercion.

Article 212

Whoever paid the same debt twice, even if it was once on the basis of performed adjustment, he/she shall be entitled to request a refund according to the general rules on unjust enrichment.

Article 213

Something that has been given or done as a fulfillment of a natural obligation, moral or social duty, cannot be requested back.

Article 358

(1) Each party can terminate the debt relationship through cancellation, unless the terms of the debt relationship has been stipulated.

(2) Cancellation must be submitted to the other party.

(3) Cancellation, unless inopportune, can be submitted any time.

(4) Dismissed debt relationship ceases to exist upon the expiry of the notice period defined by the contract, and if such a period has not been contracted, the relationship ceases upon expiry of a legal deadline or deadline determined by business practice, i.e. appropriate deadline.

(5) Parties can agree that their debt relationship will cease to exist by a mere submitting of cancellation, unless stipulated otherwise by the law for the specific case.

(6) Creditor has the right to request from the debtor whatever was due before the obligation ceased to exist due to deadline expiry or cancellation.

42. The **Agreement on Mutual Rights and Obligations in the Implementation of Pension and Disability Insurance (***the Official Gazette of the Federation of BiH* no. 24/00), as relevant, reads:

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Article 1

By this Agreement the Public Fund of Pension and Disability Insurance of the Republika Srpska, the Social Fund of Pension and Disability Insurance of Bosnia and Herzegovina and the Bureau of Pension and Disability Insurance Mostar („the insurers") regulate the manner in which the pension payment obligations are divided, the length of service for retirement in the procedure of realisation of the right to a pension, the determination of proportionate pension, the realisation of the right to disability pension and family pension, the responsibility for deciding on the right to divide the burden of paying for the pensions realised after the entry into force of the Pension Agreement, the exchange of documentation and data and other issues relating to the implementation of pension and disability insurance and the Pension Agreement itself.

Article 2

The insurer paying a pension to a pension beneficiary on the date of entry into force of the Pension Agreement shall continue to make the payment irrespective of the pensioner's temporary or permanent place of residence.

The pension beneficiary who had been receiving his/her pension payment as of April 1992, but whose pension payment was terminated before the entry into force of the Pension Agreement, will be paid by the insurer which made the last pension payment to the pension beneficiary.

43. The **Law on Pension and Disability Insurance** (*the Official Gazette of the Republika Srpska* no. 106/05 – the consolidated text), as relevant, reads:

Article 241

Pensionable service earned by citizens of the Republic in the former SFRY Republics before their independence and in the Federation of Bosnia and Herzegovina shall be taken into account only for determining the conditions for acquiring the rights.

As to the recognition of pensionable service earned in the countries referred to in paragraph 1 of this Article after their independence and in the Federation of Bosnia and Herzegovina until appropriate agreements have been entered into with those countries and the Federation of Bosnia and Herzegovina, the principle of reciprocity shall apply.

44. The **Law on Pension and Disability Insurance** (*the Official Gazette of the Federation of BiH* nos. 29/98, 49/00, 32/01, 61/02, 73/05, 59/06 and 4/09), as relevant, reads:

Pensionable service earned until March 6, 1992 in other republics of former Socialist Federative Republic of Yugoslavia and in the Bureaus for Pension and Disability Insurance

of the Military Insurees shall be taken into account for acquiring pension and disability rights for the citizens of Bosnia and Herzegovina in the territory of the Federation, and the pension shall be determined according to the pensionable service earned in the Federation, unless otherwise determined by an international agreement, or on the basis of reciprocity.

VI. Admissibility

45. 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.

46. Pursuant to Article 16(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

47. In the particular case the subject matter of the appeal is the judgment of the Supreme Court no. 58 0 Ps 902182 08 Rev of 14 May 2009 against which there are no other effective legal remedies available under the law. Furthermore, the appellant received the challenged judgment on 25 June 2009, and the appeal was filed on 10 August 2009, *i.e.* within 60 days time-limit as provided for by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court because it is not manifestly (*prima facie*) ill-founded nor is there any other formal reason that would render the appeal inadmissible.

48. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16 (1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal meets the admissibility requirements.

VII. Merits

49. The appellant challenges the aforementioned judgments claiming that they are in violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No.1 to the European Convention, the right to an effective legal remedy under Article 13 of the European Convention, and the right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention.

Right to a fair trial

Article II(3) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

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

Article 6(1) European Convention, as relevant, reads:

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

50. In the present case it is necessary first to answer the question whether the proceedings in question have the character of „dispute" in which the appellant's „civil rights and obligations" have been determined. The Constitutional Court holds that Article 6(1) of the European Convention is applicable in the case at hand, as the relevant proceedings relate to the appellant's compensation claim and this implies that the mentioned case is a civil law case.

51. The appellant's allegations about a violation of the right to a fair trial are, in essence, related to the erroneously established facts and the alleged misapplication of substantive law and procedural law.

52. In this regard, the Constitutional Court primarily refers to the case-laws of the European Court of Human Rights and the Constitutional Court, according to which the task of these courts is not to review the findings of the regular courts as to the facts and application of the substantive law (see ECHR, *Pronina vs. Russia*, and Decision on Admissibility of 30 June 2005, Application no. 65167/01). That is to say that the Constitutional Court cannot generally substitute its own appraisal of the facts or evidence for that of the regular courts but it is the regular courts' task to appraise the presented facts and evidence (see, the European Court of Human Rights, *Thomas vs. the United Kingdom*, judgment of 10 May 2005, Application no. 19354/02). The Court is therefore called upon to examine whether the constitutional rights (right to a fair trial, right of access to court, right to an effective legal remedy, *etc.*) were violated or neglected or whether the application of law was arbitrary or discriminatory. Accordingly, within its appellate jurisdiction the Constitutional Court exclusively deals with possible violations of constitutional rights or rights under the European Convention in the proceedings before ordinary courts and therefore, as far as the

instant case is concerned, the Constitutional Court shall examine whether the proceedings, as a whole, were fair as required under Article 6(1) of the European Convention (see, the Constitutional Court, Decision No. *AP 20/50* of 18 May 2005, published in *the Official Gazette of BiH*, no. 58/05). Furthermore, the Constitutional Court's task is not to ascertain the way in which the evidence was taken by the ordinary courts. The Constitutional Court will not interfere in a situation where the ordinary courts give their credence to the evidence of one party to the proceedings based on judicial margin of appreciation (see the Constitutional Court, Decisions no. *AP 612/04* of 30 November 2004, and the European Court of Human Rights, *Doorson vs. Netherlands*, judgment of 6 March 1996 published in the Reports no. 1996-II, paragraph 78).

53. In addition, the Constitutional Court underlines that according to the consistent case-law of the European Court of Human Rights and the Constitutional Court, Article 6(1) of the European Convention obliges the courts to give reasons for their judgments, but this cannot be understood as requiring a detailed answer to every argument (see the Constitutional Court, Decisions no. *U 62/01* of 5 April 2002 and *AP 352/04* of 23 March 2005). The extent to which this duty to give reasons applies may vary according to the nature of the decision (see the European Court of Human Rights, *Ruiz Torija vs. Spain,* judgment of 9 December 1994, Series A No. 303-A, paragraph 29). The European Court of Human Rights and the Constitutional Court have indicated in a number of their decisions that even though a domestic court has a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, an authority is obliged to justify its activities by giving reasons for its decisions (see the European Court of Human Rights, *Suominen vs. Finland*, judgment of 1 July 2003, Application no. 37801/97, paragraph 36 and, *mutatis mutandis*, the Constitutional Court, Decision no. *AP 5/05* of 14 March 2006).

54. Considering the appellant's allegations, the Constitutional Court finds that the ordinary courts, contrary to the appellant's allegations, provided the clear and thorough reasons for their decisions, which do not lead to a conclusion that the procedural law and substantive law were applied arbitrarily at any stage of the proceedings. Namely, the appellant in the present case requested in its statement of claim that the defendant be obliged to take over all pensioners who acquired their pension right in the territory of the Federation of BiH before 30 April 1992 and to pay the appellant compensation for damages due to unjust enrichment in the total amount of BAM 175,587,316.13, which is the sum the appellant paid to the pensioners between 1 October 2003 and 30 November 2006, and that the defendant be obliged to pay all amounts paid to the pensioners by the appellant until the takeover has been completed. Deciding on the first part of the appellant's statement of claim seeking that the defendant be obliged to take over the

pensioners, the ordinary courts established that the appellant had no standing to sue. The reason being that in the opinion of the ordinary courts only the pensioners of the RS Fund have standing to sue and, accordingly, the appellant cannot file the action with regard to the transfer of an unspecified number of pensioners from one Fund to another. In addition, the ordinary courts emphasise that a party has standing to sue only if that party entered into a material-legal relationship out of which litigation has occurred. However, this is not the case, as there is no material-legal relationship between the appellant and defendant and the appellant is not authorised under the law to represent the pensioners and, consequently, the appellant cannot file the claim on their behalf and request that the pensioners should be taken over and paid their pensions, which is an individual right of each pensioner.

55. As to the second part of the appellant's statement of claim, the Constitutional Court finds that the appellant in the present case failed to prove that it had sustained any damage that the defendant could be held liable to pay compensation for, nor did the appellant prove that the defendant had unjustly enriched within the meaning of Article 210 of the Law on Obligations. Namely, it was established in the relevant proceedings that the Pension Agreement had not been terminated within the meaning of the provisions of Articles 124 through 128 of the Law on Obligations, nor could it be deemed that it had been terminated in accordance with the provision of Article 358(1) and (4) of the Law on Obligations. The reason being that in the opinion of the Supreme Court it cannot be considered that the requirements were met to terminate the Pension Agreement under Article 358 of the Law on Obligations based on the Decision of the RS Government to grant consent to the appellant to terminate the Pension Agreement and the appellant's verbal notice of termination, while the appellant has continued to meet its obligations under the Pension Agreement. In addition, the Supreme Court took into account particularly the facts that the appellant had never given the defendant a written notice of cancellation of the Pension Agreement and that the appellant continued to make pension payments under the Pension Agreement and failed to notify the defendant that it retained the right to request a refund of pension payments made by the appellant and that the appellant, after signing the Pension Agreement, issued individual rulings to the pensioners retired before 30 April 1992 in accordance with the RS regulations, based on which the appellant continued to make pension payments. In view of the above, the Constitutional Court cannot find that the ordinary courts acted arbitrarily. Furthermore, the Constitutional Court holds that the reasons provided by the ordinary courts meet the standards set forth in Article 6(1) of the European Convention. Contrary to the appellant's allegations, the Constitutional Court holds that the appellant's right of access to a court has not been violated in the relevant proceedings, as the appellant took active part in the proceedings of three instances, and the appellant's dissatisfaction with the outcome of the proceedings in question does not necessarily lead to a conclusion that its right to a fair trial has been violated.

56. As to the appellant's allegations that the Cantonal Court and the Supreme Court failed to examine all complaints stated in the appeal and revision appeal, the Constitutional Court recalls that Article 6(1) of the European Convention obliges the courts to give reasons for their judgments, but this cannot be understood as requiring a detailed answer to every argument apart from the relevant ones (see *Harutyunyan vs. Armenia*, partial judgment on the admissibility of Application no. 36549/03 of 5 July 2005). Namely, the final decisions of appellate courts do not necessarily contain detailed reasons (see European Commission on Human Rights, Decision on Admissibility no. 8769/97 of 16 July 1981, OI 25), but they contain the reasons relating to the allegations contained in the appeal, which are considered relevant. In the present case, the Constitutional Court holds that the Cantonal Court and the Supreme Court provided the clear and thorough reasons for their decisions relating to the appellant's allegations, which the courts considered relevant, and in accordance with the requirements of Article 6 of the European Convention.

57. As to the appellant's allegations relating to the European Court of Human Rights' decision in the case of *Karanović,* judgment of 20 November 2007, the Constitutional Court finds that the European Court of Human Rights, in the case of *Šekerović* and *Pašalić,* which is similar to the case of *Karanović,* passed the judgment dated 8 March 2011. While considering the appellant's allegations, the Constitutional Court takes into account the mentioned judgment although it has not been the subject-matter of the appellant's allegations. In view of the above, the Constitutional Court first finds that the mentioned judgments considered by the European Court of Human Rights concern the individual cases in which the Human Rights Chamber and the Human Rights Commission within the Constitutional Court of BiH passed their decisions establishing a violation of the applicants' rights, and the appellant is aware of the aforementioned decisions. The persons named above filed the applications with the European Court of Human Rights because the judgments in their favour had not been enforced. The European Court of Human Rights established the violation of the applicants' rights as a result of non-enforcement of the decisions of the Human Rights Chamber and the Human Rights Commission within the Constitutional Court of BiH. It follows that the individual rights of the pensioners who returned to the Federation of BiH after the war are the subject matter of the decisions of the Human Rights Chamber and the Human Rights Commission within the Constitutional Court of BiH as well as of the European Court of Human Rights.

58. In the present case, the subject matter of the dispute is the appellant's statement of claim seeking that the defendant should take over an unspecified number of pensioners to the Pension and Disability Insurance Fund of the Federation of BiH and the ordinary courts have found that the appellant has no standing to sue to file the action on behalf of un

unspecified number of pensioners and request that the pensioners should be transferred from one Fund to another. Furthermore, the Constitutional Court finds that the European Court of Human Rights took the position in its decisions that the appropriate legal framework should be created in order to enforce the decisions concerned. However, in considering the grounds of the appellant's statement of claim, the ordinary courts correctly took the legal validity of the Pension Agreement as a starting point, as the Pension Agreement had been entered into by mutual consent of the contracting parties on the basis of the FBiH Law on Pension and Disability Insurance and the RS Law Pension and Disability Insurance, and the ordinary courts established that the Pension Agreement, contrary to the appellant's allegations, had not been terminated in accordance with Articles 124 through 128 of the Law on Obligations, nor can it be considered that the Pension Agreement had been unilaterally terminated by the cancellation thereof under Article 358(1) and (4) of the Law on Obligations. In addition, the ordinary courts established that it cannot be deemed that the requirements had been met to terminate the Pension Agreement under Article 358 of the Law on Obligations. In view of the above, it follows that the individual rights of „unspecified persons" could not be considered in the relevant proceedings, but the rights and obligations of the two legal persons, which were the parties thereto. Moreover, in the relevant proceedings the ordinary courts considered the appellant's statement of claim in accordance with the applicable legal framework.

59. In view of the aforementioned, the Constitutional Court concludes that there has been no violation of the appellant's constitutional right to a fair trial under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention.

60. The Constitutional Court will not consider the appellant's allegations relating to the alleged violation of the right to property under Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention, as these allegations are in essence the same as those relating to the violation of the right to a fair trial under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention, which the Constitutional Court have already considered in the present decision.

As to the violation of right to an effective legal remedy

61. Article 13 of the European Convention, as relevant, reads:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority [...]

62. As to the appellant's allegations about the violation of the right to an effective remedy under Article 13 of the European Convention, the Constitutional Court underlines

that the appellant failed explicitly to state the rights in connection with which it held that the rights under Article 13 of the European Convention were violated. However, it follows from the appeal that the appellant's allegations about the violation of this right include the right to a fair trial. In this connection, the Constitutional Court notes that the appellant had the possibility to use legal remedies and that he availed himself of those remedies (appeal and revision appeal). The fact that the Cantonal Court and the Supreme Court, while deciding on the appellant's appeal and revision appeal, passed the decisions unfavourable to the appellant cannot lead to a conclusion that the legal remedies were ineffective or did not exist.

63. In view of the above, the Constitutional Court concludes that in the present case there has been no violation of the right to an effective remedy under Article 13 of the European Convention taken in conjunction with the right to a fair trial.

As to the right to non-discrimination

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

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 of the European Convention reads:

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

65. The Constitutional Court recalls that according to the case-law of the European Court of Human Rights, discrimination occurs when a person or a group in an analogous situation are subject to differential treatment based on sex, race, colour, language, religion, (…), in the enjoyment of the rights and freedoms safeguarded by the European Convention if it has no objective and reasonable justification, or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized (see European Court of Human Rights, *Case „Relating to certain aspects of the laws on the use of languages in education in Belgium„ vs. Belgium*, Judgment of 9 February 1967, Series A, No. 6, paragraph 10). In addition, it is irrelevant whether discrimination results from a

difference of treatment permitted by legislation or arose from the mere application of laws (see European Court of Human Rights, *Ireland vs. the United Kingdom*, Judgment of 18 January 1978, Series A, No. 25, paragraph 226).

66. Although the appellant failed explicitly to state the rights in connection with which it held that the rights under Article 14 of the European Convention were violated, the Constitutional Court finds that it follows from the appeal that the appellant's allegations about the violation of this right include the right to a fair trial. In the present case, the appellant holds that there is a violation of the mentioned right because the pensioners, who, according to the appellant, should be taken over by the defendant, have been discriminated against. It follows from the aforementioned that, essentially, the appellant as party to the relevant proceedings does not hold that it has been discriminated against in the relevant proceedings, but that other persons who have taken no part in the proceedings have been indirectly discriminated against. Taking into account the aforementioned, the Constitutional Court holds that the appellant's allegations are ill founded, as they do not relate to a violation of the appellant's constitutional right to non-discrimination.

67. In view of the aforementioned, the Constitutional Court concludes that the appeal, as to the allegations of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention taken in conjunction with the right to a fair trial, is ill founded.

VIII. Conclusion

68. The Constitutional Court concludes that there is no violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, since the Constitutional Court, in respect of the application of procedural law and substantive law, finds no arbitrariness in the reasons given in the impugned decisions.

69. Also, the Constitutional Court concludes that there is no violation of the right to an effective legal remedy under Article 13 of the European Convention taken in conjunction with the right to a fair trial under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention, as there is nothing which would indicate that the appellant was prevented from pursuing the remedies provided for by the law.

70. The Constitutional Court concludes that the appellant's allegations of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention taken in conjunction with the right to a fair trial under Article

II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention are ill founded, as the appellant has not stated that it as party to the relevant proceedings has been discriminated against, but that other persons have been indirectly discriminated against.

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

72. Pursuant to Article 41 of the Rules of the Constitutional Court, annex to this decision contains a Separate Dissenting Opinion of the President of the Constitutional Court, Miodrag Simović.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of President Miodrag Simović

In my view, this is a case in which the Constitutional Court ought to fulfil an important constitutional and judicial task of clarifying a constitutional and legal aspect of the issue raised in the field of pension and disability insurance.

Namely, we start with the fact that the right to a pension is an important social and civil (property) right of a person. This is also a constitutional right within the meaning of Article II(3)(a) and (k) of the Constitution of BiH, *i.e.* Article 9 of the International Covenant on Economic, Social and Cultural Rights.

The principle of the rule of law, as established by Article I(2) of the Constitution of BiH, imposes an obligation on the state (in the loosest sense of the word) to regulate such rights by law! Certainly, only a legislative body, which has no legitimacy under the law to regulate social and legal relations, has power to enact laws. In addition, it is indisputable that the executive bodies, within the scope of their powers established by law, can pass legal regulations in the form of generally binding decrees or other legal acts. However, the principle of separation of powers, as an inherent element of the rule of law, entails certain limitations on the executive bodies with regard to the boundaries of the margin of appreciation. Namely, the executive bodies cannot take over the right to regulate fundamental elements of a specific right, irrespective of whether or not they refer to a specific law. Such laws, which entitle the executive bodies to regulate an issue falling within the responsibility of the legislative authority, are in violation of the Constitution of BiH, as they are contrary to **the principle of separation of powers**. Actually, the executive bodies lack democratic legitimacy, which the legislator gains through democratic elections, entitling the legislator to take over the responsibility for regulating these areas.

In the present case, the essential element (reciprocal relations between the Entities' pension authorities) of the manner of determining the right to a pension of a large group of citizens (this is not irrelevant) is regulated by the „Agreement" entered into by the Directors of the public legal administrative bodies (the Pension and Disability Insurance Funds) based on the decisions made by the Entities' governments. The decisions of the governments were made on the basis of certain provisions of the Entities' laws. Such a fundamental segment of the right to a pension, which determines, *inter alia*, who will pay the pensions of the citizens, the amount of their pensions and the manner in which the coefficient of their pensions will be calculated, cannot rest with the executive bodies irrespective of whether or not the entities' legislators have created the legal basis for it.

Next, in my view, this manner of regulating this part of the right to a pension is inconsistent with **the principle of legal certainty**, as a further element of the principle of the rule of law. The right to a pension is endangered once one of the contracting

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partners wishes no longer to be a partner of contractual relationship or to comply with that agreement. The present case actually confirms the extent to which legal uncertainty affects the citizens when it regards their right to a pension, as this right is regulated by the „agreement" and not by a permanent and stable legal basis such as a law.

Finally, the issue of regulating the inter-entity relations in the field of social protection includes the creation of a single market with **free movement of persons (employees and establishment of legal entities),** as stipulated in Article I(4) of the Constitution of BiH. Namely, it is clear that a violation of these constitutional and legal principles constitutes an „obstacle" for the freedom of movement of persons in terms of Article I(4) of the Constitution of BiH.

In view of the above, it is clear that the manner in which the Entities have regulated these relations (by enacting the relevant provisions – Article 205(2) of the of the RS Law on Pension and Disability Insurance and Article 82(2) of the FBiH Law on Pension and Disability Insurance, based on which the agreement between the two Funds was concluded) is inconsistent with the Constitution of BiH. Once the legal basis of a certain agreement is unconstitutional, the act itself, which is passed on the bases of such an unconstitutional norm, is unconstitutional. In connection with the aforementioned, we must not forget that the Entities' laws on obligations stipulates that all agreements are **invalid** if concluded in contradiction of, *inter alia*, the Constitution of BiH. Furthermore, nullity is observed *ex officio* by a court. In the event that nullity originates from an unconstitutional law, than it is a classic case falling under the jurisdiction, *par excellence*, of the Constitutional Court. Moreover, the Constitutional Court, when acting in is appellate capacity (Article VI(3) (b) of the Constitution of BiH), has the obligation to review the constitutionality. Namely, the Constitutional Court of BiH is authorised, in appellate proceedings, to bring together its jurisdictions under Article VI(3)(b) and Article VI(3)(c) of the Constitution of BiH – concrete constitutional review. The Constitutional Court has done it in a number of its decisions (see, for example, case nos. *U 19/00* and *U 106/03*).

For these reasons, I consider that the agreement, as the manner in which this part of the inter-Entity relations in the field of pension insurance has been regulated, is **inconsistent with the Constitution of BiH**. There are no adequate legal solutions. This position has been corroborated by the European Court of Human Rights not only in the case of *Karanović* but also in its decision in the case of *Šekerović* and *Pašalić*.

In my view, the Constitutional Court of BiH should have granted the appeal and passed the decision on the merits in terms of Article 64(2) of the Rules of the Constitutional Court. In addition, this situation should have been declared unconstitutional and the Constitutional Court of BiH should have ordered Bosnia and Herzegovina and the Entities to undertake the same measures as those ordered by the European Court of Human Rights, *i.e.* to develop a fair and secure mutual relationship through the legal regulation.

Case No. AP 3679/08

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Boško Bjelošević and Ms. Marinka Bjelošević against the judgment of the Supreme Court of the Republika Srpska, no. 118-0-Rev-06-000 471 of 1 September 2008 and judgment of the County Court of Banja Luka, no. Gž-1546/04 of 24 February 2006

Decision of 12 May 2011

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), as a Grand Chamber and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić,

Mr. Mirsad Ćeman

Having deliberated on the appeal of **Mr. Boško Bjelošević and Others** in case no. **AP 3679/08**, at its session held on 12 May 2011, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Boško Bjelošević and Ms. Marina Bjelošević is hereby granted.

A violation of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The judgement of the Supreme Court of the Republika Srpska, no. 118-0-Rev-06-000 471 of 1 September 2008 is quashed.

The case shall be referred back to the Supreme Court of the Republika Srpska, which is obligated to employ an expedited procedure and take a new decision in line with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Supreme Court of the Republika Srpska is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 60 days from the date of delivery of this Decision, about the measures taken to execute this

Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 22 November 2008, Mr. Boško Bjelošević and Ms. Marinka Bjelošević („the appellants") from Maslovar – Kotor Varoš, temporarily residing in Australia, represented by Mr. Milorad Đukic, a lawyer practicing in 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. 118-0-Rev-06-000 471 of 1 September 2008 and judgment of the County Court of Banja Luka („the County Court"), no. Gž-1546/04 of 24 February 2006.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Supreme Court, the County Court, the Basic Court of Kotor Varoš („the Basic Court") and lawyer Zoran Bubić, in the capacity of attorney of Mr. Borislav Pelčić and Zora Pelčić („the plaintiffs") were requested on 10 March 2009 to submit their replies to the appeal.

3. The Supreme Court and County Court submitted their replies to the appeal on 30 March 2009, the Basic Court submitted its reply on 6 April 2009 and the plaintiffs failed to submit their reply to the appeal.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies of the Supreme Court, County Court and Basic Court were submitted to the appellants on 2 June 2009. On 10 June 2009, the appellants submitted their comments on the replies to the appeal.

III. Facts of the Case

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

6. By judgment no. P-70/00 of 29 June 2004, the Basic Court dismissed the plaintiffs' claim wherein they requested the court to establish that a purchase contract concluded in writing on 13 August 1995 between the plaintiffs as sellers and appellant as a buyer, which was certified under no. OV-191/95 by the Basic Court and based on which the purchase of the business premises described in the enacting clause of the aforementioned judgment („the real property at issue") was carried out, was null and void, and to order the appellants to hand over the real property at issue to the plaintiffs together with valid documentation to transfer the ownership right and register it in land books. In the reasons for its judgment, the Basic Court noted that it was not disputed between the parties that the real property at issue had not been completely constructed at the time of purchase, that the appellants had subsequently invested in the real property at issue and had completed the construction and that presently this was a catering facility. Furthermore, the Basic Court noted that the amount of the appellants' investments was not relevant to the settlement of this dispute and that it was not the subject-matter of this dispute, although it was possible to establish it from the findings of the court expert in the field of construction, and that the parties to the proceedings had not disputed it.

7. Furthermore, the Basic Court observed that the disputable issue between the parties was whether the purchase contract concerning to the real property at issue was an usurious contract within the meaning of Article 141 of the Law on Obligations and whether it was null and void within the meaning of Article 25 of the Law on the Cessation of Application of the Law on the Use of Abandoned Property, since it had been concluded „during the period in dispute". The Basic Court concluded from the evidence presented during the first-instance proceedings that in the present case the plaintiffs had not submitted evidence to prove that the appellants had abused their state of necessity, lack of experience, reckless or dependence, „nor did it follow from their testimonies given on 26 June 2002 that they had been in such a situation". Furthermore, the Basic Court concluded that the plaintiffs had not submitted evidence to prove that the price of the real property at issue they had sold was less than the market price, that the court expert found that the value of the real property at issue at the time of purchase was 23,128.00 KM and that the appellants had paid the purchase price in the amount of BAM 20,000.00 to the plaintiffs. Thus, the court concluded that the real property at issue had been sold at an appropriate price.

8. Furthermore, the Basic Court noted that it could not accept the plaintiffs' view that the purchase contract in question had been concluded in the disputed period, between 1 April 1992 and 19 December 1998 as referred to in the Law on the Cessation of Application of the Law on the Use of Abandoned Property. The court noted that the contracts on the sales of real properties which had been concluded in that period were subject to verification,

although their validity was to be examined in the court proceedings if „the parties to the proceedings are interested in establishing validity" within the meaning of Article 25 of the Law on the Cessation of Application of the Law on the Use of Abandoned Property. Furthermore, the court noted that the plaintiffs had not submitted any evidence to prove that the appellants or third persons had forced them in any way whatsoever to conclude the contract and that plaintiff Borislav Peličić had stated before the court that no pressure had been exerted on him, that he had not been at risk because of his ethnic affiliation and that his main motive to sell the real property at issue were „finances". The court noted that this statement had been confirmed by his wife and that the plaintiffs' reference to war and state of war and fear of uncertainty was not sufficient reason for the court to establish that the contract was null and void „as that fear of uncertain future could have had further influence on the [appellants] who had invested cash during and after the war". Taking into account the aforesaid, the Basic Court concluded that the purchase contract was formally and substantially valid and that it was not contrary to the mandatory regulations, legal order, best practice and social morality.

9. In judgment no. Gž-1546/04 of 24 February 2006, the County Court granted the plaintiffs' appeal, modified the first-instance judgment by granting the plaintiffs' claim and declaring the purchase contract null and void and ordered the appellants to hand over the real property at issue to the plaintiffs and valid document for the transfer of ownership right and registration thereof in land books. Furthermore, the County Court ordered the plaintiffs to pay back the amount of BAM 30,389.56 to the appellants and ordered the appellants to pay the plaintiffs compensation for the costs of the proceedings. In the reasons for its judgment, the County Court noted that it had fully accepted the facts established by the first-instance court that the plaintiffs, while concluding the purchase contract in question had acted „by exercising free will while concluding the contract with such a content", and that the contract at issue did not contain the elements of a usurious contract under Article 141 of the Law on Obligations. In this connection, the County Court considered as unfounded the plaintiffs' allegations that the contract in question was not valid because they had been forced to sell the business premises in order to have the funds for education of their children, since such a motive on the part of the plaintiffs had no impact on the validity of the concluded contract and „does not render it null and void, nor does it contain defects of consent within the meaning of Articles 26 and 28 of the Law on Obligations". The County Court considered as unfounded the plaintiffs' allegations that the contract in question was a usurious contract, since it did not follow from the evidence presented before the first-instance court, i.e. it was established that the plaintiffs „had not been in state of necessity, difficult material situation which would have endangered subsistence of their family, and [the appellants] did not agree an excessive material gain."

10. However, the County Court concluded that the first-instance court had failed to apply the provisions of Article 3 of the Law on the Application of the Law on Sales of Real Property during Immediate War Danger and State of War („the Law on the Application of the Law on Sales of Real Property"), which had entered into force on the date of its publication, i.e. 29 November 1994 and had been in force until 27 June 1996, when the Law on the Cessation of Application of the Law on Application of the Law on Sales of Real Property during Immediate War Danger and State of War entered into force.

11. The County Court noted that the fact was that the Law on the Application of the Law on Sales of Real Property had been published in a special issue of the „Official Gazette of the Republika Srpska" with a designation „state secret", but that „despite that fact it entered into force and the Supreme Court of the Republika Srpska based several decisions on the application of the regulations published in the same issue (…) so that this Court is of the opinion that the aforementioned law regulation has mandatory legal force". The County Court further noted that Article 3 of that law stipulated that the contracts on sales of real property, which were concluded after 29 November 1994, as the date of entry into force of that law, were null and void. Given that fact and the provisions of Article 103 of the Law on Obligations, according to which the contracts contrary to coercive obligations shall be null and void, and Article 104 of the Law on Obligations, which prescribes a sanction in case of nullity of the contract, the County Court concluded that the contract in question was null and void and that the parties to the proceedings were ordered to give back what they had received „unless the return is not possible or the nature of what was given does not allow the return." Furthermore, the County Court noted that the value of mutual giving was to be assessed at the time of taking a decision if it was not possible to give back the subject-matter of the contract. The County Court noted that in the present case, despite the appellants' indisputable investments in the real property at issue, which amounted to the increase in the value of the real property at issue, the restitution in kind, i.e. the return of the real property at issue was possible. The court further observed that the value of what the plaintiffs had received based on the null and void contract had been assessed on the basis of the findings of a court expert in the field of finances. Given the fact that the appellants specified their claim and thus requested the plaintiffs to pay them pecuniary compensation for the works carried out on the real property at issue, the County Court concluded that they had the possibility to effectuate their claims either by concluding an agreement or by initiating separate proceedings.

12. The Supreme Court, in the impugned judgment no. 118-0-Rev-06-000 471 of 1 September 2008, having considered a revision-appeal lodged by the appellants, modified the second-instance judgment *ex officio* in the part in which the plaintiffs were ordered

to give back the revalorized amount of the purchase price to the appellants by ordering the plaintiffs to give back the amount of BAM 20,000.00 to the appellants instead of BAM 30,389.56 with the default interest from the date when the real property had been given into possession of the plaintiffs. The remaining part of the revision-appeal of the appellants was dismissed. The Supreme Court concluded that the second-instance decision was correct, with the exception of the part wherein the plaintiffs were ordered to give back the revalorized purchase price in the amount of BAM 30,389.56 to the appellants. In the reasons for its judgment, the Supreme Court referred to the provisions of the Law on the Application of the Law on Sales of Real Property, which prescribed the nullity of the contracts on the sales of real property following a certain date, as also concluded by the County Court. The Supreme Court concluded that the provision of Article 3 of the Law on the Application of the Law on Sales of Real Property was of imperative nature and that the failure to comply with that provision entailed the nullity of all legal affairs under Article 103 of the Law on Obligations. Therefore, the Supreme Court concluded that the County Court had correctly concluded that the contract at issue was null.

13. Furthermore, the Supreme Court noted that restitution as the consequence of nullity implied the return of what was given and that, therefore, the second-instance court could not obligate the plaintiffs to return the revalorized amount of the purchase price to the appellants but the paid amount of the price, i.e. BAM 20,000. However, as stated by the Supreme Court, „given the profit [the appellants] had earned using the business premises, the interest on this amount was to be awarded from the date of taking the real property at issue into possession" until the payment within the meaning of Article 277 of the Law on Obligations. The Supreme Court considered as unfounded the appellants' allegations that the court should have applied the substantive provisions applicable at the time of bringing an action and rendering the second-instance decision, not those which had been in force at the time of concluding the contract. Furthermore, the Supreme Court dismissed the appellants' allegations that the prohibition of sales of real property had not been prescribed in the public interest, but for the purpose of protection of sellers; as the contract had been executed, and the prohibition was of minor significance, it was not possible to refer to nullity anymore. Furthermore, the Supreme Court noted that prohibition had been prescribed by the Law on the Application of the Law on Sales of Real Property for the purpose of protecting the public interest, i.e. preventing possible abuses of „purchase of real property for bagatelle by failing to comply with the market criteria, tax regulations and similar regulations." Taking into account the aforementioned, the Supreme Court considered as unfounded the allegations in the revision-appeal that the second-instance decision was in violation with Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention").

IV. Appeal

a) Allegations stated in the appeal

14. The appellants claim that the challenged decisions are in violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, 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, right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention, and the right under Article 2(3)(c) and Articles 14 and 26 of the International Covenant on Civil and Political Rights („the International Covenant"). The essence of the allegations set forth in the appeal relates to the fact that the County Court and Supreme Court applied, as alleged by the appellants, a non-existing law. The appellants claim that the Law on the Application of the Law on Sales of Real Property could not have been applied to the present case as that law has never been publicly disclosed and that it is designated as „state secret", which was the reason why it was not available to all citizens, thus, including the parties in this case. The appellants attached the copy of that law to their comments on the replies to the appeal. The appellants further allege that the public disclosure and availability of the law are the precondition of the application of regulations and that only the laws published in such a manner may produce legal effects. Furthermore, the appellants allege that the law in question remained the „state secret" until the moment it was rendered ineffective. The appellants claim that this was the reason why the parties had not been informed, nor could they be informed, of the prohibition of sales of real property at the relevant time and allege that the challenged decisions are in violation of the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina. Furthermore, the appellants claim that the courts could not have applied the law in question, since it was not in force at the time of the proceedings, „if such a regulation could actually be considered a law". The further claim that they alleged the same in their revision-appeal and that the law which was applicable at the time when the lawsuit was brought or when a decision was taken should have been applied. Furthermore, the appellants allege that the courts did not give any reason for considering that it was possible to apply a law designated as „state secret", which was in fact their obligation. According to the appellants, the courts did not explain the purpose of prohibition, namely, whether such a prohibition constituted the protection of public or individual interest and how it was possible to conclude the contract at issue at the time when the law in question was in force and only the persons who were allowed to know a „state secret" could be informed of the law in question. Given all the aforesaid, the appellants are of the opinion that the contract concluded on basis of the statement on the consent could not have been terminated to the detriment of the *bona fide* party who paid the market purchase price. Furthermore, the

appellants are of the opinion that the Supreme Court exceeded its competencies when it modified the second-instance decision with regards to the payment of the purchase price and ordered the plaintiffs to pay back the received amount with interest, since the plaintiffs did not file a revision-appeal against the second-instance decision.

15. In their comments on the replies to the appeal, the appellants allege that the it follows from the copy of the law in question, which they submitted, that there is a designation „state secret" on page 1 of the *Official Gazette of the Republika Srpska*, no. 1/94 – Special Edition, and on the last page thereof, „Warning for Users. This issue will be given to the users on a record number. Making copies thereof is forbidden. Only official persons may use the Gazette. The borrowed copy must be returned." The appellants claim that the Supreme Court should have been mindful *ex officio* of the correct application of the substantive law, which it failed to do, and that it exceeded its competences when it took a decision on the return of the purchase price, although the plaintiffs did not claim it in their lawsuit, nor did they file a lawsuit against the second-instance decision. However, with regards to the return of the funds invested by the appellants, the Supreme Court did not decide on it, since the appellants did not claim it, but it instructed the appellants to institute separate proceedings with regards to it. Therefore, the appellants are of the opinion that the decision of the Supreme Court does not constitute full restitution, which was noted by the court, and that at any rate such a decision amounted to the arbitrary application of the law and discrimination.

b) Replies to the appeal

16. In reply to the appeal, the Supreme Court presented the essence of the proceedings, which resulted in the impugned decisions and alleged that given the circumstances of the case, it concluded that the second-instance court correctly decided that the contract on the purchase of real property at issue was absolutely null and void according to Article 3 of the Law on the Application of the Law of Sales of Real Property. The Supreme Court noted that the aforementioned law stipulated that the contracts on sales of real property, which were concluded after the entry into force of that law, i.e. 29 November 1994, were null and void, and that the contract in question was concluded on 13 August 1995. Furthermore, the Supreme Court alleged that the appropriate law to resolve the dispute was the substantive law applicable at the relevant time, i.e. at the time of conclusion of the contract in question, so that the appellants unfoundedly alleged that the law which was applicable at the time when the lawsuit was brought or decision was taken should have been applied. The Supreme Court furthered alleged that „the lack of knowledge of law cannot excuse the party" and that the party could not allege detrimental consequences caused only „because of lack of knowledge of law". Furthermore, the Supreme Court is of the opinion that the appellants unfoundedly alleged that the law in question was of minor relevance as it protected only

the interests of the seller and that the Supreme Court failed to explain the purpose of the aforementioned prohibition. In particular, the Supreme Court alleged that it followed from the decision it took that the provision of Article 3 of the Law in question was prescribed with the aim of protecting the public interest, since various abuses could occur during the war or immediate danger of war through sales of real properties for next to nothing etc. Furthermore, the Supreme Court alleged that the appellants had challenged the decision of the second-instance court by filing a revision-appeal, wherein the contract in question was declared null and void, and thereby they had challenged the decision on restitution as the result of nullity, where a restitution implied „simultaneous and full obligations of both parties and forms inseparable legal unity". Therefore, the Supreme Court considered as unfounded the appellants' allegations that the Supreme Court had exceeded its competences when it had decided to order the plaintiffs to return the purchase price paid by the appellants and that the plaintiffs should have returned revalorized price, since the correct application of Article 104 of the Law on Obligations implied the obligation of returning only what was given and the interest from the date when the thing was given into possession, as decided by the court. Furthermore, the Supreme Court noted that the appellants unfoundedly alleged that the courts had not taken into account the funds they had invested in the real property at issue as this was not the subject-matter of the claim.

17. In its reply to the appeal the County Court alleged that it remained supportive of its reasons for the second-instance decision, which was the subject-matter of consideration and proceedings on revision-appeal before the Supreme Court. Furthermore, the County Court alleged that the appellants' complaints about the violation of the rights invoked by the appellants were unfounded.

18. The Basic Court alleged that taking into account the appellate jurisdiction of the Constitutional Court, it did not see „any justification for delivering an opinion on the alleged violations of human rights, since the appellants did not challenge the decision of that court but the decisions of the courts which decided at second and third instance".

V. Relevant Law

19. The **Law on the Application of the Law on Sales of Real Property during Immediate War Danger and State of War** (*Official Gazette of RS*, no. 1/94 – Special Edition, unpublished), in its relevant part, reads as follows:

Article 3

The contracts on sales of real property concluded after the entry into force of this law shall be null.

Article 6

This Law shall enter into force on the date on its publishing in the „Official Gazette of the Republika Srpska"

VI. Admissibility

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

21. In accordance with Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

22. In the present case, the subject-matter challenged by the appeal is the judgment rendered by the Supreme Court, no. 118-0-Rev-06-000 471 of 1 September 2008, against which no other effective legal remedies are available under the law. Furthermore, the appellants received the challenged judgment on 25 September 2008, and the appeal was lodged on 22 November 2008, i.e. within the time limit of 60 days, as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court, as it is not manifestly (*prima facie*) ill-founded, nor are there any other formal reason rendering the appeal inadmissible.

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

VII. Merits

24. The appellants challenge the mentioned judgments and claim that they are in violation of their right under Article II(3)(e) and (k) of the Constitution of Bosnia and Herzegovina, right to a fair trial under Article 6 of the European Convention and right to property under Article 1 of Protocol No. 1 to the European Convention, right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention and right under Article 2(3)(c) and Articles 14 and 26 of the International Covenant.

Right to property

25. Article II(3)(k) of the Constitution of Bosnia and Herzegovina reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

k) The right to property

26. 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.

27. In the present case, it is indisputable that the contract in question concerns the purchase of a real property between the appellants and plaintiffs and that the challenged decisions declaring that contract null and void concern the „possessions" safeguarded under Article 1 of Protocol No. 1 to the European Convention. Furthermore, it is indisputable that the challenged decisions interfere with the appellants' right to property within the meaning of the aforementioned Article.

28. In this connection, the Constitutional Court notes that 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; it is contained in the second paragraph. These three rules are not distinct in the sense of being unconnected: the second and the third rule refer to individual cases of interference with the right to peaceful enjoyment of possessions and they should be interpreted in the light of the general principle enunciated in the first rule (see the ECtHR, *Sporrong and Lönnorth v. Sweden*, judgment of 23 September 1982, Series A no. 52, paragraph 61). In the circumstances of the present case, the Constitutional Court holds that the interference with the appellants' property should be considered as

an issue of general interest in the peaceful enjoyment of property. In this connection, the Court will analyse whether the interference was justified in the light of applicable principles: a) the principle of lawfulness; b) the principle of legitimate aim in the public interest; c) the principle of a fair balance.

a) As to the principle of lawfulness

29. The Constitutional Court notes that according to the case-law of the European Court, the first and most important requirement of Article 1 of Protocol No. 1 to the European Convention is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only „subject to the conditions provided for by law" and the second paragraph recognises that the States have the right to control the use of property by enforcing „laws". The principle of legal certainty, which is present in the entire European Convention, must be respected irrespective of which of these three rules under Article 1 of Protocol No. 1 to the European Convention will be applied. This principle implies space for adequately available and sufficiently precise national laws meeting the basic requirements of the term of „law„ (see, ECtHR, *Iatridis v. Greece,* judgment of 25 March 1999, *Reports of Judgments and Decisions* 1999-II, para 58, and Constitutional Court, Decision on Admissibility and Merits*, AP 2843/07,* of 12 January 2010*,* published in the *Official Gazette of BiH,* no. 23/10, para 27*).* It is only when that requirement is fulfilled that the issue whether there is a fair balance between demands of general or public interest and those of protection of individual right to property can be considered.

30. Furthermore, according to the case-law of the European Court, the term „law„ relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention (see, ECtHR, *Malone v. the United Kingdom,* judgment of 2 August 1984, Series A, para 67). The phrase thus implies several elements. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case (see, ECtHR, *Sunday Times v. the United Kingdom (no. 1),* judgment of 26 April 1979, Series A no. 30, para 49). Secondly, a norm cannot be regarded as a „law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (*idem.).*

31. Turning to the present case, the Constitutional Court noted notes that the public authorities enacted the Law on the Application of the Law on Sales of Real Property

on 29 November 1994, stipulating that that law would enter into force on the date when it was published in the „Official Gazette of the Republika Srpska" Furthermore, the Constitutional Court notes that the law in question appeared in the special issue of that Official Gazette, and that there is the indication „National Defence. State Secret" on that issue of the Official Gazette, which was the reason why that issue of „the Official Gazette of the RS" was never made available to the public in the usual manner. Moreover, there is also the indication „This issue will be given to the users on a record number. Making copies thereof is forbidden. Only official persons may use the Gazette". Therefore, it is indisputable that the Law on the Application of the Law on Sales of Real Property has never been available to the public, i.e. individuals who were supposed to adapt their conduct to that law. According to the Constitutional Court, this gives rise to the issue whether it could be actually considered that the law in question actually entered into force, since it appeared in an issue of the Official Gazette, which remained unavailable to the public during the application of the law. The County Court and Supreme Court failed to give responses to that question. It is indisputable, for the same reason, that neither the appellants nor the plaintiffs were aware of that law when concluding the contract, nor could they objectively be aware of it, which means that they could not know „to a degree that is reasonable in the given circumstances" about the prohibition of sales of real properties and foresee the consequences of their conducts.

32. Furthermore, the Constitutional Court notes that it is indisputable that the County Court and Supreme Court accepted as a whole the conclusion of the first-instance court that the contract had been concluded without defect in consent, i.e. it did not constitute a secured debt. The only reason for which they declared the contract null and void was that they applied the disputable law. The Constitutional Court notes that the reasons given by the County Court and confirmed by the Supreme Court are unacceptable, which related to the fact that the disputable law was not the only regulation which was published in the „Official Gazette of the RS" and designated as „state secret", and that the „Supreme Court of the Republika Srpska" based its several decisions on the application of the regulations published in that issue (…) so that this Court holds that the aforementioned regulation has mandatory legal force". In particular, the fact that the State is entitled to declare certain information as „state secret" in accordance with laws regulating it and that the Supreme Court based other decisions on the laws published in the *Official Gazette* marked as „state secret", although not publicly disclosed, cannot lead to the conclusion that such a conduct is in accordance with the principle of lawfulness within the meaning of Article 1 of Protocol No. 1 to the European Convention. In this connection, the Constitutional Court particularly notes that the issue of the *Official Gazette* in which the law in question

was published could in no way be available to individuals, although it regulates private legal relationships, but only to officials, including certain restrictions, as explicitly prescribed in that issue of the *Official Gazette*. This is the reason why the Supreme Court's allegations set forth in the reply to the appeal that the party „cannot refer to the detrimental consequences occurred only because the party's lack of knowledge of law" when the court did not consider the issue of public disclosure of the law and its availability to the public. Furthermore, the Constitutional Court notes that the Supreme Court explicitly concluded that there was no violation of the right to property under the aforementioned Article without dealing with the issue of „lawfulness" of the challenged regulation within the meaning of the right to property, the application of which it considered to be correct.

33. Taking into account the foregoing, the Constitutional Court holds that in the present case, the interference with the appellants' right to property was not in compliance with the principle of „lawfulness", which was the reason why there is no need to consider other aspects concerning Article 1 of Protocol No. 1 to the European Convention.

34. Taking into account all the aforesaid, the Constitutional Court concludes that in the present case the appellants' right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention has been violated.

Other allegations

35. Taking into account the conclusion with regards to the right to property, the Constitutional Court does not need to consider the appellants' allegations on the violation of the rights under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and the right to a fair trial under Article 6 of the European Convention, right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention and the right under Article 2(3)(c) and Articles 14 and 26 of the International Covenant.

VIII. Conclusion

36. The Constitutional Court concludes that there has been a violation of the right under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention as the interference with that right has not been in compliance with the principle of „lawfulness", since the regulation, which was applied, has never been publicly disclosed and equally available to all, but it was disclosed in the *Official Gazette* designated as „state secret".

37. Pursuant to Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this Decision.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP 2581/08

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Ms. Mara Memić and others against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. 070-0-Rev-07-001747 of 17 April 2008

Decision of 29 June 2011

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1), (2) and (3) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in the Grand Chamber and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Seada Paravlić, Vice-President

Mr. Mato Tadić,

Mr. Mirsad Ćeman,

Having deliberated on the appeal of Ms. **Mara Memić *et al*.,** in case no. **AP 2581/08**, at its session held on 29 June 2011, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Ms. Mara Memić, Messrs. Nezir Kadić, Ilijas Tahirbegović, Edin Crmčalo, Mehmed Karović, Muris Terzić, Meho Hajdarević, Osman Vladavić, Narcis Kalajdžić, Behudin Džanović, Edin Džafić, Nijaz Kurspahić, Faik Čelebić, Azim Ljeva and Ms. Džemila Fazlibašić is hereby partially granted.

A violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. 070-0-Rev-07-001747 of 17 April 2008 is hereby quashed.

The case shall be referred back to the Supreme Court of the Federation of Bosnia and Herzegovina, which is obligated to take a new decision in an expedited procedure in accordance with Article II(3)(k) of the Constitution

of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Supreme Court of the Federation of Bosnia and Herzegovina is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of delivery of this Decision, about the measures taken in order to enforce this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal lodged by Ms. Mara Memić, Messrs. Nezir Kadić, Ilijas Tahirbegović, Edin Crmčalo, Mehmed Karović, Muris Terzić, Meho Hajdarević, Osman Vladavić, Narcis Kalajdžić, Behudin Džanović, Edin Džafić, Nijaz Kurspahić, Faik Čelebić, Azim Ljeva and Ms. Džemila Fazlibašić against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. 070-0-Rev-07-001747 of 17 April 2008 is hereby dismissed as ill-founded with regard to the right to freedom of peaceful assembly and association under Article II(3)(i) of the Constitution of Bosnia and Herzegovina and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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

Reasoning

I. Introduction

1. On 22 August 2008, Ms. Mara Memić and Messrs. Nezir Kadić, Ilijas Tahirbegović, Edin Crmčalo, Mehmed Karović, Muris Terzić, Meho Hajdarević, Osman Vladavić, Narcis Kalajdžić, Behudin Džanović, Edin Džafić, Nijaz Kurspahić, Faik Čelebić, Azim Ljeva and Ms. Džemila Fazlibašić from Ilidža, Binježevo („the appellants"), represented by Adnan Novo, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina („the Supreme Court") no. 070-0-Rev-07-001747 of 17 April 2008.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Supreme Court and ENERGOINVEST-COMET d.d. Sarajevo („the defendant") were requested on 11 November 2008 to submit their respective replies to the appeal.

3. The Supreme Court submitted its reply to the appeal on 12 December 2008 and the defendant did so on 20 November 2008.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal by the Supreme Court and the Cantonal Court were communicated to the appellant on 6 January 2009.

III. Facts of the Case

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

6. In the judgment of the Municipal Court in Sarajevo („the Municipal Court") no. Pr-531/02 of 16 March 2005, the defendant as employer was obliged to pay the appellants, *inter alia*, their basic salaries *i.e.* the difference in the amounts of their basic salaries increased for each year of service for the period between 1 June 2000 and 30 September 2004 plus statutory default interest. In addition, the defendant was obliged to calculate and to pay them their basic monthly salaries increased for their years of service and regular work performance, *i.e.* to calculate and to pay them the remunerations they were entitled to in place of their salary and meal allowance as of 1 October 2004 until the legal requirements existed, plus statutory default interest for each monthly salary due by the 15th of each month for the preceding month, until the settlement in full.

7. In the reasoning of the first instance judgment it is pointed out, *inter alia*, that based on the evidence presented it was established that on 23 May 2003 the Strike Board had passed a Decision to go on a strike starting on 4 June 2003 and that the Judgment of the Municipal Court II in Sarajevo no. PS-111/03 of 30 April 2003 to prohibit the strike had not been relating to the Decision. In addition, based on the evidence presented and examined, it was established that the appellants and the defendant had entered into employment contracts, so that the defendant was obliged to fulfil all its obligations arising from the employment relations under the Labour Law, General Collective Agreement, Collective Agreement on Rights and Obligations of Employers and Employees in the Metal Production and Processing Sector in the Federation of BiH („the Collective Agreement"), defendant's Rulebook and the employment contracts entered into with the employees. It was concluded

that the appellant's statement of claim was well-founded, where the appellants sought the payment of their salaries, meal allowance and vacation allowance. The Municipal Court based its decision on the relevant articles of the aforementioned regulations, governing the method of determining, calculating and payment of salaries, meal allowances, vacation allowances and severance packages.

8. In its judgment no. 009-00-Gž-07-000715 of 15 June 2007, the Cantonal Court partially granted the defendant's appeal and modified the first instance judgment, so that it dismissed the appellants' claim, wherein they sought that the defendant be obligated to calculate and to pay them their monthly salaries *i.e.* to calculate and to pay them the remunerations they were entitled to in place of their salary and meal allowance as of 1 October 2004 and to pay them vacation allowance as of 1 January 2004 plus statutory default interest, as well as the part of the decision on interest, so that the statutory default interest on the amounts awarded for remuneration of salary as of 30 September 2004 and the meal allowance and vacation allowance started to run as of 27 December 2002 until the settlement in full. The remainder of the defendant's appeal was dismissed and the first instance judgment was upheld.

9. In the reasoning of the judgment, it is stated that the defendant asserted during the proceedings and in the appeal, that the appellants had been striking for several years although the strike had been prohibited and that they had started striking on 28 April 2003 and suspended it upon a court order; therefore, according to the defendant, the first instance court incorrectly concluded that on 4 June 2003 the appellants went on strike once again and that it was still underway and the first instance court awarded the salary, meal allowance and vacation allowance to the appellants.

10. Further, the Cantonal Court pointed out that the first instance court correctly concluded that the appellants were entitled to the salary for the relevant time period, before starting the strike, pursuant to Article 72 of Labour Law. In this regard, it was underlined that the appellants were employees of the defendant for the whole time and that their employment contracts determining the amounts of appellants' salary were in effect and unchanged and, therefore, they were binding upon the both parties. Therefore, pursuant to Article 68 of the Labour Law and Article 11 of the Employment Agreement, the appellants were entitled to the salary, meal allowance and vacation allowance, as specified in the enacting clause of the judgment. Also, based on the inspection of the case-file and evidence presented, it was established that the strike of 4 June 2003 had been organised based on a new decision of the trade union of 23 May 2003 and, therefore, the strike had not been prohibited and its legality had not been called into question. In view of the above, it was assessed that the defendant's complaint was unfounded, where it was claimed that

the strike of 4 June 2003 was the continuation of the strike prohibited in April 2004. The Cantonal Court pointed out that Article 9 of the Law on Strike prescribed that the salary of an employee on strike may be reduced by the amount proportionate to the time he/she spent on strike, in accordance with the Collective Agreement and Rule Book. However, since this issue was not regulated by any of the mentioned documents, it was concluded that the employer could but did not have to reduce the salary. Given that the defendant did not reduce the appellants' salaries during the strike, the appellants, according to the cited provision, were entitled to the salary until the specified date, as determined by Article 11 of the employment contract, as correctly concluded by the first instance court. Furthermore, the Cantonal Court underlined that the strike was the temporary collective stoppage of work and that the employees' labour relations did not cease during that period and that the strike, by its nature, could not go forever and, taking into account Article 177 of the Civil Procedure Code, it was concluded that the salary remuneration exceeding the amount awarded after 30 September 2004 was ill-founded and unfair.

11. In its judgment no. 070-0-Rev-07-001747 of 17 April 2008 the Supreme Court partially granted a petition for review filed by the defendant and modified the amounts awarded to the appellants for unpaid salaries, so that it reduced the amounts that had been previously determined, as well as the part of the decision on interest, so that the statutory default interest on the amounts awarded for meal allowance and vacation allowance for 2003 should be calculated as of 23 December 2004. Finally, the decision on the costs of proceedings was modified and the defendant was obliged to pay the specific amount in place of the amount specified in the second instance judgment.

12. In the reasoning it is stated that in its petition for review the defendant challenged, *inter alia*, the appellants' right to salary and remuneration of meal allowance and vacation allowance during the strike, *i.e.* for the period between 1 May 2003 and 30 September 2004, and for the period of absence from work according to its records of employees' presence at work for the period between 1 June 2000 until the date on which the employees went on the strike. In addition, according to the Supreme Court, the second instance court's position was incorrect that pursuant to Article 9 of the Law on Strike and given that the issue of remuneration of salaries during a strike was not regulated by the Collective Agreement or the defendants' Rulebook, the employees were entitled to the remunerations although they had been on strike. In this connection, the Supreme Court pointed out that given that the employees work had been suspended based on their right to strike, it also implied that the employer's obligation to pay the salaries to the employees had been suspended. According to the Supreme Court, the employees were not obligated to work and the employer was not obligated to pay the salaries to the employees. In the opinion of the Supreme Court, this was the basic idea expressed in Article 9 of the Law on Strike, which might be corrected

by the Collective Agreement or Rulebook; however, the circumstances of the present case were not such. Furthermore, it was noted that during a strike the labour relations were stayed, *i.e.* that the basic rights and obligations of the parties to labour relations were stayed. In view of the above, it was concluded that the defendant's complaints in the petition for review were well-founded, where it was claimed that the appellants were not entitled to the remuneration of salary during the strike for the period between 1 June 2003 (for easier calculation the 4 June 2003, the *date of first day of strike* was not used) and 30 September 2004. Accordingly, the Supreme Court, pursuant to Article 250 of the Criminal Procedure Code, reduced the amounts awarded as remuneration for salaries for the aforementioned period.

IV. Appeal

a) Allegations stated in the appeal

13. The appellants hold that the challenged judgment of the Supreme Court is in violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („European Convention") and of the right to freedom of peaceful assembly and association under Article II(3)(i) of the Constitution of Bosnia and Herzegovina and Article 11 of the European Convention, as well as of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to European Convention.

14. In the appellants' opinion, the violation of the guarantees under Article 11 of the European Convention is a result of an erroneous interpretation by the Supreme Court, where it is stated that an employee on strike is not entitled to salary, even if his/her salary is reduced, because „the employee is not obligated to work and the employer is not obligated to pay the salary". According to the appellants, the erroneous interpretation by the Supreme Court is unfounded, incorrect and discriminatory. In this regard, the appellants point out that the right to strike is one of the fundamental rights of trade unions, as set forth in Article 1(1) of the Law on Strike. The first instance court and the second instance court established beyond a doubt that the appellants were striking and that the strike was neither prohibited nor was its legality called into question. In addition, the appellants refer to Article 9 of the Law on Strike, which stipulates that the salary of an employee on strike may be reduced by the amount proportionate to the time he/she spent on strike, in accordance with the Collective Agreement and Rule Book. Taking into account that this issue is not regulated by any of the mentioned documents, the appellants hold that the

lower instance courts correctly concluded that the employer may but does not have to reduce the salary in the aforementioned situation, *i.e.* that the employer cannot reduce the salary of employees on strike, as there is no specific regulation about it. Furthermore, the appellants underline that Article 11 of European Convention explicitly stipulates the right to form and to join trade unions for the protection of one's interests and that, based on the judgment of the Supreme Court, they are *de facto* unable to avail themselves of the right to freedom of association, *i.e.* the formation of trade unions is completely useless, as the strike was organised by the trade union, the strike was not prohibited and its legality was not called into question.

15. The appellants hold that there is also a violation of their right to a fair trial, as the Supreme Court passed its decision without providing the appellants with the opportunity to present their opinion about the matter in question. Finally, the appellants assert that their right to property is violated, as the impugned judgment of the Supreme Court deprived the appellants of the property they are entitled to under law.

b) Reply to the appeal

16. In its reply to the appeal, the Supreme Court referred to the reasons stated in the impugned judgment and concluded that no violation of the appellants' rights occurred.

17. In its reply to the appeal, the defendant points out the position taken by the Supreme Court that the employees on strike are not obliged to work and that the employer is not obliged to pay them salaries in accordance with Article 9 of the Law on Strike, *i.e.* that the mentioned provision implies that „the salary of an employee on strike may be reduced by the amount proportionate to the time he/she spent on strike". In addition, the defendant emphasises that the appellants are not deprived of the right to freedom of association, as their strike has never been prohibited although it lasted 4 years and exceeded a conceptual framework of a strike; it is obvious that the appellants hold that they can strike for an indefinite period of time and receive their salaries during the strike. In this context, the defendant points out that the obligation of funding, organising and carrying on a strike certainly should not be an obligation of the employer but of the trade union, which also has certain funds for such purposes. According to the defendant, the appellants' allegations about a violation of the right to property are ungrounded, for the grounds of their claim were established only by the impugned judgment of the Supreme Court, including the violation of the right to a fair trial, as the provisions of the Civil Procedure Code were fully complied with. Finally, the defendant expressed doubts as to whether the appeal was filed in a timely fashion and suggested that the date on which the appellants received the impugned judgment of the Supreme Court should be checked.

V. Relevant Law

18. The **Law on Strike** (*Official Gazette of the Federation of BiH*, no. 14/00), in the relevant part, reads:

Article 1

This Law shall regulate the right of employees to strike, the right of trade unions to call a strike, the right of employers to exclude employees from work and other strike-related issues.

Article 2

Trade unions shall be entitled to call a strike and to conduct it with the purpose of protecting and promoting economic and social rights and interest of their members.

The strike may be organized only in accordance with this or another law, the strike rules of trade unions and the collective agreement.

Article 3

Employees shall be free to decide on their participation in a strike.

Organising and participating in a strike called in accordance with the provisions of the law, the strike rules of trade unions and the collective agreement shall not constitute a violation of the employment contract.

Article 9

The salary of an employee on strike may be reduced by the amount proportionate to the time he/she spent on strike, in accordance with the Collective Agreement and Rule Book.

19. The **Labour Law** (*Official Gazette of the Federation of BiH*, nos. 43/99, 32/00 and 29/03), in the relevant part, reads:

Article 9

Employees shall be entitled, at their own discretion, to organize a trade union, and become members of it, in accordance with the statute or the rules of that trade union. ... Trade unions and employers' organizations may be founded without any prior approval.

Article 10

Employees... shall freely decide on their joining or leaving the trade union or... An employee... may not be discriminated against based on his membership or non-membership in the trade union....

Article 68

Employees' salaries shall be determined in collective agreement, the Rule Book or employment contract.

Article 69

Collective agreement and the Rule Book shall regulate the lowest salary and the terms and methods of its harmonization. The employer bound by the collective agreement or the Rule Book may not calculate and pay the employee a salary lower than the salary determined in the collective agreement, the Rule Book or employment contract.

Article 128

The trade union shall be entitled to call upon a strike and conduct it with the purpose of protecting and promoting economic and social rights and interest of its members. The strike may be organized only in accordance with the Law on Strike, the rules on strike of the trade union, and the collective agreement.

Article 129

An employee may not be discriminated against because of organizing or participating in a strike, in terms of Article 128, paragraph 2 of this law.

20. The **General Collective Agreement for the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH*, nos. 54/05 and 62/08), in the relevant part, reads:

Article 3

(...) In case that a right arising from employment is differently regulated in the collective agreement, collective agreement at the level of Cantons, collective agreement for the relevant area of activity, Rule Book, employment contract or law, the most favourable right shall apply to the employee, with the exception of the circumstance referred to in Article 8(3) of this Collective Agreement.

Article 6

An employer bound by a collective agreement must not calculate and pay to the employee a salary amounting to less than the amount established by the collective agreement, Rule Book and employment contract, apart from the case referred to in Article 8(3) of this Collective Agreement.

Article 8

(...) Exceptionally, the conditions, amount, method and time periods for determining gross and net pay per hour, including the minimum net pay per hour of KM 1.25, may be stipulated by the collective agreements in the area of activity and for specific subjects in the area of activity.

Article 38

(...) The trade union shall have the right to organise a strike in accordance with the law and strike rules of the trade union in the event that the issues have not been resolved through negotiations.

21. The **Collective Agreement on the Rights and Obligations of Employers and Employees in the Metal Production and Processing Sector in the Federation of BiH** (*Official Gazette of the Federation of Bosnia and Herzegovina no. 30/00)*, as relevant, reads:

Article 4

The provisions of the Labour Law, General Collective Agreement and other regulations in this area shall apply to all the issues not regulated by this Agreement.

Article 5

Weaker rights and obligations or working conditions less favourable than those stipulated by the law and General Collective Agreement may not be stipulated by this Agreement.

Article 6

Employees' rights that are weaker than those stipulated by law and this Agreement may not be stipulated by employer's general and other acts or by employment contracts.

Article 73

If the trade union evaluates that the employees' rights stipulated by the law and this Agreement are not complied with, and after unsuccessful negotiations with the employer, the trade union will avail itself of the right to organise and to conduct a strike.

VI. Admissibility

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

23. Pursuant to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective legal remedies available under law against a judgment/decision challenged by the appeal have been exhausted and if the appeal has been lodged within a time-limit of 60 days as from the date on which the decision on the last effective legal remedy used by the appellant had been served on him/her.

24. In the present case, the subject challenged by the appeal is the judgment of the Supreme Court no. 070-0-Rev-07-001747 of 17 April 2008, against which there are no other effective remedies available under law. The appellant received the impugned judgment on 25 June 2008 and the appeal was lodged on 22 August 2008, *i.e.* within the time limit of 60 days, as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court because it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason that would render the appeal inadmissible.

25. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16 (1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal meets the admissibility requirements.

VII. Merits

26. The appellants hold that the challenged judgment of the Supreme Court is in violation of their right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („European Convention") and of their right to freedom of peaceful assembly and association under Article II(3)(i) of the Constitution of Bosnia and Herzegovina and Article 11 of the European Convention, as well as of their right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to European Convention.

Right to property

27. The appellants assert that the impugned judgment is in violation of their right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

28. Article II(3) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

k) The right to property

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

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

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

30. The appellants assert that they are deprived of the property they are entitled to under law because the Supreme Court took the position that the appellants were not entitled to salary during the strike, even if the salary was reduced.

31. 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 sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not „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 they should be construed within the framework of the general principle of the first rule.

32. The notion of „property" includes a wide scope of property interests to be protected, and it represents an economic value (see Constitutional Court, Decision No. *U 14/00* of 4 April 2001, published in the *Official Gazette of Bosnia and Herzegovina* No. 33/01). Furthermore, under the case-law of the European Court of Human Rights, „possession" that is protected may be only „existing possession" (see European Court of Human Rights, *Van der Mussele vs. Belgium*, Judgment of 23 November 1983, Series A No. 70, paragraph 48), or at least possessions for which the appellant has „a justified expectation" of obtaining it (see European Court of Human Rights, *Pine Valley Developments Ltd and others vs. Ireland*, Judgment of 29 November 1995, Series A No. 332, paragraph 31).

33. In the present case, the ordinary courts decided on the appellants' claim in which they sought that the defendant, as their employer, be obligated to pay them salaries, *i.e.* to pay them the difference of their basic salaries for the specified period of time. According to the relevant provisions of the Labour Law, General Collective Agreement

and Collective Agreement on the Rights and Obligations of Employers and Employees in the Metal Production and Processing Sector in the Federation of BiH („the Collective Agreement"), the appellants had a legitimate expectation that they would be paid their salaries. In view of the above, the Constitutional Court concludes that the appellants' salaries constitute a „property" for the purpose of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

34. In addition, the Constitutional Court notes that the Supreme Court, deciding on the defendant's petition for review, modified the judgment of the Cantonal Court and established that the appellants were not entitled to salaries for the period they had spent on strike. According to the aforementioned, because of the judgment of the Supreme Court, there is an interference with the appellants' right to property. Therefore, the Constitutional Court must answer the following questions: (a) whether the interference was envisaged by law, (b) whether it pursued a legitimate aim that was in the public interest, and (c) whether the interference was proportionate to this aim, *i.e.* whether it struck a fair balance between the protection of the appellants' right to property and the requirement of the general interest.

35. In the present case, the Supreme Court concluded that the appellants were not entitled to salary for the time period they had spent on strike, „given that the employees' work had been suspended and, therefore the employer's obligation to pay the salaries to the employees had been suspended, too. According to the Supreme Court, the employees were not obliged to work and the employer was not obliged to pay him/her salary." In addition, the Supreme Court pointed out that this fundamental idea was expressed also in Article 9 of the Law on Strike, although it could be corrected by the Collective Agreement or Rule Book; however, the circumstances of the present case were not such. In view of the above, the Supreme Court concluded that the lower instance courts' position presented in the judgments was incorrect that the appellants were entitled to salary during the strike, regardless of the fact that neither the Collective Agreement nor the Rule Book contained a provision regulating salary payments during a strike and a work stoppage and that the defendant had not reduced the appellants' salary during the strike.

36. The Constitutional Court notes that the lower instance courts established that the appellants had been on strike between 4 June 2003 and 30 September 2004 and that the strike had been organised by their trade union in accordance with the Law on Strike, meaning that the strike had been neither prohibited not called into question as to its lawfulness. Pursuant to Article 3 of the Law on Strike, the organisation or participation in such a strike does not constitute a violation of an employment contract. In addition, pursuant to Article 68 of the Labour Law, *employees' salaries shall be determined in collective*

agreement, the Rule Book or employment contract. In the proceedings before the ordinary courts it was established beyond a doubt that no provision of the mentioned documents had been amended to change the obligation under the employment contracts concluded between the defendant as employer and the applicants, as regards the calculation, amount and payment of the appellants' salaries. In this context, the Constitutional Court notes that Article 69 of the Labour Law explicitly regulates that the employer bound by the collective agreement or the Rule Book, as in the present case, may not calculate and pay the employee a salary lower than the salary determined in the collective agreement, the Rule Book or employment contract. In addition, Article 9 of the Law on Strike stipulates that the salary of an employee on strike may be reduced by the amount proportionate to the time he/she spent on strike, in accordance with the Collective Agreement and Rule Book. Therefore, the cited provision prescribes a reduction in salary as the possibility that may but does not have to be made; however, the reduction in salary ought to be regulated by the collective agreement and Rule Book. An opposite interpretation would lead to an arbitrary application of the cited provision that would also be rendered illusory, as the employer would have unlimited freedom to decide on the right to salary, which is one of the rights guaranteed by law, and that would call into question the right to strike, as one of the recognised mechanisms for the promotion and protection of workers' economic and social interests. In the present case, the lower instance courts undisputedly established that the Collective Agreement and the defendant's Rule Book did not comprise a provision regulating the possibility to make a reduction in salary during a strike. In addition, the lower instance courts also established that the defendant had not reduced the salary of the appellants for the period they had spent on strike and, based on the aforementioned, the Cantonal Court concluded that the defendant was obliged to pay the appellants the salary for the period they had spent on strike, in accordance with the employment contracts concluded between the defendant as employer and the appellants.

37. Bringing the aforementioned into connection with the position taken by the Supreme Court that the appellants were not entitled to salary while on strike „as they were not obliged to work and the employer was not obliged to pay the salaries", the Constitutional Court concludes that there is a violation of the principle of „lawfulness" in the present case, as the Supreme Court applied the substantive law in an arbitrary manner by interpreting that the appellants were not entitled to the right to salary for the time period spent on strike because of the lack of a provision in the collective agreement and Rule Book that would regulate, in terms of Article 9 of the Law on Strike, the possibility to make a reduction in salary by the amount proportionate to the time the employees spent on strike, although it concerns one of the rights arising from employment, which is explicitly guaranteed in the law, collective agreements and employer's acts.

38. Finally, taking into account that a salary is one of the rights arising out of employment, the Constitutional Court notes that Article 3 of the General Collective Agreement, applicable at the relevant time, stipulates that in case that a right arising from employment is differently regulated in the collective agreement, collective agreement at the level of Cantons, collective agreement for the relevant area of activity, Rule Book, employment contract or law, the most favourable right shall apply to the employee, with the exception of the circumstance referred to in Article 8(3) of the Collective Agreement, which is not applicable in the circumstances of the present case.

39. In view of the above, the Constitutional Court concludes that there is a violation of the appellants' right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, as the interference with their right to peaceful enjoyment of property was not in accordance with law and, consequently, the Constitutional Court will not examine other criteria.

Freedom of peaceful assembly and association

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

i) Freedom of peaceful assembly and freedom of association with others.

41. Article 11 of the European Convention reads:

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

42. According to the allegations in the appeal, the appellants hold that there is a violation of their right to form and to join trade unions to protect and advance their interests, for the Supreme Court took the position that they were not entitled to salary during the strike, *i.e.* that they did not even have the right to a reduced salary, which, in the opinion of the

appellants, is contrary to the law. In addition, the appellants assert that their rights were rendered illusory, since the strike was organised by the trade union, it was not prohibited and its legality was not called into question.

43. Article 11(1) of the European Convention protects two closely related, complementary, yet distinct rights: the right to freedom of peaceful assembly and the right to freedom of association with others. Paragraph 2 of the said Article specifies in which circumstances the national authorities of a country are entitled to legitimately interfere with those rights. However, unlike the other Articles of the European Convention structured in the same way (Articles 8-10), Article 11(2) goes further in permitting additional 'lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.' The right to form and to join trade unions constitutes part of the freedom of association with others and it is not a separate or autonomous right. The European Convention does not offer a definition of trade union, save an indication contained in Article 11(1) that those are organisations of workers united to protect and promote their common interests.

44. In the case of *Demir and Baykara vs. Turkey* (see, ECHR, Application no. 34503, Judgment of 12 November 2008, paragraphs 140-145), the European Court of Human Rights gave a list of the general elements relating to the essence of the right to freedom of association, as follows:

- The development of the Court's case-law concerning the constituent elements of the right of association can be summarised as follows: the Court has always considered that Article 11 of the Convention safeguards freedom to protect the occupational interests of trade-union members by the union's collective action, the conduct and development of which the Contracting States must both permit and make possible (see *National Union of Belgian Police*, Judgment of 27 October 1975, paragraph 39, Series A no. 19; *Swedish Engine Drivers' Union*, Judgment of 6 February 1976, paragraph 40; and *Schmidt and Dahlström vs. Sweden*, 6 February 1976, paragraph 36, Series A no. 21).

- As to the substance of the right of association enshrined in Article 11 of the Convention, the Court has taken the view that paragraph 1 of that Article affords members of a trade union a right, in order to protect their interests, that the trade union should be heard, but has left each State a free choice of the means to be used towards this end. What the Convention requires, in the Court's view, is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests (see *National Union of Belgian Police*, cited

above, paragraph 39; *Swedish Engine Drivers' Union*, cited above, paragraph 40; and *Schmidt and Dahlström*, cited above, paragraph 36).

- As regards the right to enter into collective agreements, the Court initially considered that Article 11 did not secure any particular treatment of trade unions, such as a right for them to enter into collective agreements (see *Swedish Engine Drivers' Union*, cited above, paragraph 39). It further stated that this right in no way constituted an element necessarily inherent in a right guaranteed by the Convention (see *Schmidt and Dahlström*, cited above, paragraph 34).

- Subsequently, in the case of *Wilson*, *National Union of Journalists and Others vs. the United Kingdom* judgment of 2 July 2002, Applications nos. 30668/96, 30671/96 and 30678/96, ECHR 2002-V), the Court considered that even if collective bargaining was not indispensable for the effective enjoyment of trade-union freedom, it might be one of the ways by which trade unions could be enabled to protect their members' interests. The union had to be free, in one way or another, to seek to persuade the employer to listen to what it had to say on behalf of its members (*ibid.* paragraph 44).

- As a result of the foregoing, the evolution of case-law as to the substance of the right of association enshrined in Article 11 is marked by two guiding principles: firstly, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation; secondly, the Court does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance. These two principles are not contradictory but are correlated. This correlation implies that the Contracting State in question, while in principle being free to decide what measures it wishes to take in order to ensure compliance with Article 11, is under an obligation to take account of the elements regarded as essential by the Court's case-law.

- From the Court's case-law as it stands, the following essential elements of the right of association can be established: the right to form and join a trade union (see, as a recent authority, *Tüm Haber Sen and Çınar vs. Turkey*, Application no. 28602/95, paragraphs 36-39, ECHR 2006-II),, cited above), the prohibition of closed-shop agreements (see, for example, *Sørensen and Rasmussen, vs. Denmark* [GC], Applications nos. 52562/99 and 52620/99, paragraphs 72-75, ECHR 2006-I) and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members (see *Wilson, National Union of Journalists and Others vs. the United Kingdom*, cited above, paragraph 44).

45. Consequently, the European Court of Human Rights has pointed out that the list is not final and is subject to further evolution and, accordingly, having regard to the developments in labour law, it includes the right to bargain collectively. Namely, the European Court of Human Rights has concluded that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the „right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions (see *Demir and Baykara vs. Turkey*, cited above, paragraph 154).

46. Finally, in the case of *Schmidt and Dahlström vs. Sweden* (paragraph 36), the European Court of Human Rights has recalled that the European Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible (see *National Union of Belgian Police*, cited above, paragraph 39). Article 11 para. 1 nevertheless leaves each State a free choice of the means to be used towards this end. The grant of a right to strike represents without any doubt one of the most important of these means, but there are others. Such a right, which is not expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances.

47. In the present case, the Constitutional Court notes that the appellants were deprived of the right to form and join a trade union, which would protect their occupational interests. In addition, the trade union was not prevented from engaging in collective bargaining, since the General and Collective Agreements were concluded at the relevant time. Furthermore, given what was presented to the Constitutional Court it cannot be concluded that the appellants' trade union was prevented from negotiating with the defendant as their employer and using a strike, as a means under the law, to persuade the employer to hear what the trade union had to say on behalf of its members.

48. Bringing the circumstances of the present case into connection with the aforementioned positions of the European Court of Human Rights, which include the following elements inherent in the right to freedom of association: the right to form and join a trade union, the prohibition of closed-shop agreements, the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members and the right to bargain collectively, the Constitutional Court holds that the appellants' rights guaranteed in Article 11 of the European Convention are not called into question by the

impugned judgment of the Supreme Court. Namely, the appellants allege nothing about, nor does it appear from the reasoning of the impugned judgment of the Supreme Court, the manner in which any of the aforementioned elements inherent in the right to freedom of association has been called into question. Even the fact that the appellants sought the payment of their salary while on strike, which had been organised in accordance with the law and had not been prohibited, does not lead to an opposite conclusion, as the right to strike, although one of the most important mechanisms for the protection of occupational interests of trade union members, according to the position taken by the European Court of Human Rights, does not constitute an element inherent in the right to freedom of association under Article 11(1) of the European Convention.

49. Given that in the present case the guarantees under Article 11(1) of the European Convention are not violated in respect of the appellants, the Constitutional Court holds that it is not necessary to examine the appellants' allegations in terms of paragraph 2 of the said Article.

50. In view of the above, the Constitutional Court concludes that the appellants' allegations are ill-founded where they claim a violation of their rights referred to in Article II(3)(i) of the Constitution of Bosnia and Herzegovina and Article 11 of the European Convention on account of the position of the Supreme Court that the appellants are not entitled to salary during the strike.

Other allegations

51. Bearing in mind the conclusions of the Constitutional Court in relation to the right to freedom of peaceful assembly and association, the Constitutional Court is of the opinion that it is not necessary to examine separately other allegations in the appeal on a violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

VIII. Conclusion

52. The Constitutional Court concludes that there is a violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, as the ordinary court violated the principle of „lawfulness" by applying the substantive law in an arbitrary manner and by interpreting that the appellants, due to the lack of a provision in the collective agreement and Rule Book regulating the possibility to make a reduction, but not a loss of the entire salary by the amount proportionate to the time the employees spent on strike within the meaning of

Article 9 of the Law on Strike, were not entitled to the salary for the time period spent on strike, although it concerns one of the rights arising from employment, which is explicitly guaranteed in the law, collective agreements and employer's acts.

53. However, the Constitutional Court concludes that there is no violation of the right to freedom of peaceful assembly and association under Article II(3)(i) of the Constitution of Bosnia and Herzegovina and Article 11 of the European Convention where an element inherent in the right protected by the cited provisions is nether violated nor called into question by the impugned judgment of the ordinary court.

54. Pursuant to Article 61(1), (2) and (3) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of the present decision.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 2499/08

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Nikola Pilipović against the judgment of the County Court in Doboj, no. 013-0-Gž-07-000 460 of 14 July 2008

Decision of 15 July 2011

CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) (2) (3) and Article 64(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina *(Official Gazette of Bosnia and Herzegovina* Nos. 60/05 and 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knežević

Having deliberated on the appeal of **Mr. Nikola Pilipović** in case no. **AP 2499/08** at its session held on 15 July 2011, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. Nikola Pilipović is hereby partially granted.

A violation of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and right to property under II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The judgment of the County Court in Doboj, no. 013-0-Gž-07-000 460 of 14 July 2008 is hereby quashed.

The judgment of the Basic Court in Derventa, no. 13 84 P-001502 05 P of 16 April 2007 shall be rendered effective.

The appeal of Mr. Nikola Pilipović lodged due to a violation of his right to a fair trial in conjunction with the right to a decision within a reasonable time under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the proceeding which was concluded by the Judgment of the County Court in Doboj no. 013-0-Gž-07-000 460 of 14 July 2008, is dismissed as ill-founded.

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

Reasoning

I. Introduction

1. On 15 August 2008, Mr. Nikola Pilipović („the appellant") from Bosanski Brod, represented by Mr. Jadranko Hadžisejdić, a lawyer practicing in Bosanski Brod, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the County Court in Doboj („the County Court"), no. 013-0-Gž-07-000 460 of 14 July 2008.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, on 27 August 2008, the County Court, the Basic Court in Derventa („the Basic Court") and the Ministry for Refugees and Displaced Persons of the Republika Srpska - the Bosanski Brod Section („the defendant"), were requested to submit their respective replies to the appeal.

3. The County Court submitted its reply on 8 September 2009. The defendant did so on 15 September 2008. However, the Basic Court did not submit its reply to the appeal.

4. On 23 July 2010, the Constitutional Court requested the Basic Court to submit the case-file for inspection in case no. 13 84 P 001502 05 P, and the Basic Court submitted the aforementioned case-file on 4 August 2010.

5. Pursuant to Article 26 (2) of the Rules of the Constitutional Court, the replies of the County Court and the defendant were communicated to the appellant on 16 September 2008.

III. Facts of the case

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

7. By inspection of the case-file it was recorded that on 10 December 1998 the appellant had filed the application for voluntary return with the defendant. The defendant, as an administrative body, was not deciding this application, in other words the defendant did not deal with his application as with the claim for repossession of the apartment in Bosanski Brod in Skele Street („the apartment in question") over which the appellant had the occupancy right before the war events. It further follows that the appellant did not lodge a complaint to the second instance administrative body due to *silence of administration.*

8. On 13 September 2005, the appellant filed a lawsuit with the Basic Court against the defendant, for the purpose of determination and recognition of the occupancy right over a two-room apartment in Bosanski Broad, Skele Street, with surface area of 57 m2 („the apartment in question"). In his lawsuit he stated that he had been allocated this apartment for use as the employee of the RP „Rafinerija nafte" - *Oil Refinery*, the Basic Organization of Associated Labour „Proizvodnja", and that on 28 November 1984 he concluded the Contract on Use of the apartment in question with the competent authorities, i.e. with SIZ (the *Self-Management Community of Interests*). He was using the apartment together with the members of his household until 1992 when he left the apartment due to the war that took place in Bosnia and Herzegovina at that time. The appellant notes that on 10 December 1998 he filed an application with the defendant for voluntary return and that the authorised persons of the defendant failed to inform him that it was necessary to submit a separate claim for the repossession of the apartment. The application for voluntary return was registered in the defendant's record under number ID-1034/1355-98.

9. In its ruling no. 13 84 P 001502 05 P of 6 December 2006, the Basic Court scheduled a preparatory hearing for 23 January 2007.

10. On 23 January 2007, the Basic Court held a preparatory hearing while the defendant was not present although he was duly informed about the hearing. During this hearing the ruling was adopted and it was decided that the main hearing would be held on 15 March 2007.

11. The Basic Court held the main hearing scheduled for 15 March 2007. The appellant and the defendant's legal representative from the Public Attorney's Office of the Republika Srpska („the Public Attorney's Office") were present at this hearing including the witnesses who came to attend the hearing. After presentation of numerous pieces of evidence, the Court concluded the main hearing and noted that the decision in this legal matter would be adopted on 16 April 2007.

12. In its judgment no. 13 84 P-001 502 05 P of 16 April 2007, the Basic Court granted the appellant's claim and established that the appellant had submitted the claim for repossession of the apartment and for recognition of the occupancy right over the mentioned apartments in his capacity as an occupancy right holder. In the mentioned judgment the Court ordered that the defendant pay the appellant the amount of BAM 1,030.00 for the costs of the proceeding.

13. In the reasoning for the judgment it is stated that the Court, after conducting the evidentiary proceeding, established that the appellant was the occupancy right holder over the mentioned apartment, that in 1984 he was allocated the apartment on the basis of his employment with the RP „Rafinerija nafte" - Basic Organisation of Associated Labour „Proizvodnja" Bosanski Brod. After he had been allocated the apartment he concluded the Contract on use of the apartment with the competent authority - SIZ. The appellant was using the apartment until 1992 without any impediments and in 1992 he left the apartment due to the war and found the refuge at some other place. Further, the Basic Court established that on 10 December 1998 the appellant filed an application for voluntary return with the defendant and he also attached the Contract on use of the apartment, and it was also established that this application was not handed over in person but that Bozana Curic did it for him and she had the power of attorney to undertake the mentioned actions. The Court further stated that there is no dispute between the parties to the proceeding: that the mentioned application was registered with the defendant under number ID-1034/1355-98 of 10 December 1998, that, at the time of the proceeding, the apartment in question was vacant and that it was used earlier as an alternative accommodation. It is also without dispute that the defendant, as an authorised body, did not adopt any decision but it only established the data base system on persons registered for return. The Basic Court stated that there is dispute between the parties as to whether the court is competent to discuss the mentioned claim, whether the application for voluntary return could be considered as a claim for repossession of the occupancy right according to the Law on the Cessation of Application of the Law on Use of the Abandoned Property and whether the mentioned application is timely. While considering the presented evidence and discussing the disputable issues, the Basic Court established that the appellant, as a refugee/displaced person, by filing an application for voluntary return to which the contract on use of the apartment and copy of his ID card were

attached and by indicating that he wants to return to „his own home/apartment", had also filed the claim for repossession of the apartment, i.e. the claim for repossession of property. In this context, the Court stated that „the resolution of the legal issue which is raised on the basis of the disputable facts" has been regulated by the applicable by-laws and laws which provide that „in case where a person who filed a claim by way of filing an application, as it was done by the plaintiff in the instant case, and in case where this person failed to file a new claim, the previously submitted claim should be considered as a claim filed in accordance with the applicable regulations." The Court further considered that the motion of lack of subject-matter jurisdiction is ill-founded, stating that the court of first instance is competent in all disputes unless otherwise stipulated by law.

14. In conclusion, the Basic Court stated that the decision was adopted on the basis of Article (2) of the Law on Courts and Judicial Service and paragraphs 2 and 6 of the Instruction on the Application of Articles 8 through 11 and 15 through 18 of the Law on the Cessation of the Application of the Law on the Use of Abandoned Property, Article 14 (2), Article 15 (2) and Article 17 (2) of Law on the Cessation of the Application of the Law on the Use of Abandoned Property *Official Gazette of the Republika Srpska*, nos. 38/98 and 96/03), Article 11 of the taken over Law on Housing Relations, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), Article 1 of Protocol No. 1 to the European Convention and Annex VII of the General Framework Agreement for Peace in BiH. Bearing in mid the aforesaid provisions, the Basic Court concluded that the application of the appellant for voluntary return constitutes a claim for repossession of the apartment in question and, therefore, this Court concluded that the appellant's request was entirely well-founded.

15. On 14 May 2007, on behalf of the defendant, the Public Attorney's Office lodged the complaint with the County Court against the judgment of the Basic Court no. 13 84 P-00150205 P on the ground that the provisions of the civil proceeding were substantially violated and that the facts were established in an erroneous and incomplete manner and that the substantive law was misapplied.

16. In its judgment no. 013-0-Gž-07-000 460 of 14 June 2008, the County Court granted the defendant's complaint and modified the challenged judgment by dismissing the appellant's claim in its entirety as ill-founded.

17. Based on the facts established in the course of the first-instance proceeding, the County Court established that the Basic Court had erroneously concluded that the application for voluntary return constituted the appellant's repossession claim concerning the mentioned apartment and that the Basic Court failed to offer a valid reasons for its decision and that

it arbitrary referred to the provisions that should be applied to this case. In view of the aforesaid, the County Court referred to the provision of Article 8 of the Law on Refugees and Displaced Persons (*Official Gazette of the Republika Srpska*, no. 26/95, hereinafter „the Law on Refugees"), which was in force at the time of the submission of the appellant's application for voluntary return, wherein it is stated that the refugees and displaced persons, when registering their return and submitting the request for recognition of their status and exercising other rights, shall give accurate data and fill in the prescribed forms, but the right to repossession of the pre-war property or state-owned apartments was not regulated. The right to repossession of the pre-war property or the state-owned apartments is regulated by the Law on the Cessation of Application of the Law on Abandoned Property, which came into force on 19 December 1998 and which, in its Article 15, explicitly prescribes the right to repossession of apartment, the contents of a claim, to whom a claim is to be submitted and the time-limit within which a claim is to submitted (16 months), which means that this time-limit expired on 19 April 2000. This Law also provides for the consequences in the event of failure to submit a claim, as stipulated under Article 16 of the mentioned Law. The County Court established that given the fact that the mentioned law entered into force after the appellant had filed the application for voluntary return with the defendant and that this law was regulating the right to repossession of abandoned property and apartments and given that the appellant, pursuant to the mentioned provisions of the Law, could have submitted the repossession claim during the period from 19 December 1998 to 119 April 2000, the County Court concluded that the appellant had failed to file a repossession claim with the competent authority concerning the apartment in question and he was supposed to do so in accordance with the provisions of the Law on the Cessation of Application of the Law on Use of the Abandoned Property and the existence of his right could not have been determined in judicial proceeding as he had failed to comply with the time-limits which have a preclusive character. Therefore, by failing to comply with the said time-limits the appellant has lost his right as provided for under Article 16 of the aforementioned Law. Therefore, pursuant to Article 229 (1)(4) of the Civil Procedure Code („the CPC"), the Court adopted a decision as set out in the enacting clause of the judgment.

IV. Appeal

a) Allegations from the appeal

18. The appellant complains of violation of the following rights by the judgment of the County Court: the right to home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and right to property under

II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. to the European Convention. He also complains that „due to the slow actions of the courts", his right to a fair trial was violated in relation to the adoption of a decision within reasonable time under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention. The appellant alleges that on 13 September 2005 he initiated a civil proceeding before the Basic Court against the defendant for the purpose of determination and recognition of his occupancy right over the apartment in question, which he legally used during the period from the day of allocation of the apartment for use, i.e. from 28 February 1984 to 6 October 1992, when he had to leave the apartment for the well-known reasons. He notes that on 10 December 1998, after the legal prerequisites had been created, he filed an application for voluntary return, which was registered in the defendant's record under number ID-1034/1355-98, considering that the competent authorities would deem this application to be a repossession claim regarding the apartment in question. He further states that the Basic Court granted his request as well-founded and concluded that the application for voluntary return includes the right to repossession of property, while the County Court granted the defendant's claim and modified the challenged judgment in a way that it dismissed the appellant's claim in its entirety as ill-founded. Therefore, the appellant considers that his right to home and his right to property were violated by the Judgment of the County Court of 14 July 2008.

b) Reply to the appeal

19. In its reply to the appeal the County Court noted that in the proceeding before this court the rights of the appellant he refers to in his appeal have not been violated, and therefore the Court considers that the appellant's allegations are ill-founded and suggests that the appeal be dismissed d as ill-founded.

20. The Public Attorney's Office notes that the appellant's allegations are ill-founded as the submission of repossession claim was an obligation stipulated by law and, therefore, an application for voluntary return cannot be deemed to be a repossession claim, as concluded by the Basic Court. The Public Attorney's Office is of the opinion that the position of the County Court is lawful and suggests that the appeal be dismissed in its entirety as ill-founded.

V. Relevant Law

21. The **Law on General Administrative Procedure** (*Official Gazette of SRY* no. 47/86), which was in force at the time of filing the application for voluntary return submitted to the defendant), reads as relevant:

Article 218(1)(2)

Where the procedure is instituted at the party's request or ex officio if it is in the party's interest, and where there is no need to conduct a separate investigation procedure before adoption of a decision or there are no reasons preventing adoption of the decision without delay (resolution of a preliminary issue, etc.), the authority shall be obliged to adopt a decision and serve it on the party within 30 days from the submission of a proper request, or from the day when the procedure was instituted ex officio, unless a shorter period of time is specified under the law.

If the authority whose decisions are subject to appeal fails to adopt a decision and serve it on the party within the specified time period, the party shall be entitled to file an appeal as if his/her request were rejected.

22. The **Law on Administrative Disputes** (*Official Gazette of the Republika Srpska***,** no. 12/94), which was in force at the time of filing the application for voluntary return submitted to the defendant, as relevant reads:

Article 8

Administrative dispute may also be lodged when the competent authority has failed to issue an appropriate administrative act upon request or appeal of the party, under the conditions stipulated in this Law.

Article 25 (3)

If the first instance authority whose act may be appealed within 60 days or a shorter time limit determined by special regulation, has failed to decide on the request, the party may address the request to the second instance authority. The party may initiate an administrative dispute against the second instance authority decision under the conditions of paragraph 1 of this Article, even when this organ has not made a decision.

23. The **Civil Procedure Code (***Official Gazette of the Republika Srpska***,** nos. 58/03, 85/03, 74/05 and 63/07**)**, as relevant reads:

Article 10

The court shall be obliged to conduct the proceedings without any unnecessary delay, with the lowest possible costs, and prevent any abuse by the parties in the proceedings of rights to which they are entitled.

Article 75 (4)

As a rule, the preparatory hearing shall be held within thirty (30) days upon the receipt of the written response to the complaint from the defendant or expiry of the deadline for

filing the response, or where an admissible counter-claim has been filed, within thirty (30) days from the receipt of the written answer to the counter-claim from the plaintiff.

Article 94 (2)

The main hearing shall, as a rule, be held within thirty (30) days after the preparatory hearing at the latest.

24. The **Law on the Cessation of Application of the Law on Use of the Abandoned Property** (*Official Gazette of the Republika Srpska*, nos. 38/98, 12/99, 31/99, 65/01, 13/02, 64/02 and 39/03) as relevant reads:

Article 14 (1)(2)

The occupancy right holder of an abandoned apartment or a member of his or her family household as defined in Article 6 of the ZOSO (hereinafter the „occupancy right holder") shall have the right to return to the apartment in accordance with Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina. The provisions of this Law shall apply to all apartments vacated between 30 April 1991 and 19 December 1998, whether or not the apartment was registered as abandoned or not.(...)

A person who left his/her apartment between 30 April 1991 and 19 December 1998 shall be presumed to be a refugee or displaced person under Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina with a right to return to that apartment irrespective of the circumstances under which s/he left the apartment.

Article 15 (1)(2)

The occupancy right holder as defined in Article 14, Paragraph 1, of this Law shall be entitled to file a claim for repossession of the apartment.

A claim for repossession of the apartment shall be filed with the competent authority of the Ministry of Refugees and Displaced Persons in the municipality in which the apartment is located.

Article 16

A claim for repossession of the apartment may be filed within 16 months from the date of entry into force of this Law.

If the occupancy right holder does not file a claim to the competent administrative authority, to a competent court, or to the CRPC within the appropriate time limit, or a request for enforcement of a decision of the CRPC within the deadline specified in the Law on Implementation of the Decisions of the CRPC (Official Gazette of the Republika Srpska, nos.31/99, 2/00, 39/00 and 65/01) his/her occupancy right shall be cancelled.

25. The **Instruction on the Application of Articles 8 through 11 and 15 through 18 of the Law on the Cessation of the Application of the Law on the Use of Abandoned Property** *(Official Gazette of the Republika Srpska*, no. 1/99, as relevant reads:

Item 6

The person who has submitted the claim in compliance with the previous regulations, in cases where the claim has not yet been validly resolved, should submit a new claim in line with this Instruction.

If such person does not submit a new claim, her/his previously submitted claim shall be considered as a claim submitted in accordance with the provisions of the Law on Cessation of Application of the Law on Use of the Abandoned Property and this Instruction.

If the previously submitted claim is not completed in accordance with the provisions of the Law, the Claimant shall be requested to enclose the supplementary data prescribed by the Instruction.

VI. Admissibility

26. 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.

27. According to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective legal remedies available under the law against a judgment/decision challenged by the appeal are exhausted and if the appeal was lodged within a time-limit of 60 days as from the date on which the decision on the last effective legal remedy used by the appellant was served on him/her.

28. In the case at hand the subject challenged by the appeal is the Judgment of the County Court no. 013/0/Gž-07-000 460 of 14 July 2008, against which no other effective legal remedies are available under the law. The appellant received the challenged judgment on 18 July 2008. The appeal was lodged on 15 August 2008, i.e. within 60 days as prescribed by Article 16 (1) of the Rules of the Constitutional Court. Finally, the appeal has met the requirements under Article 16 (2)(4) of the Rules of the Constitutional Court for it is not manifestly (*prima facie*) ill-founded, nor is there any other formal reason rendering the appeal inadmissible.

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

VII. Merits

30. The appellant complains that by the judgment of the County Court no. 013-Gž-07-000 460 of 14 July 2009 the following of his rights have been violated: the right to home under Article II(3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and right to property under II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. to the European Convention. He also complains that due to a failure of the courts to adopt a decision within reasonable time in the proceeding which was concluded by the judgment of the County Court no. 013-0-Gž-07-000 460 of 14 July 2008, his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention was violated.

Right to respect for home

31. Article II (3)(f) 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 paragraph 2 above; these include:

(...)

f) The right to private and family life, home, and correspondence.

Article 8 of the European Convention reads:

Everyone has the right to respect for his private and family life, his home and his correspondence.

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.

32. The Constitutional Court emphasizes that the basic goal of Article 8 of the European Convention is to protect individuals from the authorities' arbitrary interference with their rights guaranteed under this article (see the European Court of Human Rights, *Kroon vs. the Netherlands*, judgment of 27 October 1994, Series A, 297-C).

33. In examining whether in the instant case the issue is about the violation of Article 8 of the European Convention, the Constitutional Court must first establish whether the apartment

in question can be considered the appellant's „home" within the meaning of Article 8 (1) of the European Convention and, if it is so, whether the undertaken measures constitute „interference" with his right to respect for home. This condition, within the meaning of terms of the European Convention, consists of several elements: (a) the interference has to be based upon national or international law; (b) the law concerned must be widely available thus enabling an individual to be familiarized with the circumstances of the law that could be applied in the case concerned; (c) the law also has to be formulated with the adequate accuracy and clarity to allow an individual to adjust his/her actions in accordance therewith (see the European Court for Human Rights, *Sunday Times vs. the United Kingdom*, judgment of 26 April 1979, Series A, no. 30, paragraph. 49). If it is established that the interference of public authorities was in accordance with law it must be also established whether the interference was a necessary measure in democratic society and whether the interference was connected with one of the goals stated under paragraph 2 of Article 8 of the European Convention. In that context, it should be considered whether the decision of public authorities pursued a legitimate aim and whether it constitutes a measure necessary in a democratic society. Necessary in this context means that the „interference" corresponds to the „social needs" and there is a reasonable proportion between the interference and the legitimate aim pursued (e.g. see ECHR, the *Niemietz vs. Germany* judgment of 16 December 1992, Series A no. 251).

34. According to the case-law of the European Court for Human Rights, the notion „home" encompasses both the rented home and the home in private ownership (see the European Court for Human Rights *Gillow vs. the Great Britain* judgment of 24 November 1986, Series A, no. 109, paragraph 46 f, and the *Kroon vs. Holland* judgment of 27 October 1994, Series A, no. 297-C, paragraph 31). In accordance with this interpretation, the Constitutional Court extended the scope of Article 8 of the European Convention to the apartments in which persons live on the basis of the occupancy right (see the Constitutional Court's decision *U 8/99* of 11 May 1999, published in the *Official Gazette of Bosnia and Herzegovina*, no. 24/99). Also, the Constitutional Court has taken a position that, within the meaning of Article 8 of the European Convention, an apartment into which a person moved on the basis of a decision on allocation of the apartment can be considered a „home", even if the respective person has not concluded a contract on use of the apartment (see, *mutatis mutandi*s, Decision of the Constitutional Court no. U 102/03 of 14 October 2004, *Official Gazette of Bosnia and Herzegovina* no. 60/04.

35. In its judicial practice relating to a case involving the issue of the house in which the applicants lived and which they owned, the European Court of Human Rights was considering how much the attachment of the applicants with their home/house was strong.

The Court considered that a key element was the fact that they indeed returned to their house with the intention to stay there permanently after formal conditions are met to do so. There was also an important fact that the applicants did not establish home at some other place (see *mutatis mutandis*, the mentioned judgment of the Court of Human Rights, *Gillow vs. the Great Britain*). In its decisions the Constitutional Court also concluded that a „home" is a factual situation which does not require the existence of legal basis (see the Decision of the Constitutional Court no. *AP 323/04*, *Official Gazette of Bosnia and Herzegovina*, no. 34/05).

36. With regard to the question whether the apartment at issue could be regarded as the appellant's „home" within the meaning of Article 8 of the Convention, the Constitutional Court points out that before the war the appellant was the occupancy right holder over the apartment in question, that he used the apartment together with the members of his family household based on the Contract on use concluded on 28 November 1984 until October 1992 when he left it due to the war conflict in Bosnia and Herzegovina and that his return to the apartment in question should be considered in the context of the rights of refugees and displaced persons to return to their homes as provided for under Article II(5) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1, item 1 of Annex 7 to the General Framework Agreement. In this connection, the Constitutional Court refers to its already taken position that one the basic aims of the General Peace Agreement was the return of persons to their homes of origin which they had in 1991 and that the factual situation on 30 April 1991 should be a starting point for any litigation arising from the measures taken by the competent authorities of the Entities and Bosnia and Herzegovina within the scope of their competence with the aim of returning the property to their pre-war owners (see *mutatis mutandis,* the Constitutional Court, Decision no. *U 14/00* of 4 May 2001, *Official Gazette of Bosnia and Herzegovina*, no. 33/01, paragraph 20).

37. The Constitutional Court observes that in the aforementioned judicial proceeding it was undoubtedly established that the appellant was the occupancy right holder over the apartment in question according to the contract on use of the apartment which was concluded on 28 November 1984 and that he lived in this apartment until October 1992 when he left it due to the outbreak of war conflict in BiH and these facts were not challenged, neither by the defendant nor by the competent court. Neither was the fact challenged that on 10 December 1998 the appellant submitted the application for voluntary return to the defendant for the purpose of returning to his pre-war place of residence, in which case he stated the address of the apartment in question. It follows from the aforesaid that it is undisputable that the appellant lived in the apartment in question before the war in BiH and that he explicitly showed his intention to return to the apartment in question after the

war. Therefore, by bringing the aforementioned positions of the European Court of Human Rights and Constitutional Court into connection with the facts of this specific case, it is undisputable for the Constitutional Court that the apartment in question constitutes the appellant's „home" within the meaning of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 (1) of the European Convention.

38. Taking into account the aforesaid, the further task of the Constitutional Court in the instant case, within the meaning of the aforementioned jurisprudences of the European Court and Constitutional Court relating to the guarantees provided for under Article 8 of the European Convention, is to give an answer to the question whether the challenged decisions constitute „the interference" with the appellant's right to respect for home and whether the interference was justified. In that context and pursuant to the meaning of the terms of the European Convention, the Constitutional Court should first answer the question whether the interference was based on the law.

39. In this connection, the Constitutional Court firstly notes that it follows from the reasons for the challenged decision that the County Court granted the appeal of the defendant and modified the first-instance judgment in the manner that it dismissed the appellant's claim as it considered as erroneous the County Court's findings that on 10 December 1998 the appellant, within the meaning of Article 6 of the Instruction, had lodged with the defendant a claim for repossession of the apartment and recognition of occupancy right over the apartment in question. It follows from the reasons for the challenged decision that the County Court gave reasons for such decision by applying Articles 15 and 16 of the Law on the Cessation of Application of the Law on Use of Abandoned Apartments and concluded that the appellant (who filed an application for voluntary return with the defendant) failed to lodge timely claim for repossession of the apartment in question with the competent authority in accordance with the provisions of the Law on Cessation of Application of the Law on Use of Abandoned Property, thus it failed to comply with the prescribed time-limits of preclusive character so that the existence of his right, as it was held by the County Court, could not be established in the court proceedings. Taking this into account, the Constitutional Court holds that the challenged decision of the County Court indisputably resulted in the interference of the public authority with the appellant's right to respect for home within the meaning of Article 8 paragraph 1 of the European Convention.

40. With respect to the issue whether the interference with the appellant's right to respect for home was in accordance with the law, the Constitutional Court holds that the County Court (as well as the defendant in the procedure regarding to the appellant's application

for voluntary return), by modifying the judgment of the Basic Court in accordance with Article 15 and 16 of the Law on Cessation on Application of the Law on Use of Abandoned Property, failed to take into account the provisions of the Instruction on Application of Articles 8 through 11 and 15 through 18 of the Law on Cessation of Application of the Law on the Use of Abandoned Property, which regulated the action regarding the claims for repossession of apartments, which had been lodged before the entry of the Law on Cessation of Application of the Law on Use of Abandoned Property.

41. In this context, the Constitutional Court notes that unlike the findings of the County Court, the Basic Court based the decision granting the appellant's claim on the provisions of item 6.2 of the Instruction, which regulates the action of the authorities if a new claim is submitted in the manner that *her/his previously submitted claim shall be considered as a claim submitted in accordance with the provisions of the Law on Cessation of Application of the Law on Use of the Abandoned Property and this Instruction*, by concluding that the appellant's case relates to such a situation. Furthermore, the Constitutional Court also notes that the aforementioned provision of the Instruction (item 6.3) also regulates the possibility of requesting, if necessary, the person claiming return to enclose data prescribed by the Instruction, which, according to the case-file in the instant case, was not done, since it follows from the reasons for the first-instance judgment that the defendant did not make any decision regarding the appellant's application but it only registered in database.

42. Taking into account the aforesaid, the Constitutional Court holds that the appellant, by submitting an application for the voluntary return before the entry into force of the Law on the Cessation of the Application (the Law went into force on 19 December 1998), showed unequivocal wish and intention to continue living in the disputed apartment. Further, the Constitutional Court emphasizes that the appellant had been the occupancy right holder on the disputed apartment before the war, and that, within the meaning of Annex 7 of the General Framework Agreement, he is entitled to the right to return to her pre-war place of residence. In addition, the Constitutional Court observes that on 10 December 1998, the appellant filled in the form for the return in accordance with the then regulations regarding the return of refugees and displaced persons, and that he stated in the form that he wished to return to his apartment. Furthermore, the Constitutional Court notes that the Instruction, which was passed as the enforcement regulation based on Article 29 of the Law on Cessation of Application of the Law, regulated the procedure of the administrative authorities as to the „claim lodged in accordance with the previous regulations". In the opinion of the Constitutional Court, in the circumstances that were established in the present case, it was justifiable to interpret the provision of item 6 of the Instruction, which speaks of „a claim" so as to relate to the appellant's „application for return" wherein he

explicitly requested to return to his apartment on which he established the occupancy right before the war, i.e. that the County Court showed excessive formalism when making the challenged decision and disregarded the very essence of the right.

43. Taking into account the aforesaid, particularly that the facts of the case at issue are not disputable as established in the first-instance judgment (that the appellant was the occupancy right holder, that he filed an application for voluntary return on 10 December 1998, thus before the entry into force the Law on Cessation of Application of the Law, that he did not lodge a new claim following the entry of that Law), the Constitutional Court concludes that by rendering the challenged judgment finally dismissing the appellant's claim, the County Court unlawfully interfered with the appellant's right to home and disregarded item 6.2 of the Instruction which, given the circumstances of this case, was relevant to the decision on the appellant's claim. Therefore, the Constitutional Court holds that the dismissal of the appellant's claim was not based on the law within the meaning of Article 8(2) of the European Convention.

44. Taking into account the conclusion that the challenged decision constitute unlawful interference with the appellant's right to home, the Constitutional Court holds that it is pointless to consider whether that interference was *necessary measure in a democratic society* and that interference was in connection with one of the objectives mentioned in para 2 of Article 8 of the European Convention (whether a decision of public authorities had a legitimate aim or whether it constituted measure necessary in a democratic society).

45. Taking this into account, the Constitutional Court concludes that Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention has been violated.

Right to property

46. Article II(3)(k) of the Constitution of Bosnia and Herzegovina reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

k) The right to property

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

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

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

47. In considering whether Article 1 of Protocol No. 1 to the European Convention has been violated, the Court must first establish whether the challenged decision violated the right to property within the meaning of Article 1 of Protocol No. 1 to the European Convention.

48. The Constitutional Court points to that the notion of „property" includes a wide scope of property interests to be protected, and it represents an economic value (see Constitutional Court, Decision No. *U 14/00* of 4 April 2001, published in the *Official Gazette of Bosnia and Herzegovina* No. 33/01). Furthermore, under the case-law of the European Court of Human Rights, „possession" that is protected may be only „existing possession" (see European Court of Human Rights, *Van der Mussele vs. Belgium*, Judgment of 23 November 1983, Series A No. 70, paragraph 48), or at least possessions for which the appellant has a „justified expectation" of obtaining it (see European Court of Human Rights, *Pine Valley Developments Ltd and others vs. Ireland*, Judgment of 29 November 1995, Series A No. 332, paragraph 31). In its previous decision, the Constitutional Court concluded that the term „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 (see, Constitutional Court, *Decision no. U 26/00*, 0f 21 December 2001).

49. Turning to the instant case, the appellant complains that the challenged decision violated his right to property. The Constitutional Court holds that the occupancy right constitutes *sui generis* property interests representing an *economic value (see Decision of the Constitutional Court no. U 8/99 of 5 November 1999, published in the Official Gazette of Bosnia and Herzegovina* no. 24/99). In this connection, the Constitutional Court must first examine whether Article 1 of Protocol No. 1 to the European Convention is applicable to the instant case. In this connection, the Constitutional Court notes that it follows from the facts of the case that the appellant used the apartment in question with the members of his family household based on the Contract on Use concluded on 28 November 1984 so that it follows that the appellant was the occupancy right holder of the apartment in question and that within the meaning of the aforementioned case-law

of the Constitutional Court, the apartment in question represents the appellant's property enjoying the protection under Article II(3)(k) of the Constitution of Bosnia and Article 1 of Protocol No. 1 to the European Convention.

50. Furthermore, the Constitutional Court indicates that Article 1 of Protocol No. 1 to the European Convention comprises three distinct rules. The first rule, set out in the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property. The second rule contained in the second sentence of the same paragraph, covers deprivation of possession and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not „distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see ECHR, *Sporrong and Lönnroth vs. Sweden*, judgment of 23 September 1982, Series A, no. 52, paragraph 61).

51. In the context of the aforementioned, the Constitutional Court finds undisputed that the challenged judgment of the County Court constitutes „interference" with the appellant's right to peaceful enjoyment of property, as the appellant is practically being deprived of his occupancy right over the respective apartment on the basis of the challenged decision. The reason being that, by adopting the challenged judgement in which it was concluded that the appellant failed to lodge a claim for the repossession of the apartment at hand within the prescribed deadline with the competent authority in accordance with the provisions of the Law on the Cessation of the Application of the Law on Abandoned Property, thereby practically assessing as correct the failure of the defendant as an administrative authority to proceed upon the appellant's application for voluntary return by treating it as the claim for the repossession of the respective apartment, although the appellant had explicitly stated in the application the place of residence-stay, as well as the street where the respective apartment is located, the County Court interfered with the appellant's right to property so as to make it impossible fro the appellant to exercise his rights arising from his status as an occupancy right holder over the apartment at issue. However, the Constitutional Court holds that that interference was not in accordance with the law, since the provision of item 6.2 of the Instruction was completely disregarded and which, considering the circumstances of the present case, was relevant for the adoption of the decision on the claim lodged by the appellant.

52. Considering the conclusion that the County Court, by adopting the challenged judgment, unlawfully interfered with the appellant's right to property, the Constitutional

Court also holds that it is pointless, within the meaning of the guarantees referred to in Article 1 of Protocol No. 1 to the European Convention, to consider whether the interference was in public interest and whether the principle of proportionality was violated.

53. In view of the aforementioned, the Constitutional Court holds that there is a violation in the present case of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

Right to a Fair Trial

Article II(3) of the Constitution of Bosnia and Herzegovina, as far as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings. […]

Article 6(1) of the European Convention, as far as relevant, reads:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time…

Trial within a Reasonable Time

a) Relevant Principles

54. Pursuant to the consistent case-law of both, the European and the Constitutional Court, the reasonableness of the length of proceedings must be assessed in the light of circumstances of each individual case, having regard to the criteria laid down in the case-law of the European Court, and in particular to the complexity of the case, the conduct of the parties to the proceedings and of the relevant court or other public authorities, and to the importance that the present legal matter has for the appellant (see the European Court of Human Rights, *Mikulić vs. Croatia*, Application no. 53176/99 of 7 February 2002, Report no. 2002-I, paragraph 38).

55. The Constitutional Court recalls the case-law of the European Court and its own jurisprudence under which it is an obligation of the state to organize its legal system so as to allow the courts and public authorities to comply with the requirements and conditions of the European Convention (see, European Court of Human Rights, *Zanghi vs. Italy*, judgement of 19 February 1991, Series A, no. 194, paragraph 21 and the Constitutional Court, Decision no. AP-1070/05 of 9 February 2006, paragraph 34).

b) Period to be Taken into Account

56. On 13 September 2005, the appellant instituted a lawsuit against the defendant before the Basic Court for the determination and recognition of the occupancy right over the respective apartment, which proceedings were finalized by the judgement of the County Court no. 013-0-Gž-07-000 460 of 14 July 2008. Thus, the proceedings concerned lasted for nine years, seven months and four days, this being the period that would be subject-matter of the analysis of the Constitutional Court in the subsequent paragraphs.

c) Analysis of the Length of the Proceedings

57. As to the complexity of the case, the Constitutional Court notes that the present case concerned the proceedings which were not complex, as it concerned the application of the appellant for voluntary return, for which to be solved it was not necessary to establish special facts nor were there any legal issues which one could consider complex.

58. As to the actions of the parties to the proceedings, the Constitutional Court observes that the appellant filed a lawsuit on 13 September 2005 with the Basic Court against the defendant. The Constitutional Court observes that the appellant had actively participated in the respective contentious proceedings, by availing himself of all the legal instruments available under the law in order to establish the well-foundedness of his claim, and that the Municipal Court, following the filing of the lawsuit, adopted a decision on the appellant's claim within one year and seven months (judgment adopted on 16 April 2007). The Constitutional Court observes that the Basic Court, bearing in mind the relevant provisions of the Law on Civil Procedure, which regulate the submission of the lawsuit to the reply and the provision of the reply to the lawsuit (Articles 69 and 70 of the Law on Civil Procedure), the scheduling of the preliminary hearing and the main hearing (Articles 75 and 94 of the Law on Civil Procedure) and the deadline for the preparation of the judgment (Article 184 of the Law on Civil Procedure), undertook activities from within its respective jurisdiction by observing appropriate, although not always (particularly in the initial stage of the proceedings) time limits prescribed by law. Thus the Constitutional Court is of the opinion that the Basic Court, through its conduct, did not contribute substantially to the length of the proceedings. On the other hand the Constitutional Court observes that the County Court decided on the appeal lodged against the first-instance judgment after one year and three months from the day when the appeal was lodged, which time limit cannot be considered in itself to be unreasonably long, when bearing in mind the relevant provisions of the Law on Civil Procedure which regulate the proceedings of the first-instance court on the appeal (communication to the opposing party for their respective

reply, forwarding to the second-instance court – Articles 203 and 214) as well as the proceedings and the time limits for decision-making before the second-instance court.

59. In view of the aforementioned, the Constitutional Court holds that the ordinary courts did not violate the right of the appellant to have a decision adopted within a reasonable time in the respective contentious proceedings, which were completed at the two judicial instances within the time limit of two years and 10 months (from 13 September 2005 to 14 July 2008).

60. Finally, by considering the proceedings as a whole, the Constitutional Court concludes that in the respective contentious proceedings, which lasted a total of two years and 10 months, there is no violation of the right to „a trial within a reasonable time", as one of the aspects 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

61. The Constitutional Court concludes that the appellant's right to respect for home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention has been violated, because the County Court, by adopting the challenged judgment, unlawfully interfered with the appellant's right to home thereby disregarding the application of the provision of item 6.2 of the Instruction which, given the circumstances of the present case, was relevant for the adoption of the decision on the claim lodged by the appellant.

62. The Constitutional Court concludes that there is a violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, because the County Court, by refusing the appellant's claim for the determination that the appellant, as an occupancy right holder, had lodged a claim with the defendant for the repossession of apartment and the recognition of the occupancy right, interfered with the appellant's right to property, and that interference was not in accordance with the law.

63. The Constitutional Court concludes that there is no violation of the right to adoption of a decision within a reasonable time within the scope 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, given that the proceedings were completed within the time-limit that could not be considered unreasonably lengthy.

64. In view of the provision of Article 61(1),(2) and (3) and Article 64(2) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this Decision.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 498/11

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Pero Tokalić against the Ruling of the Court of Bosnia and Herzegovina no. KPZ-13/10 of 24 January 2011

Decision of 15 July 2011

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1), (2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska,

Mr. Zlatko M. Knežević,

Having deliberated on the appeal of Mr. **Pero Tokalić** in case no. **AP 498/11,** at its session held on 15 July 2011 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Pero Tokalić is partially granted.

A violation of the right to personal liberty and security under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the proceedings concluded by the Ruling of the Court of Bosnia and Herzegovina no. KPŽ-13/10 of 24 January 2011 is hereby established.

In order to secure the compliance with the rights under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Council of Ministers of Bosnia and Herzegovina is hereby

ordered to take all appropriate measures as a matter of urgency to amend the provisions of Article 138(1) of the Criminal Procedure Code of Bosnia and Herzegovina.

The Council of Ministers of Bosnia and Herzegovina is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 6 months from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal lodged by Mr. Pero Tokalić against the Ruling of the Court of Bosnia and Herzegovina no. KPZ-13/10 of 24 January 2011 is hereby dismissed as ill-founded in respect of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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

Reasoning

I. Introduction

1. On 2 February 2011, Mr. Pero Tokalić („the appellant"), represented by Mr. Mesud Duvnjak, a lawyer practicing in Bugojno, filed an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Ruling of the Court of Bosnia and Herzegovina („the Court of BiH") no. KPZ-13/10 of 24 January 2011.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22 (1) and (2) of the Rules of the Constitutional Court, on 11 February 2011 the Court of BiH and the Prosecutor's Office of Bosnia and Herzegovina

(„the Prosecutor's Office of BiH") were requested to submit their respective replies to the appeal. On 3 June 2011 the Constitutional Court requested from the Court of BiH the case-file no. KPV-01/09 for inspection.

3. The Prosecutor's Office of BiH submitted its reply to the appeal on 16 February 2011 and the Court of BiH did so on 21 February 2011. On 6 June 2011, the Court of BiH submitted the requested case-file for inspection.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies of the Court of BiH and the Prosecutor's Office of BiH were communicated to the appellant on 25 February 2011.

III. Facts of the Case

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

6. By its verdict no. KPV-01/09 of 28 January 2010 the Court of BiH found the appellant guilty of the continued criminal offence of tax evasion referred to in Article 273(3) in conjunction with Articles 33 and 55 of the Criminal Code of the Federation of Bosnia and Herzegovina („the Criminal Code of the Federation of BiH") and sentenced the appellant to three years imprisonment. In addition, the mentioned verdict acquitted the appellant of charges that he had committed the criminal offence of money laundering referred to in Article 209(2) in conjunction with Articles 54 and 29 of the Criminal Code of Bosnia and Herzegovina („the Criminal Code of BiH").

7. Deciding on the appeals lodged by the Prosecutor's Office of BiH and the appellant against the first-instance verdict, the Court of BiH passed the Verdict no. KPŽ-13/10 of 15 October 2010 and granted the appeal of the Prosecutor's Office of BiH related to the acquitting part of the first-instance verdict, and in relation to the decision on criminal sanction, while the appellant's appeal was granted in the part related to counting the period he had already spent in detention towards the sentence imposed on him. Accordingly, the first-instance verdict was modified in that part so as to find the appellant guilty of the continued criminal offence of money laundering under Article 209(2) in conjunction with Articles 54 and 29 of the Criminal Code of BiH, accordingly, for the mentioned criminal offence, he was sentenced to two years imprisonment, whereas for the continued criminal offence of tax evasion under Article 273(3) of the Criminal Code of the Federation of BiH, the appellant was sentenced to four years imprisonment. Pursuant to Article 53 of the Criminal Code of BiH, the respective verdict imposed on the appellant a compound

prison sentence in duration of five years, which includes the time the appellant had spent in detention between 23 and 24 November 2004 and 11 January and 20 January 2005.

8. By its Ruling no. KPZ-13/10 of 24 January 2011 the Court of BiH issued a detention order for the appellant, according to which the appellant's detention may last until he has been committed to serve his sentence but no longer than the date when the imposed sentence expires. The Court of BiH reasoned in its Ruling that in the Verdict of the Court of BiH no. KPV-01/09 of 28 January 2010 the appellant was found guilty of the continued criminal offence of tax evasion referred to in Article 273(3) in conjunction with Articles 33 and 55 of the Criminal Code of the Federation of BiH and, in the same verdict, the appellant was acquitted of the charges that he had committed the criminal offence of money laundering under Article 209(2) in conjunction with Articles 54 and 29 of the Criminal Code of BiH. However, the Court of BiH underlined that the first-instance verdict was modified by the second-instance verdict of the Court of BiH no. KPZ-13/10 of 15 October 2010 in the acquitting part of the first-instance verdict and in relation to the decision on criminal sanction, as stated in the enacting clause of the verdict in question, so that the compound prison sentence in duration of five years was imposed upon the appellant. In this regard, the Court of BiH underlines that the provisions of Article 138(1) of the Criminal Procedure Code of Bosnia and Herzegovina („the Criminal Procedure Code of BiH") prescribes that if the sentence pronounced is imprisonment of five years or longer, the court shall order or extend the custody immediately, and in such cases, a special decision shall be issued, and an appeal against that decision shall not stay its execution. In view of the foregoing, the Court of BiH concluded that all legal requirements quoted in the legal provision on detention were satisfied in respect of the appellant, and decided as stated in the enacting clause of the Ruling in accordance with the provisions of Article 138(1) in conjunction with paragraph 6 of the Criminal Procedure Code of BiH.

9. In the Ruling, in the part relating to „legal remedies", it is stated that no appeal is admissible against the Ruling in question.

IV. Appeal

a) Allegations of the appeal

10. The appellant complains that the challenged ruling is in violation of the right to personal liberty and security under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), the right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 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 and Article 8 of the European Convention, the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, the right to freedom of movement and residence under Article II(3)(m) of the Constitution of Bosnia and Herzegovina, and the right to an effective remedy under Article 13 of the European Convention. The appellant asserts that the enacting clause of the ruling in question is contradictory in itself and in contradiction to the legal provisions prescribing the possible length of the proceedings, and that his rights, as stated above, have been violated as a result of the manner in which the detention of the appellant was determined. The appellant states that he had no right to appeal against the ruling in question, although it follows from the provisions of Article 138(1) of the Criminal Procedure Code of BiH that in the case at hand an appeal is allowed against the detention ruling. The appellant holds that in this way the right to personal liberty and security was violated. Since he had no right to appeal against the ruling determining the detention, the appellant holds that this resulted in the violation of his right to an effective legal remedy. As to the right to a fair trial, the appellant only mentioned that his „universal right, the right to legal remedy in criminal proceedings and other rights related to criminal proceedings" were violated, whereby he failed to provide a separate reasoning as to the violation of this right.

11. Furthermore, the appellant claims that, after being detained for 48 hours, he was not given the opportunity to contact either his family and his defense counsel and that the ruling ordering the detention was not submitted to the appellant's defense counsel within those 48 hours. For these reasons, the appellant holds that his right to private and family life and correspondence was violated. Moreover, the appellant states that in the course of the criminal proceedings a bail was set, which consisted of the mortgage registered against the property of the appellant's wife, which is actually his property taking into account that he has 1/2 of their marital assets. In this regard, the appellant asserts that his right to property was violated as the Court of BiH issued the detention order and failed to cancel the bail and to order a deletion of the registered mortgage. Finally, the appellant asserts that his right to freedom of movement and residence was violated, as the detention measure imposed on him was to be implemented in an institution located outside his place of residence.

b) Reply to the appeal

12. In the reply to the appeal, the Court of BiH states that the case at hand did not relate to the detention ordered after the rendering of the first-instance verdict, but it related to the detention ordered following the second-instance verdict modifying the first-instance

verdict. In this regard, the Court of BiH underlines that the provisions of Article 314(2) of the Criminal Procedure Code of BiH stipulate that „If due to the revision of the first-instance verdict, conditions to order or to terminate the custody pursuant to Article 138(1) and (2) of this Code have been fulfilled, the Panel of the Appellate Division shall issue a separate decision against which an appeal is not allowed". Furthermore, the Court of BiH highlights that an appeal against a decision of the court to order detention is permitted after it has been passed by the first-instance panel, *i.e.* after the first-instance verdict has been pronounced, but that is not the case here. As to the appellant's allegations that, after being detained for 48 hours, he was not given the opportunity to contact his family and his defence counsel, the Court of BiH states that it accommodated the appellant's demands to make phone calls and to receive visits as soon as such demands were made to the Court in accordance with the House Rules. As to the appellant's objection that the detention measure imposed on him was to be implemented in an institution situated outside his place of residence, the Court of BiH highlights that the present case is about the execution of a detention measure and not about sending the appellant to serve his prison sentence, when there is an obligation to comply with the Rules on criteria for sending convicts to serve their sentences and to be mindful of the place of residence of a convict. In addition, the Court of BiH states that the appellant's assertion is correct where it is stated that the court, after ordering a detention, is obliged to pass a ruling on cancelling the bail. However, the Court of BiH underlines that this does not mean that the provision of Article 129(2) of the Criminal Procedure Code of BiH stipulates that it should be done by the same ruling and at the same time. In addition, the Court of BiH states that one also has to take into account the provision of Article 130 of the Criminal Procedure Code of BiH, which prescribes the competence to pass a ruling cancelling the bail as well as the obligation to hear the Prosecutor before passing the ruling. Moreover, the Court of BiH underlines that in the meantime the appellant was sent to serve his prison sentence and that the bail was cancelled based on the decision of the Court of BiH of 18 February 2011.

13. In the reply to the appeal, the Prosecutor's Office of BiH stated that the appellant's detention was determined pursuant to the provisions of Article 138(1) of the Criminal Procedure Code of BiH which stipulate compulsory detention in a situation where the accused was sentenced to imprisonment in duration of five years or more severe punishment. Furthermore, the Prosecutor's Office of BiH stated that the provisions of Article 45 of the Criminal Procedure Code of BiH prescribe that the suspect, or the accused must have a defence counsel throughout the duration of the detention, and that accordingly the appellant is given the opportunity to give his opinion in the presence of his defence counsel about the facts he has been charged with. Also, the Prosecutor's Office of BiH stated that the appellant's allegations regarding the failure to issue a decision on the

cancellation of bail are ill-founded, since the provisions of Article 129(2) of the Criminal Procedure Code of BiH stipulate that the bail is to be cancelled once the accused starts serving the sentence.

V. Relevant Law

14. The **Criminal Procedure Code of BiH** (*Official Gazette of BiH* nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09 and 93/09), as relevant, reads:

Article 129(3)
Cancellation of Bail

(3) If a prison sentence is pronounced in the verdict, the bail bond shall be cancelled only when the convicted person begins to serve the sentence.

Article 130
Decision on Bail

In the course of an investigation, a decision on bail and the cancellation of the bail shall be issued by the preliminary proceedings judge and after the issuance of an indictment – by a preliminary hearing judge and after the case has been submitted to the judge or the Panel for the purpose of scheduling the main trial – by that judge or the presiding judge. A decision setting the bail and a decision cancelling the bail shall be taken following the hearing of the Prosecutor.

Article 134(3)
Competence for Ordering Custody

(3) A decision on custody shall be delivered to the pertinent person at the moment of deprivation of liberty. The files must indicate the hour of the deprivation of liberty and the hour of the delivery of the decision.

Article 138(1) and (6)

(1) When the Court pronounces a sentence of imprisonment against an accused, the Court may order custody of the accused or the custody shall be extended if that is necessary in order to ensure an unhindered conduct of the criminal proceedings, while taking into account all the circumstances related to the commission of the criminal offence and the personality of the perpetrator. If the sentence pronounced is imprisonment of five years or longer, the Court shall order or extend custody immediately. In such case,

a special decision shall be issued, and an appeal from such decision shall not stay its execution.

(6) The accused placed in custody against whom a sentence of imprisonment has become legally binding, shall remain in custody until he/she is sent to prison but not after the expiration of the prison term he has received.

Article 144(4) and (5)
The Right to Communication of the Person in Custody with the Outside World and Defense Attorney

(4) A detainee shall be prohibited from using cellular phone but shall have the right, subject to internal regulations of the custody, to make telephone calls at his own expense. To that end, the detention administration shall provide the detainees with a sufficient number of public telephone connections. The preliminary proceedings judge, the preliminary hearing judge, the individual judge or the presiding judge may, for a reason of security or due to the existence of one of the reasons referred to in Article 132 Paragraph 1 Item a) through c), of this Code restrict or prohibit, by a decision, the use of the telephone by a detainee.

(5) A detainee shall be entitled to free and unrestrained communications with his defense attorney.

Article 171(4)
Contents of Personally Served Documents

(4) If the accused has a defense attorney, the indictment and all decisions for which the period of time for filing an appeal commences on the date of delivery, and also the appeal of the opposing party submitted for an answer, shall be served on the defense attorney and the accused in accordance with the provisions of Article 170 of this Code. In such a case, the period for pursuing a legal remedy or answering the appeal shall commence on the date when the writ or notice is delivered to the accused or defense attorney. [...]

Article 314(2)
Revision of the First Instance Verdict

(2) If due to the revision of the first instance verdict, conditions to order or to terminate the custody pursuant to Article 138(1) and (2) of this Code have been fulfilled, the Panel of the Appellate Division shall issue a separate decision against which an appeal is not allowed.

VI. Admissibility

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

16. Pursuant to Article 16(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

17. In the present case, the subject matter of the appeal is the Ruling of the Court of BiH no. KPZ-13/10 of 24 January 2011, against which there are no other effective remedies available under the law. Furthermore, the appellant received the challenged judgment on 26 January 2011 and the appeal was filed on 2 February 2011, *i.e.* within 60 days time-limit as provided for by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court because it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

18. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16 (1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal meets the admissibility requirements.

VII. Merits

19. The appellant claims that the challenged Ruling of the Court of BiH is in violation of his rights under Article II(3) (d), (e), (f), (k) and (m) of the Constitution of Bosnia and Herzegovina and Articles 5, 6, 8 and 13 of the European Convention and Article 1 of Protocol No. 1 to the European Convention.

Right to personal liberty and security

20. Article II(3)(d) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

d) The rights to liberty and security of person.

21. Article 5 of the European Convention, as relevant, reads:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a) the lawful detention of a person after conviction by a competent court;

[...]

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

[...]

22. The appellant considers that the challenged detention order ruling is in violation of his right to personal liberty and security under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention. In this regard, the Constitutional Court recalls that it has highlighted in a number of its decisions that the right to personal liberty and security is considered to be one of the most important human rights and that Article 5 of the European Convention provides protection so that no one may be arbitrarily deprived of liberty. The exceptions to the prohibition against deprivation of liberty are given in Article 5(1) of the European Convention where the cases of permitted deprivation of liberty are listed. That is an extensive list that should be closely interpreted (see the European Court of Human Rights, *Ireland vs. The United Kingdom,* judgment of 18 January 1978, Series A-25). Only such approach is consistent with Article 5 of the European Convention which is aimed at ensuring that no one shall be arbitrarily deprived of his/her liberty (see the European Court of Human Rights, *Quinn,* judgment of 22 March 1995, Series A-311 and *Winterwerp*, judgment of 24 October 1979, Series A-33). The arbitrariness in deprivation of liberty is to be primarily assessed with regards to the compliance with procedural requirements of the Criminal Procedure Code of BiH which was applied in the instant case and which has to be adjusted to the standards of the European Convention.

23. The Constitutional Court recalls that the same legal issue was considered in its Decision no. *AP 573/07* (see, Constitutional Court, Decision on Admissibility and Merits of 29 April 2009, published in the *Official Gazette of Bosnia and Herzegovina* no. 75/09, available at www.ustavnisud.ba). In the aforementioned decision, the Constitutional Court granted the appeal lodged against the detention order rulings issued by the ordinary courts and established a violation of Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention. Namely, based on the mentioned rulings, the

courts imposed detention on the appellant pursuant to the provisions of Article 348(1) of the Criminal Procedure Code of the Federation of BiH, which prescribes the following: „In pronouncing a verdict which sentences the accused to 5 years' imprisonment or more severe punishment, the court shall order custody if the accused is not already in custody." In this regard, the Constitutional Court pointed out that it was undisputed that the appellant's detention had been ordered in accordance with the domestic law. However, the Constitutional Court underlined that the European Court of Human Rights had consistently reiterated that the removal of judicial margin of appreciation on the basis of law was inconsistent with the European Convention and that any detention based on such a provision would be unlawful (see European Court of Human Rights, *Fox, Campbell and Hartley vs. United Kingdom,* judgment of 30 August 1990 and 27 March 1991, Series A, no. 182). In view of the aforementioned, the Constitutional Court concludes that the mentioned domestic law provisions, which stipulate „mandatory detention", are not in conformity with Article 5(1) of the European Convention.

24. Setting the appellant's case in the contexts of the aforementioned case-law of the Constitutional Court, it is clear that in the present case the Court of BiH, by the Ruling no. KPZ-13/10 of 24 January 2011, imposed the detention on the appellant pursuant to the provisions of Article 138(1) of the Criminal Procedure Code of BiH, which stipulate „mandatory detention", given that according to the mentioned provision (which is essentially identical to the provision on the basis of which the ordinary courts had made their decisions that were considered and assessed in the Decision no. *AP 573/07*), the sole condition to be met for ordering a detention includes the existence of a sentence of five years imprisonment or a more severe punishment. Therefore, the competent court was unable to individualize the measure imposed in the appellant's case or to assess any special circumstances that might justify the detention imposed on the appellant in terms of the guaranties of Article 5 of the European Convention, but the court based the reasons for ordering the detention on the fact that the appellant had been sentenced by the legally binding verdict to five years imprisonment. Finally, it means that the provision of Article 138(1) of the Criminal Procedure Code of BiH removed the court's margin of appreciation which, as mentioned-above, and under the case-law of the European Court and the Constitutional Court, is not consistent with the guarantees under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention.

25. Taking into account that the appeal concerned raises the same legal issue as the one that the Constitutional Court considered in the Decision no. *AP 573/07* of 29 April 2009, the Constitutional Court points out that the reasons stated in the aforementioned Decision also apply to the present decision and, consequently, the Constitutional Court concludes

that there has been a violation of the appellant's right to personal liberty and security under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention.

26. Furthermore, the Constitutional Court refers to its case-law where it has concluded that under the appellate jurisdiction it is competent to examine the quality of law to such an extent that it has an impact on the exercise of the individuals' rights under the European Convention (see Constitutional Court, Decision on Admissibility and Merits, *no. AP 2271/05* of 21 December 2006, published in the *Official Gazette of Bosnia and Herzegovina* no. 38/07, available at www.ustavnisud.ba). In this connection, the Constitutional Court outlines that the Constitution of Bosnia and Herzegovina is the most supreme general act and has priority over any other law which is not compatible with it, that the European Convention, according to Article II(2) of the Constitution of Bosnia and Herzegovina, has priority over any national law, and that all authorities of Bosnia and Herzegovina, according to Article II(6) of the Constitution of Bosnia and Herzegovina, shall apply the rights guaranteed by the European Convention. In this connection, the Constitutional Court notes that it follows from the aforementioned that the detention was imposed on the appellant in accordance with the national law, i.e. in the manner prescribed by the provisions of Article 138(1) of the Criminal Procedure Code of BiH, but the aforementioned provisions do not meet the requirements relating to the quality of law to such an extent that the standards under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention are complied with.

27. Having regard to the aforementioned, the Constitutional Court considers necessary to make an order to the Council of Ministers of Bosnia and Herzegovina to take all appropriate measures within its competence in order to amend the provisions of Article 138(1) of the Criminal Procedure Code of Bosnia and Herzegovina, which, according to the conclusion made by the Constitutional Court, are not consistent with the guaranties under Article 5(1) of the European Convention, i.e. which do not meet the necessary quality of law to the extent that they respect the standards under Article II(3)(d) of the Constitution of Bosnia and Herzegovina an Article 5(1) of the European Convention.

28. Taking into account the findings relating to the violation of Article 5(1) of the European Convention, the Constitutional Court does not find necessary to examine the allegations on the violation of Article 5(4) of the European Convention.

Other allegations

29. Furthermore, the appellant holds that the challenged ruling is in violation of his right to private and family life, and correspondence under Article II(3)(f) of the Constitution of

Bosnia and Herzegovina and Article 8 of the European Convention. Namely, the appellant reasons the violation of the mentioned rights with the fact that within 48 hours of his detention, he was not given the opportunity to contact his family and his defense counsel and that the ruling ordering the detention was not submitted to the appellant's defense counsel within those 48 hours. In this respect, the Constitutional Court, primarily, points out that, contrary to the appellant's allegations, no provision of the Criminal Procedure Code of BiH explicitly prescribes that the detained person must be ensured the contact with family and defense counsel „within 48 hours" following detention. The Constitutional Court points out that the provisions of Article 144(4) and (5) of the Criminal Procedure Code of BiH prescribes that the detained person has the right, in accordance with the house rules, to make telephone calls at his/her own expense, and that he/she has the right to free and unhindered contact with the defense counsel. The Constitutional Court observes, as it follows from the case-file of the Curt of BiH no. KPV-01/09, that the appellant, through the Penal and Correctional Facility in Tuzla, addressed on 25 January 2011 a request to the Court of BiH to allow him to have a telephone conversation with the defense counsel. In this respect, the Constitutional Court observes that the Court of BiH, on 26 January 2011, in accordance with Article 144(1) of the Criminal Procedure Code of BiH, granted the visits with the appellant to the defense counsel, and gave the approval for the telephone calls with the defense counsel. Also, the Constitutional Court observes that the Court of BiH, proceeding on the request of the appellant's defense counsel, the same day when the request was submitted, i.e. on 26 January 2011, granted the permanent visits with the appellant to his family members. As for the appellant's allegations that the ruling ordering detention was not submitted to his defense counsel within a given time limit, the Constitutional Court observes that the respective ruling was submitted to the appellant's defense counsel on 26 January 2011, and points out again that no provision of the Criminal Procedure Code of BiH explicitly prescribes that that ruling must be communicated to the defense counsel „within 48 hours", as alleged by the appellant. In view of the aforementioned, the Constitutional Court holds that the appellant's allegations about the violation of the right to private and family life, and correspondence under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention are ill-founded.

30. Also, the appellant holds that the challenged ruling violated his right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. Namely, the appellant reasons the violation of the mentioned right by stating that the Court of BiH rendered a ruling ordering detention, thereby failing to cancel the bail and order the deletion of the registered mortgage. In relation to these allegations stated in the appeal, the Constitutional Court observes that it follows from the respective case file of the Court of BiH that that court adopted a

Ruling no. KPV-01/09 of 18 February 2011, canceling the bail which was set against the appellant (at the investigative stage, by the ruling of the preliminary proceedings judge of 24 November 2004 – that is like a measure securing the attendance of the appellant during the criminal proceedings itself): by the said ruling the Court of BiH (dated 18 February 2011) ordered the deletion of the mortgage registered in favor of Bosnia and Herzegovina on the real estate owned by the appellant's wife at a share of 6/7, since the appellant started serving his prison sentence on 14 February 2011 on the basis of the order of that court dated 14 February 2011. In this respect, the Constitutional Court observes that the Court of BiH adopted the said ruling on the basis of the provision of Article 129(3) of the Criminal Procedure Code of BiH which prescribes that, in the event when the prison sentence was imposed by a verdict, the bail is cancelled only once the convicted person starts to serve the sentence. So, on the basis of the aforementioned it follows clearly that the Court of BiH, when adopting the ruling canceling the bail, acted in accordance with the relevant legal provisions.

31. In view of the aforementioned, the Constitutional Court concludes that the allegations stated by the appellant in the appeal, that the challenged ruling violated his right to property, are ill-founded, since that ruling exclusively decided about ordering detention for the appellant. On the other hand, bearing in mind the relevant provisions of the Criminal Procedure Code of BiH, the Constitutional Court observes that, contrary to the appellant's allegations, there was no obligation on the part of the Court of BiH, while determining the detention for the appellant by the challenged ruling, to cancel at the same time the bail which was set during the criminal proceedings at hand, during which it decided about the criminal charges against the appellant. Besides, the Constitutional Court points out that the bail is set and cancelled by a special ruling in accordance with the provisions of Article 130 of the Criminal Procedure Code of BiH. In that sense, the Constitutional Court indicates that the challenged ruling ordering the detention could not decide the cancellation of the bail, and consequently anyone's property rights. Therefore, the Constitutional Court holds that the appellant's allegations about the violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention are ill-founded.

32. As to the appellant's allegations that the challenged ruling violated his right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, the Constitutional Court observes that the appellant did not reason at all what amounted to the alleged violation of this right. Namely, the appellant solely stated arbitrarily that his „universal right, the right to legal remedy in criminal proceedings and other rights related to criminal proceedings" under Article 6 of the

European Convention were violated. Given that, apart from these arbitrary allegations, the appellant failed to offer any other arguments that would corroborate his assertions about the violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, the Constitutional Court holds that these allegations of the appellant are ill-founded too.

33. As to the appellant's allegations of a violation of his right to freedom of movement and residence under Article II(3)(m) of the Constitution of Bosnia and Herzegovina, the Constitutional Court points out that the rights guaranteed by the aforementioned article were in no way decided by the ruling in question. Namely, the Constitutional Court observes that the violation of this right would be possible in a situation where the appellant was issued a measure, which prohibits him to leave without permission the place of residence, which prohibition measure is regulated by the provision of Article 126 of the Criminal Procedure Code of BiH. Since the present case does not concern a situation like that, the Constitutional Court will not consider these allegations.

34. Taking into account the Constitutional Court's findings relating to Article 5(4) of the European Convention, which is a *lex specialis* comparing to Article 13 of the European Convention, the Constitutional Court does not find it necessary to consider the appellant's allegations on the violation of the right to an effective legal remedy under Article 13 of the European Convention.

VIII. Conclusion

35. The Constitutional Court concludes that there has been a violation of the rights referred to in Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention where the ruling ordering the detention is based on the legal provision which stipulates „mandatory detention", that is where the court was unable to individualize the imposed measure, nor could it involve itself in examining any special circumstances which could justify the ordering of the detention for the appellant within the meaning of the guarantees under Article 5 of the European Convention. Furthermore, the Constitutional Court concludes that the law provision in question does not meet the necessary quality of law to such an extent that the standards under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention are respected.

36. The Constitutional Court concludes that there has been no violation of the rights referred to in Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and Article II(3)(k) of the Constitution of Bosnia and

Herzegovina and Article 1 of Protocol No. 1 to the European Convention, as the facts of the present case do not in any way disclose potential violations of these rights. Also, the Constitutional Court concludes that there is no violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, where the appellant, apart from arbitrary allegations, did not offer any sort of arguments indicating the violation of that right.

37. Pursuant to Article 61(1) (2) and (3) of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause of the present decision.

38. Pursuant to Article 41 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of Judge Tudor Pantiru makes annex to this Decision.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of Judge Tudor Pantiru

The appellant Pero Tokalic was sentenced on 15 October 2010 by the Second Instance Panel of the State Court of Bosnia and Herzegovina to 5 (five) years of imprisonment. The judgment is final and cannot be appealed against.

By Ruling No. KPZ-13/10 of the same court on 24 January 2011 Pero Tokalic was detained *„ ...until he has been committed to serve his sentence but no longer then the date when the imposed sentence expires."*

In his Appeal before the Constitutional Court of B&H the appellant complained that the ruling on his detention is in violation of his right to personal liberty and security under Article II(3)(d) of the B&H Constitution and Article 5 of European Convention on Human Rights „ ...as a result of the manner in which the detention...was determined". The appellant also states that he had no right to appeal against the ruling in question, although it follows from the provisions of Article 138(1) of the Criminal Procedure Code of BiH that in the case at hand an appeal is allowed against the detention ruling. The appellant holds that in this way the right to personal liberty and security was violated. Since he had no right to appeal against the ruling determining the detention, the appellant holds that this resulted in the violation of his right to an effective legal remedy.

The Constitutional Court agreed partially with the appeal and found „A violation of the right to personal liberty and security under Article II(3)(d) of the B&H Constitution and Article 5(1) of the European Convention on Human Rights in the proceedings concluded by the Ruling of the Court of Bosnia and Herzegovina No. KPZ-13/10 of 24/01/2011 ..."

Taking into account the findings relating to the violation of Article 5(1) of the European Convention, the Constitutional Court did not find necessary to examine the allegations on the violation of Article 5(4) of the European Convention.

The Constitutional Court also decided that *„ ...the Council of Ministers of Bosnia and Herzegovina is hereby ordered to take all appropriate measures as a matter of urgency to amend the provisions of Article 138-1 of the Criminal Procedure Code of Bosnia and Herzegovina."*

I cannot agree with the Decision of the Constitutional Court for the following reasons:

The Constitutional Court motivated the violation of Article 5-1 of the ECHR with the fact that *„ ...the Court of BiH, by the Ruling no. KPZ-13/10 of 24 January 2011, imposed the detention on the appellant pursuant to the provisions of Article 138(1) of the Criminal*

Procedure Code of BiH, which stipulates „mandatory detention", given that according to the mentioned provision (which is essentially identical to the provision on the basis of which the ordinary courts had made their decisions that were considered and assessed in the Decision no. AP 573/07), the sole condition to be met for ordering a detention includes the existence of a sentence of five years imprisonment or a more severe punishment. Therefore, the competent court was unable to individualize the measure imposed in the appellant's case or to assess any special circumstances that might justify the detention imposed on the appellant in terms of the guaranties of Article 5 of the European Convention, but the court based the reasons for ordering the detention on the fact that the appellant had been sentenced by a legally binding verdict to five years imprisonment. Finally, it means that the provision of Article 138(1) of the Criminal Procedure Code of BiH removed the court's margin of appreciation which, as mentioned-above, and under the case-law of the European Court and the Constitutional Court, is not consistent with the guarantees under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention.

Taking into account that the appeal concerned raises the same legal issue as the one that the Constitutional Court considered in the Decision no. AP 573/07 of 29 April 2009, the Constitutional Court points out that the reasons stated in the aforementioned Decision also apply to the present decision and, consequently, the Constitutional Court concludes that there has been a violation of the appellant's right to personal liberty and security under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention."

It is obvious that the appellant *was* detained after he was convicted by the State Court of B&H to a 5 years' term of deprivation of liberty. The ruling on detention expressly stated that the appellant was detained in connection with the final judgment of the BiH Court, sentencing him to a punishment of imprisonment of five years.

Article 5(1)(a) of the Convention allows „the lawful detention of a person after conviction by a competent court".

The appellant never challenged in his appeal the lawfulness of the judgment of the B&H State Court by which he was convicted nor did he challenge the competence of that court. He did not specify in his appeal what was wrong with the „manner in which detention was determined". His main complaint is, in fact, about the impossibility to appeal the ruling on detention in accordance with article 5(4) of the Convention.

In its judgment *Iribarne Perez vs. France* of 24 October 1995 (paragraph 30-1) the ECtHR held : „The review required by Article 5(4) is incorporated in the decision depriving a person of his liberty when that decision is made by a court at the close of

judicial proceedings; this is so, for example, where a sentence of imprisonment is pronounced after 'conviction by a competent court' within the meaning of Article 5-1(a) of the Convention".

In view of the above I find unjustified the conclusion of the Constitutional Court that article 5(1) of the Convention was violated because *„...the Court of BiH, by the Ruling no. KPZ of 24/01/2011, imposed the detention of the appellant pursuant to the provisions of Article 138(1) of the CPC of BiH, which stipulates „mandatory detention", given that according to the mentioned provision, the sole condition to be met for ordering a detention includes the existence of a sentence of five years imprisonment or a more severe sentence."*

Article 5(1)(a) allows the detention of a person after conviction by a competent court without imposing any restrictions related to the length of imprisonment by a court judgment. Therefore Article 138-1 of the Criminal Procedure Code of BiH, requiring the arrest only of persons sentenced to a punishment of five years and more, is imposing a higher standard of protection than that contained in Article 5(1)(a) of the Convention and cannot violate this Article as concluded by the Constitutional Court in its decision.

CONTENTS

Case No. AP 291/08

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Nikica Žderić against the Judgment of the County Court in Trebinje no. 015-0-Kž-07-000 069 of 30 October 2007 and Judgment of the Basic Court in Trebinje no. 095-K-07-000 003 of 8 June 2007

Decision of 19 November 2011

CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in the Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-president

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knezevic

Having deliberated on the appeal of **Mr. Nikica Žderić,** in case no. **AP 291/08**, at its session held on 19 November 2011, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Nikica Žderić is hereby granted.

A violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Judgment of the County Court in Trebinje no. 015-0-Kž-07-000 069 of 30 October 2007 is hereby quashed.

The case shall be referred back to the County Court in Trebinje which shall make a new decision in an expedient manner in accordance with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The County Court in Trebinje is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 60 days from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

Reasoning

I. Introduction

1. On 22 January 2008, Mr. Nikica Žderić („the appellant") from Ploče, Republic of Croatia, represented by Mr. Branko Karadeglić, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Judgment of the County Court in Trebinje („County Court") no. 015-0-Kž-07-000 069 of 30 October 2007 and Judgment of the Basic Court in Trebinje („Basic Court") no. 095-K-07-000 003 of 8 June 2007.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the County Prosecutor's Office in Trebinje, County and Basic Court were requested on 25 February 2008 to submit their respective replies to the appeal. On 19 November 2010 and 25 January 2011 the Basic Court was requested to submit the case-file no. 095-K-07-000 003.

3. The County Prosecutor's Office submitted its reply to the appeal on 3 March 2008 and the County Court and Basic Court did so on 5 March 2008. The Basic Court submitted the case-file on 25 February 2011.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 7 July 2011.

III. Facts of the Case

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

6. By the judgment of the Basic Court no. 095-K-07-000 003 of 8 June 2007, which was upheld by the judgment of the County Court no. 015-0-Kž-07-000 069 of 30 October 2007, the appellant was found guilty of the criminal offense of unauthorized production

and sale of narcotics referred to in Article 224(1) of the Criminal Code of the Republika Srpska (*Official Gazette of Republika Srpska* nos. 49/03 and 108/04), and sentenced to three (3) years and six (6) months' imprisonment. The Basic Court established that the appellant committed the criminal offense in the manner that he on 1 November 2006, around 19h30, in the motor car „Renault Megane", registration plate DU-668-CG, illicitly transported for sale 16 kilograms and 373 grams of herbal substance derived from the hemp plant having hallucinogenic effects for its element tetrahydrocannabinol and is put on the list of narcotics (*Official Gazette of the Republika Srpska* no. 37/04). On 2 November 2006, around 9h00, the aforementioned quantity of the aforementioned herbal substance was found with him in Berkovići during a routine traffic control by authorized officers of the Police Station of Berkovići and temporarily confiscated from him with a receipt of confiscation.

7. In the reasoning of its judgment, the Basic Court states that after conducting the evidentiary proceedings and analyzing all the evidence, both individually and in mutual connection, it is undisputedly established that on 1 November 2006 the appellant was driving the Renault-Megane car, registration plate DU-668-CG, owned by Vladimir Goran from Komin, without a letter of authorization given by the owner of the car. While driving the car along the main road Bileća-Stolac, in the settlement of Berkovići, at approximately 19h30, the appellant was stopped near a gas station by police officer Slavko Samardžić, for a routine traffic control. As the police officer established the aforementioned data and as he wanted to compare the number of chassis and the registration, he requested the accused person to open the car hood when he noticed a yellow package in the right corner of the fender jutting out around 10 cm. Having seen the hidden package, which reminded him of packages of narcotics, he closed the hood of the car and informed the criminal investigator Jovo Samardžić and his colleague Kojović in the Police Station Berkovići, who arrived immediately after the call and established that the packages reminding them of packages of narcotics were hidden in the car and informed the commander of the police Station of Berkovići about it. Taking into account that there was a doubt that Nikica Žderić was transporting narcotics and that he was a foreign citizen (the citizen of the Republic of Croatia) and that there was a danger of flight, the police officer Slavko Samardžić arrested Nikica Žderić in compliance with the approval given by the commander of the Police Station of Berkovići and gave him a certificate on deprivation of liberty. Police officers Slavko Samardžić and Svetozar Kojović drove the appellant's vehicle to the Police Station Berkovići.

8. In the reasoning of the judgment, it is further stated that at approximately 20h00, the prosecutor and the preliminary proceedings judge were informed and the latter was

requested to issue a warrant for search of the car driven by the appellant. The preliminary proceedings judge approved, over the phone, the issuance of the search warrant. The police officer of Police Station Berkovići then drafted a written warrant and read it to the preliminary proceedings judge, although this was not indicated in the warrant. Taking into account the fact that it was a night and bad weather conditions (it was a rainy and windy night), and according to the provisions of the applicable Criminal Procedure Code, a search cannot be carried out between 21h00 and 6h00, the search of the car was carried out one day later, *i.e.* on 2 November 2006 at 9h00. As approved by the judge, a copy of the written warrant to search the car was delivered to the appellant together with an instruction stating that he had the right to a defense counsel and that he could request that the defense counsel be present at the search of the car. The appellant signed the receipt of the warrant and answered that he did not want a defense counsel. The car was taken in front of the Police Station of Berkovići on 1 November 2006 and was parked in front of the entrance of the Police Station, which was safeguarded by the police officer on duty and the keys of the car were with the police officer on duty. The search of the car was carried out by the police officer on duty and a crime technician in the presence of appellant, two inspectors of the Public Safety Center of Trebinje and two adult citizens. During the vehicle search 16 square-shaped packages were found, which were purposefully made, wrapped in a yellow scotch tape. These packages were found in both fenders and along the entire front part of the vehicle. Also, during the search 31 pieces of pistol ammunition 9 mm caliber were found, which were hidden under the wiper next to the driver's seat. The found items were marked and photographed, and seized from the appellant who was issued a receipt on temporary seizure of items, with one copy thereof being handed over to the appellant.

9. The Basic Court emphasized that the complaint of the defense counsel that the report on the criminal-technical investigation of the scene dated 2 November 2006, which was made by technician Ljubiša Sukić, cannot be admitted as evidence under the Criminal Procedure Code is ill-founded, as it was made on the conducted search of the passenger's motor vehicle which was driven by the appellant within the meaning of Article 221 of the Criminal Procedure Code. A preliminary proceedings judge was informed on the found and seized items and he ordered that the items be stored at the storage rooms of the Trebinje Public Security Center. The weighing of the found 16 packages was done at the Berkovići Police Station in the presence of the appellant, and the second weighing was done on the premises of the Trebinje State Border Service, as they have the standardized scales. Upon weighing it was established that the quantity was 16 kilograms and 373 grams.

10. The Basic Court found that the complaint of the defense counsel that evidence were obtained in an illegitimate manner, as they were obtained through violation of the

provisions of the Criminal Procedure Code, is ill-founded. The Basic Court emphasized that a legislator does not determine what can be evidence in a given criminal case, restriction exists nevertheless. Those restrictions are placed in a negative sense whereby Article 10 of the Criminal Procedure Code determines that a court decision cannot be based on illegitimate proof. For the very definition of illegitimate proof the legislator again uses a negative point of reference prescribing in Article 10(2) that they would concern evidence obtained by violating the Constitution, laws or defense rights guaranteed by the international law, as well as such evidence which were obtained through the violation of the provisions of the criminal procedure. Basic Court stressed that in order to assess whether they are legitimate evidence it is necessary to assess carefully the contents of the issued warrant, both in relation to the circle of persons and in relation to the criminal act regarding which the warrant was issued. Authorized employees of Berkovići Police Station acted in accordance with Article 120 of the Criminal Procedure Code when they, because of reasonable suspicion that the accused is transporting narcotics, that is a foreign national and that there is a threat of flight, which means that there was a threat from delaying , immediately after making the arrest, they requested along with the consent of the prosecutor the issuing of a oral warrant from the preliminary proceedings judge for the vehicle search. Upon receiving an oral approval they made a written warrant, instructed the appellant that he has the right to defense counsel during the search and handed him the written warrant. Also they acted in compliance with Article 121 and Article 122 and Article 123 of the Criminal Procedure Code. It is a fact that following the statement given by the defense witness the preliminary proceedings judge, the conversation, which had been conducted in relation to the vehicle search warrant, was not recorded by the judge and the original record handed over to the court. Also, it is a fact that the written warrant for vehicle search, under item 5, carries an instruction „prior to search the person concerned must be instructed that he/she has the right to inform the defense counsel who can be present during the search", so a part of the instruction referred to in Article 122(1) (j) as follows „that the search can be carried out in the absence of the defense counsel if special circumstances require so". In the opinion of the Basic Court these are relative violations of the provisions of the Criminal Procedure Code which do not have a bearing on the legitimacy of the presented evidence, and on the basis of such violations one cannot assess whether it was illegitimate evidence violating the right to defense. Namely, it is undisputed that the appellant was instructed that he had the right to inform the defense counsel who can be present during the search, that such an instruction was entered in the warrant under item 5, that the warrant was handed in to the appellant, and that he signed in person the reception thereof. According to the statement of the witness Jovo Samardžić he stated that he did not need the defense counsel. Thus, the appellant was not deprived

of the right to defense counsel. Omission of a part of the instruction from Article 122(j) of the Criminal Procedure Code cannot affect the lawfulness of this piece of evidence, nor can the failure of the preliminary proceedings judge who failed to make the official record of the conversation do so.

11. The Basic Court further stated that the search was carried out in the presence of the authorized official persons and two adult citizens and the appellant. The complaint of the defense counsel for the accused that the vehicle search was unlawful on the grounds that one citizen failed to sign the record on the front, *i.e.* first page, cannot render this piece of evidence unlawful. Namely, the first page, as one can see from the record, caries the already imprinted text for the witness's data under items 1 and 2, namely for the name and family name, the place, street and number. The fact that one witness had put his signature under item 1 in the column between the street and number, and that the second witness had not done so, is an obvious mistake of the witness who signed as that is not the intended spot for the witness's signature.

12. In regards to the complaint of the defense counsel, aimed at reasoning that evidence were obtained unlawfully, is the fact that the temporarily seized items, following the issuance of the receipt on temporary seizure were stored at the storage rooms of the Trebinje Public Security Center, and were not submitted to the Basic Court in Trebinje immediately upon the seizure thereof, as stated in the written warrant dated 2 November 2006, the Basic Court stressed that the heard prosecution witnesses as well as the defense witness the preliminary procedure judge Milan Bosić confirmed that in practice the temporarily seized items are stored at the Trebinje Public Security Center due to the lack of conditions for such items to be stored at the court. The defense witness Milan Bosić explained that only small items and money which can be deposited at the court safe are deposited at the court pending the completion of the criminal procedure and the final decision on such items. So, although no formal action was taken under item 6 of the written warrant, it was established undisputedly that this did not concern a failure *i.e*. non-compliance with the legal provisions on criminal procedure, but the case-law resulting from impossibility to proceed differently, all in accordance with Article 134 of the Criminal Procedure Code.

13. The Basic Court also found the complaint of the defense that Article 135 of the Criminal Procedure Code was not complied with while opening and inspecting the temporarily seized items, as unfounded. As stated the temporarily seized items were stored at the Trebinje Public Security Center storage rooms, and then delivered for expert analysis in accordance with the provisions of Articles 159 – 166 of the Criminal Procedure Code. The provision of Article 135 of the Criminal Procedure Code is of general character and it relates to safeguarding the contents of the temporarily seized items and documentation

if there are reasons to safeguard secrecy, confidentiality and information or to protect privacy, thus it is prescribed that when opening and inspecting the seized items and documentation one must take care that unauthorized persons do not learn of the contents thereof, which is not the case in the present case.

14. The Basic Court further stated that the complaint of the defense that it concerned evidence which was „a fruit of poisonous fruit-tree" *i.e.* a proof which was subjected to expert analysis had not been obtained in a legitimate manner, is unfounded. Namely, as already mentioned, evidence were collected in compliance with the provisions of the Criminal Procedure Code and by respecting the rights of the appellant. The complaint of the defense that the finding of the expert was not thorough as it failed to answer the question regarding the percentage of hallucinogens that were found in the plant samples is unfounded. The expert Siniša Drakul provided an expert explanation in his statement on the process of expert analysis and establishment that the examined plant substance falls in the group of hallucinogens, due to the established presence of psychoactive substance of tetrahydrocannabinol. The court accepted his finding and opinion in full. Upon the inquiry by the defense the expert explained that the age of the plant samples affects the concentration of THC, i.e. it affects the quantitative finding establishing the percentage of the presence of THC and two other cannabinoids. However, quantitative analysis is seldom conducted in practice, not only when it comes to cannabis, but also when it comes to other narcotics, on an explicit request only. He explained that „the Weller Test" reads that if plant substance contains less than 0.3% of hallucinogens it is not a narcotic, but that „the Weller Test" has never been legally regulated.

15. The County Court found in its reasoning as to the defense counsel's claims that the first-instance judgment is based on an invalid item of evidence, thinking of the search of the car driven by the appellant, which was carried out on 2 November 2006, that the Basic Court, in the reasoning for the challenged judgment, gave clear and substantiated reasons for considering this item of evidence lawful despite a few obvious failures relating to the evidentiary procedure. Holding that the search is an urgent investigating action to be taken only if there is a probability that the criminal offence has been committed and that there is sufficient grounds for doubt that the search would achieve the objective, in the instant case the danger of delaying was correctly assessed, which would give an opportunity to issue a search warrant based on the oral request. The established circumstance that the preliminary proceedings judge, who gave clear reasons for his conducts at the main trial, did not record the further conversation when oral request to issue a warrant was filed, does not constitute a failure which would give the search procedure the character of an unlawful action. Furthermore, the fact that the name of the person who had filed the

request was not indicated in the warrant does not constitute the grounds for concluding that the control function of the preliminary proceedings judge was lost, which the appeal aims to prove. The appeal of the defense counsel of the accused indicates that the search of the car without presence of defense counsel violated the right of the accused to defense. According to the County Court, there has been no violation of the right to defense in the case when the accused, having read the search warrant, became aware of the instruction that he had the right to inform his defense counsel of the search which was to be carried out. The appellant was obviously informed of his right and it was up to him to exercise that right so as to inform the chosen defense counsel of the search. By its passive attitude towards right that is allowed by law, the appellant consciously deprived himself of this right. On the other hand, the precise circumstances of the case, indicated through the place and subject of the search, found traces, indicate that the circumstances were special so as to give possibility of carrying out a search without defense counsel.

16. It is further stated that the appeal questions the authenticity of the seized items, since they were not under supervision of the preliminary proceedings judge and the heard witnesses mentioned different colors of packages of herbal substance. With regards to these complaints, the court has the obligation (pursuant to the provision of Article 127(4) of the Criminal Procedure Code), after receiving the items seized based on the search warrant, to keep the seized items under its control until a final decision. However, the provision of Article 134 of the Criminal Procedure Code allows the seized items to be kept in the manner of other than the storage in the premises of the court. The seized items were treated in accordance with the aforementioned law provision, i.e. upon the approval given by the judge of preliminary proceedings they were stored in the premises of the Public Security Center Trebinje. In that manner, the control over the seized item has not been violated. Different perception of the color of found packages by certain witnesses cannot constitute the grounds for doubting their authenticity, all the more so since these colors (yellow and brown) are different only in nuances.

17. In regards to the appellant's statements that contest the procedural value of the report on the criminal–technical investigation of the scene by the Police Station Berkovići, dated 2 November 2006, the County Court stressed that the Report on the Collected Information and Evidence presents only information on the taken measures for the prosecutor and as such it does not have any procedural force and cannot be used as a piece of evidence in the criminal proceedings. The fact that the first-instance court used the aforementioned report as a piece of evidence does not constitute flagrant violation of the provisions of the criminal proceedings under Article 303(1)(z) of the Criminal Procedure Code. In particular, in the opinion of the County Court there is a flagrant procedural violation within the meaning

of the aforementioned provision if a judgment is based on a piece of evidence on which it could not be based according to the provisions of that Law. Invalid pieces of evidence within the meaning of Article 310 of the Criminal Procedure Code, which could not be the basis for the court' decision, are those which are collected in violation of human rights and freedoms provided for by the Constitution and international agreements and those collated in violation of the criminal procedure code. As the Criminal Code of the Republika Srpska does not provide that a report may be used as the basis for the court's decision, it is necessary to determine in each individual case whether a piece of evidence is unlawful. The County Court holds that the report by the competent authorized officers cannot have the character of unlawful piece of evidence as it sublimates the collected information and evidence and is used as information on the taken measures and actions. The first-instance court's findings on the culpability of the accused person was not based on that piece of information but on evidence collected in support of that piece of information.

18. The County Court finally stressed that there was no flagrant violation of the provisions of the criminal proceedings committed when the court presented the written item of evidence for the prosecution by reading the content of the search warrant, dated 2 November 2006 before the cross-examination of witness Jovo Samardžić by the defense. Such conduct of the court has not violated the principle of equality of parties, since the defense was not deprived of the right to discredit unconvincing testimony of this witness, as it was stated in the appeal. It is up to the court to assess the testimony as a whole when individually assessing the presented evidence and to assess the credibility of the given statement before the contested item of evidence was presented.

IV. Appeal

a) Allegations stated in the appeal

19. The appellant asserts that the challenged judgments are in violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1),(2) and (3)(c) and (d) of the European Convention for the Protection of Human Rights and Fundamental Principles („European Convention"). The appellant sees the violation of his right to a fair trial in the fact that during the search of vehicle, which was driven by the appellant and which was not his property, he was not properly instructed that he had the right to inform his defense counsel and that the search could be carried out without defense counsel if special circumstances required it. Instead of this instruction, the appellant was communicated the warrant in which in its item 5 it is stated that: „the accused must be informed that he has the right to inform his defense counsel, who is allowed to be present

at the search". Therefore, the search of the vehicle was carried out without an defense counsel present, whereas there is no statement indicating that the accused accepted it, either in the record relating to the search or in the warrant. In addition, there was no justification for existence of special circumstances that would allow the vehicle search without a defense counsel. In this manner there was a violation of the appellant's right to defense which led to a flagrant violation of the criminal procedure provisions referred to in Article 303(1)(g) of the Criminal Procedure Code. The Court arbitrarily states in the reasoning for its judgment that the accused, having received the warrant, replied that he did not want a defense counsel without stating any evidence confirming it. In addition, in appellant's view, the opinion of the First-Instance Court that the court's lack of action within the meaning of the part of the provisions of Article 122(1)(j) of the Criminal Procedure Code constitutes a relative violation of the provisions of the Criminal Procedure Code of the Republika Srpska, which does not have an effect on lawfulness of the presented evidence, disregarding the fact that the law prescribes that a violation of the right to defense constitutes a flagrant violation of the criminal procedure provisions, as provided for in Article 303(1)(g) of the Criminal Procedure Code, particularly in the situation where his request to have a defense counsel was not met, where there was no statement that he did not want to have a defense counsel and there were no special circumstances justifying the search without a defense counsel. The failure to allow the accused person a contact with his defense counsel in the initial stage of the criminal proceedings amounted at a later point to a serious violation of the fair trial so that the accused was deprived of the right to a fair trial, particularly in the evidentiary part of the criminal proceedings when the witnesses for the prosecution describe the seized item in a different manner and on which no prints of the appellant's papillary lines were found.

20. Furthermore, the appellant stresses that the search of the vehicle which was driven by him, was unlawful and the use of this item of evidence amounted to the flagrant violation of the proceedings under Article 303(1)(z) of the Criminal Procedure Code of the Republika Srpska, and all what subsequently happened with regards to this unlawful piece of evidence and what followed from that original piece of evidence was not legally valid-lawful. He states that in the instant case, three cumulative requirements in order for the search to be lawful and capable of being accomplished have not been met. In fact, in case of oral approval of search warrant, the preliminary proceedings judge did not record the conversation as provided for by Article 120 of the Criminal Procedure Code of the Republika Srpska so that there is no written trace recorded by the court, which would justify the danger of postponing a written request to issue a search warrant nor does the written warrant indicate who orally filed the request, name and the title of the authorized person, nor does it indicate to whom the warrant concerns – Article 122(1)(g)

of the Criminal Procedure Code) nor it is stated that the warrant is submitted to the court in accordance with provision of Article 122(1)(i) of the Criminal Procedure Code.

21. The appellant further claims that his right to a fair trial was violated also because of the fact that neither the judge in charge of preliminary proceedings nor the appellant or his defense counsel were present at opening and inspection of seized items, as provided for by Article 135 of the Criminal Procedure Code. The result of this failure was that the seized items represented legally invalid evidence especially for the reason that certain witnesses stated that it involved 16 packages of green herbal substance in yellow and some in brown packaging on which no prints of papillary lines of the appellant were found.

22. The appellant further claims that there was a violation of the right to adversarial proceedings as well as the right to examine witness since the court presented written evidence of prosecution in the form of reading the contents of warrant for the vehicle search of 2 November 2006 prior to a cross-examination of witness Jovo Samardžić by the defense.

23. Finally, the appellant complains of the manner in which the court accepted the finding and opinion of the court expert witness by claiming that the court has simply presented the contents of the expert's finding without giving its evaluation in relation to the decisive fact which is whether the herbal substance indeed has the property of narcotics.

b) Reply to the appeal

24. The County Prosecutor's Office stated in its reply that the appellant's constitutional rights were not violated during the proceedings before the courts and that the proceedings were conducted in a fair manner. The County Prosecutor's Office stated that the prosecution and the defense were given an opportunity to present evidence, the possibility to invite and hear witnesses was used, appropriate court experts were involved, evidence was assessed, cases were exempted based on the adequate warrant by the judge in charge of the preliminary proceedings, the cases were exempted and considered in accordance with the appropriate provisions of the Criminal Procedure Code. It is stated that both the appellant and his defense counsel were present at the main trial and were given an opportunity to raise objections to the report of the court expert and witnesses, the court correctly, fully and in accordance with the provisions of the Criminal Procedure Code presented the relevant evidence in order to establish decisive facts, the court judgments gave all necessary reasons, particularly those relating to the appellant's allegations. The County Prosecutor finally stated that the courts did not abuse the positive regulations on which the decision is based so that there was no violation of the right to a fair trial under

Article II(3)(e) of the Constitution of Bosnia and Herzegovina and provisions of Article 6(1), (2) and (3)(c) and (d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

25. The Basic and County Courts emphasized in their replies to the appeal that there was no violation of human rights in the proceedings in which the challenged judgments were adopted.

V. Relevant Law

26. The **Criminal Procedure Code of the Republika Srpska** (*the Official Gazette of the RS* nos. 50/03, 111/04, 115/04 and 29/07), in the relevant part, reads:

Article 3
Presumption of Innocence and In Dubio Pro Reo

(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
Legally Invalid Evidence

(...)

(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
Equality of Arms

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

Article 15
Free Evaluation of Evidence

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

Article 120
Oral Request for a Search Warrant

(1) An oral request for a search warrant may be filed when there is a risk of delay.

(2) An oral request for a search warrant may be communicated to a preliminary proceedings judge also by telephone, radio or other means of electronic communication.

(3) Upon being advised that an oral request for a search warrant is being made, the preliminary proceedings judge shall record all of the remaining communication. If a voice recording device is used or a stenographic record made, the preliminary proceedings judge must have the record transcribed, certify to the accuracy of the transcription and file the original record and transcript with the Court within 24 hours of the issuance of the warrant. If longhand notes are taken, the judge shall sign a copy and file it with the Court within 24 hours of the issuance of the warrant.

Article 121
The Issuance of a Search Warrant

(1) If the preliminary proceedings judge determines that the request for a search warrant is justified, he shall grant the request and issue a search warrant.

(2) When the preliminary proceedings judge decides to issue a search warrant based upon an oral request, the applicant shall draft the warrant in accordance with Article 122 of this Code, and shall read it, verbatim, to the preliminary proceeding judge.

Article 122
Contents of a Search Warrant

A search warrant must contain:

a) where the search warrant has been obtained through an oral request, it shall so indicate and it shall state the name of the issuing judge and the time, date and place of issuance;

j) an instruction that the suspect is entitled to notify the defense counsel and that the search may be executed without the presence of the defense counsel if required by the extraordinary circumstances.

Article 134
Safekeeping of the Seized Objects and Documentation

The seized objects and documentation shall be deposited with the Court, or the Court shall otherwise provide for their safekeeping.

Article 135
Opening and Inspection of the Seized Objects and Documents

(1) The opening and inspection of the seized objects or documentation shall be done by the Prosecutor.

(2) The Prosecutor shall be bound to notify the person or the business enterprise from which the objects were seized, the preliminary proceedings judge and the defense counsel about the opening of the seized objects or documentation.

(3) When opening and inspecting the seized objects and documents, attention shall be paid that no unauthorized person gets the insight into their contents.

Article 276
Expert witness appointment

(1) An expert witness may be appointed by parties, defense lawyer and court.

(2) Party who appointed an expert witness shall bear the costs of an expert witness referred to in paragraph 1 of this Article.

Article 303
Essential Violations of the Criminal Procedure Provisions

(1) The following constitute an essential violation of the provisions of criminal procedure:

(...)

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;

27. The **Criminal Code of the Republika Srpska** (*the Official Gazette of the RS* nos. 49/03 and 108/04), in the relevant part, reads:

Unauthorized Production and Sale of Narcotics

Article 224

(1) Whoever without proper authorization, produces, processes, sells or offers for sale, or whoever for the purpose of selling purchases, keeps or transfers, or intercedes in

a sale or purchase, or otherwise puts into circulation substances or preparations which are declared intoxicating drugs, shall be punished by imprisonment term ranging between one and ten years.

VI. Admissibility

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

29. In accordance with Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

30. In the present case, the subject challenged by the appeal is the Judgment of the County Court no. 015-0-Kž-07-000 069 of 30 October 2007 against which no other effective legal remedies are available under the law. Furthermore, the appellant received the challenged judgment on 5 December 2007, and the appeal was lodged on 22 January 2008 *i.e.* within the time limit of 60 days, as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court, as it is not manifestly (*prima facie*) ill-founded, nor are there any other formal reasons rendering the appeal inadmissible.

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

VII. Merits

32. The appellant challenges the aforementioned judgments claiming that they have violated his rights under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1), (2) and (3)(c) and (d) of the European Convention.

a) Right to a fair trial

33. Article II(3)(e) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and 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.

34. Article 6(1) of the European Convention, in its relevant part, reads:

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

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

35. The present case involves the criminal proceedings in which the appellant was pronounced guilty of the criminal offense stipulated in the law and received a prison sentence. Therefore, the outcome of the proceedings concerned is decisive „in determination of any criminal charge against" the appellant and Article 6 of the European Convention is applicable. Also, even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a „tribunal" competent to determine „any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see European Court of Human Rights, *Imbrioscia v vs. Switzerland,* judgment of 24 November 1993, paragraph 36, Series A, no. 275 and *Salduz vs. Turkey,* judgment of 27 November 2008 [GC] no. 36391/02, paragraph 50). Therefore, the Constitutional Court must examine whether the challenged judgments are in violation of the appellant's right to a fair trial as guaranteed by Article 6(1) of the European Convention.

36. In determining whether the proceedings as a whole were fair, regard must also be taken as to whether the rights of the defense were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see European Court of Human Rights, *Bykov vs. Russia*, Judgment of 10 March 2009, [CG], Application no. 4378/02, paragraph 90).

37. In the instant case, the appellant was sentenced based on evidence – 16 kilograms and 373 grams of marijuana that was found when the vehicle he drove was searched. The search in question, in the appellant's opinion, was conducted inconsistent with the provisions of the Criminal Procedure Code of the RS, as he was not allowed to call a defense counsel to be present at the search of vehicle and as the search warrant was not taken in accordance with the provisions of the Criminal Procedure Code of the RS, since the preliminary proceedings judge, when issuing the search warrant based on oral request, failed to make a record and submit it to the court. The Constitutional Court finds that these are the key allegations that must be examined in the instant case.

38. Considering the aforementioned principles from the case *Bykov vs. Russia*, the Constitutional Court will first examine whether the appellant was given possibility to challenge the authenticity of evidence (narcotics found after the search, which was executed based on an oral search warrant) and to oppose its use during the criminal proceedings conducted against him. In that regard, the Constitutional Court notices that the appellant, through his appointed representative, had possibility to challenge this evidence, which he did, in the proceedings before the First Instant Court and later in the complaint. The Constitutional Court does not find that the reasoning given by the ordinary courts on that issue are arbitrary.

39. Therefore, the Constitutional Court will further examine whether the second condition referred to in case *Bykov* was met and, taking into account the specific circumstances of the instant case, it will consider the quality of the evidence (narcotics found after the search of the appellant's vehicle executed based on the oral search warrant).

40. The Constitutional Court notes that the ordinary courts examined the appellant's objections relating to „illegality" of the vehicle search and dismissed them as ill-founded. The Courts concluded that the determined circumstance that the preliminary proceedings judge, who at the main hearing gave statement as to his actions, failed to record the conversation when the oral request for issuing the search warrant was submitted, does not

indeed represent a failure that would render the entire criminal procedure process relating to the vehicle search illegal.

41. However, the Constitutional Court notes that provision of Article 120(3) of the Criminal Procedure Code of the RS provides that, in case of issuing a search warrant based on an oral request, a preliminary proceedings judge shall record further conversation and submit the signed copy of the record to the court within 24 hours from issuing the search warrant. In the opinion of the Constitutional Court, this provision is undisputedly of imperative character and clearly and unambiguously imposes an obligation on the preliminary proceedings judge to make a record when issuing a search warrant based on the oral request and to submit the record to the court within 24 hours. The Constitutional Court finds that this obligation is imposed due to the guarantee that the oral search warrant was issued exclusively based on an approval of the preliminary proceedings judge *i.e.* that the function of the court, in terms of determining existing legal conditions for search, was achieved and the very deadline of 24 hours excludes the possibility of subsequent abuses. In the opinion of the Constitutional Court, the Criminal Procedure Code of the RS does not leave a possibility that the failure to record the conversation (when issuing an oral search warrant) as well as the failure to submit a verified copy of the record to the court, can later be convalidated by certain actions (for example, a statement given by preliminary proceedings judge with regard to the given oral search warrant). In the context, it follows that the failure of preliminary proceedings judge to make the record and to submit it to the court, as provided for by provisions of Article 120(3) of the Criminal Procedure Code of the RS, would represent an absolute flagrant violation of the provisions of the criminal proceedings under Article 303(1)(z) of the Criminal Procedure Code of the RS, since the search done without observing the legal regulations, renders the action illegal. This results in the situation where evidence obtained by that action, cannot be used in evidentiary proceedings, having in mind the provision of Article 10(2) of the Criminal Procedure Code of the RS that provides that the court cannot base its decision on evidence that is obtained by flagrant violations of the Criminal Procedure Code of the RS.

42. Therefore, having in mind the aforesaid, it is undisputable for the Constitutional Court that the search warrant for appellant's vehicle based on the oral request was not issued in accordance with the provisions of Article 120(3) of the Criminal Procedural Code of the RS, as the Criminal Procedure Code strictly stipulates the conditions for issuing such a warrant and the failure to comply with them cannot be convalidated by subsequent actions. Therefore, the Constitutional Court finds that ordinary courts have applied the provisions of Article 120(3) of the Criminal Procedure Code of the RS arbitrarily, as they believed that the statement of the preliminary proceedings judge (that he issued an oral

search warrant) can justify his obvious failures (which was not disputable neither for the ordinary courts considering that they concluded this in the reasoning of their judgments) which relate to the failure to record the conversation with the official in terms of the request for oral search warrant as well as the failure to submit a verified copy of the record to the court on the oral search warrant that had been issued.

43. In addition, the Constitutional Court finds that the question is raised whether the arbitrary application of Article 120(3) of the Criminal Procedure Code of the RS, in the instant case, has as a consequence the adoption of arbitrary decisions that led to the violation of the appellant's right to a fair trial under Article 6(1) of the European Convention.

44. As already stated, if the evidence is obtained illegally, the court cannot base its decision on it. In the previous part of this decision, it is reasoned that the oral search warrant in question was not issued in accordance with the provisions of the Criminal Procedure Code of the RS, which leads to an inevitable conclusion that the search of the appellant's vehicle was executed illegally *i.e.* inconsistent with the provisions of the Criminal Procedure Code of the RS. The search of the appellant's vehicle resulted in finding the substance subsequently determined to contain narcotics, as established through the testimony of an expert witness. However, if the search of the appellant's vehicle was illegal (and indeed it was), then the items found on that occasion cannot be used as evidence pursuant to the provisions of Article 10 of the Criminal Procedure Code of the RS. Considering that, in the instant case, the narcotics found represent the only direct evidence based on which the ordinary courts founded their decisions and found the appellant guilty for the criminal offense of unauthorized production and sale of narcotics referred to in Article 224 of the Criminal Code of the RS and, as the search of the appellant's vehicle, that resulted in finding the narcotics, was executed illegally, then such evidence does not have the quality of the evidence within the meaning of Article 6(1) of the European Convention for courts to base their decisions on it. Having in mind that the ordinary courts used the found narcotics as evidence in the criminal proceedings, more precisely, that was *de facto* the only direct evidence *i.e.* the incriminating evidence against the appellant, and given that that evidence was obtained through the arbitrary application of Article 120(3) of the Criminal Procedure Code of the RS, then, in the opinion of the Constitutional Court, the evidence (narcotics) does not have the necessary quality for the courts to base their decisions on it, as done in the instant case. As a result, the decisions were made in an arbitrary manner and in violation of the appellant's right to a fair trial under Article 6(1) of the European Convention and Article II(3)(e) of the Constitution of Bosnia and Herzegovina.

45. In addition and in line with its consistent case-law, according to which the issue involving the fairness of proceedings must be determined based on the proceedings „as a whole", the Constitutional Court will examine the appellant's objection that, as understood by the Constitutional Court, raises an issue of identity of the temporary seized items, in other words, it raises an issue of use of the temporary seized items as evidence against the appellant. As already stated, the appellant emphasizes that during the procedure of opening and inspecting the seized items, there was no preliminary proceedings judge present. In addition, neither he personally (the appellant) nor his defense counsel was present, as stipulated by Article 135 of the Criminal Procedure Code. This failure, in the opinion of the appellant, led to the situation in which the seized items represent legally invalid evidence, especially as certain witnesses stated that this involved 16 packages of green herbal substance in yellow, while some stated, in brown, packaging, on which no prints of papillary lines (fingerprints) of the appellant were found.

46. The Basic Court examined the appellant's objection that the opening and inspection of temporary seized items was not done in accordance with the provisions of Article 135 of the Criminal Procedure Code of the RS. In this regard, the Basic Court emphasizes that the provision of Article 135 of the Criminal Procedure Code is of a general character and relates to the protection of contents of temporary seized items and documentation if there are reasons for safeguarding the secrecy, confidentially of information or protection of privacy, so that it is stipulated that during opening and inspecting of seized items and documentation, attention should be paid that no unauthorized person gets to know into their contents. This is not the case here. The County Court did not examine this objection in greater detail but it is obvious that it accepted the reasoning of the judgment of the Basic Court in that part, as the judgment of the First Instance Court was upheld in full.

47. The Constitutional Court notes that the reasoning of the judgment of the Basic Court is primarily focused on the provisions of Article 135(3) of the Criminal Procedure Code of the RS, which provides that during opening and inspecting of seized items and documentation, attention should be paid that no unauthorized person gets to know into their contents. From the mentioned reasoning it can be concluded that the Basic Court considers that in the instant case there were no reasons for safeguarding the secrecy or confidentiality of information or protection of privacy and that opening and inspection of items seized from the appellant was carried out in accordance with the provisions of Article 135 of the Criminal Procedure Code of the RS.

48. However, the Constitutional Court emphasizes that this reasoning fully disregards the imperative provisions of paragraphs 1 and 2 of Article 135 of the Criminal Procedure Code, which provide that opening and inspection of temporary seized items and

documentation should be done by prosecutor and that the prosecutor should notify the person or the business enterprise from which the objects were seized, the preliminary proceedings judge and the defense counsel about the opening of the seized objects or documentation. The Constitutional Court recalls that the absence of these persons does not prevent the prosecutor to carry out the opening and inspection of temporary seized items and documentation but that the prosecutor should, in the record on opening and inspection, note the persons who were, in accordance with the obligation of notification referred to paragraph 2 of Article 135 of the Criminal Procedure Code, present or absent, noting that these persons were duly informed. In addition, the record should contain the state of each package or seal. It is considered that the opening and inspection of items represents an on-the-spot-inquiry. In that regard, court experts or professionals can be present during this action if their presence is necessary for giving the findings and opinions *i.e.* for the purpose of providing adequate professional assistance (for example, to ensure the accuracy of the list of items and documentation seized).

49. In the present case, by examining the court case-file, the Constitutional Court has ascertained that the competent prosecutor did not carry out these actions at all, as provided for by Article 135 of the Criminal Procedure Code. In short, the case-file does not contain the record on opening and inspection of the items temporarily seized from the appellant.

50. It indisputably follows from the case-file that the police, during the search and seizure of the items, (also) carried out the opening of the packages. It is evident from the certificate on temporary seizure of items (signed by the appellant) no. 14-4/02-230-16/06 of 2 November 2006, which was made at the police station Berkovići, that under item 1 it is stated „green herbal substance that has morphological traits of narcotics marijuana…16 packages with a total weight of approximately 16340 grams". Also, it is evident from the photo documentation no. 14-4/02-18/06 of 24 November 2006 (made in police station Berkovići) that seized item no. 7 was opened. In the record on search (number and date same as certificate on item seizure) made by authorized persons from the Police Station Berkovići which was signed by the appellant and witness who were present during search, it was stated that the following was seized: „green herbal substance that has morphological traits of narcotics marijuana…16 packages…". In that regard, it was noted that all previously seized items were packaged *i.e.* taped. Furthermore, it was evident from the record no. 14-02/6-85/06 of 2 November 2006 (that was made at the Police Station in Trebinje) that the weighing of items seized from the appellant was done but in the presence of persons employed in the police only and that it was concluded that the total weight of 16 packages was 16373.05 grams. It was also noted that it was clear from the text of the record that the police officers were familiar with the contents of the packages as it was stated „…during weighing of 16 brown packages containing herbal substance

that has morphological traits of narcotics – marijuana...". It was evident from the warrant no. Kt 546/06 of 3 November 2011 which was issued by the County Prosecutor Office in Trebinje that the court expert was submitted „….16373 grams of green herbal substance that has morphological traits of narcotics marijuana…"

51. Therefore, it is undisputed that the competent prosecutor in the instant case failed to carry out the opening and inspection of temporary seized items in accordance with the imperative provisions of paragraphs 1 and 2 of Article 135 of the Criminal Procedure Code. In addition, it is undisputed that, in terms of non-compliance with the provisions of paragraphs 1 and 2 of Article 135 of the Criminal Procedure Code of the RS, the ordinary courts failed to give any reasoning apart from, in the opinion of the Constitutional Court, redundant references in respect of the lack of reasons under the provision of paragraph 3 of Article 135 of Criminal Procedure Code of the RS. It should also be added that the witnesses interrogated gave different statements in terms of color of the adhesive tape used to wrap the items seized from the appellant as well as that there were no traces of papillary lines or appellant's prints on the seized items. When all of this is considered, the Constitutional Court finds that the ordinary courts in the instant case did not eliminate a reasonable doubt as to identity of the items seized from the appellant and considering that the challenged judgments are exclusively based on that evidence (the seized items for which it was subsequently established by the court expert to be narcotics), the Constitutional Court is of the opinion that the proceedings in question, taken as a whole, do not meet standards of the right to a fair trail under Article 6(1) of the European Convention.

52. Therefore, the Constitutional Court finds that in the present case there was a violation of the right to a fair trail under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention and that it is not possible to correct subsequently such violation, as it is undisputable that the items seized from the appellant were destroyed (evident from the case-file). In this regard, the Constitutional Court finds that it is not necessary to examine other allegations relating to the violation of Article 6(1) of the European Convention (the seized items were not under the supervision of the court, *etc*.).

53. In view of the aforementioned, the Constitutional Court concludes that there is a violation of the appellant's right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

Other allegations

54. The Constitutional Court finds that it serves no purpose to examine other appellant's allegations relating to other aspects of Article 6 of the European Convention, considering

that it has already established the violation of the appellant's right to a fair trial under Article 6(1) of the European Convention.

VIII. Conclusion

55. The Constitutional Court concludes that there has been a violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, given that the ordinary courts used the discovered narcotics as evidence in the criminal proceedings. More precisely, that was *de facto* the only direct evidence *i.e.* the incriminating evidence against the appellant, which was obtained through the arbitrary application of Article 120(3) of the Criminal Procedure Code of the RS. In the opinion of the Constitutional Court, the evidence (narcotics) in question does not have the necessary quality for the courts to base their decisions on it, as done in the instant case. Therefore, the decisions made in such a manner are arbitrary and in violation of the appellant's right to a fair trial. In addition, the Constitutional Court concludes that there has been a violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, since it is undisputed that the competent prosecutor in the instant case did not carry out the opening and inspection of items temporarily seized from the appellant, as required by the imperative provisions of paragraphs 1 and 2 of Article 135 of the Criminal Procedure Code of the RS.

56. Pursuant to Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP 4101/09

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Vitomir Soldat against the Decision of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina no. 04-02-8488/09 of 15 October 2009, a Decision of the Second Instance Disciplinary Panel of the HJPC no. DŽVS (Prosecutors): 1/2009 of 23 July 2009, and a Decision of the First Instance Disciplinary Panel for Prosecutors of the HJPC no. DCVS (Prosecutors): 8/2008 of 23 March 2009

Appeal Ms. Katica Jozak-Mađar against the Decision of the HJPC no. 04-02-68-4/2011 of 12 May 2011, a Decision of the Second Instance Disciplinary Panel no. DŽLJM (Judges) no. 4/2010 of 9 March 2011, and a Decision of the First Instance Disciplinary Panel for Judges no. DCKJM (Judges) no. 04-02-2468-20/2010 of 2 December 2010

Decision of 30 March 2012

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knežević

Having deliberated on the appeals of Mr. **Vitomir Soldat** and Ms**. Katica Jozak-Mađar**, in case no. **AP 4101/09**, at its session held on 30 March 2012, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeals of Mr. Vitomir Soldat and Ms. Katica Jozak-Mađar are hereby granted.

It is hereby established that the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms has been violated.

The case shall be referred back to the High Judicial and Prosecutorial Council of Bosnia and Herzegovina to ensure the appellants' constitutional rights and issue new decisions on disciplinary proceedings in an expedited manner, in accordance with all the guarantees provided under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1)

of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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

Reasoning

I. Introduction

1. On 25 December 2009, Mr. Vitomir Soldat („the first appellant") from Mrkonjić Grad, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Decision of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina („the HJPC") no. 04-02-8488/09 of 15 October 2009, a Decision of the Second Instance Disciplinary Panel of the HJPC („the Second Instance Disciplinary Panel") no. DŽVS (Prosecutors): 1/2009 of 23 July 2009, and a Decision of the First Instance Disciplinary Panel for Prosecutors of the HJPC („the First Instance Disciplinary Panel") no. DCVS (Prosecutors): 8/2008 of 23 March 2009. The appellant submitted supplements to the appeal on 20 and 22 September 2010.

2. On 30 May 2011, Ms. Katica Jozak-Mađar („the second appellant") from Novi Travnik, represented by Mr. Sead Hodžić, attorney-at-law practicing in Sarajevo, lodged an appeal with the Constitutional Court against the Decision of the HJPC no. 04-02-68-4/2011 of 12 May 2011, a Decision of the Second Instance Disciplinary Panel no. DŽLJM (Judges) no. 4/2010 of 9 March 2011, and a Decision of the First Instance Disciplinary Panel for Judges („the First Instance Disciplinary Panel") no. DCKJM (Judges) no. 04-02-2468-20/2010 of 2 December 2010. The second appellant also submitted a request for interim measure, requesting from the Constitutional Court to stay the enforcement of the decisions by the First instance and Second Instance Disciplinary Panels pending the issuance of its decision upon the appeal.

II. Procedure before the Constitutional Court

3. Pursuant to Article 22(1) of the Rules of the Constitutional Court, in case no. AP 4101/09 it was requested from the HJPC and the Chief Disciplinary Prosecutor of the HJPC („the Disciplinary Prosecutor") on 19 July 2010 and 3 November 2011 to submit their replies to the appeal.

4. The HJPC communicated its reply to the appeal on 5 August 2010, whereas the Disciplinary Prosecutor replied on 15 November 2011.

5. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the reply to the appeal of the HJPC was transmitted to the first appellant on 9 August 2010 and the reply of the Disciplinary Prosecutor was transmitted on 21 November 2011.

6. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, in case no. AP 2241/09, it was requested from the HJPC and the Chief Disciplinary Prosecutor on 2 June 2011 to submit their replies to the appeal.

7. The HJPC and the Disciplinary Prosecutor communicated their replies to the appeal on 13 June 2011.

8. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were transmitted to the second appellant on 22 July 2011.

9. In view of the fact that the Constitutional Court received several requests which fall under its jurisdiction and the fact that the appeals nos. AP 4101/09 and AP 2242/11 concern the identical factual and legal grounds, the Constitutional Court decided, pursuant to Article 31(1) of the Rules of the Constitutional Court, to join these two cases, conduct one set of proceedings and issue one decision under no. AP 4101/09.

10. Pursuant to Article 93(1)(3) and (3) of the Rules of the Constitutional Court, the Constitutional Court adopted a decision on the exemption of judge Zlatko M. Knežević from consideration and deciding in these appeals since the judge had been the member of the HJPC at the time the challenged decisions were adopted.

III. The facts of the case

Case no. AP 4101/09

11. The facts of the case as following from the allegations of the first appellant and the documents presented to the Constitutional Court may be summarized as follows:

12. By the Decision of the First Instance Disciplinary Panel no. DCVS (Prosecutors): 8/2008 of 23 March 2009, the first appellant as the chief prosecutor in the County Prosecutor's Office in Banja Luka was pronounced liable for the following disciplinary offences: 1) exploiting his position as a prosecutor in order to obtain unjustified advantages for himself or for other persons under Article 57(6) of the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (*Official Gazette of*

Bosnia and Herzegovina nos. 25/04, 93/05, 48/07 and 15/08; hereinafter „the Law on the HJPC") described under count III 1 of the disciplinary action; 2) any other behavior that compromises the public confidence in the impartiality or credibility of the Office of the Prosecutor under Article 57(23) of the Law on the HJPC, described under count III 1 of the disciplinary action; and 3) any other behavior that represents a serious breach of official duties under Article 57(23) of the Law on the HJPC, described under count III 4 of the disciplinary action. By application of the provisions of Articles 58 and 59 of the Law on the HJPC a disciplinary sanction of decreased salary by 20 percent for the period of one (1) year was imposed upon the defendant for the aforementioned disciplinary offences. The aforementioned decision by the First Instance Disciplinary Panel dismissed the disciplinary action in relation to the following disciplinary offences: 1) under Article 57(6) of the Law on the HJPC - exploiting his position as a prosecutor in order to obtain unjustified advantages for himself or for other persons - in the manner as described under count III 2 of the disciplinary action; 2) under Article 57(7) of the Law on the HJPC - not disqualifying himself from prosecuting a case when a conflict of interest exists - in the manner as described under count III 3 of the disciplinary action; 3) under Article 57(12) of the Law on the HJPC - interfering in the jurisdictional activity of a judge or prosecutor ... in order to obstruct their activities or demean them - in the manner as described under count III 3 of the disciplinary action; 4) under Article 57(22) of the Law on the HJPC - behavior within or outside the prosecutor's office that demeans the dignity of office of prosecutor - in the manner as described under count III 2 of the disciplinary action.

13. In the reasoning of the First Instance Disciplinary Panel's decision it is stated that during the course of the disciplinary proceedings the Panel had held a pretrial hearing, enabling the parties to present, exchange and take admitted evidence at the main hearing and, after analyzing and evaluating the taken evidence and the results of the hearing, it issued the concerned decision. It was further stated that the appellant had been charged under count III 1 of the disciplinary action with exploiting his position as a prosecutor in order to obtain unjustified advantages for himself or for other persons and behaving in the manner that compromised the public confidence in the impartiality or credibility of the office of the Prosecutor because he used official vehicles of the Prosecutor's Office for transport to and from work in the period April-May 2004 through October 2008, thereby committing disciplinary offences under Article 57(6) and (23) of the Law on the HJPC.

14. The First Instance Disciplinary Panel stated further in its decision that in the present case it was not disputed that the first appellant had been using official vehicle for transportation from and to work to cover the distance Mrkonjić Grad – Banja Luka - Mrkonjić Grad and that D.Č., a driver of the County Prosecutor's Office Banja Luka used

to park official vehicle in front of his house in Mrkonjić Grad after coming from work, on weekend days and during vacation. It is further stated in the reasoning that the Law Amending the Law on Prosecutor's Offices in the Republika Srpska (*Official Gazette of the RS* no. 85/03) does not prescribe for chief prosecutors, deputy chief prosecutors and prosecutors to be entitled to remuneration for transportation expenses. The aforementioned law rendered ineffective the provision of the Law on Prosecutor's Offices in the Republika Srpska from 2002 (*Official Gazette of the RS* no. 55/02), pursuant to which the above mentioned persons were entitled to remuneration for transportation expenses incurred in riding to and from work. It is stated that the Law on Salaries and Other Compensations for Judges and Prosecutors in the Republika Srpska does not provide for remuneration for transportation expenses to and from work. In addition, the First Instance Disciplinary Panel established that the appellant had also violated the Rulebook on Conditions, Method of Use and Storage of Official Vehicles of the County Prosecutor's Office in Banja Luka, issued on 8 July 2005 by the first appellant as the chief prosecutor. The First Instance Disciplinary Panel did not accept the statement of the first appellant about the cost-effectiveness of that kind of transport based upon the finding and opinion of the traffic expert, stating that the transportation expenses of both the appellant and other prosecutors and employees of the Prosecutor's Office were partially covered by the amounts of employees' remuneration to which they were all entitled. In view of the aforementioned, the First Instance Disciplinary Panel established that the first appellant was not entitled to remuneration for transportation expenses incurred in riding to and from work and, therefore, by riding in an official vehicle during the said period against the budget funds of the County Prosecutor's Office Banja Luka, he had committed a violation under Article 57(6) of the Law on the HJPC by exploiting his position as a prosecutor in order to obtain unjustified advantages for himself or for other persons, and under Article 57(23) of the Law on the HJPC by compromising the public confidence in the impartiality or credibility of the Office of the Prosecutor, on account of which he was pronounced liable for the aforementioned disciplinary offences.

15. The First Instance Disciplinary Panel stated further in the reasoning that under count III 4 of the disciplinary action the first appellant was charged with improperly employing the drivers D.Č., A.T. and V.M., committing thereby a serious breach of official duties or compromising the public confidence in the impartiality or credibility of the office of the Prosecutor, i.e. a disciplinary offence under Article 57(23) of the Law on the HJPC. It is further stated that it follows from the statement of a witness as well as the submitted material evidence that the said drivers were employed without the job vacancy announcement procedure. It is further stated in the reasoning that the first appellant did not act in accordance with Article 10(2) of the Law Amending the Law on Employment (*Official Gazette of the RS* no. 85/03) which prescribes that the employer shall submit an

application to the Employment Bureau stating its need for employees and that Bureau shall have a duty to place announcement of job vacancy in one of the public journals in RS within three days at the latest from the date the application was received if the employer requires it, unless the employer requires that job announcement be made otherwise. It is also stated that, pursuant to Article 11(3) of the Law Amending the Law on Employment, the employer shall alone decide on the selection of candidates for employment among those proposed by the Bureau or the agency or the other candidates who applied directly to the employer to get that job, but that selection should involve several candidates who applied and that was not the case in employing any of the three drivers employed in 2004. Also, Article 8(1) and (2) of the Law on Labor Relations in the State Bodies stipulates that persons shall become employees of state bodies pursuant to a final decision of the official in charge of selection of registered candidates. During the period while the aforementioned drivers performed their assignments as drivers pursuant to fixed-term contract, the HJPC adopted on 13 December 2004 and started applying on 10 February 2005 the Rulebook of Internal Organization and Operations of the Republic Prosecutor's Office of the RS and the County Prosecutor's Offices of the RS („the Rulebook"). The Rulebook prescribes in particular the issue of filling the vacated positions. Its Article 66 stipulates that the chief prosecutor and, upon his order, the Prosecutor's Office secretary shall announce vacated positions within the Prosecutor's Office and that a public announcement shall be published in the *Official Gazette of RS* and at least two daily newspapers distributed in BiH and that the provisions of the Law on Civil Service in the RS and the RS Law on Labor shall apply to employed workers. The presented evidence, it is further stated, established beyond any doubt that the aforementioned drivers had been employed without conducting the procedure prescribed by the laws and the Rulebook, which would have enabled the employer an opportunity to choose among several candidates. The First Instance Disciplinary Panel, therefore, established that by such conduct the first appellant had committed a serious breach of official duties, i.e. a disciplinary offence under Article 57(23) of the Law on the HJPC, on account of which he had been pronounced liable for the aforementioned disciplinary offence. As for the remaining disciplinary offences under Article 57(6), (7), (12) and (22) of the Law on the HJPC, described under count III 2 and 3 of the disciplinary action, the First Instance Disciplinary Panel dismissed the disciplinary action as ill-founded.

16. Both the Office of the Disciplinary Prosecutor and the first appellant duly filed appeals against the aforementioned decision of the First Instance Disciplinary Panel. Deciding about the appeals, the Second Instance Disciplinary Panel issued the decision no. DZVS (Prosecutors): 1/2009 of 23 July 2009, partially granting the appeal of the first appellant and modifying the decision of the First Instance Disciplinary Panel by dismissing the claim of the disciplinary prosecutor in the part establishing that the defendant was liable

for disciplinary breaches under Article 57(1)(6) and (23) of the Law on the HJPC under counts 1 and 2 of the Decision of the First Instance Disciplinary Panel, imposing upon the defendant a disciplinary sanction of decreased salary by 10 percent for the period of 6 months starting from the date the decision became final and binding. The aforementioned decision dismissed the remaining part the appeal of the first defendant and the appeal of the disciplinary prosecutor and affirmed the remaining part of the first instance decision.

17. The Second Instance Disciplinary Panel stated in the reasoning part that, pursuant to the allegations in the appeals by the first appellant and the disciplinary prosecutor, there was a disputed fact as to whether the decision of the first appellant on the manner of transportation by official vehicles had obtained unjustified advantages for himself or for the aforementioned persons, committing thereby the disciplinary offence under Article 57(1)(6) of the Law on the HJPC. It follows from the established facts, in the opinion of the Second Instance Disciplinary Panel, that the manner of transportation of the employees and prosecutors was primarily organized with a view to organizing the work of branch offices as efficiently as possible as well as the entire Prosecutor's Office, where the presence of those employees and prosecutors was necessary during the working hours and motivated by rational and economic expenditure of available budgetary funds. The presented evidence leads to a conclusion that there has been no inappropriate spending of budgetary funds and no overdrafts of budgetary funds on accounts related to travel expenses, fuel, lubricant and maintenance costs. Such conclusion is prominent in the Report on Audit of Consolidated Financial Reports by the Ministry of Justice of RS for 2006 and 2007 and the Report on Audit of Consolidated Financial Reports by the Prosecutor's Office of RS for 2005, which means that budgetary funds were used in an economic and appropriate manner. The Second Instance Disciplinary Panel established that it followed from the presented evidence and established facts that this manner of transport of the defendant and the aforementioned employees and prosecutors had not resulted in any detrimental consequences for budgetary funds because if there were any they would have been mentioned in the said reports. In the opinion of the Second Instance Disciplinary Panel, any gained financial advantages for oneself or other persons must result in detrimental consequences for budgetary funds and, since such consequences had not occurred and neither have they been proven, the conclusion that the first appellant had not obtained any financial advantage either for himself or for the aforementioned persons is correct. The said employees of the Prosecutor's Office could only have obtained financial advantage, it was stated, in case they used transportation by official vehicles on described distances and at the same time received the amounts of remuneration for transport in that period, but since those facts were not being presented to be proven in the first instance proceedings and the disciplinary prosecutor did not indicate them in his appeal, the Second Instance Disciplinary Panel did not deal with them in

terms of Article 21 of the Civil Procedure Code of the RS. Having considered the issue whether the defendant obtained for himself and the aforementioned persons any financial advantage, the Second Instance Disciplinary Panel held that the important issue for such advantage was the intention of the first defendant to make it possible for himself and the others to obtain such advantage because only in that case it was possible to speak about the existence of the features of the disciplinary offence under Article 57(1)(6) of the Law on the HJPC. As it does not follow from the taken evidence and the established facts that there are grounds to conclude that such intention existed, or in contrast, that the intention of the first appellant had been motivated exclusively by good organization of work as well as rational and cost-effective spending of funds with a view to achieving effective work of both branch offices and the Prosecutor's Office as a whole, the Second Instance Disciplinary Panel found that also this necessary consequence of the existence of the aforementioned disciplinary offence was missing.

18. Regarding the part of the first appellant's appeal relating to the challenging of the first instance decision pronouncing him guilty of the disciplinary offence under Article 57(1)(23) of the Law on the HJPC, committed by improperly employing D.V., A.T. and V.M. on the positions of driver, i.e. courier, the Second Instance Disciplinary Panel found that the first appellant's complaint was ill-founded. Namely, it follows from the presented evidence and established facts, in the opinion of the Second Instance Disciplinary Panel, that the concerned persons obtained permanent employment in contravention of the provision of Article 66(2) and (3) of the Rulebook because the vacancies in the Prosecutor's Office had not been publicly announced in the *Official Gazette of the RS* and at least two daily newspapers distributed in Bosnia and Herzegovina. Therefore, the Second Instance Disciplinary Panel evaluated, the decision by the First Instance Disciplinary Panel was correct and lawful in the part pronouncing the first appellant liable for the disciplinary offence under Article 57(1)(23) of the Law on the HJPC. In the remedy part of the decision, the Second Instance Disciplinary Panel stated that the unsatisfied parties may lodge an appeal against this decision with the Council within 15 days from the date of its receipt.

19. Both the first appellant and the Office of Disciplinary Prosecutor appealed against the aforementioned decision of the Second Instance Disciplinary Panel. By it Decision no. 04-02-8488/09 of 15 October 2009, the HJPC rejected as inadmissible the appeals of the parties to the concerned disciplinary proceedings.

20. In the reasoning part of its decision, the HJPC stated that, acting in accordance with the provision of Article 60(6) of the Law on the HJPC, it concluded that the appeals of the parties, pursuant to the provisions of the aforementioned law, were not allowed, given that it followed from the aforementioned provision of the law that an appeal against a decision

of the Second Instance Disciplinary Panel might only be filed in case disciplinary sanction of dismissal from office had been imposed and since in the present case the sanction of dismissal had not been imposed, appealing against any other imposed sanction was not allowed. It is further stated that the Second Instance Disciplinary Panel had a duty to state in its decision that appealing was not allowed in the present case. However, although the Second Instance Disciplinary Panel offered an erroneous remedy in the challenged decision, such erroneous remedy, in the opinion of the HJPC, does not constitute the right for the parties in the disciplinary proceedings to a remedy that is not allowed under the law. For the reasons stated above, the HJPC, acting in accordance with Article 17(1) (5) and (30) and in conjunction with Article 60(6) of the Law on the HJPC, issued the aforementioned decision.

Case no. AP 2242/11

21. The facts of the case as following from the allegations of the second appellant and the documents presented to the Constitutional Court may be summarized as follows:

22. By the Decision of the First Instance Disciplinary Panel no. 04-02-2468-20/2010 of 2 December 2010, upheld by the Decision of the Second Instance Disciplinary Panel no. 4/2010 of 9 March 2011, the second appellant as the President of the Cantonal Court in Novi Travnik and a judge in the Cantonal Court in Novi Travnik was pronounced liable for the disciplinary offence of interference with the activity of the judge or prosecutor with the intention to obstruct or belittle his/her activities under Article 56(13) of the Law on the HJPC. For the mentioned disciplinary offence, by applying the provisions of Articles 58 and 59 of the Law on the HJPC, a disciplinary sanction of reducing her salary by 30% for a period of one year was imposed on her.

23. It is stated in the reasoning part of the decision by the First Instance Disciplinary Panel that the Office of the Disciplinary Prosecutor, by its disciplinary action of 30 June 2010, charged the second appellant with having interfered in her capacity a the president of the court in the criminal case of that court no. 006-0-Kpp-09-000 010 with the activity and work of the trial Judge Darmin Avdić with the intention to obstruct and belittle his activities by prohibiting the dispatch of the issued ruling no. 006-0-Kpp-09-000 010 of 17 April 2009, granting the request of the suspect Pero Gudelj in case no. 01-03/09-P of 19 March 2009 for the repossession of the money temporarily confiscated on 27 March 2003. On 25 August 2009, the second appellant put Judge Mehmedalija Huseinović in charge of the aforementioned case, who issued a ruling rejecting the suspect's request in that case, whereby the second appellant committed the disciplinary offence under Article 56(13) of the Law on the HJPC. The disciplinary panel, after taking numerous pieces of material

and immaterial evidence, decided as in the enacting clause of the decision. Namely, it was established that what was in dispute between the parties were the allegations in the disciplinary action that the second appellant had interfered with the work of Judge Darmin Avdić by prohibiting the dispatch of the ruling no. 006-0-Kpp-09-000 010 of 17 April 2009, issued by Judge Avdić and putting Judge Mehmedalija Huseinović in charge of the aforementioned case on 25 August 2009. The First Instance Disciplinary Panel dismissed as ill-founded the second appellant's allegations justifying putting Judge Mehmedalija Huseinović in charge of the case file already entrusted to Judge Avdić because she herself confirmed in her statement that Judge Avdić had already issued the decision in that case and that she was aware of it and requested the criminal panel to take a referrer opinion. In addition, it was established that the second appellant had thwarted the dispatch of the decision in the concerned case issued by Judge Avdić and, later on, initiated on three occasions by way of the president of the Criminal Division the holding of the Department's session (on 5 May, 17 June and 9 July 2009) and once even the general session of the Court on 11 May 2009 with a view to obtaining a referral decision in respect of the concerned case. When such position was not taken at those sessions, the appellant issued, on 17 June 2009, a Rulebook on Work and Duties of the Division President, introducing mandatory initialing of decisions by the Division's President prior to dispatching decisions to parties. Furthermore, on 17 August 2009, the second appellant issued a Decision Amending the Decision on Organization and Composition of Panels within that Court, expanding the Criminal Division for two additional judges: Mehmedalija Huseinović and Mirjana Grubešić in spite of the fact that this Division had been keeping up-to-date in its work and entrusting Judge Huseinović with the criminal case file no. 006-0-Kpp-09-000 010 who, on 28 August 2009, issued a ruling in that case rejecting the request of the suspect Pero Gudelj for the reinstatement of the temporarily confiscated goods, thus issuing a different decision. Pursuant to the aforementioned, the First Instance Disciplinary Panel issued a decision as in the enacting clause of the judgment, imposing upon the second appellant a disciplinary sanction for the disciplinary offence for which she had been pronounced liable and, pursuant to the provision of Article 59 of the Law on the HJPC, imposing a disciplinary sanction of reducing her salary by 30 percent for a period of one year, considering the imposed sanction to be adequate to the severity of the committed offence.

24. The Second Instance Disciplinary Panel, having examined the challenged decision in the part challenged by the second appellant's appeal, and also acting *ex officio* in terms of the provision of Article 221 of the Civil Procedure Code, concluded that the decision by the First Instance Disciplinary Panel had been lawful and correct. The Panel also concluded that the committed acts of the second appellant in addition to being a disciplinary offence under Article 56(13) of the Law on the HJPC, also amounted to behavior that demeaned

the dignity of office of the president of the court and that the disciplinary panel did not overstep the framework of the disciplinary action either in respect of the established facts which reflected the elements of the disciplinary offence or in respect of the legal qualification of the offence, i.e. the application of substantive law as pointed out in the second appellant's appeal. The Second Instance Disciplinary Panel finally states that the challenged first instance decision was based upon the completely correctly established facts and correct application of substantive law in qualifying the acts of the second appellant as the disciplinary offence under Article 56(13) of the Law on the HJPC and when deciding upon the length and severity of the disciplinary sanction imposed upon the second appellant the sanction adequate to the severity of the disciplinary offence and the degree of the disciplinary liability.

25. By its Decision no. 04-02-68-4/2011 of 12 May 2011, the HJPC rejected as inadmissible the appeal of the second appellant lodged against the decision of the Second Instance Disciplinary Panel no. 4/2010 of 9 March 2011.

26. In the reasoning of the its decision, the HJPC stated that acting in accordance with the provision of Article 60(6) of the Law on the HJPC it concluded that the appeal of the second appellant was inadmissible pursuant to the provisions of the aforementioned law as it followed from the aforementioned provision that an appeal against a decision of the Second Instance Disciplinary Panel might only be filed in case of disciplinary sanction of dismissal from office and since in the present case the sanction of dismissal had not been imposed, appealing against any other imposed sanction was not allowed. Accordingly, the HJPC, acting in pursuance of the provision of Article 17(1)(6) in conjunction with Article 60(6) of the Law on the HJPC, decided as in the enacting clause of the decision.

IV. Appeal

a) Allegations of the Appeal in Case AP 4101/09

27. The first appellant complains that the challenged decisions violated his right to the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina, his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), his right to non-discrimination as guaranteed under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention as well as his right to appeal, i.e. to effective remedy under Article 13 of the European Convention. The appellant alleges that Article 6(1) of the European Convention guarantees to everyone, including him, the right to present any

legal request pertaining to his civil rights and obligations before a court, i.e. before a body in the disciplinary proceedings as provided for by the law, i.e. rulebook. The first appellant highlights that in the present case „access to competent body, i.e. the HJPC of BiH as a whole" has been denied to him. In that regard, the first appellant invoked the decisions of the European Court of Human Rights in case *Golder v. the United Kingdom* of 21 February 1975, the decision *Philis v. Greece* of 27 September 1991, the decision *Hornsby v. Greece* of 19 March 1997, pointing out that in the aforementioned decisions the European Court took the position that „proceedings that are fair, public and expeditious – have no value without judicial proceedings,,, i.e. that „Article 6(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". The first appellant particularly stressed that the HJPC had decided on the merits of appeals against decisions of the Second Instance Disciplinary Panel in some earlier cases, although no dismissal from office had been involved. The challenged decision of the HJPC, in the opinion of the first appellant, violates the concept of the rule of law because identical or similar proceedings may not result in issuance of various decisions, which is contrary to Article I(2) of the Constitution of Bosnia and Herzegovina (rule of law). The first appellant concludes from the aforementioned that in his case the law has been applied selectively, that it involved discrimination, which exists when one person has a certain right while the other has not without any valid explanation and in the situation when that right has been provided for by the Law on the HJPC and the Rules of Procedure of the HJPC. He also particularly pointed out that in the decision by the Second Instance Disciplinary Panel he had received a remedy (right to appeal to the HJPC), subsequent to which that remedy had been denied to him. The first appellant highlights that due to rejection of his appeal by the HJPC he looses the right to institute proceedings before the Court of Bosnia and Herzegovina, whereas „the court review is obligatory and the right to court protection cannot be denied by any act", taking into account Article II(2) of the Constitution of Bosnia and Herzegovina concerning the direct application of the European Convention. In regard of the aforementioned, the first appellant holds that the right to effective remedy has been denied to him and that such conduct „introduces legal uncertainty into the principle of the rule of law as well as inequality of arms". The first appellant also points out that his right to a fair trial has been violated due to erroneous and arbitrary application of substantive law. He alleges that both disciplinary panels invoked the Labor Law and the Law on Employment, instead of the relevant Labor Law Relations in the State Bodies. Also, there was applied Article 66 of the Rulebook which had never been published in the *Official Gazette of RS* and, therefore, could not have had any legal effect. The first appellant proposed to the Constitutional Court to establish that the above mentioned constitutional rights of the appellant had been violated and order the HJPC to decide upon the appeal of the first appellant and issue a decision on the merits.

b) Replies to the appeal of the first appellant

28. Replying to the allegations in the appeal, the HJPC emphasized that the first appellant's allegations relating to the violation of the right to a fair trial and arbitrary application of the provision of Article 60 of the Law on the HJPC were ill-founded. In that regard, the HJPC points out that the provision of Article 60(6) of the Law on the HJPC prescribes that an appeal against a decision of the Second Instance Disciplinary Panel imposing a disciplinary sanction may be filed to the full Council as a whole. If the Council does not confirm the sanction of dismissal, the Council may impose any other sanction provided for by this law. Therefore, the HJPC holds that it clearly follows from the first sentence of the above cited legal provision that the law provides that an appeal against a second instance disciplinary decision may only be filed to the Council as a whole in respect of the imposed disciplinary sanction. However, the second sentence of the cited provision limits the scope of examination by the Council of the decision of the Second Instance Disciplinary Panel in that the Council may only confirm the sanction of dismissal or impose another sanction provided for by the law. It follows from the aforementioned legal provision, in the opinion of the HJPC, that an appeal against a second instance disciplinary decision may only be filed in case where the disciplinary sanction of dismissal from office has been imposed. Thus the Council concludes, the Council as a whole in the third instance may only decide upon an appeal where the disciplinary sanction of dismissal from office had been imposed, i.e. the most severe disciplinary sanction. It is further stated that the existence of certain limitations in terms of the possibility to examine decisions in the third instance does not amount to an exemption and such concept is a rule even in judicial proceedings. In this manner, the prescribed concept of remedies entirely meets, in the opinion of the HJPC, the criteria set by Articles 6 and 13 of the European Convention, given that within the disciplinary proceedings the appellant had full access to „a court of full jurisdiction", as required by Article 6 of the European Convention. In that regard, the HJPC invoked the Decision of the Constitutional Court no. *U 25/03* of 21 January 2004, stating that every state had a discretionary right to organize its legal system enabling everyone within it access to court when it comes to „determination of his civil rights and obligations", that in this way arises the right of every state to request from everyone to comply with relevant domestic legislation prescribing procedures before competent authorities, primarily regulations which affect authorities' competence and the admissibility of legal remedy. The HJPC further states that it is true that the Council did consider and decide on the merits in earlier cases following appeals filed against decisions of the Second Instance Disciplinary Panel although those cases did not involve dismissal from office. However, the change of previous case law, in the opinion of the HJPC, does not automatically involve in the appellant's case a violation of Article 6 of the European Convention, of the principle of the rule of law or discriminatory treatment

by the Council. In support of such conclusion, the HJPC referred to the decisions of the Constitutional Court in cases *AP 758/07* of 10 June 2009, *AP 138/08* of 28 April 2010 etc., expressing the following position: „Regarding the appellant's allegations that in identical cases courts issued different decisions in some of them, the Constitutional Court notes that, although such case law of those courts and inconsistent application of substantive law in identical or similar cases may lead to violation of the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina as well as the principles of legal certainty as an inseparable element of the rule of law, that fact, on its own, does not mean that the present case involves violations of constitutional rights invoked by the first appellant„. In respect of the appellant's allegations that he received instruction on a remedy in the decision issued by the Second Instance Disciplinary Panel, pursuant to which he was entitled to file an appeal and then he was denied that right, the HJPC notes that the Second Instance Disciplinary Panel did give an erroneous remedy in the challenged decision, but such erroneous remedy does not constitute the right for a party in the disciplinary proceedings to a remedy that is not allowed under the law. In support of the aforementioned, the HJPC recalled the Decision of the Constitutional Court no. *AP 309/04* of 12 April 2005, wherein it was stated that as a rule, in case of erroneous remedy given in decisions which may be challenged by any of the prescribed remedies, the interested parties are under obligation to use prescribed remedies, not those given in the erroneous remedy.

29. In respect of the first appellant's allegations that the HJPC discriminated against him in issuing the challenged decision in his case, i.e. treated him differently in comparison with other persons because of „political or other opinion", as stated by the appellant on page 4 of his appeal, the HJPC stated that the first appellant had not further elaborated on this claim, nor offered sufficient facts or any evidence to prove that the present case did indeed involve discrimination either on those or any other grounds under Article II(4) of the Constitution of Bosnia and Herzegovina, i.e. that the HJPC had issued the challenged decision from discriminatory motives directed at the appellant. Regarding the first appellant's claim that his right to effective remedy as guaranteed under Article 13 of the European Convention has been violated, the HJPC points out that pursuant to the case law of the European Court, the effectiveness of a remedy is seen as an obligation to enable a national authority to deal with the „*substance*" of concerned complaint and that the concerned article does not reach so far as to require a specific form of remedy and it gives in that sense a high level of margin of appreciation to the contracting states in meeting their obligations pursuant to this provision. Regarding the aforementioned, the HJPC highlighted that in the first appellant's case the Second Instance Disciplinary Panel did deal with the „substance" of the complaint, examining the first instance decision on the whole, thus meeting, in the opinion of the HJPC, on the whole the requirement of Article 13 of the European Convention.

30. It is stated in the reply by the disciplinary prosecutor that the first appellant particularly stressed that access to the competent body, i.e. the HJPC as a whole had been denied to him. Analyzing Article 60(6) of the Law on the HJPC, the disciplinary prosecutor noted that the second sentence of the cited provision limited the scope of examination by the Council of the decision of the Second Instance Disciplinary Panel. Accordingly, it is further stated, it follows from the aforementioned legal provision of the Law on the HJPC that an appeal to the Council as a whole against a second instance disciplinary decision may only be filed in case where the Second Instance Disciplinary Panel imposed the disciplinary sanction of dismissal from office of judges or prosecutors against which disciplinary proceedings were initiated. It is further stated that the existence of certain limitations in terms of the possibility to examine decisions in the third instance is international legislative practice which is sooner a rule than an exemption even in judicial proceedings. In this manner, the prescribed concept of remedies entirely meets the criteria set by Articles 6 and 13 of the European Convention, given that within the disciplinary proceedings the appellant had full access to an independent and impartial tribunal established by law, before which the appellant participated in the two-instance proceedings. In respect of the first appellant's allegations that he has been discriminated against in relation to his right to a fair trial, the disciplinary prosecutor stated that the HJPC, after the change of its position, in acting upon the appeals of other holders of judicial offices against decisions of the Second Instance Disciplinary Panel in which the disciplinary sanctions of dismissal from office had not been imposed, issued decisions rejecting the appeals as inadmissible which shows the non-discriminatory character of the challenged decision. Regarding the appellant's allegations that the Second Instance Disciplinary Panel had given a remedy pursuant to which he was entitled to file an appeal, it is stated in the reply to the appeal that the error of the Second Instance Disciplinary Panel was duly noted and corrected by the HJPC as a whole. It was proposed that the concerned appeal be rejected as manifestly (*prima facie*) ill-founded or, in case it should be decided on the merits, to reject the appeal as ill-founded.

c) Allegations of the appeal in case no. AP 2242/11

31. The second appellant complains that the challenged decisions have violated her right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention as well as her right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. The second appellant sees the violation of her right to a fair trial in arbitrary application of substantive law, more specifically Article 60(6) of the Law on the HJPC because she holds that the HJPC, by its decision rejecting her appeal lodged against the decision of the Second Instance Disciplinary Panel as inadmissible lost site of a number

of other legal provisions, in particular the provision of Article 89 of the Rules of Procedure of the HJPC of BiH prescribing the right to appeal any adverse decisions. That is why it is unclear, she alleges, on what ground did the HJPC suspend in her case her right to appeal against the Second Instance Disciplinary Panel in view of the fact that the concerned decision is adverse. She, therefore, claims that this decision by the HJPC is arbitrary. She also holds that the facts have been erroneously established in the disciplinary proceedings and the evidence she proposed during the proceedings have not been evaluated, in particular the testimony of witnesses Ms. Amra Hrvačić and Mr. Mehmedalija Huseinović and such failure amounts to a violation of the provisions of the Civil Procedure Code. The decisions of the Panels are solely based upon the testimonies of witnesses Mr. Darmin Avdić and Ms. Mironija Jozek which, she alleges, is in contravention of the provisions of Article 13 of the Civil Procedure Code, pursuant to which a Disciplinary Panel is under obligation to conscientiously and carefully evaluate every piece of evidence separately and all together. In respect of the aforementioned, the second appellant also complains of the disciplinary sanction imposed without any grounds, holding that the key element of the disciplinary offence has not been proven, that element being that she had given the instructions to the chief of the Registry Ms. Amra Hrvačić not to dispatch the ruling of Judge Avdić and, therefore, she alleges, there is no disciplinary offence to speak of for which she would be liable. Regarding the allegation that the facts have been erroneously established in the disciplinary proceedings, she also alleges that she had initiated the holding of the Criminal Division session and that the concerned case had been reassigned from judge Avdić to Judge Huseinović and that the real reason for reassigning this case to another judge was that while Judge Avdic was in charge of it this case was not resolved in the period of over five months. Since every judge had a rather small number of cases to deal with she entrusted Judge Huseinović with that case. The second appellant also holds that the enacting clause of the decision by the Second Instance Disciplinary Panel is absolutely incomprehensible and that as such it amounts to *a caricature of the legal provisions* which prescribe what an enacting clause has to contain.

32. In her proposal for the issuance of an interim measure, the second appellant requested from the Constitutional Court to stay the enforcement of the decisions by the First Instance Disciplinary Panel and the Second Instance Disciplinary Panel until the issuance of the decision on the merits. In that respect, the second appellant highlights that she is a family person, with a husband and four underage children, that her salary as the president of the court amounts to BAM 3,695.26, but that her salary is encumbered by loans in the amount of BAM 2,466.62, and, therefore, she would be left with the amount of BAM 380.00 to support her family in case the disciplinary sanction was enforced. She alleges that her husband's salary is also encumbered with loans and that the enforcement of the challenged

decisions would cause irreparable damage to her and her family. She, therefore, proposes to the Constitutional Court to adopt the proposed interim measure as well-founded.

d) Reply to the appeal of the second appellant

33. Replying to the allegations in the appeal, the HJPC emphasized that the second appellant's allegations relating to the violation of the right to a fair trial and arbitrary application of the provision of Article 60 of the Law on the HJPC were ill-founded. In that regard, the HJPC points out that the provision of Article 60(6) of the Law on the HJPC prescribes that an appeal against a decision of the Second Instance Disciplinary Panel imposing a disciplinary sanction may be filed with Council as a whole. If the Council does not confirm the sanction of dismissal, the Council may impose any other sanction provided for by this law. Therefore, the HJPC holds that it clearly follows from the first sentence of the above cited legal provision that the law provides that an appeal against a second instance disciplinary decision may be filed to the Council as a whole in respect of the imposed disciplinary sanction of dismissal and that pursuant to this provision, only in case the Council does not confirm the sanction of dismissal, it may impose any other sanction provided for by this law. In that respect, the Council points out, it complied with the provision of Article 60(13) of the Law on the HJPC in the present case, pursuant to which a defendant in disciplinary proceedings is entitled to appeal any adverse decisions because the second appellant did file an appeal and that appeal was decided on the merits in the second instance disciplinary proceedings. Also, in respect of the second appellant's allegations that the enacting clause of the decision by the First Instance Disciplinary Panel does not contain a factual description of the disciplinary offence acts and that on that account the enacting clause was made incomprehensible and contradictory in the reasoning, that the facts had been erroneously established and that the evidence she proposed during the proceedings had not been evaluated, the HJPC points out that it maintains the position as contained in the reasoning of the decision of the Second Instance Disciplinary Panel no. 04-02-68-2/11 of 9 March 2011. In respect of the second appellant's allegations relating to violation of her right to property, the HJPC notes that those allegations are also ill-founded because the imposition of the disciplinary sanction upon the second appellant (reducing her salary by 30 percent for a period of one year) has not violated her right to property, given that the imposed disciplinary sanction is based on law as it has been stipulated and imposed in public interest and it does not violate the principle of proportionality between the means used and the aim sought in these proceedings. As for the proposal to issue an interim measure and stay the enforcement of the disciplinary panel decision, the HJPC notes that the second appellant has not proven that the proposed interim measure is justified and, therefore, the HJPC proposes that her request be dismissed as ill-founded.

34. In reply to the appeal, the disciplinary prosecutor stresses that the second appellant's allegations relating to the violation if her right to a fair trial and arbitrary application of Article 60(6) of the Law on the HJPC are ill-founded, holding that it follows clearly from the aforementioned legal provision that an appeal may only be filed against a decision by the Second Instance Disciplinary Panel imposing a disciplinary sanction of dismissal from office. The disciplinary prosecutor also considers ill-founded her allegations that the enacting clause of the First Instance Disciplinary Panel's decision does not contain the description of the disciplinary offence acts, violating thereby Article 85 of the Rules of Procedure of the HJPC, given that the said article of the Rules of Procedure does not prescribe that acts of a disciplinary offence should be contained in the enacting clause of a decision. The second appellant's allegations that the decision of the First Instance Disciplinary Panel failed to evaluate the testimonies of the witnesses proposed by the second appellant, the disciplinary prosecutor also considers to be ill-founded, claiming that the decision of the disciplinary panel is valid and lawful and, pursuant to the case law of the Constitutional Court of BiH, failure to evaluate irrelevant evidence does not result in unlawfulness of the decision. In addition, he highlights that the second appellant's allegations of erroneously established facts are ill-founded because the appellant has not marked any fact which would lead to a conclusion that the key element of disciplinary offence was not proven and because the evidence taken at the main hearing, in the evaluation of the disciplinary prosecutor, offered reliable grounds that the appellant in her capacity of the president of the court achieved the characteristics of disciplinary offence. Regarding the second appellant's allegation that the challenged decisions also violated her right to property, the disciplinary prosecutor considers that those allegations are also ill-founded because the disciplinary sanction has not been imposed in the amount higher that such as provided by the law. He, therefore, proposes that the appeal be dismissed as ill-founded.

V. Relevant Law

35. The **Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* nos. 25/04, 93/05, 48/07 and 15/08), in the relevant part, reads:

Article 17

The Council shall have the following competence:

(...)

(5) deciding upon appeals in disciplinary proceedings;

Article 55
Competence for Disciplinary Proceedings

The Council, through its designated disciplinary bodies, shall exercise its competence in disciplinary proceedings.

Article 56
Disciplinary offences for judges

Disciplinary offences for judges shall include:

(...)

13. interfering in the jurisdictional activity of another judge or prosecutor in order to obstruct their activities or demean them;

(...).

Article 57
Disciplinary offences for prosecutors

Disciplinary offences for prosecutors shall include:

(...)

23. any other behavior that represents a serious breach of official duties or that compromises the public confidence in the impartiality or credibility of the office of the Prosecutor.

Article 58
List of Sanctions

(1) The Council may impose the following disciplinary sanctions:

(a) A written warning, not published;

(b) A public reprimand;

(c) A fine that decreases the offender's salary by up to 50% for up to one year;

(d) Temporary or permanent transfer to another court or prosecutor's office;

(e) Transfer from the position of the president of the court to the position of a judge or from the position of the chief prosecutor or deputy chief prosecutor to the position of a prosecutor;

(f) Dismissal from office.

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Article 60
Conduct of Disciplinary Proceedings and Appeals

(1) Disciplinary proceedings shall be conducted by:

(a) the First Instance Disciplinary Panel; and

(b) the Second Instance Disciplinary Panel

(6) An appeal against a decision of the Second Instance Disciplinary Panel imposing a disciplinary sanction may be filed to the full Council as a whole. If the Council does not confirm the sanction of dismissal, the Council may impose any other sanction provided for by this law. Members of the First Instance and Second Instance Disciplinary Panels are entitled to participate, unless their exemption is requested for a reason different from their previous participation in the issuance of a decision concerning the same matter.

(7) A judge or prosecutor who has been dismissed from office by a decision of the Council may lodge an appeal with the Court of Bosnia and Herzegovina solely upon one or both reasons:

(a) that in conducting disciplinary proceedings which resulted in a decision imposing a disciplinary sanction of dismissal from office, the Council committed a substantive violation of the rules of procedure as provided for by this law;

(b) that in conducting disciplinary proceedings which resulted in a decision imposing a disciplinary sanction of dismissal from office, the Council misapplied the law.

Article 68(1)(e)
Rights of Parties during Disciplinary Proceedings

The disciplinary proceedings shall be conducted in a fair and transparent manner. Throughout all disciplinary proceedings, the judge or prosecutor concerned shall have the following rights that must be guaranteed in the rules of procedure for disciplinary proceedings adopted by the Council:

(e) the right to appeal any adverse decisions.

36. The **Rules of Procedure of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* nos. 59/04, 29/06, 98/06, 2/07 and 20/08) in the relevant part reads:

Article 55

1. An appeal shall be lodged in writing against a decision of the Second Instance Disciplinary Panel with the Council within fifteen (15) days from the date of serving thereof.

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2. Such appeal shall be decided by the Council at its session. The decision of the Council shall be final and binding.

37. The **Rules of Procedure of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina** (*Official* Gazette *of Bosnia and Herzegovina* nos. 44/09 of 8 June 2009, 28/10 and 58/10) in the relevant part reads:

Article 89
(Appeals to the Council against decisions of the Second Instance Disciplinary Panel)

(1) An appeal shall be lodged in writing against a decision of the Second Instance Disciplinary Panel with the Council within 15 days from the date of serving thereof.

(2) Such appeal shall be decided by the Council at its session. The decision of the Council shall be final and binding.

Article 103

On the day of coming into force of these Rules of Procedure, the Rules of Procedure of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina nos. 59/04, 29/06, 98/06, 2/07 and 20/08) shall cease to be applicable as well as the Decision on Amendments to the Rules of Procedure of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina no. THE HJPC-08-0202-01022008 of 1 February 2008.

Article 104

These Rules of Procedure shall enter into force on the day following the date of its publication in the Official Gazette of Bosnia and Herzegovina.

VI. Admissibility

38. 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.

39. Pursuant to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may consider an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last effective remedy used by the appellant was served on him/her.

40. In the present case, the Constitutional Court must, primarily, examine whether the challenged decisions may be considered „judgments, i.e. decisions" in terms of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article16(1) of the Rules of the Constitutional Court. The Constitutional Court highlights that is has already examined a similar legal issue in case no. *AP 633/04* and concluded that the HJPC's decisions „issued in disciplinary proceedings must be considered „judgments, i.e. decisions" in terms of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article15(3) of the Rules of the Constitutional Court which the Constitutional Court has jurisdiction to consider" (see the Constitutional Court, Decision no. *AP 633/04* of 27 May 2005, *Official Gazette of BiH* no. 73/05, items 19 and 20).

41. In view of the aforementioned case law of the Constitutional Court, the Constitutional Court holds that the reasons given in the decision of the Constitutional Court no. *AP 633/04* also pertain to the present cases and, therefore, the challenged decisions issued in the disciplinary proceedings must be considered „judgments, i.e. decisions" in terms of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article16(1) of the Rules of the Constitutional Court.

42. In the case no. *AP 4101/09* the subject of challenging by the appeal is the decision of the HJPC no. 04-02-8488/09 of 15 October 2009, against which there are no further effective remedies. The first appellant received the aforementioned decision on 29 October 2009, filing his appeal on 25 December 2009, therefore, within 60 days as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the conditions under Article 16(2) and (4) of the Rules of the Constitutional Court as it is neither manifestly (*prima facie*) ill-founded, nor there are any other formal reasons on account of which the appeal would be inadmissible.

43. In case *AP 2242/11* the subject of challenging by the appeal is the decision of the HJPC no. 04-02-68-4/2011 of 12 May 2011, against which there are no further effective remedies. The second appellant received the aforementioned decision on 20 May 2011, filing her appeal on 30 May 2011, therefore, within 60 days as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the conditions under Article 16(2) and (4) of the Rules of the Constitutional Court as it is neither manifestly (*prima facie*) ill-founded, nor there are any other formal reasons on account of which the appeal would be inadmissible.

44. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that the concerned appeals meet the conditions in respect of the admissibility.

VII. Merits

45. The first appellant complains of a violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, his right not to be discriminated against under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention as well as his right to effective remedy under Article 13 of the European Convention. The first appellant also holds that in his case there occurred a violation of the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina. The second appellant holds that the challenged decisions violated her right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention and in that regard also 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.

46. **Right to a fair trial**

Article II(3)(e) of the Constitution of Bosnia and Herzegovina reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

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

Article 6(1) of the European Convention, in the relevant part, reads:

1. In 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 and independent and impartial tribunal established by law. […]

47. In respect of the issue as to whether Article 6 of the European Convention is applicable in the concerned disciplinary proceedings, the Constitutional Court upholds its case law in similar cases and it follows that Article 6 of the European Convention is also applicable in the present case (see the Constitutional Court, Decision no. *AP 3080/09* of 25 September 2010, *Official Gazette of BiH* no. 48/11, items 36-39).

48. The Constitutional Court finds that the key issue that needs to be addressed in the present case is whether the appellants' right of access to court has been violated, that being one of the aspects of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention by making it

impossible for them to lodge an appeal with the HJPC against the decision of the Second Instance Disciplinary Panel.

49. In respect of the appellants' objections that the challenged decisions of the HJPC violate their right to appeal, the Constitutional Court notes that „the right to appeal to a higher court is neither defined nor implied in Article 6(1) of the European Convention. However, if an appeal was made possible and was filed and a court of that instance was called upon to „establish" facts, the first paragraph of Article 6 of the European Convention is applicable" (see the European Court of Human Rights, *Delcourt v. Belgium*, judgment of 17 January 1970, Series A, no. 11, pp. 14-15). The Constitutional Court notes that although the right to appeal to a higher court is not implied in Article 6(1) of the European Convention, if such right is stipulated by law guarantees must be ensured for its consistent application by way of a clear and precise norm.

50. It is highlighted in the replies to the appeals by the HJPC and also by the disciplinary prosecutor that Article 60(6) of the Law on the HJPC prescribes in its first sentence that an appeal against a decision of the Second Instance Disciplinary Panel imposing a disciplinary sanction may be filed to the full Council as a whole, but the second sentence of the aforementioned provision limits the scope of examination by the Council of the decision by the Second Instance Disciplinary Panel in that the Council may only confirm the sanction of dismissal or impose another sanction provided for by the law. The HJPC holds that the full Council as a whole may only decide upon an appeal in the third instance where the disciplinary sanction of dismissal from office had been imposed, i.e. the most severe disciplinary sanction. In the opinion of the HJPC, in the present case the concept of remedies stipulated in this manner entirely meets the criteria set by Articles 6 and 13 of the European Convention, given that within the disciplinary proceedings the appellant had full access to „a court of full jurisdiction", as required by Article 6 of the European Convention. the HJPC further states that it is true that the Council did consider and decide on the merits in earlier cases following appeals filed against decisions of the Second Instance Disciplinary Panel although those cases did not involve dismissal from office. However, the change of previous case law, in the opinion of the HJPC, does not automatically involve in the appellant's case a violation of Article 6 of the European Convention, of the principle of the rule of law or discriminatory treatment by the HJPC.

51. The Constitutional Court notes that the Law on the HJPC stipulates that the HJPC shall decide about appeals in disciplinary proceedings (Article 17(1)(5)), that an appeal against a decision of the Second Instance Disciplinary Panel imposing a disciplinary sanction may be filed to the full Council as a whole (Article 60(6) of the Law on the HJPC, first

sentence) and that the parties against whom the disciplinary proceedings are conducted shall have the right to appeal any adverse decisions (Article 68(1)(e). The Constitutional Court also notes that the Rules of Procedure of the HJPC which as a by-law has been enacted to facilitate the implementation of the Law on the HJPC proscribes that an appeal shall be lodged in writing against a decision of the Second Instance Disciplinary Panel with the Council within 15 days from the date of serving thereof and that the decision of the Council shall be final and binding (Article 89(1) and (2) of the Rules of Procedure).

52. The Constitutional Court notes that Article 60(6) of the Law on the HJPC in its first sentence generally anticipates the right to appeal against a decision of the Second Instance Disciplinary Panel imposing a disciplinary sanction to the full Council as a whole. Taking into account the second sentence of the aforementioned provision providing that if the Council does not confirm the sanction of dismissal, it may impose any other sanction provided for by this law, the Constitutional Court finds that the challenged provision has not been stipulated clearly and, therefore, the HJPC itself could not establish the precise content of the concerned norm as it acted differently in applying the same provision. The Constitutional Court further notes that the first appellant complains that the challenged decision by the HJPC in the present case violated the principle of the rule of law as guaranteed by Article I(2) of the Constitution of Bosnia and Herzegovina, whereas in respect of the second appellant the Constitutional Court notes that her appeal also raises these issues. In that regard, the Constitutional Court points out that the first criterion of the rule of law is the principle of legal certainty. The Constitutional Court highlights that the legal certainty, *inter alia*, implies that the established mechanisms and institutions function in accordance with the laws, which must be prospective, open, clear and relatively stable, and which must apply equally to all. In addition, this principle entails the prohibition of arbitrariness in decision-making process and in acting of all authorities, which must operate in accordance with the law and within the scope of authority conferred upon them by law. In this regard, this principle also implies the existence of procedural guarantees (see the Constitutional Court, Decision no. *U 16/08* of 28 March 2009, *Official Gazette of BiH* no. 50/09, item 39). Thus, the principle of the rule of law requires that the laws must be sufficiently precise and clear in order to avoid arbitrariness in decision-making process. The Constitutional Court notes that even the HJPC did not contest in its reply that it is the right of the state to request from everyone to respect relevant domestic legal provisions prescribing proceedings before competent bodies, primarily regulations upon which depends the competence of authorities and admissibility of remedies. However, in view of the disputed legal provision, which on account of its imprecision leaves a possibility for arbitrary interpretation, it is not possible in the present case to determine in a reliable

manner whether the appellants are entitled to file an appeal or not under the domestic law and, therefore, it is also not possible to examine whether, in terms of guarantees under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, the relevant domestic regulations prescribing the proceedings before the HJPC have been complied with in terms of the competence of authorities and admissibility of remedies. The Constitutional Court holds that the contested provision has not been formulated in a manner that would satisfy the principle of the rule of law, i.e. the principle of legal certainty as its basic element. The concerned provision, therefore, has the effect of creating legal uncertainty for judges and prosecutors against whom disciplinary proceedings are conducted in respect of their right of full access to court and the court protection on several instances. The Constitutional Court emphasizes that while Article 6(1) of the European Convention does not imply the right to appeal to a higher court, if such right is stipulated by law guarantees must be ensured for its consistent application by way of a clear and precise norm.

53. In the context of the aforementioned, the Constitutional Court concludes that the challenged decision by the HJPC has violated the appellants' right to consistent application of law, i.e. due to imprecision of the applied legal provision the appellants have been denied the right to legal certainty as an element of the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina in conjunction with the appellants' right of access to court within the meaning of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

54. In view of the conclusions arrived at in the present situation, the Constitutional Court did not venture into evaluation of the quality of the Law on the HJPC itself, although it did note the imprecision of the concerned legal norm upon which the challenged decisions of the HJPC were based. Within that context, the Constitutional Court holds that public authorities, i.e. the bodies conducting the proceedings must make studious effort to ensure consistent application of positive regulations. However, in case any dilemma arises in respect of application, they should construe the law in favor of the concerned party in such a situation.

Other Allegations

55. In view of the conclusion in respect of the violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, the Constitutional Court holds that it is not necessary to separately examine the allegations of the first appellant of violation of his right not to be discriminated against under Article II(4)

of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention as well as the right to an effective remedy under Article 13 of the European Convention or the allegations of the second appellant of the violation of her 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

56. The Constitutional Court concludes that the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention has been violated in the present case by the issuance of the HJPC's decision in the disciplinary proceedings before the HJPC in which, due to inconsistent application of substantive law and imprecision of the legal norm, the appellants were denied the right to legal certainty as an element of of the rule of law principle under Article I(2) of the Constitution of Bosnia and Herzegovina in the disciplinary proceedings which enjoy the guarantees of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina as well as of Article 6 of the European Convention.

57. In view of the Decision on Admissibility and Merits, the Constitutional Court concludes that there are not grounds for consideration of the second appellant's proposal for the issuance of interim measure.

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

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP 3153/09

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Benkhira Aisse against the verdicts of the Court of BiH, no. U-464/09 of 2 October 2009 and U-416/09 of 3 September 2009

Decision of 15 May 2009

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(4)(9), Article 59(2)(2) and Article 61(1) and (2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), as a Grand Chamber composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Seada Paravlić, Vice-President

Mr. Mato Tadić,

Mr. Mirsad Ćeman,

Having deliberated on the appeal of **Mr. Benkhira Aisse**, in case no. **AP 3153/09**, at its session held on 15 May 2012, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. Benkhira Aisse against:

- the verdict of the Court of Bosnia and Herzegovina, no. U-534/09 of 3 November 2009, U-464/09 of 2 October 2009 and U-416/09 of 3 September 2009 is partially granted with regards to Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

A violation of Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The verdicts of the Court of Bosnia and Herzegovina, no. U-534/09 of 3 November 2009, U-464/09 of 2 October 2009 and U-416/09 of 3 September 2009 are hereby quashed.

The appeal Mr. Benkhira Aisse against:

- the verdict of the Court of Bosnia and Herzegovina, no. U- 534/09 of 3 November 2009, U-464/09 of 2 October 2009 and U-416/09 of 3 September 2009

is rejected as inadmissible with regards to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms as being *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 12 October 2009, Mr. Benkhira Aisse („the appellant"), represented by Mr. Kadrija Kolić, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") registered as AP 3153/09 against the verdicts of the Court of BiH („the Court of BiH"), no. U-464/09 of 2 October 2009 and U-416/09 of 3 September 2009.

2. The appellant filed a request for interim measure wherein the Constitutional Court would prohibit the Ministry of Security of Bosnia and Herzegovina („the Ministry of Security") and any other authority in Bosnia and Herzegovina from expelling him from Bosnia and Herzegovina pending a new decision by the Constitutional Court.

3. On 16 November 2009 the appellant filed an appeal which was registered as no. AP 3571/09 against the verdict of the Court of BiH, no. U 534/09 of 3 November 2009.

4. According to the Decision on Admissibility, no. AP 1499/09 of 24 June 2009, and Decision on Admissibility, no. 2608/09 of 17 September 2009, the Constitutional Court rejected as inadmissible an appeal filed by the appellant against the verdicts of the Court of BiH, no. U 219/09 of 1 June 2009 and U-189/09 of 11 May 2009 (*the imposition and extension of a supervision measure*) and the verdicts of the Court of BiH, no. U-372/09 of 3 August 2009 and U-312/09 of 3 July 2009 (*extension of surveillance measure*), with regards to Article II(3)(d), (e), (f) and (m) of the Constitution of Bosnia and Herzegovina and Articles 5, 8, and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and Article 2 of Protocol No. 4 to the European Convention as being manifestly (*prima facie*) ill-founded. With regards to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the

European Convention, the appeal was rejected as being incompatible *ratione materiae* with the Constitution of Bosnia and Herzegovina.

II. Procedure before the Constitutional Court

5. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Court of BiH and Ministry of Security - Service for Foreigners' Affairs were requested on 28 May 2010 and 10 April 2012 to submit their responses to the appeal.

6. The Court of BiH submitted its response on 17 June 2010 and 27 April 2012, and the Service for Foreigners' Affairs submitted its response on 11 June 2010 and 19 April 2012 respectively.

7. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the responses to the appeal were submitted to the appellant on 29 June 2010 and 9 May 2012.

8. As the appeals are registered as nos. AP 3153/09 and AP 3571/09 concern the same factual and legal basis, the Constitutional Court, in accordance with Article 31(1) of the Rules of the Constitutional Court, decided to join the appeals, to conduct one set of proceedings and to take one decision registered under no. AP 3153/09.

III. Facts of the Case

9. The facts of the case as they appear from the appellant's allegations and documents submitted to the Constitutional Court may be summarized as follows:

10. In rulings no. UP-1/19.5-07.3-4-4/09 of 27 August 2009 and 29 September 2009, the Services for Foreigners' Affairs extended the supervision measure imposed on the appellant for a determined period of time with the aim of preventing him from free and unrestricted movement as it found that the appellant posed a threat to the public order, peace and security of BiH.

11. In the reasons for the aforementioned rulings, the Service for Foreigner's Affairs noted that the appellant's status was not changed and that the circumstances and reasons for modifying the classification given in the Ruling to place him under supervision, no. UP-1/19.4.1-07.3-48/09 of 5 May 2009 and the enumerated rulings on extension of supervision, which had been issued in the period from 26 May 2009 to 27 August 2009, were not changed either. Therefore, according to information of the Intelligence-Security Agency („the OSA"), dated 4 May 2009, the appellant still posed a threat to the public order, peace and national security of BiH. Furthermore, it noted that according to Article 7 of the Law on Movement and Stay of Aliens and Asylum („the LMSAA"), the OSA had

competence over security checks in respect to aliens with the purpose of establishing the security reasons of BiH. Taking into account the fact that the reasons for placing the alien under supervision did not essentially change, a decision as stated in the enacting clause of the ruling was issued in application of Article 102(2) of the LMSAA, in conjunction with paragraph 4 of the same Article. Finally, if the measure to place the appellant under supervision had not been extended, this would have been contrary to Article 99(2)(b) of the LMSAA, stipulating that supervision would be imposed on an alien on the grounds for suspicion that free and unrestricted movement of the alien might jeopardize the public order, peace and security of BiH, and contrary to Article 102(2) of the same Law, stipulating that the alien would remain under supervision until the reasons that constituted the grounds for his/her placement under supervision significantly changed.

12. The appellant filed complaints in a timely fashion with the Ministry of Security against the aforementioned rulings. As the Ministry of Security did not decide on any of the complaints within the time limit stipulated by Article 103(3) of the LMSAA, the appellant brought lawsuits to initiate administrative disputes before the Court of BiH.

13. In verdicts nos. U 416/09 of 3 September 2009 and U 464/09 of 2 October 2009, the Court of BiH dismissed the appellant's lawsuits as ill-founded.

14. The Court of BiH noted in the reasons for the verdicts that the President of the Panel had heard the appellant within the time limit prescribed by law and in the presence of his attorney, an associate of his attorney. It further noted that the challenged rulings were based on correctly established facts and correctly applied law, since there were still reasons for which the appellant remained placed under supervision and the appellant had not disputed such reasons at the hearing. The Court of BiH noted that it had examined the case-file and found that the appellant was an alien, that his citizenship had been revoked and that he was living in BiH illegally, i.e. that his stay was not resolved so that only that reason could be sufficient to place him in the Immigration Center. The Court of BiH considered as incorrect the appellant's conclusion that he was still a citizen of BiH, since the proceedings related to his lawsuit brought against the ruling issued by the State Commission for the Revision of the Decisions on Naturalization of Foreign Citizens („the State Commission„), wherein his citizenship was revoked, were still pending before the Court of BiH. In this connection, the Court of BiH outlined that Article 41(9) of the Law stipulated that the citizenship of BiH (*Official Gazette of BiH* nos. 13/99, 6/03, 14/03 and 82/05) would be lost by withdrawal on the day of delivery of the Commission's or BiH Council of Minister's decision to the person concerned; if the address or the place of residence of that person was not known or could not be confirmed, the citizenship of BiH would be lost on the day of publication of the Commission's or Council of Ministers' decision in the Official Gazette of Bosnia and

Herzegovina; and that the decision of the Commission for the Revision of Citizenship of BiH would be final, and an administrative dispute against such a decision would not have suspensive effects. Having examined the case-file, the Court of BiH found that neither temporary nor permanent residence in BiH had been granted to the appellant. It further noted that according to Article 99(2)(b) of the LMSAA, supervision would be imposed on an alien on the grounds for suspicion that free and unrestricted movement of the alien might jeopardize the public order, peace and security of BiH. In this connection, it outlined that the appellant's objection that he did not pose a threat to the public order, peace and security of BiH was contrary to information from the case-file, since it followed from the part of the case-file classified as „confidential„ that the conclusion that the appellant posed a potential threat to the security of BiH was founded. In this connection, the Court of BiH referred to Protocol No. 7 to the European Convention, according to which the movement and stay of an alien may be restricted if it is necessary in the interest of legal order and national security. Therefore, according to Article 7(3) and (4) of the LMSAA, security checks for an alien for the purpose of establishing the security reasons of BiH shall be performed by the OSA. The request of the appellant and his attorney that the Court of BiH should presented to them the documents demonstrating that the appellant posed a threat to the national security was unfounded and contrary to the Law on the Protection of Secret Data (*Official Gazette of BiH* no. 54/05). In this connection, the Court of BiH noted that the aforementioned law regulated the procedure for access and keeping of secret data. Finally, it concluded that the appellant's rights under Articles 5, 6, 8 and 13 of the European Convention were not violated by the extension of the supervision measure in the Immigration Center, since the issue of movement of aliens was the public matter of the State and its authorities so that the placement of aliens under supervision in accordance with the procedure prescribed by law could not be considered a violation of the aforementioned rights.

15. In ruling no. UP-1/19.5-07.3-4-5/09 of 26 October 2009, the Service for Foreigners' Affairs extended the supervision for a determined period in order to prevent free and unrestricted movement as it found that the appellant posed a threat to the public order, peace and security of BiH.

16. In addition to the reasons which were identical to the reasons set forth in the rulings on extension of supervision (*paragraph 12 of this Decision*), the Service for Foreigner's Affairs noted that Article 102(4) of the LMSAA stipulated that the maximum duration of supervision could not exceed 180 days and that paragraph 5 of the same Article stipulated that exceptionally, in case that an alien failed to enable his removal from the country or it was impossible to remove an alien within 180 days for other reasons, the total duration of supervision might be prolonged for a period longer than 180 days. As the appellant still posed a threat to the public order, peace and national security of BiH and

as the administrative dispute, which was instituted on 7 February 2007 for the purpose of quashing the decision of the Commission which revoked the appellant's citizenship, was still pending, pursuant to Article 102(5) of the LMSAA, a ruling as stated in its enacting clause was issued.

17. The appellant filed complaints within the prescribed time limit with the Ministry of Security. As the Ministry of Security failed to decide on the complaints within the time limit prescribed by Article 103(3) of the LMSAA, the appellant brought a lawsuit to initiate an administration dispute before the Court of BiH.

18. In verdict no. U-534/09 of 3 November 2009, the Court of BiH dismissed the appellant's lawsuit as ill-founded. The Court of BiH noted in the reasons for the verdict that the allegations in the appellant's lawsuit were identical to the allegations set forth in the previously brought lawsuits against the decisions wherein the supervision imposed on the appellant had been extended. The Court of BiH concluded that it had given clear and specified reasons with regards to these allegations in verdict no. U-219/09 of 1 June 2009. In this connection, it pointed to the identical reasons for considering the appellant's complaint that he could not be considered an alien as ill-founded, i.e. that he did not pose a threat to the public order, peace or security (*paragraph 15 of this Decision*). Finally, the Court of BiH noted in the reasons for its verdict that the appellant had filed an appeal with the Constitutional Court against the verdicts of the Court of BiH, no. U-372/09 of 3 August 2009 and U-312/09 of 3 July 2009 (*the extension of supervision measure*), and that the Constitutional Court adopted Decision on Admissibility no. AP 2608/09 wherein it had rejected the appeal as manifestly ill-founded with regards to Article II(3)(b), (d), (f) and (m) of the Constitution of Bosnia and Herzegovina and Articles 3, 5, 8 and 13 of the European Convention, i.e. as *ratione materiae* incompatible with regards to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

19. At a later point, in verdict no. U-86/07 of 5 November 2009, the Court of BiH granted the appellant's lawsuit and quashed the ruling of the Commission for Revision of Citizenship of BiH, no. UP-01-07-58-2/06 of 8 January 2007, wherein the appellant's citizenship was revoked, and referred the case back for a new decision.

20. In ruling no. UP-1/19.5-07.3-4-6/09 of 12 November 2009, the Service for Foreigner's Affairs quashed ruling no. UP-1/19.5-07.3-4-5/09 of 26 October 2009. The supervision measure ceased to be valid on the date of adoption of that ruling and the appellant left the Immigration Center.

IV. Appeal

a) Allegations from the appeal

21. The appellant claims that the challenged verdicts are in violation of his right not to be subjected to torture or to inhuman or degrading treatment or punishment under Article II(3)(b) and Article 3 of the European Convention, right to liberty and security of person of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention, right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, right to private and family life, home and correspondence under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, right to liberty of movement and residence under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and freedom of movement under Article 2 of Protocol No. 4 to the European Convention and right to an effective legal remedy under Article 13 of the European Convention.

22. The appellant claims that his rights under Article 5(1), Article 6(1) and Article 13 of the European Convention have been violated as the impugned decisions are based on erroneous findings on point of facts and law, namely that he is an alien and poses a threat to the national security. The appellant does not contest the fact that his citizenship was revoked in the decision of the Commission for Revision of Citizenship of BiH, dated 8 January 2007, and alleges that he referred an administrative dispute against that decision on 7 February 2007 claiming that the decision was unlawful and requesting that the decision be quashed so that the decision of the Commission could not be considered as final. Accordingly, the appellant concludes that the LMSAA could not be applied to him as he is not alien. Furthermore, the appellant indicates that the Court of BiH, in verdict no. U-86/07 of 5 November 2009, granted his lawsuit, quashed the ruling on revocation of citizenship and referred the case back for new proceedings, whereupon he was allowed to leave the Immigration Center. The appellant notes that none of the impugned decisions contains the reasons for considering that the purpose of the supervision could not be achieved by imposing a more lenient measure, which, according to the appellant, amounted to the violation of Article 5(1) of the European Convention and Article II(3)(m) of the Constitution of Bosnia and Herzegovina.

23. The appellant holds that the extension of the supervision measure amounted the violation of Article 6(1) and Article 8 of the European Convention. In this connection, he points out that he is married to a BiH citizen and that he has four children, that he and his family have the right to the preservation of their family unit, i.e. to live together. The appellant alleges that the impugned decisions do not contain anything which would justify

the public interest in interfering with his family and private life. With the exception of the reference to the act of the OSA („the confidental part of the case-file"), the impugned decisions do not refer to any material evidence as a basis for taking such a view. The appellant claims that the opinion of the OSA is arbitrary and does not contain the relevant facts, since he has never breached the law. According to the appellant, the aforementioned is probably the reason why his right of access to a court under Article 6(1) has been restricted unfoundedly, since on 6 May 2009 he requested access to the „confidential part of the case-file" and the marked opinion in order have an opportunity to respond to it. Taking into account the fact that he was deprived of that opportunity with no reason given, he claims that his rights under Articles 6(1), 8 and 13 of the European Convention have been violated.

24. The appellant complains that his rights under Articles 6(1), 8 and 13 of the European Convention have been violated and Article 2 of Protocol No. 4 to the European Convention as the interpretation of the facts in the impugned decisions was erroneous and *male fide* and the appellant was not given an opportunity to respond to any of the adopted findings, reasons or facts. In this connection, the appellant refers to the views the Constitutional Court took in Decision no. *AP 1222/07* and *AP 41/09* and European Court took in case *Chahal v. the United Kingdom.* The appellant particularly points to the part of the impugned verdict of the Court of BiH, no. U 534/09 of 3 November 2009, wherein it is stated: „The plaintiff's complaint that there was no reason for extending the supervision under which he was placed as he does not pose a threat to the public order, peace and national security is irrelevant and cannot be the subject-matter of examination in these proceedings, since the defendant and the Court assessed this circumstance while deciding on the imposition of the supervision measure on the plaintiff", which, in his opinion, indicates that his lawsuit in the administrative dispute became purposeless after the ruling on the placement under supervision had been issued on 5 May 2009 and the verdict of the Court of BiH, no. U-219/09 had been rendered on 1 June 2009, which means that the view on the threat the appellant poses to the public order, peace and security, which had already been taken, could not be reviewed in the rulings issued at a later point. The appellant further alleges that the Court of BiH, while rendering verdict no. U-416/09 of 3 September 2009, committed a flagrant procedural violation as the hearing of the appellant and presentation of evidence with regards to the lawsuit were „conducted by a single judge, whereas decisions on lawsuits are to be taken by a panel, which, in his opinion, points to the conclusion that the indication on the decision that it is taken by a three-member panel is put *pro forma* only. The appellant further alleges that the unlawful work of the authorities placed him in the situation that he has no identification papers.

b) Response to the appeal

25. In response to the appeal the Court of BiH alleges that the appellant failed to file a request for review of the impugned verdicts, which is the reason why it considers the appeals as premature. Furthermore, the Court of BiH considers as unfounded the appellant's allegations on the violation of the rights guaranteed under Article 5(1), Article 6(1) and Article 13 of the European Convention. In this connection, it notes that the European Convention allows deprivation of liberty in accordance with the procedure prescribed by law, as in the instant case. It further alleges that the measure of the placement under supervision was reviewed within the prescribed time-limit and that the basic circumstance with regards to issue whether the appellant's presence still posed a threat to the public order and national security of BiH was reviewed while taking the decision on the extension of the supervision measure, which was conditional upon that circumstance. The Court of BiH considers as unfounded the appellant's allegations on the violation of Article 6(1) and Article 13 of the European Convention as the procedure for imposition and extension of the supervision measure is conducted in accordance with the LMSAA and the appellant had the opportunity to avail himself of all legal remedies, including appeals. Finally, the Court of BiH considers as unfounded the appellant's allegations on the violation of the right safeguarded under Article 8 of the European Convention as the issue of stay and movement of aliens is the public domain of the State or its authorities so that the extension of supervision as prescribed by law cannot be regarded as violating one of the aforementioned rights.

26. In response to the appeal the Service for Foreigners' Affairs notes that the appellant's status of citizen of BiH ceased on the date when the decision on the revocation of the appellant's citizenship was served on him in accordance with Article 41(9) of the Law on the Citizenship of BiH so that his allegations that he was not an alien at the time of issuance of the ruling on the imposition and extension of the supervision measure are unfounded. The Service for Foreigners' Affairs noted that based on information provided by the OSA, dated 4 May 2009, the Service for Foreigners' Affairs was informed that the appellant posed a threat to the public order and national security of BiH so that the Service for Foreigners', Affairs had to deal with the case. It further notes that the failure to extend the supervision measure would have been contrary to Article 99(2)(b) and 102(2) of the LMSAA as the appellant poses a threat to the national security and as the circumstances which entailed that measure did not change. The appellant's allegations that he does not pose a threat to the national security are considered as unfounded as the contrary stemmed from the part of the case-file marked as „confidential", which was the reason why the Service's conclusion on the appellant's potential threat to the national security of BiH was founded. It further

pointed to the OSA's authorization prescribed by the law to carry out security checks with regards to the aliens. As the OSA's information was marked as „confidential", it could not be disclosed to the appellant, since this would have been contrary to Articles 8 and 10 of the Law on Protection of Secret Data. In this connection, it noted that Article 72(4) of the Law on Administrative Disputes stipulated that the case-files marked as confidential could not be inspected nor reviewed if it was contrary to the public interest and if this could prevent the purpose of the procedure. The Service for Foreigners' Affairs further noted that the appellant's rights under Articles 6(1), 8 and 13 of the European Convention had not been violated as the issue of movement of aliens is the public domain of the State and its authorities. Furthermore, it noted that the public authorities, in accordance with Article 8(2) of the European Convention, could interfere with that right if it was a necessary measure in the interest of national and public security and that, pursuant to Protocol No. 7 to the European Convention, the movement and stay of an alien could be restricted if it was necessary in the interest of public order and national security.

27. Finally, the Service for Foreigner's Affairs alleges in its response that in its Ruling no. UP-1/19.5-07.3-4-6/09 of 12 November 2009 it quashed Ruling no. 1/19.5-07.3-4-6/09 of 26 October 2009, when the measure of supervision imposed on the appellant ceased to be in force and when the appellant left the Immigration Center. The Service notes that the reason for imposing the aforementioned measure was the fact that on 12 November 2009 it had received the verdict of the Court of BiH, no. U-86/07 of 5 November 2009, wherein the ruling on revocation of the appellant's citizenship was quashed and the case was referred back for a new decision. As the final act on revocation of the citizenship of BiH was quashed, it was established that he enjoyed again the status of citizen of BiH pending the adoption of a different decision. According to the aforementioned, the LMSAA could not be applied to the appellant anymore, which had been the basis for initially imposing and extending the supervision measure.

V. Relevant Law

28. The **Law on Movement and Stay of Aliens and Asylum of BiH** (*Official Gazette of the BiH* no. 36/08), so far as relevant, reads as follows:

Article 5
(Definitions)

For the purpose of this Law, certain terms shall have the following meaning:

(a) an alien refers to any person who is not a national of BiH but is a national of another state pursuant to legislation of that state or is stateless

Article 7
(Freedom of Movement)

(4) Security check for an alien to the purpose of establishing the security reasons of BiH shall be performed by the Intelligence and Security Agency of Bosnia and Herzegovina. The rulebook on the method of performing security checks shall be issued by the General Director of the Intelligence and Security Agency.

Article 99

2) Supervision shall be imposed against an alien on the following grounds for suspicion that:

(a) The free and unrestricted movement of the alien might jeopardize the public order, legal order and security of BiH, or constitute a threat to public health in BiH, i.e. if it has been established that the alien constitutes a threat for public order, legal order and security of BiH; or

Article 101
(Legal remedy against the decision on placing alien under supervision)

(1) An appeal against the decision on placing an alien under detention may be lodged with the Ministry within 24 hours from the delivery of the decision.

(...)

(3) If the Ministry does not revoke decision on placing alien under supervision or fails to take a decision upon the appeal within 24 from the date of its receipt, lawsuit may be filed in the administrative procedure before the Court of Bosnia and Herzegovina.

(4) The lawsuit must be filed before the Court of Bosnia and Herzegovina within 24 hours from the expiry of the deadline under paragraph (3) of this Article. The Court shall consider such cases urgent and hear the alien and render the decision within 3 days as of the filing of the lawsuit.

Article 102

(Execution of the decision placing an alien under supervision and extending supervision)

(1) The measure of placing an alien under supervision shall be carried out by accommodating the alien in an institution specialized for the reception of aliens (immigration center)

(2) The alien shall remain under supervision until the moment of his/her forcible removal from the country or as long as is necessary for execution of the purpose of the supervision, or until the reasons that constituted the grounds for his/her placement under

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supervision have significantly changed, but not exceeding the deadline set in the decision placing an alien under supervision or decision extending supervision.

29. The **Law on Administrative Disputes** (*Official Gazette of BiH* nos. 19/02, 88/07, 83/08 and 74/10), in its relevant part, reads as follows:

Article 7

The Court shall decide on the administrative dispute sitting as a panel composed of three judges, unless otherwise prescribed by the law.

An administrative dispute initiated against a ruling to place an alien under supervision shall be decided by a single judge.

Article 19

By derogation from paragraph 1 of this Article, the lawsuit against a ruling to place an alien under supervision shall be brought within a time limit of 24 hours from the date of delivery of the ruling of the second-instance administrative authority or after the expiry of that time limit if the second-instance administrative decisions has not been taken. In the disputes referred to in this Article, the Court shall decide under expedite procedure, shall hear foreigners and shall take a decision as soon as possible, i.e. within a time limit of 30 days at the latest from the date on which the lawsuit was brought.

Article 36

The Court shall render a verdict or a ruling by the majority vote.

A record on deliberation and voting shall be made and it will be signed by all members of the panel and recording secretary.

30. The **Law on the Citizenship of Bosnia and Herzegovina** (*Official Gazette of BiH* nos. 13/99, 6/03, 14/03 and 82/05), in its relevant part, reads as follows:

Article 41

1. The BiH citizenship shall cease on the service date of the Commission's or the BiH Council of Ministers' decision on revocation of the citizenship. If the address or the place of permanent residence of the concerned person is not known or cannot be confirmed, the BiH citizenship shall cease on the date when the notification of the Commission's or the BiH Council of Minister's decision is published in the BiH Official Gazette.

VI. Admissibility

Admissibility with regards to Article II(3)(b),(d),(f) and (m) of the Constitution of Bosnia and Herzegovina and Articles 3, 5(1), 8 and 13 of the European Convention and Article 2 of Protocol No. 4 to the European Convention

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

32. In accordance with Article 16(1) of the Rules of the Constitutional Court, the Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

33. In the present case, the subject challenged by the appeal are the verdicts of the Court of BiH, no. U-464/09 of 2 October 2009 and U-534/09 of 3 November 2009, against which there are no other effective legal remedies available under the law. The appellant received the challenged verdict, no. U-534/09 of 3 November 2009, on 9 November 2009 and the appeal was filed on 16 November 2009 within the 60-day time-limit. Although the Constitutional Court did not receive a proof demonstrating when the appellant received the challenged verdicts U-464/09 of 2 October 2009 and U-416/09 of 3 September 2009 as the appeal was filed on 12 October 2009, it is obvious that it was filed within the time limit of 60 days as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court as it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

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

Admissibility with regards to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention

35. Article 16(4)(9) of the Rules of the Constitutional Court reads as follows:

An appeal shall also be inadmissible in any of the following cases:

the appeal is ratione materiae incompatible with the Constitution;

36. The appellant holds that the challenged decisions placing him under supervision and in the Immigration Center, and extending the supervision imposed on him are in violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

37. The Constitutional Court notes that the placement under supervision in the Immigration Center of an alien within the framework of the procedure regarding the right to stay, on which a decision has not been taken yet, or in the interest of national security, falls within the scope of public law of every country so that Article 6(1) of the of the European Convention is not applicable to the present case. As Article II(3)(e) of the Constitution of Bosnia and Herzegovina does not provide for a broader scope of protection than that provided for by Article 6 of the European Convention, the appellant's complaints about the violation of the right to a fair trial are incompatible *ratione materiae* with the Constitution of Bosnia and Herzegovina (see Application no. 3325/67, *X, Y, Z, V and W v. the United Kingdom,* Collection 25 [1968] and the Constitutional Court, cited Decision *no. AP 3307/08*, paragraph 33).

38. In view of the provisions of Article 16(2) and (4)(9) of the Rules of the Constitutional Court, according to which an appeal shall be rejected as inadmissible if it is manifestly (*prima facie)* ill-founded, i.e. if it is *ratione materiae* incompatible with the Constitution, the Constitutional Court decided as stated in the enacting clause of this Decision.

VII. Merits

39. The appellant challenges the aforementioned verdicts by claiming that they are in violation of his rights under Article II(3)(b),(d), (f) and (m) of the Constitution of Bosnia and Herzegovina and Articles 3, 5(1), 8 and 13 of the European Convention, and Article 2 of Protocol No. 4 to the European Convention.

40. Article II(3)(d) of the Constitution of Bosnia and Herzegovina, so far as relevant, reads as follows:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

d) The right to liberty and security of person

Article 5 of the European Convention, so far as relevant, 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:

(...)

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

41. The appellant's allegations on the violation of the right to liberty and security of person comes down to the claim that the LMSAA could not be applied to him and that the competent authorities erroneously concluded that the appellant was an alien and posed a threat to the national security. Accordingly, the Constitutional Court concludes that the appeal in question raises an issue of lawful grounds for deprivation of liberty under Article 5(1)(f) of the European Convention.

Article 5(1)(f) of the European Convention

42. The Constitutional Court recalls that Article 5 of the European Convention enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty (see, ECtHR, *Aksoy v. Turkey*, judgment of 18 December 1996, paragraph 76, *Reports* 1996-VI). It follows from the wording of Article 5 that the guarantees it encompasses apply to all. Article 5(1)(a) through (f) of the European Convention provides for an exhaustive list of lawful grounds for deprivation of a person's liberty (see, ECtHR, *Saadi v. the United Kingdom* [GC], no. 13229/03, para 43, ECHR 2008).

43. One of the exceptions prescribed by Article 5(1)(f) of the European Convention allows the State to have control over the liberty of an alien in the immigration context. The aforementioned provision does not demand that the detention of a person against whom action is being taken be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect all what is required is that the deportation proceedings are in progress and that they are conducted with due diligence (see, ECtHR, *Chahal v. the United Kingdom,* judgment of 15 November 1996, paras. 112-113). Furthermore, any deprivation of liberty must be „lawful". Where the „lawfulness" of detention is in issue, including the question whether „a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient. Any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental

principle that no detention which is arbitrary can be compatible with Article 5(1) and the notion of „arbitrariness" in Article 5(1) extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see, ECtHR, *Saadi v. the United Kingdom* [GC], no. 13229/03, paragraph 67, of 29 January 2008).

44. The Constitutional Court recalls that in its Decision on Admissibility no. AP 1499/99 od 24 June 2009 (paragraph 16) and AP 2608/09 of 17 September 2009 (paragraph 14), while considering essentially the same allegations of an appellant, i.e. that he was not an alien and did not pose a threat to the national security, took the view which could be summarized as follows: that case related to the lawful deprivation of liberty of an alien, which was permissible under Article 5(1)(f) of the European Convention, as the appellant's BiH citizenship was revoked, where he lived illegally as his stay was not approved. Furthermore, the court concluded that the appellant had not been deprived of liberty arbitrarily, since it had been carried out in accordance with the provisions of Article 99(2)(b) of the LMSAA, according to the OSA's information that he posed a threat to the national security.

45. Taking into account the aforesaid, the Constitutional Court holds that there is no reason for departing from the expressed view on the fact that the appellant, even at the time when the measure of supervision was extended by the decisions being the subject-matter of the challenge in the present case, was an alien within the meaning of Article 5(a) of the LMSAA. In particular, it follows from the reasons for the challenged verdicts of the Court of BiH that the appellant's BiH citizenship was revoked by the decision of the Commission for Revision for Decisions on the BiH citizenship, dated 8 January 2007, and that the citizenship, pursuant to Article 41(9) of the Law on the BiH Citizenship, ceases to exist by the revocation on the date of delivery of the Commission's decision. Finally, the appellants does not allege nor does he propose evidence that the aforementioned decision was not served on him in accordance with the law. Accordingly, the fact that the appellant instituted a dispute by bringing a lawsuit against that decision did not affect in itself the final nature of that decision and, accordingly, the appellant's status as an alien. In this connection, the Constitutional Court notes that it apparently follows from Articles 12 and 18 of the Law on Administrative Disputes that a lawsuit to initiate an administrative dispute does not postpone the enforcement of the final administrative act, unless otherwise prescribed by the law or unless the court decides otherwise, or if the postponement is not contrary to the public interest, which is to be determine by the competent administrative authority or a court. Finally, the fact that the decision on revocation of the citizenship was quashed in the verdict rendered by the Court of BiH on 5 November 2009 and that the case was referred back for a new decision could not have a retrospective effect and could not be considered

a proof demonstrating that the appellant, at the time of extension of supervision, was not an alien and that the relevant provisions of the LMSAA could not be applied. In particular, the aforementioned verdict of the Court of BiH was delivered to the Service for Foreigners' Affairs on 12 November 2009, which, on the same date, established that the appellant enjoyed again the status of the BiH citizen and issued a ruling wherein the measure of supervision was quashed, and the appellant left the Immigration Center. Therefore, the appellant's claim that he was not an alien at the time of extension was unfounded.

46. The measure imposed on the appellant was extended pursuant to Article 99(2)(b) of the LMSAA as the conclusion was adopted based on the OSA' information that the appellant posed a threat to the national security.

47. The Constitutional Court notes that the European Court, in the case of *Al-Husin v. Bosnia and Herzegovina* (see, ECtHR, Application no. 3727/10, judgement of 7 February 2012) and *Al-Hamdani v. Bosnia and Herzegovina* (see, ECtHR, Application no. 31098/10, judgment of 7 February 2012) examined detention, which, in both cases, was imposed on the applicants and then extended on several occasions pursuant to Article 99(2)(b) of the LMSAA. Having reiterated its previous views that Article 5(1)(a) through (f) of the European Convention provides for an extensive list of exceptions, that only a narrow interpretation of these exceptions is compatible with the aims of Article 5 and that detention on security grounds only is accordingly not permitted (*A. and Others v. the United Kingdom* (VV), no. 3455/05 of 19 February 2009, paragraph 171), the European Court concluded in both cases that detention, imposed and extended on the sole fact that those persons posed a threat to national security did not meet the standards under Article 5(1)(f) of the European Convention, i.e. that deprivation of liberty within the meaning of the aforementioned provision was justified only for the purpose and during the deportation procedure (*Al-Husin*, paragraph 62 and *Al-Hamdani*, paragraph 59).

48. Furthermore, in the aforementioned cases the European Court considered the imposition of detention with regards to other permissible exceptions prescribed by Article 5(1) of the European Convention. In this connection, the European Court noted that Article 5(1)(c) did not permit a policy of general prevention directed against an individual or a category of individuals who were perceived by the authorities, rightly or wrongly, as being dangerous or having propensity to unlawful acts. It does no more than afford the Contracting States a means of preventing a concrete and specific offence (see, ECtHR, *Guzzardi v. Italy*, judgment of 6 November 1980, paragraph 102, Series A no. 3; *M. v. Germany*, Application no. 19359/04, paragraph 89, and 102, of 17 December 2009; and *Shimovolos v. Russia,* Application no. 30194/09, paragraph 54, of 21 June 2011). Detention for the purpose of preventing a person from committing an offence must be

imposed in order to bring such a person before the authority prescribed by the law (see, ECtHR, *Lawless v. Ireland (No.3),* judgment of 1 July 1061, paragraph 14, Series A, no. 3). Thus, the exception referred to in sub-paragraph (c) permits deprivation of liberty only in connection with criminal proceedings (see, ECtHR, *Ciulla v. Italy,* paragraph 38, of 22 February 1989, Series A no. 148; and *Schwabe and M.G. v. Germany,* Applications no. 8080/08 and 8577/08, paragraph 72, of 1 December 2011, not final yet). Taking into account the fact that no concrete or specific offence was mentioned with regards to any of the applicants that should have been prevented from committing such offence, it was concluded that their detention was not covered by Article (5) (c)(1) of the European Convention. Finally, the court concluded that other exceptions under Article 5(1) of the European Convention were not relevant (*Al-Hamdani*, para 60 and *Al-Husin,* para 65).

49. Accordingly, the European Court concluded that in the cases of both applicants, at the time when the supervision measure was based only on Article 99(2)(b) of the LMSAA and when the deportation procedure was neither initiated nor conducted against them, the guarantees under Article 5(1)(f) of the European Convention had been violated. Furthermore, the court observed in both cases the national authorities, at the time of deprivation of liberty, had had the possibility of issuing an order for deportation within the meaning of Article 88(1)(h) of the LMSAA and depriving them of liberty for the purpose of deportation pursuant to Article 99(1)(a) of the LMSAA, but they had not done so nor had they given any reasons for it (see, ECtHR, *Al-Hanchi v. Bosnia and Herzegovina,* Application no. 48205/09 judgment of 15 November 2011). Accordingly, a violation of Article 5(1)(f) of the European Convention was found with regards to the period when the supervision measure in the Immigration Center was based solely on the fact that the persons concerned posed a threat to the national security. However, in both cases the European Court noted that the supervision measure in the Immigration Center, after the issuance on ruling on deportation, and taking into account other relevant factors, satisfied the standards under Article 5(1)(f) of the European Convention, so that the court did not find any violation in respect to that period.

50. In the present case, the supervision measure imposed on the appellant was extended pursuant to Article 99(2)(b) of the LMSAA. Taking into account the foregoing, it follows that the measure was imposed in the manner and in accordance with the procedure prescribed by law, which were consistently respected by the Service for Foreigners' Affairs and the Court of BiH. Furthermore, the extension of the measure was imposed for a period as prescribed by law, and the possibility of reviewing the decision by a court was not denied. The fact that the appellant posed a threat to the national security was assessed on the basis of information of the OSA's which, pursuant to Article 7 of the LMSAA, is authorized to

carry out security checks with regards to aliens. It follows from the documents presented to the Constitutional Court that OSA's information was available to the Service for Foreigner's Affairs and particularly to the Court of BiH, the judges of which, pursuant to Article 5 of the Law on Protection of Secret Data, have access to information of all degrees of confidentiality. In this connection, the Constitutional Court notes that the reasons for the challenged verdicts expressly state that the appellant's allegations that he does not pose a threat to the national security are conflicting to the data in the case-file, since it follows from the part of the case-file marked as „confidential" that the appellant poses a threat to the national security. Accordingly, it follows that there were grounds for believing that if the appellant, the BiH citizenship of whom was revoked and who did not have approval for stay in BiH either temporary or permanent at the time of adoption of challenged decisions on extension of supervision, was not prevented from freely and unrestrictedly moving, the national security could be jeopardized. Finally, on the same date when the law requirements were fulfilled (*the challenged decision on the revocation of citizenship*), the competent authority quashed the supervision measure and the appellant was allowed to leave the Immigration Center. Therefore, the measure of supervision in the appellant's case was extended strictly in accordance with the relevant provisions of the national law.

51. However, deprivation of liberty within the meaning of Article 5(1)(f) of the European Convention is justified only for the purpose of and during the deportation procedure. In the present case, it cannot be concluded from the documents presented to the Constitutional Court that such proceedings were initiated against the appellant or that they were conducted during the supervision imposed in the challenged decisions. In particular, it apparently follows from the documents presented to the Constitutional Court that the measure of supervision imposed on the appellant was extended with the *aim of preventing free and unrestricted movement as it was established that the person concerned posed a threat to the public order and peace, and security of BiH.* Furthermore, it does not follow from the documents presented to the Constitutional Court that the appellant should have been prevented from committing a concrete or specific offence.

52. Bringing these circumstances into connection with the quoted views of the European Court in the case of *Al-Husin* and Al-*Hamdani,* the Constitutional Court concludes that in the appellant's case the extension of the supervision measure solely based on the fact that he posed a threat to the national security in the situation where the deportation proceedings were neither initiated nor conducted against him does not constitute deprivation of liberty permissible under Article 5(1)(f) of the European Convention. Furthermore, given the circumstances of the present case, the appellant's detention does not fall under any of other exceptions prescribed by Article 5(1) of the European Convention.

53. The Constitutional Court, bearing in mind the fact that the supervision measure was quashed in the Ruling of the Service for Foreigner's Affairs, no. UP-1/19.5-07.3-4-6/09 of 12 November 2009, and that the appellant was allowed on the same date to leave the Immigration Center, concludes that, in the circumstances of the present case, it is sufficient to quash the challenged verdicts which violated the appellant's right safeguarded under the Constitution of Bosnia and Herzegovina and European Convention and that there is no need to refer the case back for a new decision.

54. The Constitutional Court concludes that taking into account the circumstances of the present case, the appellant's right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(f) of the European Convention have been violated.

Other allegations

55. The appellant notes that the challenged decisions are in violation of his right not to be subjected to torture or to inhuman or degrading treatment or punishment under Article II(3)(b) and Article 3 of the European Convention, right to private and family life, home and correspondence under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, right to liberty of movement and residence under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and freedom of movement under Article 2 of Protocol No. 4 to the European Convention and the right to an effective legal remedy under Article 13 of the European Convention.

56. With regards to the appellant's claim that the safeguards under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention have been violated, the Constitutional Court notes that the appellant did not present any specific allegation or evidence to demonstrate that the aforementioned safeguards were violated at the time of duration of the supervision measure, and this does not follow either from the documents presented to the Constitutional Court. Accordingly, the Constitutional Court holds that there is no need to separately consider these allegations.

57. Furthermore, with regards to the appellant's allegations that the extension of the supervision measure is in violation of his rights under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Articles 8 and 13 of the European Convention and Article 2 of Protocol No. 4 to the European Convention, which essentially come down to the claim that the decisions to extend the supervision were unlawful, taking into account the fact that the Constitutional Court has already found in this Decision that in the circumstances of this case Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(f) of the European Convention have been violated, the Constitutional Court holds that is does not need to separately examine this part of the appellant's allegations.

VIII. Conclusion

58. The Constitutional Court concludes that there has been a violation of Article II(3) (d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(f) of the European Convention in the case where the person concerned, who, at the time of imposing and extending the measure of supervision, does not have the status of the BiH citizen or does not have the right to stay in BiH, is deprived of liberty as prescribed by law because he poses a threat to the public order, peace or the national security of BiH, and such a deprivation of liberty is not carried out with the aim of initiating or conducting the procedure for expelling him, nor could such a deprivation fall under the remaining exceptions under Article 5(1) of the European Convention.

59. Having regard to Article 16(4)(9) and Article 61(1) and (2) of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause.

60. Given the Decision of the Constitutional Court in this case, the Constitutional Court does not need to separately consider the appellant's request for an interim measure in case no. AP 3153/09.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP 2120/09

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Behzad Hadžić against the Search Warrant of the Court of Bosnia and Herzegovina no. X-KRN/09/713 of 11 May 2009

Decision of 25 May 2012

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(4)(9), Article 59(2)(1) and (2), and Article 61(1) and (2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Miodrag Simović, President,

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Mr. Mirsad Ćeman,

Ms. Margarita Tsatsa-Nikolovska,

Mr. Zlatko M. Knežević

Having deliberated on the appeal of **Mr. Behzad Hadžić** in case no. **AP 2120/09**, at its session held on 26 May 2012 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Behzad Hadžić is partially granted.

A violation of the right to respect for private and family life and home 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, upon the Search Warrant of the Court of Bosnia and Herzegovina no. X-KRN/09/713 of 11 May 2009, is hereby established.

The appeal lodged by Mr. Behzad Hadžić against the Search Warrant of the Court of Bosnia and Herzegovina no. X-KRN/09/713 of 11 May 2009, in relation to the right to right to liberty and security under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms and the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is rejected as inadmissible for being *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 6 July 2009, Mr. Behzad Hadžić („the appellant") from Ključ, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Search Warrant of the Court of Bosnia and Herzegovina („the Court of BiH„) no. X-KRN/09/713 of 11 May 2009.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Court of BiH, the Prosecutor's Office of Bosnia and Herzegovina („the Prosecutor's Office") and the Ministry of the Interior of the Federation of BiH („the Ministry of the Interior of FBiH") were requested on 3 November 2009 to submit their respective replies to the appeal.

3. The Court of BiH submitted its reply on 13 November 2009, the Prosecutor's Office did so on 16 November 2009, and the Ministry of the Interior of FBiH submitted its reply to the appeal on 5 November 2009.

4. Having regard to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were delivered to the appellant on 3 February 2010.

III. Facts of the Case

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

6. The Court of BiH (the Preliminary Proceedings Judge), deciding on the request of the Prosecutor's Office no. KTA-182/09 of 11 May 2009 for the issuing of a warrant for the search of an apartment, movable goods and persons and the confiscation of items, pursuant to Articles 51, 52, 53 and 65 of the Criminal Procedure Code of Bosnia and Herzegovina („the Criminal Procedure Code"), issued Search Warrant no. X-KRN/09/713 dated 11 May 2009.

7. The Search Warrant reads that due to the existence of reasonable suspicion that Goran Popović *et al.,* had committed a criminal act of organized crime under Article 250(1) (2) and (3) of the Criminal Code of Bosnia and Herzegovina („the Criminal Code") in connection with the criminal act of illegal sale of narcotics under Article 195(1) of the Criminal Code, which follows from the Report of the Ministry of the Interior of the Republika Srpska, Crime Police Department, no. 02/5-pov.187/09 of 8 May 2009, in order to find and confiscate items to be found during the search, and which arise from or can be connected to the commission of the mentioned criminal act, the following is ordered: (under paragraph I(1)) the search of the appellant in order to find items-goods which can serve as evidence for the purpose of proving a criminal act of organized crime under Article 250(1)(2) and (3) of the Criminal Code in connection with the criminal act of illegal sale of narcotics under Article 195(1) of the Criminal Code (such as: drugs, cell-phones with SIM cards and SIM cards which are used as communication means, messages, notes, etc.). Under paragraph 2, the Search Warrant ordered the search of the house-apartment and of all the accompanying parts of the house-apartment, such as the basement, garage, yard, place for garbage disposal, attic, which are used by the suspect, at the address of Kulina Bana bb – Ključ and the premises which are found to be used by the appellant personally or for the purpose of carrying out criminal acts that he is suspected of, in order to find items-goods which can be used as evidence for the purpose of proving the mentioned criminal act (such as: drugs, computers, presses, scales, cell-phones with SIM cards and SIM cards which the appellant has used as communication means, messages, notes, etc.). Under paragraph 3, the Search Warrant ordered the search of the passengers motor vehicle „Ford Mondeo" (of the specified registration plates) and other passengers motor vehicles, which are found to owned by the appellant or if established during the search that the suspect (the appellant) has used them, in order to find items-goods which can serve as evidence for the purpose of proving the mentioned criminal act (such as: drugs, computers, presses, scales, cell-phones with SIM cards and SIM cards which the appellant has used as communication means, messages, notes, etc.) Under paragraph 4, the Search Warrant ordered the search of all cell-phones found during the search, as stipulated in paragraphs 1 and 2, in order to determine incoming, outgoing and missed calls and SMS messages, in order to determine memorized voice messages, and to print out the

contacts list memorized in the cell-phones and SIM cards, in order to identify the persons that he had communication with, with the aim to commit a criminal act of organized crime under Article 250(1), (2) and (3) of the Criminal Code in connection with the criminal act of illegal sale of narcotics under Article 195(1) of the Criminal Code. Under paragraph 5, the Search Warrant ordered the search of all computers, hard discs, and other data storage devices, found during the search, as stipulated in paragraphs 1 and 2, in order to determine incoming and outgoing e-mails and other stored data which can be brought into connection with the commission of the criminal act of organized crime in connection with the criminal act of illegal sale of narcotics.

8. Furthermore, (under heading II), the Search Warrant ordered the confiscation of all items that are found during the search, as stipulated in paragraphs 1, 2 and 3, which can be brought into connection with the commission of the criminal act of organized crime under Article 250(1), (2) and (3) of the Criminal Code in connection with the criminal act of illegal sale of narcotics under Article 195(1) of the Criminal Code, as well as items which can be brought into connection with the commission of some other criminal act and which can serve as evidence on the commission of some other criminal act prescribed by the Criminal Code, and the Entities' Criminal Codes. The Search Warrant determined that the search of persons, premises and vehicles as well as temporary confiscation of items shall be entrusted to the authorized official persons of the Ministry of the Interior of FBiH (heading III), and the search will be carried out within 15 days from the day of issuing the Search Warrant (heading IV). Also, the Search Warrant stated that the search can be carried out outside the time frame provided for the search, that is to say outside the time frame of 6 through 21 hrs, and by employing appropriate methods and means of force in order to open the premises and goods to be searched in order to prevent the destruction of items sought and which may serve as evidence in the criminal procedure, in accordance with Article 59(2) of the Criminal Procedure Code. The Search Warrant reads that the suspect (the appellant) has the right to inform the defence counsel of the search, however the Search Warrant can be enforced without the presence of the defence counsel considering the urgency of action (heading V). In accordance with the Search Warrant, the temporarily confiscated items will be submitted to the Court of BiH, after which they will be forwarded to the Prosecutor's Office for possible use in the criminal procedure (heading VI). The Search Warrant clearly states that a record will be made during the search in accordance with Article 62 of the Criminal Procedure Code. When confiscating items, notes will be made as to where they were found and their description will be provided, and if necessary other ways will be used to provide for the establishment of their identity (heading VII). Also, a receipt must be issued for all the confiscated items. The Search Warrant specified a prosecutor to coordinate the enforcement of this Search Warrant (heading VIII). Also (under

heading IX), the Search Warrant reads that the person holding items (stated under heading III of this Search Warrant) is obliged to hand them over to the authorized persons, under the threat of a fine, or imprisonment, if he/she fails to hand them over. Also, the Search Warrant carries the instruction that the person, whom the items were temporarily confiscated from, shall have the right to appeal (which shall not stay the temporary confiscation of items) within three days from the day of receiving this Search Warrant.

9. In case no. KTA-182/09 of 11 May 182/09, the Prosecutor's Office, pursuant to Article 35(2)(b) of the Criminal Procedure Code, ordered the Ministry of the Interior of FBiH to carry out the search warrant of the Court of BiH, no. X-KRN/09/713 of 11 May 2009, against four persons, including the appellant. The Prosecutor's Office further ordered the Ministry of the Interior of FBiH that after the search an inspection and analysis should be carried out, that an expert examination of confiscated and suspicious items should be carried out and that a detailed report should be made and submitted to the Prosecutor's Office, including the motion for investigation, and only after this, the report on the search, minutes, receipts on the confiscated items and confiscated items should be delivered to the Court of BiH in accordance with the Criminal Procedure Code. Furthermore, the Prosecutor's Office ordered the undertaking of all necessary measures with the aim of protecting the confidentiality in enforcement of the warrant and all necessary measures to protect the executor of the warrant, and the Prosecutor's Office's phone number which was to be called during the enforcement of the warrant in the urgent cases is indicated.

10. According to the appellant's allegations, the search started at 4.30hrs, in the apartment located in Kulina Bana Street where his two daughters were. He was informed of this over phone by the doorman of the hospital (where the appellant was employed). The appellant came to his apartment, called his lawyer who arrived at around 5.30hrs, and the search was over at 11.00 hrs.

11. The Ministry of the Interior of the FBiH, i.e. the persons who carried out the search, namely Dario Zović and Saša Petrović, made a Report on the search, no. 13/4-155 of 12 May 2009. The Report stated that on 12 May 2009, at around 5.00hrs, the official persons started the search. They entered the apartment located in Kulina Bana Street at 5.15hrs, where they found the appellant's daughters whose identity was checked. A few minutes later (according to the Report, at 5.20hrs), the appellant came to the apartment, he was identified and asked whether the narcotics being the subject of the search warrant were in his possession. The appellant answered that they were not, whereupon the search warrant of the Court of BiH was read before him, he was given a copy of the search warrant and he was informed of the rights and reasons for the search. After this, the team (the official persons), in the presence of two adult persons, started the search, i.e. informed

the appellant of the reasons for the search as an official action. A record on the search and receipt on the confiscated items (three mobile phones, one laptop and one camera) were delivered after the search of the apartment located in the Kulina Bana Street, and the search was continued by searching two cars (at around 6.30hrs) but nothing was found. During an interview with the appellant, the police found that the appellant possessed a house in Zgon so that the search was continued in that location (7.20hrs) in the presence of the appellant, a lawyer and witnesses and a phone book and central processing unit were confiscated during the search. According to the Report, the official persons established during the interview with the appellant that the appellant had an office for use in the health care institution, that he had items being the subject of the warrant in that office, which was the reason why the search was continued there and when the following items were confiscated (red notebook, 5 mobile phones, USB memory stick, and GSM card). It follows from the Report that photos of all of this were taken, that receipts on the confiscated items and records on the search were issued. Moreover, according to the Report, no objections were raised by the witnesses and the appellant so that the search was over at around 930hrs. The records on the search, receipts on the confiscation of items and search warrants issued by the Court of BiH are attached to the Report.

12. The signatures of the appellant, witnesses Admira Smajić and Belmin Smajić, the person who made the records and official persons are affixed to the records on the search, which were delivered by the Ministry of the Interior of the FBiH, no. 13/4-1709, 13/4-1-a/09, 13/4-1-b/09 and 1374-1-c/09 of 12 may 2009 and the date, place of the search and the items confiscated during the search were indicated on the records (four records on the search of the apartment, house, cars and office).

13. On 15 May 2009 the appellant lodged a complaint with the Ministry of the Interior of the FBiH complaining of the excessive use of force of the official persons who searched his apartment, house, cars and office.

14. The Ministry of the Interior of the FBiH notified the appellant that upon the appellant's complaint they opened an internal investigation against the persons who carried out the search and that the Head of the Ministry of the Interior of the FBiH, in notification no. 15-543 of 23 July 2009, informed him that he agreed with the inspector's assessment that the complaint was ill-founded and that the established facts indicated that the appellant's allegations on the unprofessional conduct of the official persons were incorrect. The Office for Public Complaints of the Federal Ministry of the Interior of the FBiH, in its Conclusion no. 08-404/09 of 7 September 2009, agreed with the Head's opinion that the complaint against the official persons who carried out the search was ill-founded.

15. On 22 May 2009, the appellant addressed the Court of BiH in accordance with Article 4 of the Law on Access to Information requesting that Court to deliver him the evidence which the Prosecutor's Office presented to the Court of BiH with the aim of issuing the warrant to search his apartment. In submission no. X-KRN/09/713 of 25 May 2009, the Court of BiH informed the appellant that all pieces of evidence gathered during the search were forwarded to the Prosecutor's Office. On 28 May 2009 the appellant submitted the same request to the Prosecutor's Office, i.e. he requested the Prosecutor's Office to inform him of the evidence which the Prosecutor's Office presented to the Court of BiH when requesting the Court of BiH to issue them a search warrant. The Prosecutor's Office failed to submit a response to the appellant's letter (and request).

IV. Appeal

a) Allegations of the appeal

16. The appellant alleges that there is a violation of his right not to be subjected to torture, or inhuman or degrading treatment or punishment 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 („the European Convention"), his right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention, 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 and his right to respect for private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. In addition, the appellant states that the search of the apartment where his daughters live was carried out on 12 May 2009, starting at around 04.30 hrs, and that the search warrant was not in their name, and that the official persons were notified of that. In addition, a higher number of the police officers, around 20 of them, with a number of vehicles, with a large number of the men being armed with rifles and other long-barrel arms were engaged in the search. According to the appellant's allegations, the search was carried out in a forceful manner and by excessive use of force, including threats and a demonstration of force in front of citizens with the aim to discredit the appellant. The appellant alleges that for this reason he and his family suffer severe consequences such as mental pain and suffering. According to the appellant's allegations, the search was carried out over a long time in the heavy-handed and degrading manner and nothing was found during the search. The appellant highlights that in the time period from 04.30 to 11.00 hrs, he and his family were unable to report for work and to get decently ready and dressed and to have breakfast and to have beverages that all people take in the morning, because they were not allowed to

do so as „their freedom of movement and residence was denied". The appellant also states that he addressed the Court of BiH and requested access to information, and the Court of BiH replied that all evidence collected during the search had been sent to the Prosecutor's Office. In this regard, the appellant addressed the Prosecutor's Office and sought to see the evidence which the Prosecutor's Office had submitted to the Court of BiH against him when requesting the search warrant from the Court of BiH. Given that the Prosecutor's Office has never replied to him, the appellant considers that that no elements under Article 51 of the Criminal Procedure Code have existed, *i.e.* the facts and evidence constituting sufficient grounds for suspicion that the appellant is connected with the perpetrator, the accessory, traces of a criminal offence or objects relevant to the criminal proceedings. In this regard, the appellant provides detailed reasoning in his submission of 17 February 2010 (after he has received the replies by the parties to the proceedings), and he states that Article 51 of the Criminal Procedure Code is clear and that a search warrant must be justified in accordance with the provision of Article 57(1) of the Criminal Procedure Code. In addition, the appellant underlines that the Court of BiH must be cautious, otherwise any request for a search warrant by the Prosecutor's Office will be granted. All the more so given the manner in which the search was carried out as well as the fact that he enjoys a high reputation, as he is a Dr., neuropsychiatrist, the hospital director and a well-known humanist. The appellant underlines that it is pure nonsense that the police report produced through operational activity can be considered to be evidence in criminal proceedings on the basis of which the legal conclusion can be reached that there are sufficient grounds for suspicion based on which the issuance of a search warrant can be requested. The appellant believes that „there is a scenario" staged by „an interest crime group", and the Prosecutor's Office and the Court of BiH, by their conduct, made it possible. In addition, the appellant alleges that his rights have been breached given the fact that the preliminary proceedings judge failed to check whether the issuance of the search warrant was justified in accordance with Article 57(1) of the Criminal Procedure Code, *i.e.* she granted by inertia the request of the Prosecutor's Office. Furthermore, the appellant absolutely denies that the records on the search of the apartment and other premises were made and that he or his legal representative signed them. Moreover, the appellant requests an answer to his question as to why the search warrant was executed between 21.00 and 06.00 hrs (the appellant states that the search started at 04.30 hrs), and if there was urgency to take action, how it is possible that urgency no longer exists, *i.e.* why no further action against the appellant has been taken. The appellant states that the police seized several items, which have never been returned to him, including the items which belong to his daughters. In his submission presented to the Constitutional Court (dated 15 February 2010), the appellant clarifies that the official persons had made threats to his daughters before his arrival at the apartment, *i.e.* that they

were waiving their pistols and using offensive language, stating that a serious crime had been committed and that they were looking for evidence of that crime. The appellant also alleges that he has been active in the work of the Institute for Alcoholism and Other Drug Addictions, that he has introduced a detoxification therapy (which is successful), that he provides psychological assistance for witnesses of war crimes, that he has been included in the activities of the groups dealing with the issue of missing persons and that he has worked for the Witness Protection Department of the State Investigation and Protection Agency and that during the war he worked in the medical unit of the BiH Army. For these reasons, in the appellant's view, „a certain interest crime group" had a bone to pick with him and, given the conduct of the Court of BiH, it succeeded. By the letters of 18 February and 31 August 2011, the appellant notified the Constitutional Court that he had not been contacted by any relevant authority (after the search), nor had he been heard, nor had the seized items been returned to him. The appellant alleges that he and his family feel the flagrant violations of their right caused by the conduct of the relevant authorities.

b) Reply to the appeal

17. In the reply to the appeal, the Court of BiH states that the appeal is ill-founded and arbitrary, as the search warrant was issued upon the request by the Prosecutor's Office no. KTA-182/09 dated 11 May 2009, including the attachment thereto. Considering the respective request as a whole, and considering the note of urgency stated on it, in accordance with Articles 51, 52, 53 and 65 of the Criminal Procedure Code of BiH, the Court issued the search warrant concerning all the suspects (14 of them), including the appellant. The Court of BiH notes that the appellant complains about the manner in which the search warrant was executed. However, the Court of BiH considers that the allegations stated in the appeal are ill-founded and arbitrary and states that through re-inspection of the respective case file one cannot conclude that any single right of the appellant was violated. In addition, the Court of BiH states that, according to the status of the case-file, it is evident that it received the request of the Prosecutor's Office of BiH for the warrant for the search of the apartment, the remainder of the premises, movable goods and persons and temporary confiscation of items. Considering the respective request, particularly the attachment thereto, the Court of BiH found sufficient evidence indicating the existence of reasonable suspicion that the appellant, among others, had committed a criminal act of organized crime in connection with the criminal act of illegal sale of narcotics. The Court of BiH states that *the search warrant itself specifies that the Court of BiH based the existence of reasonable suspicion on the contents of the report of the RS MoI Crime Police Department no. 02/5-pov.187/09 of 8 May 2009, on the basis of which it follows unambiguously that through operational work it was learned that the appellant belonged to*

an organized crime group dealing in illegal transportation of narcotics. Hence, considering the request of the Prosecutor's Office of BiH along with the attachments thereto, the Court of BiH took a position that they contain elements prescribed by the provision of Article 55 of the Criminal Procedure Code and, pursuant to Articles 57 and 65 of the Criminal Procedure Code of BiH, it issued the respective search warrant. Furthermore, the Court of BiH states that it is a fact that the search of apartment amounts to a violation of the right to respect for private and family life, *i.e.* a violation of the right to respect for someone's home always involves an interference with someone else's „private life", which is the practice of the European Court of Human Rights. However, it is necessary to mention that this judicial instance establishes at the same time that this is admissible provided the existence of legal conditions, which conditions the Court of BiH found to be fulfilled in the present case. Also, the Court of BiH states that the execution of search warrant is the right and responsibility of the Prosecutor (Article 35(2) of the Criminal Procedure Code of BiH), whereby a Prosecutor can entrust authorized official persons with the execution of the search warrant under the supervision of authorized official persons and the Court of BiH took it into account when issuing the respective search warrant. Furthermore, as to the alleged violation of Article 4 of the Law on Access to Information of FBiH, the Court of BiH states that, on the same day on which he submitted the request for access to information, the appellant was notified that all evidence collected through the searches were forwarded to the BiH Prosecutor's Office and he was advised to address the Prosecutor's Office in this regard. With regard to the action of the authorized official persons, in its reply, the Court of BiH states that the records on the search do not assert that the appellant made any complaint whatsoever regarding the action taken by the authorized official persons during the search.

18. In its reply to the appeal, the BiH Prosecutor's Office states that the search warrant was issued by the Court of BiH and that the BiH Prosecutor's Office does not find it necessary to provide detailed argumentation for the contents and reasoning of the request for issuance of the search warrant by the BiH Prosecutor's Office, as the same was decided by the Court of BiH.

19. In a very detailed reply to the appeal, including a number of documents attached thereto, the Ministry of Interior of the FBiH states that the members of the FBiH Police Administration along with the members of the Support Unit of the MoI of the Una-Sana Canton, after the operational plan prepared beforehand and approved (in secret), carried out the search. According to the allegations of the Ministry of Interior of the FBiH, the search was carried out in accordance with the law and in the presence of adult witnesses, the legal representative of the appellant and the appellant himself. Also, there was no use of force during the search, which is evident from the record that none of the aforementioned

persons made any objection. As to the action taken by the official persons during the search, the appellant had lodged a complaint and the Professional Standards Unit carried out an internal investigation and found that the complaint was ill-founded. Finally, it is stated that the results of the investigation were approved by the Office for Public Complaints of the Ministry of the Interior of the FBiH, by its respective conclusion of 7 September 2009.

V. Relevant Laws

20. The **Criminal Procedure Code of Bosnia and Herzegovina** (*Official Gazette of BiH* nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05. 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 15/08, 58/08, 12/09, 16/09 and 93/09) as relevant reads:

Article 35
Rights and Duties

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

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

(...)

e) to issue summonses and orders and to propose the issuance of summonses and orders as provided under this Code;

f) to order authorized person to carry out order issued by Court in accordance with the law

(...)

Chapter VIII
ACTIONS AIMED AT OBTAINING EVIDENCE

Section 1 - SEARCH OF DWELLINGS OR OTHER PREMISES AND PERSONS

Article 51
Search of dwellings, other premises and personal property

(1) A search of dwellings and other premises of the suspect, accused or other persons, as well as his personal property outside the dwelling may be conducted only when there are sufficient grounds for suspicion that the perpetrator, the accessory, traces of a criminal offence or objects relevant to the criminal proceedings might be found there.

(2) Search of personal property pursuant to Paragraph 1 of this article shall include a search of the computer and similar devices for automated data processing connected with it. At the request of the Court, the person using such devices shall be obligated to allow

access to them, to hand over diskettes and magnetic tapes or some other forms of saved data, as well as to provide necessary information concerning the use of the devices. A person, who refuses to do so, although there are no reasons for that referred to in Article 84 of this Code, may be punished under the provision of Article 65 Paragraph 5 of this Code.

Article 52
Search of Persons

(1) The search of a person shall be permitted if it is likely that the person has committed a criminal offence or that through a search some objects or traces relevant to the criminal proceedings may be found with the person.

Article 53
A Search Warrant

(1) The Court may issue a search warrant under the conditions provided by this Code.

(2) A search warrant may be issued by the Court on the request of the Prosecutor or on the request of authorized officials who have been approved by the Prosecutor.

Article 54
A Form of the Request for the Search Warrant

A request for the issuance of a search warrant may be submitted in writing or orally. If the request is submitted in writing, it must be drafted, signed and certified in the manner as defined in Article 55 Paragraph 1 of this Code. The request for the issuance of a search warrant may be submitted in accordance with Article 56 of this Code.

Article 55
Contents of the Request for a Search Warrant

(1) The request for a search warrant must contain:

a) the name of the Court and the name and title of the applicant;

b) facts indicating the likelihood that the persons, or traces and objects referred to in Article 51 Paragraph 1 of this Code shall be found at the designated or described place, or with a certain person;

c) a request that the Court issue a search warrant in order to find the person in question or to forfeit the object.

(2) The request may also suggest that:

(a) the search warrant be made executable at any time of the day or night, because there is grounded suspicion that the search cannot be executed between the hours of 6:00 A.M. and 9:00 P.M., the property sought will be removed or destroyed if not seized

immediately, or the person sought is likely to flee or commit another criminal offence or may endanger the safety of the executing authorized official or another person, if not seized immediately or between the hours of 9:00 P.M. and 6:00 A.M.;

(b) the executing authorized official execute the warrant without prior presentation of the warrant, when there is grounded suspicion to believe that the property sought may be easily and quickly destroyed if not seized immediately, the presentation of such warrant may endanger the safety of the executing authorized official or another person or the person sought is likely to commit another criminal offence or may endanger the safety of the executing authorized official or another person.

Article 57
The Issuance of a Search Warrant

(1) If the preliminary proceedings judge determines that the request for a search warrant is justified, he shall grant the request and issue a search warrant.

Article 58
Contents of a Search Warrant

A search warrant must contain:

f) a description of the dwelling or other premises or person to be searched, by indicating the address, ownership, name or any other means essential for identification with certainty;

g) a direction that the warrant be executed between hours of 6:00 A.M. and 9:00 P.M., or, where the Court has specifically so determined, an authorization for execution thereof at any time of the day;

h) an authorization, where the Court has specifically determined, for the executing authorized official to enter the premises to be searched without giving prior notice;

i) a direction that the warrant and any property seized pursuant thereto be delivered to the Court without delay;

j) an instruction that the suspect is entitled to notify the defence attorney and that the search may be executed without the presence of the defence attorney if required by the extraordinary circumstances.

Article 59
Time of the Execution of a Search Warrant

(1) A search warrant must be executed not later than 15 days from the day of its issuance and it must thereafter be returned to the Court without delay.

(2) A search warrant may be executed on any day of the week. It may be executed only between the hours of 6:00 A.M. and 9:00 P.M., unless the warrant expressly authorizes execution thereof at any time of the day or night, as provided in Article 55 Paragraph 2 this Code.

Article 60
Procedure of the Execution of a Search Warrant

(1) Prior to the commencement of a search an authorized official must give notice of his authority and of the purpose of his arrival and show the warrant to the person whose property is to be searched or who himself is to be searched. If the authorized official is not thereafter admitted, he may resort to use of force in accordance with the law.

(2) In executing a search warrant that directs a search of a dwelling or other premises, an authorized official need not give notice to anyone of his authority and purpose, but may promptly enter the same, if such premises or vehicle is at the time unoccupied or reasonably believed by the authorized official to be unoccupied and if the search warrant expressly authorizes entry without notice.

(3) The occupant of the dwelling or other premises shall be called to be present at the search, and if he is absent, his representative or an adult member of the household or a neighbour shall be called to be present. If the occupant of the dwelling or other premises is not present, the search warrant shall be left in the premise subject to search, and the search shall be conducted without the presence of the occupant.

(4) A search of the dwelling or other premises or of the person shall be witnessed by two adult citizens. Witnesses of the same gender shall be present at the search of the person. Witnesses shall be instructed to pay attention as to how the search is conducted, and that they have the right to make comments before signing the record on the search if they believe that the content of the record is not truthful. .

Article 62
Recording the Search

(1) A record shall be made regarding every search of dwellings or other premises or person, which shall be signed by the person whose dwellings or other premises or who is being searched, and the persons whose presence is mandatory. In executing a search, only those objects and documents shall be seized that relate to the purpose of the search in that individual case. The record shall include and clearly identify the objects and documents that are the subject of seizure, which shall be indicated in a receipt immediately to be given to the person from whom the objects or documents are being seized.

(2) If, during a search of dwellings or other premises or a person, objects are found that are unrelated to the criminal offence for which the search warrant was issued, but

indicate another criminal offence, they shall be described in the record and temporarily seized and a receipt on the seizure shall be issued immediately. The Prosecutor shall be notified thereof. Those objects shall be returned immediately if the Prosecutor establishes that there are no grounds for initiating criminal proceedings, and there is no other legal ground for seizing the objects.

(3) The objects used in the search of the computer and similar electronic devices for automated data processing shall be returned to their users after the search, unless they are required for the further conduct of the criminal proceedings. Personal data obtained by the search may be used only for the purpose of the criminal proceedings and shall be deleted immediately after the purpose is fulfilled.

Article 63
Seizure of Objects under a Search Warrant

(1) Upon temporary seizure of objects pursuant to a search warrant, an authorized official must draft and sign a receipt indicating the objects seized and the name of the issuing Court.

(2) If an object has been temporarily seized from a person, the receipt referred to in Paragraph 1 of this Article must be given to that person. If an object has been seized from a dwelling or other premises, such receipt must be given to the owner, tenant or user, as applicable.

(3) Upon seizing objects pursuant to a search warrant, an authorized official must, without unnecessary delay, return to the Court the warrant and the property, and must file therewith a written inventory of the seized objects.

(4) Upon receiving objects seized pursuant to a search warrant, the Court shall either: retain it in the custody of the Court pending further disposition; or direct that it be held in the custody of the applicant for the warrant or of the authorized official who executed it.

Section 2 - SEIZURE OF OBJECTS AND PROPERTY

Article 65
Order for Seizure of Objects

(1) Objects that are the subject of seizure pursuant to the Criminal Code or that may be used as evidence in the criminal proceedings shall be seized temporarily and their custody shall be secured pursuant to a Court decision.

(2) The seizure warrant shall be issued by the preliminary proceedings judge on the motion of the Prosecutor or on the motion of authorized officials who have been approved by the Prosecutor.

(3) The seizure warrant shall contain the name of the Court, legal grounds for undertaking the action of seizure of objects, indication of the objects that are subject to seizure, the name of persons from whom objects are to be seized, place where the objects are to be seized, a timeframe within which the objects are to be seized, and notification of the right of the affected person to a legal remedy.

(4) The authorized official shall seize objects on the basis of the issued warrant.

(5) Anyone in possession of such objects must turn them over at the request of the preliminary proceedings judge. A person who refuses to surrender articles may be fined in an amount up to 50.000 KM, and may be imprisoned if he persists in his refusal. Imprisonment shall last until the article is surrendered or until the end of criminal proceedings, but no longer than 90 days. An official or responsible person in a state body or a legal entity shall be dealt with in the same manner.

(6) The provisions of Paragraph 5 of this Article shall also apply to the data stored in devices for automated or electronic data processing. In obtaining such data, special care shall be taken with respect to regulations governing the maintenance of confidentiality of certain data.

(7) An appeal against a decision on fine or on imprisonment shall be decided by the Panel. An appeal against the decision on imprisonment shall not stay execution of the decision.

(8) When articles are seized, a note shall be made of the place where they were found, and they shall be described, and if necessary, establishment of their identity shall also be provided for in some other manner. A receipt shall be issued for articles seized.

(9) Forceful measures referred to in paragraph 5 and 6 of this article may not be applied to the suspect or to persons who are exempt from the duty to testify.

VI. Admissibility

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

***Ratione materiae* admissibility**

22. In the instant case, the appellant complains that the search caused a violation of his right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention and 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.

23. The Constitutional Court reiterates that Article 5 of the European Convention, as a whole, relates to the protection of liberty, and specifically liberty from arbitrary arrest or detention. This Article does not offer protection from less grave forms of limitation of liberty such as application of traffic regulations, compulsory registration of foreigners or citizens, the major part of measures in relation to the supervision of persons released on parole, police curfew or other forms of supervision that do not seriously limit a man's freedom to move freely in the community. In the practice, the position has become quite clear that the issue of whether someone has been deprived of liberty is observed on a case by case basis. In the instant case, the appellant complains of limited freedom of movement since he and his family members were not able to get ready and go to work during the search. However, the Constitutional Court does not find that in the instant case, the search warrant the appellant challenges by the appeal, in any way brought into question the issue of right of the appellant as guaranteed by Article 5 of the European Convention and concludes that the allegations on violation of this right are *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

24. With regards to the appellant's allegation as to the violation of the right to a fair trial, the Constitutional Court reiterates that Article 6 of the European Convention, the appellant refers to, guarantees fair proceedings in „determination of civil rights and obligations or any criminal charges" against some person. Considering that in the instant case the appellant complains of search of his home and other listed items, that has been conducted based on the search warrant issued by the competent court, it is obvious that there was no determination of civil right and obligations or any charges within the meaning of Article 6 of the European Convention (*mutatis mutandis*, Constitutional Court, Decision on Admissibility and Merits no. *AP 3376/07* of 28 April 2010, published in the *Official Gazette of Bosnia and Herzegovina* no. 95/10, item 23). Therefore, this allegation is also *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

25. Taking into account the provisions of Article 16(4)(9) of the Rules of the Constitutional Court, according to which the appeal shall be rejected as inadmissible if it is *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina, the Constitutional Court decided as stated in the enacting clause of this decision in relation to this part of the appeal.

Admissibility in relation to the violation of the right under Article II(3)(b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3 and 8 of the European Convention

26. In the instant case, the appellant complains that his rights have been violated by unlawful search.

27. The Constitutional Court refers to Article 16(3) of the Rules of the Constitutional Court, according to which, exceptionally, the Constitutional Court may examine an appeal when there is no decision of a competent court if the appeal indicates a grave violation of the rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina or by the international documents applied in Bosnia and Herzegovina. Considering that the appeal in question indicates grave violation of the rights under the Constitution of Bosnia and Herzegovina and European Convention, the appeal is, according to the case-law of the Constitutional Court, admissible within the meaning of Article 16(3) (*op.cit, AP 3376/07*, item 29).

28. Finally, the appeal in this part meets the conditions under Article 16(2) and (4) of the Rules of the Constitutional Court, as it is not manifestly (*prima facie*) ill-founded nor is there any formal reason for which the appeal is not admissible.

29. Taking into account the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1),(2) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that this part of the appeal meets the admissibility requirements.

VII. Merits

30. The appellant complains that the search, which was conducted based on unlawful search warrant of the court with excessive use of force and threat and display of the same before the citizens in order to discredit the appellant, was in violation 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.

Right to private and family life and home

31. Article II(3)(f) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads:

3. Enumeration of Rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

f) The right to private and family life, home, and correspondence

32. Article 8 of the European Convention reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic 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.

33. The Constitutional Court emphasizes that the basic aim of Article 8 of the European Convention is to protect individuals from the authorities' arbitrary interference with their rights guaranteed under this article (see, ECtHR, *Kroon v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, paragraph 31). Article 8 of the European Convention protects the right of individual to respect for his home and provides that there shall be no interference by a public authority with the exercise of this right except in cases referred to in paragraph 2 of this Article.

34. The European Court established that the apartment search represents interference with the respect to right to home, private life and correspondence. In this regard, the European Court concluded that the Contracting States may consider it necessary to, in order to obtain physical evidence for some criminal offence, use measures such as search and property seizure. Although such measures, under normal circumstances, represent interference with the right of individual under paragraph 1 of Article 8 of the European Convention - private, family life or home - the reasons given for justification of such measures must be relevant and sufficient and proportionate to the aim sought to be achieved (see ECtHR, *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251). In order for „interference" to be justified it has to be „in accordance with the law". If it is established that the interference on the part of the public authorities was in conformity with the law, even then it can represent violation of Article 8 of the European Convention, if it is considered that it is not „*necessary"* in order to reach one of the legitimate goals under paragraph 2 of Article 8 of the European Convention. „Necessary" in this context

means that the „interference" matches „pressures related to social needs" and that there is a reasonable proportion between the interference and the legitimate goal sought to be achieved (see *Niemietz v. Germany).*

35. In its case-law, the European Court has noted that the expression „in accordance with the law", within the meaning of Article 8, para 2 requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law. Therefore, the European Court has emphasized that the term „law" is to be understood in its „substantive" sense, not its „formal" one. In the subject that is covered by a written law – a „law" that is in force is implemented by regular courts. In this regard, the European Court has noted that its power to review compliance with domestic law is limited, it being in the first place for the national authorities, notably the courts, to interpret and apply that law (see ECtHR *Petri Salinene v. Finland*, judgment of 27 September 2005, Application no. 50882/99). In addition, the European Court examined cases that relate to search without any search warrant (issued prior or after the search) and without any documents that would indicate legitimacy as well as any written or oral instruction by which the purpose and goal of search would be explained by the court authority. The European Court established a violation of Article 8 of the European Convention in cases in which the search and seizure of objects were conducted without any or adequate powers or measures of protection against arbitrary interference. According to the position of the European Court, the failure of national authorities to comply with rules of national legislation that regulate search shall lead to unlawfulness of such action for the purpose of Article 8 of the European Convention (see ECtHR*, Elci and Others v. Turkey*, application no. 23145/93 and 25091/95 of 13 November 2003). In addition, in one of its cases (see ECtHR, *Panteleyenko v. Ukraine*, application no. 11901/02 of 29 June 2006, paragraphs 50-53) the European Court concluded that there was a violation of Article 8 of the European Convention by referring to the conclusion of national courts presented in the decisions (that were challenged during procedure before the national courts, but not on that ground) that there was no compliance with procedural guarantees as provided for by the law as the search was concluded and search warrant was not served on the appellant, which is the legal condition, i.e. legal protection from arbitrariness in actions during the search, while the prosecutor was also aware the appellant was undergoing medical treatment. In addition, in one case, the European Court examined legality in relation to the allegations of the applicant (who was an attorney) that the search of office and seizure of items were illegal, as there was violation of Article of the Bar Act which protected the professional secrecy of lawyers. The European Court examined whether the search and seizure of items were „in accordance with the law" considering that

it was established that a Bar Act existed, that a lawyer's files and papers were inviolable and could not be checked or seized. The European Court has established that it does not seem that there exists any reported case-law clarifying the exact purview of this provision and, in particular, whether it prohibits the removal of material covered by legal professional privilege under all circumstances. It is therefore open to doubt whether the search and seizure were „in accordance with the law". However, the European Court has not found it necessary to determine this point as it has considered that these measures are incompatible with Article 8 of the Convention in other respects (see ECtHR, *Ilya Stefanov v. Bulgaria*, judgment of 22 May 2008, Application no. 65755/01).

36. Furthermore, the European Court has noted that in order to determine whether the measure of search and seizure of items is „necessary measure in a democratic society" it is examined in each individual case. Although the European Court has noted that the Contracting States are given a certain margin of appreciation, the exceptions under paragraph 2 of Article 8 of the European Convention should be interpreted closely. In this regard, the European Court has pointed out that in each case it examines whether the national law contains effective protection from arbitrariness. Elements that are to be considered are the gravity of criminal offence the warrant was issued for, whether the warrant issued by the judge is based on reasonable doubt, whether the aim of warrant is reasonably limited, whether the search was done in the presence of witnesses, circumstances under which the warrant was issued especially evidence accessible at that time, content of the warrant, as well as guarantees undertaken in order to limit the effect of the warrant to a reasonable proportion and scope of possible repercussions to the reputation of person affected by the warrant (see, *mutatis mutandis*, *Niemietz v. Germany*). The European Court has emphasized that the fact that the warrant was issued under the court order does not necessarily imply the compliance with Article 8 of the European Convention.

37. In the instant case, the Constitutional Court notes that the appellant was suspected of very grave offence - organized crime in connection with the offence of illicit narcotics trafficking and the grounds for suspicion (according to data available to the Constitutional Court) are based on the Report of the Crime Police Administration of the RS which was obtained through operations in the field. At the request of the Prosecution, the Court of BiH issued a warrant which ordered the search of appellant's apartment, car, mobile phones and computers, hard drives and other storage devices for detecting and seizure of items that encourage or can be brought into connection with the commission of the offence and traces of crime. The appellant considers the warrant as illegal and contests grounds for warrant and arbitrariness in the issuance by the Court of BiH, the grounds for the request lodged by the prosecution, as well as the manner of execution of the warrant itself.

38. First of all, when deciding whether the warrant is „in accordance with the law," the Constitutional Court notes that in this field it has a „wider" jurisdiction, i.e. it provides greater guarantees than the European Court and has jurisdiction to „enter" the issue of legality so as to determine whether a particular provision of the law is applied in an appropriate manner, or whether it is „in accordance with the law." In its decision no. *AP 3376/07* of 28 April 2010, the Constitutional Court found a violation of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and found that the search was illegal because the search warrant was not served on the appellant prior to the search. In that case, the Constitutional Court found that the search was conducted in the home of the appellant, the warrant did not specify the name of appellant but only name O.L. The appellant alleged (among other allegations that were declared ill-founded) that the warrant had not been served on her prior to the search of her home on the basis of which the search had been conducted. In this regard, the Constitutional Court referred to Article 60 of the Criminal Procedure Code (in that case Brčko District) that provides that *prior to the commencement of a search an authorized official must give notice of his authority and of the purpose of his arrival and show the warrant to the person whose property is to be searched or who himself is to be searched.* Invoking the allegations of the appellant in this case that the warrant of the Court of BiH was arbitrary and illegal because the provisions of Articles 51 and 57 of the Criminal Procedure Code were not complied with, the Constitutional Court will examine whether the warrant of the Court of BiH was „in accordance with the law." Taking into account the content of the warrant, the Constitutional Court notes that the Court of BiH issued the warrant (at the request of the Prosecutor's Office) in accordance with the provisions of Articles 51, 52, 53 and 65 of the Criminal Procedure Code „because of the reasonable suspicion that Goran Popović and others committed the act" of organized crime in connection with illicit narcotics trafficking, which followed from the Report of the RS Ministry of Internal Affairs, for the purpose of finding and seizing objects that are found during the search and originating in or that may result in connection with criminal offences or traces of the crime. The Constitutional Court notes that the warrant is based on Article 51 of the Criminal Procedure Code which states that the search of the dwelling or other premises may be *conducted only when there are sufficient grounds for suspicion that the perpetrator, accomplice, traces of a criminal offence or objects relevant to the criminal proceedings might be found there.* So, by invoking the content of Article 51 of the Criminal Procedure Code, the Constitutional Court observes that the reason or basis for the issuance of the warrant are grounds for suspecting that they will find something or someone (in this case objects relevant to criminal acts, or traces of the crime). This implies that when issuing a search warrant, *the court does not address the existence of grounds for suspicion that a crime was committed.*

Grounds for suspicion that a crime was committed are the „jurisdiction" of the Prosecution and that is a *conditio sine qua non* for issuing the warrant. It also means that after the prosecution establishes that there is a lower degree of suspicion (so-called „reason to suspect" – in the stage of investigation) that the offence has been committed if there is a probability that there is likelihood that something or someone can be found, it then submits a request for issuance of a search warrant but it must submit to the court the facts indicating the likelihood that the person or traces and objects (referred to in Article 51, paragraph 1) shall be found at the designated or described place or with a certain person. When issuing a search warrant, the court does not deal with the grounds for suspicion that a criminal offence was committed but must establish sufficient grounds for suspicion that the person searched or whose places are searched, contain certain objects, traces or persons. Since the Criminal Procedure Code contains the terms „grounds for suspicion", „likelihood", „well-grounded suspicion" - which could be graded differently in ordinary life, it is important to note that the „grounds for suspicion" is the lowest degree of suspicion, „well-grounded suspicion" is the degree of suspicion that the prosecution has when issuing the indictment (which implies a certain security) and the „likelihood" is found between these two degrees of suspicion. This also means that in order to issue a warrant, the court must have an even higher degree of suspicion that it will find something or someone through search than just a mere grounds for suspicion that the crime was committed. The reason why the court decides, or issues a search warrant, as well as the reason for this „higher degree of suspicion" in the investigation lies in the fact that it wants to protect the home, privacy and family life of persons the warrant relates to. Thus, the warrant that relates to certain persons (suspect, accused, but also to third parties) must contain minimum specific reasons that are reflected in the likelihood that they will find something or someone, which clearly stems from the content of the provisions of Articles 51, 54 and 57 of the Criminal Procedure Code. The Constitutional Court is also aware of the fact that during the investigation, which is highly sensitive and confidential, there is no need to present facts or evidence which would jeopardize the proceedings. However, after the search is conducted, there is no more „confidentially", i.e. the person is already familiar with the specific actions of the prosecution. Because of this, at this stage of proceedings the sole guarantor of human rights protection (right to home, privacy and family life) is the court's assessment of the probability that something will be found or the assurance of the court that the search is justified (Article 57 of the Criminal Procedure Code), and that „assurance„ of the court should be known to the person it relates to. Otherwise, the fact that the search is allowed due to „grounds for suspicion" that a criminal offence has been committed, would indeed lead to the possibility of arbitrariness or abuse and such measure could be converted into a means of confirming the existence of grounds for suspicion or reasonable suspicion that

a crime was committed. That would further open a possibility for anyone to be searched at any time. The Constitutional Court did not receive an assurance from the Court of BiH that it had sufficient grounds for suspicion that the search would result in finding something or someone, because the Court of BiH only refers to grounds for suspicion that appellant has committed the offence. Namely, the warrant offers grounds for suspicion that a crime was committed and the warrant clearly defined „target" of the warrant - to seek and seize items that encourage or can be correlated with criminal offences and traces of the crime but the warrant lacks „the essence of warrant" and „concretization" of *sufficient grounds for suspicion that the perpetrator, the accessory, traces of a criminal offence or objects relevant to the criminal proceedings might be found there.* Grounds for suspicion of a crime do not imply *a priori* likelihood of finding items and clues to the crime but the „likelihood" must be given in detail through a search warrant. These two concepts are essentially and linguistically different and the court cannot operate on „automatism" and, if there are grounds for suspicion of a criminal offence, allow search warrant. In addition, as provided for by the case-law of the European Court, the Contracting States have a wide margin of appreciation in regulating national legislation but when the law prescribes a certain condition, then the same must be complied with. Otherwise, each request for search of someone or something could be deemed justified with a minimum degree of suspicion of committed crime, so judicial review would only „formally exist" without the effective protection and with loss of a sense of legal control and justification conducted by the courts for issuance of warrant.

39. Furthermore, the Constitutional Court notes that the appellant claims that even two years and three months after the search the seized items were not returned and no other action was taken by the authorities. The Constitutional Court notes that the provision of Article 71 of the Criminal Procedure Code provides that the opening and inspection of the seized objects and documentation shall be done by the prosecutor, with the obligation to notify the person from whom the objects were seized as well as the preliminary proceedings judge and the defence attorney. Also, in accordance with Article 74 of the Criminal Procedure Code there is an obligation that the objects that have been seized shall be returned to the owner once it becomes evident that their retention is contrary to Article 65, i.e. there are no reasons for their seizure under Article 391 of the Criminal Procedure Code (cases where the judgment of acquittal is adopted but the interests of public safety and morals require retention of items).

40. In addition to these allegations, the Constitutional Court notes that the appellant claimed, after he was sent a response to the appeal submitted by the Court of BiH, Prosecutor's Office and Federal Ministry of Interior, that neither he nor his lawyer signed

any record of search. However, having in mind the previous conclusions, the Constitutional Court does not find it necessary to engage in further aspects of the „legality".

41. In assessing the above, the Constitutional Court concludes that in this case the procedure of issuing a search warrant for search of the appellant and his apartment-house and others as specified by the search warrant of the Court of BiH, did not satisfy the criterion of „interference in accordance with the law" under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. The process of issuing the search warrant was not conducted in accordance with the relevant regulations, given that the Court of BiH did not give reasons that it had sufficient grounds for suspecting that the search will result in finding something with the appellant or in his apartment-house, car, mobile or computer, which is a necessary condition for the issuance of a search warrant.

42. Accordingly, the Constitutional Court concludes that there has been a violation of the appellant's right to respect for home, private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

43. Taking into account that the warrant of the Court of BiH was „conducted" or completed, and taking into account the appellant's allegation that he suffers damages from this action of the Court of BiH and competent persons who have carried out the search, the Constitutional Court finds that the established violation is a sufficient satisfaction for the appellant and decided as stated in the enacting clause.

Other allegations

44. The Constitutional Court notes that the appellant stated that there was a violation of his right not to be subjected to torture and inhumane treatment. In connection with these allegations, the Constitutional Court observes that they essentially relate to the manner of execution of search warrant, due to the large number of officers present and the weapons they carried. However, given the conclusion of violation of the right to home, the Constitutional Court considers that there is no need to separately examine the allegation of violation of Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention.

VIII. Conclusion

45. The Constitutional Court concludes that there has been a violation of the appellant's right to respect for home, private and family life since the warrant of the Court of BiH

based on which the search was conducted, lacked a minimum of concretization in terms of existence of reasons suggesting that there exists a likelihood that someone (perpetrator or accomplice) or something (the traces of a criminal offence or objects relevant to the proceedings) would be found with the appellant, which clearly stems from the content of the provisions of the Criminal Procedure Code and represents a guarantee of justification for issuing a search warrant.

46. Pursuant to Article 16(4)(9) and Article 61(1) and (2) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 2900/09

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Ms. Tereza Usar against the Ruling of the Cantonal Court in Mostar no. 58 0 P 025328 08 Gž of 21 February 2008 and the Ruling of the Municipal Court in Mostar no. 07 58 P 025328 07 P of 22 January 2008

Decision of 13 June 2012

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Grand Chamber and composed of the following judges:

Ms. Valerija Galić, President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mirsad Ćeman

Mr. Zlatko M. Knežević

Having deliberated on the appeal of Ms. **Tereza Usar**, in case no. **AP 2900/09**, at its session held on 13 June 2012, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Ms. Tereza Usar is hereby granted.

A violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Ruling of the Cantonal Court in Mostar no. 58 0 P 025328 08 Gž of 21 February 2008 is quashed.

The case shall be referred back to the Cantonal Court in Mostar, which is obliged to take a new decision in an expedited procedure, in accordance with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Cantonal Court in Mostar is ordered, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to inform the Constitutional Court of Bosnia and Herzegovina, within three

months as from the date of the delivery of this Decision, of the measures taken with a view to enforcing this Decision.

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

Reasoning

I. Introduction

1. On 17 March 2008, Ms. Tereza Usar („the appellant") from Mostar, represented by Nikica Vučina, a lawyer practicing in Mostar, lodged initially an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Ruling of the Cantonal Court in Mostar („the Cantonal Court") no. 58 0 P 025328 08 Gž of 21 February 2008 and the Ruling of the Municipal Court in Mostar („the Municipal Court") no. 07 58 P 025328 07 P of 22 January 2008. The appeal was registered under number AP 816/08.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Municipal Court and the Cantonal Court were requested on 19 March 2008 to submit their respective replies to the appeal.

3. The Municipal Court submitted its reply to the appeal on 31 March 2008 and the Cantonal Court did so on 4 April 2008 respectively.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies of the Municipal Court and the Cantonal Court were communicated to the appellant on 15 July 2008.

5. On 14 October 2008, the Constitutional Court adopted a Decision no. AP 816/08 rejecting the mentioned appeal as premature, as the procedure on the appellant's revision-appeal lodged with the Supreme Court of FBiH („the Supreme Court") was still pending.

6. The appellant lodged an appeal on 14 September 2009 against the Ruling of the Supreme Court no. 58 0 P 0025328 08 Rev of 28 July 2009 rejecting her revision-appeal for formal reasons, which was registered under number AP 2900/09.

III. Facts of the Case

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

8. On 11 June 2007, the appellant submitted a petition (which the court registered as a lawsuit) before the Municipal Court for the establishment of the existence of a common-law marriage pursuant to Article 3 of the Family Law of BiH, with a view to exercising the right to a family pension. By a Ruling no. 07 58 P 025328 07 P of 23 July 2007 the Municipal Court remitted the lawsuit to the appellant to supplement it giving her instructions, among other things, that she should state her legal interest for filing the lawsuit because, among other things, a lawsuit does not allow to establish whether the facts related to a specific right or relation exist or not.

9. On 14 August 2008, the appellant submitted to the court a specified lawsuit against the defendants an underage I.U., Igor Usar and Ana Usar („the defendants"), as legal heirs of their late father Ivan Usar, for the establishment of the existence of a common-law marriage, wherein she stated as the legal basis for the lawsuit Article 3 of the Family Law of BiH and Article 54(2) of the Law on Civil Procedure.

10. The Ruling of the Municipal Court no. 07 58 P 025328 07 P of 22 January 2008 rejected the appellant's lawsuit and quashed all the actions undertaken in the respective legal matter. The reasoning of the ruling reads that it follows from the appellant's lawsuit that she had lived in a common-law marriage with Ivan Usar from the beginning of July 1992 to 24 September 1993 when he got killed; that during the common-law marriage their child, underage I.U., was born (who is the first-defendant in the respective proceedings); that the second-defendant and third-defendant are the children of the late Ivan Usar and Milja Usar who were born in a marriage that ended by the Judgment of the Basic Court in Mostar no. P.1725/88 of 21 November 1988; that the appellant holds that Ivan Usar, who had had an engagement in the Croatian Defense Council forces, secured her the right to a family pension following his death, and that the establishment of the existence of a common-law marriage is necessary for her to exercise the right arising from pension insurance.

11. In that respect, the Municipal Court stated that a lawsuit for establishment may require the establishment of a right or legal relation, or authenticity or inauthenticity of a public document when provided so by special regulations, or when a plaintiff has a legal interest in establishing the existence of a right or legal relation, or authenticity or inauthenticity of a document before the request for action arising from that relation becomes due. Further, it

was stated that based on a letter of the Croatian Pension Insurance Fund, Zagreb Regional Office, it follows that the appellant sought that her right to a family pension be recognized and that, in connection thereto, the appellant was required to submit along with the rest of documentation the ruling establishing the status of a common-law marriage with Ivan Usar. In that respect, the Municipal Court stated that the respective letter is not binding on that court, and that in the respective proceedings the competent administrative body may itself resolve the issue of the existence of a common-law marriage as a preliminary legal issue in accordance with Article 144 in conjunction with Article 142(1) of the Law on Administrative Procedure (*Official Gazette of FBiH*, no. 2/98), or if it concerns a civil procedure under the provisions of Article 12(1) and (2) of the Law on Civil Procedure.

12. The Municipal Court further stated that the petition for the establishment of the existence of a common-law marriage constitutes a request for the establishment of facts and not rights or a legal relation, thus the lawsuit is inadmissible in that sense, since the establishment of facts is not allowed in lawsuits seeking establishment. It was stated that the court has no authorization to establish autonomously any facts, but only the facts that are the basis for adopting a decision on the existence of personal, family, property and other rights and legal interests of certain persons. As there was no legal relation in the case at hand between the appellant and Ivan Usar, because the common-law marriage is not a bond regulated by law between certain persons on the basis of which one may institute a litigation, instead it concerns a factual situation of a union of a man and woman who are not married living together (Article 3 of the Family Law of FBiH), the Municipal Court rejected the appellant's lawsuit as inadmissible.

13. The appellant lodged an appeal against the mentioned ruling with the Cantonal Court, which dismissed the appeal as ill-founded by the Ruling no. 58 0 P 025328 08 Gž of 21 February 2008 and upheld the first-instance ruling. In the reasoning of the ruling the Cantonal Court stated that Article 54 of the Civil Procedure code prescribes that the plaintiff may request in the lawsuit that the court establishes the existence or lack of a right or legal relation, or the authenticity or inauthenticity of a document. It was stated that it followed therefrom that the subject-matter of a lawsuit seeking establishment may be only a specific, i.e. existing right or a legal relation, whereby the plaintiff must have a legal interest for filing a lawsuit, which exists in cases where a lawsuit seeking establishment of a legal relation is used to remove uncertainty or a dispute on the substance of that relation, or where a threat exists that the defendant might endanger, through one's conduct, the exercise of the right of the plaintiff in the near future. As the present relation does not concern, in the opinion of the Cantonal Court, the establishment of the existence or lack of a right or legal relation, but the establishment of a fact of the existence of a common-

law marriage, the respective lawsuit is inadmissible, therefore the appellant's allegations stated in the appeal that her right to property and other rights were denied cannot be accepted for the aforementioned reasons. The reason being that the appellant, according to the reasoning of the Cantonal Court, may exercise her rights to property in a special procedure before a court, where she would prove that she had acquired certain property with Ivan Usar, whom with she had lived in a common-law marriage, and thus seek the conveyance or division of such property.

14. The appellant lodged a revision-appeal against the mentioned ruling with the Supreme Court, which, by the Ruling no. 58 0 P 0025328 08 Rev of 28 July 2009, rejected the revision-appeal as inadmissible thereby referring to the provisions of Article 237(2) of the Law on Civil Procedure, according to which the revision-appeal is inadmissible if the value of the challenged part of the legally binding judgment does not exceed the amount of BAM 10,000.00. In the case at hand the value of the dispute was given in the amount of BAM 1,000.00. The revision-appeal is inadmissible also because the mentioned court held that the revision-appeal should not be admitted exceptionally through the application of the provision of Article 237(3) of the Civil Procedure code, because the decision-making on the revision-appeal is not of relevance for the application of law in other cases.

IV. Appeal

a) Allegations stated in the appeal

15. The appellant holds that the challenged rulings violated her right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), as well as her right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. The appellant sees the violation of the mentioned rights in the erroneously established facts of the case and the erroneous application of the substantive law. The appellant alleges that the first-instance court failed to provide the reasons in the challenged ruling why it did not accept her allegations and the factual basis of the claim. The appellant holds that she was denied the right of access to court, because her claim was not discussed despite the fact that marriage and common-law marriage were equalized in terms of rights to maintenance and obligations and relations, which is the reason why she holds that the courts had the competence to establish the existence of a common-law marriage.

b) Reply to appeal

16. In its reply to the appeal, the Cantonal Court stated that there was no violation of the rights in the procedure before that court, which the appellant alleged in the appeal, as Article 54 of the Civil Procedure code did not allow the establishment of facts.

17. In its reply to the appeal, the Municipal Court stated that there was no violation of the rights that the appellant alleged in the appeal, as the request for the establishment of the existence of a common-law marriage constitutes a request for the establishment of facts, and not a request for the establishment of rights or a legal relation, as well as that there was no legal relation between the appellant and the late Ivan Usar, as the common-law marriage is not a union regulated by law, but only a factual status of a union of coexistence of a man and a woman.

V. Relevant Law

18. The **Civil Procedure code of FBiH** (*Official Gazette of FBiH,* nos. 53/03, 73/05 and 19/06), in its relevant part reads as follows:

Article 12, paragraphs 1 and 2

(1) When the court's decision depends on a preliminary decision regarding the existence of a certain right or legal relation, and such a decision has not yet been made by a court or another competent body (preliminary issues), the court itself may resolve the issue unless otherwise stipulated by special regulations.

(2) The court's decision on a preliminary issue shall have legal effect only in the civil proceedings in which that issue has been solved.

2. Lawsuit seeking establishment

Article 54

(1) The plaintiff may request in a lawsuit that the court establishes only the existence or non-existence of a right or legal relation or the authenticity or inauthenticity of a document.

(2) Such a lawsuit may be filed when the special regulations so prescribe or when the plaintiff has the legal interest that the court establishes the existence or non-existence of a right or legal relation or authenticity or inauthenticity of a document before the maturity of the claim arising from that relation.

(3) If the decision on a dispute depends on the existence or non-existence of a legal relationship which became disputable in the course of the litigation, the plaintiff may, in addition to the existing claim, request the court to determine whether such a relation exists or not, if the court conducting the litigation is competent to decide on such a claim.

(4) Claims under Paragraph 3 of this Article shall not be considered as an alteration of the initial complaint.

19. The **Family Law of FBiH** (*Official Gazette of FBiH,* no. 35/05), in its relevant part reads as follows:

Article 2

A family, under this Law, is a union of parents and children and other blood relatives, in-laws, adoptive parents and adoptees and persons from a common-law marriage if they live together in the same household.

(1) The regulation of family relations is based on the following:

a) The protection of privacy of family life;

b) The equality, mutual help and respect of family members;

c) The obligation of parents to ensure the protection of interests and welfare of a child and their responsibility in rearing, upbringing and educating a child;

d) The obligation of the State to ensure the protection of a family and a child;

e) Providing guardianship to children without parental care and to adults who are unable to look after themselves, their rights, interests and property.

Article 3

A common-law marriage, under this Law, is a union of a woman and a man who are not married to or in a common-law marriage with another person, which has lasted for a minimum of three years or less if they have a child out of that union.

Article 213

(1) Mutual maintenance of marital and common-law partners, parents and children and other relatives is their duty and right when so stipulated by this Law.

(2) In cases where mutual maintenance of persons referred to in paragraph 1 of this article cannot be realized in entirety or in part, the social community shall provide, under conditions set forth by law, to uninsured family members the funds necessary for maintenance.

(3) Waiving one's right and duty shall have no legal effect.

Article 214

Persons referred to in paragraph 1 of Article 213 of this Law shall contribute to the mutual maintenance commensurately with their respective ability and needs of a dependent.

Article 230

(1) A common-law partner who meets conditions under Articles 3 and 224 of this Law shall be entitled to maintenance by the other common-law partner after the cessation of a common-law marriage.

(2) A lawsuit for maintenance referred to in paragraph 1 of this article may be filed within one year from the cessation of a common-law marriage.

Article 231

A court may dismiss a claim for maintenance of a common-law partner if he/she has behaved rudely or inappropriately in the common-law marriage without a serious cause by the other common-law partner, or if the obligation of maintenance should constitute an apparent injustice to the other common-law partner.

Article 232

(1) The court may decide for the obligation to maintain a common-law partner to last for a certain period of time, particularly in the case where the maintenance seeker is able to secure the means for living in another way in due time.

(2) In justified cases the court may extend the obligation of maintenance.

(3) A lawsuit seeking the extension of maintenance may be filed only before the expiry of the period of time for which the maintenance has been determined.

Article 233

The right to maintenance shall cease when the dependent common-law partner enters into marriage, or enters into a new common-law marriage, or becomes unworthy of that right, or if some of the reasons laid down in Article 224 of this Law no longer exist.

Article 234

A father of a natural child has a duty, commensurate with his abilities, to maintain the mother of his child during the three months period prior to the birth and one year after the birth, if the mother looks after the child and has no sufficient means for living.

Article 263

(1) Property that the common-law partners have acquired through work during the common-law marriage, which meets requirements under Article 3 of this Law, shall be considered their property from common-law marriage.

(2) The provisions of this Law on marital property shall apply to the property referred to in paragraph 1 of this article.

Article 380

(1) Marital partners, common-law marriage partners and all family members shall be entitled to protection against domestic violence.

(2) Police, guardianship body and the Misdemeanor Court are obliged to provide protection against violent behavior.

(3) All physical and legal persons are obliged to notify a competent police administration immediately upon learning of violent behavior.

VI. Admissibility

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

21. In accordance with Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

22. While examining the admissibility of the present appeal within the meaning of Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court recalls that, by the Decision on Admissibility no. AP 816-08 of 14 October 2008, it rejected as premature the appellant's earlier appeal lodged against the Ruling of the Cantonal Court no. 58 0 P 025328 08 Gž of 21 February 2008 and the Ruling of the Municipal Court no. 07 58 P 025328 07 P of 22 January 2008, because a decision on revision-appeal before the Supreme Court had not been adopted at the time of the adoption of the mentioned decision by the Constitutional Court. Given that the Ruling of the Supreme Court no. 58 0 P 0025328 08 Rev of 28 July 2009 rejected the revision-appeal as inadmissible for formal reasons, the final decision in this case is the Ruling of the Cantonal Court no. 58

0 P 025328 08 Gž of 21 February 2008. Therefore, in accordance with its case-law the Constitutional Court (see Constitutional Court, Decision no. *AP 2884/06* of 10 January 2008, available at the website of the Constitutional Court www.ustavnisud.ba), takes into account as the relevant date of lodging the appeal the date when the appeal, which was rejected as premature, was lodged. Given that the appellant received the mentioned Ruling of the Cantonal Court on 27 February 2008, and the appeal no. AP 816/08 was lodged on 17 March 2008, it follows that the appeal was lodged within a time limit of 60 days as prescribed by Article 16(1) of the Rules of the Constitutional Court, thereby meeting the admissibility requirement. Finally, the Constitutional Court holds that the appeal meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court, for it is neither manifestly (prima facie) ill-founded, nor is there any other formal reason rendering the appeal inadmissible.

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

VII. Merits

24. The appellant challenges the mentioned rulings claiming that the said rulings violated her rights under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, and under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

Right to a fair trial

25. Article II(3) of the Constitution of Bosnia and Herzegovina, in the relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

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

Article 6(1) of the European Convention, in the relevant part, reads:

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. […]

26. As to the appellant's allegations on the violation of the right to a fair trial over erroneous application of the substantive law, the Constitutional Court points out that according to the case-law of the European Court and of the Constitutional Court, these courts are not called upon to review the conclusions of ordinary courts regarding facts of the case and application of the substantive and procedural law (see the European Court, *Pronina v. Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01). Namely, the Constitutional Court does not have jurisdiction to substitute ordinary courts in assessing facts and evidence, but, generally speaking, it is the responsibility of the ordinary courts to assess facts and evidence they presented (see the European Court, *Thomas v. United Kingdom*, Judgment of 10 May 2005, Application no. 19354/02). It is the responsibility of the Constitutional Court to examine whether the constitutional rights were violated or disregarded (the right to a fair trial, the right of access to court, the right to an effective legal remedy etc.), and whether the application of the law was possibly arbitrary or discriminatory. Thus, within the scope of appellate jurisdiction, the Constitutional Court exclusively tackles the issues of possible violations of constitutional rights or rights referred to in the European Convention in the proceedings before the ordinary courts. Accordingly, in the present case, the Constitutional Court will examine whether the proceedings as a whole were fair, as required by Article 6 paragraph 1 of the European Convention (see the Constitutional Court, Decision No. *AP 20/05* of 18 May 2005, published in the *Official Gazette of BiH,* no. 58/05).

27. The appellant holds that the Municipal Court and the Cantonal Court had applied arbitrarily the material provisions of Article 54 of the Civil Procedure code. Therefore, the appellant claims that there was arbitrariness in the application of regulations, which falls under the scope of a fairness of proceedings (see, e.g. Decision of the Constitutional Court no. *AP 1293/05* of 12 September 2006, paragraph 25 *et seq*.). The appellant also holds that the challenged decisions denied her access to court.

28. The Constitutional Court observes that the competent courts rejected the appellant's petition for the establishment of the existence of a common-law marriage, referring to the provisions of Article 54 of the Civil Procedure code thereby providing a reasoning that a lawsuit seeking establishment cannot seek the establishment of facts. In that respect, the Constitutional Court recalls that the disputed Article 54 of the Civil Procedure code, among other things, prescribes that the *plaintiff may request in a lawsuit that the court establishes only the existence or non-existence of a right or legal relation or the authenticity or inauthenticity of a document,* and that Article 3 of the Family Law of FBiH stipulates that *a common-law marriage, under this Law, is a union of a woman and a man who are not married or in a common-law marriage with another person, which has*

lasted for a minimum of three years or less if they have a child out of that union. Besides, Articles 213, 230 through to 234, 263 and 380 of the Family Law prescribe the manner for the maintenance of common-law marriage partners and children from the common-law marriage, their property relations and the procedure of protection against domestic violence.

29. On the basis of the provisions of Article 213 of the Family Law, it is clear, among other things, that mutual maintenance of common-law marriage partners is an obligation and right, as prescribed by the Law, and that waiving one's right and obligation of maintenance has no legal effect. Also, on the basis of the provisions of Articles 230 through to 234 of the Family Law, which regulate in detail the maintenance of common-law marriage partners, it follows that upon the cessation of a common-law marriage, a partner who meets conditions under Articles 3 and 224 of this Law may file a lawsuit for maintenance within one year from the day of the cessation of the common-law marriage. In addition, on the basis of the contents of the provisions of Article 2 of the Family Law it is evident that the legislator itself did not make any distinction between a marriage and a common-law marriage in respect of a legal relation. Namely, that provision stipulates that *a family, under this Law, is a union of parents and children and other blood relatives, in-laws, adoptive parents and adoptees and persons from a common-law marriage if they live together in the same household.* Therefore, the Constitutional Court holds that it follows undisputedly from the mentioned provisions of the Family Law regulating relations between common-law marriage partners, that a life in common-law marriage implies certain rights and obligations, and hence the existence of *a legal relation* between the persons who live or who had lived in a common-law marriage.

30. Additionally, as it follows from the reasons of the challenged rulings, ordinary courts concluded that the appellant may file such a claim only as a preliminary legal issue in some other civil or administrative procedure related to the exercise of other rights. In the opinion of the Constitutional Court, such inconsistency in considering that issue and the comprehension by the ordinary courts (in a sense that they consider the said issue to be simultaneously the establishment of facts and a preliminary issue), is contradictory with the very definition of the term „preliminary issue" in a manner in which it was provided in Article 12(1) of the Civil Procedure code, which the ordinary courts referred to in the challenged decisions. Namely, according to the mentioned provision, a preliminary issue implies precisely the issue of *whether a right or legal relation exist*, that is to say not a fact, and prescribes that *the court itself may resolve the issue unless otherwise stipulated by special regulations*. Since the ordinary courts themselves had concluded in the challenged decisions that the case concerned a preliminary issue, namely the establishment of

whether a right or legal relation exist, it follows that, through the consistent application of the provisions of the Civil Procedure code (Articles 12 and 54), they were authorized and competent to examine whether the present case met conditions for the mentioned establishment, i.e. to decide on the merits of the appellant's claim.

31. In addition, the Constitutional Court observes that the appellant does not seek in the case at hand the exercise of a right (which is in any way whatsoever related to the existence of a common-law marriage) in FBiH, but in the Republic of Croatia, which stems from the Notification issued by the Croatian Pension Insurance Fund – Zagreb Regional Unit dated 16 February 2007 – with which the appellant filed a claim for the exercise of a right to a family pension and which requested from the appellant the submission of a ruling „establishing the common-law marriage". Considering the aforementioned, the Constitutional Court holds that references made by the ordinary courts to national regulations (the provisions of the Law on Administrative Procedure of FBiH and the Civil Procedure code of FBiH) are related to the resolution of a legal matter in the Republic of Croatia, thus referring the appellant *to obtain a ruling establishing a common-law marriage* in another state, and not in hers, is – to say the least – ill-founded.

32. In view of all the aforementioned, the Constitutional Court holds that the ordinary courts applied arbitrarily in the case at hand the provisions of Articles 12 and 54 of the Civil Procedure code, thereby interpreting that the common-law marriage is considered to be a fact and not a legal relation, which is in direct collision with the relevant provisions of Articles 2, 213, 230 through to 234, 263 and 380 of the Family Law, which point to the existence of a legal relation between the common-law marriage partners.

33. Therefore, the Constitutional Court holds that the appellant's right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention was violated.

Other allegations

34. Bearing in mind that the violation of the right to a fair trial was established in the foregoing paragraphs, the Constitutional Court holds that it is not necessary to consider separately the appellant's allegations as to the violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

VIII. Conclusion

35. The Constitutional Court concludes that there is a violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention in the event where the competent courts applied arbitrarily the provisions of Articles 12 and 54 of the Civil Procedure code in the appellant's case, thereby interpreting that the establishment of the existence of the common-law marriage is considered to be the establishment of a fact and not of a legal relation, since not a single legal provision refers to such an interpretation, but, instead it follows to the contrary from the provisions of Articles 2, 213, 230 through to 234, 263 and 380 of the Family Law that this case concerns a legal relation.

36. Pursuant to Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 1381/12

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Nihad Bojadžić against the rulings of the Court of Bosnia and Herzegovina nos. S1 1 K008494 12 Kv of 7 February 2012 and S1 1 K008494 11 Kro of 16 January 2012

Decision of 19 July 2012

CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(4)(14), Article 59(2)(2), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), as a Grand Chamber and composed of the following judges:

Ms. Valerija Galić, President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić

Mr. Zlatko M. Knežević

Having deliberated on the appeal of Mr. **Nihad Bojadžić** in case no. **AP 1381/12,** at its session held on 19 July 2012 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Nihad Bojadžić is partially granted.

A violation of Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Rulings of the Court of Bosnia and Herzegovina nos. S1 1 K008494 12 Kv of 7 February 2012 and S1 1 K008494 11 Kro of 16 January 2012 are hereby quashed.

The case shall be referred back to the Court of Bosnia and Herzegovina which is obligated to employ an expedited procedure and take a new decision in accordance with Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court of Bosnia and Herzegovina is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 8 days from the

date of delivery of this Decision, about the measures taken to execute this Decision, as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal lodged by Mr. Nihad Bojadžić against the Rulings of the Court of Bosnia and Herzegovina nos. S1 1 K008494 12 and Kv of 24 January 2011 of 7 February 2012 and S1 1 K008494 11 Kro of 16 January 2012 is hereby dismissed as inadmissible in respect of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, by reason of being premature.

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

Reasoning

I. Introduction

1. On 13 April 2012, Mr. Nihad Bojadžić („the appellant"), represented by Vasvija Vidović and Edina Rešidović, the lawyers practicing in Sarajevo, filed an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the rulings of the Court of Bosnia and Herzegovina („the Court of BiH") nos. S1 1 K008494 12 Kv of 7 February 2012 and S1 1 K008494 11 Kro of 16 January 2012. On 10 May 2012 the appellant supplemented his appeal.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22 (1) and (2) of the Rules of the Constitutional Court, on 24 April 2012 the Court of BiH and the Prosecutor's Office of Bosnia and Herzegovina („the Prosecutor's Office of BiH") were requested to submit their respective replies to the appeal.

3. The Court of BiH and the Prosecutor's Office of BiH submitted their replies to the appeal on 11 and 7 May 2012, respectively.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 18 May 2012.

III. Facts of the Case

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

6. On 4 November 2009 the appellant was deprived of liberty and, based on the ruling of the Court of BiH no. X-KRN-09/786 of 5 November 2009 („the ruling of 5 November 2009"), he was ordered into detention for the reasons referred to in the provisions of Article 132(b) and (d) of the Criminal Procedure Code of Bosnia and Herzegovina („the CPC of BiH"). During the proceedings, the appellant was ordered into detention also for the reasons referred to in the provisions of Article 132(1)(a) of the CPC of BiH. The Prosecutor's Office of BiH filed several indictments against the appellant (with charges involving War Crimes against Civilians and War Crimes against Prisoners of War in the area of Konjic). The Court of BiH joined the cases relating to the indictments and commenced a main trial on 14 September 2010. In addition, pursuant to Article 137(1) of the CPC of BiH, the Court of BiH was reviewing the justifiability of the appellant's detention on a bimonthly basis and was extending his detention based on its rulings.

7. On 29 December 2011 the Prosecutor's Office of BiH filed a new indictment charging the appellant with the commission of the criminal offence of War Crimes against Civilians under Article 173(1) items (c), (e) and (f) of the Criminal Code of Bosnia and Herzegovina („the CC of BiH") and of the criminal offence of War Crimes against Prisoners of War under Article 175(1) items (a) and (b) of the CC of BiH (the area of Jablanica). Along with the indictment, the Prosecutor's Office of BiH filed a motion for issuing a detention order.

8. By its Ruling no. S 1 1 K 008494 Kro of 16 January 2012, the Court of BiH issued the detention order for the appellant based on the existence of specific grounds for detention referred to in Article 132(1) items (a), (b) and (d) of the CPC of BiH. In the Ruling it was determined that the appellant's detention commenced on the date when the detention ordered by the Ruling of 5 December 2009 had expired or had been terminated and that it could last until the completion of the main trial but no longer than three years from the date when the detention had commenced and that the review of the appellant's detention would be carried out every two months.

9. As to a grounded suspicion that the appellant had committed the criminal offenses as charged, the Court of BiH reasoned that the grounded suspicion ensued from the confirmed

indictment and particularly from the testimonies of witnesses „I", „F", „E", „H", „D" and „J", who were under the witness protection programme, the statements made by witnesses K.M. and F.R., and suspect A.I., as well as from the statements made by other witnesses and the substantive evidence.

10. As to the justification of the appellant's detention on the grounds referred to in Article 132(1)(a) of the CPC of BiH, the Court of BiH reasoned that the appellant holds dual citizenship, meaning that he is simultaneously a citizen of BiH and of the Republic of Serbia, which, according to its positive legislation, does not extradite its own nationals to other states. In addition, the Court of BiH reasoned that the defendant, after the confirmation of the indictment, was fully aware of the gravity of the charges against him, as reflected in the scope and complexity of the criminal acts and the punishment set for such offences. The aforementioned unambiguously indicated that the appellant had a strong motive to flee to the territory of the Republic of Serbia, thereby making further trials against him impossible. Such a position exists also in the case-law of the Constitutional Court in case no. *AP 6/08* (see, Constitutional Court, Decision on Admissibility and Merits, *AP 6/08* of 13 May 2008, published in the *Official Gazette of BiH* no. 49/08), which reads: *...The gravity of the criminal offence a suspect or an accused person is charged with is the decisive element in assessing the justification of his/her detention.* All the reasons mentioned by the Prosecutor's Office of BiH, *i.e.* the appellant's dual citizenship, the fact that the appellant's brothers live in Novi Pazar and have a good financial standing, the fact that the appellant is a pensioner, divorced and does not live with his children, are sufficient to believe that the appellant, if released, could flee or hide. The Court of BiH pointed out that the mere fact relating to the appellant's dual citizenship does not constitute a sufficient ground for the appellant's detention. However, taking into account the aforementioned facts as a whole, it is clear that the appellant has strong ties with the Republic of Serbia and that his fleeing and staying in that country could be considerably facilitated to that end.

11. As to the grounds for detention referred to in Article 132(1)(b) of the CPC of BiH, the Court of BiH pointed out that it was necessary to hear a large number of witnesses in the relevant case, in particular, the victims who asked to be under witness protection programme because they feared the appellant or they expressed concerns for their personal safety or for the safety of their families. In this regard, witness „B" stated that he did not want that his name was mentioned during the proceedings and that the appellant committed a lot of offences during the war. In addition, witness „F" stated that he feared the appellant's reaction, given the appellant's strong influence in Jablanica, and that it was necessary to ensure the confidentiality of the witness's personal data. Furthermore, in the present case it is essential that there is a justified fear to believe that the appellant, if released, would

hinder the inquiry by influencing his accessories or accomplices, as certain number of the suspects were interrogated in the present case and one of them, A.I., in presenting his defence, showed an intense fear, stating the following: „I fear for my family's safety, for my wife and children's safety there in Jablanica, as well as for the safety of my brothers who live in Novi Pazar… The fact is that the appellant's family lives in Novi Pazar and his family is very powerful and the appellant, regardless of his detention, has his people on the ground." In addition, according to the Ruling of the Court of BiH of 5 December 2009, it follows that the appellant exerted pressure on the witnesses in that case, so that he requested witness „O" not to tell the truth and, in return, he would give that witness money; the appellant also threatened to kill the witness's children. The Court of BiH pointed out that graffiti writings displayed in many public places in Jablanica, containing the following wordings: „Zuka is a victim of show trail", „Justice for Zuka", *etc*. in the situation where the majority of the heard witnesses was aware that the appellant had been a member of „Zuka's Unit" (Deputy Commander), were a kind of pressure exerted on the witnesses and accomplices who had certain information on incriminating events. In fact, the graffiti showed the direction to be follow by the witnesses in making their statements and, as a result, the witnesses experienced anxiety, unease and fear. The aforementioned also follows from the statement made by witness „L", being under the witness protection programme. Furthermore, the evidence to confirm the indictment was secured at that stage of the proceedings, whereas the main trial did not commence and the witnesses should be given an opportunity to give their testimonies without fear of revenge, threats and pressure, which could occur if the appellant were released. The Court of BiH stated that it was not necessary to prove the specific pressure exerted on the witnesses, as it was sufficient that all the circumstances surrounding the case raised a well-grounded suspicion that undue influence could occur.

12. Giving the reasons for considering that the detention was justified on the grounds referred to in Article 132(1)(d) of CPC of BiH, the Court of BiH stated that it took into account the gravity of the criminal offences the appellant was charged with and the punishments set for such offences (a term of imprisonment of not less than 10 years or long-term imprisonment). In addition, the Court of BiH stated that it also took into account that the relevant criminal offences were among the gravest offences, as they were the crimes against the values protected by both domestic and international law. Furthermore, the crimes committed in the imprisonment center at *Bitka na Neretvi* Museum have had the profound and the most far-reaching consequences for the survivors, the victims and their relatives, as corroborated in the testimonies presented to the Court of BiH. This state of fear did in no way contribute to the successful conduct of these proceedings and additionally aggravate the return of the Croat population to the area of Jablanica.

Moreover, there existed an extraordinary consequence relating to the statements made to the media by the President of the Croatian Association of Concentrations Camp Prisoners and the former President of the War Presidency of the Municipalities of Konjic, Jablanica and Prozor, so that there were two different truths about the incriminated events, which showed that the public was interested in the criminal proceedings. Taking into account the appellant's role in the relevant events and the fact that at the time the appellant had been the Deputy Commander of „Zuka's Unit", his release could create a negative public atmosphere and evoke feelings of fear and uncertainty, as it ensued from the statement made by witness „L", who underlined that he had already experienced some difficulties and that on Christmas Day last year he had found a knife stuck in the door of his home.

13. The Court of BiH stated that it considered, in accordance with the obligation under Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), the possibility of applying more lenient measures to guarantee the appellant's appearance before the Court. However, the Court of BiH was of the opinion that no other security measure apart from detention could ensure the effective and efficient conduct of the proceedings.

14. By the Ruling of the Court of BiH no. S1 1 K008494 12 Kv of 7 February 2012, the appellant's appeal was partially granted and the first instance ruling was modified so that the appellant was ordered into detention for the reasons referred to in the provisions of Article 132(1) items (a), (b) and (d) of the CPC of BiH, which, according to the said ruling, started running as of the date of expiry or termination of the appellant's detention determined by the Ruling of 5 December 2009 and could last no longer than three years as of the date on which the indictment in the relevant case was confirmed. By the same ruling it was determined that on the date on which the detention determined by the Ruling of 5 December 2009 expired or was terminated and after hearing the appellant, the Court of BiH would review the grounds of the appellant's detention and assess the justification of the appellant's further detention.

15. As to the complaints in the appeal that the CPC of BiH does not recognise a mechanism of double detention, *i.e.* the detention that has a suspensive effect, the Court of BiH notes that the CPC of BiH does not prohibit it. Reasons for determining a detention depend on the specific facts of each case and are assessed accordingly. In the case-law of the Court of BiH there are certain cases involving the detention that has a suspensive effect, where the detention is determined for suspects at large or where international arrest warrants are issued and, in such cases, the time from which the period of detention is calculated is the date and hour at which that suspect is deprived of liberty, including the indication that, immediately after the arrest, the suspect will be brought promptly before a

judge in accordance with Article 5 of the European Convention and Article 131(2) of the CPC of BiH. Pursuant to the provisions of Article 123 of the CPC of BiH, *i.e.* the purpose of ordering a detention, and taking into account that the detention, as a measure securing the appellant's appearance and the effective and efficient conduct of the proceedings, had already been imposed on the appellant, the preliminary proceedings judge took into account that its purpose was satisfied and determined in the enacting clause that the detention had a suspensive effect. According to that ruling, the detention was calculated as of the date on which the detention determined by the Ruling of 5 December 2009 expired or was terminated. As to the length of detention, the Court of BiH stated that the appellant correctly indicated that the detention, according to the first instance ruling, could last until the main trial was completed, as the provisions of Article 137(2)(d) stipulated that after the confirmation of an indictment and before the first instance verdict was pronounced, the detention may not last longer than three years. Consequently, the Court of BiH modified that part of the decision of the first instance court. In addition, the Court of BiH stated that it indicated in the enacting clause of the ruling concerned that the Court of BiH would review the grounds of the detention and assess the justification of the appellant's further detention on the date on which the detention determined by the Ruling of 5 December 2009 expired or was terminated and after hearing the appellant, all in accordance with Article 5 of the European Convention. Therefore, the appeal was partially granted in respect of both, the length of detention and the obligation by the court to review, after the expiry or termination of the detention and in the presence of the appellant, the grounds of the appellant's further detention and thus prevented an automatic application of the ruling, whereby the requirements of Article 5 of the European Convention were fully satisfied.

16. The Court of BiH pointed out that the first instance court correctly concluded that the general requirement for detention was satisfied, *i.e.* that there was a reasonable suspicion that the appellant had committed the criminal offenses as charged, and according to the case-law of the European Court of Human Rights, „having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence". In the present case, taking into account that the indictment had been confirmed, the first instance court applied the standards of the European Court of Human Rights. As to the grounds for detention referred to in the provisions of Article 132(1)(a) of the CPC of BiH, the Court of BiH stated that the first instance ruling was correct, as there existed the reasons indicating that the appellant, if released, would go into hiding, *i.e.* there were other circumstances indicating that there existed a risk of his fleeing. As to the appellant's objection that the risk of fleeing must be realistic, the Court of BiH stated that there was a real risk that the appellant would abscond, as thoroughly reasoned in the first instance ruling. As to the

grounds for detention referred to in the provisions of Article 132(1)(b) of the CPC of BiH, the Court of BiH stated that the first instance ruling was correct, as it presented the facts sufficiently clear and precise that had been assessed separately and together. Namely, in the course of the proceedings, several witnesses („B" an „F"), who were under the witness protection programme, expressed fears for their and their families' safety, so it was correctly established in the first instance ruling that at that stage of the proceedings it was necessary to ensure that the witnesses could testify freely and without fear of reprisals, threats and pressure, which could happen if the appellant was released. As to the complaints that the court had twice assessed the same facts, as it had referred to the circumstances of specific influence exerted on the witnesses in the earlier case, the Court of BiH pointed out that the complaints were unfounded, as those facts in the relevant case had been assessed only in the context of the appellant's character and behaviour and not in the context of concretisation of influence on witnesses, as the ground for detention required under the provisions of Article 132(1)(b) of the CPC of BiH. The Court of BiH underlined that the Constitutional Court, in case No. *AP 6/08* of 13 May 2008, established the standard that there was a violation of Article II(3)(d) of Constitution of Bosnia and Herzegovina and Article 5(3) of the European Convention in case where the appellant's detention was ordered based on fear that the appellant would exert influence over witnesses and thus would hinder the criminal proceedings, but such fear was not substantiated by specific and valid reasons that would objectively indicate that the appellant attempted or that there was a serious risk that he would attempt to exert influence on witnesses. In fact, the decision was based merely on the assumptions made by the court due to the nature and severity of the offence the appellant had been charged with. Therefore, the existence of special circumstances indicating the possibility of such influence is sufficient, so that it is unnecessary to prove a specific influence, since a serious risk or justified indication of such a risk suffices.

17. As to the grounds for detention referred to in the provisions of Article 132(1)(d) of the CPC of BiH, the Court of BiH stated that the first instance ruling was correct, as the general requirement for detention was satisfied since the punishments set for the criminal offences the appellant had been charged with included a term of imprisonment of not less than 10 years or long-term imprisonment. In addition, the criminal offences involve the crimes against values protected by both domestic and international law, which have had the profound and the most far-reaching consequences for the survivors, the victims and their relatives, so that the state of fear does in no way contribute to the successful conduct of these proceedings and additionally aggravates the return of the Croat population to the area of Jablanica. Furthermore, there is an extraordinary consequence relating to

the statements made to the media by the Croatian Association of Concentrations Camp Prisoners, providing one interpretation of the incriminated events, which shows that the public is interested in the criminal proceedings, so that the release may create a negative public atmosphere and evoke feelings of fear and uncertainty among large parts of the population.

18. As to the complaints relating to the possibility of applying more lenient measures to guarantee the appellant's appearance before the Court, the Court of BiH stated that the first instance ruling was correct, as no other security measure apart from detention could ensure the effective and efficient conduct of the proceedings.

IV. Appeal

a) Allegations of the appeal

19. The appellant considers that the challenged rulings are in violation of his right to personal liberty and security under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention, 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, his right under Article 9 of the International Covenant on Civil and Political Rights and his right under Article 3 of the Universal Human Rights Declaration (the rights referred to in the aforementioned documents stipulate the right to personal liberty and security). The appellant alleges that the Court of BiH arbitrarily applied the provisions of procedural law where ordering the „double detention" that has a suspensive effect. Namely, in the challenged ruling, the Court of BiH states that it concerns „a consistent practice of the Court of BiH", according to which this type of detention is ordered for suspects at large or where international arrest warrants are issued, but even if it is so, the appellant is neither at large nor an international arrest warrant is issued against him. Pursuant to the provisions of Article 131(1) of the CPC of BiH, *detention may be ordered only under the conditions prescribed by this Code*, and *the special grounds referred to in the provisions of Article 132(1) items (a), (b) and (d) of the CPC of BiH must exist at the time when the ruling is issued*. However, by the challenged rulings the appellant's detention is determined for some future time, so that it is impossible to know whether such grounds will exist then. Pursuant to the provisions of Article 131(5) of the CPC of BiH, a detention is to be terminated as soon as the grounds for which it was ordered cease to exist and, therefore, how is it possible to apply the mentioned provision in his case, if his detention is determined under the circumstances in respect of which their future existence is assumed. The Court of BiH should have rejected the motion by the Prosecutor's Office

for issuing the detention order, since the CPC of BiH does not recognise a mechanism of double detention, as admitted also by the Court of BiH, which arbitrarily concludes that whatever is not prohibited it may be applied to him. The Court of BiH was obliged first to check and to establish whether the detention relating to the other case would last and for how long and, only then, if it expired or was terminated, the Court should assess the grounds for detention. The appellant points out that his allegations are corroborated by the Ruling of the Court of BiH No. X-KR-05/58 of 28 July 2006 (Momčilo Mandić), where the Court rejected the motion filed by the Prosecutor's Office as premature, as the accused person had already been detained on other grounds. In addition, the positions taken by other countries uphold the aforementioned, as follows: „Taking into account that the accused is detained based on the court's decision in another criminal case, it is neither necessary nor admissible to decide about a deprivation of his liberty in parallel proceedings, as in the present case. The court conducting the parallel criminal proceedings against the same accused person, the first instance court in the present case, is obliged to review the situation and to establish whether the detention relating to the other case will last and for how long and, only then, if the detention in that case is terminated, the court is to assess the existence of the grounds for detention and, possibly, to order the detention against the accused person" (see, Z. Đurđević, D. Tripalo: „Duration of detention in the light of international standards").

20. The appellant also alleges that the challenged rulings do not offer the reasons why it was not possible in the specific case to apply more lenient measures to him, which is in contravention of the provisions of Article 131 of the CPC of BiH and of the Resolution on Detention adopted by the Ministers' Deputies of member States. In addition, ordering the detention on the basis that the appellant poses a flight risk is not justified by specific facts and valid reasons. The question is how it can be determined that the appellant is a flight risk, given that the appellant is already detained based on the ruling of the Court of BiH issued in another case. Furthermore, the appellant's dual citizenship and his real property in the respective country are the circumstances that are in contravention of the established case-law. Also, the gravity of the criminal offence concerned, as well as his marital status, are not the circumstances indicating that he poses a flight risk. Moreover, the witnesses' statements that contain no specific information do not represent such a risk. The appellant states that the investigation of the events that took place in Jablanica has been ongoing since 2004 and that all the witnesses have already been heard in the course of investigation and that he has been held in detention for more than two years and six months. Consequently, according to the appellant, the position that he can influence the further proceedings is ill-founded. In the appellant's view, the Court of BiH erroneously construed the Decision of the Constitutional Court No. *AP 6/08* and incorrectly acted where it twice assessed the

same facts in two different cases so that, even if those facts were proved, they could not be used as the grounds for detention in another case. In addition, the appellant challenges the existence of the special grounds for detention referred to in the provisions of Article 132(1)(d) of the CPC of BiH. According to the appellant, the position of the Court of BiH is ill-founded that the detention on those grounds may be ordered by reason of the amount of punishment prescribed and the gravity of the criminal offence at issue, as there must exist special circumstances, whereas the crime that was committed fifteen years earlier cannot constitute the special circumstances, it must be something new, actual and something that happened recently. The appellant points out the standpoint of the European Court of Human Rights in the case of *I.A. versus France*, that *the nature and seriousness of the offence were not in themselves sufficient to justify the detention on that ground*.

21. The appellant also alleges that there is a violation of his right to a reasoned decision in violation of Article 6 of the European Convention and that, consequently, there is a violation of his right to personal liberty and security safeguarded by the provisions of Article 5 of the European Convention.

22. In his supplement to the appeal, upon a request by the Constitutional Court, the appellant submitted a summary of his appeal and requested that *the provisional measure referred to in the appeal be granted*, whereas the appellant requested in his appeal, in terms of Article 24(4) of the Rules of the Constitutional Court, that an expedited procedure be applied in his case.

b) Reply to the appeal

23. According to the Court of BiH, there is no breach of domestic or international legal standards in the present case, as the appellant *de facto* does not suffer a substantial detriment as a consequence of the impugned rulings, given that all deficiencies of the first instance ruling have been eliminated by the final and binding ruling, so that, after the expiry or termination of the detention following the hearing of the appellant, the Court will review the necessity of the measure of detention imposed on the appellant and will adopt a decision and allow an appeal against the decision by the appellant. Thus, contrary to the appellant's allegations, an automatic application of the ruling determining the appellant's detention was prevented, as determined in the first instance ruling. In addition, the appellant incorrectly indicates that the Court failed to assess the application of more lenient measures. On the contrary, the Court „found" that no other security measure apart from detention could ensure the effective and efficient conduct of the proceedings. Therefore, the Court fully maintained its reasoning on the existence of the special circumstances. In view of the above, the Court of BiH stated that the appeal was ill-founded.

24. The Prosecutor's Office of BiH points out that it issued five indictments and that the cases were joined according to the indictments, so that the case of Z.A. a.k.a. Zuka were joined, too, and one joint main trial started on 14 September 2010. In addition, the Prosecutor's Office of BiH states that on 29 December 2011 it issued the indictment against the appellant, charged with committing the criminal offences in the area of Jablanica. The Court of BiH correctly decided to issue the order of detention against the appellant, *i.e.* the Court took into account all of the former rulings extending the appellant's detention, which were also enclosed with the indictment. In this case, the Court decided independently of the detention in the other case, wherein the Prosecutor's Office of BiH presented new facts and, therefore, the appellant's assertion that the Court of BiH twice assessed the same facts is ill-founded. The Court of BiH correctly decided that it was not possible to conduct a single proceeding, pursuant to Article 25 of the CPC of BiH, on the two indictments that had been upheld, as the proceedings were at different stages and joining those proceedings would call into question the right to a fair trial within a reasonable time and there would be a risk of endangering the appellant's right to defend himself. The Prosecutor's Office of BiH proposed that the appeal be rejected as manifestly (*prima facie*) ill-founded.

V. Relevant Law

25. The **Criminal Procedure Code of BiH** (*the Official Gazette of BiH* nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09 and 93/09), as relevant, reads:

Article 131
General Provisions

(1) Custody may be ordered or extended only under the conditions prescribed by this Code and only if the same purpose cannot be achieved by another measure.

(2) Custody shall be ordered or extended by a decision of the Court issued on the motion of the Prosecutor after the Court has heard the suspect or the accused regarding the circumstances surrounding the grounds for proposed custody, except in the case prescribed by Article 132(1) a) of this Code.

(3) The Prosecutor shall submit to the Court a reasoned proposal to extend custody no later than five days before the expiration of the deadline set in the decision on ordering custody. The Court shall forward the proposal to the suspect or the accused and his defence attorney without delay.

(4) The duration of custody must be reduced to the shortest necessary time. It is the duty of all authorities participating in criminal proceedings and of agencies extending them legal aid to proceed with particular urgency if the suspect or the accused is in custody.

(5) Throughout the proceedings, custody shall be terminated as soon as the grounds for which it was ordered cease to exist, and the person in custody shall be released immediately. Upon proposal of the accused or defence attorney for termination of custody that is based on new facts, the Court shall hold a hearing or panel session, of which the parties and defence attorney shall be notified. The failure of duly summoned parties or the defence attorney to appear shall not prevent the hearing or panel session from being held. An appeal against the decision dismissing the motion to terminate custody shall be allowed. If the motion is not based on new facts relevant to the termination of custody, the Court shall not issue a separate decision.

Article 136
Termination of Custody

(1) In the course of the investigation and before the expiration of the custody, the preliminary proceedings judge may terminate custody by the decision upon hearing from the Prosecutor. Against the decision, the Prosecutor may file an appeal to the Panel referred to in Article 24 Paragraph 7. The Panel shall be bound to reach a decision within 48 hours.

Article 137
Custody after the Confirmation of the Indictment

(1) After the confirmation of indictment, custody may be ordered, extended or terminated. The review of justification of the custody shall be carried out upon the expiration of each two (2) month period following the date of issuance of the most recent decision on custody. The appeal against this decision shall not stay its execution.

(2) After the confirmation of an indictment and before the first instance verdict is pronounced, the custody may not last longer than: […]

d) three years in the case of a criminal offense for which a punishment of long-term imprisonment is prescribed.

(3) If, during the period referred to in Paragraph 2 of this Article, no first instance verdict is pronounced, the custody shall be terminated and the accused released.

Article 227
Contents of Indictment

[…]

(3) If the suspect is not detained, it may be proposed in the indictment that he be detained, and if the suspect is already detained, it may be proposed to extend the detention or that he be released.

VI. Admissibility

26. 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.

27. Pursuant to Article 16(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant has been served on him.

a) Admissibility in respect of Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention

28. In the present case, the subject matter of the appeal is the Ruling of the Court of BiH no. S1 1 K008494 12 Kv of 7 February 2012 against which there is no other effective remedy available under the law. Furthermore, the appellant received the challenged Ruling on 13 February 2012 and the appeal was filed on 13 April 2012, *i.e.* within 60 day time-limit, as provided for by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court because it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason that would render the appeal inadmissible.

29. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16 (1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal meets the admissibility requirements.

b) Admissibility in respect of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention

30. The appellant holds that the Rulings to impose the detention on him are in violation of his right to a fair trial.

31. As to the allegations relating to a violation of the right to a fair trial, the Constitutional Court recalls that it has already taken a clear position in its case-law that the question whether an appellant has or will have a fair trial before ordinary courts cannot be answered while the proceedings are underway. According to the case-law of the Constitutional Court and the European Court of Human Rights, the issue involving the fairness of proceedings must be determined based on the proceedings as a whole. Taking into account the complexity of the

criminal proceedings, possible failures and shortcomings, which may appear at one stage of the proceedings, may be remedied at a later stage of the proceedings. In view of this, it is not possible, in principle, to establish whether the criminal proceedings have been fair until the proceedings are finalised by a legally binding decision (see, the European Court of Human Rights, *Barbera, Meeseque and Jabardo v. Spain*, judgment of 6 December 1988, Series A no. 146, paragraph 68; the Constitutional Court, Decision no. *U 63/01* of 27 June 2003, paragraph 18, published in the *Official Gazette of Bosnia and Herzegovina* no. 38/03).

32. In the present case, the criminal proceedings against the appellant have not been finalised and, at the time when the appeal was filed, only the procedural decisions imposing the detention on the appellant were passed. In this regard, the Constitutional Court notes that the challenged rulings do not concern „the determination of criminal charges" against the appellant, within the meaning of Article 6(1) of the European Convention.

33. In view of the above, the Constitutional Court concludes that the appeal at hand is premature in the part pertaining to the appellant's allegations that the challenged rulings are in violation of 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.

34. Having regard to Article 16(4), item 14 of the Rules of the Constitutional Court, the Constitutional Court establishes that this part of the present appeal does not meet the admissibility requirements.

VII. Merits

35. The appellant claims that the challenged rulings are in violation of his rights under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention.

36. Article II(3)(d) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include: […]

d) The rights to liberty and security of person. […]

37. Article 5 of the European Convention, as relevant, reads:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

[...]

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable 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;

[...]

38. In the present case the appellant considers that the impugned rulings ordering his detention are in violation of his right to personal liberty and security under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention. In this regard, the Constitutional Court recalls that it has highlighted in a number of its decisions that the right to personal liberty and security is considered to be one of the most important human rights and that Article 5 of the European Convention provides protection so that no one may be arbitrarily deprived of liberty. The arbitrariness in deprivation of liberty is to be primarily assessed with regards to the compliance with procedural requirements of law applied in the instant case and that is the Criminal Procedure Code of BiH, which has to be adjusted to the standards of the European Convention. The fundamental principle is that an arbitrary detention is inconsistent with Article 5(1) of the European Convention and that the notion of „arbitrariness" in Article 5(1) extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see ECHR, *Saadi v. the United Kingdom* (VV), No. 13229/03, para 67, of 29 January 2008).

33. The Constitutional Court will assess the appellant's allegations that the Court of BiH, by the impugned rulings, unlawfully imposed the detention on the appellant, *i.e.* that it concerns the „double detention", *i.e.* that it is the detention that has a suspensive effect. In this regard, the Constitutional Court recalls that the appellant's detention was determined by the impugned rulings, so that the ruling passed upon the appeal determined that the first instance ruling was to be modified in the way that the appellant's detention was based on the grounds referred to in the provisions of Article 132(1)(a), (b) and (d) of the CPC of BiH and started running as of the date of expiry or termination of the appellant's detention determined by the ruling of 5 December 2009 and could last no longer than three years as of the date on which the indictment in the relevant case was confirmed. By the same ruling it was determined that on the date on which the detention determined by the ruling of 5 December 2009 expired or was terminated and after hearing the appellant, the Court of BiH would review the grounds of the detention and assess the justification of the appellant's further detention.

40. As to the objection raised by the appellant, it follows from the reasoning in the impugned ruling that the CPC of BiH does not prohibit the determination of a detention that has a suspensive effect, whereas the grounds for ordering the detention are assessed on a case-by-case basis. In addition, in the case-law of the Court of BiH there are certain cases involving the detention that has a suspensive effect, where the detention is determined for suspects at large or where international arrest warrants are issued. In such cases, the time from which the period of the detention is calculated is the date and hour at which that suspect is deprived of liberty. It is also indicated that, immediately after the arrest, the suspect will be brought promptly before a judge in accordance with Article 5 of the European Convention and Article 131(2) of the CPC of BiH. The detention with suspensive effect was correctly determined, after ascertaining the existence of the reasonable suspicion and special grounds for detention, and the detention, according to the relevant ruling, was to be calculated as of the date on which the detention determined by the ruling of 5 December 2009 expired or was terminated. Furthermore, it was determined in the ruling that the Court of BiH would review the grounds of the detention determined by that ruling and assess the justification of the appellant's further detention on the date on which the detention determined by the ruling of 5 December 2009 expired or was terminated, and after hearing the appellant, in accordance with Article 5 of the European Convention. By the impugned ruling, an automatic application of the ruling was prevented, whereby the requirements of Article 5 of the European Convention were fully satisfied.

41. Before a further assessment, the Constitutional Court points out the case-law of the European Court of Human Rights in case *Šebalj versus Croatia* (see, ECHR, *Šebalj versus Croatia*, Judgment of 28 June 2011, Application No. 4429/09), wherein the European Court of Human Rights held that a violation of the applicant's right to liberty under Article 5(1) of the European Convention occurred, as the applicant's detention was unlawful. According to the European Court of Human Rights, *to detain a person after the maximum statutory period for his detention has expired, on the basis of a detention order issued in parallel criminal proceedings, without such detention being based on a specific statutory provision or clear judicial practice, is incompatible with the principle of legal certainty and arbitrary, and runs counter to the fundamental aspects of the rule of law*.

42. In addition, the European Court of Human Rights, in the case of *Baranowski versus Poland* (see, ECHR, *Baranowski versus Poland*, Judgment of 28 March 2000, Application No. 28358/95), established a violation of Article 5(1) of the European Convention. Namely, the applicant was lawfully arrested and charged with fraud and detained on remand at the investigation stage. After the bill of indictment was lodged by the Prosecutor, the lawfulness of his detention was not reviewed. According to a Polish courts' practice,

„placing a detainee at the disposal of a court", the period of detention fixed at the investigation stage is prolonged for an indefinite period of time. The court was not obliged to give, of its own motion, any further decision as to whether the period of detention fixed at the investigation stage should be prolonged. Such a practice is certainly and reasonably developed in response to the statutory lacuna, but there is nothing to support it either by law or case-law. In this case, the court found a violation of Article 5(1) of the European Convention, as the test of „foreseeability" of a „law" was not satisfied and the principle of legal certainty was not complied with, thereby creating room for arbitrariness.

43. Therefore, the European Court of Human Rights established a violation of Article 5(1) of the European Convention where the detention on the basis of a detention order issued in parallel criminal proceedings and the prolongation of the detention for an indefinite time were not based on clear legal provisions and case-law. The Criminal Procedure Code of BiH stipulates as follows: *Custody may be ordered or extended only under the conditions prescribed by this Code and only if the same purpose cannot be achieved by another measure. Custody shall be ordered or extended by a decision of the Court issued on the motion of the Prosecutor after the Court has heard the suspect or the accused regarding the circumstances surrounding the grounds for proposed custody, except in the case prescribed by Article 132(1) a) of this Code. The duration of custody must be reduced to the shortest necessary time. It is the duty of all authorities participating in criminal proceedings and of agencies extending them legal aid to proceed with particular urgency if the suspect or the accused is in custody. Throughout the proceedings, custody shall be terminated as soon as the grounds for which it was ordered cease to exist, and the person in custody shall be released immediately. The Prosecutor shall submit to the Court a reasoned proposal to extend custody no later than five days before the expiration of the deadline set in the decision on ordering custody. The Court shall forward the proposal to the suspect or the accused and his defence attorney without delay. Upon proposal of the accused or defence attorney for termination of custody that is based on new facts, the Court shall hold a hearing or panel session, of which the parties and defence attorney shall be notified. The failure of duly summoned parties or the defence attorney to appear shall not prevent the hearing or panel session from being held. An appeal against the decision dismissing the motion to terminate custody shall be allowed. If the motion is not based on new facts relevant to the termination of custody, the Court shall not issue a separate decision.* Given that the present case concerns the motion for issuing a detention order filed along with the indictment, the Constitutional Court notes that the provisions of Article 227(3) of the CPC of BiH stipulate as follows: *If the suspect is not detained, it may be proposed in the indictment that he be detained, and if the suspect is already detained,*

it may be proposed to extend the detention or that he be released, and that the provisions of Article 137(2)(d) of the CPC of BiH stipulate as follows: *After the confirmation of an indictment and before the first instance verdict is pronounced, the custody may not last longer than: […] three years in the case of a criminal offense for which a punishment of long-term imprisonment is prescribed.*

44. Therefore, the relevant provisions do not stipulate anything relating to the situation where a suspect, *i.e.* an accused person is detained on the basis of a detention order issued in the criminal proceedings against him/her, whereas the motion for issuing a detention order relates to other criminal proceedings, meaning that there is such a procedural situation in which the proceedings cannot be joined and the requirements for detention are satisfied in respect of both proceedings. In the present case, the appellant is detained on the basis of ruling of 5 November 2009 and charged with the criminal offences for which a punishment of long-term imprisonment is prescribed under the CPC of BiH, so that the maximum statutory period for his detention is three years. However, the impugned rulings determine the detention where the former detention has expired or has been terminated, and the impugned ruling upon the appeal determines that the appellant will be heard on the date of expiry or termination of the appellant's former detention and the court will review the reasons for which the detention has been ordered and decide whether the appellant's further detention is justified. According to the reasons offered in the impugned ruling, the CPC of BiH does not prohibit a detention that has a suspensive effect and in the case-law of the Court of BiH there are certain cases involving the detention that has a suspensive effect, where the detention is ordered for suspects at large or where international arrest warrants are issued. Hence, it is certain that the appellant's detention was ordered in the new criminal proceedings on the basis of the motion for issuing a detention order filed along with the indictment, although the appellant was already in detention relating to the former criminal proceedings, and it is clear that the CPC of BiH lacks the provisions governing such a situation. The Constitutional Court recalls that the safeguards under Article 5 of the European Convention are of vital importance and that they afford the protection against arbitrary deprivations of liberty, so that a deprivation of a person's liberty must be in accordance with the provisions of domestic substantive and procedural laws. Therefore, the fact that the CPC of BiH does not prescribe that a detention order can be issued in parallel criminal proceedings, *i.e.*, that a new detention order can be issued while the person has already been placed in detention, is not corroborated by the well-founded reasoning by the Court of BiH, so since „the CPC of BiH does not prohibit", it is allowed. The Constitutional Court's opinion is directly contrary to the aforementioned, anything that is not prohibited by the CPC of BiH cannot and must not be interpreted to

the detriment but in favour of the appellant in the present case. Thus, the reasoning of the Court of BiH does not fulfil the requirement of „foreseeability" and is inconsistent with the principle of legal certainty, thereby creating room for arbitrariness, which is prohibited in terms of Article 5(1) of the European Convention in the case relating to the orders of detention. Furthermore, reference by the Court of BiH to certain cases where the detention is ordered for suspects at large or where international arrest warrants are issued, is unclear, as the appellant is held in detention, *i.e.* the appellant is not free, nor is there an arrest warrant issued against him.

45. The Constitutional Court recalls that the general provisions on detention stipulate that detention may be ordered only under the conditions stipulated by law and, given that detention is the most severe measure foreseen to ensure the presence of defendants and successful conduct of criminal proceedings, it may be ordered only if the same purpose cannot be achieved by another measure. In addition, the Court recalls that detention can last no longer than is necessary, *i.e.* it must be terminated as soon as the grounds for which it was ordered cease to exist, and the person held in detention must be released immediately. The purpose of ordering the appellant's detention based on the impugned rulings to ensure the presence of the appellant in the criminal proceedings while he is already being held in detention is indeed questionable. Furthermore, according to the general provisions, detention will be ordered or extended by a decision of the Court issued on the motion of the Prosecutor, whereas the provisions on the termination of detention stipulate the obligation of the Court to hear the Prosecutor. According to the provisions on contents of the indictment, if the suspect is not detained, it may be proposed in the indictment that he/she be detained, and if the suspect is already detained, it may be proposed to extend the detention or that he be released. In the present case, the appellant has already been held in detention and, based on the impugned rulings, a different detention order has been issued in parallel criminal proceedings. In addition, the Constitutional Court holds that it concerns the same criminal offences, *i.e.* in the former criminal proceedings the appellant was accused of war crimes committed against civilians and war crimes committed against war prisoners in the area of Konjic, while in the later proceedings he was accused of the same crimes committed in the area of Jablanica, so that it is certain that the Court of BiH and the Prosecutor's Office of BiH have acted in both criminal proceedings. Despite the aforementioned, the Court of BiH has adopted the impugned rulings, so that there are currently two rulings ordering the detention in two different criminal proceedings. Indeed, the impugned rulings order the detention that has a suspensive effect, meaning that the detention will start to run immediately from the point at which the previous detention is either terminated or expires, which is not provided for in the CPC of BiH. In addition, the Court of BiH had no basis in a case-law for adopting the impugned rulings, because,

as stated above, it is vague why the Court of BiH, in the reasoning, made reference to certain cases involving the detention ordered for suspects at large or where international arrest warrants were issued, where the appellant was in detention, *i.e.* he was neither at large nor was an arrest warrant issued against him. Therefore, there is neither an express legal provision nor case-law in the present case. Taking into account the aforementioned, the Constitutional Court holds that, in procedural and legal terms, two parallel rulings ordering or extending the detention cannot exist, *i.e.* the court is to be watchful of whether the detention has already been ordered in another case and, if so, it must not adopt another ruling ordering the detention.

46. Taking into account the aforementioned and, particularly, the said case-law of the European Court of Human Rights, the Constitutional Court holds that there is a violation of the appellant's right to liberty and security under Article 5(1) of the European Convention, as the appellant's detention was not ordered in a lawful manner by the impugned rulings. As the Constitutional Court has concluded that the appellant's detention was not ordered in a lawful manner, since there is no possibility to have two rulings ordering the detention, *i.e.* because the appellant, although he had already been placed in detention on the basis of the former ruling relating to the criminal offences in other proceedings, was ordered into detention based on the impugned rulings, the Constitutional Court has not examined the appellant's allegations relating to lawfulness of the impugned rulings and the existence of special reasons for ordering the detention.

47. As to the appellant's allegations on a violation of his right under Article 9 of the International Covenant on Civil and Political Rights and his right under Article 3 of the Universal Human Rights Declaration, the Constitutional Court holds that it is not necessary to examine separately the appellant's reference to the said Articles, which also guarantee the right to personal liberty and security, as the reasons for finding the violation of the said right have already been given.

VIII. Conclusion

48. The Constitutional Court concludes that there is a violation Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention where the new detention order against the appellant, who is already being held in detention in accordance with the former ruling relating to the criminal offences in other proceedings, is issued to commence on the date when the former detention expires or is terminated and where there is neither an express legal provision nor case-law supporting the aforementioned.

49. The Constitutional Court concludes that the appeal is premature in respect of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

50. Pursuant to Article 16(4) item 14, Article 61(1) and (2) and Article 64(1) of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause of the present decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 1011/08

DECISION ON ADMISSIBILITY AND MERITS

Appeals of Mr. Risto Marković and others for the reason that they were unable to repossess the apartments they had occupied prior to the war in Bosnia and Herzegovina and to be registered as owners of those apartments

Decision of 23 November 2012

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in the Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić

Ms. Constance Grewe

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knežević

Having deliberated on the appeal of **Mr. Risto Marković and Others,** in case no. **AP 1011/08**, at its session held on 23 November 2012, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeals lodged by Mr. Risto Marković, Mr. Milenko Đurica, Mr. Mile Sučić, Ms. Nada Đukić, Mr. Nikola Torbica, Mr. Milan Petrović, Mr. Duško Miljanović, Mr. Mladen Dujmović, Mr. Zdravko Volaš, Mr. Davor Pleše and Ms. Gordana Pleše, Mr. Branko Marković, Mr. Milan Knežević, Mr. Zdravko Mastilović, Mr. Milan Nedeljković, Mr. Dragan Ćosić, Mr. Zdravko Grabovac, Mr. Dragan Vejnović, Mr. Petar Ivanović, Ms. Biljana Milišić, Mr. Vlastimir Stamenković, Mr. Safet Bejtović and Mr. Budimir Antunović are hereby granted.

The violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

This Decision shall be transmitted to the Government of the Federation of Bosnia and Herzegovina which shall be obligated to secure the appellants' rights in accordance with the standards set forth in the Decision of the Constitutional Court of Bosnia and Herzegovina, no. *U 15/11* of 30 March 2012, published in the *Official Gazette of Bosnia and Herzegovina* no. 37/12 within three months time limit as of the date of filing of each of the appellants' respective claims.

The Decision of the Constitutional Court of Bosnia and Herzegovina relating to interim measure no. *AP 1543/09* of 12 May 2001 shall be rendered ineffective.

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

Reasoning

I. Introduction

1. Mr. Risto Marković from Sarajevo, represented by Mr. Amir Šapčanin, a lawyer practicing in Sarajevo; Mr. Milenko Đurica from Nikšić, Montenegro, represented by Ms. Maja Škoro, a lawyer practicing in Mostar; Ms. Mila Sučić from Sarajevo, represented by Ms. Edina Jahić, a lawyer practicing in Sarajevo; Ms. Nada Đukić from Sarajevo, represented by Ms. Edina Jahić, a lawyer practicing in Sarajevo; Mr. Nikola Torbica from Mostar, represented by the „Kebo&Guzin" Law Office Mostar; Mr. Milan Petrović from Novi Sad, Serbia; Mr. Duško Miljanović from Mostar, represented by Ms. Maja Škoro, a lawyer practicing in Mostar; Mr. Mladen Dujmović from Zagreb, represented by Mr. Drago Reljić, a lawyer practicing in Tuzla; Mr. Zdravko Volaš from Mostar, represented by Ms. Maja Škoro, a lawyer practicing in Mostar and Mr. Svetozar Ivetić, a lawyer practicing in Banja Luka; Mr. Davor Pleše and Ms. Gordana Pleše from Tuzla; Mr. Branko Marković from Mostar, represented by Law Office „Ćupina and Co" d.o.o. Mostar; Mr. Milan Knežević from Banja Luka; Mr. Zdravko Mastilović from Pale; Mr. Milan Nedeljković from Užice, Serbia, represented by Mr. Miloš Stanimirović from Tuzla; Mr. Dragan Ćosić from Mostar, represented by the „Kebo&Guzin" Law Office in Mostar, Mr. Zdravko Grabovac from Bihać, represented by Ms. Safeta Alijagić, a lawyer practicing in Bihać; Mr. Dragan Vejnović from Sarajevo, represented by Mr. Nenad Maglajlić, a

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lawyer practicing in Sarajevo; Mr. Petar Ivanović from Tuzla, represented by Mr. Drago Reljić, a lawyer practicing in Tuzla; Ms. Biljana Milišić from Sarajevo, represented by Mr. Vahdet Ibranović, a lawyer practicing in Ilidža; Mr. Vlastimir Stamenković from Novi Sad, Republic of Serbia; Mr. Safet Bejtović from Tutin, represented by Mr. Ismet Mehić, a lawyer practicing in Sarajevo and Mr. Budmir Antunović from Berkovići, represented by Mr. Momo Turanjanin and Mr. Dragan Škuletić, lawyers practicing in Trebinje („the appellants") lodged their appeals with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court"), in the period from 1 April 2008 to 30 May 2012, for the reason that they were unable to repossess the apartments they had occupied prior to the war in Bosnia and Herzegovina and to be registered as owners of those apartments.

2. On 18 May 2009, the appellant, Mr. Milan Knežević filed an appeal with the Constitutional Court, which was registered as no. *AP 1543/09*, and on 8 September 2010, he filed an appeal with the Constitutional Court, which was registered as no. *AP 3865/10*. In addition to appeal no. *AP 1543/09*, the appellant filed a request for interim measure whereby the Constitutional Court would order the Service for Property Affairs and Cadastre of Real Property of the Municipality of Bihać to postpone the enforcement of the legally binding judgment of the Cantonal Court, no. 01 0 U 000009 08 of 20 April 2009, until the Constitutional Court makes a final decision. On 4 October 2010, the appellant filed a request for interim measure whereby the Constitutional Court would order the Service for Property Affairs and Cadastre of Real Property of the Municipality of Bihać to postpone the enforcement of the legally binding ruling no. 3/36-372-1004/98 of 4 June 2009, issued in the procedure for enforcement of the judgment of the Cantonal Court, no. 01 0 U 000009 08 of 20 April 2009, wherein the appellant and members of his family household were ordered to vacate the apartment in Bihać, Residential Settlement Harmani H-15, and to hand it over to the Service within a time limit of 15 days as of the date of receipt of the ruling under threat of enforcement action.

II. Procedure before the Constitutional Court

3. As the Constitutional Court received several appeals within its competence concerning the same matter, the Constitutional Court, in accordance with Article 31(1) of the Rules of the Constitutional Court, decided to join the cases and to conduct one set of proceedings, and to take one decision no. *AP 1011/08*. The following appeals have been joined: *AP 1011/08, AP 2136/08, AP 3129/08, AP 3130/08, AP 3175/08, AP 3495/08, AP 3654/08, AP 3761/08, AP 3954/08, AP 3975/08, AP 501/09, AP 747/09, AP 1543/09, AP 3865/10, AP 1814/09, AP 1855/09, AP 2103/09, AP 3112/09, AP 3303/09, AP 3647/09, AP 3937/09, AP 3898/10, AP 1578/12* and *AP 2059/12*.

4. In its decision no. *AP 1543/09* of 12 May 2011, the Constitutional Court granted the appellant's request for interim measure.

III. Facts of the Case

Facts relating to the appeal no. AP 1011/08

5. In the ruling of the Administration for Housing Affairs of the Sarajevo Canton („the Administration"), no. 23/1-372-1248/98 of 7 February 2006, which was upheld by the ruling of the Ministry of Housing Affairs of the Sarajevo Canton („the Ministry"), no. 27/02-23-3989/06 of 19 April 2006, a claim of appellant Risto Marković for repossession of an apartment located at Dajanli Ibrahim Bega no. 10/5 in Sarajevo was dismissed. The appellant was the occupancy right holder over the aforementioned apartment, which was established by the Administration after the inspection of Contract for Use of Apartment no. 17-496 of 16 June 1989 and ruling of the Headquarters of the Army of Bosnia and Herzegovina no. 8/27-6-NT-1245/96 of 23 May 1996. Furthermore, having inspected the copy of the *Official Military Journal* no. 11 of 11 June 1998, page 249, the Administration established that the active duty of appellant Risto Marković as a Lieutenant Colonel Medical Service Corps Officer came to an end by Order of the Commander of III Army no. 89-110 of 21 May 1998. Taking into account the established facts, the Administration referred to Article 3a of the Law on Cessation of Application of the Law on Abandoned Apartments (*Official Gazette of FBiH* nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99 31/01, 56/01, 15/02, 24/03, 29/03 and 81/09 – hereinafter: the Law on Cessation of Application of the Law on Abandoned Apartment; „the Law on Cessation„) and pointed out that the appellant had no right to repossess the apartment for the reason that he had remained on the active duty in the armed forces outside the territory of Bosnia and Herzegovina and that he had not obtained refugee status or other equivalent protective status.

6. By the judgment of the Cantonal Court of Sarajevo („the Cantonal Court"), no. 009-0-U-06-000676 of 27 February 2008, a lawsuit whereby the appellant instituted an administrative dispute against the ruling of the Ministry, no. 27/02-23-3989/06 of 19 April 2006, was dismissed. The Cantonal Court pointed out in the reasons for its judgment that the administrative authorities had made a correct decision by dismissing the appellant's claim for repossession of the apartment in question as it was established in the course of the proceedings that the appellant had remained on the active military duty in the armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995 and, pursuant to the relevant provisions of the the Law on Cessation, the appellant could not be considered a refugee nor did he have the right to repossess the apartment in the Federation of Bosnia and Herzegovina.

Facts relating to the appeal no. AP 2136/08

7. By the ruling of the Department of Social Affairs of the City of Mostar („the Department"), no. 13/V-25-1-366/04 of 22 December 2005, which was upheld by the ruling of the Ministry of Construction and Physical Planning of the Herzegovina-Neretva Canton, no. UP-II-09-04-25-23/06 of 22 January 2008, a claim of appellant Milenko Đurica for repossession of an apartment at Rude Hrozničeka 26/2 in Mostar was dismissed. Having inspected the official records of the Military Housing Fund FMO and other attached documents, the Department established during the procedure that the appellant had been the occupancy right holder of the apartment in question. Furthermore, having inspected Certificate VP-5607 Podgorica and statement the appellant gave for the record, the Department established that the appellant had remained on active military duty in the Army of Serbia and Montenegro in his capacity as civilian after 19 May 1992. Taking into account the established facts, the Department referred to Article 3a of the Law on Cessation and pointed out that the appellant had no right to repossess the apartment for the reason that he had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina and that he had not obtained refugee status or other equivalent protective status.

8. By the judgment of the Cantonal Court of Mostar, no. 07 0 U 001092 08 U of 13 June 2008, a lawsuit whereby the appellant referred an administrative dispute against the ruling of the Ministry of Construction and Physical Planning of the Herzegovina-Neretva Canton, no. UP-II-09-04-25-23/06 of 22 January 2008, was dismissed. The Cantonal Court pointed out in the reasons for its judgment that the administrative authorities had made a correct decision when they had applied Article 3a of the Law on Cessation and thus dismissed the appellant's claim for repossession of the apartment in question as it was established in the course of the proceedings that the appellant had remained on active military duty in the armed forces outside the territory of Bosnia and Herzegovina after 18 May 1992 so that, pursuant to the relevant provisions of the Law on Cessation, the appellant could not be considered a refugee nor did he have the right to repossess the apartment in the Federation of Bosnia and Herzegovina.

Facts relating to the appeal no. AP 3129/08

9. By the ruling of the Administration, no. 23/1-372-2710/98 of 16 February 2004, which was upheld by the ruling of the Ministry, no. 27/02-23-1105/04 of 23 June 2004, a claim of the appellant, Ms. Mila Sučić for repossession of an apartment located at Husrefa Redžića 15//I in Sarajevo was dismissed. The Administration established in the course of the proceedings that the appellant's husband, Mr. Drago Sučić, based on Contract for

Use of Apartment no. 27-245-1294 of 14 July 1998, had been the occupancy right holder of the apartment in question. Furthermore, having inspected Order of the Chief of the General Staff of the Yugoslav Army no. 66-38 of 17 May 1993 (*Official Military Journal of the SRJ* no. 32/93) and Order of the Chief of the General Staff of the Yugoslav Army no. 10-59 of 23 April 1997, the Administration determined that Mr. Drago Sučić had been promoted into the rank of Lieutenant Colonel of the Music Service on 2 March 1997. The Administration pointed out that given the fact that Mr. Drago Sučić had remained on active military duty in the Yugoslav Army after 19 May 1992 he could not be considered a refugee. Furthermore, it pointed out that appellant Mila Sučić, the right of whom derived from the right of her husband, in accordance with Article 3a of the Law on Cessation, did not have the right to repossess the apartment in question.

10. By the judgment of the Cantonal Court, no. U-910/04 of 16 July 2008, a lawsuit whereby the appellant initiated an administrative dispute against the ruling of the Ministry, no. 27/02-23-1105/04 of 23 June 2004, was dismissed. The Cantonal Court pointed out in the reasons for its judgment that the administrative authorities had made a correct decision when they had dismissed the appellant's claim for repossession of the apartment in question for the reason that it was established in the course of the proceedings that the appellant's husband, Mr. Drago Sučić had remained on active military duty in the armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995 and that the appellant derived her right over the apartment in question from his right, and as Mr. Drago Sučić could not be considered a refugee, pursuant to the relevant provisions of the Law on Cessation, she did not have the right to repossess the apartment in the Federation of Bosnia and Herzegovina.

Facts relating to appeal no. AP 3130/08

11. By the ruling of the Administration, no. 23/6-372-6640/98 of 20 December 2005, which was upheld by the ruling of the Ministry, no. 27/02-23-947/06 of 27 January 2006, a claim of the appellant, Ms. Nada Đukić for repossession of an apartment located at Topal Osman Paše 26/4 in Sarajevo, was dismissed. The Administration established that the appellant's husband, Mr. Miloš Đukić, based on Contract for Use of Apartment no. 40-344/81 of 20 March 1981, had been the occupancy right holder over the apartment in question. Furthermore, having inspected the statement which the appellant gave for the record during the oral hearing, according to which her husband Miloš Đukić, *worked, during the war and after the Dayton Agreement, as a civilian for the Yugoslav Army where he had acquired the old-age pension on 13 June 1996*, the Administration established that Miloš Đukić had remained on active military duty in the Yugoslav Army after 19 May 1992 so that he could not be considered a refugee. Taking into account the aforesaid, it

was also indicated that the appellant, Ms. Nada Đukić, the right of whom derived from the right of her husband, did not have the right to repossess the apartment in question in accordance with Article 3a of the Law on Cessation.

12. By the judgment of the Cantonal Court, no. 009-0-U-06-000303 of 17 July 2008, a lawsuit filed by the appellant to refer an administrative dispute against the ruling of the Ministry, no. 27/02-23-947/06 of 27 January 2006, was dismissed. The Cantonal Court pointed out in the reasons that the administrative authorities had made a correct decision when they had dismissed the appellant's claim for repossession of the apartment in question for the reason that it was established in the course of the proceedings that the appellant's husband, Mr. Miloš Đukić had remained on active military duty in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992 or 14 December 1995 and that the appellant derived her right over the apartment in question from his right so that as Mr. Miloš Đukić could not be considered a refugee, pursuant to the relevant provisions of the Law on Cessation, she did not have the right to repossess the apartment in the Federation of Bosnia and Herzegovina.

Facts relating to appeal no. AP 3175/08

13. By a ruling of the Service for Construction, Property-Legal and Housing Affairs and Environmental Protection of the City-Municipality Mostar West, no. 07/II-3-1040/99 of 19 May 2003, a claim of the appellant, Mr. Nikola Torbica for recognition of the occupancy right and repossession of the apartment was dismissed and it was established that Nikola Torbica's right over the apartment at Ante Starčevića 46 in Mostar ceased to exist. The Service pointed out in the reasons that the appellant had filed a claim for repossession of the apartment in question, that he had attached to the claim Contract for Use of Apartment no. 40-226/80 of 28 February 1980 and ruling no. 296-3 of 20 December 1979. During the oral hearing, the appellant's wife, Ms. Stana Torbica confirmed that the aforementioned claim had been filed on 4 August 1999. The Service pointed out that Article 5(1) of the Law on Amendments to the Law on the Cessation of Application of the Law on Abandoned Apartments (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 12/99) provided that the claim for repossession of an apartment had to be filed within a time limit of 15 months from the date of entry into force of the Law. The Service pointed out that given the fact that the aforementioned Law had entered into force on 4 April 1998, a deadline to file a claim was 4 July 1999. Finally, given the fact that based on the statement of the appellant's wife it was established during the proceedings that the claim for repossession of the apartment had been filed on 4 August 1999, the Service rejected the claim as untimely.

14. By the ruling of the Ministry of Construction, Physical Planning and Environmental Protection, no. 09-03-25-186/03 of 23 July 2003, which was upheld by the judgment of the Cantonal Court of Mostar, no. U-395/02 of 1 December 2003, a complaint which the appellant filed against the ruling of the Service, no. 07/II-3-1040/99 of 19 May 2003, was dismissed. In the reasons for the ruling, the Ministry considered as founded the appellant's allegations that the Service had erroneously established the date when the claim had been submitted. The appellant submitted the copy of the registered mail receipt of the Vladimirovci Post Office, no. 26315 of 3 July 1999, according to which he had filed the claim in a timely fashion and the recipient's address was correct. Furthermore, the Ministry found that the appellant had been the occupancy right holder of the apartment in question, which had been allocated to him from the JNA Fund based on the ruling of the Garrison Command of Mostar, no. 296-3 of 20 December 1979. It was further established that based on the ruling of the SSNO (Federal Secretariat for National Defence), Personnel Administration of the Yugoslav Army POV no. 02/2716-3 of 19 May 1992, the appellant had been relieved from the JNA active military duty as a warrant officer, 1st class on 1 June 1992. The Ministry pointed out that it followed from the aforementioned that the appellant had remained on active military duty in the Yugoslav Army after 19 May 1992 so that, pursuant to Article 3a of the Law on Cessation, he could not be considered a refugee, nor was he entitled to repossess the apartment in question.

15. According to the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina („the Supreme Court"), no. Už-52/04 of 31 July 2008, the appellant's appeal against the judgment of the Cantonal Court of Mostar, no. U-395/02 of 1 December 2003, was dismissed. In the reasons for the judgment the Supreme Court noted that the Cantonal Court of Mostar and the administrative authorities had made a correct decision when they had applied the provision of Article 3a of the Law on Cessation and thus dismissed the appellant's claim for repossession of the apartment in question as it was established during the proceedings that the appellant had remained on active military duty in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992.

Facts relating to appeal no. AP 3495/08

16. By the ruling of Administration, no. 23/6-372-P-6014/98 of 28 June 2002, which was upheld by the ruling of the Ministry, no. 27/02-23-4367/02 of 28 March 2003, a claim of the appellant, Mr. Milan Petrović to repossess an apartment at Hasana Brkića 13/III in Sarajevo was dismissed. Having inspected Contract for Use of Apartment no. 27/02-136-0-339 of 19 March 1986, the Administration found that the appellant had been the occupancy right holder of the apartment in question. Furthermore, having inspected the statement of the appellant's attorney, which was taken in the Minutes on 24 April

2002 and certificate of the Military Post no. 3366 Novi Sad, no. 31-30 of 29 March 2002, the Administration found that the appellant had remained on active military duty in the Yugoslav Army after 14 December 1995. Taking into account such state of facts, the Administration referred to Article 3a of the Law on Cessation and pointed out that the appellant had no right to repossess the apartment for the reason that he had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina and that he had no residence approved to him in the capacity of a refugee or other equivalent protective status.

17. According to the judgment of the Cantonal Court, no. 009-0-U-06-000040 of 15 September 2008, a lawsuit whereby the appellant initiated an administrative dispute against the ruling of the Ministry no. 27/02-23-4367/02 of 28 March 2003, was dismissed. The Cantonal Court pointed out in the reasons for its judgment that the administrative authorities had made a correct decision by dismissing the appellant's claim for repossession of the apartment in question as it was established in the course of the proceedings that the appellant had remained on active military duty in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992 and, pursuant to the relevant provisions of the Law on Cessation, the appellant could not be considered a refugee nor did he have a right to repossess the apartment in the Federation of Bosnia and Herzegovina.

Facts relating to appeal no. AP 3654/08

18. By the ruling of the Municipal Service for Housing Affairs, Reconstruction and Cadastre of Real Properties of the Municipality of Stari grad, City of Mostar, no. 06-23-227/99 of 12 November 2003, a claim of the appellant, Mr. Duško Miljanović for repossession of an apartment at Maršala Tita 82d in Mostar, was dismissed. Having inspected the ruling of the Command of the Garrison relating to the allocation of the apartment, no. 2/67-3 of 27 November 1986, and records of the Public Housing Company „Dom" Mostar, the Service found that the appellant had been the occupancy right holder of the apartment in question. Furthermore, having inspected Order of the Command of the Air Force and Air Defense no. 3-16 of 7 May 1997, which was published in the *Official Military Journal* of the Yugoslav Army, no. 9, page 232, of 12 June 1997, the Service found that on 28 February 1995 the appellant had been promoted into the rank of Aviation Technical Captain and, consequently, he had remained on active military duty in the Yugoslav Army after 14 December 1995. Given the facts established above, the Administration referred to Article 3a of the Law on Cessation and pointed out that the appellant had no right to repossess the apartment for the reason that he had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina and that he had no residence approved to him in the capacity of a refugee or other equivalent protective status.

19. By the ruling of the Ministry for Construction, Physical Planning and Environmental Protection of the Herzegovina-Neretva Canton, no. UP/II-13-25-222/01 of 14 December 2003, which was upheld by the judgment of the Cantonal Court of Mostar, no. U-57/04 of 13 April 2004, an appeal filed by the appellant against the ruling of the Service, no. 06-23-227/09 of 12 November 2003, was dismissed. The Cantonal Court indicated in the reasons for the judgment that the administrative authorities had made a correct decision by dismissing the appellant's claim for repossession of the apartment in question as it was established in the course of the proceedings that the appellant had remained on active military duty in the armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995 and, pursuant to the relevant provisions of the Law on Cessation, the appellant could not be considered a refugee nor did he have a right to repossess the apartment in the Federation of Bosnia and Herzegovina.

20. By the judgment of the Supreme Court, no. Už-268/04 of 13 August 2008, the appellant's appeal against the judgment of the Cantonal Court of Mostar, no. U-57/04 of 13 April 2004 was dismissed. The Supreme Court pointed out in the reasons for its judgment that the Cantonal Court of Mostar and the administrative authorities had made a correct decision when they had applied the provision of Article 3a of the Law on Cessation and thus dismissed the appellant's claim for repossession of the apartment in question as it was established during the proceedings that the appellant had remained on active military duty in the armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995.

Facts relating to appeal no. AP 3761/08

21. According to the ruling of the Service for Housing Affairs of the Municipality of Tuzla, no. 05-02/3-23-447/99 of 13 August 2003, a claim of the appellant Mr. Mladen Dujmović for repossession of an apartment at Stupine B-6 in Tuzla was dismissed. Having inspected a Contract for Use of Apartment, which was concluded between the appellant and JNA Housing Fund, no. 17-1003 of 21 November 1989 and ruling of the Command of Garrison relating to the allocation of the apartment for use, no. 1-57/3 of 8 August 1998, the Service found that the appellant had been the occupancy right holder of the apartment in question. Having inspected a certificate issued by the Ministry of Defense of the Republic of Croatia, Headquarters of the Armed Forces of the Republic of Croatia, Command of Air Force and Air Defense, ur. no. 3044-G1-08-01-48 of 11 July 2011, the Service found that the appellant had been on active duty in the Armed Forces of the Republic of Croatia from 9 December 1991 to 30 June 1995, i.e. the appellant had remained in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992.

22. Given the facts established above, the Service referred to Article 3a of the Law on Cessation and pointed out that the appellant had no right to repossess the apartment for the reason that he had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina and that he had no residence approved to him in the capacity of a refugee or other equivalent protective status.

23. According to the ruling of the Ministry of Physical Planning and Protection of Environment of the Canton of Tuzla, no. 12-06/1-23-1618/03 of 11 December 2003, which was upheld by the judgment of the Cantonal Court of Tuzla, no. U-5/04 of 26 April 2006, the appellant's appeal against the ruling of the Service for Housing Affairs of the Municipality of Tuzla, no. 05-02/3-23-447/99 of 13 August 2003, was dismissed. The Cantonal Court pointed out in the reasons for its judgment that the administrative authorities had made a correct decision by dismissing the appellant's claim for repossession of the apartment in question as it was established in the course of the proceedings that the appellant had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992 and, pursuant to the relevant provisions of the Law on Cessation, the appellant could not be considered a refugee nor did he have a right to repossess the apartment in the Federation of Bosnia and Herzegovina.

24. According to the judgment of the Supreme Court, no. Už-391/04 of 28 August 2008, the appellant's appeal against the judgment of the Cantonal Court of Tuzla, no. U-5/04 of 26 April 2004 was dismissed. The Supreme Court pointed out in the reasons for its judgment that the Cantonal Court of Tuzla and the administrative authorities had made a correct decision when they had applied the provision of Article 3a of the Law on Cessation and thus dismissed the appellant's claim for repossession of the apartment in question as it was established during the proceedings that the appellant had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992.

Facts relating to appeals nos. AP 3954/08 and AP 3975/08

25. By the ruling of the Service for Construction, Property-Legal and Housing Affairs and Environmental Protection, Section for Housing Administration and Business Premises of the City-Municipality Mostar Southwest, no. 07/II-3-973/99 of 27 October 2003, a claim of the appellant, Mr. Zdravko Volaš for repossession of an apartment at Splitska no. 11 in Mostar was dismissed. Having inspected a Contract for Use of Apartment concluded on 28 April 1988, the Service established that the appellant had been the occupancy right holder of the apartment in question. Furthermore, having inspected the records relating to taking possession by the Ministry of Refugees and Displaced Persons of the RS, Office in

Banja Luka, dated 17 January 2002, the Service found that the appellant had not acquired a new occupancy right. Furthermore, having inspected the Certificate of the Ministry of Defence of RS, Office in Banja Luka, no. 8/2-02-08-835-17 of 27 November 2002, the Service found that the appellant had uninterruptedly participated in the war in the period from 25 June 1991 to 30 June 1996, and, having inspected the *Official Military Journal* of the Yugoslav Army, no. 19, page 408, of 14 July 1994, wherein it was stated that by Order of the Chief of the General Staff of the Yugoslav Army, dated 25 May 1994, the appellant had been promoted into the rank of Aviation Technical Major, the Service found that he had remained on active duty in the Yugoslav Army after 19 May 1992 or 14 December 1995. Given the facts established above, the Service referred to Article 3a of the Law on Cessation and pointed out that the appellant had no right to repossess the apartment for the reason that he had remained on active duty of the armed forces outside the territory of Bosnia and Herzegovina and that he had no residence approved to him in the capacity of a refugee or other equivalent protective status.

26. By the ruling of the Ministry for Construction, Physical Planning and Environmental Protection of the Herzegovina-Neretva Canton, no. UP-09-25-03-125/03 of 19 January 2003, which was upheld by the judgment of the Cantonal Court of Mostar, no. U-83/04 of 23 March 2004, an appeal filed by the appellant against the ruling of the Service, no. 07/II-3-973/99 of 27 October 2003, was dismissed. The Cantonal Court indicated in the reasons for the judgment that the administrative authorities had made a correct decision by dismissing the appellant's claim for repossession of the apartment in question as it was established in the course of the proceedings that the appellant had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992 or after 14 December 1995 and, pursuant to the relevant provisions of the Law on Cessation, the appellant could not be considered a refugee nor did he have a right to repossess the apartment in the Federation of Bosnia and Herzegovina.

27. By the judgment of the Supreme Court, no. Už-234/04 of 22 September 2008, the appellant's appeal against the judgment of the Cantonal Court of Mostar, no. U-83/04 of 23 March 2004, was dismissed. The Supreme Court pointed out in the reasons for its judgment that the Cantonal Court of Mostar and the administrative authorities had made a correct decision when they had applied the provision of Article 3a of the Law on Cessation and thus dismissed the appellant's claim for repossession of the apartment in question as it was established during the proceedings that the appellant had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992 or 14 December 1995.

Facts relating to appeal no. AP 501/09

28. By the ruling of the Administration, no. 23/6-372-2888/98 of 21 June 2005, which was upheld by the ruling of the Ministry of Housing Affairs of the Sarajevo Canton, no. 27/02-23-16759/05 of 16 August 2005, a claim of the appellant, Mr. Davor Pleše for repossession of an apartment located at Topal Osman Paše no. 15 in Sarajevo was dismissed. The appellant was the occupancy right holder of the aforementioned apartment, which was established by the Administration after the inspection of Contract for Use of Apartment no. 17-795 of 7 September 1989. Furthermore, having inspected Certificate of the Personnel Administration of the Headquarters of the Yugoslav Army, no. 3-17 of 8 June 1994 and the copy of the military identification card, the Administration found that the appellant's active duty as a Senior Sergeant had been terminated on 15 June 1992. Having inspected Order of the Command of the Air Force and Air Defense no. 2-19, which was published in the *Official Military Journal of the Yugoslav Army*, no. 13, page 259, of 5 May 1994, the Administration found that the appellant's active duty as a Senior Sergeant had been terminated on 18 March 1994. Given the facts established above, the Administration referred to Article 3a of the Law on Cessation and pointed out that the appellant had no right to repossess the apartment for the reason that he had remained on active duty of the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992 and that he had no residence approved to him in the capacity of a refugee or other equivalent protective status.

29. In the judgment of the Cantonal Court of Sarajevo, no. U-2242/05 of 17 December 2008, a lawsuit whereby the appellant referred an administrative dispute against the ruling of the Ministry, no. 27/02-23-16759/05 of 16 August 2005, was dismissed. The Cantonal Court pointed out in the reasons that the administrative authorities had made a correct decision by dismissing the appellant's claim for repossession of the apartment in question as it was established in the course of the proceedings that the appellant had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992 and, pursuant to the relevant provisions of the Law on Cessation, the appellant could not be considered a refugee nor did he have a right to repossess the apartment in the Federation of Bosnia and Herzegovina.

Facts relating to appeal no. AP 747/09

30. By the ruling of the Service for Construction, Property-Legal and Housing Affairs and Environmental Protection of the Municipality of Mostar West, no. 07/II-3-356/99 of 1 August 2003, a claim of the appellant, Mr. Branko Marković for repossession of an apartment at Kralja Tomislava no. 16/V in Mostar, over which the appellant had the

occupancy right, was dismissed. Having inspected an Order of the Chief of the General Staff of the Yugoslav Army, published in the *Official Military Journal of the Yugoslav Army*, page 637, the Service found that the appellant had been promoted to into the rank of Aviation Technical Sergeant, 1st Class on 18 July 1994, from which it followed that the appellant had remained on the active duty in the Yugoslav Army after 19 May 1992. Given the facts established above, the Administration referred to Article 3a of the Law on Cessation and pointed out that the appellant had no right to repossess the apartment for the reason that he had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina and that he had no residence approved to him in the capacity of a refugee or other equivalent protective status.

31. By the ruling of the Ministry of Construction, Physical Planning and Environmental Protection of the Herzegovina-Neretva Canton, no. 09-03-25-323/03 of 30 September 2003, which was upheld by the judgment of the Cantonal Court of Mostar, no. U-472/03 of 21 May 2004, the appellant's appeal against the ruling of the Service, no. 07/II-3-356/99 of 1 August 2003, was dismissed. The Cantonal Court pointed out in the reasons that the administrative authorities had made a correct decision by dismissing the appellant's claim for repossession of the apartment in question as it was established in the course of the proceedings that the appellant had remained on active duty in armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992 and, pursuant to the relevant provisions of the Law on Cessation, the appellant could not be considered a refugee nor did he have a right to repossess the apartment in the Federation of Bosnia and Herzegovina.

32. According to the judgment of the Supreme Court, no. Už-374/04 of 7 January 2009, the appeal which the appellant filed against the judgment of the Cantonal Court of Mostar, no. U-472/03 of 21 May 2004, was dismissed. In the reasons for the judgment the Supreme Court noted that the Cantonal Court of Mostar and the administrative authorities had made a correct decision when they had applied the provision of Article 3a of the Law on Cessation and thus dismissed the appellant's claim for repossession of the apartment in question as it was established during the proceedings that the appellant had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992.

Facts relating to the appeals nos. AP 1543/09 and AP 3865/10

33. Pursuant to the Contract for use of the apartment of 12 February 1987, which was concluded with the Bihać Garrison Command, appellant Milan Knežević was the occupancy right holder over the apartment located in Bihać, in the settlement of Harmani H-15, the 3rd entrance, the 4th floor.

34. Based on the provisions of the Law on Cessation, on 20 July 1998 the appellant submitted the claim to the Service for the repossession of the apartment. At the time when there was no final and binding decision adopted regarding his clam the appellant submitted the application to the Human Rights Chamber of Bosnia and Herzegovina. The Commission for Human Rights within the Constitutional Court of Bosnia and Herzegovina („the Commission") adopted Decision on Admissibility and Merits no. CH/00/6254 of 7 September 2005, whereby it was established that the appellant's right to a fair trial under Article 6(1) of the European Convention for the Protection of Human Rights and Freedoms („the European Convention") was violated in the sense of the right to a judicial decision within a reasonable time and, in paragraph no. 8 of the Conclusion, ordered the Federation of Bosnia and Herzegovina to adopt a legally binding decision on the appellant's case within six months from the day of receipt of the decision of the Commission. As to the allegations about a violation of the right to property, the Commission considered that Article 3a(1) of the Law on Cessation established a fair balance between the rights of the occupancy right holders and public interest. The Commission concluded that the appellant's right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the European Convention was not violated and that the appellant was not entitled to the repossession of the apartment in question. The Commission also concluded that there was no need for examining the allegations arising under Article 8 of the European Convention.

35. By the ruling of the Service no. 3/36-372-1004/98 of 30 January 2008, which was upheld by the Ruling of the Cantonal Ministry for Construction, Physical Planning and Environmental Protection in Bihać („the Cantonal Ministry„) no. 11/12-23-133-UP-2/08 of 7 July 2008, it was confirmed that the appellant was the occupancy right holder over the apartment in question and that the apartment was to be repossessed by the occupancy right holder. In paragraph 3 of the ruling's enacting clause it is stated that the right of Safija Nanić to temporarily use the apartment ceased to be in effect.

36. The Federation of Bosnia and Herzegovina, i.e. the General Service Office of the Federation of Bosnia and Herzegovina represented by the Federation Attorney and Safija Nanić („the plaintiffs"), filed the lawsuit initiating an administrative dispute for the purpose of quashing the ruling of the Cantonal Ministry no. 11/12-23-133-UP-2/08 of 7 July 2008.

37. On 20 April 2009, the Cantonal Court rendered the judgment no. 01 0 U 000009 08 U, whereby the claim of defendants was granted and the ruling of the Cantonal Ministry and the Ruling of the Service no. 3/36-372-1004/98 of 30 January 2008 were quashed as unlawful. The Cantonal Court resolved this administrative dispute by dismissing the appellant's claim for repossession of the apartment in question and the apartment in

question was handed over to the Federation of Bosnia and Herzegovina - the General Service Office of the Federation of Bosnia and Herzegovina to dispose of it.

38. In the reasoning of the judgment the Cantonal Court stated that it was established during the proceeding that on 31 December 1998 the appellant had been relieved from the professional military service in his capacity as a warrant officer of the 1st class in accordance with the ruling VP 3001 Beograd of 28 December 1998 on which date he had handed over his duty to which he was assigned while being a member of the mentioned Military Post Office. After inspecting the mentioned ruling it becomes obvious that the appellant was not a member of the Army of the Republika Srpska („the RS Army") given the fact that at the time he was retired there was the Law on the Army of the Republic Srpska in effect and that law was published on 1 June 1992 (*Official Gazette of RS* no. 7/92), as well as the Law on Service in the RS Army published on 31 December 1996 (*Official Gazette of RS* no. 31/96). Therefore, the Cantonal Court did not accept the appellant's statement that he was a member of the RS Army and that he received the ruling from the Beograd Military Post Office while he was the member of the RS Army for the reason that something like that was not mentioned in the ruling at all. In other words, in the ruling it was explicitly stated that he was the warrant officer of the 1st class and that he got retired while holding that rank in the Army of Yugoslavia. After inspecting the note of the Ministry of Foreign Affairs of the Republika Srpska no. 5/7617-6/07 it was established that the appellant was in the professional military service from 23 July 1996 until the day he was relieved from duty on 31 December 1998 and that in 1998 he submitted an application for allocation of an apartment for lease in the Garrison in Belgrade and that he was not allocated any apartment from the military housing fund in the territory of the Republic of Serbia. The Cantonal Court also stated that it cannot accept the certificate issued by the so-called Team for Disbanding the General Staff of the RS Army for the reason that the Team for Disbanding the General Staff is not an organ entitled to issue such certificate as the Personnel Office of the Ministry of Defence of Bosnia and Herzegovina is in charge of issuing such certificates. The proof that the appellant was a member of the Yugoslav Army is the very ruling on his retirement which was issued by the Fund for Social Insurance of the Military Persons of Serbia no. 526881 UP-1-159/99 of 10 February 1999, wherefrom it follows that the appellant had resided in Belgrade at 56/14 Agostina Neta Street and that he was granted the right to the old-age pension by the mentioned Fund. After inspecting the CRPC decision no. 703-960-1/1 of 9 July 2002, which was upheld by CRPC decision no. R-703-960-1/1-90/1084 of 4 March 2003, it was established that the appellant had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995 and, therefore, he is not to be considered a refugee in accordance with Article 3(3) of the Rulebook on

Confirmation of the Occupancy Rights of Displaced Persons and Refugees. Based on the established facts and pursuant to the provisions of Article 3a(1) of the Law on Cessation, the Cantonal Court concluded that the appellant is not to be considered a refugee and he is not entitled to repossess the apartment in F BiH. Furthermore, the Cantonal Court stated that it is obvious that the defendant/the Cantonal Ministry erroneously applied Article 3a of the quoted law and the aforesaid becomes obvious after referring to the Decision of the Constitutional Court *U 83/03* of 22 September 2004, whereby it was established that Article 3a is in conformity with the Constitution of Bosnia and Herzegovina and that it is not in contravention of Article 1 of Protocol No. 1 to the European Convention. Moreover, after referring to Article 3a of the Law on the Amendments to the Law on Cessation of Application of the Law on Abandoned Apartments (*Official Gazette of F BiH* no. 29/03), which was the subject of review by the Constitutional Court, it becomes obvious that paragraphs 1 and 2 lack cumulative setting. Given the fact that the Cantonal Court found the allegations of the plaintiff well-founded in their entirety it decided as set out in the enacting clause of the judgment on the basis of the provisions of Article 36(2) of the Law on Administrative Disputes of F BiH.

39. By the ruling of the Service no. 3/36-372-1004/98 of 4 June 2009, which was upheld by the ruling of the Cantonal Ministry no. 11/2-23-410-UP-2/09 of 9 October 2009, it was ordered to the appellant and the members of his family household to vacate the apartment within 15 days as from the day of receiving the ruling and hand over the apartment to the Service under threat of enforcement.

40. The appellant filed a lawsuit initiating an administrative dispute before the Cantonal Court for the purpose of annulment of the ruling of the Cantonal Ministry no. 11/2-23-410-UP-2/09 of 9 October 2009.

41. By the judgment of the Cantonal Court no. 01 0 U 001287 09 U of 7 July 2010 the appellant's lawsuit was dismissed as ill-founded.

42. In the reasoning of the judgment the Cantonal Court noted that the Cantonal Ministry acted properly when it had enforced the legally binding and final decision of the Cantonal Court and that the appellant's allegations were ill- founded in their entirety. The Cantonal Court noted that it is not true that by the decision of the Commission the appellant repossessed the apartment as paragraph 8 of the Conclusion of the decision of the Commission is related to the act of rendering a legally binding decision within the time-limit of six months and it is not related to repossession of the apartment. This is supported by the decision of CRPC no. 703-960-171 of 9 July 2002, which was upheld by the CRPC decision no. R-703-960-1/1-90-1084 of 4 March 2003, wherefrom it obviously

follows that the appellant is not considered a refugee in accordance with Article 3(3) of the Rulebook on Confirmation of the Occupancy Right of Displaced Persons and Refugees. The aforementioned decisions are final and legally binding and on the basis of these decisions the Cantonal Court rendered the judgment according to which the Cantonal Ministry had acted properly. Given the fact that the Cantonal Court did not find that there was a breach of the rules of proceedings in the course of rendering the challenged act, it dismissed the appellant's lawsuit as ill-founded by application of Article 36(2) of the Law on Administrative Disputes of F BiH.

Facts relating to appeal no. AP 1814/09

43. By the ruling of the Administration no. 23/5-372-5364/98 of 23 December 2003, which was upheld by ruling of the Ministry for Housing Affairs of the Canton of Sarajevo no. 27/02-23-44/04 of 8 June 2004 the claim of appellant Zdravko Mastilović for repossession of the apartment at Adija Mulabegovića Street 13/I in Sarajevo was dismissed. The appellant was the occupancy right holder over the apartment in question which was established by the Administration after the inspection of the ruling of the Garrison Command no. M-433/II of 8 June 1987. Furthermore, in the course of the proceeding and after the inspection of the Order of the Chief of the Personnel Department of the General Staff of the Yugoslav Army no. 4-58 of 14 August 1996, the Administration established that the appellant was relieved from the professional military service as of 3 December 1996 from which it follows that the appellant had remained in the service in his capacity as professional military person in the Army of Yugoslavia after 19 May 1992.

44. By judgment of the Cantonal Court in Sarajevo no. 009-0-U-07-000404 of 18 March 2009 the lawsuit of the appellant initiating an administrative dispute against ruling of the Ministry no. 27/02-23-441/04 of 8 June 2004 was dismissed. In its reasoning the Cantonal Court indicated that the administrative bodies adopted a correct decision when they dismissed the appellant's claim for the repossession of the apartment in question for the reason that during the proceeding it was established that after 19 May 1992 the appellant had remained in the armed forces outside the territory of Bosnia and Herzegovina and, therefore, pursuant to the relevant provisions of the Law on Cessation, the appellant is not considered a refugee nor is he entitled to the repossession of the apartment in the Federation of Bosnia and Herzegovina.

Facts relating to appeal no. AP 1855/09

45. By the ruling of the Service for Housing Affairs of the Municipality of Tuzla no. 05-02-5-23-3045/99 of 12 September 2003, the claim of appellant Milan Nedeljković

for repossession of the apartment at Armije BiH Street 19 in Tuzla was dismissed. The appellant was the occupancy right holder over the apartment in question, which was established by the Service after the inspection of the Certificate of the Military Post Office of Ponikve-Užice no. 4036 UPI-1 no. 1-2 of 10 July 1992 based on which it was established that at the time of the certificate issuance the appellant had been permanently employed by the Army of Yugoslavia at the position of cashier, wherefrom it follows that the appellant had remained in the service of the Yugoslav Army after 19 May 1992. The Service also noted that the appellant had failed to submit any proof that he was granted the status of a refugee or some other form of protection which corresponds to that status. Given those established facts, the Service referred to Article 3a of the Law on the Cessation and noted that the appellant was not entitled to repossession of the apartment given the fact that he had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina and that he had not been granted the status of a refugee or other equivalent protective status.

46. By the ruling of the Ministry for Physical Planning and Environmental Protection of the Canton of Tuzla no. 12-06/3-23-1733/03 of 7 January 2004, which was upheld by the judgment of the Cantonal Court in Tuzla no. U.103/04 of 24 January 2005, the complaint lodged by the appellant against the ruling of the Service for Housing Affairs of the Municipality of Tuzla no. 05-02/5-23-3045/99 of 12 September 2003 was dismissed. In the reasoning of its judgment the Cantonal Court noted that the administrative bodies adopted a correct decision when they dismissed the appellant's claim for repossession of the apartment in question for the reason that in the course of the proceeding it was established that the appellant had remained in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992. Therefore, pursuant to the relevant provisions of the Law on Cessation, the appellant is not considered a refugee nor is he entitled to repossession of the apartment in the Federation of Bosnia and Herzegovina.

47. By the judgment of the Supreme Court no. Už-209/05 of 5 March 2008 the complaint lodged by the appellant against the judgment of the Cantonal Court in Tuzla no. U.103/04 of 24 January 2005 was dismissed. In the reasoning of its judgment the Supreme Court noted that the Cantonal Court in Tuzla and administrative bodies correctly decided when they, by application of the provision of Article 3a of the Law on the Cessation dismissed the appellant's claim for repossession of the apartment in question and noted that the appellant was not entitled to the repossession of the apartment given the fact that it was established during the proceeding that he had remained in the service of armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992.

Facts relating to appeal no. AP 2103/09

48. By the ruling of the Service for Construction, Property-Legal and Housing Affairs and Environmental Protection of the City Municipality Mostar Southwest no. 07/II-3-224/98 of 6 May 2003 the Conclusion approving the enforcement of the CRPC Decision no. 07/II-3-224/98 was rendered ineffective. The aforementioned Conclusion had been adopted by the Service on 11 November 2002, whereby appellant Dragan Ćosić was granted the occupancy right over the apartment at Kralja Tomislava Street in Mostar. By the same ruling the appellant's claim for repossession of the apartment in question was dismissed. In the reasoning of the ruling the Service stated that after the inspection of the Official Military Journal no. 29 of 16 August 1999 it was established that the appellant had been awarded the medal of military virtue in the field of defence and security, which means that after 19 May 1992 he had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina. In view of the aforesaid, pursuant to Article 3a of the Law on Cessation, he cannot be considered a refugee nor is he entitled to repossession of the apartment in the Federation of Bosnia and Herzegovina. By the ruling of the Ministry for Construction, Property-Legal and Housing Affairs and Environmental Protection of the Herzegovina-Neretva Canton, no UP-09-25-03-165/03 of 15 September 2003 the appellant's complaint against the first instance ruling was dismissed.

49. By the judgment of the Cantonal Court in Mostar no. U-436/2003 of 7 October 2004 the appellant's lawsuit whereby an administrative dispute had been initiated against the ruling of the Ministry for Construction, Property-Legal and Housing Affairs and Environmental Protection of the Herzegovina-Neretva Canton no. UP-09-25-03-165/03 of 15 September 2003 was dismissed. In the reasoning of its judgment the Cantonal Court noted that the administrative bodies adopted a correct decision when they dismissed the appellant's claim for repossession of the apartment in question for the reason that in the course of the proceeding it was established that the appellant had remained in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992. Therefore, pursuant to the relevant provisions of the Law on Cessation, the appellant is not considered a refugee nor is he entitled to repossession of the apartment in the Federation of Bosnia and Herzegovina.

50. By the judgment of the Supreme Court no. Už-598/04 of 29 April 2009 the complaint lodged by the appellant against the judgment of the Cantonal Court was dismissed. In the reasoning of its judgment the Supreme Court noted that the Cantonal Court correctly considered that the administrative bodies established all relevant facts for the purpose of correct and lawful resolution of the appellant's claim and that the substantive law was correctly applied to the established facts and a correct decision was adopted to dismiss the appellant's lawsuit.

Facts relating to appeal no. AP 3112/09

51. By the ruling of the Service for Property Affairs and Cadastre of Real Property of the Municipality of Bihać no. 04-23-3041/99 of 27 October 2008, which was upheld by the ruling of the Ministry for Construction, Property-Legal and Housing Affairs and Environmental Protection of the Una-Sana Canton no. 11/2-23-614-UP-2/08 of 5 February 2009, the claim of appellant Zdravko Grabovac for repossession of the apartment at H-15 Harmani Street in Bihać was dismissed. The appellant was the occupancy right holder over the apartment in question, which the Service established by inspecting the ruling of the Garrison Command int. no. 458-459 of 27 June 1986 and Contract for use of the apartment no. 23-238 of 11 February 1987. Furthermore, by the inspection of the Order of the Commander of Air Force and Anti-Air Defence no. 2-9 of 5 April 2000 published in the Official Military Journal no. 11 of 4 May 2000, page 227, and the ruling of the Military Post Office no. 6478 int. no. 22-5 of 16 June 2000, whereby the appellant had been relieved from military service as of 15 August 2000, the Service established that the appellant had remained in the service of Yugoslav Army after 19 May 1992. Taking into account the established facts, the Service referred to Article 3a of the Law on Cessation and noted that considering the fact that the appellant had remained in the service of the armed forces outside the territory of Bosnia and Herzegovina and that he was not granted the status of a refugee or other equivalent protective status, he is not entitled to repossession of the apartment.

52. By the judgment of the Cantonal Court in Bihać no. 01 0 U 000738 09 U of 21 August 2009 the complaint lodged by the appellant against the ruling of the Ministry for Construction, Property-Legal and Housing Affairs and Environmental Protection of the Una-Sana Canton no. 11/2-23-614-UP-2/08 of 5 February 2009 was dismissed. In the reasoning of its judgment the Cantonal Court noted that the administrative bodies adopted a correct decision when they dismissed the appellant's claim for repossession of the apartment in question for the reason that in the course of the proceeding it was established that the appellant had remained in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992. Therefore, pursuant to the relevant provisions of the Law on Cessation, the appellant is not considered a refugee nor is he entitled to repossession of the apartment in the Federation of Bosnia and Herzegovina.

Facts relating to appeal no. AP 3303/09

53. By the ruling of Administration no. 23/5-372-4641/98 of 23 June 2005, which was upheld by ruling of the Ministry for Housing Affairs of the Canton of Sarajevo no. 27/02-23-16467/0 of 18 August 2005, the claim of appellant Dragan Vejnović for repossession of the apartment at 20/4 Derviša Numića Street in Sarajevo was dismissed. The appellant

was the occupancy right holder over the apartment in question which was established by the Administration after the inspection of the Contract for use of the apartment no. 27/245-265 of 29 April 1988. Furthermore, in the course of the proceeding the Administration established, by inspecting both the Certificate VP 3001 Beograd int. no. 5471-2 of 6 July 2000 and statement of the appellant given for the record, that the military service of the appellant in the rank of the warrant officer of the 1st class ceased to be in effect upon the order of the Chief of Personnel Department of the General Staff of the Army of Yugoslavia no. 160-43 of 15 July 2001, wherefrom it follows that the appellant had remained in the active service in his capacity as professional military person in the Army of Yugoslavia after 14 December 1995. Considering such established facts of the case, the Service referred to Article 3a of the Law on Cessation and noted that, considering the fact that the appellant had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina and that had not been granted a refugee status or other equivalent protective status, the appellant is not entitled to the right to repossession of the apartment.

54. By the judgment of the Cantonal Court in Sarajevo no. 09 0 U 0003177 of 27 March 2009 the lawsuit of the appellant initiating an administrative dispute against ruling of the Ministry no. 27/02-23-16467/0 of 18 August 2005 was dismissed. In its reasoning the Cantonal Court indicated that the administrative bodies adopted a correct decision when they dismissed the appellant's claim for the repossession of the apartment in question for the reason that during the proceeding it was established that after 14 December 1995 the appellant had remained in the armed forces outside the territory of Bosnia and Herzegovina and, therefore, pursuant to the relevant provisions of the Law on Cessation, the appellant is not considered a refugee nor is he entitled to repossession of the apartment in the Federation of Bosnia and Herzegovina.

Facts relating to appeal no. AP 3647/09

55. On 9 August 2005, appellant Petar Ivanović initiated law proceedings with the Municipal Court in Tuzla against the Federation of Bosnia and Herzegovina and suggested that, upon the conduct of the proceeding, the Court establish the validity of the contract to purchase the apartment IN. no. 3513-7104-4 of 4 March 1992, which he concluded with the SSNO (the Federal Secretariat of the National Defence) - the Military-Construction Directorate of Sarajevo and to order the defendant to accept the fact that the appellant is to be registered as owner over the apartment with full ownership and be entered into possession of the apartment. The Municipal Court, by its judgment no. P-1397/05 of 10 September 2007 which was upheld by the judgment of the Cantonal Court in Tuzla no. 003-Gz-07-001708 of 28 May 2008 dismissed the appellant's claim in its entirety. In the reasoning of its judgment the Municipal Court stated that after the conducted proceeding

it undoubtedly established that the appellant had concluded the contract to purchase the apartment in question and that he had paid the price determined in the aforementioned contract but that the said contract, upon its conclusion, was not delivered to the competent taxation office for the certification purposes. After the inspection of the contract for use of the mentioned apartment no. 55-281 of 6 May 1991 it was established that the appellant had been the occupancy right holder over the apartment in question. Furthermore, it was established that the appellant was the member of the Yugoslav Army and that his professional military service seized to be in effect on 26 September 2000. Based on the aforesaid, the Municipal Court referred to the provision of Article 39e(1) and (2) of the Law on Sale of Apartments and found that, instead of being entitled to registration of ownership in the land books, the appellant is entitled to compensation from the FBiH.

56. By the judgment of the Supreme Court no. 070-0-Rev-08-001335 of 3 September 2009 the revision appeal filed by the appellant against the judgement of the Cantonal Court in Tuzla no. 003-0-Gž-07-001708 of 28 May 2008 was dismissed. In the reasoning of its judgment the Supreme Court noted that the decisions of the Cantonal Court and Municipal Court are correct and based on the law and that the appellant's allegations from the revision appeal are ill-founded for which reason his appeal could not be granted.

Facts relating to appeal no. AP 3937/09

57. By the ruling of the Administration no. 23/5-372-P-3499/99 of 22 April 2003, which was upheld by ruling of the Ministry for Housing Affairs of the Canton of Sarajevo no. 23/6-372-3499/99 of 7 January 2008, the claim of appellant Biljana Milišić for repossession of the apartment at Nedima Filipovića Street 23/VI in Sarajevo was dismissed. The appellant was the occupancy right holder over the apartment in question, which was established by the Administration after the inspection of the Contract for use of the apartment no. 17-889 of 6 September 1989. Furthermore, in the course of the proceeding and after the inspection the certificate no. 2-163 of 16 April 2003 issued by the Post Office no. 9195 Meljine, the Administration established that on 12 January 1993 the appellant had been employed by the PO Meljine at the work post of pharmacist in the Biochemical-Haematological Ward of the Military Hospital, wherefrom it follows that the appellant had remained on active duty in the Army of Yugoslavia after 19 May 1992. Bearing in mind the aforementioned established facts, the Administration referred to Article 3a of the Law on Cessation and noted that, given the fact that the appellant had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina and that she had not been granted the refugee status or other equivalent protective stats, the appellant is not entitled to repossession of the apartment.

58. By the judgment of the Cantonal Court in Sarajevo no. 09 0 U 001200 08 U of 29 October 2009 the lawsuit of the appellant initiating an administrative dispute against ruling of the Ministry no. 23/6-372-3499/99 of 7 January 2008 was dismissed. In its reasoning the Cantonal Court indicated that the administrative bodies adopted a correct decision when they dismissed the appellant's claim for the repossession of the apartment in question for the reason that during the proceeding it was established that after 19 May 1992 the appellant had remained in the armed forces outside the territory of Bosnia and Herzegovina and, therefore, pursuant to the relevant provisions of the Law on Cessation the appellant is not considered a refugee nor is he entitled to repossession of the apartment in the Federation of Bosnia and Herzegovina

Facts relating to appeal no. AP 3898/10

59. By the ruling of the Social Affairs Department of the City of Mostar no. 06-25-579/05 of 1 February 2007 the claim of appellant Vlastimir Stamenković for repossession of the apartment at Brune Busica Street 5 in Mostar was dismissed. The appellant was the occupancy right holder over the apartment in question and that fact was established by the Department after the inspection of the Contract for use of the apartment of 26 April 1988. Furthermore, in the course of the proceeding the Department established, after the inspection of the ruling of the Institute for Social Insurance of Military Persons of the Army of Yugoslavia no. 103292-Up-1-1252/94 of 18 January 1994, that the appellant retired on 31 December 1993, wherefrom it follows that the appellant had remained on active duty in the Army of Yugoslavia. Bearing in mind the established facts, the Department referred to Article 3a of the Law on Cessation and noted that, given the fact that the appellant had remained on active duty in the armed forces and that he had not been granted the refugee status or other equivalent protective status, he is not entitled to repossession of the apartment.

60. By the ruling of the Ministry for Construction, Property-Legal and Housing Affairs and Environmental Protection of the Herzegovina-Neretva Canton, no UP-09-03-25-37/03 of 26 March 2009 September 2003, which was upheld by the judgment of the Cantonal Court in Mostar no. 07 0 U 002831 09 U of 13 November 2009, the complaint lodged by the appellant against the ruling of the Department no. 06-25-579/05 of 1 February 2007 was dismissed.

61. By the judgment of the Supreme Court no. 07 0 U 002831 10 Uvp of 30 June 2010 the appellant's request for extraordinary review of the judgement of the Cantonal Court in Mostar no. 07 0 U 002831 09 U of 13 November 2009 was dismissed. In the reasoning of its judgment the Supreme Court noted that the Cantonal Court in Mostar and administrative bodies correctly decided when they, by application of the provision of Article 3a of the

Law on the Cessation, dismissed the appellant's claim for repossession of the apartment in question given the fact that in the course of the proceeding it was established that the appellant had remained on active duty in the armed forces outside the territory of Bosnia and Herzegovina after 19 May 1992.

Facts relating to appeal no. AP 1578/12

62. By the ruling of the Administration no. 23/5-372-2669/98 of 15 May 2008, which was upheld by ruling of the Ministry for Housing Affairs of the Canton of Sarajevo no. 27/02-23-3543/08 of 1 July 2008 the claim of appellant Safet Bejtović for repossession of the apartment at 3 Hamze Orlovića Street in Sarajevo was dismissed. Based on the evidence from the case-file the Administration established that the appellant was the occupancy right holder over the apartment in question. Furthermore, in the course of the proceeding and after the inspection of the Order of the Chief of the Personnel Department of the Federal Secretariat for National Defence no. 2-229/29 of 25 April 1992, the Administration established that the appellant, upon his own request, was relieved from the professional military service as of 1 July 1992, wherefrom it follows that the appellant had remained on active duty in the Army of Yugoslavia after 19 May 1992. Bearing in mind the established facts, the Administration referred to Article 3a of the Law on Cessation and noted that, given the fact that the appellant had remained on active duty in the armed forces and that he had not been granted the refugee status or other equivalent protective status, he is not entitled to repossession of the apartment.

63. By the judgment of the Supreme Court no. 09 0 U 001153 08 U of 27 February 2012 the lawsuit of the appellant initiating an administrative dispute against the ruling of the Ministry no. 27/02-23-3543/08 of 1 July 2008 was dismissed. In its reasoning the Cantonal Court indicated that the administrative bodies adopted a correct decision when they dismissed the appellant's claim for repossession of the apartment in question for the reason that during the proceeding it was established that after 19 May 1992 the appellant had remained in the armed forces outside the territory of Bosnia and Herzegovina and, therefore, pursuant to the relevant provisions of the Law on Cessation, the appellant is not considered a refugee nor is he entitled to repossession of the apartment in the Federation of Bosnia and Herzegovina.

Facts relating to appeal no. AP 2059/12

64. By the ruling of the Administration for Housing Affairs of the Canton of Sarajevo no. 23/6-372-6525/98 of 16 December 2008, which was upheld by the ruling of the Ministry for Housing Affairs of the Canton of Sarajevo no. 27/02-23-876/09 of 16 February 2009

the claim of appellant Budimir Antunović for repossession of the apartment at Topal Osman Paše Street 26 in Sarajevo was dismissed. After the inspection of the Contract for use of the apartment no. 40-326/81 of 19 March 1981, the Administration established that the appellant was the occupancy right holder over the apartment in question. Furthermore, in the course of the proceeding the Administration also established, after the inspection of the order of the Chief of the General Staff of the Army of Yugoslavia no. 3-12 of 14 January 1994 published in the Official Military Journal of the Army of Yugoslavia no. 4 of 10 February 1994, that the appellant had been promoted on 7 June 1992 into the rank of Colonel of Technical Service and, after the inspection of the ruling of the Fund for Social Insurance of Military Persons Beograd SP no. 508173 UP 1151/99 of 28 January 1999, the Administration established that the appellant had been relieved from the professional military service on 31 December 1998, wherefrom it follows that the appellant had remained in the service of the Army of Yugoslavia after 19 May 1992. Bearing in mind the established facts, the Administration referred to Article 3a of the Law on Cessation and noted that, given the fact that the appellant had remained on active duty in the armed forces and that he had not been granted a refugee status or other equivalent protective status, he is not entitled to repossession of the apartment.

65. By the judgment of the Cantonal Court in Sarajevo no. 09 0 U 003693 U of 16 April 2102 the lawsuit of the appellant initiating an administrative dispute against the ruling of the Ministry no. 27/02-23-876/09 of 16 February 2009 was dismissed. In its reasoning the Cantonal Court indicated that the administrative bodies adopted a correct decision when they dismissed the appellant's claim for the repossession of the apartment in question for the reason that during the proceeding it was established that after 19 May 1992 the appellant had remained in the armed forces outside the territory of Bosnia and Herzegovina and, therefore, pursuant to the relevant provisions of the Law on Cessation, the appellant is not considered a refugee nor is he entitled to repossession of the apartment in the Federation of Bosnia and Herzegovina.

IV. Appeal

a) Allegations stated in the appeals

66. The appellants lodged their appeals claiming that it was impossible for them to repossess the apartments they had used before the war in Bosnia and Herzegovina. In this regard, the appellants pointed out that because of the impossibility of regaining possession of their apartments their right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), their right to

home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, as well as their right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention were violated. In addition, all the appellants stated that the apartments in question had been allocated to them for use, as „military apartments" from the Housing Fund of the former JNA, based on the valid rulings on allocation of the apartments and the valid contracts on the use of the apartments. The appellants instituted proceedings in several instances, including the competent administrative bodies and first-instance and second-instance ordinary courts, so that the resolutions of these cases differ depending on the authority deciding on these cases.

V. Relevant Law

67. The **Law on Cessation of Application of the Law on Abandoned Apartments** (*the 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, 29/03 and 81/09), in the relevant part, reads:

Article 3(1) and (2)

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 Annex 7, Article 1 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.

Article 3a

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 nor have a right to repossess the apartment if after May 19, 1992 s/he remained in active service as a military or civilian personnel of any armed forces outside the territory of Bosnia and Herzegovina, unless s/he had residence approved to him or her in the capacity of a refugee, or other equivalent protective status, in a country outside the Former SFRY before 14 December 1995.

A holder of an occupancy right from paragraph 1 of this Article will not be considered a refugee or have a right to repossess the apartment in the Federation of Bosnia and Herzegovina, if s/he has acquired another occupancy right or other equivalent right from the same housing fund of former JNA or newly-established funds of armed forces of states created on the territory of former SFRY.

VI. Admissibility

68. 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.

69. Pursuant to Article 16(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

70. In the present case, the subject matter of the appeals relates to the decisions rendered by different authorities in different types of proceedings that were initiated by the appellants for repossession of the apartments they had used before the war and over which they had occupancy rights. The appeals were filed within 60 days time-limit from the date of the final decisions providing an effective remedy, as provided for by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeals also meet the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court because they are neither manifestly (*prima facie*) ill-founded nor is there any other formal reason that would render the appeals inadmissible.

71. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16 (1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court notes that the appeals meet the admissibility requirements.

VII. Merits

72. The appellants have challenged the decisions of the ordinary courts and competent administrative bodies, claiming that these decisions are in violation of their rights under Article II(3)(e), (f) and (k) of the Constitution of Bosnia and Herzegovina and Articles 6 and 8 of the European Convention and Article 1 of Protocol No. 1 to the European Convention. In essence, the appellants' allegations relate to the *impossibility for them of regaining possession of the so-called military apartments over which they had occupancy rights but failed to enter into legally valid purchase contracts relating to these apartments*.

73. As to the allegations stated in the appeals, the Constitutional Court points out that it has dealt with the right to restitution of pre-war apartments in a number of its decisions through its case-law and expressed the view, in light of the provision of Article II(5) of the Constitution of Bosnia and Herzegovina, that the refugees and displaced persons had the right to freely return to their homes. In a number of its decisions, the Constitutional Court has concluded that the property restitution is the 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 be seen as a predominating objective (see Constitutional Court, Decision no. *U 14/00* of 4 May 2001, *the Official Gazette of Bosnia and Herzegovina* no. 33/01). The Constitutional Court recalls that given the new legal situation and amendments in the field of housing legislation, it has examined the issues relating to restitution of military apartments in several of its decision, including decision no. *U 15/11* of 30 March 2012 (see, Constitutional Court, Decision on Admissibility and Merits no. *U 15/11* of 30 March 2012, *the Official Gazette of Bosnia and Herzegovina* no. 37/12, available at www.ccbha.ba), and its Decision on Admissibility and Merits no. *AP 1205/08* of 25 May 2012. In the aforementioned decisions, the Constitutional Court examined the issues similar to those raised in the present appeals, so that in the Decision on Admissibility and Merits no. *U 15/11* of 30 March 2012, the Constitutional Court *reviewed the constitutionality of the relevant provisions of the national law, regulating the right to restitution of a military apartment in cases where appellants possessed a legally valid purchase contract and where they did not take part, as members of the VJ forces, in war crimes committed in the territory of Bosnia and Herzegovina, the right to registration of the ownership over such an apartment and the right of public authorities to pay compensation rather than natural restitution, and whether the stipulated compensation was in compliance with the right to property*, in light of the judgment of the European Court („the European Court") in the case of *Đokic v. Bosnia and Herzegovina* (Judgment of 27 May 2010, Application no. 6518/04, available at www.mhrr.gov.ba). In its decision no. *AP 1205/08* of 25 May 2012, the Constitutional Court decided on an issue relating to a violation of the appellants' constitutional rights in cases where the appellants possessed the legally valid contracts on purchase of their pre-war apartments, *i.e.* the so-called military apartments but were deprived of the possibility to repossess the apartments that had been the subject matter of purchase contracts and to register their ownership, although they had not taken part, as members of the VJ forces, in war crimes committed in the territory of Bosnia and Herzegovina and, *meanwhile, i.e. after abandoning their apartments, they did not acquire a new housing right or an equivalent right, either from the same Housing Fund or from the newly established funds of the armed forces crated in the territory of the former Yugoslavia*. In addition, the Constitutional Court refers to a judgment of the European Court in the case of *Mago and Others v. Bosnia*

and Herzegovina (Judgment of 3 May 2012, available at www.mhrr.gov.ba), in which the European Court considered the applicants' requests for repossession of their pre-war apartments *i.e.* the so-called military apartments over which they had had occupancy rights but had not entered into legally valid purchase contracts. In addition, the European Court dealt with the issue whether the applicants had participated, as part of the VJ forces, in any war crime in the territory of Bosnia and Herzegovina and whether or not they had meanwhile been granted, *i.e.* after abandoning their apartments, a new housing right or an equivalent right either from the same Housing Fund or from the newly established funds of the armed forces created in the territory of the former Yugoslavia.

Right to property

Article II(3)(e) of the Constitution of Bosnia and Herzegovina, in the relevant part, reads:

„All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

k) The right to property."

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

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

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

74. When considering whether the violation of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention has occurred, the Constitutional Court must first determine whether the appellants had „property" within the meaning of the aforementioned provisions of the Constitution of Bosnia and Herzegovina and the European Convention.

75. In answering the question whether the appellants had „property" within the meaning of the aforementioned provisions of the Constitution of Bosnia and Herzegovina and the European Convention, the Constitutional Court, in addition to its own case law, recalls the above cited judgment of the European Court in the case of *Mago and Others v. Bosnia and*

Herzegovina, where in paragraph 78, the aforementioned Court pointed out the following: „The Gacesa and Trifunovic cases, referred to above, like the present case, concerned the restitution of flats following massive migrations linked to the brutal disintegration of the SFRY. The Court held that the applicants in those cases did not have „possessions" within the meaning of Article 1 of Protocol No. 1 because occupancy right holders in Croatia had no longer been able to purchase their flats since 1 January 1996. *However, the present case must be distinguished*. Pursuant to the Dayton Peace Agreement and domestic laws enacted under international pressure, all occupancy right holders in Bosnia and Herzegovina are as a rule entitled to get back their pre-war flats and then purchase them under very favourable terms. In Croatia, this is not the case. Furthermore, unlike the Croatian authorities, the Bosnian-Herzegovinian authorities have consistently held that an occupancy right constitutes „possessions" within the meaning of Article 1 of Protocol No. 1 (see, for example, the Human Rights Commission's decision mentioned in paragraph 34 above and the Constitutional Court's decision mentioned in paragraph 54 above). As the position of the national authorities appears to be in accordance with international standards, the Court does not see any reason to depart from it. *Lastly, the situation in the present case is not that different from the situation in Đokić, given that those who purchased military flats located in the present-day Federation of Bosnia and Herzegovina could not register their ownership and remained, strictly speaking, occupancy right holders (see Đokić, cited above, paragraph 12). The Court therefore dismisses the respondent Government's objection*."

76. In the present case, the Constitutional Court notes that the appellants' requests for repossession of the apartment on which they or their spouses had had a pre-war occupancy right were dismissed by the challenged decisions. Given that according to the case law of the Constitutional Court and the European Court, occupancy rights constitute a „possession" within the meaning of Article 1 of Protocol No. 1 to the European Convention, the Constitutional Court holds that the apartments in question over which the appellants or their spouses had the occupancy rights, constitute the appellants' property safeguarded by Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

77. In respect of the issue of whether in the present case there has been an interference with the appellants' right to property, the Constitutional Court recalls that, in a number of its decisions (see Constitutional Court, Decision of Admissibility and Merits no. *AP 2531/05* of 12 April 2006 and Decision of Admissibility and Merits no. *AP 1512/06* of 3 April 2008), it concluded that the denial of a request for restitution of an apartment amounted to the interference with the appellants' right to property within the meaning of Article 1 of Protocol No. 1 to the European Convention. The European Court, in the

case of *Mago and Others v. Bosnia and Herzegovina*, considered the applications of two groups of the applicants. In all the cases referred to in the aforementioned decision, the European Court established that the cancellation of the applicants' occupancy rights which had prevented them from getting back their pre-war apartments amounted to a deprivation of their possessions within the meaning of the second rule of Article 1 of Protocol No. 1 to the European Convention. Therefore, the Constitutional Court does not see any reason to depart from its case law and the case law of the European Court and concludes that the denial of a request for restitution of an apartment amounts to the interference with the appellant's right to property within the meaning of Article 1 of Protocol No. 1 to the European Convention.

78. In view of the above, it just remains for the Constitutional Court to answer the following questions: (a) whether the interference was in accordance with the law and in the public interest and (b) whether the interference was proportionate to the aim, *i.e.* whether it struck a fair balance between the rights of the appellants and the general public interest.

79. The Constitutional Court recalls that, in the cited judgment *Mago and Others v. Bosnia and Herzegovina*, the European Court examined the lawfulness of interference by public authorities with the applicants' right to property and concluded that the applicants' occupancy rights had been cancelled pursuant to Article 3a of the 1998 Law on Cessation (paragraphs 96-97 of the cited judgment) and that the Constitutional Court declared that provision constitutional (see paragraph 54 of the cited judgment). Finally, the European Court concluded that it was therefore clear that the interference had been provided for by law within the meaning of the second rule of Article 1 of Protocol No. 1. The Constitutional Court does not see any reason to depart from its case law and the case law of the European Court and concludes *that the interference by public authorities with the appellants' right to peaceful enjoyment of their property was provided for by law within the meaning of the second rule of Article 1 of Protocol No. 1 to the European Convention*.

80. The Constitutional Court notes that, in the cited judgment *Mago and Others v. Bosnia and Herzegovina*, the European Court *examined the aim of the interference* and pointed out in paragraph 100 of the cited judgment the following: „While the Court is aware that during and immediately after the war many abandoned flats were reportedly allocated to the highest military and civilian officials whose housing needs had otherwise been met (see *Đokić*, cited above, paragraphs 10 and 61), it would appear that those deficiencies have later been remedied (see paragraphs 57 and 91 above). In view of that, *the Court accepts that the interference with the applicants' possessions was aimed at enhancing social justice, as argued by the respondent Government." Consequently, as to the aim of the interference with the appellants' right to peaceful enjoyment of their property, the*

Constitutional Court continues to adhere to its case law and the case law of the European Court and concludes that the interference in question pursued a legitimate aim.

81. In answering the question whether *a fair balance* was struck, the Constitutional Court recalls that the European Court, in the cited judgment *Mago and Others v. Bosnia and Herzegovina*, took two views and *found a violation* of Article 1 of Protocol No. 1 to the European Convention with respect to Ms. Ljeposava Mago (paragraph 102), who had been deprived of her property because of Mr Mago's service in the VJ forces during and after the war. However, the respondent Government underlined that under the housing legislation spouses held occupancy rights in common, but they disregarded the fact that Ms. Mago was no longer married to Mr. Mago, a member of the VJ forces. It is noted that in the event of a divorce spouses are entitled under the housing legislation to choose which one of them will continue to use their flat (see paragraph 6). In the view of the European Court, the authorities must respect that choice. Furthermore, the respondent Government also argued that the applicant should have applied to the competent court for a transfer of the occupancy right following her divorce. However, according to the housing legislation, such proceedings must be pursued only in the absence of an agreement between former spouses as to the use of their flat after their divorce. In the case concerned, Mr Mago did not apply for the restitution of the flat in Sarajevo and thereby tacitly agreed that Ms Mago would take it back. In those circumstances, his status should not have been taken into account when examining Ms Mago's restitution claim. The European Court concluded that *since the applicant had not fallen into any of the categories targeted by the contested measures and the respondent Government had not suggested any other reason for the deprivation of her possessions, there was a breach of Article 1 of Protocol No. 1 with respect to Ms Mago*. Next, the European Court pointed out in paragraph 103 of the aforementioned judgment that it further observed that „[…]*Mr Jovan Radovic and Mr Vase Krstevski had been deprived of their possessions merely because of their service in the VJ forces during and after the war in Bosnia and Herzegovina*. According to the European Court, *while the respondent Government alleged that those applicants had probably been allocated flats in Serbia, they failed to substantiate that allegation*. In addition, the parties agreed, and this is indeed well known, that the nature of the war in Bosnia and Herzegovina was such that service in certain armed forces was to a large extent indicative of one's ethnic origin (see *Đokic*, paragraph 60). As a result, the contested measures, although apparently neutral, have the effect of treating people differently on the ground of their ethnic origin. The European Court held in comparable situations that, as a matter of principle, no difference in treatment which was based exclusively or to a decisive extent on one's ethnic origin was capable of being objectively justified in a contemporary democratic society (*Sejdic and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and

34836/06, paragraph 44, ECHR 2009; *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, paragraph 176, ECHR 2007-IV; and *Timishev v. Russia*, nos. 55762/00 and 55974/00, paragraph 58, ECHR 2005-XII). The European Court did not see any reason to depart from that finding. As the applicants had not been given any compensation, the European Court concluded that there was a violation of Article 1 of Protocol No. 1 with respect to Mr Jovan Radovic and Mr Vase Krstevski" .

82. In view of the above and in accordance with the case-law of the European Court in the judgment *Mago and Others v. Bosnia and Herzegovina*, the Constitutional Court should establish that *a)* there has been no violation of Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention and should dismiss the appeals as ill-founded in the cases where, *after abandoning their apartments*, the appellants, who had remained in the active service of the armed forces outside the territory of Bosnia and Herzegovina and for whom it was established that they had not participated as members of the VJ forces in war crimes committed in the territory of Bosnia and Herzegovina, *were granted new occupancy rights or equivalent rights,* whereas the Constitutional Court should establish that *b)* there has been a violation of Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention and should grant the appeals as well-founded in the cases where, *after abandoning their apartments*, the appellants, who had remained in the active service of the armed forces outside the territory of Bosnia and Herzegovina and for whom it was established that they had not taken part as members of the VJ forces in war crimes committed in the territory of Bosnia and Herzegovina, *were not granted new occupancy rights or equivalent rights.*

83. However, the Constitutional Court is aware that both administrative bodies and ordinary courts failed to establish the fact as to whether the appellants, *after abandoning their pre-war apartments were granted or not granted new occupancy rights or equivalent rights*, apart from appellant Zdravko Volaš (AP 3954 and AP 3975/08) and appellant Milan Knežević (AP 1543/09), in respect of whom it was established that they had not acquired new occupancy rights or equivalent rights.

84. In view of the above, the Constitutional Court concludes that there has been a violation of the property rights of the appellants referred to in the present decision, as they were deprived of their property without establishing the relevant facts as to whether the requirements were met so that their pre-war occupancy rights were compensated appropriately, whereby the appellants have had to bear an excessive burden, *i.e.* no fair balance has been struck between the protection of the appellants' property and the requirements of the general interest.

85. The Constitutional Court recalls that, before making the decision in the case of *Mago and Others v. Bosnia and Herzegovina*, the European Court itself, with the assistance of the Serbian Government, established the relevant facts. The Constitutional Court cannot directly conduct such proceedings to establish the relevant facts. Hence, the Constitutional Court has decided to deliver the present decision to the Government of the Federation of BiH, which, in deciding the appellants' respective claims, *will establish* whether the appellant or his/her spouse with whom he/she still lives in marriage *were granted new occupancy rights or equivalent right after abandoning their pre-war apartments were granted new occupancy rights or equivalent rights*. As to the appellants in respect of whom it will be established that they or their spouses with whom they still live in marriage *have not been granted new occupancy rights or equivalent rights after abandoning their apartments*, the Government of the Federation of BiH will secure their right in accordance with the standards of the decision of the Constitutional Court of Bosnia and Herzegovina no. *U 15/11* of 30 March 2012, published in the *Official Gazette of Bosnia and Herzegovina* no. 37/12, within three months from the date of filing of the appellants' respective claims. In addition, as to the appellants in respect of whom it will be established that they or their spouses with whom they still live in marriage *have been granted new occupancy rights or equivalent rights after abandoning their apartments*, the Government of the Federation of BiH will complete the proceedings and take into account that there has been no violation of their property rights and that they are not entitled to the right in accordance with the standards of the Decision of the Constitutional Court of Bosnia and Herzegovina no. *U 15/11* of 30 March 2012, published in the *Official Gazette of Bosnia and Herzegovina* no. 37/12.

Right to a fair trial and the right to respect for home

86. Taking into account the allegations and conclusions presented in the course of consideration of violations of the appellants' right to property, the Constitutional Court finds it unnecessary to examine the appellants' allegations that their right to a fair trial and their right to respect for home have been violated.

VIII. Conclusion

87. The Constitutional Court concludes that there has been a violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention where, by the interference with the appellants' property, which was in accordance with the law and pursued the legitimate aim, and by preventing the appellants from getting back their pre-war apartments over

which they or their spouses had had occupancy rights, public authorities actually seized the property without having established the relevant facts as to whether the requirements were met so that the appellants' pre-war occupancy rights were compensated appropriately and, as a result, the appellants have had to bear an excessive burden, *i.e.* no fair balance has been struck between the protection of the appellants' property and the requirements of the general interest.

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

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 3151/09

DECISION ON ADMISSIBILITY AND MERITS

Appeals of M.B., V.B., G.B., K.B., Radoslav Anđić and Vlastimir Antić over the impossibility to repossess apartments which they had used before the war in Bosnia and Herzegovina and which they were the occupancy right holders of

Decision of 23 November 2012

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President,

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić,

Ms. Constance Grewe,

Mr. Mirsad Ćeman,

Ms. Margarita Tsatsa-Nikolovska,

Mr. Zlatko M. Knežević

Having deliberated on the appeals of **Mr. M.B. et al.,** in case no. **AP 3151/09**, at its session held on 23 November 2012 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeals lodged by Mr. M.B., Ms. V.B., Mr. G.B., Ms. K. B., Mr. Vlastimir Antić and Mr. Radoslav Anđić are dismissed as ill-founded.

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

Reasoning

I. Introduction

1. In the period from 9 October 2009 through 28 May 2010, M.B., V.B., G.B., K.B. from Belgrade; Radoslav Anđić from Sarajevo, represented by Dragan Medović, a lawyer

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practicing in Sarajevo; Vlastimir Antić from Belgrade, represented by Sofka Osmančević, a lawyer practicing in Banja Luka („the appellants"), lodged appeals with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") over the impossibility to repossess apartments which they had used before the war in Bosnia and Herzegovina and of which they were the occupancy right holders.

II. Procedure before the Constitutional Court

2. Given that the Constitutional Court received a number of appeals from within its respective jurisdiction, which concern the same factual and legal grounds, pursuant to Article 31(1) of the Rules of the Constitutional Court, the Constitutional Court rendered a decision on the merger of cases, regarding which it would conduct a single proceeding and adopt a single decision under number AP 3151/09. The following appeals have been merged: AP 3151/09, AP 348/10 and AP 2025/10.

III. Facts of the Case

Facts stated in the Appeal no. AP 3151/09

3. On 3 November 2003, the appellant V.B. lodged with the Sarajevo Canton Administration for Housing Issues a request for the enforcement of the Decision of the Commission for Real Property Claims of Displaced Persons and Refugees („the CRPC") no. 303-4329-1/1 of 2 September 2003. The mentioned decision of the CRPC confirmed that on 1 April 1992, M.B. had been the occupancy right holder over the apartment in the street of Milutina Đurasковića no. 20 in Sarajevo. The same decision determined that the occupancy right holder or members of his/her family household, who have such a status on the basis of the Law on Housing Relations which had been in force in the territory of BiH on 1 April 1992, upon the presentation of the CRPC Decision and a proof attesting to their status of members of a family household with the person whose occupancy right was confirmed, can enter into possession of an apartment in accordance with Article 1 of Annex 7 of the Dayton Peace Agreement.

4. The Administration rendered a conclusion no. 23/6-372-1349/98 of 30 March 2004 wherein it was established that the CRPC Decision no. 303-4329-1/1 of 2 September 2003 has become enforceable and that the management over the respective apartment by the Sarajevo Canton Administration Body for Housing Issues has ceased. The same conclusion established that the appellant V.B., a member of the family household of the occupancy right holder over the respective apartment, shall be entitled to repossess the said apartment. It was established also that Nusret Šahić's right to use the respective apartment on a temporary basis shall cease, and he was ordered to leave the apartment within 15

days from the day of receiving the conclusion and vacate the apartment and clear it of all persons and objects, save for those objects belonging to the person who has been authorized to repossess the apartment, without the right to an alternative accommodation.

5. The CRPC Decision no. R-303-4329-1/1-01-518/04 of 18 November 2005 granted the request of the FBiH Ministry of Defense for the reconsideration of the CRPC Decision no. 303-4329-1/1 of 2 September 2003 and the Decision of 2 September was rendered ineffective, and the request of the appellant M.B. for the repossession of the respective apartment was dismissed. It was stated that the Decision no. R-303-4329-1/1-01-518/04 of 18 November 2005 is final and binding and that the applicant can institute a proceeding for reconsideration of that decision before the CRPC, provided that he provides new evidence, or presents allegations, within 60 days from the day of receiving the decision, on new evidence, which the CRPC did not consider when rendering the decision, and which may significantly influence the CRPC decision.

6. The Ruling of the Sarajevo Canton Ministry of Housing Affairs („the Ministry") no. 27/02-23-10300/06 of 22 December 2006 quashed the Conclusion of the Administration no. 23/6-372-1349/98 of 30 March 2004 and suspended the procedure of the enforcement of the CRPC Decision no. 303-4329-1/1 of 2 September 2003. The Ministry noted that the mentioned CRPC decision, after reconsideration, was rendered ineffective by the CRPC Decision no. R-303-4329-1/1-01-518/04 of 18 November 2005, and that the request of M.B. for the repossession of the respective apartment was dismissed, and, as the title of execution, on which basis a conclusion was adopted, was quashed in full and the procedure in the mentioned administrative matter was suspended, the Ministry decided within the meaning of Article 236(3) of the Law on Administrative Procedure (*the Official Gazette of the Federation of Bosnia and Herzegovina* no. 2/98).

7. The appellant V.B. (as a member of the family household of her husband M.B.), by lodging a lawsuit on 22 January 2007 and a supplement to the lawsuit on 26 November 2007, together with her husband M.B. (who was the occupancy right holder over the apartment at issue) and their children as members of the household, instituted an administrative dispute against the Ruling of the Ministry no. 27/02-23-10300/06 of 22 December 2006, which was dismissed by the Judgment of the Cantonal Court no. 09 0 U 003248 07 U of 14 September 2011.

8. The Cantonal Court stated in the reasoning of the judgment that it established during the course of the proceeding that, under the Contract on the Use of the Apartment no. 40-288/81 of 19 March 1981, M.B. was the occupancy right holder over the respective apartment. Further, upon inspecting the Order of the Federal Secretariat for National Defense of SFRY no. 15-87 of 22 December 1988 it was established that M.B. had been an active military

person of the former Yugoslav People's Army with the rank of Lieutenant Colonel, and that the mentioned Order promoted him into the rank of Colonel; upon the inspection of the Order of the Federal Minister of Defense no. 10-364 of 24 October 1995 it was established that M.B.'s professional military service had ceased, upon his request, in order to exercise the right to old-age pension, and that the ruling of the Social Insurance Military Beneficiaries Fund no. 105145 UP-1 1799/05 acknowledged his right to old-age pension starting as of 3 November 1995. Further, by inspecting the documentation submitted by N.S. – the interested person – the occupant of the respective apartment, the Cantonal Court, on the basis of the Inventory list, land registry file no. 4385 – pages 1, 2 and 3 and the Contract int. no. 1458-607 of 17 December 1991, which had been entered into between the Military-Construction Directorate „Beograd 2" and the appellant M.B., *established that the ownership right had been registered over a three-room apartment in Belgrade, described as land registry body II under ordinal number 54, in favor of the appellant M.B. from Belgrade.*

9. In view of the aforementioned, the Cantonal Court *concluded that the appellant M.B. had acquired a new occupancy right outside the territory of BiH through the allocation of the mentioned apartment, which had been registered in his name*, wherefrom it follows that the administration authorities had correctly applied the provision of Article 3(2) of the Law on the Cessation of the Application of the Law on Abandoned Apartments, under which: *A holder of an occupancy right referred to in paragraph 1 of this Article shall not be considered a refugee or have a right to repossess the apartment in the Federation of Bosnia and Herzegovina, if s/he has acquired another occupancy right or other equivalent right from the same housing fund of former JNA or newly-established funds of armed forces of states created in the territory of the former SFRY.*

10. On 16 June 2006, the appellants M.B., V.B., G.B. and K.B. filed a lawsuit with the Municipal Court in Sarajevo against the Government of the Federation of Bosnia and Herzegovina and N. S., and on 21 January 2008 they specified their claim and sought that it be established that M.B. was the occupancy right holder with the lease right on the respective apartment for an indefinite period of time and that V.B., G.B. and K.B. were members of the family household. Further, the appellants requested that the Ruling of the Sarajevo Canton Ministry of Housing Affairs no. 27/02-23-10300/06 of 22 December 2006 and the Contract on the Use of Apartment no. 28-5-U-445/97 of 7 March 1997 entered into between the Government of the Federation of BiH and N.S. be quashed and that N.S. be obligated to hand over the possession of the apartment to them.

11. The Judgment of the Municipal Court no. 065-0-P-06-003222 of 15May 2008 rejected the lawsuit in the part proposing that it be established that M.B. was the occupancy right holder with the lease right on the respective apartment for an indefinite period of time, and

that V.B., G.B. and K.B. were members of the family household with the equivalent rights. As for the part of the claim seeking that the Ruling of the Sarajevo Canton Ministry of Housing Affairs no. 27/02-23-10300/06 of 22 December 2006 be quashed, the Municipal Court declared itself to have no competence on it, all the undertaken actions were quashed and the lawsuit was rejected. The portion of the claim seeking that the Contract on the Use of Apartment no. 28-5-U-445/97 of 7 March 1997 be quashed was dismissed. Finally, the appellants were obliged to pay to the Government of the Federation of BiH the costs of the civil procedure.

12. The Municipal Court stated in the reasoning of the judgment that on the basis of evidence presented during the procedure it was established that the appellant M.B., in accordance with the provision of Article 4 of the Law on the Cessation of the Application of the Law on Abandoned Apartments, lodged a claim for the repossession of the respective apartment, which was dismissed by the ruling of the Sarajevo Canton Administration for Housing Issues dated 22 December 1999. It was established that the CRPC decision of 18 November 2005 dismissed the appellant's claim for the repossession of the respective apartment, and the CRPC decision of 27 October 2006 dismissed the request for reconsideration of the CRPC decision of 18 November 2005 for the reason that it was established that the appellant M.B. had remained in the armed forces outside BiH after 19 May 1992, thus, in accordance with the provision of Article 3a of the Law on the Cessation of the Application of the Law on Abandoned Apartments, he is neither considered a refugee nor does he have the right to repossess the apartment.

13. In view of the aforementioned, the Municipal Court concluded that the appellant M.B.'s occupancy right over the respective apartment has ceased, within the meaning of the provisions of Articles 5 and 13 of the Law on the Cessation of the Application of the Law on Abandoned Apartments, thus in view of that fact and due to lack of a legal interest, it decided as stated in the enacting clause, that is it rejected the request for it to establish that M.B. was the occupancy right holder over the respective apartment, and, accordingly, the claims by V.B., G.B. and K.B. whose rights are accessory rights to the right of M.B..

14. As to the part of the claim seeking the quashing of the ruling of the Ministry of Housing Affairs of the Sarajevo Canton no. 27/02-23-10300/06 of 22 December 2006, the Municipal Court referred to the provision of Article 16 of the Law on Civil Procedure, which prescribes that the court is not called upon to examine the lawfulness of the administrative authorities acts, thus it declared itself to have no competence and rejected that part of the claim.

15. The Judgment of the Cantonal Court in Sarajevo no. 009-0-Gž-08-005357 of 20 May 2009 partly granted the appellant's appeal and modified the first-instance judgment in the

part carrying a decision on the costs of the proceedings, so as to dismiss the request of the Government of the Federation of BiH for the compensation of the costs of the civil procedure. The remaining part of the first-instance judgment was upheld.

16. The Cantonal Court indicated in the reasoning of the judgment that the crucial fact for the resolution of the respective dispute was whether M.B. had remained in the armed forces outside the territory of BiH after 19 May 1992, given that, in such a case, within the meaning of the provision of Article 3a of the Law on the Cessation of the Application of the Law on Abandoned Apartments, he may not be considered a refugee or a displaced person, thus neither he (nor members of his family household) would be entitled to the repossession of the apartment. Given that the first-instance court established that M.B. had been retired as an active military person with the rank of Colonel of the Yugoslav Army by the ruling of the Social Insurance Military Beneficiaries Fund of 14 December 1995, it follows that M.B. had remained in the armed forces outside BiH after 19 May 1992, thus, according to the position of the Cantonal Court, the decision of the first-instance court is correct in rejecting a part of the claim seeking that it be established that M.B. was the occupancy right holder over the respective apartment, and V.B., G.B. and K.B. were members of the family household with the equivalent rights. The Cantonal Court further indicated that the appellants did not dispute the correctness of the established facts of the case in the first-instance proceedings, or the validity of the application of the substantive law, thus the appeal was dismissed in that part and the first-instance judgment upheld. By referring to Article 395 of the Law on Civil Procedure, the Cantonal Court granted the appellant's appeal relating to the costs of the proceedings and modified the first-instance judgment so as to dismiss the request of the Government of the Federation of BiH for the compensation of the costs of the proceedings.

Facts stated in the Appeal no. AP 438/10

17. The Judgment of the Basic Court in Banja Luka no. 71 0 P 033974 07 P of 17 November 2008, in a procedure for the cancellation of a contract on the use of apartment of the plaintiff Republika Srpska, the Ministry of Urban Planning, Civil Engineering and Ecology („the plaintiff"), granted the cancellation of the contract on the use of apartment in Banja Luka, in Nikole Pašića St. no. 58/3, Apt. no. 37 („the apartment at issue"), which the appellant Vlastimir Antić had entered into with the plaintiff's predecessor no. 93/96 of 5 September 1979, and the appellant is obligated to reimburse the costs of the proceedings to the plaintiff.

18. The Basic Court stated in the reasoning of the judgment that it established on the basis of the ruling of the Ministry of Refugees and Displaced Persons, Banja Luka Department no. 05-050-02-02-557/00 of 13 April 2004 that the claim of the appellant for the repossession of the apartment at issue was dismissed as ill-founded.

19. On the basis of the statement of opinion of the Ministry of Urban Planning, Civil Engineering and Ecology, the Republic Directorate for Reconstruction and Construction, no. 15/1.5-372-358/08 of 14 April 2008, the Basic Court established that the appellant had been allocated, by the ruling no. 93/96 of 5 September 1979, an apartment for use in Banja Luka, which the parties find to be undisputable. According to the allegations by the Ministry of Defense of the Republika Srpska, the appellant had been in the professional military service of the Republic of Serbia since 1989. The appellant submitted a petition for the resolution of his housing issue in Belgrade, and the aforesaid is corroborated also by the allegations stated in the submission by the Ministry of Defense of Bosnia and Herzegovina no. 01-50-9780-1/07 of 4 September 2007. The Ministry of Defense of Bosnia and Herzegovina requested, by way of the mentioned act, from the Government of the Republika Srpska, namely the Republic Directorate for Reconstruction and Construction, to check the housing status of a certain number of professional military persons of the Republic of Serbia, who had been occupancy right holders over apartments from the housing fund of the former Yugoslav People's Army, in the territory of Bosnia and Herzegovina, and they submitted a request with the Ministry of Defense of the Republic of Serbia for allocation of apartments and housing loans. By inspecting the list of persons who had the occupancy holder rights over apartments in Bosnia and Herzegovina, the Court established that the mentioned list included the appellant as well, under ordinal number 9, and that the apartment at issue was concerned.

20. Further, on the basis of the letter of the Ministry of Defense of the Republic of Serbia – Human Resources Sector, no. 4874-2 of 13 May 2008, the Court established that the mentioned Sector, on the basis of the inspection of the official records, stated data that the appellant was the retired Sergeant Major, who had served since 31 January 1986 at the School Center of OMJ (Armored and Mechanized Unit) at the Banja Luka Garrison, since 26 September 1989 at the Institute for Military Beneficiaries Social Insurance at the Belgrade Garrison, since 5 August 1994 at the Military Film Center „Zastava film" at the Belgrade Garrison, up until the end of his professional military service on 31 December 1996. Also, on the basis of the presented evidence, conclusion no. UP-1 no. 11199-24/98 of 18 April 2008, the Basic Court *established that the appellant had residence in Batutova Street no. 21, Belgrade.*

21. On the basis of the statements of witnesses Z.S., P.M., M.B., T.B. and N.K., the Basic Court established that the appellant had lived with his family at the apartment at issue, that he had been in Belgrade since 1989, but that he occasionally visited Banja Luka, and that the appellant's family had left the apartment at issue in 1994 and left for Belgrade. Finally, on the basis of the statement of the witness M.G., the Basic Court established that the appellant had lived with his family at the apartment at issue, but that he had left for

Belgrade at his own request. The witness stated that he lived in the same building as the appellant and that he had been told so by the appellant.

22. Further, the Basic Court indicated that Article 47(1) of the Law on Amendments to the Law on Housing Relations (*Official Gazette of the Republika Srpska* no. 12/99) was amended, so that item 7 prescribes that the persons who had left their apartments after 30 April 1992 shall be considered refugees and displaced persons in accordance with Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina, unless proven that they had left their respective apartments for reasons completely unrelated to the war conflicts. The Law on Amendments to the Law on the Cessation of the Application of the Law on the Use of Abandoned Property (*the Official Gazette of the Republika Srpska* no. 96/03) amended the provision of Article 14 of the Law on the Cessation of the Application of the Law on the Use of Abandoned Property so as to insert paragraphs 3 and 4 which prescribe that an occupancy right holder over an apartment owned by the Ministry of Defense of the Republika Srpska, presently the Ministry of Defense of Bosnia and Herzegovina, who had remained, after 14 December 1995, in the professional service in any armed forces outside Bosnia and Herzegovina, *shall not be considered a refugee nor have the right to repossess an apartment in the Republika Srpska.*

23. In view of the aforementioned, particularly the fact that the appellant had been transferred to Belgrade since 1989, upon his personal application, that after 14 December 1995 he had remained in professional military service with the Army of Serbia, where he had been retired; that the *leaving of the apartment was not the result of the war developments,* the court decided to grant the plaintiff's claim.

24. The Judgment of the County Court no. 71 0 P 033974 09 Gž of 10 November 2009 dismissed the appellant's appeal and upheld the Judgment of the Basic Court no. 71 0 P 033874 07 P of 17 November 2008. The reasoning of the judgment reads that on the basis of evidence presented by the first-instance court – that the appellant got the transfer from Banja Luka to Belgrade at his own request, where, since 26 September 1989, he had worked at the Institute for Military Beneficiaries Social Insurance, and since 5 August 1994 at the Military Film Center „Zastava film" up until the end of his military service, that is retirement on 31 December 1996; *that the appellant has residence in Belgrade, that as a professional military person of the Republic of Serbia he lodged a request for the allocation of an apartment and housing loan, that the apartment, after the appellant's family had moved out on 17 July 1994, had been restored to the housing authority of the Republika Srpska Army for management.* In view of these facts, the County Court established that the decision of the first-instance court was correct and lawful. The County Court referred to the provision of Article 47(1)(7) of the Law on Housing Relations (*the*

Official Gazette of the Socialist Republic of Bosnia and Herzegovina nos. 14/84, 12/87 and 36/89; and *the Official Gazette of the Republika Srpska* nos. 19/93, 22/93, 12/99 and 93/99), which prescribes that the contract on the use of apartment can be cancelled to the occupancy right holder even when he and members of his family household, who had lived together with him, stop using the apartment for a continuous period of time exceeding six months, and they stayed either in the country or abroad during that time, unless the occupancy right holder lived elsewhere, namely as a displaced person after 30 April 1991, until the entry into force of the mentioned law, *whereby persons who had left their apartments after 30 April 1991 shall be considered refugees and displaced persons in accordance with Annex VII, unless proven that they had left their respective apartments for reasons completely unrelated to the conflict.*

Facts stated in the Appeal no. AP 2025/10

25. On 24 August 1998, a wife of the appellant Radoslav Anđić filed a claim with the Sarajevo Canton Administration for Housing Issues for the repossession of the apartment in Topal Osman Paše St. no. 18/6, wherein she stated that she was the member of the family household of the occupancy right holder over the respective apartment, which was dismissed as ill-founded by the ruling of the Administration no. 23/6-372-3672/98 of 22 January 2007, which was upheld by the ruling of the Ministry of Housing Affairs of the Sarajevo Canton no. 27/02-23-5695/07 of 18 June 2007. During the procedure, upon inspecting the ruling of the Military Beneficiaries Social Insurance Fund in Belgrade no. SP 532829 UP-1 2613/01 of 1 November 2001, the Administration established that the occupancy right holder – the appellant Radoslav Anđić, had been relieved of the professional military service by the ruling issued by the competent superior dated 31 October 2001. Further, on the basis of the act of the Ministry of Defense of the Republika Srpska no. 8-3-37-140/04 of 3 March 2005, the Administration established *that the right of the appellant Radoslav Anđić to a loan for an apartment in Belgrade and also for an official one-room apartment also in Belgrade had been granted*. In view of the aforementioned, the Administration concluded that, given that Radoslav Anđić – the occupancy right holder over the respective apartment, after 14 December 1995, had remained in the service of the armed forces outside the territory of BiH, *and that he had acquired a new occupancy right, or the equivalent right, he cannot be considered a refugee within the meaning of Article 3a of the Law, nor is he entitled to repossess the apartment.*

26. The Judgment of the Cantonal Court no. 09 0 U 000920 07 U of 15 March 2010 dismissed the lawsuit, by way of which the appellant and his wife instituted an administrative dispute against the ruling of the Ministry no. 27/02-23-5695/07 of 18 June 2007.

27. The Cantonal Court noted in the reasoning of the judgment that it had been established before the administrative authorities, in view of the aforementioned, that the first-instance body had correctly and in compliance with the provisions of Article 3a of the Law on the Cessation of the Application of the Law on Abandoned Apartments (*the Official Gazette of the Federation of Bosnia and Herzegovina* nos. 11/98 through 29/03) established that the appellant, as the previous occupancy right holder over the respective apartment, as of 14 December 1995, had remained in the active military service of the Army of Yugoslavia, *as well as that he had acquired a new occupancy right from the same fund, namely the right equivalent to that right, which is the reason why he is not considered a refugee or a displaced person, nor does he have the right to repossess the apartment.* In view of the aforementioned, the Cantonal Court established that the administrative authorities had adopted the challenged rulings by correctly applying the substantive law and the relevant provisions of the Law on the Cessation of the Application of the Law on Abandoned Apartments in the Federation of Bosnia and Herzegovina and that the rules of the Law on Administrative Procedure were not violated, which may have had a bearing on the resolution of the present administrative matter, thus, as a result thereof, the appellant's claim could not be granted.

IV. Appeal

a) Allegations stated in the appeals

28. The appellants lodged their appeals claiming that it was impossible for them to repossess the apartments they had used before the war in Bosnia and Herzegovina as occupancy right holders. In this regard, the appellants pointed out that the aforementioned amounted to a violation of their right to a fair hearing under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), their right to home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, as well as their right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. The appellants instituted proceedings in several instances, including the competent administrative bodies and first-instance and second-instance ordinary courts, so that the resolutions of these cases differ depending on the authority deciding on these cases.

V. Relevant Law

29. The **Law on Cessation of Application of the Law on Abandoned Apartments** (*the 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, 29/03 and 81/09), in the relevant part, reads:

Article 3(1) and (2)

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 Annex 7, Article 1 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.

Article 3a

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 Defense, the occupancy right holder shall not be considered a refugee nor have a right to repossess the apartment if after May 19, 1992 s/he remained in active service as a military or civilian personnel of any armed forces outside the territory of Bosnia and Herzegovina, unless s/he had residence approved to him or her in the capacity of a refugee, or other equivalent protective status, in a country outside the Former SFRY before 14 December 1995.

A holder of an occupancy right from paragraph 1 of this Article will not be considered a refugee or have a right to repossess the apartment in the Federation of Bosnia and Herzegovina, if s/he has acquired another occupancy right or other equivalent right from the same housing fund of former JNA or newly-established funds of armed forces of states created on the territory of former SFRY.

30. The **Law on Housing Relations** (*Official Gazette of SR BiH* nos. 17/46, 12/87 and 36/89 and *Official Gazette of Republika Srpska* no. 19/93 and 22/93), in the relevant part, reads:

Article 47

The cancellation of the holder of the occupancy right's contract on usage of the apartment can be made when he and the members of his family household who have lived together with him stop with personal usage of the apartment longer than six months continuously, and have lived in the country or abroad for that time, except if:

1) the holder of the occupancy right is called on into service by the JNA,

(...)

6. the holder of the occupancy right and members of his family household temporarily reside at another place in the country or abroad due to reasons listed in paragraph 1f Article 48 of this Law.

It will be considered that the holder of the occupancy right has continuously stopped using the apartment also in the case when he only visits the apartment occasionally, and also when the whole apartment is used by the person who is not a member of the family household.

31. The **Law on Amendments to the Law on Housing Relations** (*Official Gazette of Republika Srpska* no. 12/99), in the relevant part, reads:

Article 47 paragraph 1 of the Law shall be amended with item 7 that reads:

(7) If the occupancy right holder lived in another place, as displaced person, after 30 April 1991, until this law becoming effective.

Persons who had left their apartments after 30 April 1991 shall be considered refugees and displaced person in accordance with Annex VII of the General Framework Agreement for peace in Bosnia and Herzegovina, unless proven they had left their respective apartments for reasons completely unrelated to the conflict.

VI. Admissibility

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

33. Pursuant to Article 16(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-

limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

34. In the present case, the subject matter of the appeals relates to the decisions rendered by different authorities in different types of proceedings that were initiated by the appellants for repossession of the apartments they had used before the war and over which they had occupancy rights. The appeals were filed within 60 days time-limit as provided for by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeals also meet the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court because they are neither manifestly (*prima facie*) ill-founded nor is there any other formal reason that would render the appeals inadmissible.

35. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16 (1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court notes that the appeals meet the admissibility requirements.

VII. Merits

36. The appellants have challenged the judgments of the ordinary courts and competent administrative bodies, claiming that these judgments are in violation of their rights under Article II(3)(e), (f) and (k) of the Constitution of Bosnia and Herzegovina and Articles 6 and 8 of the European Convention and Article 1 of Protocol No. 1 to the European Convention. In essence, the appellants' allegations relate to the impossibility for them to regain possession of the apartments over which they or their spouses had occupancy rights before the war.

37. As to the allegations stated in the appeals, the Constitutional Court points out that it has dealt with the right to restitution of pre-war apartments in a number of its decisions through its case-law and expressed the view, in light of the provision of Article II(5) of the Constitution of Bosnia and Herzegovina, that the refugees and displaced persons had the right to freely return to their homes. In a number of its decisions, the Constitutional Court has concluded that the property restitution is the 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 be seen as a predominating objective (see Constitutional Court, Decision no. *U 14/00* of 4 May 2001, *the Official Gazette of Bosnia and Herzegovina* no. 33/01). The Constitutional Court recalls that given the new legal situation and amendments in the field of housing legislation, it has examined the issues relating to restitution of military apartments in several of its decision, including decision no. *U 15/11* of 30 March

2012 (see, Constitutional Court, Decision on Admissibility and Merits no. *U 15/11* of 30 March 2012, *the Official Gazette of Bosnia and Herzegovina* no. 37/12, available at www.ccbh.ba), and its last decision in case no. *AP 1205/08*, Decision on Admissibility and Merits no. *AP 1205/08* of 25 May 2012. In the aforementioned decisions, the Constitutional Court examined the issues similar to those raised in the present appeals, so that in the Decision on Admissibility and Merits no. *U 15/11* of 30 March 2012, the Constitutional Court reviewed the constitutionality of the relevant provisions of the national law, regulating *the right to restitution of a military apartment in cases where appellants possessed a legally valid purchase contract and where they did not take part, as members of the VJ forces, in war crimes committed in the territory of Bosnia and Herzegovina, the right to registration of the ownership over such an apartment and the right of public authorities to pay compensation rather than natural restitution, and whether the stipulated compensation was in compliance with the right to property*, in light of the judgment of the European Court of Human Rights in the case of *Đokić v. Bosnia and Herzegovina* (Judgment of 27 May 2010, Application no. 6518/04, available at www.mhrr.gov.ba). In its decision no. *AP 1205/08* of 25 May 2012, the Constitutional Court decided on an issue relating to a violation of the appellants' constitutional rights in cases where the appellants possessed the legally valid contracts on purchase of their pre-war apartments, *i.e.* the so-called military apartments but were deprived of the possibility to repossess the apartments that had been the subject matter of purchase contracts and to register their ownership, although they had not taken part, as members of the VJ forces, in war crimes committed in the territory of Bosnia and Herzegovina and, meanwhile, *i.e.* after abandoning their apartments, they did not acquire a new occupancy right or an equivalent right, either from the same Housing Fund or from the newly established funds of the armed forced created in the territory of the former Yugoslavia. In addition, the Constitutional Court refers to a judgment of the European Court of Human Rights in the case of *Mago and Others v. Bosnia and Herzegovina* (Judgment of 3 May 2012, available at www.mhrr.gov.ba), in which the European Court of Human Rights considered the applicants' requests for repossession of their pre-war apartments *i.e.* the so-called military apartments over which they had had occupancy rights but had not entered into legally valid purchase contracts. In addition, the European Court of Human Rights dealt with the issue whether the applicants had participated, as part of the VJ forces, in any war crime in the territory of Bosnia and Herzegovina and whether or not they had meanwhile been granted, *i.e.* after abandoning their apartments, a new occupancy right or an equivalent right either from the same Housing Fund or from the newly established funds of the armed forces created in the territory of the former Yugoslavia.

Right to property

Article II(3)(e) of the Constitution of Bosnia and Herzegovina, in the relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

k) The right to property.

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

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

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

38. When considering whether the violation of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention has occurred, the Constitutional Court must first determine whether the appellants had „property" within the meaning of the aforementioned provisions of the Constitution of Bosnia and Herzegovina and the European Convention.

39. In answering the question whether the appellants had „property" within the meaning of the aforementioned provisions of the Constitution of Bosnia and Herzegovina and the European Convention, the Constitutional Court, in addition to its own case law, recalls the above cited judgment of the European Court of Human Rights in the case of *Mago and Others v. Bosnia and Herzegovina*, where in paragraph 78, the aforementioned Court pointed out the following: „The *Gaćeša and Trifunović* cases, referred to above, like the present case, concerned the restitution of flats following massive migrations linked to the brutal disintegration of the SFRY. The Court held that the applicants in those cases did not have „possessions" within the meaning of Article 1 of Protocol No. 1 because occupancy right holders in Croatia had no longer been able to purchase their flats since 1 January 1996. However, the present case must be distinguished. Pursuant to the Dayton Peace Agreement and domestic laws enacted under international pressure, all occupancy right holders in Bosnia and Herzegovina are as a rule entitled to get back their pre-war flats and then purchase them under very favourable terms. In Croatia, this

is not the case. Furthermore, unlike the Croatian authorities, the authorities of Bosnia and Herzegovina have consistently held that an occupancy right constitutes „possessions" within the meaning of Article 1 of Protocol No. 1 (see, for example, the Human Rights Commission's decision mentioned in paragraph 34 above and the Constitutional Court's decision mentioned in paragraph 54 above). As the position of the national authorities appears to be in accordance with international standards, the Court does not see any reason to depart from it. *Lastly, the situation in the present case is not that different from the situation in Đokić, given that those who purchased military flats located in the present-day Federation of Bosnia and Herzegovina could not register their ownership and remained, strictly speaking, occupancy right holders* (see *Đokić*, cited above, paragraph 12). *The Court therefore dismisses the respondent Government's objection*."

40. In the present case, the Constitutional Court notes that the appellants' requests for repossession of the apartment on which they or their spouses had had a pre-war occupancy right were dismissed by the challenged decisions. Given that according to the case-law of the Constitutional Court and the European Court of Human Rights, occupancy rights constitute a „possession" within the meaning of Article 1 of Protocol No. 1 to the European Convention, the Constitutional Court holds that the apartments over which the appellants or their spouses had occupancy rights constitute the appellants' property safeguarded by Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

41. In respect of the issue of whether in the present case there has been an interference with the appellants' right to property, the Constitutional Court recalls that, in a number of its decisions (see Constitutional Court, Decision of Admissibility and Merits no. *AP 2531/05* of 12 April 2006 and Decision of Admissibility and Merits no. *AP 1512/06* of 3 April 2008), it concluded that the denial of a request for restitution of an apartment amounted to the interference with the appellants' right to property within the meaning of Article 1 of Protocol No. 1 to the European Convention. The European Court of Human Rights, in the case of *Mago and Others v. Bosnia and Herzegovina*, considered the applications of two groups of the applicants. In all the cases referred to in the aforementioned decision, the European Court of Human Rights established that the cancellation of the applicants' occupancy rights which had prevented them from getting back their pre-war apartments amounted to a deprivation of their possessions within the meaning of the second rule of Article 1 of Protocol No. 1 to the European Convention. Therefore, the Constitutional Court does not see any reason to depart from its case-law and the case-law of the European Court of Human Rights and concludes that the denial of a request for restitution of an apartment amounts to the interference with the appellant's right to property within the meaning of Article 1 of Protocol No. 1 to the European Convention.

42. In view of the above, it just remains for the Constitutional Court to answer the following questions: (a) whether the interference was in accordance with the law and in the public interest and (b) whether the interference was proportionate to the aim, *i.e.* whether it struck a fair balance between the appellants' rights and the general public interest.

43. The Constitutional Court recalls that, in the cited judgment *Mago and Others v. Bosnia and Herzegovina*, the European Court of Human Rights examined the lawfulness of interference by public authorities with the applicants' right to property and concluded that the applicants' occupancy rights had been cancelled pursuant to Article 3a of the 1998 Law on Cessation of Application of the Law on Abandoned Apartments (paragraphs 96-97 of the cited judgment) and that the Constitutional Court declared that provision constitutional (see paragraph 54 of the aforementioned judgment). The European Court of Human Rights concluded that it was therefore clear that the interference had been provided for by law within the meaning of the second rule of Article 1 of Protocol No. 1 to the European Convention. The Constitutional Court does not see any reason to depart from its case law and the case law of the European Court of Human Rights and concludes that the interference by public authorities with the appellants' right to peaceful enjoyment of their property was provided for by law within the meaning of the second rule of Article 1 of Protocol No. 1 to the European Convention.

44. The Constitutional Court notes that, in the aforementioned judgment *Mago and Others v. Bosnia and Herzegovina*, the European Court of Human Rights examined the aim of the interference and pointed out in paragraph 100 of the cited judgment the following: „While the Court is aware that during and immediately after the war many abandoned flats were reportedly allocated to the highest military and civilian officials whose housing needs had otherwise been met (see *Đokić*, cited above, paragraphs 10 and 61), it would appear that those deficiencies have later been remedied. In view of that, the Court accepts that the interference with the applicants' possessions was aimed at enhancing social justice, as argued by the respondent Government." Consequently, as to the aim of the interference with the appellants' right to peaceful enjoyment of their property, the Constitutional Court continues to adhere to its case law and the case law of the European Court of Human Rights and concludes that the interference in question pursued a legitimate aim.

45. The European Court of Human Rights, in the cited judgment *Mago and Others v. Bosnia and Herzegovina*, also took the view that there was no breach of Article 1 of Protocol No. 1 with respect to Mr. Ivan Antonov and Mr. Milutin Radojević. The European Court of Human Rights pointed out in paragraph 104 of the aforementioned judgment that „they were allocated tenancy rights of unlimited duration on flats in Serbia and Montenegro

respectively. In order to qualify for those rights in Serbia and Montenegro, they had to renounce the equivalent rights on their pre-war flats in Sarajevo (see paragraph 59 above). It is true that states must normally offer compensation if taking a property. Furthermore, the fact that a person has acquired a property right in one State is normally not sufficient in itself to justify a taking of his or her property in another State. That being said, in the exceptional circumstances of the dissolution of the SFRY and the wars in the region, the Court considers that the respondent State has not been required under Article 1 of Protocol No. 1 to pay compensation to the applicants for the cancellation of their occupancy rights given that they have meanwhile been granted equivalent rights in other former Republics of the SFRY (see *Jahn and Others*, cited above, paragraph 117). There has hence been no breach of Article 1 of Protocol No. 1 with respect to Mr. Ivan Antonov and Mr. Milutin Radojević." In paragraph 105 of the cited judgment, the European Court of Human Rights states the following: „Lastly, Mr. Milutin Banović obtained a mortgage loan to purchase a flat in Serbia. The Serbian Government argued that his position was totally different from the position of those who had been granted tenancy rights on military flats in Serbia. However, the Court disagrees. First, the applicant's loan was co-financed by the military authorities. Secondly, like those who were granted a tenancy right on a military flat in Serbia, the applicant had to renounce the occupancy right on his flat in Sarajevo. There has thus been no breach of Article 1 of Protocol No. 1 with respect to Mr. Milutin Banović".

46. Taking into account that both administrative bodies and ordinary courts established in the present cases that the appellants, after abandoning their apartments in Bosnia and Herzegovina, had been granted equivalent rights in other former Republics of the SFRY and that they had therefore given up their rights on those apartments in Bosnia and Herzegovina, the Constitutional Court, in accordance with the case law of the European Court of Human Rights in the judgment *Mago and Others v. Bosnia and Herzegovina*, concludes that there has been no violation of the appellants' 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 where a fair balance between the rights of the appellants and the general public interest was not disturbed by the interference with the appellants' property right, which was in accordance with the law and pursued the legitimate aim, and by preventing the appellants from getting back their pre-war apartments over which they had had occupancy rights.

Other allegations

47. Taking into account the above conclusion relating to the right to property and the position taken by the European Court of Human Rights in the judgments *Đokić v. Bosnia*

and Herzegovina and *Mago and Others v. Bosnia and Herzegovina*, the Constitutional Court finds it unnecessary to examine the remainder of the appellants' allegations.

VIII. Conclusion

48. The Constitutional Court concludes that there has been no violation of the appellants' 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, given that they have meanwhile been granted equivalent rights in states created in the territory of former SFRY, *i.e.* no excessive burden has been imposed on the appellants.

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

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP 2175/09

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Zoran Stanković against the judgment of the Cantonal Court in Mostar, no. 07 0 U 001201 08 U of 1 June 2009. On 6 January 2012, the appellant supplemented his appeal by contesting the judgment of the Cantonal Court in Mostar no. 07 0 U 001201 11 Uvp of 21 September 2011

Decision of 31 January 2013

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1), (2) and (3) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić, Judge

Ms. Constance Grewe, Judge

Mr. Mirsad Ćeman, Judge,

Ms. Margarita Tsatsa-Nikolovska, Judge

Mr. Zlatko M. Knežević, Judge

Having deliberated on the appeal of **Mr. Zoran Stanković** in case no. **AP 2175/09**, at its session held on 30 January 2013 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. Zoran Stanković is hereby granted.

A violation of the right to property under Article (II)(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The following are quashed:

- Judgment of the Cantonal Court in Mostar, no. 07 0 U 001201 11 Uvp of 21 September 2011,

- Judgement of the Cantonal Court in Mostar, no. 07 0 U 001201 08 U of 1 June 2009.

The case shall be referred back to the Cantonal Court in Mostar, which is obligated to employ an expedited procedure and take a new decision in line with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

The Cantonal Court in Mostar is ordered to inform the Constitutional Court, within a time limit of three months from the date of delivery of this Decision, on the measures taken to enforce this Decision in accordance with Article 74(5) of the Rules of 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*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 9 July 2009 Mr. Zoran Stanković („the appellant"), represented by joint lawyer's office KEBO&GUZIN from Mostar, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgement of the Cantonal Court in Mostar („the Cantonal Court"), no. 07 0 U 001201 08 U of 1 June 2009. On 6 January 2012, the appellant supplemented his appeal by contesting the judgement of the Cantonal Court in Mostar no. 07 0 U 001201 11 Uvp of 21 September 2011.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Cantonal Court and the Federal Ministry of Finances were requested on 28 and 29 December 2009 to submit their respective replies to the appeal.

3. On 8 January 2010, the Cantonal Court submitted its reply. The Federal Ministry of Finances submitted its reply on 14 January 2010.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were transmitted to the appellant on 1 February 2012.

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 Cantonal Tax Office Mostar, the Commission for Resolving of Appeals („the Commission for Appeals") dismissed as ill-founded the appellant's request for real property tax assessment regarding the apartment in Mostar, which is described in detail in the operative part of ruling, based on the gift contract no. 02-06-146 of 11 June 2002 entered into by the appellant's father I.S. as gift giver and the appellant as gift recipient, by its Ruling no. 10-7-05-15-86-6/07 of 10 September 2007. In the reasoning of the ruling it is indicated that Article 14(2) of the Law on Real Property Transfer Tax (*Official Gazette of Herzegovina-Neretva Canton* (HNC) no. 8/00) provides for all contracts by which the transfer of real property is performed must be verified by the competent court in the municipality where the real property is located before applying for the tax assessment of real property transfer. In the present case the real property at issue is located on the territory of the City of Mostar and the Municipal Court in Mostar had the jurisdiction over the verification of the real property transfer. Given that the gift contract has been certified by the stamp of the Embassy of Bosnia and Herzegovina in Stockholm, Sweden, it is concluded that it has not been verified in accordance with the quoted provision of the Law before the request for the real property transfer tax assessment; therefore, the tax assessment could not have been performed.

7. By its ruling no. 07-15-1184/07 of 25 January 2008, the Federal Ministry of Finance dismissed as ill-founded the appellant's appeal lodged against the ruling of the Commission for Appeals. The reasoning of the ruling indicates that Article 1 of the Law on Real property Transfer Tax of HNC (*Official Gazette of HNC* nos. 8/00 and 5/04) stipulates that this law regulates the field of taxation of the real property transfer on the territory of HNC and Article 14 stipulates that all contracts under which the real property transfer is conducted must be verified before the competent court in the municipality where the real property is located prior to applying for the real property transfer tax assessment. On the basis of the insight into the case-file it is established that the appellant's request for tax assessment was correctly dismissed as the gift contract has not been verified in accordance with Article 14 of the Law on Real Property Transfer Tax. Finally, it is indicated that neither could there be application of the provisions of the Law on Real Property Transfer (*Official Gazette of SRBiH* nos. 38/78, 4/89, 29/90 and 22/91, and *Official Gazette of RBiH* nos. 21/92, 3/93, 13/94, 18/94 and 33/94), which is applied pursuant to Article IX(5) of the Constitution of the Federation of Bosnia and Herzegovina as thee mentioned provisions provide for the

contract, on the grounds of which the property right over the real property is transferred, to be prepared in a written form and signatures must be validated before the competent court.

8. The appellant's lawsuit in an administrative dispute filed against the second instance ruling was dismissed as ill-founded by the Cantonal Court's judgment no. 07 0 U 001201 08 U of 1 June 2009. In the reasoning of the judgment it is, *inter alia*, stated that the appellant's application for the tax assessment was correctly dismissed as it was established that the gift contract had not been validated before the competent court in terms of Article 14(2) of the Law on Real property Transfer Tax of HNC. In this respect, it is pointed out that, according to the aforementioned provision, verification before any other body, including the verification before the Diplomatic and Consular mission of Bosnia and Herzegovina, cannot replace a mandatory obligation of the contractual parties to verify such contract before the competent court in the municipality where the real property is located before applying for the real property transfer tax assessment notwithstanding the fact that such contracts verified before other bodies might be deemed valid in other legal transactions. Given that the gift contract has not been verified before the competent court, it could not have represented the valid legal grounds for the real property transfer tax assessment. The appellant's allegations that his father had died subsequent to the conclusion of the gift contract and that, therefore, it had been impossible to carry out the revalidation of the contract before the competent court, were evaluated as ill-founded. Accordingly, it is pointed out that the appellant attached an excerpt from the Register of Population of the Swedish Tax Agency dated 9 December 2004 showing that his father had died on 5 October 2004, thus more that two years after the conclusion of the gift contract, which, in the opinion of the Court, has given plenty of time to verify the contract in accordance with Article 14(2) of the Law on Real Property Transfer Tax.

9. The appellant's request for an extraordinary review of the Cantonal Court's judgment no. 07 0 U 001201 08 U of 1 June 2009 was dismissed as ill-founded by the Cantonal Court's judgment no. 07 0 U 001201 11 Uvp of 21 September 2011. The reasoning of the judgment, *inter alia*, points out to the exclusiveness and formalistic nature of the provision of Article 14(2) the Law on Real Property Transfer Tax and indicates that the same Law neither provides for any other alternative manner of verification of the gift contract relating to real property, nor such a possibility is provided for by any other law. On the basis of the above, the court concluded that the law has been correctly applied in relation to the appellant's tax assessment application. The Cantonal Court did not accept the appellant's allegation that the verification of signatures in the particular gift contract has been performed in accordance with provisions regulating the matter of diplomatic and consular functions, as the request does not allege such regulations and the court does not

know of such regulations which would derogate Article 14(2) of the Law on Real Property Transfer Tax either.

IV. Appeal

a) Allegations of the appeal

10. The appellant holds 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 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. The appellant holds that the verification of the gift contract has been performed according to the provisions regulating the matter of diplomatic and consular functions. The aim of formal verification is the establishment of the contracting parties' identity and thereby prevention of abuse by the verification before competent bodies. The appellant underlines that this involves a gift transfer between the father and son and, as the identity of the parties as well as the authenticity of signatures have been established beyond dispute, the contract has been fully executed, while one of the parties died in the meantime. In the appellant's opinion, the Embassy of Bosnia and Herzegovina as the State's representative abroad, utilizes jurisdiction of the courts of the state it represents relative to the verification of signatures on documents produced by its citizens in the country where that BiH Embassy is located. On the basis of all aforementioned, the appellant holds that substantive law has been applied arbitrarily for which reason he is not in the position to register the gift contract in the land books which, as a consequence, amounts to the infringement of his right to property. Finally, the appellant holds that an unlawful decision has been adopted as a result of an arbitrary and selective application of law, and, as being unlawful and arbitrary; its reasoning does not satisfy the requirements of Article 6(1) of the European Convention.

b) Reply to the appeal

11. In its reply to the appeal, the Cantonal Court stressed that the appellant's rights, indicated in the appeal, have not been violated in the judicial proceedings and that it fully maintains the reasoning of the challenged judgments.

12. The Federal Ministry of Finance stated that the first and second instance rulings were issued on the basis of law, as upheld by the Cantonal Court's judgment, and that the rulings were adopted after the facts had been completely and correctly established and by the appropriate application of substantive law.

V. Relevant Law

13. The **Law on Law on Real Property Transfer Tax of the Herzegovina-Neretva Canton** (*Official Gazette of Herzegovina-Neretva Canton,* nos. 8/00 and 5/04), in the relevant part reads as follows:

Article 14

[...]

All contracts under which the real property transfer is conducted must be certified before the competent court in the municipality where the real property is located before applying for the real property transfer tax assessment.

Article 24

A transfer of ownership over a real property cannot be registered in the Land Books without evidence on the real property transfer tax payment.

14. The **Law on Land Books of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina,* nos. 19/03 and 54/04), in its relevant part reads as follows:

Article 5
Constitutive Effect

1. The ownership and other rights over real property ensue only after their registration in the Land Books […]

15. The **Law on Real Property Transfer** (*Official Gazette of SRBiH* nos. 38/78, 4/89, 29/90 and 22/91; and *Official Gazette of RBiH* nos. 21/92, 3/93, 13/94, 18/94 and 33/94), in the relevant part reads as follows:

Article 9

Contract on the grounds of which the property right over the real property is transferred must be prepared in written form and the signatures must be verified before the competent court of the Republic of Bosnia and Herzegovina.

Contract concluded contrary to the provision of paragraph 1 of this Article shall render no legal effect.

16. The **Vienna Convention on Consular Relations** (*Official Gazette of the Republic of Bosnia and Herzegovina* no. 25/93 – Overview of International Multilateral Agreements), in its relevant part reads as follows:

Article 5
Consular functions

Consular functions consist in:

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

[...]

(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;

(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

(f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;

(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;

(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

17. The **Law on Ministries and Other Bodies of Administration of Bosnia and Herzegovina** (*Official Gazette of BiH,* nos. 5/03, 42/03, 26/04, 42/04, 45/06, 88/07, 35/09 and 59/09, 103/09), in its relevant part reads as follows:

Article 8

The Ministry of Foreign Affairs shall be responsible for:

[...]

- organization, direction and co-ordination of the work of diplomatic and consular representations of BiH abroad;

[...]

- carrying out duties concerning the stay and protection of the rights and interests of BiH citizens permanently and temporarily staying abroad and of domestic legal entities abroad;

18. The **Law on Notaries** (*Official Gazette of FBiH,* no. 45/02), in the relevant part reads as follows:

Article 73
Legal transactions for which the notary processing of documents is mandatory

Legal affairs that require notary processing in order to be considered legally valid are related to:

[...]

4. legal transactions concerning the transfer or acquisition of ownership or other real rights over the real property;

[...]

VI. Admissibility

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

20. In accordance with Article 16(1) of the Rules of the Constitutional Court, the Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

21. In the present case, the subject-matter challenged by the appeal lodged on 9 July 2009 is the judgment of the Cantonal Court no. 07 0 U 001201 08 U of 1 June 2009 issued upon the appellant's lawsuit in the administrative dispute which he received on 23 June 2009. Accordingly, the appeal was lodged within 60 days time-limit as provided for under Article 16(1) of the Rules of the Constitutional Court. Furthermore, in the supplement to his appeal of 6 January 2012, the appellant also challenged the judgement of the Cantonal Court under no. 07 0 U 001201 11 Uvp of 21 September 2011 by which the court decided on his request for extraordinary review of the judicial decision which represents the final decision on his right in the present case. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court as it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

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

VII. Merits

23. The appellant challenges the aforesaid judgments, claiming that those judgments violated his rights under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention as well as under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

The right to property

24. Article II(3)(k) of the Constitution of Bosnia and Herzegovina, in the relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

k) The right to property.

Article 1 of Protocol No. 1 to the European Convention, in its relevant part, reads:

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

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

25. 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 sentence of the first paragraph, is general and enunciates the principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions. The third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things,

to control the use of property in accordance with the general interest. The three rules are interconnected and are not in contradiction amongst themselves: the second and third are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, the European Court of Human Rights, *Holy Monasteries vs. Greece*, judgment of 9 December 1994, Series A, no. 301-A, paragraph 51).

26. The Constitutional Court indicates the consistent case-law of the European Court and its own jurisprudence, pursuant to which the concept of „possessions" in the first part of Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods and it is independent of the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as „property rights", and thus as „possessions" for the purposes of Article 1 of Protocol No. 1 (see, the European Court, *Iatridis vs. Greece* [GC], application no. 31107/96, ECHR 1999-II, paragraph 54).

27. In the present case it is necessary to address the issue as to whether the appellant's request for tax assessment relative to the contract on gift of real property falls under the application of Article 1 of Protocol No. 1.

28. The appellant as the gift receiver concluded with his father as the gift giver the contract on gift, the subject of which was an apartment, which contract he submitted to the competent tax authority to get a tax assessment. Pursuant to Article 8 of the Law on Real Property Transfer Tax, a person under obligation to pay tax in respect of real property transfer in case it is a gift is a gift receiver, as the person acquiring the real property. In the challenged decisions the appellant's request for tax assessment is dismissed because the gift contract had not been verified in accordance with Article 14(2) of the Law on Real Property Transfer Tax. The fact that the appellant acquired the real property concerned on the basis of the gift contract and that he is holding the possession thereof, i.e. that the gift contract has been executed in its entirety has not been brought into question in the proceedings conducted before the competent tax authorities and before the court. However, without proof of tax paid for the transfer of real property it is not possible to register the transfer of ownership over the real property in the land register. Accordingly, deciding about the appellant's request for tax assessment concerned deciding on property rights in terms of Article 1 of Protocol No. 1 to the European Convention and, therefore, the challenged decisions dismissing his request amounted to interference with his right.

29. Therefore, the Constitutional Court has to respond to the following the questions: (a) whether the interference was provided for under the applicable law, (b) whether the interference pursues a legitimate aim in the public interest and (c) whether the interference

is proportionate to the goal, i.e. whether it strikes a fair balance between the right of the appellant and general public interest.

30. The appellant attached to his request for tax assessment the gift contract verified at the Embassy of BiH in Sweden, the subject of which is the apartment located in Mostar. The appellant's request was dismissed on the bases of Article 14(2) of the Law on Real Property Transfer Tax. The aforementioned provision, which was in force at the time of filing of the request, regulated that all contracts on transfer of real property, prior to application for tax assessment, have to be verified at the competent court, designated as *the court in the municipality where the real property is located*. Accordingly, the challenged decisions have been based upon the law applicable at the time of filing of the request, i.e. the interference with the appellant's right to property was in accordance with the law in terms of Article 1 of Protocol No. 1.

31. In regulation of taxes, states have a wide margin of appreciation relative to enactment of laws they deem necessary in order to secure the payment of taxes including, *inter alia*, prescribing conditions under which to file a tax liability application, i.e. that a contract verified before the competent court has to be presented as attachment to the application, as in the present case. When this provision is brought into connection with Article 9 of the Law on Real Property Transfer Tax, pursuant to which the contract on transfer of real property in order to produce legal effect has to be made in writing and the contracting parties signatures verified with the competent court in the Republic of Bosnia and Herzegovina, it follows that it is also in the service of legal certainty. In that manner, a contract which is an expression of free will of the persons who are concluding it acquires the character of a public document with the effect of assuming that the presented data are accurate. This is an important factor regarding the state's obligation to provide legal certainty for its citizens when it comes to acquiring and exercising their proprietary rights and the state is not exempted from that obligation even when it comes to the exercise and protection of rights they have regulated by their own free will. Accordingly, it is beyond doubt that the interference in the present case pursued a legitimate aim.

32. Finally, it is necessary to address the issue as to whether, in the circumstances of the present case, the interference also satisfies a reasonable relationship of proportionality between the general interest and the interest of an individual. In this connection, the Constitutional Court, following its own case-law and the case-law of the European Court of Human Rights, points out that in every individual case there has to be a „fair relationship" between the requirements of public interest and the protection of individual's fundamental rights and this aim will not be achieved if the appellant has to bear „an excessive burden"

(see, the European Court of Human Rights, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A, no. 98, paragraphs 46 and 50).

33. The Constitutional Court notes that the gift contract was verified at the BH Embassy in Sweden, where both the appellant and his father were living at the moment of its making and signing. The appellant held that the BiH Embassy, as the state's representative abroad, consumes the jurisdiction of the courts it represents relative to the verification of signatures on documents produced for verification by its citizens in the country where that BiH Embassy is located.

34. The Constitutional Court recalls that it has already been concluded in this decision that the interference with the appellant's right to property is based on the law. The said law is clear and unambiguous; it was published in the official gazette and it is available. Therefore, the fact that the appellant and his father at the time of conclusion of the gift contract were staying in Sweden cannot be taken as a circumstance which would amount to an absolute barrier for the appellant to be acquainted with the law in question. Also, it is not unreasonable to expect that a person, in ascertaining and protecting of his or her rights, takes an active attitude, i.e. takes measures and actions to effectuate the protection of his or her rights.

35. Furthermore, the Constitutional Court recalls that the Vienna Convention on Consular Relations provides that consular functions are, *inter alia*, issuing passports and travel documents to nationals of the sending State, acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State, performing any other functions entrusted to a consular post by the sending State in accordance with the conditions determined by the Vienna Convention. Pursuant to Article 8 of the Law on Ministries and Other Bodies of Administration, it is within the competence of the Ministry of Foreign Affairs, as an administrative authority performing administrative and professional duties that fall under the BiH jurisdiction, to organize, direct and coordinate the operation of diplomatic and consular missions of BiH aboard. It is, therefore, beyond dispute that embassies and consulates represent the public authority of the state they belong to.

36. In the circumstances of the present case, the signatures on the gift contract have been verified by the stamp of the Embassy of BiH in Sweden, hence the appellant's request for verification of the contract was granted by the public authority as permissible. In that manner, the appellant was brought to believe that he met his obligation under the law, i.e. that there were no further steps he needed to take in order to protect his rights. In that

sense, it does not matter how much time elapsed from the conclusion and verification of the contract at the Embassy of BiH in Sweden to the death of the appellant's father, i.e. whether there had been enough time to verify the contract at the competent court because the actions of public authorities made the appellant to believe that he had acted in accordance with law. Given that the appellant's father passed away subsequent to the verification of the contract and prior to filing the application for tax assessment, the appellant is no longer able to remedy this deficiency, although his claim that the gift contract was executed in its entirety and that he is in possession of the real property in question has not been brought into question in the proceedings conducted. Finally, the Constitutional Court notes that pursuant to the Law on Notaries, which became effective on 4 May 2007, certain legal affairs require legal transactions concerning the transfer or acquisition of ownership or other real rights. Following that, Article 14(2) of the Law on Real Property Transfer Tax has been amended in that the verification of a contract on transfer of real property at the local *court where the real property is situated* is no longer required. Instead, the verification is to be performed before the competent authority (*Official Gazette of HNC* no. 11/08, *effective from 27 November 2008*).

37. The Constitutional Court holds that in the specific circumstances of the present case, where by the actions of public authorities the appellant was made to believe that he had acted in accordance with law and that his contract was legally valid and where no more possibility exists to revalidate such contract subsequently and thus remedy the deficiency because the other contracting party died, the consistent interpretation of the law stipulating that a contract has to be verified before a competent court does no longer strike a fair balance of proportionality between the protection of general interest and the interest of an individual, and that the appellant has to bear an excessive burden.

38. The Constitutional Court concludes that the appellant's right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention has been violated.

Other allegations

39. Given that the violation of the right to property has been found, the Constitutional Court considers that there is no need for separately examining the allegations relating to the alleged violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

VIII. Conclusion

40. The Constitutional Court concludes that there is a violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, where the interference with the right to property, based upon law and in pursuance of a legitimate aim, in the specific circumstances of the present case has undermined the reasonable relationship of proportionality in a such manner in which an individual has to bear an excessive burden because by the actions of public authorities the individual was brought to believe that he had acted in accordance with law, while there no longer exists the possibility to remedy the deficiency perceived by consistent interpretation of the law, on account of which he is prevented from enjoyment and protection of the right he is entitled to.

41. Pursuant to Article 61(1), (2) and (3) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 2763/09

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Bejtulah Ilijazi and Mr. Jakup Ilijazi against the judgment of the Supreme Court of Bosnia and Herzegovina no. 118-0-Rev-07-000 790 of 2 April 2009 and judgment of the County Court in Banja Luka no. 011-0-Gz-06-000 443 of 27 February 2007 and judgment of the Basic Court in Gradiška no. P. 147/03 of 18 March 2005

Decision of 22 March 2013

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59 (2)(2) and Article 61 (1) and (2) and Article 64 (1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in the Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić,

Ms. Constance Grewe,

Mr. Mirsad Ćeman,

Ms. Margarita Tsatsa-Nikolovska,

Mr. Zlatko M. Knežević

Having deliberated on the appeal of **Messrs. Bejtulah Ilijazi and Jakup Ilijazi** in case no. **AP 2763/09**, at its session held on 22 March 2013 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Messrs. Bejtulah Ilijazi and Jakup Ilijazi is hereby granted.

A violation of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 to Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The judgment of the Supreme Court of the Republika Srpska no. 118-0-Rev-07-000 790 of 2 April 2009 and judgment of the County Court in Banja Luka no. 011-0-Gz-06-000 443 of 27 February 2007 and judgment of the Basic Court in Gradiška no. P. 147/03 of 18 March 2005, are hereby quashed.

The case shall be remitted to the Basic Court in Gradiška which is obligated to take a new decision, within three months from the day of the delivery of this decision, on the amount of compensation for damage to be paid to the appellants in accordance with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 to Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms

The Basic Court in Gradiška is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within one month from the expiry of the time-limit stated in the preceding paragraph, of the measures taken with the aim of executing this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 29 August 2009, Mr. Bejtulah Ilijazi and Mr. Jakup Ilijazi from Negotin – the Republic of Macedonia („the appellants"), represented by Mr. Momir Mirjanić, a lawyer practicing in Gradiška, filed an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the Supreme Court of Bosnia and Herzegovina („the Supreme Court") no. 118-0-Rev-07-000 790 of 2 April 2009 and judgment of the County Court in Banja Luka („the County Court") no. 011-0-Gz-06-000 443 of 27 February 2007 and judgment of the Basic Court in Gradiška („Basic Court") no. P. 147/03 of 18 March 2005.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22 (1) and (2) of the Rules of the Constitutional Court, on 11 February 2010, the Supreme Court, the County Court, the Basic Court and the Republika Srpska – the Ministry of Interior represented by the Attorney's Office of the Republika Srpska („the defendants"), in their capacity as parties to the proceeding, were requested to submit their responses to the appeal.

3. The Supreme Court submitted its response on 26 February 2010, the County Court did so on 8 March 2012 and the Basic Court on 26 February 2010. The defendant submitted its response on 19 February 2010.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the responses to the appeal were submitted to the appellant on 15 March 2010.

III. Facts of the Case

5. The facts of the case as they appear from the appellants' allegations and the documents submitted to the Constitutional Court may be summarized as follows:

6. On 16 April 2003 the appellants filed a damage claim with the Basic Court against the Republika Srpska – Banja Luka Ministry of Interior and the Gradiška Municipality. In their claim, the appellants alleged that they were the co-owners of ½ share of the house in Gradiška. In addition, they alleged that in the first half of 1993 unknown persons had planted explosive under the house co-owned by the appellants and destroyed it. It was also stated that during the war the appellants had been compelled to leave Gradiška and that they stayed in Macedonia at the time. Upon their return to Gradiška after the war, they found that the incident had not been recorded and that no investigation report had been made and that there had been no official note by the Ministry of Interior or the Prosecutor's Office or courts. Furthermore, the appellants mentioned, as a very well known fact, that other six houses in the neighbourhood had been destroyed on the same night and in the same manner. The absurdity was that all these facilities were situated in front of the Police Station in Gradiška. Afterwards, upon an order by the second defendant, the persons on work duty pulled down the additional facilities and fences and collected the construction material (a hearing of witnesses M.I., T.M. and K.H. was proposed as evidence supporting these allegations). Furthermore, the appellants stated in their claim that the destruction of the house co-owned by them was not a result of war activities but a terrorist act, and that the defendants were obliged to prevent it. Although according to the organisation of the Republika Srpska that matter is within the competence of the first defendant, it is a well-known fact that municipalities, through their bodies, also exercise real authority over public security affairs.

7. On 5 April 2005 the appellants, through their legal representative, sent a letter to the RS Ministry of Interior – Police Station in Gradiška (Attn: Chief of Police), stating that in the first half of August 1993 their house had been destroyed by explosives planted by unknown persons. The appellants stated that on several occasions they had sought an excerpt from official records or any written document relating to the mentioned event,

but they got none. According to the appellants, they were told that the police had no knowledge of the incident. It was also stated that the proceedings for compensation of damages were pending before the Basic Court and that the appellant requested that they be given the relevant information about the incident in question. For a clarification of the whole incident, it was noted that the house in question had been located in the immediate vicinity of the entrance to the Police Station and that the remains of the house could be seen through the office window of the Chief of Police in Gradiška. It was further pointed out that other five houses owned by L.D, T.M, the B's family, *etc*. had been destroyed on the same night and in the same manner. The destruction had lasted several houses and it was a very well-known incident in the territory of the Gradiška Municipality.

8. In an act of 8 April 2005, the Police Station informed the appellants about the circumstances surrounding the destruction of their business facility situated also in Gradiška, but failed to inform them about what the appellants requested in their letter of 5 April 2005. In a letter of 15 April 2005, the appellants' legal representative indicated the aforementioned failure and requested again the information relating to the destruction of their house.

9. After that, in its act of 19 May 2005, the Police Station informed the appellants' legal representative that in the Police Station, according to the available records, there was no record of the incident relating to the destruction of the house owned by Bejtulah Ilijazi, which, according to the account given by the appellants' legal representative, had taken place at the beginning of August 1993.

10. By the judgment of the Basic Court no. P. 147/03 of 18 March 2005, upheld by the judgment of the County Court no. 011-0-Gz-06-000 443 of 27 February 2007, the appellants' claim was dismissed where they sought that the defendant be ordered to pay them the amount of 39,123.00 KM as a compensation for damage, including the legal default interest and the costs of the proceedings.

11. In the course of the first instance proceeding the County Court established that the appellants were the owners of the house built on the cadastral plot no. 885/1 covering the surface of 47 m2, which is registered in the title deed no. 2413 of the cadastral municipality of Gradiška („the house"), that the house in question was blown up in 1993 and that the value of the house, according to the finding and opinion of the expert, is 39,123.60 KM. In the reasoning for its judgment the Basic Court noted that while making a decision regarding the objection of limitations relating to the appellants' claims, it concluded that the objection is well-founded. Namely, the damage sustained by the appellants occurred in 1993 and that fact is indisputable. The appellants, as they stated, learned about the damage after the war when they visited Gradiška. The Basic Court referred to Article 383 of the Law of Contractual Obligations and pointed out that the limitation period did not run until

19 June 1996 when the war threat ceased. Given that the appellants had filed the lawsuit on 16 April 2003, the Basic Court concluded that the lawsuit had not been filed within the time-limit prescribed by law as envisaged under Article 376 of the Law on Obligations and that the appellants' claims are barred by the statute of limitations and, therefore, the court dismissed the claim.

12. The County Court, while accepting the facts established by the court of first instance as correct, found that the claim is unfounded for the reasons that the defendant lacks the capacity to be sued regarding the payment of compensation for damage caused to the appellants and, according to the provisions of the Constitution of Bosnia and Herzegovina, the State of Bosnia and Herzegovina has that capacity.

13. While making a decision on the petition for review filed against the second instance judgment by the appellants, the Supreme Court dismissed the petition for review in its judgment no. 118-0-Rev-07-000 790 of 2 April 2009.

14. In the reasoning of its judgment the Supreme Court noted that according to the established facts the explosive had been planted under the house in question and the house had been destroyed by unknown persons during 1993 and that the appellants had learned about this fact at the earliest on 24 September 1999 upon being delivered the ruling of the Ministry for Refugees and Displaced Persons - the Gradiška Section („the Ministry for Refugees") no. 05-050-11-2089 of 24 September 1999, and that the claim had been filed on 16 April 2003 and, therefore, the objection that the claim is not barred by the statute of limitations is unfounded. Pursuant to Article 360 (1) of the Law on Contractual Obligations, the expiry of the limitation period means, as further stated by the court, the extinction of a right to claim fulfilment of an obligation, and under Article 376 of the Law on Contractual Obligations it is stipulated that *the claim for compensation of caused damage expires in three years after the injured party found out about the damage and about the person who caused the damage (paragraph 1) and in any case, this claim expires in five years from the date when the damage was inflicted (paragraph 2).* The Supreme Court further explained that the statute of limitations does not mean only the extinction of a right but also the extinction of a possibility to claim fulfilment of an obligation before court. By the expiry of the limitation period the obligation does not cease to exist and it continues to exist but the title holder has no more possibility to request the enforced performance in case the debtor invokes the statute of limitations. The Supreme Court is of the opinion that the conclusion of the court of first instance is correct that, according to Article 376 paragraph 1 of the Law on Contractual Obligations, the claim in question is barred by the statute of limitations given that from the moment the appellants had learned about the damage (it is undisputable that they have been aware of the damage since 24

September 1999) until the moment the lawsuit was filed with the court on 16 April 2003 the time-limit referred to under the mentioned provision has expired. Therefore, by the expiry of the said time-limit the defendant, in his capacity as a debtor, acquired the right to permanently deny the payment of the debt to the appellants - the creditors.

15. The Supreme Court further noted that the appellants' allegations that the objection of limitation is unfounded should be considered by way of applying Article 377 paragraph 1 of the Law on Contractual Obligations. Namely, this provision provides that when the damage is caused in a criminal offence, and a longer limitation period is anticipated for prosecution for criminal offence, the damage compensation claim addressed to the competent person expires with the end of time period determined for limitation period of prosecution for criminal offence. In the instant case it is indisputable that the damage is question was caused by unknown persons and that no criminal proceeding was conducted concerning this incident and, therefore, the time-limit referred to under Article 377 paragraph 1 of the Law on Contractual Obligations cannot be applied as the appellants failed to prove that the damage in question was caused by the commission of criminal offence. Namely, due to the principle that nobody is to be considered guilty for criminal offence until that guilt is proven in the course of criminal proceeding resulting in a legally binding decision, in the civil lawsuit it is to be considered that the damage was not caused by the commission of criminal offence. The parties to the proceeding are entitled to seek that the court establish the existence of the elements of criminal offence if justification for the objection of limitation depends on it, but only if there are the obstacles impending the conduct of the criminal proceedings, which is not true as regards the instant case. For the aforementioned reasons, the allegations stated in the petition for review relating to the defendant's lack of the capacity to be sued and to the responsibility of the defendant for damages compensation, as referred to under Article 180 of the Law on Contractual Obligations, have no effect on the adjudication of this dispute.

16. Finally, the Supreme Court noted that the provisions of Article II (5) of Annex IV to the General Framework Agreement for Peace in Bosnia and Herzegovina imply that there is the obligation of the Entities to ensure conditions for the safe return of refugees and displaced persons to their pre-war homes and those provisions also imply that there is such organisation of the competent bodies and procedure in which those persons may exercise their rights and the right to compensation for damage for their devastated or damaged property. The appellants repossessed the property which was considerably damaged and it is undisputable that the appellant suffered damage. However, the courts made a correct decision regarding the appellants' claim in which they sought compensation for damage and the courts also correctly applied the provisions of the Law on Contractual Obligations regulating the issue of compensation for damage, including the provisions relating to the

claims being barred by the statute of limitations. Pursuant to the provisions of Article II (5) of Annex VII to the Agreement on Refugees and Displaced Persons and the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), the application of the law provisions in the instant case is not excluded, i.e. the provisions of the Law on Contractual Obligations that prescribe the time-limits and conditions for the protection of the aforementioned rights.

IV. Appeal

a) Allegations of the appeal

17. The appellants consider that in the challenged decisions their rights under Article II(3)(e) (f) and (k) of the Constitution of Bosnia and Herzegovina have been violated, as well as the rights under Article 6 and Article 8 of the European Convention and Article 1 of Protocol No.1 to the European Convention. The appellants extensively explained the events that had occurred prior to the initiation of the proceeding before the court and they had also chronologically described the course of the proceeding before ordinary courts. The appellants noted that they had repossessed the house in question upon the issuance of the ruling of the Ministry for Refugees of 24 September 1999 and they also stated that the house was destroyed. The appellants are of the opinion that the ordinary courts did not correctly establish the facts and that they misapplied the provisions of the Law on Obligations given that by the destruction of their property the criminal offence of „war crime against civilian population" had been committed and, therefore, Article 377 of the Law on Contractual Obligations should have been applied. Pursuant to this law, the damage compensation claim expires with the end of time period determined for limitation period of prosecution for criminal offence. However, the courts applied Article 376 (1) of the Law on Contractual Obligations as no criminal proceeding was conducted against the perpetrator of the criminal offence. In support of their allegations the appellants referred to the judgment of the European Court of Human Rights no. 48788/99 of 1 March 2002 in the case of *Ana Kutić v. Croatia* and decision of the Constitutional Court no. *AP 289/03* and suggested that the Constitutional Court grant the appellants' appeal and establish that there was a violation of their rights.

b) Reply to the appeal

18. In their responses to the appeal the Supreme Court and County Court challenged the statements in the appeal pointing our that they remain supportive of the reasons for the judgments, wherein it is stated that the constitutional rights of the appellants were not violated.

19. In its reply to the appeal the Basic Court pointed out that the appeal was filed on the ground of alleged misapplication of the substantive law, in which case the Constitutional Court is not competent to decide and, therefore, the proposal was given for the appeal to be rejected as manifestly ill-founded.

20. The defendant also challenged the allegations of the appeal as ill-founded pointing out that the appellants have failed to give reasons for the appeal, *i.e.* to state the facts in which the violation of the mentioned rights is reflected, but they have just chronologically described the course of the proceeding. Furthermore, the defendant emphasized that in the instant case the claims are barred by the statute of limitations about which the court correctly decided upon the filed objection of limitations and dismissed the claim.

V. Relevant Law

21. The **Criminal Procedure Code** (*the Official Gazette of the Republika Srpska – consolidated text* no. 100/09, as relevant, reads:

Article 17

The prosecutor shall initiate a prosecution if there is evidence that a criminal offence has been committed unless otherwise prescribed by this Code.

VI. Admissibility

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

23. Pursuant to Article 16 paragraph 1 of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

24. In the particular case the subject matter of the appeal is the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. 118-0-Rev-07-000 790 of 2 April 2009, against which there are no other effective legal remedies available under the law. Furthermore, the appellant received the challenged judgment on 30 June 2009, and the appeal was filed on 29 August 2009, i.e. within 60 days time-limit as provided for by Article 16 paragraph 1 of the Rules of the Constitutional Court. Finally, the appeal also

meets the requirements under Article 16 (2) and (4) of the Rules of the Constitutional Court because it is not manifestly (*prima facie*) ill-founded nor is there any other formal reason that would render the appeal inadmissible.

25. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16 (1) (2) 4) of the Rules of the Constitutional Court, the Constitutional Court established that the appeal has met the admissibility requirements.

VII. Merits

26. The appellants challenge the aforementioned judgments claiming that their rights under Article II(3) (e) (f) and (k) of the Constitution of Bosnia and Herzegovina were violated, *i.e.* the right to a fair trial under Article 6 (1) of the European Convention, the right to respect for home under Article 8 of the European Convention and the right to property under Article 1 of Protocol No. 1 to the European Convention.

Right to property

27. Article II(3)(k) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

k) Right to property.

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

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

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

29. In the view of the Constitutional Court, a key issue in the present case is whether the relevant and competent public authority, that is the Republika Srpska in the case at hand, met its positive obligation regarding the protection of the appellants' constitutional rights. The Constitutional Court holds that it is undisputed that the appellants possess property protected by Article 1 of Protocol No. 1 to the European Convention, as they are the owners of the house that had been blown up with explosives during the war and for

which they claimed compensation for damages in the relevant proceedings. The appellants sought information from the competent authorities as to the circumstances surrounding the destruction of their house. According to the information received from the Police Station in Gradiška, there was no record of the incident relating to the destruction of the house owned by the appellants. Therefore, in the present case the Constitutional Court will examine whether the Republika Srpska met its positive obligation regarding the protection of the appellants' property.

30. According to the case-law of the European Court of Human Rights, the main characteristic of positive obligations is that national authorities are required to take all practicable and necessary measures to protect a right (see, European Court of Human Rights, Judgment in the Case of *Siliadin v. France* of 26 June 2005), or, more precisely, to adopt reasonable and appropriate measures to protect the rights of individuals (see, European Court of Human Rights, Judgment in the Case of *López Ostra v. Spain*, Judgment of 9 December 1994).

31. In the opinion of the Constitutional Court, all positive obligations are directed towards the same goal, which is an effective application of the European Convention and effectiveness of the rights guaranteed by the European Convention. A stronghold for the aforesaid may be found in the well known position of the European Court of Human Rights, presented in the *Airey* Judgment, as follows: *The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective* (see, the European Court of Human Rights, *Airey vs. Ireland.* Judgment of 11 September 1979, paragraph 24).

32. The Constitutional Court holds that positive obligations may include practical measures, too. The Constitutional Court has ordered competent authorities, through its case law, to take practical measures to fulfil their positive obligations to protect the constitutional rights of citizens. In its decisions nos. *AP 129/04* of 27 May 2005 and *AP 143/04* of 23 September 2005, the Constitutional Court ordered the Council of Ministers of Bosnia and Herzegovina, the Government of the Federation of Bosnia and Herzegovina and the Government of the Republika Srpska immediately to provide all available information relating to the investigation into the circumstances surrounding the disappearance and violent death of members of their families, that is, to conduct, urgently and without further delay, the investigation into the disappearance and violent death of members of the appellants' families and to inform the appellants about the results of the investigation. In this context, the Constitutional Court refers to the relevant part of paragraph 73 of the Decision no. *AP 143/04*, which reads: „However, for almost ten years

the competent authorities failed to take reasonable steps to locate the persons responsible for the death of the appellants' family members and to inform the appellants on the measures taken. In view of the aforementioned, the Constitutional Court finds also a failure of the State and Entities to comply with their positive obligation to take reasonable steps for conducting an impartial investigation into the violent death of members of the appellants' families, which the failure gave rise to a violation of the rights under Article 3 of the European Convention".

33. Taking into account the facts of the present case, the Constitutional Court holds that it is undisputed that the house owned by the appellant had been destroyed and that the competent authorities failed to conduct the investigation into the circumstances surrounding the destruction of the house in question. It should be noted that the appellants asserted that the destruction of their house as well as the destruction of six neighbouring houses (the data they presented in their claim as well as before the competent police bodies) was a very well known fact, as it had been done in the immediate vicinity of the Police Station in Gradiška and that, upon an order subsequently issued by the Gradiška Municipality, the persons on work duty had cleaned and collected the construction material. In addition, the appellants mentioned the date on which the incident had occurred and the names of witnesses that could testify about the aforementioned circumstances.

34. Taking into account the appellants' assertions relating to the circumstances surrounding the destruction of their house as well as the supporting evidence presented by them (it should be noted that the incident occurred during the war and that the appellants were members of an ethnic minority in that region), the Constitutional Court holds that the investigation into the incident was necessary for the protection of the appellants' property. The Constitutional Court holds that the presented facts indicate the existence of *a specific criminal offence* and that the competent public authorities were obliged (within the meaning of Article 17 of the Criminal Procedure Code) to conduct the investigation relating to the incident concerned. Given that no investigation was conducted (the incident was not even registered in the official records of the Police Station situated in the immediate vicinity of the place where the incident had occurred), the Constitutional Court considers that the Republika Srpska failed to fulfil its positive obligation and, as a result, the appellants' right to property was violated. Therefore, the appellants have to be compensated for the damage caused to them by destruction of their property.

VIII. Conclusion

35. Taking into account the appellants' assertions relating to the circumstances surrounding the destruction of their house and the supporting evidence presented by the appellants (it should be noted that the incident occurred during the war and that the appellants were members of an ethnic minority in that region), the Constitutional Court holds that the investigation into the incident was necessary for the protection of the appellants' property. Given that no investigation was carried out (the incident was not even registered in the official records of the Police Station situated in the immediate vicinity of the place where the incident had occurred), the Constitutional Court considers that the Republika Srpska failed to fulfil its positive obligation and, as a result, the appellants' 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 was violated.

36. Pursuant to Article 61(1) and (2) and Article 64 (1) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

37. Pursuant to Article 41 of the Rules of the Constitutional Court, Separate Dissenting Opinions of the Vice-President Miodrag Simović and Judge Mato Tadić are annexed to the present decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of the Vice-President Miodrag Simović

In the Decision on Admissibility and Merits no. **AP 2763/09** of 22 March 2013, the Constitutional Court of Bosnia and Herzegovina established the violation of Article II(3) (k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

I share the opinion of the majority that the investigation relating to this event was mandatory for the purpose of the protection of the appellants' property. On the other hand, regretfully, my opinion regarding the enacting clause and the reasoning of this decision substantially differentiates from the conclusion by the majority of judges.

With regards to the appellants' allegations on the violation of the right to a fair trial and property, which exclusively relate to the manner in which the ordinary courts established facts and applied substantive law, it is necessary to indicate that under the jurisprudence of both, the European Court and the Constitutional Court, it is not the task of these courts to review the facts as established by the ordinary courts or their application of substantive law (see the European Court, *Pronina v. Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01). Namely, the Constitutional Court cannot generally substitute its own appraisal of the facts or evidence for that of the domestic courts but, in general, it is the task of ordinary courts to asses the facts and evidence they presented (see the European Court, *Thomas v. the United Kingdom,* judgment of 10 May 2005, Application no. 19354/02). The assignment of the Constitutional Court is to asses whether a possible violation or neglect of the constitutional rights have occurred (the right to a fair trial, the right of access to court, the right to efficient remedy, etc.) and whether there has been any possible arbitrary or discriminatory application of the law. Within the scope of its appellate jurisdiction, therefore, the Constitutional Court exclusively deals with the issue of possible breach of the constitutional rights or the rights safeguarded by the European Convention in the proceedings before the ordinary courts and, in the case at hand, the Constitutional Court should have examined whether the proceedings as whole were fair in terms of Article 6(1) of the European Convention or whether the right to property has been violated (see the Constitutional Court, Decision no. *AP 20/05* of 18 May 2005, published in the *Official Gazette of BiH* no. 58/05).

In the particular case, the reasoning of the challenged decisions the ordinary courts have given detailed, clear and precise reasons for why the objection of the claims set out by the defendant having lost their validity through the statute of limitations has been well-

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founded for which reason the appellants' request for compensation of damages has been dismissed. Namely, it is reasoned in the challenged judgments that the respective claim of the appellants lost its validity through the statute of limitations in terms of Article 376(1) of the Law on Contractual Obligations because from the moment the appellants found out about the relevant damages (24 September 1999) to the moment of filing the lawsuit in question (16 April 2003) the time limit of three years set out in the above provision expired. It is also reasoned that in the present case there was no reason for evaluation of the time limit for the statute of limitations in terms of Article 377(1) of the Law on Contractual Obligations as the time limit of this legal provision could have been applied only if the appellants had proven that the damages in question were caused by the criminal offence. Therefore, having in view that the appellants exclusively complain against the erroneously established facts and erroneous application of substantive law , as well as the aforementioned positions of the European Convention and the Constitutional Court, I hold that in respect of the appellants' allegations on the violation of the right to a fair trial and the right to property nothing indicates that the appellants have an „arguable claim" that raises issues under the Constitution of Bosnia and Herzegovina or the European Convention that should be considered in the merits. For that reason, the allegations on the violation of right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention and the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina are manifestly *(prima facie)* ill-founded.

The appellants also complain that the challenged judgments have violated their right to private and family life, home and correspondence under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. I hold that the appellants are referring arbitrarily to this right, i.e., they neither have reasoned in any way where they see the breach of the respective right nor has this right been decided upon in the proceedings in question. Hence, having regard to the fact that the appeal lacks *prima facie* items of evidence which clearly enough indicate that the aforementioned violation of human rights and freedoms is possible, this allegation of the appellants is manifestly *(prima facie)* ill-founded as well.

Separate Dissenting Opinion of Judge Mato Tadić

Pursuant to Article 41, paragraph 2 of the Rules of the Constitutional Court of Bosnia and Herzegovina, I give my separate opinion, which is partially contrary to the opinion of the majority given in the decision adopted in Case No. AP 2763/09 of 22 March 2013.

Reasons:

1. In their appeal filed regarding the aforesaid case the appellants have raised an issue of violation of the right to property under Article II(3)(k) of the Constitution of BiH and Article 1 paragraph 1 of the European Convention, and Article 6 paragraph 1 of the European Convention – the right to a fair trial.

2. Ordinary courts dismissed the appellants' claim whereby they sought compensation for damage caused by the demolition of their house in the first half of 1993 in the municipality of Bosanska Gradiška by referring to Article 376 of the Law of Contractual Obligations as the absolute limitation period of five years had expired before the appellants filed a lawsuit (the applicable limitation period was from 19 June 1966 when the state of war was abolished until 16 April 2003 when the lawsuit was filed).

3. The appellants claim that the time-limit under Article 377 of the Law on Obligations should have been applied. The aforesaid article prescribes that when the damage is caused in a criminal offence, the claim for damage compensation expires with the end of time period determined for limitation period of prosecution for criminal offence. It is true that the perpetrator is unknown and that there was no criminal prosecution. However the appellants claim that in their case the criminal offence of war crime against civilians was committed and given that the said crime is not subject to limitation period then the damages compensation claim is not subject to limitation either.

4. It follows that there is a basic question whether the constitutional rights of the appellants were violated and what is the scope of violation.

5. In my opinion, the constitutional rights of the appellants were but not for the reasons stated in the decision adopted by the majority of the judges.

6. Namely, it is not disputable that the appellants filed a lawsuit after the expiry of the absolute limitation period as stated under Article 376 of the Law on Contractual Obligations and the courts correctly applied the substantive law. However, the appellants' claim that the interference with their property occurred by the commission of criminal offence of war crime against civilians and that in the instant case the legal mechanism under Article 377 of the Law on Contractual Obligations should have been applied, which means that the limitation claim in such cases shares the destiny of limitation claim for criminal offence.

The majority of the judges of the Constitutional Court accepted the aforesaid approach and found that ordinary courts violated the appellants' constitutional rights.

7. The mechanism of limitation period relating to commission of criminal offence is not questionable. However, there is a question whether the Constitutional Court had sufficient factual and legal elements to apply this mechanism in the instant case (the same applies to ordinary courts). The Constitutional Court is not a body dealing with discovery and prosecution of criminal offences, neither is it the adjudicating body. Moreover, there are no evidence in the case-file as to whether the criminal offence was committed at all, who committed the criminal offence and which criminal offence was committed. To the contrary, there is a report about an unknown perpetrator, about demolition of the building without explanation about possible elements of a criminal offence. It should be noted that it could be about the commission of various criminal offences (the act of terrorism, which the appellants also refer to, the act of causing damage to someone else's things, the act of provoking the state of general danger, etc), resulting in different limitations periods.

8. Given such kind of state of facts, I am deeply convinced that the Constitutional Court should have found a violation of the right to property under Article II (3)(k) of the Constitution of Bosnia and Herzegovina with regards to positive obligation of a public authority, i.e. the Ministry of the Interior of the Republika Srpska, which failed to undertake appropriate measures and fulfill its positive obligation of conducting investigation as regards the clarification of circumstances of destruction of property and finding the perpetrators, the type of criminal offence and undertaking criminal prosecution and leaving appropriate time-limit for fulfilling the positive obligation. After that, depending upon the results of investigation, a possibility is to be given to the appellants to exercise their right to compensation for damage. Taking into account the manner in which it was done by the Constitutional Court, it follows that the Constitutional Court undertook the responsibility for establishing that there was criminal offence of war crimes which, in my opinion, is absolutely inadmissible and ordered ordinary courts to adopt a new decision in favor of the appellants although they had no evidence about the perpetrators of criminal offence.

9. The whole case-law of the former Yugoslavia and Bosnia and Herzegovina, when it comes to application of Article 377 of the Law on Contractual Obligations, implies that the perpetrator of criminal offence by which the damage is caused shall be a high profile individual and that, additionally, he/she was convicted for the said offence (except in exceptional cases where perpetrator had died before the completion of the proceeding, in cases of pardon for criminal prosecution or amnesty). Therefore, I consider that correct course of action is to establish that there was a violation of the appellants' right and order the public authorities of the Republika Srpska to conduct investigation and fulfill its positive obligation and, after that, give the appellants the possibility to file a new lawsuit.

Case No. AP 1123/11

DECISION ON ADMISSIBILITY AND MERITS

Appeals of Ms. Luca Tokalić, Mr. Pero Tokalić and Tock promet d.o.o. from Travnik against the verdict of the Court of Bosnia and Herzegovina, no. KPŽ-13/10 of 15 October 2010 and the verdict of the Court of BiH no. KPV-01/09 of 28 January 2010

Decision of 22 March 2013

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić,

Mr. Constance Grewe,

Mr. Mirsad Ćeman,

Ms. Margarita Tsatsa-Nikolovska,

Mr. Zlatko M. Knežević

Having deliberated on the appeal of **Ms. Luca Tokalić et al.** in case no. **AP 1123/11**, at its session held on 22 March 2013 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeals of Ms. Luca Tokalić, Mr. Pero Tokalić and *Tock-promet d.o.o. Novi Travnik* are hereby granted.

A violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Verdict of the Court of Bosnia and Herzegovina no. KPŽ-13/10 of 15 October 2010 and the verdict of the Court of Bosnia and Herzegovina no. KPV-01/09 of 28 January 2010 is hereby quashed.

The case shall be remitted to the Court of Bosnia and Herzegovina which is obligated to adopt a new decision in an expedited procedure in accordance

with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to Article 77(6) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Decision on Interim Measure no. AP 1123/11 of 26 October 2011 shall be rendered ineffective.

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

Reasoning

I. Introduction

1. On 9 March 2011 Ms. Luca Tokalić from Novi Travnik („the appellant"), represented by Mr. Nikica Gržić, a lawyer practicing in Sarajevo filed an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the verdict of the Court of Bosnia and Herzegovina („the Court of BiH"), no. KPŽ-13/10 of 15 October 2010 and the verdict of the Court of BiH no. KPV-01/09 of 28 January 2010.

2. On 14 March 2011, Mr. Pero Tokalić and *Tock promet* d.o.o. from Travnik („the appellants") from Novi Travnik, represented by Mr. Mesud Duvnjak, a lawyer practicing in Bugojno filed an appeal with the Constitutional Court against the verdict of the Court BiH no. KPŽ-13/10 of 15 October 2010 and the verdict of the Court of BiH no. KPV-01/09 of 28 January 2010. This appeal was registered under number AP 1218/11.

3. On 10 October 2011 the appellant filed a request for the issuance of an interim measure to postpone the enforcement of the ruling of the Court of BiH no. KPV-01/09 of 22 April 2011, pursuant to which the appellant was under obligation to report to serve her sentence of imprisonment at the Correctional Institute Tuzla („CI Tuzla„) on 25 October 2011. The appellant supplemented her appeal on 16 November, 21 November 2012 and 24 January 2013.

4. On 22 December 2011, 21 February 2012, 23 April 2012 and 26 April 2012, the appellant Mr. Pero Tokalić filed supplements to his appeal, including the request for the issuance of an interim measure to postpone the already commenced serving of his sentence of imprisonment until the issuance of a decision by the Constitutional Court relevant to his

appeal. Finally, the appellant supplemented his appeal on 7 November and 13 November 2012 and 7 January 2013 and 4 March 2013.

II. Procedure before the Constitutional Court

5. The Constitutional Court issued its Decision on Interim Measure no. AP 1123/11 of 26 October 2011, granting the request of the appellant request for the issuance of an interim measure and postponing the enforcement of the ruling of the Court of BiH no. KVP-01/09 of 22 April 2011, pursuant to which the appellant was under obligation to report to serve her sentence of imprisonment at the Correctional Institute Tuzla („CI Tuzla„) on 25 October 2011.

6. The Constitutional Court issued its Decision on Interim Measure no. AP 1218/11 of 18 April 2012, dismissing the request of the appellant Pero Tokalić request for the issuance of an interim measure.

7. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Court of BiH and the Prosecutor's Office of Bosnia and Herzegovina („the Prosecutor's Office of BiH„) were requested on 31 October 2011 and 26 December 2011 to submit their responses to the appeals.

8. The Court of BiH submitted its response on 9 November 2011 and 13 January 2012. The Prosecutor's Office of BiH submitted its response on 3 November 2011 and 12 January 2012.

9. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the responses to the appeals were submitted to the appellant on 19 December 2011 and to the appellants on 23 April 2012.

10. Given that the appeals were registered under numbers AP 1123/11 and AP 1218/011 and concern the same factual and legal basis, the Constitutional Court, pursuant to Article 31(1) of the Rules of the Constitutional Court, decided to join them and conduct one set of proceedings, issuing a single decision under number AP 1123/11.

III. Facts of the Case

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

12. By the indictment of the Prosecutor's Office of BiH no. KT-293/04, confirmed on 27 January 2009, the appellant Luca Tokalić, appellant Pero Tokalić and the appellant *Tock promet* were charged with having committed: (1) the continued criminal offence

of tax evasion under Article 272(2) of the Criminal Code of the Federation of Bosnia and Herzegovina (*Official Gazette of the FBiH*, no. 43/98 - the Criminal Code of FBiH of 1998) i.e. under Article 273(3) of the Criminal Code of the Federation of Bosnia and Herzegovina (*Official Gazette of the FBiH* no. 36/03 – the 2003 Criminal Code of FBiH) and all in conjunction with Article 23 of the Criminal Code F BiH of 1998, i.e. Articles 31 and 55 of the 2003 Criminal Code of FBiH in the period from „2001 to 2003" and (2) the continued criminal offence of money laundering under Article 209(2) in conjunction with Article 54 and Article 29 of the Criminal Code of Bosnia and Herzegovina (Criminal Code of BiH) in the period „between 1 March 2003 and 14 April 2004 „.

13. By its verdict no. KVP-01/09 of 28 January 2010, in its paragraph 1, the Court of BiH pronounced guilty the appellant Luca Tokalić and appellant Pero Tokalić of having in the period „from 2001 to 2003", and the appellant *Tock promet* in the period from „1 August 2003 to 31 December 2003" committed continued criminal offence of tax evasion under Article 273(3) of the 2003 Criminal Code of FBiH and sentenced the appellant Luca Tokalić to the imprisonment term of 1 year, the appellant Pero Tokalić to the imprisonment term of 3 years, whereas the Court imposed upon the appellant *Tock promet* the fine in the amount of KM 80,000.00.

14. By the paragraph 2 of the same verdict, the appellant Pero Tokalić and appellant *Tock promet* were acquitted of the charges of having in the period „from 1 March 2003 and 14 April 2004" committed criminal offence of money laundering under Article 209(2) of the Criminal Code of BiH.

15. It was concluded in the paragraph 1 of the enacting clause of the first instance verdict relating to the continued criminal offence of tax evasion that the appellant Pero Tokalić, the appellant Luca Tokalić and the appellant *Tock promet*, evaded payment of sales tax required in violation of Articles 13, 25 through 29 of the Law on Sales Tax on Products and Services of FBiH by presenting in their business books that they sold goods in designated values in 2001, 2002 and 2003 to the designated buyers as wholesale (13 companies from the territory of the Federation of BiH and RS) although no real sale occurred between the appellant *Tock promet* and the above said buyers; instead, the goods were sold on black market for cash, which constitutes taxable final consumption, by which the appellant and the appellant Pero Tokalić evaded to pay sales tax in the total amount of KM 1,346,512.82 (in 2001 KM 128,938.99, in 2002 KM 638,050.76, and in 2003 KM 579,523.07, while the amount of sales tax evaded by the appellant *Tock promet* was of KM 367,322.62).

16. It was further indicated that the appellant, with a view to enabling the appellant *Tock promet* to evade payment of taxes in contravention of the legislation of FBiH,

submitted false information on acquired taxable income, which exceeded the amount KM 200,000.00 whereas the appellant Pero Tokalić, with intent, assisted the appellant in enabling the appellant *Tock promet* to evade paying taxes contrary to the legislation of FBiH, by submitting false data on acquired taxable income, which exceeded the amount KM 200,000.00 and the appellant *Tock promet* in the period from 1 August 2003 until 31 December 2003, disposed of the unlawfully gained property in the amount of KM 367,322.62 acquired by appellant, as the co-owner and responsible person and the appellant Pero Tokalić, as the co-owner on behalf, on account and for the benefit of the appellant *Tock promet*, in the manner as described above.

17. In paragraph 2 of the first instance verdict in relation to continued criminal offence of money laundering it was concluded that the appellant Luca Tokalić and the appellant Pero Tokalić were acquitted of the charges that in the period between 1 March 2003 and 14 April 2004, through various money and commercial transactions, along with the legal entities of *Zoka Trend* d.o.o., Pule – *prom* d.o.o., *Kondor Kompani* d.o.o. and *Darko-produkt* d.o.o. concealed the money in the amount of KM 579,523.07 acquired by tax evasion of sales taxes, although they were aware that the amount was acquired by committing the criminal offence of tax evasion, in as much as they enabled the money, gained from the retail sale of goods intended for the further sale, be deposited into the bank accounts of the referenced legal entities, following which the funds were transferred to the bank account of the appellant *Tock promet* in order to present that the origin of the money was lawful. Thus, with a view to enabling the legal entity to conceal money, for which they knew that it was acquired through perpetration of criminal offence, used this money in commercial activity and such money is of larger value and such an act endangers the common economic space of Bosnia and Herzegovina and has detrimental consequences to the operations or financing of institutions of Bosnia and Herzegovina and the amount of concealed money exceeds KM 50,000, by which they would have committed the continued criminal offence of money laundering in violation o Article 209(2), in conjunction with Articles 54 and 29 of the Criminal Code of BiH.

18. In the reasons for the verdict, it is noted that it was *established beyond dispute* that the appellant Luca Tokalić and the appellant Pero Tokalić were co-founders and the appellant also the director of the appellant *Tock promet*, that the appellant *Tock promet* was a registered tax payer, dealing, among others, with wholesale and retail sale in various goods. Furthermore, based on the financial documentation which was seized from the appellant *Tock promet*, it was established that in the period between 2001 and 2003 the appellant *Tock promet* made financial transactions with 13 individual business companies. It is further noted as undisputable that at the time the criminal acts were perpetrated, tax regulations were in force under which business companies engaged in the sale of goods

and services were bound to pay the sales tax. There were indicted Articles 5, 7, 8, 13, 25, 27 and 28 of the Law on Sales Tax on Products and Services which regulated the obligation of payment of tax on turnover, conditions under which exemption was possible for the aforesaid tax, the commencement of liability and the time limit for payment of tax.

19. It was further pointed out that in the particular case *a decisive fact for making a correct and lawful decision on this criminal matter was to establish whether the real sale of goods occurred between the appellant Tock promet and its buyers.*

20. It was established based on the evidence adduced, that the appellant *Tock promet* was liable to pay the sales tax and that this obligation could not be transferred to another taxpayer. It was noted that the appellant and the appellant *Tock promet*, with the decisive help of the appellant Pero Tokalić, sold the goods in the mentioned amounts to buyers unknown to the Court, as the goods intended for the final consumption. Furthermore, instead of calculating and reporting the tax on sales of products, by submitting false information on the facts significant for establishing the amount of tax liabilities, they evaded this tax in the manner that in the period as stated in the operative part of the verdict, they sold the goods which they had previously purchased from various suppliers, to buyers who were known to them. However, contrary to Articles 25 through 29 of the Law on Sales Tax they failed to calculate report and pay the tax. Instead, in order to conceal and evade the payment of taxes they presented the sale as the sale of goods to the companies listed in the operative part of the verdict, intended for further sale. Prior to that, with the same goal, they made arrangements with the said companies so as to produce purchase orders containing the statement by the alleged buyers that the goods were intended for further sales, in order for the taxpayer's obligation to be transferred on the buyer, although no real sale occurred.

21. On the basis of the conducted evidentiary proceedings, the Court found that it was established beyond doubt that in the reasoning individually listed companies were registered for the purpose of money laundering, that is, to provide services to other companies so as to evade the payment of tax and other liabilities, for a commission. Thus, those companies, „money launderers„ received cash from the appellant, deposited it into the account of their own companies, and immediately thereafter transferred the money by transfer orders to the account of the appellant *Tock promet*, for the alleged payment of goods which were only fictitiously ordered and have never been delivered to the buyers. Such a court finding was based on the testimony of the witnesses of the Prosecutor's Office of BiH as follows: D.K., the responsible person in the company *Darko produkt d.o.o.*, M.P. the founder and director of the company *Pule prom* d.o.o., H.S., the owner and director of the company *Rakić prom*, I.L., the founder and director of the company *Stare trade*, from

which it follows that the companies they had registered or worked for had been founded with a view to rendering services of money laundering and that for an agreed commission they placed vast amounts of money on the accounts of those companies and immediately thereafter transferred the money by transfer orders to the account of the alleged sellers of goods, issuing at the same time purchase orders stating that the goods were intended for further sale in order to meet the formal requirements for being exempted from payment of taxes, although no real sale occurred. Among those who offered such services these witnesses confirmed was also the appellant *Tock promet*.

22. The aforementioned witnesses were brought into connection with the witnesses of the Prosecutor's Office of BiH as follows: I.T., D.Č., S.B., G.R., the testimony of F.K., employed as bookkeeper by the appellant *Tock promet* and the testimonies of the authorized officials S.H., a tax inspector, B.B. and E.K., inspectors in the Tuzla Canton Ministry of Interior, M.J., an employee of the Bijeljina Tax Administration, G.B., an employee in the RS Republic Directorate for Commodity Reserves, S.K., a Federation investigative inspector with the Federation Tax Administration, M.P., an employee of the Mostar Tax Administration, Dz.K., an employee of the Indirect Taxation Authority, from which it follows that the appellant *Tock promet* conducted business with all 13 enumerated companies, that some of those companies were mostly inaccessible companies which could not be located at their registered addresses, that those companies conducted business by placing of cash to the registered bank accounts, that the amounts paid in such fashion were often consistent with the amounts which were paid on the same day to the account of the appellant *Tock promet*. The Court gave credence to the testimonies of the witnesses D.K. and H.S. who were convicted of the criminal offences of money laundering but who had already served their sentences and the witness M.P. as well as witnesses I.T., D.C. and G.R., who, in the opinion of the court, left no doubt that the three aforesaid companies the appellant *Tock promet* conducted business with, had been registered by way of counterfeit and stolen personal documents with a view to money laundering and tax evasion for other persons without there ever having been any real sale. In support of such conclusion the testimony of the witness S.B. was also indicated as well as of witness F.K., employed by the appellant *Tock promet*. In addition, the testimonies of the authorized persons and the investigators who had conducted the investigation in this case indicated, in the opinion of the court, the existence of the decisive fact that there had been no real sale between the appellant *Tock promet* and the 13 aforementioned companies.

23. It was further indicated in support of the finding that between the appellant *Tock promet* and the aforementioned companies had not been any real sale by the finding and opinion of the financial expert who indicated the deficiency of the financial documentation of the companies the appellant Tock promet in accordance with Article 7 of the Law on

Business Companies and Article 7 of the Law on Trade, that the financial documentation of the appellant *Tock promet* lacked clear information on the receiver of goods, means of transportation by which the goods were transported, person who issued the products, person who did the transportation, person who took over the products, location of the takeover of goods, i.e. that it did not contain the information in terms of Article 21 of the Law on Business Companies and Article 3 of the Amendment to the Law on Business Companies. Pursuant to the findings and opinion of the financial expert, the total amount of the diminished calculated and paid sales tax, i.e. the amount for the years 2001, 2002 and 2003 was established. This finding was substantiated by extensive material documentation comprising individually enumerated reports, official records, and notifications by the Indirect Taxation Administration, RS Tax Administration, Federation Ministry of the Interior, Ministry of the Interior of Tuzla as well as the competent inspection and taxation authorities from Mostar and Sarajevo.

24. During the course of the proceedings, the appellants proposed the hearing of the financial expert R.S. who also produced a finding and opinion. The court admitted the major part of this expert's finding and opinion. However, the court established the existence of any real purchase and sale of goods between the appellant *Tock promet* and the buyers mentioned in the enacting clause of the verdict on the basis of other enumerated pieces of evidence and relevant to that part the finding and opinion of this financial expert was not decisive. In support of this conclusion it was noted that undertaking actions which lead to the commission of the criminal office of tax evasion involves in fact providing of financial documentation required by the law for the purpose of exemption from the sales tax, on account of which such documentation may not be the sole and decisive evidence in establishing whether there had been any real sale but this fact has also to be assessed on the basis of other evidence.

25. Finally, based upon the finding and opinion of an expert graphologist, an analysis was performed of the signatures on the documents of the legal entity produced in transactions with the 13 listed companies by comparing them with the signatures of the appellant and the appellant Pero Tokalić as well as the analysis of the stamps of all 13 companies.

26. It follows further from the reasoning of the verdict that the Court of BiH established its subject matter jurisdiction by the application of Article 7(2)(b) of the Law on the Court of BiH. Taking into account that the appellants were charged with the perpetration of the continued criminal offence of tax evasion in violation of Article 272(2) of the 1998 Criminal Code of FBiH and Article 273(3) of the Criminal Code of FBiH, that a large amount of tax was evaded, more specifically, KM 1,346,512.82, which points to a sizeable turnover of goods, and that a large number of legal entities, both from the territory of

the Federation of Bosnia and Herzegovina and the Republika Srpska, which all points to the conclusion that the criminal offence at hand can have serious repercussions, that is, detrimental consequences for the economy of Bosnia and Herzegovina, as well as serious economic damage or other detrimental consequences beyond the territory of the Federation of Bosnia and Herzegovina.

27. With regard to the criminal offence of money laundering referred to in Article 209 of the Criminal Code of BiH, of which the Court acquitted the accused persons, the subject matter jurisdiction of the Court was not disputable, considering that it involved a criminal offence from the original jurisdiction of the Court of BiH.

28. It was further noted that *the indictment included as the time of perpetration of criminal act of continued criminal offence of tax evasion for all the appellants*, *the timeframe from 2001 to 2003* during which they conducted business with individually listed companies.

29. In order to establish the time of perpetration of the criminal offence, the Court of BiH noted that by analyzing every individual financial document, purchase order, invoice and delivery note it established the time of issuance as well as the amount relative to the allegedly performed transaction. It is further stated that pursuant to the evidence taken *the factual description could be divided into the period before the 2003 Criminal Code of FBiH entered into force and the period after the Criminal Code of FBiH entered into force in August 2003.* It is further stated that as for the time of the perpetration of the criminal offences, it is evident that some actions were committed in the period up until 1 August 2003 and some in the period following 1 August 2003, contrary to the defense submission that the time period at hand is the period between 2002 and first half of 2003. Moreover, as pointed out, the application of Article 4 of the Criminal Code of BiH, that is, Article 5 of the Criminal Code of FBiH, binding the court to apply the law which is more lenient to the perpetrator if the law has been amended once or several times after the perpetration of the criminal offence, which implies that it is necessary to establish the time of the perpetration of the criminal offence.

30. In the present case, the appellants have been found guilty of several criminal offences committed over a continuous time period. Given the nature of their perpetration, their temporal connection and other material circumstances connecting them, these criminal offences constitute continued criminal offence. Bearing in mind that this is a continued criminal offence, the Court finds that the time when the last action was perpetrated is considered as the time of the perpetration of the criminal offence. In view of the fact that the last constituent action of the continued criminal offence of tax evasion was committed after the entering the 2003 Criminal Code of FBiH, that is after 1 August 2003,

the principle of application of a more lenient law could not be applied because that legal institute requires the law to be amended once or several times after the perpetration of the criminal offence. Therefore, in this particular case, the 2003 Criminal Code of FBiH has been applied.

31. It is further concluded that, in accordance with the principle *nullum crimen sine lege* the appellant *Tock promet* may not be charged with the perpetration of the criminal offences prior to 1 August 2003, because at the established time (2001, 2002 until 1 August 2003) the Criminal Code of the Federation of BiH did not envisage the possibility of sanctioning legal entities i.e. it was possible only after the 2003 Criminal Code of FBiH entered into force.

32. Having in mind that the criminal offence of tax evasion under Article 273(3) of the Criminal Code F BiH, with which the appellants were charged, was provided for as the criminal offence of tax evasion under Article 272(2) of the 1998 Criminal Code of FBiH (*Official Gazette of FBiH* no. 43/98) which was in effect until 1 August 2003, and as the criminal offence in violation of Article 273 (3) of the Criminal Code of FBiH which entered into force as of 1 August 2003, the Court specified all the transactions in the period „from 2001 to 2003" according to the time and the name of the legal entities with which the appellant *Tock promet* allegedly conducted business, based on the original documentation submitted during the evidentiary proceedings, and based on the expertise conducted by the expert in finance.

33. Given that these transactions were made both at the time when the 1998 Criminal Code of F BiH and 2003 Criminal Code of FBiH were in force, the transactions occurred after 1 August 2003 were separated i.e. after the new 2003 Criminal Code of FBiH entered into force, which was a total of 81 invoices which were issued by the appellant *Tock promet* to the company „Zoka trend" and 164 invoices issued to the company „Kondor kompani", the total amounts of transactions were designated and amounts of taxes as per these invoices. Based on these the responsibility of the appellant *Tock promet* was established as well as the amount of the taxes it evaded (367,322.62KM).

34. In respect of the acquitting part of the verdict the reasoning notes, *inter alia*, that the legal classification in the indictment classifying the acts of the accused as the continued criminal offence of money laundering under Article 209(2) of Criminal Code of BiH and tax evasion under Article 273(3) of the Criminal Code of FBiH, committed in concurrence, was not accepted.

35. In the evaluation of the court, the case in question only involved provisional concurrence, where it is possible to apply only one legal definition of the criminal offence, although elements of another criminal offence have also been satisfied, and all this with

a view to avoiding double or multiple punishments. The court further held that in this particular case, money laundering represented a manner of the perpetration of the criminal offence of tax evasion and the direct intent of the accused was directed at that goal. Thus, the tax evasion could be committed in this manner only with the participation of the so-called „Money Launderer" companies. Therefore, applying Article 284(c) of the Criminal Procedure Code of BiH, regarding this part of the charges the Court rendered the decision as stated in the operative part of the verdict.

36. By its Verdict no. KPZ-13/10 of 15 October 2010, the Court of BiH granted the appeal of the Prosecutor's Office of BiH in respect of the acquitting part of the first instance verdict and the decision on the criminal sanction, modifying paragraph II of the first instance verdict in that the appellants were also found guilty of committing the continued criminal offence of money laundering in violation of Article 209(2) in conjunction with Articles 54 and 29 of the Criminal Code of BiH and in accordance with Articles 39, 42, and 48 of the Criminal Code of BiH, and also Article 49 in reference to the appellant, they were sentenced as follows: the appellant to a prison term of 10 months, the appellant Pero Tokalic to a prison term of 2 years and the appellant *Tock promet*, pursuant to Articles 124(c), 128, 131, and 135 of the Criminal Code of BiH was fined as quantified.

37. Further, the first instance verdict was further modified in the sentencing part in that the appellant was sentenced for the continued criminal offence of tax evasion in violation of Article 273(3) of the Criminal Code of F BiH to a prison term of 2 years, the appellant Pero Tokalić to a prison term of 4 years. Finally, pursuant to Article 53 of the Criminal Code of BiH, the appellant was sentenced to a compound prison term of 2 years and 6 months, the appellant Pero Tokalić to a compound prison term of 5 years and the appellant *Tock promet* to a compound fine as quantified. The appellants' appeals were dismissed as ill-founded.

38. In the reasoning of the verdict it is stated, *inter alia*, that the allegations of all the appellants about the subject matter jurisdiction of the Court of BiH are ill-founded. In fact, all appellants have claimed in their appeals that the Law on Products and Services Turnover Tax of FBiH was in force at the time of the commission of criminal offence of tax evasion, which regulated the obligation of tax payment at the territory of FBiH and that considering the time of commission of criminal offence of tax evasion (from 2001 to 2003) this did not have serious repercussion or damaging consequences on the economy of BiH and that the amount of KM 1,300,000.00 of evaded tax does not represent a large amount of evaded tax. Finally, it was emphasized in the appeals that this concerned a jurisdiction of the Cantonal or Municipal Court while reference was made to the case-law of the Court of BiH in case no. KPZ-14/09 of 7 December 2009.

39. In regard to the allegations from the appeal on the subject matter jurisdiction of the Court of BiH, the second instance court pointed out that the case pertains in addition to the criminal offence of tax evasion prescribed by the Criminal Code of FBiH to the criminal offence of money laundering under Article 209 (2) of the Criminal Code of BiH which falls under jurisdiction of the Court of BiH. It is further pointed out that the present case involves a large amount of evaded tax and a broad network of legal persons who had business operation with the appellant *Tock promet*, covering the entire territory of BiH. On the basis of the aforementioned it was concluded that this criminal offence may have serious repercussions to the economy of BiH. The allegations that the specified amount of the evaded tax does not constitute a significant portion of the Bosnia and Herzegovina budget, considering particularly the fact that this amount of money exceeds the amount of six-fold statutory threshold provided in Article 273(3) of the 2003 Criminal Code FBiH, which in this case constitute a classified form of this criminal offence, were found to be ill-founded.

40. The second instance court further concluded that the appeal by the Prosecutor's Office of BiH, stating that in the present case in addition to the continued criminal offence of tax evasion also the criminal offence of money laundering had been committed, was well-founded and modified the first instance verdict in this part.

41. In that regard, the second instance court concludes that although the present case involves a series of actions taken to the same end, as they really constitute pieces of unified plan of the appellant, their criminal relevance and amount of the crime committed cannot be sufficiently expressed and valued if it was considered that there was only one offence, that is, if all these actions were classified only as tax evasion under Article 273(3) of the Criminal Code of FBiH.

42. In the evaluation of the second instance court, the appellants first undertook the actions related to the criminal offence of tax evasion, and then, although aware that the money derived from the criminal offence, they successively took other actions with a view of legalizing such criminal money and at the same time acquiring gain, whose criminal origin is concealed in this way, which constitutes now a criminal offence of money laundering under Article 209 of the Criminal Code of BiH. Therefore, it was concluded that, although these actions were the result of a unified plan of their perpetrators, they represented separate and independent actions, which contained special and separate criminal offences, and thus they had to be evaluated and classified as two independent criminal offences. During the evaluation of these offences, the second instance court considered that the criminal offence of money laundering as a subsequent offence was not a lesser offence, but rather this was the offence which was even in its basic form more severe offence than tax evasion.

43. In support of this conclusion, the second instance court noted that it arises from the findings of the first instance court, that the appellant Luca Tokalić and the appellant Pero Tokalić handed over the money, obtained through tax evasion in the period „between 1 March 2003 and 14 April 2004" to the persons who deposited it into the bank accounts of the companies *Zoka Trend*, *Pule-prom*, *Kondor Kompani*, and *Darko Produkt*, after which it was transferred to the bank account of the legal person.

44. In this manner, the second instance court assessed, the appellants went beyond the criminal offence of tax evasion and satisfied both objective and subjective elements of criminal offence of money laundering. The additional element of money laundering was also satisfied, which concerns, *inter alia* the money of larger value, as it was the case here, considering that the value amounts to BAM 579,523.07. Furthermore, it is noted, that it is of no relevance that this case involves actions taken to the same end, given that even such cases do not exclude the concurrence of criminal offences, especially if these criminal offences are committed by the actions different in their character, undertaken at different times and against different subjects, and which individually constitute such amount of the crime committed that may be expressed as independent criminal offence.

45. Based on all these reasons, it was concluded that the case at hand did not concern a provisional, but actual concurrence as set forth under Article 53 of the Criminal Code of BiH, that is, the appellants, in addition to the continued criminal offence of tax evasion under Article 273(3) of the Criminal Code of FBiH, committed also the continued criminal offence of money laundering under Article 209 (2) of the Criminal Code of BiH, as a separate offence.

46. Finally, the second instance court concluded that such a position constitutes a certain deviation from the positions of that court, expressed in several other cases which involved provisional concurrence and the accused were only punished for tax evasion. Such jurisprudence was really in place so far, and the first instance court applied the same case-law in its verdict. However, it was pointed out that jurisprudence had never been contested or even if it was, it was not contested sufficiently and adequately. The position expressed in the present case, it is reasoned, is a result of an assurance reached after a long analysis of mutual relations between the referenced criminal offences in many cases tried before this Court, and also the consideration of the fact that judiciary in some other countries in the region, which applied the same case-law, changed their positions after some time and ultimately found the concurrence of offences.

47. The allegations from the appeal of the appellant that the 1998 Criminal Code of F BiH should have been applied in their case as it is more lenient rather than the 2003 Criminal Code of FBiH were found as ill-founded.

48. In this regard it was pointed out that the conclusion of the first instance court was correct that in case of the continued criminal offence (tax evasion) the law being applied is the law that was in force at the time of the last action that enters into that offence. Furthermore, it was pointed out that the last action that enters into that offence was committed after the entry into force of the 2003 Criminal Code of FBiH. The material documentation in the case was also noted based on which it was concluded that the conclusion reached by the Court on the application of the 2003 Criminal Code of FBiH is valid and justified. Also, given that the act of a criminal offence was committed after the entry into force of the 2003 Criminal Code of FBiH it is of no importance for its application that the amount of tax evaded by the appellants after the entry into force was not noted in the enacting clause of the first instance verdict, which was not necessary either for establishing the appellant's guilt or determination of tax liability.

IV. Appeal

a) Allegations from the appeal

49. The appellant Luca Tokalić complains that the contested verdicts violated her right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and the right under Article 7 of the European Convention.

50. The appellants hold that the contested verdicts violated their right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention, their right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, their right to respect for private and family life, home and correspondence under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and their right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention as well as their right to freedom of movement and residence under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention.

51. The appellant Luca Tokalić and the appellant Pero Tokalić allege that the time of commission of the criminal offence of tax evasion relevant to them was specified as "in the period from 2001 until 2003", i.e. that the timeframe was specified as "until 2003" and not "in 2003". Given the aforesaid, they allege that it is unclear how they evaded the tax in the amount of BAM 579,523.07 in 2003 as well. Furthermore, they point out that for the appellant *Tock promet* the time of commission of the criminal offence of tax evasion was

specified as from 1 August 2003 until 31 December 2003 but that the indicated amount of evaded tax, i.e. BAM 579,523.07 was thus for the entire year 2003.

52. Furthermore, starting from the above position that the time of commission of the criminal offence of tax evasion was specified as until 2003 and not also in 2003, the appellant and the appellant Pero Tokalić hold that the Criminal Code of FBiH could not bee applied as it entered into force on 1 August 2003, but there should have been applied the 1998 Criminal Code of FBiH. In relation to this claim the appellant points out in particular that given the length of prescribed sentence, the 1998 Criminal Code of FBiH would be more lenient to her and the appellant Pero Tokalić particularly stressed in respect of this claim that at the time of commission of the acts he was charged with the 1998 Criminal Code of FBiH was in effect and, therefore, he could have been aware of committing the criminal offence of tax evasion which was proscribed by the said law.

53. In view of the aforementioned, the appellant Pero Tokalić holds that the Court of BiH could not establish its subject matter jurisdiction. In support of the claim that the Court of BiH did not have jurisdiction he pointed out that in the reasoning of the challenged verdicts it is arbitrarily stated that the commission of the criminal offence of tax evasion could have had detrimental economic consequences, but it was not explained in any way. The appellant invoked the verdict of the Court of BiH in case no. KPŽ-14/09 of 7 December 2009, from which it follows, in the appellant's opinion, that regardless of which legal persons the business had been conducted with, when it comes to the criminal offence of tax evasion under Article 273 of the Criminal Code of FBiH, it is detrimental to the Federation of BiH and, in that case, the Court of BiH may not establish its jurisdiction.

54. In addition, starting from the position that the time of commission of the criminal offence of tax evasion was specified as until 2003 and not also in 2003, the appellant Luca Tokalić and the appellant Pero Tokalić claim that they could not have been found guilty of the criminal offence of money laundering which is prescribed under the Criminal Code of BiH which came into force on 1 March 2003.

55. The appellant Luca Tokalić expressly points out in respect of this claim that due to the fact that by the second instance verdict she had also been found guilty of the criminal offence of money laundering the prohibition of retroactive application of the law to was violated to her detriment. In the appellant's opinion, the statement in the reasoning of the challenged second instance verdict that „criminal relevance and amount of the crime committed cannot be sufficiently expressed„ actually shows the dissatisfaction of the court in respect of the facts and the law which ought to be applied because it appears that the appellant had committed a lot of things and is to be only punished for one of them,

which brings into question the independence of the court and the principle of the equality of arms. In her opinion, the court expressed its interest in „more severe punishment than the one required by the law".

56. Furthermore, the appellant Luca Tokalić and the appellant Pero Tokalić claim that the reasoning of the second instance verdict lacks a well-explained reasons on account of which the Court of BiH gave up the case law applied by the first instance court which the Court of BiH followed in a number of other cases, pursuant to which the first instance court concluded that the case at hand only involved provisional concurrence, pronouncing the appellant Luca Tokalić, the appellant Pero Tokalić and the appellant *Tock promet* guilty of the continued criminal offence of tax evasion and acquitting them of the charges of the continued criminal offence of money laundering.

57. The appellant Luca Tokalić and the appellant Pero Tokalić have presented extended allegations relating to the manner in which their liability was established, the manner in which the presented evidence was assessed, challenging the lawfulness of their obtaining and that the facts of the case were erroneously established. In that regard, they emphasize that it was not precisely stated what constitutes the conduct contrary to Articles 13 and 15 of the Law on Sales Tax on Products and Services, which all the appellants were found guilty of.

58. Furthermore, the appellant Pero Tokalić emphasizes that the Court of BiH and the Prosecutor's Office of BiH assumed the role of an administrative authority, given that the ruling of the Cantonal Court in Sarajevo no. 09 0 U 003379 09 U had postponed the enforcement of the ruling by the Federation Ministry of Finance of 16 December 2008, ordering the payment of tax liabilities additionally determined by the ruling of 23 November 2007. Pursuant to the aforementioned, it follows, in his opinion, that it has not even been established yet that he is a taxpayer and, accordingly he could not have committed the criminal offence of tax evasion.

59. The appellant Pero Tokalić supplemented his appeal on 22 December 2011 requesting from the Constitutional Court to issue an interim measure which would postpone the serving of his sentence of imprisonment until the issuance of a decision by the Constitutional Court relevant to his appeal. The appellant stated as the reason for the issuance of the interim measure that his son who was taking care of the entire family and the company's conduct of business got killed, that, since he had the company, he had to submit his final financial report, otherwise he could face a blockade or liquidation of the company, that he employed a new person who he ought to acquaint with the operations of the company and, finally, that he had hearings scheduled before the courts in Travnik and Sarajevo where his failure to appear would entail the loss of opportunity to collect his claims.

60. The appellant Pero Tokalic repeated the same request in his supplement to the appeal of 20 February 2012. He also indicated that they, "had initiated a number of administrative disputes and that the Supreme Court of the Federation of Bosnia and Herzegovina ("the Supreme Court „) had annulled the ruling of the Federation Ministry of Finance, freeing them of unlawfully imposed obligations". The appellant attached the verdict of the Supreme Court no. 06 0 U 003274 11 Uvp of 11 January 2012 from which it followed that the ruling by the Federation Ministry of Finance no. 03-15-192/10 A.D. of 27 September 2010 had been annulled and the case remitted for retrial.

61. The appellant Pero Tokalić additionally supplemented his appeal on 23 April 2012, requesting the issuance of the interim measure which would postpone the serving of his sentence of imprisonment. He also requested the Constitutional Court to decide urgently about his appeal. The appellant highlighted that following the death of his son on 23 October 2011 he had requested pause in the serving of his sentence of imprisonment, which request had been granted and he was supposed to return to serve his sentence on 29 April 2012. The appellant explained that the verdict of the Supreme Court no. 06 0 U 003274 11 Uvp of 11 January 2012 pertained to the business dealings with the company *Darko-Produkt* doo Laktaši, that the challenged verdicts had punished him on that account for tax evasion and money laundering, that this company was one of the biggest tax debtors in RS and that it was wrong for him to serve his sentence of imprisonment for something he had not done. The appellant Pero Tokalić reiterated his claims that the challenged verdicts were unlawful and that considering that taxes were collected at the Entity level, the Court of BiH could not have had jurisdiction and also that the criminal legislation had not have the criminal offence of money laundering prescribed. Finally, a ruling on enforcement no. S1 3 I 008799 12 I of 13 April 2012 was attached, specifying enforcement by garnishment, assessment and sale of the appellant *Tock promet*'s motor vehicles in satisfaction of the monetary claim – impose fine and confiscation of illegally acquired property on the basis of the challenged verdicts of the Court of BiH.

62. The appellant Pero Tokalić, in the supplement to his appeal of 26 April 2012, submitted the verdict of the Supreme Court no. 06 0 U 001906 11 Uvp of 9 March 2012 setting aside the verdict of the Cantonal Court in Novi Travnik of 23 March 2011 and remitting the case for retrial. It follows from the presented verdict that the subject of dispute in these proceedings was the ruling of the Tax Administration which initiated the procedure of enforced collection of overdue taxes in the amount of BAM 1,829,997.77. The appellant claims that the said verdict is evidence that the appellant *Tock promet* „has no longer any debt in any form". The appellant Pero Tokalić requested either that the execution of his sentence of imprisonment be suspended or that his appeal be decided in urgent procedure.

63. In the supplement to his appeal of 7 November 2012 the appellant Pero Tokalić submitted an urgent submission relevant to the deciding upon his appeal. The appellant pointed out that the Cantonal Court in Sarajevo had annulled the unlawfully imposed tax liabilities and that he and the appellant *Tock promet* had no more unsettled tax liabilities. The appellant Pero Tokalić attached to the supplement the Certificate of Tax Administration Office, Branch Office Novi Travnik of 19 October 2012 stating that *Tock promet* Trade and Catering Service Company Novi Travnik, pursuant to tax records, has a debt on the basis of public revenue in the indicated amount. Also, the appellant Pero Tokalić only submitted the first page of the verdict by the Cantonal Court in Sarajevo of 30 October 2012 which showed that the indicated rulings by the Federal Ministry of Finance, the Tax Administration, Central Office Sarajevo and the Large Taxpayers Control Unit had been annulled and the case referred back to the Central Office Sarajevo, Large Taxpayers Control Unit for new decision-making. Finally, the appellant Pero Tokalić also submitted a request which he had filed to the Cantonal Tax Office, Branch Office Novi Travnik of 31 October 2012 for refund of excess paid funds collected through billing by ruling of, as he stated, the Cantonal Tax Office of 20 February 2009.

64. In his supplement to the appeal of 13 November 2012, the appellant Pero Tokalić submitted another urgent submission relevant to the deciding upon his appeal. The appellant Pero Tokalić claims that the Cantonal Court (not specifying which one) annulled the unlawfully imposed tax liabilities and that „we, i.e. our company have no more unsettled tax liabilities". In support of this claim, the appellant Pero Tokalić submitted for inspection the Certificate of Tax Administration Office, Branch Office Novi Travnik of 12 November 2012 stating that *Tock promet* d.o.o. Novi Travnik has no more unsettled tax liabilities. The appellant Pero Tokalic also submitted the ruling of Tax Administration Office, Branch Office Novi Travnik of 6 November 2012 showing that the Federal Ministry of Finance had been ordered to make the refund of excess funds paid through forced collection in the indicated amount for the benefit of *Tock promet* d.o.o. It follows from the reasoning of that ruling that the taxpayer *Tock promet* d.o.o. filed a request on 31 October 2012 for refund of excess funds paid through forced collection. It is, further, stated that „the ruling by the Cantonal Court in Sarajevo annulled the minutes made by the inspection for the control of big taxpayers and the proceedings of forced collection dismissed". Finally, the appellant Pero Tokalic attached the request for refund of excess paid funds collected through billing by ruling of the Cantonal Tax Office Novi Travnik of 8 November 2010.

65. On 16 November 2012, the appellant Luca Tokalić submitted to the Constitutional Court two rulings by the Cantonal Tax Office, Branch Office Novi Travnik on dismissing the proceedings of forced collection against the tax payer *Tock promet* d.o.o. Novi Travnik. Pursuant to the ruling of 17 October 2012, the proceedings of forced collection were

dismissed because the Tax Branch Office Novi Travnik had annulled on 17 October 2012 the payment order of 2 February 2009. It follows from the reasoning of that ruling that the verdict of the Cantonal Court in Sarajevo of 26 September 2012 annulled the ruling on payment of additionally established taxes and the case was referred back for renewed decision-making. It follows from the ruling of 12 November 2012 that, the proceedings of forced collection were dismissed because the Tax Branch Office Novi Travnik annulled on 12 November 2012 the payment order of 8 September 2009.it follows from the reasoning of the ruling that the verdict of the Cantonal Court in Sarajevo of 30 October 2012 had annulled rulings by the Federal Ministry of Finance, the Tax Administration, Central Office Sarajevo and the Large Taxpayers Control Unit and the case was referred back for new decision-making.

66. The appellant supplemented her appeal on 21 November 2012. She attached the verdict of the Cantonal Court in Sarajevo of 26 September 2012, annulling the rulings by the Federal Ministry of Finance, the Tax Administration, Central Office Sarajevo and the Large Taxpayers Control Unit and the case was referred back for new decision-making. Furthermore, the appellant submitted the Certificate of Tax Administration Office, Branch Office Novi Travnik of 12 November 2012 stating that *Tock promet* d.o.o. Novi Travnik as of the date of issuance of the certificate had no more unsettled tax liabilities. Finally, the appellant (just like the appellant Pero Tokalić in his supplement to the appeal of 13 November 2012) submitted the ruling of the Tax Administration Office, Branch Office Novi Travnik of 6 November 2012 showing on the refund of excess funds paid through forced collection. The appellant highlighted that pursuant to the rulings of the competent tax administration *Tock promet* d.o.o. had no tax liabilities but that, pursuant to the court verdict it was „guilty" of commission of the criminal offence of tax evasion, only for the non-existent tax liability. In the appellant's opinion, a court cannot substitute for a tax authority when it comes to determining the tax and, therefore, a question justifiably arises as to how it is possible for tax authorities to have found the tax liability relative to the convicted persons and „the verdict should have indicated that". The appellant claims that the tax authority and the court have drawn completely different conclusions on the basis of the same financial documents. The relevant provisions of the Law on Sales Tax, she opines, have been neglected, on account of which there are „tax" and „administrative" proceedings pending, disclosing where the first instance tax authority was wrong. The appellant submits that, pursuant to Article 67 of the Law on Sales Tax, there shall carried be out a procedure for checking but not „based on your own assessment, not at your discretion, not under your assumptions, but based upon inspecting the „tax documentation" with legal obligations. Finally, the appellant holds that „even the criminal verdict has been based upon manifestly erroneous assumptions and neglect of facts decisive for the convicted persons".

67. Appellant Pero Tokalić supplemented his appeal on 7 January 2013. The appellant again pointed out to the verdict of the Cantonal Court in Sarajevo of 26 September 2012 which was submitted in the previous supplement to the appeal, by which the rulings of the Federal Ministry of Finances, Tax Administration, Central Office in Sarajevo, Department for Control of Big Taxpayers were annulled and the case remanded for a new decision-making. Furthermore, the appellant, in addition to the documents submitted in the supplements, submitted for the first time the ruling of the Federal Ministry of Finance on approval of the refund of erroneously or several paid incomes of 20 November 2012, in accordance with the decision of the Tax Administration Office Travnik Cantonal Tax Office Travnik of 6 November 2012; conclusion of the Cantonal Tax Office Novi Travnik of 25 October 2011 that ended the procedure of forced collection from the appellant Tock promet in accordance with the aforementioned ruling of the Cantonal Court; a ruling of the Federal Ministry of Finance dated 16 December 2008 dismissing the appeal of the appellant „Tock promet against the ruling of the Department for Control of Large Taxpayers Mostar Region of 23 November 2007; ruling of the Federal Ministry of Finance dated 20 October 2004 by which the ruling of the Tax Administration Central Office in Sarajevo on 6 January 2004 was annulled and the case remanded for new decision-making: ruling of the Federal Ministry of Finance dated 15 September 2006 annulling ruling of the Tax Administration Central Office in Sarajevo on 20 March 2006 and remanding the case remanded for renewed proceedings; Order of the Tax Office Novi Travnik for payment of tax liabilities of 2 February 2009 and the ruling of the same office on instigating the procedure of forced collection of payment of 20 February 2009 as per the aforementioned order; ruling of the Tax Office Novi Travnik of 26 February 2009 on collection of tax liabilities from the assets of the taxpayer; Records on Inspection Supervision of the Department for the Control of Large Taxpayers Mostar Region of 22 October 2007 and the ruling of the same authority of 23 November 2007 on payment of additionally established tax liabilities.

68. On 24 January 2013, the appellant Luca Tokalić amended the appeal in connection with the allegations in the appeal relating to Article 6 of the European Convention challenging the changes in the court case-law, referring to the verdict of the European Court in case no. 42750/99 of 10 July 2011, *Del Rio Prada vs. Spain* and the Constitutional Court of Croatia no. of U-III-3010/10 of 9 December 2010 in support of the claim that a deviation from previous case-law without valid and substantiated reasons represents violation of the right to a fair trial under Article 6 paragraph 1 of the European Convention.

b) Response to the appeal

69. The Court of BiH noted in its response to the appeal that active participation of the Court in the appeal proceedings in which a verdict of that court was under review would

be in contravention of the principle of impartiality which, *inter alia*, arose under Article 6(1) of the European Convention. Furthermore, the Court of BiH invoked the parts of the challenged verdicts which could be relevant to decide this appeal. In the opinion of the Court of BiH, the challenged verdicts contain clear and convincing reasons on account of which the appellants were found guilty of commission of the criminal offence of tax evasion and the criminal offence of money laundering as well as circumstances which had lead the Court in meting out the sentence.

70. The Prosecutor's Office of BiH noted in its response to the appellant's allegations that the subject of challenge in her appeal were the verdicts of the Court of BiH and not any action committed by the Prosecutor's Office either during the investigation or during the evidentiary procedure before the Court of Bosnia and Herzegovina and, therefore, the Prosecutor's Office might not indulge in discussion on the challenged decisions and it did not feel dubbed in any part of this appeal.

71. In respect of the appellant's allegations that the indictment was fabricated and based upon unlawful evidence, it was noted that all the witnesses had been heard before the Court of BiH, that they had been cross-examined, that physical evidence had been taken at the main hearing, and, finally, that the appellant had not been deprived of the opportunity to challenge them in the appeal proceedings. Given that identical allegations were discussed before the Court of BiH, the Prosecutor's Office of BiH considers that they have been decided on the merits by the challenged decision and that they are ill-founded. The allegations about the expert K.P. were also assessed as ill-founded and it was pointed out in that regard that the Court of BiH knew the law and that no expert was called upon to interpret it. There were also found to be ill-founded the allegations by the appellant Pero Tokalić that he was not the co-owner of the appellant *Tock promet* and that the challenged verdicts lacked any reasoning in that respect. Finally, regarding the allegation that the Court of BiH had no jurisdiction to act in the case at hand, Article 7 of the Law on the Court of BiH was pointed out as the basis for the Court of BiH to establish its jurisdiction in the present case.

V. Relevant Law

72. The **Criminal Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* nos. 43/98, **2/99, 15/99, 29/00** and **59/02**), in the relevant part, reads as follows:

Article 272

(1) Whoever, with the intention that himself or someone else completely or partly, evades payment of taxes, social insurance contributions and other prescribed contribution,

furnishes false information on his/her legally acquired income, on objects or other facts of relevance for the assessment of such dues, or whoever with the same intentions in the case of a mandatory tax return, fails to state the legally acquired income or object or other facts relevant for the assessment of such dues, whereas the amount of the due whose payment is evaded exceeds 1,000 KM, shall be punished by imprisonment for a term not exceeding three years and by a fine.

(2) If the total sum of the dues described in paragraph 1 of this Article, whose payment has been evaded, exceeds 5,000 KM, the perpetrator shall be punished by imprisonment for a term between six months and five years and fined.

73. The **Criminal Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 36/03), in its relevant part, reads as follows:

Article 5
Time Constraints Regarding Applicability

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

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

Article 23
Time of Perpetrating Criminal Offence

A criminal offence is perpetrated at the time the perpetrator acts or ought to have acted, irrespective of the time when the consequences of his action or omission to act occurred.

Article 55
Continued Criminal Offence

(1) The provisions of this Code regarding concurrence of criminal offences shall not apply to a criminal offence arising out of the same transaction.

(2) A criminal offence arises out of the same transaction when the perpetrator intentionally perpetrates a number of identical criminal offences or offences of the same type which, according to the manner of perpetration, the temporal connection and other material circumstances connecting them constitute a whole.

Article 273
Tax Evasion

(1) Whoever, for himself or for another, evades payment of amounts required under the legislation on taxes in the Federation or contributions to pension scheme and health insurance prescribed in the Federation, by not submitting required data or by submitting false data on earned taxable income or on other facts which affect the determination of the amount of such obligations, and the amount of obligation whose payment is evaded exceeds 10.000 KM,

shall be punished by a fine or imprisonment for a term not exceeding three years.

(2) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article, and the amount of obligation whose payment is evaded exceeds 50.000 KM,

shall be punished by imprisonment for a term between one and ten years

(3) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article, and the amount of obligation whose payment is evaded exceeds 200.000 KM,

shall be punished by imprisonment for a term not less than three years.

Article 419
Cessation of the Application of the Previous Code

On the day of entering into force of this Code, the Criminal Code of the Federation of Bosnia and Herzegovina (Official Gazette, Nos. 43/98, 2/99, 15/99, 29/00 and 59/02) shall cease to apply.

Article 421
Entry into Force

This Code shall enter into force on 1 August 2003.

74. The **Criminal Code of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* no. 3/03), in its relevant part, reads as follows:

Article 4
Time Constraints Regarding Applicability

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

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

Article 22
Time of Perpetrating Criminal Offence

A criminal offence is perpetrated at the time the perpetrator acts or ought to have acted, irrespective of the time when the consequences of his action or omission to act occurred.

Article 54
Continued Criminal Offence

(1) The provisions of this Code regarding concurrence of criminal offences shall not apply to a criminal offence arising out of the same transaction.

(2) A criminal offence arises out of the same transaction when the perpetrator intentionally perpetrates a number of identical criminal offences or offences of the same type in which, according to the manner of perpetration, the temporal connection and other material circumstances connecting them constitute a whole.

Article 209
Money Laundering

(1) Whoever accepts, exchanges, keeps, disposes of, uses in commercial or other activity, otherwise conceals or tries to conceal money or property he knows was acquired through perpetration of criminal offence, when such a money or property is of larger value or when such an act endangers the common economic space of Bosnia and Herzegovina or has detrimental consequences to the operations or financing of institutions of Bosnia and Herzegovina,

shall be punished by imprisonment for a term between six months and five years.

(2) If the money or property gain referred to in paragraphs 1 of this Article exceeds the amount of 50.000 KM, the perpetrator

shall be punished by imprisonment for a term between one and ten years.

Entry into Force

Article 253

This Code shall enter into force on the 1 March 2003.

75. The **Law on Amendments to the Criminal Code of Bosnia and Herzegovina** ((*Official Gazette of Bosnia and Herzegovina* no. 8/10 of 2 February 2010) as far as relevant, reads:

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Money Laundering

Article 209

(1) Whoever accepts, exchanges, keeps, disposes of, uses in commercial or other activity, otherwise conceals or tries to conceal money or property he knows was acquired through perpetration of criminal offence, when such a money or property is of larger value or when such an act endangers the common economic space of Bosnia and Herzegovina or has detrimental consequences to the operations or financing of institutions of Bosnia and Herzegovina,

shall be punished by imprisonment for a term between one and eight years.

(2) The perpetrator of the offence under paragraph (1) of this Article who is at the same time a perpetrator or an accomplice in the perpetration of a criminal offence whereby the money or property referred to in paragraph (1) of this Article was obtained,

shall be punished by a prison sentence between one and ten years."

(3) If the money or property gain referred to in paragraphs 1 of this Article exceeds the amount of 200.000 KM, the perpetrator shall be punished by imprisonment for a term not less than three years.

76. The **Criminal Procedure Code of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09 and 93/09) as far as relevant, reads:

Article 14
Equality of Arms

(1) The Court shall treat the parties and the defense attorney equally and shall provide each with equal opportunities to access evidence and to present evidence at the main trial.

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

Article 285
Guilty Verdict

(1) In a guilty verdict, the Court shall pronounce the following:

the criminal offence for which the accused is found guilty along with a citation of the facts and circumstances that constitute the elements of the criminal offence and those on which the application of a particular provision of the Criminal Code depends;

the legal name of the criminal offence and the provisions of the Criminal Code that were applied;

Article 290
The Contents of the Verdict

(4) If the accused is found guilty, the operative part of the verdict must include the necessary data referred to in Article 285 of this Code, and if the accused is acquitted of the charge or the charge is rejected, the operative part of the verdict must include a description of the criminal offence for which the accused is charged and a decision on the costs of a criminal proceeding and a claim under property law if such was made.

(7) The Court shall specifically and completely state which facts and on what grounds the Court finds to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence, the reasons why the Court did not sustain particular motions of the parties, the reasons why the Court decided not to directly examine the witness or expert whose testimony was read, and the reasons guiding the Court in ruling on legal matters and especially in ascertaining whether the criminal offence was committed and whether the accused was criminally responsible and in applying specific provisions of the Criminal Code to the accused and to his act

Article 314
Revision of the First Instance Verdict

(1) By honoring an appeal, the Panel of the Appellate Division shall render a verdict revising the verdict of the first instance if the Panel deems that the decisive facts have been correctly ascertained in the verdict of the first instance and that in view of the state of the facts established, a different verdict must be rendered when the law is properly applied, according to the state of the facts and in the case of violations as per Article 297, para. 1, items f), g) and j) of this Code.

77. The **Law on the Court of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, no. 49/09 – consolidated text, 74/09 and 97/09) in the relevant part reads:

Article 7
(Criminal Jurisdiction)

(2) The Court has further jurisdiction over criminal offences prescribed in the Laws of the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brcko Districts of Bosnia and Herzegovina when such criminal offences:

b) may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina or may have other detrimental consequences to Bosnia and

Herzegovina or may cause serious economic damage or other detrimental consequences beyond the territory of an Entity or the Brcko District of Bosnia and Herzegovina.

VI. Admissibility

78. In accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a verdict of any court in Bosnia and Herzegovina.

79. In accordance with Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the verdict 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.

80. In the present case, the subject matter of the appeal is the verdict of the Court of BiH no. KPŽ-13/10 of 15 October 2010, against which there are no other effective remedies available under the law. The appellant received the challenged verdict on 25 January 2011, the appellant Pero Tokalić on 27 January 2011 and the appellant *Tock promet* on 26 January 2011, and the appeals were lodged on 9 March 2011 and 14 March 2011, that is within the time limit of 60 days as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeals also meet the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court, for they are neither manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeals inadmissible.

81. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the admissibility requirements have been met in the relevant appeals.

VII. Merits

82. The appellants point out that the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention have been violated by the challenged verdicts.

83. 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.

84. Article 6 of the European Convention in the relevant part reads:

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

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

85. Primarily, the Constitutional Court indicates that the extensive allegations from the appeal on the violation of the right to fair trial for the most part relate to objections concerning reasoning of challenged verdicts in relation to issues: a) application of substantive law and b) legal security and rule of law.

As to the reasons for the challenged verdicts

86. The Constitutional Court notes that according to the consistent case-law of the European Court and Constitutional Court, Article 6(1) of the European Convention obligates the courts to, *inter alia*, give reasons for their judgments. This obligation, however, cannot be understood as obligation to present all details and give answers to all raised issues and presented arguments (see, Constitutional Court, decisions *U 62/01* of 5 April 2002 and no. *AP 352/04* of 23 March 2005). The extent to which this duty to give reasons applies may vary according to the nature of the decision (see ECtHR, *Ruiz Torija v. Spain*, judgment of 9 December 1994, Series A no. 303-a, paragraph 29). Furthermore, in case of decision of higher court it is sufficient that reasons contain agreement with determination of lower instance or trial court by incorporating or referring to in its decisions to reasons of the lower instance court or in some other way indicate that it agrees with them (see ECtHR, *Garcia Ruiz v. Spain*, 1999-I, 31, EHRR589 GC). In case of decision of higher court, the essential requirement is that the higher court indicates that it examined issues from the appeal that were of essential importance; that in case of disagreement with the decision of lower court, it based its disagreement on its evaluation (see European Court, *Helle v. Finland*, 1997-VIII, 26 EHRR 159) and that it did not dismiss the appeal prior to having examined it (see European Court, *Lindner and Hammermayer v. Romania* HUDOC (2002).

a) Application of substantive law

87. The appellants challenge the manner in which it was established that they perpetrated the criminal offence of tax evasion in the period „between 2001 and 2003", i.e., they claim

that it has not been established that they committed this criminal offence during 2003 as well. Considering that, in their opinion, it was not established that they committed the criminal offence of tax evasion in 2003 as well, the appellants find that the 2003 Criminal Code of F BiH that entered into force on 1 August 2003 could not have been applied but rather that the 1998 Criminal Code of F BiH should have been applied, which is, in their opinion, more favorable to them.

88. Regarding those allegations, the Constitutional Court recalls that when the accusation relates to the continued criminal offence, the principle of legal certainty requires that the acts constituting such criminal offence and the criminal liability of accused must be clearly defined in the indictment (see, the ECtHR, *mutatis mutandis, Pélissier and Sassi v. France* [GC], no. 25444/94, paragraph 51, ECHR 1999-II). Furthermore, it must be clear from the decision adopted by the court that the verdict and the punishment are the results of the findings which constitute the elements of the continued criminal offence set out in the indictment.

89. In the instant case, the appellants were found guilty of having committed the continued criminal offence of tax evasion. The continued criminal offence exists when the perpetrator has intentionally committed several same or similar criminal offences, which considering the manner of perpetration, their time connection and other material circumstances connecting them, constitute a unified whole. Thus, the continued criminal offence represents a unified criminal offence. When the court pronounces a verdict, it covers all criminal offences that enter into the continued criminal offence committed to the date of adoption of the verdict. If, after the verdict has become legally binding, another criminal offence is revealed from within the continued criminal offence which was not covered by the verdict, that offence or the entire continued criminal offence cannot be a subject to the renewed court hearing. This is so because it involves the same criminal case and that would be contrary to the principle of *ne bis in idem*. Also, since this involves a unified criminal offence, the rules on concurrence of criminal offences do not apply, i.e. the rule on sentencing criminal offences in concurrence but rather one sentence is pronounced for the continued criminal offence as if it involves only one offence. In this sense, this requires the precise determination of the timeframe of the continued criminal offence and acts that enter into its composition in order to avoid situation in which the criminal offence remains unpunished i.e. the perpetrator is allowed to avoid responsibility but also so that the pronounced sentence relates to precisely determined actions the person concerned is charged with.

90. In the instant case all appellants were charged by the indictment that they committed the continued criminal offence of tax evasion offence during the period „from 2001 to 2003". By the challenged verdicts, the appellant Pero Tokalić and appellant Luca Tokalić

had been found guilty of having committed this criminal offence within the period „from 2001 to 2003, „and appellant „Tock promet „from 1 August 2003 to 31 December 2003".

91. The issue of the time of commission of the criminal offence is important for the issue of the law to be applied. In the instant case, two criminal laws were valid at the time period the appellants were charged with, as this was also pointed out in the reasoning of the challenged first instance verdict: 1998 Criminal Code of FBiH and 2003 Criminal Code of FBiH. According to the view of the first instance court, the time of commission of the continued criminal offence is the time of commission of the last action that has entered into the continued criminal offence. In the reasoning of the first instance verdict, the actions were listed i.e. transactions with 13 companies, according to the date of those actions being undertaken and the amounts of money which covered the period „from 2001 to 2003". However, the first instance court does not answer the question which one was the last action that entered into the continued criminal offence. In the reasoning of the first-instance verdict, which was agreed upon by the second instance court as well, it was concluded that the last action occurred after 1 August 2003, so that 2003 Criminal Code of FBiH is to be applied.

92. The Constitutional Court notes that the time period „from 2001 to 2003" leads to the conclusion that the period „until 2003" does not in fact include year 2003 i.e. that it includes the period until 1 January 2003 but not the period from 1 January to 31 December 2003. In this sense, the conclusion of the first instance court that the last action taken after the 1 August 2003 cannot be considered as resolution of an issue of time of the commission of criminal offence but suggests that it was not possible to accurately define the actions of commission the appellant Luca Tokalić and the appellant Pero Tokalić were charged with within the time frame „from 2001 to 2003".

93. The Constitutional Court recalls that it must be clear in the decision of the court that the conviction and sentence resulted from findings that make up the elements of the continued criminal offence laid in the indictment. This implies that the court cannot go beyond the framework specified by the indictment but it does not restrict the court to, based on the evidence presented in the proceedings and within the scope of the elements that are specified by the indictment determine the relevant facts.

94. In the instant case, the first instance court had this very approach when determining the time framework in relation to the appellant Tock promet. Specifically, the first instance court concluded that appellant Tock promet cannot be found guilty for the period 2001, 2002 until 1 August 2003 because during this period the Criminal Code of FBiH did not envisage the possibility of sentencing legal persons i.e. that this was possible only upon entry into force of the criminal legislation on 1 August 2003. Furthermore, it is pointed

out that from the listed transactions with 13 companies made „from 2001 to 2003", those dated from 1 August 2003 were separated, i.e. from the entry into force of the 2003 Criminal Code which related to 81 invoices issued by the appellant Tock promet to the company „Zoka-trend" and 164 invoices in relation to the company „Kondor-kompani" with the designation of the values of these transactions and amounts of evaded tax by this appellant.. However, in relation to the appellant Tock promet the last action that has entered into the continued criminal offence of tax evasion committed by the appellant was not designated either. Also, by the enacting clause of the challenged first instance verdict, the appellant Tock promet was found guilty of having committed this offence while doing business with 13 companies. It arises from the reasoning of the challenged verdict that this involves two out of 13 companies listed in the enacting clause of the first instance verdict.

95. Furthermore, the first instance court, which was fully agreed upon by the second instance court as well, invoking the finding that the last action that has entered into the continued criminal offence of tax evasion was taken after 1 August 2003, based on which it based the application of the 2003 Criminal Code of FBiH, concluded that „there was no room for application of the principle of applying a more lenient law, because the application of that legal institute requires that the law is amended once or several times after the commission of the criminal offence".

96. The Constitutional Court notes that both 1998 Criminal Code of FBiH and the 2003 Criminal Code of FBIH were both valid in that time framework in which the appellant was charged with continued criminal offence of tax evasion. Both laws, essentially, stipulate in the same way criminal offence of tax evasion and classified forms but with a different thresholds and different sentences. According to the 1998 Criminal Code of FBiH, the basic form existed if failure to pay obligations exceeds BAM 1,000.00 stipulating a three year prison sentence and a fine. According to the 2003 Criminal Code of FBiH, the basic form existed if failure to pay exceeds BAM 10,000 stipulating a fine or imprisonment up to three years. Furthermore, classified form in accordance with 1998 Criminal Code of F BiH (Article 272, paragraph 2, the appellants were charged with in the indictment), constitutes failure to pay that exceeds the amount of BAM 5,000.00 stipulating imprisonment of six months to five years and a fine. The 2003 Criminal Code of FBiH stipulates two classified forms: (Article 273, paragraph 2) failure to pay that exceeds BAM 50,000.00 and prescribes imprisonment of one to ten years, and (Article 273, paragraph 3, the appellants are charged with in the indictment and found guilty) failure to pay that exceeds KM 200,000.00 stipulating imprisonment of at least three years.

97. The Constitutional Court recalls that Article 4 of the Criminal Code of BiH and Article 5 of the Criminal Code of FBiH stipulate that the law which was in effect at the

time the criminal offence was committed is applied on the perpetrator and that, if the law is amended after the commission of the criminal offence once or several times, a more lenient law is applied.

98. In the instant case, the Constitutional Court observes that the actions of commission of the continued criminal offence of tax evasion the appellants were charged with, were not differentiated in a precise manner. Furthermore, the appellants have for the most part committed continued criminal offence of tax evasion by taking actions at the time when the 1998 Criminal Code of FBiH was in effect i.e. the indictment charged them with having committed the classified form of criminal offence of tax evasion under this law as well. Finally, there was no clear and precise definition of the time of commission of the last action that entered into the continued criminal offence on the basis of which the time of the commission of offence is being determined after all and consequently which law was in effect at the time of the commission of the criminal offence. Considering the foregoing, the reasoning of the first instance court that „there was no room for application of the principle of applying a more lenient law, because the application of that legal institute requires that law is amended once or several times after the commission of the criminal offence and therefore „in the instant case the 2003 Criminal Code of FBiH is applied", cannot be accepted as reasoning that answers the question of which law should have been applied i.e. which law is more lenient to the perpetrator.

99. Accordingly, the Constitutional Court found that the reasoning of challenged decisions in relation to the continued criminal offence of tax evasion lacks clear and precise reasoning in regards to the time of commission of this criminal offence, on which depended the decision which law would be applied as the law which was in force at the time of the commission of the criminal offence, and consequently whether there is room to apply a more lenient law.

100. Furthermore, the appellants claim that it has not been established that in the period between 1 March 2003 and 14 April 2004, they laundered the money acquired through tax evasion in 2003 in the amount of BAM 579,523.07. The claim that it was not established either that the appellant Tock promet was charged with having laundered the same amount of money, although the appellant was found guilty by the first instance verdict of having committed tax evasion in the amount of BAM 367,322.62.

101. The Constitutional Court notes that the criminal offence of money laundering was stipulated for the first time as a punishable by the Criminal Code of BiH that entered into force on 1 March 2003. The appellants were charged in the indictment of having committed this criminal offence as continued „between 1 March 2003 and 14 April 2004"

which is the reason why the application of the Criminal Code of BiH cannot be brought into question. Furthermore, the appellants were found guilty by the verdict of the second instance court for this criminal offence as well because the appeal of the Prosecutor's Office of BiH was granted and the first instance verdict modified in this part.

102. The Constitutional Court notes that on the basis of the legal determination of the criminal offence of money laundering it follows that it is enough that a person keeps money or property he knows was acquired through perpetration of criminal offence, and the money or property obtained in that way keeps, disposes of, uses in commercial or other activity, otherwise conceals or tries to conceal money or property, and such a money or property, among other things, is of larger value. Therefore, it must be money or property the person at issue knows was acquired through perpetration of criminal offence and that it is of larger value. The person in question must not be a perpetrator of the criminal offence the money originated from, there must not exist a legally binding verdict that established that the criminal offence the money, being „laundered", originated from has in fact been committed i.e. a criminal proceedings must not be instigated for the criminal offence from which the money originated. It is sufficient for a person who attempts to launder money that he/she knows it originates from the committed criminal offence and that it was acquired by the criminal offence.

103. In the reasoning for the second instance verdict it was indicated that it follows from the factual findings of the first instance court that the appellants had acquired money through tax evasion in the period „between 1 March 2003 and 14 April 2004" and gave it to the „persons who have deposited them on the bank accounts of the companies „Zoka-Trend „„" Pula-prom „„"Kondor Kompani" and „Darko product" after which the same was transferred to the bank accounts of the appellant Tock promet which further disposed of this unlawfully acquired property gain. In the opinion of the second instant court, by surrendering the aforementioned money to these companies for the purpose of depositing and transferring it to the same legal entity Tock promet, the appellants „exited" the framework of criminal offence of tax evasion as it described in Article 273 paragraph 3 of the Criminal Code of FBiH and thus this acquired the designation of criminal offence of money laundering under Article 209 of the Criminal Code of BiH. Furthermore, it was pointed out that in addition to the act of legalizing such money and knowledge that this involves money obtained by criminal offence i.e. awareness and willingness to place that kind of money into the legal transactions, the additional element of the criminal offence of money laundering was met as well (which has a function of objective condition of punishability or incrimination), and that it involves money of greater value, considering it involves the amount of BAM 579,532.07, which exceeds the most severe form of this offence.

104. The Constitutional Court notes that the amount of BAM 579,523.07 which the appellants are charged with of having „laundered" corresponds to the amount of evaded taxes that the appellant Luca Tokalić and the appellant Tokalić acquired through tax evasion in 2003. However, the second instance verdict does not state that this involves money acquired through tax evasion in 2003 but rather the money obtained by criminal offence of tax evasion. Therefore, it is of no importance that the appellant Tock promet did not acquire this amount as tax evasion in 2003, because this amount, acquired by criminal offence, was transferred through its accounts and placed into legal transactions.

105. Furthermore, the second instance court stated that it follows from „the factual findings of the first instance court," that the appellant's actions have a character of continued criminal offence of money laundering as well and points to transactions taken with designated companies. In this regard, the Constitutional Court notes that it follows from the reasoning for the challenged verdict of the first instance court that it was established based on presented evidence that the four designated companies were in fact „money launderers". However, the reasoning for the challenged verdict of the first instance court does not specifically identify and isolates transactions undertaken between the appellants and the designated companies through which they committed the continued criminal offence of money laundering. In that regard, the Constitutional Court recalls that the appellants were acquitted by the first-instance verdict of having committed this criminal offence, because it was concluded that money laundering represented a way of commission of the continued criminal offence of tax evasion. In this sense, the acts of commission of continued criminal offence of tax evasion and money laundering in the reasoning of the first instance verdict were listed as being interrelated and not separate i.e. it was not specifically stated what actions represented continued criminal offence of tax evasion and what represented continued criminal offence of money laundering. Given that the appellants were found guilty by the second instance verdict of the continued criminal offence of money laundering, except for the time framework and designation of the company the crime was committed with, the Constitutional Court emphasizes that neither the enacting clause nor reasoning of the challenged second-instance verdict contain specific actions that entered in the framework of the continued criminal offence of money laundering.

106. Finally, the Constitutional Court notes that the indictment and the first and second instance verdict state Article 209(2) of the Criminal Code of BiH without precisely identifying the law that is involved. The above-mentioned law has been amended as of 2003 when it entered into force, on several occasions. The last amendments of 2 February 2010 concern Article 209 (2) of the Criminal Code of BiH as well. The appellants did not indicate this in their appeals but due to the failure to state the precise law, it remains

unclear under which Article 209(2) of the Criminal Code of BiH (whether it relates to amended or unamended article) the appellants were found guilty of.

107. This decision has already indicated that for determination of the continued criminal offence it is essential that there is a precise determination of the time framework in which it was committed and the actions that went into this offence. The reasoning of the second instance verdict in relation to this criminal offence lacks clear and precise defined actions covered by the continued criminal offence of money laundering while the answer to this question is not offered by reasoning of the first instance verdict either.

b) Legal certainty and rule of law

108. The appellants hold that the second instance court failed to give reasons for departing in their case from its previous jurisprudence under which in similar circumstances it had been deciding that the cases concerned only the continued criminal offence and not the real concurrence of criminal offence of tax evasion and money laundering which was the jurisprudence followed by the first instance court.

109. Moreover, the appellants consider that the Court of BiH failed to offer reasons for considering itself competent to deal with their case given that the criminal offence of tax evasion has been stipulated in the Criminal Code of FBiH and that only the Federation of BiH was damaged. In this regard they indicated the verdict of the Court of BiH no. KpŽ-14/09 of 7 December 2009. The appellants claim that there are no criteria and measures the Court of BiH is guided when establishing jurisdiction in relation to criminal offence of tax evasion under entity laws which results in a violation of legal security.

110. The Constitutional Court pointed out that according to the position of the European Court one of the fundamental aspects of the rule of law is the principle of legal certainty which is assumed in the Convention (see *Beian v. Romania* (no. 1) Application No. 30 658/05, § 39, ECHR 2007-XIII (extracts). The principle of legal certainty guarantees, *inter alia*, certain stability in the legal system and contributes to public confidence in the judiciary. The existence of conflicting court decisions may create legal uncertainty and so impair public confidence in the judiciary, which is undoubtedly one of the essential elements of the state based on the rule of law. Furthermore, this situation can, if „there is no objective and reasonable justification", that is, if it does not follow a legitimate aim or if there is no „reasonable relationship of proportionality between the means employed and the aim pursued" (see judgment *Marckx v. Belgium* of 13 June 1979, Series A, No. 31, page 16, paragraph 33) lead to different treatment in the enjoyment of the rights guaranteed and thus lead to the violation of Article 14 European Convention (see above mentioned *Beian*, § 59 to 64).

111. However, the requirements of legal certainty and protection of legitimate public trust does not give the right to a stable (unchanging) case-law (see, ECtHR, *Unédic v. France,* Application No. 20153/04, § 74, of 18 December 2008). In this connection, the Court notes that case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see ECtHR *Atanasovski v. The Former Yugoslav Republic of Macedonia*, no. 36 815/03, paragraph 38, of 14 January 2010).

112. The Constitutional Court recalls that in its Decision on Admissibility and Merits no. *AP 1076/09* of 26 January 2012 (available on the webpage of the Constitutional Court, www.ustavnisud.ba), following the case-law of the European Court, it took position that the principle of legal certainty represents a segment of the right to a fair trial. Furthermore, it is concluded in the aforesaid decision that this principle is violated in the situation when the same court, which is at the same time the court of last instance for deciding on a particular issue, in the cases based upon the same or similar facts and legal grounds, inconsistent decisions are coming that are missing reasoning and reasons rendering it obvious why the court has diverted from its previous case-law, and, at the same time, the mechanism securing consistency in decision-making is lacking (paragraph 37).

113. In connection with the allegations of the appellants that the second instance court departed from its previous case-law and found them guilty of having committed the concurring continued criminal offence of tax evasion and the continued criminal offence of money laundering, the Constitutional Court notes that the second instance court first concluded that this case undoubtedly involves different actions that have been taken by the appellants by which they successively and continuously committed the continued criminal offence of tax evasion and continued criminal offence of money laundering, while the action by which so called money laundering is committed was regularly undertaken by them after the concerned money was acquired through tax evasion. Furthermore, it was pointed out that the appellants have first undertaken actions by which they committed criminal offence of tax evasion and only after that, although aware that this involves the money gained from criminal offences, have successively committed other actions, through which legalization of such money is made and at the same time acquiring property whose criminal origin is thus being masked. Based on the above, although it involved a unified plan, it was concluded that these were independent and separate actions that are necessary to be evaluated as two distinct and separate offences. Also, it was pointed out that the criminal offence of money laundering as a „subsequent offence" represents in its basic form a more severe criminal offence than tax evasion, and that it involves money of higher value (BAM 579,523.07), which exceeds the most severe form of the offence. Furthermore, it was pointed out that it is without significance in terms of criminal law aspect that the

specific case involves actions that are linked with the common goal, because in such cases the existence of the concurrence is not excluded, especially in the case of criminal offences that are committed by actions that are different in character, which are taken in different times and directed at different subjects. In the reasoning of the verdict it is pointed out that such position represents departure from previous case-law in several other cases in which the same question is assessed and that the result of a conviction obtained after longer analysis of mutual relationship of these criminal offences in cases that have been prosecuted before this court, as well as that in that sense the case-law was amended by other courts.

114. The Constitutional Court notes that the enacting clause of the challenged second instance verdict, first offered reasons for concluding that the appellants committed continued criminal offence of money laundering as well. These were, as it follows from the reasoning, the reasons for departing from the current case-law by which the continued criminal offence of tax evasion and the continued criminal offence of money laundering were treated as criminal offences committed in the apparent concurrence. However, it cannot be concluded from the reasoning of the challenged second instance verdict on basis of what did the Court of BiH decide that the circumstances of the instant case, compared, as the Court of BiH itself stated, with the cases that raised the same or a similar issue, lead to the conclusion that it is necessary to depart from previous position that this involves provisional and not actual concurrence. From generalized observation that amended position is a „result of an assurance reached after a long analysis of mutual relations between the referenced criminal offences in many cases tried before this Court, and also the consideration of the fact that judiciary in some other countries in the region, which applied the same case-law, changed their positions after some time and ultimately found the concurrence of offences" cannot be regarded as a sufficient reasoning why the court departed from previous case-law on the same legal issue, which is represented in a number of cases processed so far. All the more so, since the second instance court is the court of last instance that decided on this case, that that the appellants were found guilty of, by its decision, against which there are no other legal remedies available under the law, the continued criminal offence of money laundering of which they were acquitted by the first instance verdict and that they committed this offence n concurrence with the continued criminal offence of tax evasion, which, for them, resulted in a much more severe classification and sentence.

115. The Constitutional Court reiterates that the changes in the case-law and different decision of the court in circumstances that are factually and legally similar or the same, may not result in the violation of legal certainty. However, the lack of reasoning as to why the circumstances of the instant case are different in relation to all previous cases in which the position was applied in regard to an important legal issue and which should be applied in similar future situations, in the absence of a mechanism through which it would

be reviewed, may result in legal uncertainty and may undermine public confidence in the judiciary which is contrary to the principle of the rule of law.

116. The Constitutional Court concludes that the reasoning of the challenged second-instance verdict lacks reasoning as to why it has departed from the previous position on an important legal issue so that the appellant's right to legal certainty as a segment of the right to a fair trial was violated.

117. Furthermore, the appellant Pero Tokalić claimed that the reasoning on the grounds on which the Court of BiH based its jurisdiction in the present case was missing and he explicitly referred to the verdict of the Court of BiH in case no. Kpž-14/09 of 7 December 2009. The appellants noted this claim in the appeal against the first instance verdict.

118. In the instant case, the Court of BiH based its jurisdiction in relation to the criminal offence of tax evasion on Article 7 paragraph 2 item (b) of the Law on Court of BiH.

119. In this regard the Constitutional Court recalls that in its Decision on Admissibility and Merits no. U 16/08 of 28 March 2009, having examined the compliance of Article 13(2)(b) of the Law on the Court of Bosnia and Herzegovina, which is identical to Article 7(2)(b) of the Law on the Court of BiH on which in the instant case it based the jurisdiction of the Court of BiH for continued criminal offence of tax evasion, noted that (paragraph 43): (...) It envisages the jurisdiction of the Court of BiH for criminal offences as stipulated by the criminal codes of the entities and Brčko District of BiH, providing some of the conditions of this article in the form of legal standards are met. In addition, this provision at the same time assigns authority to the Court of BiH to determine the contents of the legal standards as provided in the challenged provision, while minding the fact that it should carefully establish whether the stipulated conditions are met in each particular case, depending on the given circumstances. Also, it was pointed out (paragraph 47): (...) this provision gives authority but also creates obligation of the Court of BiH when applying this principle, to carefully consider each individual case while complying with the principle of „legal certainty" and „equality before the law" as indivisible element of the principle of the rule of law.

120. In the instant case, the Court of BiH concluded that the requirements under Article 7(2)(b) of the Law on the Court of BiH were met as the case involved a large amount of evaded tax in the amount of BAM 1,346,512.84, which also indicated a large turnover, that the substantial number of companies from the territory of both Entities were involved in the financial transactions, on the basis of which it is concluded that the case concerns the criminal offence that may have repercussion or detrimental consequences to the economy of BiH as well as serious economic damage or other damaging consequences

beyond territory of Federation of BiH. Moreover, it is concluded that the jurisdiction was not disputable as to the criminal offence of money laundering as criminal offence under original jurisdiction of Court of BiH.

121. In the verdict of the Court of BiH no. Kpž-14/09 of 7 December 2009, to which the appellant Pero Tokalić explicitly refers, the Court of BiH concluded that, in the particular case, it did not have jurisdiction over the criminal offence of tax evasion under Article 273 of the Criminal Code of FBiH, the reason being that the Prosecutor's Office of BiH dropped the charges relating to the criminal offence of money laundering under Article 209 of the Criminal Code of BiH even in the course of the first instance proceedings, as the criminal offence from the original jurisdiction of this court and that there were no proofs that the Court of BiH has jurisdiction for the criminal offence of tax evasion under Article 273 of the Criminal Code of FBiH in the present case. Furthermore, it points out that the Prosecutor's Office in relation to the criminal offence of tax evasion under Article 273 of the Criminal Code of FBiH did not offer evidence based on which it could be concluded that the actions referred to in the verdict could have serious repercussions, or other detrimental effects on the economy of BiH or cause serious and harmful consequences beyond the territory of the Federation of BIH. During this process, it was found that, regardless of the legal persons it conducted business with (both from the territory of FBiH and RS), the Federation of BiH appears as the injured party, as well as that the amounts of tax evaded are clearly stipulated by Article 273 of the Criminal Code of FBiH.

122. The Constitutional Court notes that both cases involved the criminal offence of tax evasion under Article 273 of the Criminal Code of FBiH. Both cases involved charges of evasion of sales tax which is the revenue of the budget of the Federation of BiH. As criteria for establishing jurisdiction in both cases, it is obvious that the turnover between companies from the territory of both entities and the amount of evaded taxes were evaluated. In terms of both of these criteria in relation to appellants it is obvious that the case involves a greater number of persons, greater turnover and greater amount of evaded taxes than in the case they refer to. With respect to the third criterion, the Court of BiH did not declare itself on the origin of revenues based on the evaded tax in respect of the appellants. Finally, neither of those cases contains details on what could the damage for BiH consist of, especially bearing in mind that this is revenue of the budget of the Federation of BiH. The Prosecutor's Office should offer evidence on this, as indicated by the appellants.

123. It is obvious that this involves a complex issue that requires different action considering the circumstances of each individual case, so that the obligation of the Court of BiH to have it examined with special care and give reasoning is ever so greater. Otherwise, opposite decisions in these situations can bring into question the „principle of legal certainty" and

„equality of treatment". However, in this case the Prosecutor's Office has not given up on charges for money laundering under Article 209(2) of the Criminal Code of BiH as an offence under original jurisdiction of the Court of BiH as it occurred in the case during the first instance proceedings the appellant refers to. In this sense, one cannot speak of identical situations which involved different decision-making as suggested by the appellant so that the allegations of the appellant in this part that there was a violation of their right to a fair trial in relation to the principle of legal certainty is ill-founded.

124. The Constitutional Court notes that a verdict offering reasons represents a vital prerequisite for the use of effective legal remedies and exercising the right to defense of the accused. Furthermore, without reasoning, the verdict (which may not necessarily be arbitrary) leaves the impression of arbitrary verdict. Also, the verdict must provide convincing reasons showing the grounds on which the decision was taken. Furthermore, the obligation to give reasons for the verdict is in connection with the right to a public trial. The outcome of the proceedings is not only interesting to the participants. It is important that the public is certain that the proceedings were conducted fairly, that the necessary attention was given to determining the outcome of the proceedings and that the outcome of the proceedings is not the result of illicit motive.

125. In the instant case, the Constitutional Court considers that the reasoning of the challenged verdicts in identifying and deciding on issues on which the existence of criminal liability and criminal offence depends, the application of the substantive law, the reasons and reasoning that have been offered in connection with the change of the previous position on an important legal question, do not have clear and precise reasons which led to impression of arbitrariness and bring into question the fairness of the proceedings, which could undermine the public's trust in the judiciary.

126. The Constitutional Court concludes that the challenged verdicts of the Court of BiH violated the right to a fair trial under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention.

Other allegations

127. Considering the conclusions on violation of the right to a fair trial under Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention, the Constitutional Court finds that there is no need to separately examine other allegations of the appellant in relation to the right to a fair trial and right under Article 7 of the European Convention as well as allegations of the appellant Tokalić and appellant *Tock promet* on violation of the right to liberty and security of person, right for private and family life, right to property, right to freedom of movement and residence.

Supplements to the appeals

128. Finally, the Constitutional Court recalls that legal certainty, as a segment of the right to a fair trial and one of the fundamental principles of the rule of law, requires, among other things, that in situations where the court ultimately decides on an issue, its decision should not be called into question (see ECtHR, *Brumărescu v. Romania* [GC], Application no. 28342/95, paragraph 61). Legal certainty presupposes respect of the principles of *res judicata* (see, cited above, *Brumărescu*, paragraph 62) that means the finality of the verdict. This principle states that neither party has authority to seek review of a final and binding decision in order to ensure a retrial and re-determination of the case. Review by a higher court should refer to correct procedural errors and neglect of justice, but not a new determination. Questioning should not represent a disguised appeal and the possibility of the existence of at least two opinions on a particular issue is not a basis for re-determination. In accordance with the European Convention, a departure from this principle in criminal proceedings may be: a) in accordance with the law and penal procedure of the State concerned b) existence of evidence of a new or newfound fact, c) the existence of fundamental procedural errors that might be of influence on the outcome in the instant case.

129. In this case the subject challenged by the appeal is the verdict of the Court of BiH which, in accordance with the above stated principles, acquired the capacity of res judicata. The Constitutional Court recalls that, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a verdict of any other court in Bosnia and Herzegovina. In accordance with Article 16(1) of the Rules of the Constitutional Court the Court shall examine an appeal only if all effective remedies that are available under the law against a verdict or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last effective remedy used by the appellant was served on him/her. Therefore, the subject matter of examining within the appellate jurisdiction is the verdict that has acquired the capacity res judicata, which the Constitutional Court may consider in relation to the allegations on violation of rights guaranteed by the Constitution or international documents applied in BiH. However, the appellate jurisdiction of the Constitutional Court cannot be understood as a continuation of the proceedings which ended in a final and binding verdict or as a new trial or proceedings upon appeal in which it is possible to re-examine the issue and determine the issue on which there is a decision that acquired the status of *res judicata*. In this regard, the appellant's obligation to, in accordance with Article 19(5) of the Rules of the Constitutional Court inform the court, inter alia, of any change of the legal and factual issues arising after the filing of the

appeal, may be relevant only in assessment of existence or absence of a violation of the constitutional rights indicated in the appeal.

130. In the instant case, in numerous supplements to the appeal, the appellants have pointed to the facts that occurred after the challenged verdict acquired the status of *res judicata*. The appellants argue that these new facts are evidence that they did not commit criminal offence of tax evasion for which they were found guilty by the challenged verdicts. Considering that the Constitutional Court may consider within the appellate jurisdiction only the verdict that acquired the capacity of res judicata and that the proceedings upon appellate jurisdiction before the Constitutional Court is not a continuation of the proceedings that ended in such a verdict, the appellants have on their disposal to use new facts in accordance with the law. Therefore, the Constitutional Court could not consider the allegations in the supplements to the appeals.

VIII. Conclusion

131. The Constitutional Court concludes that there is a violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention when the ordinary courts, in the reasoning of the challenged verdicts, failed to give clear and argumented reasons on the issues that were of significance for the establishment of the criminal offence and when they failed to give adequate arguments and reasoning for departing from the jurisprudence in deciding on important legal issue acting as the court of last instance and in the situation when the law did not stipulate mechanism through which the change of a position would be reviewed thus violating the principle of legal certainty as segment of right to a fair trial.

132. Pursuant to Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

133. The adoption of the present decision renders ineffective the Constitutional Court's Decision on Interim Measure no. AP 1123/11 of 26 October 2011.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

CONTENTS

Case No. AP 369/10

DECISION ON ADMISSIBILITY AND MERITS

Appeal of H.K. against the Ruling of the Cantonal Court in Bihać no. 20 0 P 003388 09 Gž of 7 December 2009 and the Ruling of the Municipal Court in Cazin no. 20 0 P 003388 09 P of 6 November 2009

Decision of 24 May 2013

CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in the Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić

Ms. Constance Grewe

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knežević

Having deliberated on the appeal of **H.K.** in case no. **AP 369/10**, at its session held on 24 May 2013, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by H.K. is hereby granted.

A violation of the prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with the right of access to court under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Ruling of the Cantonal Court in Bihać no. 20 0 P 003388 09 Gž of 7 December 2009 is hereby quashed.

The case shall be referred back to the Cantonal Court in Bihać, which is obliged to pass a new decision, within three months, in accordance with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Decision shall be communicated to the Parliament of the Federation of Bosnia and Herzegovina and the Government of the Federation of Bosnia and Herzegovina, which are obliged to take measures from within their respective jurisdiction to ensure compliance with the rights under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in accordance with the present Decision.

The Cantonal Court in Bihać is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months from the date of delivery of this Decision, of the steps taken in order to enforce this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina. The Parliament of the Federation of Bosnia and Herzegovina and the Government of the Federation of Bosnia and Herzegovina are ordered to inform the Constitutional Court of Bosnia and Herzegovina, within six months from the date of delivery of this Decision, of the steps taken in order to enforce this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 26 January 2010, H.K. („the appellant") from Cazin, represented by Ms. Safeta Alijagić, a lawyer practicing in Bihać, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Ruling of the Cantonal Court in Bihać („the Cantonal Court") no. 20 0 P 003388 09 Gž of 7 December 2009 and the Ruling of the Municipal Court in Cazin („the Municipal Court") no. 20 0 P 003388 09 P of 6 November 2009.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Cantonal Court, the Municipal Court and Sanela Kovačević née Badić („the respondent") were requested on 7 October 2010 to submit their respective replies to the appeal.

3. The Cantonal Court and the Municipal Court submitted their replies to the appeal on 12 and 15 October 2010 respectively. The respondent party failed to submit her reply to the appeal.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies of the Cantonal Court and the Municipal Court were communicated to the appellant's authorised representative on 22 March 2011.

5. In addition, pursuant to Article 33 of the Rules of the Constitutional Court, the Parliament of the Federation of Bosnia and Herzegovina („the FBiH Parliament") and the Ministry of Justice of the Federation of Bosnia and Herzegovina („the Ministry") were requested on 20 February and 15 March 2013 to submit their comments and observations as to the reasons and purpose of the provision of Article 43 of the Family Law of the Federation of BiH.

6. The Ministry submitted its reply on 11 April 2013. The FBiH Parliament failed to submit its reply to the appeal.

III. Facts of the Case

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

8. The Ruling of the Municipal Court no. 20 0 P 003388 09 P of 6 November 2009, upheld by the Ruling of the Cantonal Court no. 20 0 P 003388 09 Gž of 7 December 2009, rejected a petition for divorce filed by the appellant against the respondent.

9. The reasoning of the first instance ruling read that on 2 November 2009 the appellant had filed a divorce petition with the Municipal Court against the respondent, who had been staying in a safe house of the Centre for Social Work in Ljubljana. It was pointed out that the appellant, in addition to the divorce petition, attached a copy of the birth certificate of the minor child of the appellant and the respondent and a record on mediation of the Cazin Public Institution of the Centre for Social Work. After examining the record of mediation of the Cazin Public Institution of the Centre for Social Work, the Municipal Court found that the appellant's wife had not taken part in the mediation process. The Municipal Court referred to Article 49(1) of the FBiH Family Law, stipulating that in case that both spouses were duly summoned but failed to appear before the court to participate in a mediation process without justification for their absence, the mediation process should be suspended. Given the aforementioned fact, in the view of the Municipal Court, the Cazin Public Institution Centre for the Social Work was obliged to suspend the mediation process, but the Centre failed to do so. It was pointed out that irrespective of the mentioned fact, on 2 November 2009, the appellant had filed the divorce petition with the Municipal Court against the respondent and had submitted, *inter alia*, the record of mediation no. 01/35-1044/09 of 30 October 2009 made by the Cazin Public Institution Centre for Social Work, according to which it was established that the process of mediation had not been completed. Consequently, the Municipal Court decided to reject the divorce petition pursuant to the provision of Article 52 of the Family Law of the Federation of BiH.

10. In the reasoning of the second instance ruling it was stated that the appellant's divorce petition was inadmissible in terms of the provision of Article 43 of the Family Law of the Federation of BiH and not for the reasons stated by the first instance court. The Cantonal Court stated that the said provision stipulated that the husband was not entitled to file a divorce petition at the time when his spouse was pregnant or until the time their child reached the age of three years. The Cantonal Court pointed out that the appellant was the husband in the relevant legal matter and that he alleged in his divorce petition that a child had been born inside the marriage, *i.e.* S.K., the minor child, and the appellant had also attached a copy of S.K.'s birth certificate. The Cantonal Court stated that it followed from the said birth certificate that the minor child had been born on 30 June 2007 and that the appellant had filed the divorce petition on 2 November 2009. Therefore, the Cantonal Court established that the minor child did not reach the age of three years at the time the appellant filed the petition for divorce.

IV. Appeal

a) Allegations stated in the appeal

11. The appellant considers that the challenged rulings are in violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), the right to respect for his private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the right to marry under Article 12 of the European Convention, the right not to be discriminated against under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention and the right to equality between spouses under Article 5 of Protocol No. 7 to the European Convention. The appellant holds that, compared to women, men are discriminated against by the provision of Article 43 of the Family Law, as women are entitled to file a petition for divorce at any time, whereas this right is limited for men. Therefore, the appellant indicates that there is discrimination on the ground of gender. In addition, the appellant points out that women are entitled to divorce at any time and to enter into a new marriage, whereas this right is limited as regards men/husbands since they cannot remarry during the three-year period for which they are not entitled to divorce. According to the appellant, the previous marriage has to last a minimum of three years irrespective of its purposelessness and its factual non-existence, as the basic elements of marriage are missing. In the appellant's view, based on the ruling of the Cantonal Court, the appellant is not allowed to have his rights and obligations decided within a reasonable time by a court.

b) Reply to the appeal

12. In its reply to the appeal, the Cantonal Court stated that the appeal related to the harmonisation of domestic legislation with international conventions, which may be the subject-matter of separate proceedings.

13. In its reply to the appeal, the Municipal Court stated that the appellant's constitutional rights were not violated in the relevant proceedings.

14. In its reply to the appeal, the Ministry stated that the reasons and purpose of the provision of Article 43 of the Family Law of the Federation of BiH related to the protection of fundamental human rights of women/mothers and unborn or minor children primarily during their early childhood. The Ministry pointed out that the legislator's aim was to ensure that both parents were present during the first years of a child's life, taking into account

all specific features and psychological changes that the separation of parents may cause at the time when the child was not sufficiently grown up to understand certain phenomena in society. In addition, the Ministry stated that a specific financial situation of women in our society was taken into account and that the situation was reflected in insufficient financial means that could provide for an independent life with a minor child and, therefore, the presence of a father was required. Furthermore, according to the Ministry, women – mothers are mostly without sufficient financial resources, *i.e.* they are mostly unemployed as they stand little chance of securing a job at that phase of their life. Moreover, if they are employed they usually have problems in getting compensation for the time of caring for the child and they often do not have place to live in when divorce occurs. In view of the above, the legislator considered that fathers play the very important part in raising children as their children grow and need parental care. Therefore, the legislator wanted to provide for a possibility of healthy and proper upbringing of children for the period of three years and to secure that a mother, who passes through a difficult period of upbringing of her little child, has necessary assistance and presence of the child's father. Finally, the opportunity is given to both parents to possibly overcome problems in their marriage and for further healthy existence of the marriage to be supported by love of their child. In the opinion of the Ministry, the aim of the legislator was not of a discriminatory nature but the legislator wanted primarily to provide the protection of mothers, given the natural biological and specific role of pregnant women and mothers of children under three years of age, and, only after that, the possibility of remarriage. According to the Ministry, there is no violation of the right guaranteed by Article 12 of the European Convention, as the exercise of the right to marry and to found a family is regulated by internal laws. In the relevant cases, according to the Ministry, the right to marry is limited to a certain period, as it has already been exercised through the previous marriage where certain obligations that must be fulfilled have been created; particularly, there is the responsibility to protect a minor child.

V. Relevant Law

15. The **Family Law of the Federation of Bosnia and Herzegovina** (*the Official Gazette of the Federation of Bosnia and Herzegovina* nos. 35/05 and 41/05), as relevant, reads:

Article 41

A spouse may initiate an action for divorce if marital relationship is gravely and permanently disturbed.

Article 42

The divorce may be sought by filing a divorce petition or a petition for divorce by mutual consent.

Article 43

The husband does not have the right to divorce during the pregnancy of his wife and until their child reaches the age of three years.

Article 124

(1) The child has the right to life and the right to health and the right to the development of the personality.

(2) The child has the right to live with his/her parents. The child has the right to maintain personal relationship and direct contact with both parents if separated from one or both. The child also has the right to maintain personal relationship and direct contact with his/her grandfather and grandmother.

(3) No child shall be subjected to unlawful interference with his/her privacy and family.

Article 129

Parental care refers to the responsibilities, duties and rights of parents, with the aim of protecting child's welfare, personal and proprietary interests.

Parental care shall be exercised in the best interest of the child.

Article 130

(1) The parents shall jointly have the primary responsibility for the upbringing and development of the child.

(2) The parents shall protect their child as necessary for his/her well-being.

Article 131

(1) Parental care can be limited or taken away only by a decision of competent authorities for the reasons and in the way regulated by this Act.

(2) A parent cannot renounce parental care.

Article 138

(1) The parents are obliged and entitled to support the child in accordance with the provisions of this Act.

(2) The parents have the responsibility to secure the conditions of living necessary for the child's development.

Article 152(1)

The Centre for Social Work shall determine measures of supervision over parental care for at least three months and as long as it is in the best interest of the child, if the parents neglect the care and upbringing of the child, or where the parents need help in upbringing the child.

Article 215

The parents are obliged to support their minor child and, in fulfilling their obligation, they shall use all their abilities and capacities.

Article 224

A spouse who does not have sufficient resources or cannot obtain them from her/his property, and is not able to work or to find a job, is entitled to spousal maintenance from the other spouse.

Article 249(1)

(1) In the proceedings to determine maintenance of the minor child or the child who has attained the legal age in respect of whom the parents exercise parental care, the court may ex officio determine provisional measures for child maintenance purposes.

VI. Admissibility

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

17. In accordance with Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

18. In the present case, the subject challenged by the appeal is the Ruling of the Cantonal Court no. 20 0 P 003388 09 Gž of 7 December 2009, against which no other effective legal remedies are available under the law. Furthermore, the appellant received the challenged judgment on 11 January 2010, and the appeal was lodged on 26 January 2010, *i.e.* within

the time limit of 60 days, as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court, as it is not manifestly (*prima facie*) ill-founded, nor are there any other formal reasons rendering the appeal inadmissible.

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

VII. Merits

20. The appellant holds that the challenged decisions of the ordinary courts are in violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, the right to respect for his private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the right to marry under Article 12 of the European Convention, the right not to be discriminated against under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention and the right to equality between spouses under Article 5 of Protocol No. 7 to the European Convention.

Right to a fair trial

Article II(3)(e) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and 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.

Non-discrimination

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

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 of the European Convention reads:

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

21. According the allegations stated in the appeal, it follows that the appellant claims a violation of the prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in respect of the right of access to a court, which is an aspect of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

22. The Constitutional Court notes that Article 6 of the European Convention does not explicitly provide for a right of access to courts, but the European Court of Human Rights holds that the said Article secures to everyone the right to have any claim relating to civil rights and obligations brought before a court. Article 6 of the European Convention 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. Article 6 of the European Convention is much broader than Article 13, as it embodies the right to a court and applies to any interpretation of civil rights and obligations, together with those relating to the rights guaranteed by the European Convention.

23. In addition, according to the case-law of the European Court of Human Rights, Article 6(1) of the European Convention guarantees to everyone the right to have any claim relating to his/her civil rights and obligations considered by an independent court or tribunal. This implies the „right to court", *i.e.* the „right of access to court" which includes the right of an individual to initiate proceedings in civil matters. It means that everyone is guaranteed the right to initiate proceedings before courts in civil matters (see, European Court of Human Rights, *Philis versus Greece*, Judgment of 27 August 1991, Series A, no. 209, page 20, paragraph 59). Furthermore, according to the case-law of the Constitutional Court, the right of access to court shall be violated where the court has failed to pass a decision on the merits relating to the appellant's civil rights (see, Constitutional Court, Decision no. *U 64/02* of 24 October 2003, published in the *Official Gazette of Bosnia and Herzegovina* no. 8/04, paragraph 48).

24. Therefore, Article 6(1) of the European Convention 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. However, this right of access, however, is not absolute but

may be subject to limitations since the right by its very nature calls for regulation by the state. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the European Convention's requirements rests with the court. The court must see for itself that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1), if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see the judgment in case *Stubbings and Others v. the United Kingdom* of 22 October 1996-IV, *Reports of Judgments and Decisions* 1996-IV, paragraph 50).

25. In addition, the Constitutional Court notes that, in his appeal, the appellant raises an issue of discrimination on the ground of gender in respect of the right of access to a court. The Constitutional Court recalls the fact 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 (see, European Court for Human Rights, *Marckx v. Belgium*, Judgment of 13 June 1979, Series A, no. 31, paragraph 32). Under the case-law of the European Court of Human Rights, discrimination occurs when a person or a group in an analogous situation are subject to differential treatment based on sex, race, colour, language, religion, (…), in the enjoyment of the rights and freedoms safeguarded by the European Convention and if it has no objective and reasonable justification, or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, European Court of Human Rights, *Case „Relating to certain aspects of the laws on the use of languages in education in Belgium„ v. Belgium*, Judgment of 9 February 1967, Series A, no. 6, paragraph 10). Moreover, it is irrelevant whether discrimination results from a difference of treatment permitted by legislation or arose from the mere application of laws (see, European Court of Human Rights, *Ireland v. the United Kingdom*, Judgment of 18 January 1978, Series A, No. 25, paragraph 226).

26. Besides, under the case-law of the Constitutional Court and the European Court of Human Rights, an act or a provision is discriminatory if it makes a distinction between individuals or groups that are in a similar situation and if there is no objective and reasonable justification for this distinction, or if there is no reasonable proportion between the means employed and the aims sought to be achieved. However, under the case-law of the European Court of Human Rights, the Contracting States enjoy a certain „margin of appreciation" in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will

vary according to the circumstances, the subject-matter of the case and its background (see, European Court of Human Rights, *Rasmussen v. Denmark*, Judgment of 28 November 1984, Series A, no. 87, paragraph 40).

27. In the present case, the appellant's divorce petition was essentially rejected as inadmissible in terms of the provision of Article 43 of the Family Law of the Federation of BiH. Namely, under the said provision, the husband does not have the right to divorce during the pregnancy of his wife and until their child reaches the age of three years. In the relevant proceedings it was established that the appellant was the husband of the respondent and that the minor child of the marriage of the appellant and the respondent, at the time the divorce petition had been filed, had not reached the age of three years. Consequently, the Court established that the appellant, in terms of the said provision, was not entitled to file a divorce petition.

28. The Constitutional Court considers that the provision of Article 43 of the Family Law of the Federation of BiH, based on which the appellant's divorce petition was rejected, in itself, gives rise to differential treatment of spouses, that is of men and women, in respect of their right of access to a court, *i.e.* their right to file a petition for divorce. Hence, based on the said provision, the appellant/husband is denied the right of access to court unlike the respondent as his wife. On the other hand, a wife is entitled without restriction to file a petition for divorce during her pregnancy and until her child reaches the age of three years. Therefore, in the view of the Constitutional Court, the relevant provision itself makes a distinction between spouses on the ground of gender in respect of their right of access to court. The Constitutional Court reiterates that the right of access to court is not absolute but any limitation on this right must be capable of reasonable and objective justification.

29. Accordingly, the question to be answered by the Constitutional Court is whether there is an objective and reasonable justification for such a differential treatment of spouses, that is whether there is a justification for applying the said provision in practice for the purpose of protecting the best interest of the children, as foreseen by the provision of Article 5 of Protocol No. 7 to the European Convention. Namely, under the said Article of Protocol No. 7 to the European Convention, States have been allowed a wide margin of appreciation with respect to the measures aimed at protecting the best interests of the children.

30. In this connection, the Constitutional Court requested information from the legislator and the competent Ministry, which had proposed the relevant law, as to the reasons and purpose of the provision of Article 43 of the Family Law of the Federation of BiH. The legislator failed to submit any comment or observation, although it is the sole authority to give an authentic interpretation of the law. Nevertheless, the relevant Ministry submitted

the reply requested by the Constitutional Court. Therefore, in order to establish whether there is an objective and reasonable justification for differential treatment of spouses, the Constitutional Court will take into account the mentioned information of the relevant Ministry although it does not relate to the authentic interpretation of the law. It follows from the allegations of the Ministry that the purpose of the provision of Article 43 of the Family Law of the Federation of BiH was to protect the interests of children and mothers. The Ministry pointed out that the purpose of the said provision was to secure the presence of both parents during the first years of a child's life, taking into account all specific features and psychological changes that the separation of parents may cause at the time when the child was not sufficiently grown up to understand certain phenomena in society. In addition, the Ministry stated that a specific financial situation of women in our society was taken into account and that the situation was reflected in insufficient financial means that could secure an independent life with a minor child and, therefore, the presence of father was required. Furthermore, according to the Ministry, women – mothers are mostly without sufficient financial resources, *i.e.* they are mostly unemployed as they stand little chance of securing a job at that phase of their life. Moreover, if they are employed they usually have problems in getting compensation for the time of caring for a child and they often do not have a place to live in when divorce occurs.

31. In view of the above, the question to be answered by the Constitutional Court is whether the reasons given by the Ministry constitute an objective and reasonable justification for the difference in treatment of spouses based on the provision of Article 43 of the Family Law of the Federation of BiH and in terms of the standards of the European Convention. The Constitutional Court notes that it is undisputed that the relevant provision imposes the limitation on the husband's right to divorce during the pregnancy of his wife and until their child reaches the age of three years, whereas the said right is not subject to such limitations as regards the wife/mother. On the one hand, in the opinion of the Constitutional Court, irrespective of the said provision it is not possible in real life to prevent the husband, *i.e.* the father of the child, from physically leaving the mother and the child, without getting the divorce first. On the other hand, the Constitutional Court notes that the Family Law has a number of the provisions specifically regulating the rights and responsibilities of the parents for children in their development and upbringing. Thus, the provision of Article 130 stipulates that the parents jointly have the primary responsibility for the upbringing and development of the child. Paragraph 2 of Article 131 stipulates that the parents cannot renounce parental care. Furthermore, the Family Law regulates the issues relating to the maintenance of the spouse without sufficient financial resources. Therefore, it follows that the reasons and purpose of the provision of Article 43 of the Family Law of the Federation of BiH, mentioned in the reply of the Ministry, are achieved through the other provisions

of the Family Law, which precisely regulate the issue of protecting the best interest of the children and the spouse without sufficient financial resources. Accordingly, there is no legal obstacle to protect, in accordance with the other relevant provisions of the Family Law, the interests of the children and the wife/mother, if such a protection is needed.

32. Therefore, in the view of the Constitutional Court, the reasons stated by the Ministry in its reply, do not constitute an objective and reasonable justification for the difference in treatment of spouses (men and women) in respect of the right of access to a court. All the more so given that the Family Law contains the precise provisions regulating the issue of protecting the children and spouses. Also, considering the other provisions of the Family Law, the Constitutional Court notes that apart from the provision of Article 43, which makes a distinction between spouses, all the other provisions make no distinction between men and women with regards to their mutual rights and responsibilities as well as their rights and responsibilities towards their children. Consequently, the Constitutional Court holds that the said provision gives rise to differential treatment between men and women on the ground of gender, in respect of their right of access to court, and the Constitutional Court finds no objective and reasonable justification for such a differential treatment. In the view of the Constitutional Court, the same conclusion follows from the information provided by the relevant Ministry.

33. In view of the above, the Constitutional Court holds that the provision of Article 43 of the Family Law does not have the quality of a law to the extent necessary to satisfy the standards of Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in respect of the right of access to court, as an aspect of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention. In the light of the above, the Constitutional Court holds that, in the present case, the appellant has been discriminated against on the ground of gender in respect of the right of access to court. Therefore, the Constitutional Court concludes that in the present case there is a violation of the prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in respect of the right of access to court, as an aspect of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention. Therefore, it follows that the provision under Article 43 of the Family Law is neither in accordance with the Constitution of BiH nor with the European Convention.

34. Moreover, the Constitutional Court recalls that the rights and freedoms set forth in the European Convention and its Protocols apply directly in Bosnia and Herzegovina and have

priority over all other laws, in terms of the provision of Article II(2) of the Constitution of Bosnia and Herzegovina. In the case at hand, in the opinion of the Constitutional Court, the ordinary courts failed to apply the constitutional provisions which indicate that the European Convention and its Protocols have priority over all other law. Therefore, ordinary courts, deciding claims, have the constitutional obligation to apply international standards for the protection of human rights and freedoms; however, in the present case the ordinary courts failed to do so.

35. Having regard to the conclusions in the present decision, the Constitutional Court holds that it is necessary that appropriate legislative measures be taken to ensure that both spouses have the right of access to court without discrimination on the ground of gender, within the meaning of Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention, and the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

36. Consequently, the Constitutional Court has ordered the Parliament of the Federation of Bosnia and Herzegovina and the Government of the Federation of Bosnia and Herzegovina to take all appropriate measures within their jurisdiction to ensure compliance with the constitutional right of access to court without discrimination on the ground of gender, in accordance with the present Decision, including all other relevant cases (see, the Constitutional Court, Decision no. *U 106/03* of 27 October 2004, published in the *Official Gazette of Bosnia and Herzegovina* no. 23/05, paragraph 35).

Other allegations

37. Having regard to its conclusions concerning Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in respect of the right of access to court, as an aspect of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, the Constitutional Court holds that it is not necessary to consider the appellant's allegations relating to the right to respect for his private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the right to marry under Article 12 of the European Convention and the right to equality between spouses under Article 5 of Protocol No. 7 to the European Convention, as these allegations are essentially based on the allegations of a violation of the prohibition of discrimination in respect of the right of access to court, in respect of which the Constitutional Court presented its view in the preceding paragraphs of the present Decision.

VIII. Conclusion

38. The Constitutional Court concludes that there has been a violation of the prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in respect of the right of access to court, as an aspect of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, as the appellant's petition was rejected as inadmissible within the meaning of Article 43 of the Family Law of the Federation of BiH, which is of a discriminatory nature and which gives rise to differential treatment of the appellant on the ground of gender, and there is no objective and reasonable justification for such a differential treatment.

39. Pursuant to Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of the present decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 2809/12

DECISION ON ADMISSIBILITY AND MERITS

Appeal of M.T. against the Ruling of the Cantonal Court in Široki Brijeg, no. 64 0 K 016615 12 Kž 2 of 12 June 2012 and the Ruling of the Municipal Court in Široki Brijeg, no. 64 0 K 016615 11 K 2 of 25 April 2012

Decision of 24 May 2013

CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2), Article 64(1) and Article 77(6) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić

Ms. Constance Grewe

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knežević

Having deliberated on the appeal of **M.T.** in case no. **AP 2809/12**, at its session held on 24 May 2013 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of M.T. is hereby granted.

A violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Ruling of the Cantonal Court in Široki Brijeg no. 64 0 K 016615 12 Kž 2 of 12 June 2012 is hereby quashed.

The case shall be referred back to the Cantonal Court in Široki Brijeg which is obligated to employ an expedited procedure and take a new decision in accordance with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Cantonal Court in Široki Brijeg is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months from the date of delivery of this Decision, on the measures taken to enforce this Decision in accordance with Article 74(5) of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina.

This Decision shall be communicated 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 with a view to taking activities within their competencies in order to facilitate the exercising of the constitutional rights of the appellant and other persons who find themselves in an identical situation in terms of the guarantees under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with the right under Article I(2) of the Constitution of Bosnia and Herzegovina.

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 inform the Constitutional Court of Bosnia and Herzegovina, within six months from the date of delivery of this Decision, on the measures taken to enforce this Decision in accordance with Article 74(5) of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina.

Pursuant to Article 77(6) of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina the Decision on Interim Measure no. AP 2809/12 of 28 February 2013 shall cease to have legal effect.

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

Reasoning

I. Introduction

1. On 27 July 2012 M.T. („the appellant") from Livno, represented by Josip Muselimović and Ana Primorac, lawyers practicing in Mostar, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Ruling of the Cantonal Court in Široki Brijeg („the Cantonal Court"), no. 64 0 K 016615 12 Kž 2 of 12 June 2012 and the Ruling of the Municipal Court in Široki Brijeg („the Municipal Court"), no. 64 0 K 016615 11 K 2 of 25 April 2012. By his submission of 3 September 2012 the appellant supplemented his appeal.

2. The appellant requested at the same time that the Constitutional Court issue a decision on interim measure postponing the procedure of execution of his sentence of imprisonment pending a final decision by the Constitutional Court.

3. Deciding upon the appellant's request, the Constitutional Court issued the Decision on Interim Measure no. *AP 2809/12* of 28 February 2013 (available at www.ustavnisud.ba), granting the appellant's request for interim measure to postpone the procedure of execution of his sentence of imprisonment imposed by the final Judgment of the Municipal Court no. 64 0 K 016615 10 K of 30 June 2011 until the issuance of the final decision by the Constitutional Court.

II. Proceedings before the Constitutional Court

4. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the Municipal Court and the Cantonal Court were requested on 20 February 2013 to submit their respective replies to the appeal.

5. The Cantonal Court submitted its reply to the appeal on 26 February 2013 and the Municipal Court submitted its reply to the appeal on 7 March 2013.

6. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were submitted to the appellant on 6 and 13 March 2013.

III. Facts of the case

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

8. By the Judgment of the Municipal Court no. 64 0 K 016615 10 K of 30 June 2011, upheld by the Judgment of the Cantonal Court no. 64 0 K 016615 11 Kž of 6 March 2012, the appellant was pronounced guilty of having committed the criminal offence of Lecherous Acts under Article 208(2) in conjunction with the criminal offence of Sexual Intercourse with a Child under Article 207(3) of the Criminal Code of the Federation of BiH („the Criminal Code of FBiH") and sentenced to one year of imprisonment by application of the aforesaid legal regulation and Articles 42 and 43 of the Criminal Code of FBiH. In addition to the sentence of imprisonment, the same judgment, pursuant to Article 76 of the Criminal Code of FBiH, imposed upon the appellant the security measure of ban on carrying out his occupation as teacher for the duration of three years because the appellant had committed the criminal offence in the course of performing his occupation and there was danger that such role could induce the perpetrator to perpetrate another criminal offence through the abuse of the occupation, activity or duty.

9. The Ruling of the Municipal Court no. 64 0 K 016615 11 K 2 of 25 April 2012 dismissed as ill-founded the appellant's request to have his sentence of imprisonment substituted by a fine. The Municipal Court stated in the reasoning of its ruling that the provision of Article 43(a) of the Criminal Code of FBiH prescribed *that the imposed one year imprisonment sentence might, upon a request by the convicted person, be substituted by a fine to be paid as a one-off payment within 30 days*. In addition, the Municipal Court stated that such replacement of imprisonment sentence by a fine was only anticipated as a possibility, which indicated that the particular case involved a discretionary right of the court in respect of the application of the aforesaid legal provision, not an obligation placed upon the court. It was further stated that in evaluating whether to grant such a request by a convict and substitute the imposed imprisonment sentence by a fine, the court was obliged to take into account all the circumstances relative to the criminal offence and the convicted person, *i.e.* that substitution of imprisonment sentence by a fine would only be justified in cases where the court, after evaluating all the circumstances, concluded that such fine might achieve the purpose of punishment and the purpose of execution of imprisonment sentence. In view of the aforementioned, the Municipal Court, having evaluated the kind and severity of the criminal offence, the danger it presents to society, particularly the fact that the criminal offence in question injured underage children or rather female students who must enjoy special protection of society as well as the fact that the criminal offence in question was committed by the appellant as a teacher who had been entrusted with the children for the purpose of their upbringing and education and that by the commission of this criminal offence he had used and abused his position as a teacher, and also given the number of the children injured by commission of the criminal offence

in question, which increases the danger to society by this offence, the court dismissed the request for substitution of imprisonment sentence by a fine. Finally, the Municipal Court stated that imposing a fine in the present situation could neither achieve the purpose of punishment as prescribed by Article 42 of the Criminal Code of FBiH nor the purpose of execution of imprisonment sentence and as such it would not have a preventive effect on the appellant as the perpetrator not to perpetrate criminal offences in future and neither would it have an effect on other potential perpetrators of criminal offences, on account of which and based upon Article 43(a) of the Criminal Code of FBiH, it had been decided as stated in the enacting clause of the ruling.

10. Deciding upon the appellant's appeal filed against the first instance ruling, the Cantonal Court issued the Ruling no. 64 0 K 016615 12 Kž 2 of 12 June 2012, dismissing the appeal and affirming the challenged ruling in its entirety. In the reasoning of its ruling the Cantonal Court stated that the provision of Article 43(a) of the Criminal Code of FBiH determined that the court should evaluate whether it was justified to substitute the imposed imprisonment by a fine and, therefore, the evaluation by the court that the requested substitution of the imposed imprisonment sentence by a fine was not justified by itself and did not amount to a violation of the criminal law. In addition, the Cantonal Court stated that the aforementioned legal provision exclusively linked the possibility of substitution to the amount of the imposed imprisonment sentence of up to one year and the substitution would be obligatory if other relevant circumstances were not evaluated but only the amount of the imposed sentence. Given the aforementioned legal determination, the Cantonal Court evaluated that the imposed 1 year imprisonment sentence was only a condition to enable a convicted person to file such a request for substitution. Since the said provision does not prescribe other conditions, the court is under obligation to evaluate relevant circumstances in order to assess whether the conditions have been met for the application thereof, which has been done in this case.

IV. Appeal

a) Allegations in the appeal

11. The appellant holds that the challenged rulings are in violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), his right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention as well as his right not to be tried or punished twice in the same case under

Article 4 of Protocol No. 7 to the European Convention. The appellant indicates that the challenged rulings have been issued as a result of unlawful, arbitrary and discriminatory application of the provision of Article 43(a) of the Criminal Code of FBiH and by unfair proceedings taken as a whole, in terms of provision of Article 6(1) of the European Convention and Article 4 of Protocol No. 7 of the European Convention. The appellant emphasizes that, in accordance with the provision of Article 43(a) of the Criminal Code of FBiH, he filed a request for substitution of his imprisonment sentence by a fine because all the requirements provided by the law had been met. However, his request was dismissed with the reasoning that the court had taken into account all the circumstances relative to the specific criminal offence as well as the person convicted, *which turned the proceedings into a retrial*. In that regard the appellant alleges that the request for substitution of his imprisonment sentence by a fine ought to be evaluated exclusively in the sphere of the convict, his freely expressed will, not exclusively in the sphere of the court's margin of appreciation. Namely, when the court was imposing its sentence of 1 year imprisonment it was aware of the possibility contained in the provision of Article 43(a) of the Criminal Code of FBiH and the court evaluated then both kind and severity of the criminal offence as well as its danger to society and the protected asset. The appellant supplemented his appeal by submitting the Ruling of the Court of Bosnia and Herzegovina („the Court of BiH") no. S1 3 K 00328 12 Kž 2 of 22 August 2012, as an example of applicable case law of the aforementioned court which is in contravention of the case law of ordinary courts in the present case, indicating thereby a violation of the principles of rule of law and legal certainty, *i.e.* although not explicitly stated as such, a violation of Article I(2) of the Constitution of Bosnia and Herzegovina.

b) Reply to the appeal

12. In response to the appeal the Cantonal Court states, *inter alia*, that there have been no violations of the rights in question before the aforesaid court, as alleged in the appeal. It is alleged that the first instance court has correctly established the facts and correctly applied to them the provision of Article 43(a) of the Criminal Code of FBiH regulating the issue of substitution of imprisonment sentence by a fine, since, contrary to the position presented in the appeal, the court is authorized to assess the justification of application of the mechanism of substitution of imprisonment sentence by a fine because the application of this mechanism depends upon an evaluation by the court, which may but does not have to comply with the request.

13. In response to the appeal the Municipal Court stated, *inter alia*, that it was beyond dispute that the provision of Article 43(a) of the Criminal Code of FBiH prescribed that

the imposed imprisonment sentence may, upon a request by the convict, be substituted by a fine to be paid as a one-off payment within 30 days. It is, however, also beyond dispute that such replacement of imprisonment sentence by a fine is only anticipated as a possibility, which indicates that the particular case involves a discretionary right of the court in respect of the application of this legal norm. This means, it is stated, that substitution of imprisonment sentence by a fine would only be justified in cases where the court, after evaluating all the circumstances, concludes that such fine may achieve the purpose of punishment and the purpose of execution of imprisonment sentence. The Municipal Court stated that dismissal of the request for substitution of imprisonment sentence by a fine, having also evaluated the purpose of punishment, could in no way amount to a violation of the convict's rights guaranteed by the Constitution of BiH and the provisions of the European Convention and Protocols thereto. Finally, the Municipal Court concludes in its response that, given everything aforesaid, the appellant's allegations that substitution of imprisonment sentence is exclusively left to the will of the convicted person cannot be accepted, it being clear that even the legislator had no such thing in view when enacting this provision, otherwise instead of having the phrase *may be* the foregoing provision would have contained the phrase *shall be substituted*.

V. Relevant Law

14. The **Law Amending the Criminal Code of the Federation of Bosnia and Herzegovina** (*the Official Gazette of the Federation of BiH* no. 42/10), in the relevant part, reads:

Substitution of Imprisonment

Article 43(a)

(1) A sentence not exceeding one year of imprisonment, upon request of the convicted person, may be substituted by a fine to be paid as a one-off payment within 30 days.

(2) Imprisonment shall be replaced by a fine by having one day in prison equal to a daily amount of the fine or to 100 KM, if the fine is set in a specific amount.

(3) If a fine has not been paid within the deadline referred to in paragraph (1) of this Article, the court shall order that the imprisonment sentence be enforced. If a fine is paid only in part, the imprisonment shall be enforced in proportion to the amount unpaid.

15. The **Law Amending the Criminal Code of Bosnia and Herzegovina** (*the Official Gazette of BiH* no. 8/10; „the Criminal Code of BiH"), in the relevant part, reads:

Substitution of Imprisonment

Article 42(a)

(1) A sentence not exceeding one year of imprisonment, upon request of the convicted person, may be substituted by a fine to be paid as a one-off payment within 30 days.

(2) Imprisonment shall be replaced by a fine by having one day in prison equal to a daily amount of the fine or to 100 KM, if the fine is set in a specific amount.

(3) If a fine has not been paid within the deadline referred to in paragraph (1) of this Article, the court shall order that the imprisonment sentence be enforced. If a fine is paid only in part, the imprisonment shall be enforced in proportion to the amount unpaid.

16. The **Law Amending the Criminal Code of the Republika Srpska** (*the Official Gazette of the Republika Srpska* no. 108/10), in the relevant part, reads:

Imposing of Imprisonment

Article 33(2)

(2) A sentence not exceeding six months of imprisonment, upon request of the convicted person, may be substituted by a fine, in accordance with the provisions of Article 36(2) and (3) of this law.

Substitution of Fine

Article 36(2) and (3)

(2) If the convicted person does not pay the fine within the deadline established by the judgment, the court will without delay issue a decision on substitution of the fine by imprisonment.

(3) Fine will be substituted by imprisonment in the manner that the court shall order one day of imprisonment for every commenced daily amount of the fine or, if the fine is set in a specific amount, for every commenced 50 KM of the fine, but in that case the imprisonment may not exceed six months.

17. The **Law Amending the Criminal Code of the Brčko District of Bosnia and Herzegovina** (*the Official Gazette of the Brčko District of BiH* no. 21/10; „the Criminal Code of the Brčko District of BiH"), in the relevant part, reads:

Substitution of Imprisonment

Article 43(a)

(1) A sentence not exceeding one year of imprisonment, upon request of the convicted person, may be substituted by a fine to be paid as a one-off payment within 30 days.

(2) Imprisonment shall be replaced by a fine by having one day in prison equal to a daily amount of the fine or to 100 KM, if the fine is set in a specific amount.

(3) If a fine has not been paid within the deadline referred to in paragraph (1) of this Article, the court shall order that the imprisonment sentence be enforced. If a fine is paid only in part, the imprisonment shall be enforced in proportion to the amount unpaid.

VI. Admissibility

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

19. According to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective legal remedies available under the law against a judgment/decision challenged by the appeal are exhausted and if the appeal was lodged within a time-limit of 60 days as from the date on which the decision on the last effective legal remedy used by the appellant was served on him/her.

20. In the present case, the subject of challenging by the appeal is the Ruling of the Cantonal Court no. 64 0 K 016615 12 Kž 2 of 12 June 2012, against which there are no other legal remedies available under the law. The appellant received the challenged ruling on 25 June 2012, and the appeal was filed on 27 July 2012, *i.e.* within 60-day time limit as prescribed by Article 16(1) of the Rules of the Constitutional Court.

21. However, the Constitutional Court notes that the appeal is directed against the decisions issued in the proceedings which ended in dismissing of the appellant's request seeking the substitution of the imposed imprisonment sentence by a fine. Therefore, given the aforesaid the present case raises the issue of applicability of the standard of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention relative to the challenged rulings.

22. In earlier cases of this kind the Constitutional Court took the position that such appeals in relation to Article II(3)(e) of the Constitution of Bosnia and Herzegovina

and Article 6(1) of the European Convention were *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina (see *e.g.* Decision on Admissibility no. *AP 4792/11* of 19 July 2012 and Decision on Admissibility no. *AP 2720/11* of 12 October 2012; available at www.ustavnisud.ba).

23. However, the Constitutional Court indicates that the European Court of Human Rights („the European Court") in its case law, exceptionally, in view of the circumstances of the present case, considered such applications admissible, pointing out that it was possible to relate accessory proceedings after the conclusion of criminal proceedings to the right to a fair trial, *i.e.* that particular circumstances existed that made those proceedings an integral part of the criminal proceedings in which criminal charges against the applicant were being determined. Thus in cases of *Smith vs. Germany* and *Buijen vs. Germany* (see case *Smith v. Germany*, Application no. 27801/05, of 1 April 2010 and case *Buijen v. Germany*, Application no. 27804/05, of 1 April 2010) the European Court, *inter alia*, stated: *[...] The Court is of the view that Article 6(1) of the Convention is not applicable under its criminal head, as the proceedings concerning the prison system did not relate in principle to determination of a 'criminal charge'.* (see, *Enea v. Italy [VV]*, no. 74912/01, paragraph 97, of 17 September 2009). *In the event of conviction, there is „determination ... of any criminal charge", within the meaning of Article 6(1), as long as the sentence is not definitively fixed.* (see, *Eckle v. Germany*, of 15 July 1982, paragraph 77, Series A no. 51). In the judgment *Eckle v. Germany*, the applicants received final conviction in two different sets of proceedings. According to the German law, in such cases it is the duty of courts to issue compound punishments, even upon their own initiative if needs be. The European Court examined in that case the length of proceedings and concluded that there was a violation of Article 6(1) of the European Convention (they took into account the date the proceedings were finalized by pronouncement of a compound punishment). The European Court stated that „determination of any criminal charges" existed until the sentence was definitively fixed.

24. Finally, the Constitutional Court recalls its case law as defined in case *AP 2402/08* (see, Decision of Admissibility and Merits no. *AP 2402/08* of 25 March 2011 available at www.ustavnisud.ba). Namely, in the cited decision the Constitutional Court notes *that the appellant does not challenge the decision by which it was unequivocally decided on the criminal charges. The appeal is not directed against the amount of fine either, which are the facts that the Constitutional Court, as a rule, does not consider when deciding on the violation of the right to a fair trial but it is directed against the decision by which the fine was supplemented by the imprisonment punishment.* In that regard, the Constitutional Court held *that Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article*

6 paragraph 1 of the European Convention [were] applicable in this case as well. Namely, the appeal relates to the application of the substantive law in the aspect of enforcement of the sanction pronounced while deciding of the criminal charges against the appellant and the Constitutional Court concludes that it, in fact, *concerns the united proceedings of „the establishment of criminal charges" because the decision on admissibility of enforcement or statute of limitations of the execution of pronounced sentence represents the constitutive part of trial, i.e. determination of criminal charges*.

25. In view of the aforementioned it follows that both the European Court of Human Rights and the Constitutional Court took the position that in exceptional cases Article 6(1) of the European Convention may be applicable even in accessory proceedings which are an integral part of the criminal proceedings.

26. Moreover, the Constitutional Court notes that a certain number of appeals has been lodged which raise the same legal issue relative to the application of the legal norm, with almost identical content in substantive criminal law at all levels of government (BiH, the Entities and the Brčko District of Bosnia and Herzegovina), but that is interpreted by ordinary courts in the territory of Bosnia and Herzegovina in diametrically opposite ways. Given the aforesaid circumstances, the Constitutional Court holds that such appeals primarily raise a constitutional issue of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina or rather the issue of legal certainty, as its first criterion which, *inter alia, implies that the established mechanisms and institutions function in accordance with the laws, which must be prospective, open, clear and relatively stable, and which must apply equally to all* (see, the Constitutional Court, Decision no. *U 16/08* of 28 March 2009, the *Official Gazette of BiH* no. 50/09, item 39).

27. In that context, the Constitutional Court recalls that it has identified the aforementioned problem of application of a legal norm regulating the issue of substitution of imprisonment sentence by a fine even earlier in dealing with the appeal no. *AP 2705/12* stating, *inter alia*, „*…the Constitutional Court deems it necessary to indicate […] that the provisions of Article 43(a) of the Criminal Code of FBiH prescribe the possibility, but only if the convicted person filed a request […]. It follows from the aforesaid that the cited provisions do not prescribe when, on which account or in which cases the court shall comply with such a request by the convicted person and in which cases it shall not, which could conceivably lead to different treatment of convicted persons and, thereby, to violation of the rule of law principle* (see the Constitutional Court, Decision of Admissibility no. AP 2705/12 of 13 November 2012, item 16, available at webpage www.ustavnisud.ba). The abovementioned clearly indicates that the Constitutional Court has previously pointed at

the imprecision of the provision regulating this issue, on account of which such provision is subject to various interpretations.

28. The Constitutional Court indicates the position taken by the Supreme Court of the Federation of Bosnia and Herzegovina („the Supreme Court of FBiH") relative to the application of Article 43(a) of the Criminal Code of FBiH in *The Legal Understanding of the Supreme Court of FBiH* published in the Case Law Bulletin, January-December 2011. Namely, as to the application of Article 43(a) of the Criminal Code of FBiH, it follows from *The Legal Understanding of the Supreme Court of FBiH*: 1. *For deciding about substitution of* a *sentence not exceeding one year of imprisonment, upon request of the convicted person by a fine, the subject-matter and territorial jurisdiction has the first instance court which adopted the final judgment imposing the imprisonment sentence. 2. Within the court having subject-matter and territorial jurisdiction, functionally responsible for handling of such requests is informal panel (Article 23(6) of the Criminal Procedure Code of FBiH, i.e. single judge if the offence is to be allocated to a single judge. 3. The court issues its decision upon request after a hearing where the parties and defense counsel have been afforded adversarial deliberation of such request or circumstances important for deciding upon the request. 4. If it grants the request by the convicted person, the court will issue a judgment substituting the sentence not exceeding one year of imprisonment imposed by the final judgment by a fine, but if it finds the request ill-founded it will issue a ruling on its dismissal. 5. In replacing imprisonment sentence by a fine one day in prison shall be equaled to a daily amount of the 100 KM fine or to a daily amount of fine, if the fine is set in a specific amount exceeding 100 KM per day. 6. In deciding upon replacement of imprisonment sentence by a fine the court will take into account all relevant circumstances relative to the personality of the convict and the criminal offence committed as well as the purpose of punishment and of execution of imprisonment sentence*. Furthermore, from the aspect of application of regulations applicable in the Republika Srpska, the same legal issue has been raised by the appeal no. AP 4536/10 (in which the ordinary courts originally dismissed the appellant's request for substitution of imprisonment sentence by a fine in that case and then, in the same proceedings, they issued the decision granting that request). In addition, the same legal issue from the aspect of application of the Criminal Code of Bosnia and Herzegovina has been raised by application no. AP 4533/12 in which the Court of BiH finally dismissed the appellant's request for substitution of imprisonment sentence by a fine in the case concerned. On the other hand, the Constitutional Court notes that the position of the Court of BiH relative to the application of this mechanism was almost identical to the case law of the Entities' courts, but the mentioned court had latterly been deviating from this case law. Namely, the appellate panel of the Court of BiH stated in the reasoning of its ruling no. S 1 3 K 00328 12 Kž 2 of 22 August 2012 (quashing the court's

ruling dismissing the convict's request for substitution of imprisonment sentence by a fine and referring the case back for retrial), which the appellant had submitted as evidence in support of his claim that the Court of BiH understood the issue of application of this mechanism differently from the regular courts in the present case, stating, *inter alia*, *Having analyzed the foregoing provision, this Panel evaluates, the application of the contested provision is not optional as interpreted by the challenged ruling, i.e. its application cannot only depend upon the court's evaluation because that would mean subsequent evaluation of justification of replacement of the imposed up to one year imprisonment sentence by a fine, as was objected in well-founded manner by the appeal in question. If the legislator intended to leave a possibility for the court to (re)evaluate the nature and severity of the offence in application of the mechanism of substitution of imprisonment sentence by a fine, the proportionality of such imposed fine to that offence and the possibility to achieve the purpose of punishment, then the legislator would have also envisaged for that purpose a special kind of proceedings*. The Constitutional Court notes that the appellate panel of the Court of BiH compared this mechanism in the reasoning of the Ruling no. S 1 2 K K 006662 12 Kž of 29 December 2012 with the mechanism of substitution of fine by imprisonment sentence, stating in that context *If one has in mind the aforementioned purpose of this provision, then it may be concluded with good reason that the legislator treats it similarly to the mechanism of substitution of unpaid fine by imprisonment sentence under Article 46 of the Criminal Code of BiH, the difference being that the legislator conditioned here the substitution of imprisonment sentence by a fine by the convicted person's request, i.e. left it to his personal choice. Therefore, if without any additional and specific requirements the fine as less severe, without trial and main hearing, may be turned into imprisonment as more severe sentence for the convicted person, why would it be necessary to put additional requirements in a reversed case, where a more severe sentence, i.e. imprisonment sentence is to be turned into a less severe sentence of fine, in particular those relating to reevaluation of the severity and nature of the criminal offence or severity of the imposed sentence*.

29. All the aforementioned indicates that in the territory of Bosnia and Herzegovina there are different approaches to the application and interpretation of one legal norm which entails the issue of violations of the principle of legal certainty as the first criterion of the rule of law, *i.e.* the issue of violations of fundamental constitutional rights and that very special circumstance itself additionally reinforces the position of the Constitutional Court that in the present case the guarantees of Article 6(1) of the European Convention are to be afforded.

30. As the Constitutional Court has already examined the admissibility of the appeal in question in relation to Article 16(1) of the Rules of the Constitutional Court, the

Constitutional Court will proceed to examine the admissibility of the appeal in respect of Article 16(2) and (4) of the Rules of the Constitutional Court.

31. Pursuant to Article 16(2) of the Rules of Constitutional Court, the Court shall reject an appeal as manifestly (*prima facie*) ill-founded when it establishes that the request of the party to the proceedings is not justified or when the presented facts do not in any way justify the allegation of a violation of the constitutional rights and/or when the Constitutional Court establishes that the party to the proceedings is not a „victim" of a violation of the constitutional rights, so that the examination of the merits of the appeal is superfluous.

32. Finally, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court because it is not manifestly (*prima facie*) ill-founded and there are no other formal reasons on account of which the appeal would be inadmissible.

VII. Merits

33. The appellant holds that the challenged rulings are in violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, his right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention as well as his right not to be tried or punished twice in the same case under Article 4 of Protocol No. 7 to the European Convention, thereby indicating at the same time the violation of the principle of legal certainty under Article I(2) of the Constitution of Bosnia and Herzegovina.

Right to a fair trial

34. Article II(3)(e) of the Constitution of Bosnia and Herzegovina, in the relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

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

35. Article 6(1) of the European Convention, in the relevant part, reads:

(1) In 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 and independent and impartial tribunal established by law. […]

36. The appellant's allegations of violation of the right to a fair trial are based on the claim that the ordinary courts, deciding upon the request filed for substitution of imprisonment sentence by a fine, have arbitrarily applied the provisions of the substantive law (Article 43(a) of the Criminal Code of FBiH) and, as a result, his request has been dismissed as ill-founded. In so doing, the ordinary courts have reassessed the kind and severity of the criminal offence, the danger it presents to society, *which turned the proceedings into a retrial*.

37. The Constitutional Court notes that the appeal at hand raises the issue of arbitrary application and interpretation of the substantive law by ordinary courts. In that regard the Constitutional Court recalls that, pursuant to the case law of the European Court and the Constitutional Court, it is not these Courts' task to review ordinary court's findings of facts and application of the substantive law (see European Court of Human Rights, *Pronina v. Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01). Namely, the Constitutional Court cannot generally substitute its own appraisal of the facts or evidence for that of the regular courts but it is the regular courts' task to appraise the presented facts and evidence (see European Court of Human Rights, *Thomas vs. United Kingdom*, Judgment of 10 May 2005, Application no. 19354/02). It is the Constitutional Court's task to ascertain whether the constitutional rights (fair trial, access to court, effective remedies, *etc*.) were violated or disregarded and whether the application of a law was obviously arbitrary or discriminatory. However, the relevant circumstances of the present case indicate the conclusion that it is necessary for the Constitutional Court to analyze the application of the substantive law by the ordinary courts, as it is of crucial importance for the respect of the applicant's right to a fair trial.

38. The Constitutional Court notes that the ordinary courts, deciding upon the filed request for substitution of imprisonment sentence by a fine, have dismissed his request reevaluating the circumstances under which the offence had been committed, the personality of the convict, the purpose of punishment *etc*., in fact, everything that the Municipal Court had considered when pronouncing the imprisonment sentence in the preceding proceedings.

39. Within that context, the Constitutional Court notes that the relevant provisions of the substantive law (the provisions of Articles 43(a) of the Criminal Code of FBiH, 42(a) of the Criminal Code of BiH, 33(2) of the Criminal Code of RS and 43(a) of the Criminal Code of BD), relating to the mechanism of substitution of imprisonment sentence by a fine, have almost identical content and, in the relevant part, read as follows: *that a sentence not exceeding one year of imprisonment, upon request of the convicted person, may be substituted by a fine [...]* and, according to the linguistic interpretation, it may

really be concluded that the application of the foregoing provisions is optional, *i.e*. that their application depends upon the evaluation by the court. The ambiguity of that provision actually prompted the Supreme Court of FBiH to resolve the concerns relative to the application of Article 43(a) of the Criminal Code of FBiH in *The Legal Understanding of the Supreme Court*, concluding that i*n deciding upon replacement of imprisonment sentence by a fine the court will take into account all relevant circumstances relative to the personality of the convict and the criminal offence committed as well as the purpose of punishment and of execution of imprisonment sentence*, just as it was done by the ordinary courts in the present case. However, the Constitutional Court notes that, on the other hand, the same linguistic ambiguity relative to the application of Article 42a.(1) of the Criminal Code of BiH has been overcome by the Court of BiH by the conclusion that *it follows from the nature and purpose of the provision itself (removal of harmful consequences of short-term imprisonment sentences and relieving prison facilities – which is one of the recommendations of the European Commission) that this is the kind of provision whose application is not subject to subsequent justification of substitution of a sentence not exceeding one year of imprisonment by a fine* (the quote from the reasoning of the ruling by the Court of BiH no. S 1 2 K 006662 12 Kž of 29 February 2012). Thus, a completely opposite position follows now from the aforesaid, compared to the position taken by the other courts and, finally, by the Supreme Court of FBiH relative to the application of Article 43(a) of the Criminal Code of FBiH, which all clearly indicates that an almost identical legal provision is being interpreted by courts in a completely different manner.

40. The Constitutional Court also notes that the relevant provisions regulating this mechanism do not prescribe when, on what account or in which cases the court shall comply with such a request by the convicted person and in which cases it shall not, as pointed out by the Constitutional Court in its decision no. *AP 2705/12* (op. cit. *AP 2705/12*, paragraph 16), wherein it presented its observations relative to the imprecision of Article 43(a) of the Criminal Code of FBiH. In addition to the fact indicating the imprecision of that legal norm, the Constitutional Court further notes, and considers it very important, that the convicted person's request shall be decided by the same court which has already decided about the criminal liability of the accused. Thus, the subject-matter and territorial jurisdiction has the court which conducted the criminal proceedings and which, in imposing of the imprisonment sentence, took into account all the relevant circumstances relative to the individualization and purpose of punishment, *i.e.* all that the same court reevaluates (as in the appeal in question) in the proceedings upon a request for substitution of imprisonment sentence by a fine, which is also very questionable from the aspect of legal certainty. Since the request for use of this mechanism is to be deliberated by the court that imposed the criminal sanction and concluded that only imprisonment sentence

could achieve the purpose of punishment, a question arises as to what is the circumstance, which is not specified by the legal norm, that will have an effect on the same court, so that it, in considering the convicted person's request which meets the legal requirements for using this mechanism, will change its opinion and possibly grant the request. In that context, the Constitutional Court recalls the statement of the Municipal Court in its response to the appeal, namely, *that such replacement of imprisonment sentence by a fine was only anticipated as a possibility, which indicated that the particular case involved a discretionary right of the court in respect of the application of the aforesaid legal provision and that substitution of imprisonment sentence by a fine would only be justified in cases where the court, after evaluating all the circumstances, concluded that such fine might achieve the purpose of punishment and the purpose of execution of imprisonment sentence*.

41. The Constitutional Court holds that the aforesaid, given the imprecise nature of the legal norm, opens the possibility for arbitrariness in applying this mechanism in practice if it is accepted that the same court that imposed the criminal sanction is to reestablish all the relevant circumstances important for the determination of punishment in the proceedings of deciding about the request for substitution of imprisonment sentence by a fine, which it has already done in the previous proceedings. If such a request was granted, this would cast doubt upon the purpose of the criminal sanction imposed when the court was deciding about the criminal liability of the convicted person. If such interpretation should be accepted in the circumstances *where the court may but does not have to grant the request for substitution of imprisonment sentence by a fine*, i.e. *that the application of the aforesaid legal norm involves a discretionary right of the court*, it remains unclear which new circumstances that the court did not take into account when imposing the criminal sanction may affect the court to grant the request, if such circumstances are not specified by the legal provision. The Constitutional Court, therefore, holds that the position of the Municipal Court presented in its response to the appeal, pursuant to which the phrase „may be" in the challenged provision actually means a repeated review of the purpose of the criminal sanction in the context of all the relevant circumstances, necessarily entails the question whether the legislator should have also prescribed the conditions and circumstances under which the requests by the convicted persons would be granted, (but it has not), or whether the legislator should have also prescribed a special procedure for such proceedings, (and it has not either).

42. The Constitutional Court notes that the appellant indicates that the challenged rulings have violated the principle of the rule of law as guaranteed under Article I(2) of the Constitution of Bosnia and Herzegovina. The Constitutional Court recalls that the first criterion of the rule of law is the principle of legal certainty which, *inter alia*, means that the established mechanisms and institutions shall act in accordance with laws

which are general, specific, clear, constant and which must apply equally to all, whereas the aforementioned norms, in order to ensure the constitutional guarantee of the rule of law and remove any conceivable discrimination, must be more precise or contain more objective criteria for granting or dismissing the requests. Also, this principle involves the prohibition of arbitrariness in deciding and acting by all the authorities which have to exclusively act in accordance with law and within the scope of powers that have been granted to them by law as well as the existence of institutional guarantees in that sense (op. cit. *U 16/08*, item 39). Therefore, the principle of the rule of law requires the laws to be sufficiently precise and clear in order to avoid arbitrariness in deciding.

43. In this context the Constitutional Court holds, in support of its own case law in the cases raising the similar legal issues (imprecise legal norms), *that public authorities, i.e. the authorities that conduct proceedings, must beyond any doubt take into account the consistent application of positive regulations. However, in case of any dilemmas relative to the application, they ought to interpret the law in favor of the party in question* (*mutatis mutandis* the Constitutional Court, Decision on Admissibility and Merits no. *AP 4101/09* of 30 March 2012, paragraph 54, available at www.ustavnisud.ba).

44. Therefore, since the relevant provisions regulating the issue of substitution of imprisonment sentence by a fine, because of their imprecision, leave the possibility of different interpretation by ordinary courts, the Constitutional Court holds that such provisions have not been formulated in the manner that would satisfy the principle of the rule of law, *i.e.* the principle of legal certainty as its basic element. Therefore, the application of the challenged provisions in practice leads to legal uncertainty of the convicted persons who meet the prescribed conditions in exercising of that right provided by law. In view of the above and given the circumstance that the referenced provision exists in almost identical texts both in the Criminal Code of Bosnia and Herzegovina and criminal codes of the Entities as well as in the Criminal Code of the Brčko District of Bosnia and Herzegovina, the Constitutional Court deems it necessary to communicate this decision to the competent authorities at all levels of government with a view to their taking the activities within their competencies in order to make the challenged provisions regulating the issue of substitution of imprisonment sentence by a fine more precise, primarily in linguistic terms, and to remove the different interpretations by the competent courts in their application, as stated in the reasoning of this decision.

45. The Constitutional Court concludes that the challenged rulings of the ordinary courts have violated the appellant's right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention in relation to the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina.

Other allegations

46. The Constitutional Court holds that, given the conclusions in respect of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, it is not necessary to consider separately the remaining allegations indicating the violations of his right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention as well as his right not to be tried or punished twice in the same case under Article 4 of Protocol No. 7 to the European Convention.

VIII. Conclusion

47. The Constitutional Court concludes that the challenged rulings of the ordinary courts have violated the appellant's right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention in relation to the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina because the ordinary courts, in the situation where the legal provision relating to the substitution of imprisonment sentence by a fine is ambiguous and results in different interpretations and application, *did not interpret and apply this legal provision in favor of the party in question*.

48. The Decision on Interim Measure no. *AP 2809/12* of 28 February 2013 shall cease to be effective as of the date on which the present Decision has been passed.

49. Having regard to Article 61(1) and (2), Article 64(1) and Article 77(6) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

50. Pursuant to Article 41 of the Rules of the Constitutional Court a Separate Dissenting Opinion of Vice-President Miodrag Simović joined by Judge Tudor Pantiru has been annexed to this decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of the Vice-President Miodrag Simović Joined by Judge Tudor Pantiru

I regret that I am not in a position to share the opinion of the majority of the Court in the present case. The basic reason for my dissent relates to the issue of admissibility of the appeal in terms of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(4) item (9) of the Rules of the Constitutional Court.

The appellant complains about the rulings of the Municipal Court in Široki Brijeg and the Cantonal Court in Široki Brijeg, dismissing his request to have his sentence of imprisonment substituted with a fine. Therefore, the Constitutional Court should have answered the question whether the guarantees under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") are applicable to the particular case.

The right to a fair trial under Article 6(1) of the European Convention, in the first sentence, reads: „In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." However, in the present case, the appellant lodged his appeal against the ordinary courts' rulings in which the issue of existence of legal presumptions allowing the substitution of a sentence of imprisonment with a fine was considered rather than the „well-foundedness of any criminal charge" against the appellant.

Therefore, given the fact that the relevant case does not concern the decisions passed in the proceedings determining a criminal charge against the appellant, it follows that Article 6(1) of the European Convention is not applicable. As the Constitution of Bosnia and Herzegovina does not provide the broader protection than Article 6 of the European Convention, it follows that the allegations in the appeal relating to the violation of Article II(3)(e) of the Constitution of Bosnia and Herzegovina or Article 6(1) of the European Convention are *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

The Constitutional Court should have also concluded that the appellant's rights under Article II(3)(b) and (h) of the Constitution of Bosnia and Herzegovina or Articles 3 and 10 of the European Convention, as well as his rights under Article 4 of the Protocol No. 7 to the European Convention, were not decided in the relevant proceeding. Therefore, it follows that the appeal is *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina and the European Convention.

In view of the above and taking into account the provisions of Article 16(4) item (9) of the Rules of the Constitutional Court that the appeal will be rejected as inadmissible if it is *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina, the Constitutional Court should have decided to reject as inadmissible the M.T.'s appeal lodged against the Ruling of the Cantonal Court in Široki Brijeg no. 64 0 K 016615 12 Kž 2 of 12 June 2012 and the Ruling of the Municipal Court in Široki Brijeg no. 64 0 K 016615 11 K 2 of 25 April 2012, for being *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

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Case No. AP 1885/13

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Živko Budimir against the Decision of the Court of Bosnia and Herzegovina no. S1 2 K 012709 13 Kv of 3 May 2013 and the Decision of the Court of BiH no. S1 2 K 012709 13 Krn3 of 27 April 2013

Decision of 24 May 2013

CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(4)(14), Article 59(2)(2), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina,* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić,

Ms. Constance Grewe,

Mr. Mirsad Ćeman,

Ms. Margarita Tsatsa-Nikolovska,

Mr. Zlatko M. Knežević

Having deliberated on the appeal of **Mr. Živko Budimir** in case no. **AP-1885/13**, at its session held on 24 May 2013 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. Živko Budimir is hereby granted.

A violation of Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Decisions of the Court of Bosnia and Herzegovina no. S1 2 K 012709 13 Kv of 3 May 2013 and no. S1 2 K 012709 13 Krn3 of 27 April 2013 are quashed.

The case shall be remitted to the Court of Bosnia and Herzegovina, which is obliged take a new decision forthwith, in accordance with Article

II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within eight days as from the date of delivery of this Decision, about the measures taken in order to enforce this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal of Mr. Živko Budimir lodged against the Decisions of the Court of Bosnia and Herzegovina no. S1 2 K 012709 13 Kv of 3 May 2013 and no. S1 2 K 012709 13 Krn3 of 27 April 2013 with regard to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedom is rejected as inadmissible for being premature.

Reasoning

I. Introduction

1. On 13 May 2013, Mr. Živko Budimir („the appellant") from Mostar, represented by Ragib Hadžić and Almin Dautbegović, layers practicing in Zenica, and Branka Praljak, a lawyer practicing in Novi Travnik, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court"), against the Decision of the Court of Bosnia and Herzegovina („the Court of BiH") no. S1 2 K 012709 13 Kv of 3 May 2013 and the Decision of the Court of BiH no. S1 2 K 012709 13 Krn3 of 27 April 2013. This appeal was registered under no. AP 1885/13. On the same day, Nedim Ademović, a lawyer practicing in Sarajevo, lodged the second appeal for the appellant in which he also challenged the same decisions of the Court of BiH. This appeal was registered under no. AP 1886/13. The appellant made a request in both appeals for the adoption of an interim measure, by which the Constitutional Court would order that the appellant be released forthwith.

2. Given that both appeals refer to the same factual and legal grounds, the Constitutional Court adopted a decision, in accordance with Article 31(1) of the Rules of the Constitutional Court, merging the mentioned appeals, regarding which it would conduct a single proceeding and adopt a single decision under no. AP 1885/13.

II. Procedure before the Constitutional Court

3. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Court of BiH and the Prosecutor's Office of Bosnia and Herzegovina („the Prosecutor's Office of BiH"), as parties to the proceeding, were requested on 14 May 2013 to submit their respective replies to the appeal. The Court of BiH was also requested to submit along with the reply the documentation, on the basis of which a decision was made as to the well-foundedness of the request for the appellant's detention.

4. The Court of BiH submitted its reply and requested documentation on 20 May 2013, and the Prosecutor's Office of BiH did so on 17 May 2013.

5. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 21 May 2013.

III. Facts of the Case

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

7. The appellant is the President of the Federation of Bosnia and Herzegovina („the Federation of BiH"). The Prosecutor's Office of BiH, by the Motion no. T20 0 KT 000 6564 13 of 25 April 2013, requested from the Court of BiH to order the detention against the appellant and four more suspects, Petar Barišić, Saud Kulosman, Ivan Jurčević and Hidajet Halilović, for the existence of a reasonable suspicion that they had committed criminal offenses, specified in the Motion of the Prosecutor's Office of BiH. By the Decision no. S1 2 K 012709 13 Krn3 of 27 April 2013, the Court of BiH declared itself as having a subject-matter jurisdiction to proceed in the particular matter, and, by the same decision, ordered the detention against all the suspects on the grounds prescribed by Article 132(1)(b) of the Criminal Procedure Code of BiH, and against the appellant and one more suspect also on the grounds prescribed by Article 132(1)(a) of the Criminal Procedure Code of BiH. The mentioned decision determined that the detention may last one month at the longest from the day on which the suspects have been detained, that is up until 26 May 2013. In the reasoning of this ruling, the Court of BiH stated in relation to the appellant that the Prosecutor's Office requested that the detention be ordered against the appellant for the existence of a reasonable suspicion that he had committed a criminal offense of organized crime referred to in Article 250(3) of the Criminal Code of BiH, in conjunction with the criminal offense of organized crime referred to in Article 342(3) of the Criminal Code of FBiH, in conjunction with the criminal offense of the abuse of office or authority referred to in Article 383 of the Criminal Code of FBiH and the criminal offense of accepting gifts

or other forms of benefits referred to in Article 380(1) of the Criminal Code of FBiH, all in conjunction with Article 7(2)(a) of the Law on the Court of BiH. The Court of BiH stated that the Motion of the Prosecutor's Office of BiH stated that the appellant is suspected of committing the mentioned offenses because he „by conscientiously violating the Law on Pardon of FBiH and the Criminal Code of FBiH, acted contrary to Article 2 of the Law on Pardon and failed to engage in compulsory consultations with the Vice-Presidents of FBiH Svetozar Pudarić and Mirsad Kebo, which, according to the mentioned provision, he was obliged to do, and without such a consultation he was not able to make such a decision". Also, it was mentioned in the proposal that the appellant also „by violating Article 6 of the same law, adopted decisions on several occasions pardoning the convicted persons, thereby substituting the sentences of imprisonment by suspended sentences [...]".

8. The Court of BiH stated that it had previously considered the issue of the subject-matter jurisdiction of that court to proceed in the present case, taking into account, among other things, the prevailing case-law of that court and specific circumstances „that might concern some relevant elements of a criminal offense". In that respect, the Court of BiH stated that conditions prescribed by Article 7(2) of the Law on the Court of BiH were met, particularly emphasizing that „the position of the accused as official persons within the state authority structure at the time of committing criminal offenses was one of the crucial factors in establishing the jurisdiction of the Court of BiH pursuant to Article 13(2)(b) of the Law on the Court of BiH". While considering this issue, the Court stated, among other things, that the appellant discharged the office of the President of the Federation of BiH, which means that he was „the top of executive authority", which obliged him „not only to the lawful conduct but also to insisting on the control of the lawful functioning of all bodies and organizations at the Entity's level". The Court of BiH „arrived in this manner at the question on crucial facts: whether the actions of perpetration, which the suspect [appellant] has been charged with, have generated concrete consequences, which, on account of their scope and significance, should contribute to the establishment the jurisdiction of the Court of BiH?" As an answer to this question, the Court of BiH concluded that on the basis of the evidence of the Prosecutor's Office of BiH „it follows indisputably that [the appellant] pardoned within a relatively short period of time around 142 persons in a procedure which is not entirely in accordance with the Law on Pardon (without consultations with the two Vice-Presidents), which is why one Vice-President (Mirsad Kebo) intervened, and even instituted a procedure for the review of the constitutionality of pardons". Further, the Court of BiH reasoned that „bearing in mind the fact that in the Republika Srpska and at the state level of BiH during the same period of time a pardon was granted in only one case by each", which is the reason why „there exists a reasonable suspicion that [the appellant], by violating law and failing to discharge his authorities in a lawful manner, demonstrated

the highest level of irresponsibility, which generated detrimental consequences in the public in terms of undermining justice and discrediting the public authority". Also, the Court of BiH pointed out that that took place „at the stage of the process of the state of BiH joining the European Union when the state is expected to show dedication to the rule of law and firm resolution to reform the judiciary system and to bring it in line with the highest European standards", and that „pardons covered a broad circle of the accused of varied and serious criminal offenses, with very varied forms of pardon [...]". However, as further stated, „the reasonable suspicion from this stage of the proceeding must be strengthened by the evidence of the prosecutor, which are to have the standard of proof beyond reasonable doubt and which will have to be presented at the main hearing", which is the moment when the Prosecutor's Office of BiH will have „a legal obligation to offer to the court the evidence relating to the jurisdiction of the Court derived under Article 7(2) of the Law on the Court of BiH".

9. The Court of BiH next dismissed the objection of the appellant's defense to not being provided with evidence along with the proposal for ordering detention, and that in that way the appellant's right to defense was violated as referred to in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"). In that regard, the Court of BiH stated that the prosecutor has the obligation to submit evidence to the defense, but that, pursuant to Article 47 of the Criminal Procedure Code of BiH, that right may be denied „if it concerns evidence which disclosure might threaten the objective of the investigation". Also, the Court of BiH emphasized that these pieces of evidence were accessible to the court at the time of considering the proposal, „regarding which the Court, in its decision, informed the defense of all the evidence of relevance for the assessment of the lawfulness of the detention".

10. Considering next the issue of the existence of a reasonable suspicion as a condition for ordering the detention, the Court of BiH, among other things, stated once again that the Motion of the Prosecutor's Office is well-founded with respect to the existence of a reasonable suspicion in relation to all the suspects. As the Court of BiH inferred, that arises from evidence, which the Prosecutor's Office of BiH submitted along with the motion, and particularly from the minutes on the hearing of the witnesses Mevludin Peljto, Ramiz Brajlović, Mirsad Kebo and Svetozar Pudarić, and from the minutes on the examination of the suspects Armin Kulovac and Ivan Jurčević, and from the transcript of the conversation referred to in the Report of Compliance with the Orders of the Cantonal Court in Sarajevo („the Report of Compliance"). By analyzing the mentioned evidence, the Court of BiH concluded that „there are sufficient evidence indicating that there is a reasonable suspicion that [the appellant] perpetrated the criminal offenses he has been charged with". Namely, the Court of BiH stated that the suspect Armin Kulovac stated in his statement „that he had

tried to obtain a pardon for his brother Admir [...], he had tried to reach [the appellant], for whom he heard, as he stated, that in some cases he had helped people to obtain pardons". Also, the Court of BiH stated that the same suspect stated that „he learnt during a conversation with one of the pardoned persons, Elvis Hodžić, that he had paid for his pardon BAM 48,000.00, and addressed [the appellant] with a petition, which text prepared beforehand he had received from Petar Barišić, whom he contacted directly". Next, the Court of BiH stated that „his allegations were confirmed by the witness Ramiz Brajlović who described in detail the manner in which the suspect Kulovac endeavored to obtain the pardon for his brother Admir, and that he learnt that it would cost him a total of BAM 50,000, that the money goes to [the appellant's] team and [the appellant] himself". The Court of BiH also reasoned that the same witness stated that „the Advisor Barišić said that the pardon for the person Adi Karić from Sarajevo was in the works at the same time", and that this witness's statement was confirmed also by the witness Mevludin Peljto „who stated that Armin Kulovac went together with Brajlović to the Government building in Mostar to see [the appellant] in relation to the pardon for his brother Admir".

11. Next, the Court of BiH arrived at a conclusion that there exists a reasonable suspicion that the appellant had perpetrated the criminal offenses he has been charged with also on the basis of the statement of the witness Mirsad Kebo, who discharges the office of the Vice-President of the Federation of BiH. This witness stated that the appellant „drew heavily on the constitutional and legal authorities with regard to the pardons for persons convicted before the courts in FBiH". Also, this witness stated that „drastic decisions on pardons drew his attention, because pardons were granted to the persons convicted of the most severe crimes such as murders, robberies, rapes, while, at the same time, the number of pardons was much higher than during the tenure of the previous presidents". The witness Mirsad Kebo also stated that the appellant „in accordance with the provisions of the Constitution and the Law on Pardons, was obliged to engage in compulsory consultations with the Vice-Presidents of the FBiH, however, he had never consulted them, not even when the witness addressed him with a written warning notice". Mr. Svetozar Pudarić who also discharges the office of the Vice-President of the Federation of BiH also testified about the same circumstances". As the Court of BiH stated, this witness stated that „during the tenure of [the appellant] he received cases on pardons already set with the proposals of the Commission of Pardons addressed to [the appellant]. He used to note his remarks on each case in the form of an official record, and he did so because [the appellant] had never either contacted him or asked him for opinion, which he talked about on a number of occasions with the other Vice-President Kebo".

12. Also, the Court of BiH stated that the conclusion that there exists a reasonable suspicion as a condition for the appellant's detention, in addition to the mentioned

statements of witnesses, also considered the statement of the suspect Ivan Jurčević, who stated „that on 29 March 2013 he had spoken with one of the suspects, Kulosman, and that he had told him that Adi was taken care of, and that [the appellant] should have finished that for Adi". Also, the Court of BiH stated that „it follows from evidence that the search of [the appellant's] premises yielded a black handbag, which was his ownership, containing BAM 5,900".

13. As to the special reasons for ordering the detention for the appellant, the Court of BiH stated that it took into consideration some facts which it holds, at this stage of the investigation, to be crucial for considering the detention grounds referred to in Article 132(1)(a) of the Criminal Procedure Code of BiH – risk of flight. In that respect, the Court of BiH reasoned that the appellant has dual citizenship, that he is a holder of several military decorations of the Republic of Croatia, and that he is „politically active in the parties which were, or are a part of the current governmental authority in the Republic of Croatia". These facts, as the Court of BiH reasoned, „suggest a conclusion that he has, or might have, a certain circle of friends or acquaintances who would be prepared to give him refuge or material support for his stay in Croatia for the purpose of avoiding criminal prosecution in BiH", and it is a well-known fact that the Republic of Croatia guarantees its citizens that they will not be extradited to other states. The mentioned facts, as the Court of BiH reasoned, „constitute an objective risk of flight". Also, the Court of BiH stated that these facts and circumstances may „realistically generate in the appellant a motive to flee", thus the detention is justified on these grounds.

14. Further, as to the detention grounds referred to in Article 132(1)(b) of the Criminal Procedure Code of BiH – hindering the criminal procedure, the Court of BiH stated that it pointed out first and foremost that „the circumstances justifying the detention on these grounds must be obvious and specific to a sufficient degree". Also, the Court of BiH stated that it is necessary for two conditions to be met in order to determine the detention on these grounds, as follows: that there is „'a justified fear' that the suspects might destroy, conceal, alter or falsify evidence or clues relevant for the criminal procedure", and that there are „'particular circumstances' indicating that the suspects might hinder the criminal procedure by influencing witnesses, accomplices or concealers". The Court of BiH stated that it is necessary for both of these conditions to become concrete through evidence or „indications of acceptable degree of probability on which basis the court may draw a conclusion on the existence of 'a justified fear' or 'particular circumstances'". While analyzing the existence of these conditions with respect to the appellant, the Court of BiH concluded that the condition for ordering the detention on these grounds is also justified. In the reasoning of that position, the Court of BiH stated that, „first and foremost, it took into account the number of pardons

(147) which are justifiably under suspicion of having entered the scope of actions of the perpetration of criminal offenses" which, among others, the appellant is also charged with. Also, the Court of BiH indicated that it will be necessary to hear as witnesses a large number of persons, and that it accepts as well-founded the allegations of the Prosecutor's Office of BiH „that due to the nature of criminal offenses all parties to these actions have the interest in engaging in mutual arrangements for the purpose of evading or diminishing their own responsibility and to influence witnesses, accomplices or concealers". Also, the Court of BiH stated that it assessed also the fact that „the investigation against the suspects is just at the beginning, as well as the fact that the Prosecutor's Office has yet to face the extensive process of securing evidence, that is of hearing witnesses and presenting other evidence-related actions". The Court of BiH dismissed the appellant's objection that there are no concrete circumstances and reasons for imposing the measure of detention on that ground, by giving reasons that „the existence of the risk of collusion is based on the assessment of specific circumstances, which might indicate that the influencing of witnesses, participants and the investigation might occur altogether and that „the demonstrated intention for the suspects to influence the collection of evidence would thus render […] the measure of detention entirely pointless and unnecessary". Furthermore, the Court of BiH concluded that, for this reason, the measure of detention „can exist even if there are but indications that the suspect might make the collection of evidence more difficult" and that „such indications do indeed exist in the case at hand".

15. The Court of BiH dismissed the Motion of the Prosecutor's Office of BiH to order detention against the appellant and other suspects under Article 132(1)(d) of the Criminal Procedure Code of BiH– disturbance of the public order. Having referred to the standards of the European Court of Human Rights, the Court of BiH concluded that in the present case, such a Motion of the Prosecutor's Office did not „concretize and objectivize to a sufficient degree the extraordinary circumstances and the actual threat of disturbing the public order". Furthermore, the Court of BiH noted that it took into consideration the defense's motion for the application of milder measures ensuring the undisturbed conduct of criminal proceedings, but it concluded „for all the aforementioned reasons", that the purpose of security may be achieved only by imposing the measure of detention.

16. Having deliberated on the appeals lodged by the appellant, other suspects and the Prosecutor's Office of BiH against the first-instance decision, the Court of BiH, by its Decision no. S1 2 K 012709 13 Kv of 3 May 2013, dismissed the appeal of the appellant and other suspects, whereas it granted the appeal of the Prosecutor's Office of BiH, thus it modified the first-instance decision so as to impose the detention on the appellant and other suspects under Article 132(1)(d) of the Criminal Procedure Code of BiH as well. Having deliberated in the second-instance proceedings, the Court of BiH, first and foremost,

dismissed the appellant's complaints raised in the appeal in relation to the subject-matter jurisdiction of the Court of BiH in the present case, by giving the same reasons as those given in the reasoning of the first-instance decision. As to the complaint raised in the appeal in relation to the failure to submit evidence, on which a reasonable suspicion is based, to the appellant, the Court of BiH concluded that sufficient reasons were provided regarding that issue in the first-instance decision, it held, however, that a more extensive reasoning ought to be given „due to the importance of the presented complaints". In its reasoning, the Court of BiH noted *inter alia* that the situation referred to in Article 47(2) of the Criminal Procedure Code of BiH related to the prosecutor's obligation to submit to the preliminary proceedings judge „the evidence relevant for the assessment of the legality of the detention" as well as „for notifying the defense attorney". The Court of BiH noted that the Prosecutor's Office of BiH submitted evidence to the first-instance court insofar as the reasonable suspicion and special detention grounds were concerned and that the appellant and other suspects „were informed of it at the hearing". The Court of BiH also concluded that the Criminal Procedure Code of BiH was brought into line with the European Convention and „that at the stage of the investigation and detention the submission of evidence to the defense is not required, but only and exclusively the notification of accusations, which in this particular case was done" thereby „meeting the standard of 'notification of accusation'". The Court held nevertheless that it is necessary to stress that „it expects the Prosecutor's Office of BiH to submit the evidence to the defense in the coming period, which disclosure will not put at risk the objectives of the investigation".

17. As for the complaints raised in the appeal in relation to the existence of a reasonable suspicion, the Court of BiH concluded that the allegations stated in the appeal were irrelevant reading that the appellant had fully cooperated during the search of the premises, that on that occasion he had put all the required documentation at the disposal of the competent authorities without making any troubles whatsoever. In this regard, the Court of BiH noted that such a conduct was in fact the obligation of the appellant, as well as of any other citizen, for in the event of conducting himself otherwise „his actions would possibly amount to the elements of some other criminal offense". The Court of BiH also stated that the first-instance court had correctly established that there was a reasonable suspicion as to the appellant, and it reiterated the same reasons as those given in the first-instance decision. Besides, the Court of BiH pointed out in the reasoning of the second-instance decision that the evidence contained in the case-file „indicate that the execution of the criminal offense took place in a way that the suspects established a network of middlemen, who would contact the convicted persons or the members of their families, who have submitted the petitions for pardon" and that „the roles of individual members of the organized criminal group were clearly delineated with defined and assigned roles

in arranging the profit distribution, which is all clearly visible from the testimonies of the heard witnesses and from the transcripts of the intercepted telephone conversations". Also, the Court of BiH emphasized that „the reasonable suspicion arises" from the same evidence that „a large number of the cases of pardon with positive solution, in a relatively short period of time, which were signed by [the appellant] as the President of the Federation of BiH, is associated precisely with the giving and receiving of money in return for a positive solution of a petition for pardon". The Court of BiH stated that it followed from this evidence that the appellant „who was the decision-maker at the final instance, could be reached only through middlemen, or more precisely through [the suspects Petar Barišić, Saud Kulosman or Ivan Jurišić]".

18. Also, in the reasoning of the second-instance decision, the Court of BiH noted that the appellant did not dispute that „he received letters of urgency in relation to the petitions for pardon, but that the challenged decision did not prove the existence of the link between the money found with [the appellant] in the amount of BAM 5,900 and his conduct". However, the Court of BiH noted that „for this stage of the proceedings it suffices to have a lower level of a reasonable suspicion that [the appellant], within his powers to discharge these types of works, solicited and received a compensation in cash, which is indicated by the content of the intercepted telephone conversation between the suspect Saud Kulosman and Armin Kulovac 'that if he reaches [the appellant] personally, it will be much cheaper because a couple of people will be dropped out'." The Court of BiH noted that the content of the intercepted conversations „also points to the telephone communication between [the appellant] and Saud Kulosman, from which it follows that they obviously knew each other, and often arranged to have meetings together".

19. As to the special detention grounds, the Court of BiH concluded in the second-instance decision that the detention was correctly imposed on the appellant under Article 132(1)(a) and (b) of the Criminal Procedure Code of BiH emphasizing that „the mentioned suspects are high-ranking state officials with connections both within BiH and in the countries in the region, which indicates the existence of a reasonable fear" that they might become out of reach of the prosecution authorities of BiH. As to the existence of the risk of flight, the Court of BiH noted that „the court is aware" of the existence of the Agreement on Extradition between Bosnia and Herzegovina and the Republic of Croatia, but that the Agreement has not been ratified, and that in case of flight „the extradition procedure would be slow and with a questionable outcome, bearing in mind the hitherto practice of this Court in the same or similar cases". As to the detention grounds referred to in Article 132(1)(b) of the Criminal Procedure Code of BiH, the Court of BiH noted that „it concerns an extensive investigation that is at the very beginning, that it is necessary to hear a large number of witnesses bearing in mind the number of cases of pardon, which

are reasonably suspected to be included in the scope of the actions of the perpetration of criminal offenses that the suspects have been charged with". It noted in particular that the first-instance decision correctly pointed out that not all witnesses and suspects have been heard yet, „who certainly exist due to the large number of committed criminal actions", nor have all the material evidence been provided. As for the appellant's complaint that the detention grounds were not specified, the Court of BiH referred to the Decision of the Constitutional Court of BiH, no. AP 6/08 of 13 May 2008, stating that the following stance of the Constitutional Court of BiH follows from that decision: „the very existence of a possibility that the interference with the proceedings might occur" is sufficient, i.e. that „the detention ground may be based on the circumstances indicating that there is a serious risk that such a prohibited influence will occur". In the present case, the Court of BiH concluded that in the first-instance decision „the conclusion on the existence of fear is drawn on the basis of a set of facts and circumstances which altogether make up 'particular circumstances', on which basis it is reasonably concluded that the suspects were involved in illegitimate behavior." Therefore, as the Court of BiH concluded, it is not necessary „to prove a concrete influence on witnesses and accomplices exerted by the suspects", because „a reasonable fear ahs been established that the influence will happen", which is sufficient „for the court to get convinced" that the appellant and other suspects will interfere with the conduct of the criminal proceedings.

20. While deliberating on the appeal of the Prosecutor's Office of BiH, the Court of BiH concluded that the appeal was well-founded and that there were sufficient and justified reasons for the detention to be ordered against the appellant and other suspects under Article 132(1)(d) of the Criminal Procedure Code of BiH as well – disturbance of the public. In particular, the Court of BiH concluded that all the conditions prescribed cumulatively by this legal provision were met and that the allegations of the Prosecutor's Office of BiH were well-founded reading that „considering the manner of the execution of the offense, the personality and functions of the perpetrators as well as the consequence of the criminal offense, the present case concerns extraordinary circumstances". Also, the Court of BiH stated that the conduct of the suspects, in particular the conduct of the appellant „have made the work of the judiciary senseless and have created distrust of the public in the rule of law". The Court of BiH referred to the case-law of the European Court of Human Rights and the need that the existence of a real possibility of the disturbance of the public order be assessed on a case-by-case basis. In this connection, the Court of BiH noted that the appellant and other suspects „were charged with the abuse of very responsible positions, thereby jeopardizing the legal order and the international reputation of Bosnia and Herzegovina as a State, which is at the stage of the accession to the EU […]". Also, the Court of BiH stated that the actions of the suspects resulted in the pardons

of the persons convicted of the most severe criminal offenses, „which has itself caused uneasiness among the public", which is the reason why, in the opinion of the Court of BiH, „the release of the suspects would risk the creation of distrust in the judicial authorities of BiH, which constitutes a reasonable basis for the disturbance of the public order".

21. Also, the Court of BiH stated that the first-instance court had correctly concluded that „the desired purpose may be achieved, for the time being, only by a measure of detention and that any other milder measure in this case would be contrary to that purpose".

IV. Appeal

a) Allegations set forth in the Appeal no. AP 1885/13

22. The appellant alleged in this appeal that the challenged decisions violated his right under Article II(3)(d) and (e) of the Constitution of Bosnia and Herzegovina and Articles 5 and 6 of the European Convention. The appellant stated in the reasons for his allegations that Article 6 of the European Convention is applicable at this stage of the criminal proceedings against him and that the appeal is admissible on that ground too, and considering the case-law of the Constitutional Court of BiH, according to which the appeals in similar cases are rejected as inadmissible for being premature „in the majority of cases", he considers this to be an acceptable exception. Next, the appellant points out that the provision of Article 6(3) of the European Convention, which „may be relevant before the case is sent for trial if and insofar as there is a possibility for the trial to be seriously biased due to the initial failure to respect the provisions of this Article", has particular importance in the instant case. While specifying his allegations on the violation of the aforementioned rights, the appellant first stated that the Court of BiH does not have the subject-matter jurisdiction in the instant case to decide on the specific legal matter, rather the subject-matter jurisdiction rests with the courts in the Federation of BiH. The appellant presented detailed arguments in relation to this issue emphasizing in particular that the conditions provided for in Article 7(2)(a) or (b) of the Law on the Court of BiH have not been met, as well as that the procedure, according to which the Court of BiH would establish the subject-matter jurisdiction in the instant case was not complied with, which, as the appellant alleged, „has not been stipulated anywhere", but arises from the basic principles of the Criminal Procedure Code and from the right to a fair trial. With regard to this issue, the appellant holds that the principle of legal certainty has been violated as well.

23. Furthermore, as arguments for his allegations on the violations of the mentioned rights the appellant alleges the unlawfulness of the evidence of the Prosecutor's Office of BiH relating to the reasonable suspicion as a general ground for the detention. In this

connection, the appellant points out that the evidence offered by the Prosecutor's Office of BiH along with the motion for detention „in no way compromise [the appellant] except for the doctored and false evidence in the form of the allegations as to the inability to explain the origin of the amount of money BAM 5,000, as well as the certificate on the temporary confiscation of money, wherein it was noted that [the appellant] explained the origin of money, and the testimonies by two Vice-Presidents of the FBiH, who testified about a legal dilemma as to whether the consultation with them is obligatory and what its significance is, which, actually, is not a testimony about the facts referred to in the case". The appellant notes, *inter alia,* that the transcripts of the intercepted conversations were obtained upon the order of the Cantonal Court in Sarajevo, and that the appellant and the other suspects should have been informed that this investigative action had been carried out, and that „following that notification they had the possibility of challenging the lawfulness of the order and requesting the court protection and court control of this investigative action" and that the prosecutor failed to submit to the preliminary proceedings judge a written report on the actions undertaken, as required by Article 119(3) of the Criminal Procedure Code of BiH.

24. The appellant also stated that the prosecution evidence relating to the reasonable suspicion that he had committed the criminal offenses he was charged with were not communicated to him, but the defense „was only „notified" of the existence of such evidence", which was the reason why the appellant and his defense counsels were unable to „raise proper objections that the evidence was unlawful, and the court did not go into assessing and estimating the lawfulness thereof". The appellant holds that the „lack of procedure" in relation to the collection of evidence constitutes „a suspension of the suspects' rights to an effective legal instrument, such as the objection addressed to the preliminary proceedings judge", and he alleges that there is not a single effective legal remedy whatsoever available if „an unlawful piece of evidence is introduced in the formal court proceedings". Also, the appellant alleges that the prosecutor „consented to or failed to prevent the disclosure of the contents of the intercepted conversations", and that „the fragmented publication of the contents of the intercepted conversations forms a picture of the culpability of the suspects thereby exerting pressure on the court". The appellant further presents his allegations rather extensively stating that the criminal prosecution in his case is politically motivated as well as „by the endeavors to make it impossible for [the appellant] to discharge his duties, which the Court of BiH, unfortunately, went along with". The appellant holds that this may be observed too from the letter which was sent to his defense counsel, wherein the Court of BiH alleges that „it is against the exercise of the official duties falling within the scope of the office of the President of the FBiH, because the Prosecutor's Office of BiH is also against it". The appellant also alleges that his right to presumption of innocence has been violated as well in the instant case, as a

great number of articles were published in the media on the purported crimes which the appellant was purportedly involved in.

25. The appellant filed a request for an interim measure, by means of which the Constitutional Court would quash the Decision of the Court of BiH, no. S1 2 K 012709 13 Krn3 of 27 April 2013, and the Decision of the Court of BiH, no. S1 2 K 012709 13 Kv of 2 May 2013, and order the immediate release of the appellant.

b) Allegations set forth in the Appeal no. AP 1886/13

26. In this appeal the appellant presented the allegations concerning exclusively the rights referred to in Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention. The appellant particularly pointed to the widely-known facts as to the crisis of the government in the Federation of BiH and the political disagreement between the appellant, as the head of the executive authority of the Federation of BiH and the political parties making up the so-called „new parliamentary majority„. The appellant states that for all the reasons mentioned above one may consider that the institution of the criminal proceeding against him, his arrest and detention were aimed at removing him from the political scene and transferring his competences to other bodies, that is to the Vice-Presidents of the Federation of BiH, thereby lifting „a barrier for the ruling parties to make decisions in accordance with their political agendas". In this appeal the appellant also noted that this aim was served by the media campaign, which is „brutal", and he is of the opinion that such motives must be considered when deciding on the lawfulness of the appellant's arrest, since the European Court emphasizes that it is necessary to consider not only „formal reasons for detention, which are offered as a 'screen-reasoning', but also the real reasons, which may be hidden behind these formal reasons".

27. Furthermore, the appellant challenges the lawfulness of the deprivation of liberty and points out that Article 5(1)(c) of the European Convention has been violated. In this respect, the appellant primarily disputes in general the existence of „the reasonable suspicion" as the higher degree of suspicion, which represents the condition without which the detention cannot be ordered. The appellant points out that on the basis of first-instance decision one cannot conclude that evidence exist indicating the existence of „the reasonable suspicion" that the appellant had committed the criminal offense he was charged with, instead it is only „laconically concluded 'that there are sufficient evidence'", but the real evidence, essentially, do not exist. The appellant alleges that the conclusion on the existence of „the reasonable suspicion" in relation to the appellant was adopted on the basis of the statements of witnesses, one of whom, for instance, stated that „he tried to reach [the appellant]", that he „heard that a third person [...] allegedly paid for his amnesty BAM 48,000" without

stating to whom and when he allegedly did so, and that „he addressed his petition to [the appellant]". Also, the appellant states that the conclusion on the reasonable suspicion was drawn from the statements of the two Vice-Presidents who stated that the appellant signed the decisions on pardon without consulting them. Besides, the appellant states that it is true that the amount of BAM 5,900 was found with him, but there is no evidence whatsoever that that money has anything to do with the criminal offense he was charged with.

28. The appellant points out that none of this, or nothing else stated in the decisions as evidence of the existence of „the reasonable suspicion" constitutes the elements of the essence of the criminal offenses he was charged with. Namely, the appellant states that the Constitution of the Federation of BiH gives him the exclusive competence to decide on pardons. The Law on Pardon, as the appellant further alleges, prescribes in Article 2 that „A pardon shall be granted by the President after consultations with the Vice-Presidents of the FBiH„ but „'consultations' so prescribed are not the constitutive element of the constitutional and legal mechanism of pardon" and do not imply an obligation of „following the opinion of the person consulted". Therefore, as the appellant alleges, „the legal weight of 'consultations' does not have the absolutely determining importance for the adoption of a decision" on the detention. The appellant also alleges that such a provision of the Law on Pardon is in contravention of the Constitution of the Federation of BiH, because the „constitution maker clearly prescribed the situations in which the President, under the Constitution, must consult with the Vice-Presidents", and the pardon does not fall within that „shared responsibility" under the Constitution of the Federation of BiH. The appellant points out that it is important to assess this in the particular case although „he is aware of the fact that the Constitutional Court of BiH does not have jurisdiction to assess and establish in the present case the unconstitutionality" of the provision of Article 2 of the Law on Pardon. In view of the aforementioned, the appellant holds that the Court of BiH had completely arbitrarily established the existence of „the reasonable suspicion" that he had committed the criminal offenses he was charged with, as there is no single evidence whatsoever „which implicates the appellant, directly or indirectly, in the actions of the perpetration of the criminal offense, apart from putting 'emphasis' on his signing the pardons, which is the appellant's constitutional competence". Also, the appellant notes that the reasonable suspicion possibly follows from the mentioned evidence in relation to some other persons, „but that is not the subject-matter of this case".

29. Furthermore, the appellant also challenges all the other bases in relation to which the Court of BiH concluded that they represented special grounds for ordering the detention. Firstly, the appellant challenges that relevant and sufficient reasons were mentioned so as to conclude that there is an objective risk of his flight. The appellant especially points

out that the court cannot conclude that the appellant will flee because he is threatened with the serious punishment, instead it has to justify „the risk of flight" by evidence or additional indications, which is „more than a mere possibility or easiness of flight". The appellant states that this „especially concerns a rather questionable, conditionally put and arbitrary conclusion of the Court of BiH in relation to 'the friendly relations' of the appellant". Moreover, the appellant states that the Court of BiH did not evaluate the appellant's character traits, his conduct in the proceedings so far, moral or property and family situation. So, as he further alleges, the Court of BiH has not taken into account that the appellant has not had a criminal record before, that he cooperated in the course of proceedings, that he did nothing to obstruct or stall the proceedings, that he has no property in the Republic of Croatia, that his spouse and three children (one underage) live in Bosnia and Herzegovina and not abroad, or that the appellant is „a cofounder and the president of the political party exclusively operating in BiH". Therefore, the appellant holds that there is not a single particular piece of evidence suggesting that he is preparing, undertaking or planning his flight to another state. With regard to these statements, the appellant refers to the Decision of the Constitutional Court no. *AP 247/05*.

30. The appellant also challenges the conclusion of the Court of BiH on the existence of the collusion threat as a basis for his detention. Namely, the appellant points out that both of the challenged decisions are based upon „the conditional threat and a hypothetic presumption that the appellant might influence the evidentiary proceedings", but that there is not a single concrete piece of evidence on it, instead it „goes deeply into the sphere of speculations". The appellant notes that, by accepting such a criterion, „any suspect might be placed in the detention with the aim of finalizing an investigation and an evidentiary proceeding, irrespective of the fact that there is not a single piece of evidence whatsoever in that respect". In connection with these allegations, the appellant refers to the Decision of the Constitutional Court no. *AP 6/08*, pointing out that the Court of BiH refers to the same decision, but that he „stated to the contrary from the way in which the Court of BiH interpreted this decision". The appellant also states that in this manner the burden of proof was unlawfully transferred to the appellant, which is contrary to the fundamental principles of a criminal proceeding. Besides, the appellant points out that all the suspects had already been heard, that „a great number of witnesses" had also been heard and that the Prosecutor's Office of BiH „referred mostly on the objective pieces of evidence – intercepted conversations – which are impossible to influence".

31. The appellant also challenged the existence of the third basis on which he was ordered the detention, namely the existence of a threat of the public order disturbance. The appellant points out here as well that there are no particular evidence or indications justifying the conclusion of the Court of BiH that, in the event that the appellant is free, riots, protests,

retaliations or threats to public peace and order, citizens, property and such like, will occur. Therefore, as the appellant pointed out, such a conclusion is arbitrary and contrary to the case-law of the European Court. The appellant points out „that this case has made the majority of citizens uneasy", but that is not surprising since it was the President of the Federation of BiH who has been arrested. Also, the appellant indicates in this context that the public's attention was especially drawn by his „sensational" arrest, which was executed with the „pompous media campaign", so that such attention of the public was properly „provoked". In that respect the appellant indicates that the media, before the search of the appellant's official premises, were waiting in large numbers in front of the Presidency of BiH building „prepared to greet the police-investigations bodies with 'cameras on'", which, as the appellant stressed, was criticized by the High Representative for Bosnia and Herzegovina who stated*, inter alia*, that no one is guilty until proven otherwise and that „he was a little bit surprised that during the arrest [of the appellant] some 30 cameras were already there". The appellant holds that that this clearly indicates that his arrest was already announced, although at the time of the search, no arrest warrant has been issued yet. Regarding the aforementioned, the appellant states that „it was the obvious announcement of the arrest and subsequent media coverage, which could not have been prevented, that represented the genuine reasons behind the arousing of a certain feeling of uncertainty in citizens, and not the appellant's conduct or the criminal offense *per se*".

32. The appellant also indicates that, under the case-law of the European Court, the justifiability of the detention depends on the circumstances of each particular case „which must be such as to indicate the existence of the general (public) interest, which is of such importance and significance that, despite the presumption of innocence, it prevails over the principle of the respect for the liberty of an individual". In this respect, the appellant points out that the public authorities must have taken care, in the particular case, of the dignity of the highest executive power, as the appellant in the present case is not a „citizen", but the „President of the Federation of BiH". His arrest, as further stated, eliminated a very important link of the public authority in the legislative process (the signing of decrees), but also the solution of many important issues in the Federation of BiH, which not only the functioning of the Federation of BiH, but of the entire Bosnia and Herzegovina, depends on. Also, the appellant stresses that „no one can deny that he shall remain the President of the FBiH for as long as this function does not cease in one of the manners provided for by the Constitution of the FBiH, and, therefore, the Court of BiH should have taken into consideration this public interest". The appellant also points out that Bosnia and Herzegovina suffered a substantial damage through such a conduct, and, if the public authority held that they had the basis for the arrest, which the appellant finds not to be proven, then they „could have found the milder form for the appellant's 'isolation'".

33. The appellant holds also that the conditions were met for the issuance of an interim measure by which the Constitutional Court would order the appellant's release, because the conditions for the detention were not met. By such a decision, as the appellant underlines, the Constitutional Court would not prejudge the criminal proceedings against the appellant, since the consideration of the detention does not amount to the consideration of the criminal liability. The appellant holds that the Court of BiH failed to prove that the further course of the criminal proceeding depends on the appellant's release, and, therefore, he has the right to defend himself while being out on pretrial release, whereby, contrary to the position taken by the Court of BiH, „the political and constitutional-legal situation will be relaxed, as that does not prevent all the active participants in the public authorities from continuing to use all their means provided for by the relevant legislation and constitutions, the public authority's blockade will be lifted, and 'the appellant's detention' will cease to be the subject of political speculations, which obviously undermine the democratic relations in the state".

c) Reply to the Appeal

34. The Court of BiH challenged the allegations stated in both appeals, namely in the form of three replies it transmitted, and the Constitutional Court of BiH will only state such matters it holds relevant to the decision in the present case. In relation to the appellant's objections to the unlawfulness of the detention, the Court of BiH stated that, on the basis of the challenged decisions „it is obvious on which evidence the Panel based its decision regarding the reasonable suspicion and the specified detention reasons". The Court of BiH cited parts of the reasoning of the challenged second-instance decision and stated that „the thorough analysis of the circumstances stated in the challenged decision of the Court of BiH led it to an indisputable conclusion that, for now, there are objective circumstances justifying the pronunciation of the severest measure for securing the suspect's presence, i.e. the measure of detention against the appellant". The Court of BiH disputed also the appellant's allegations on the lack of jurisdiction of that court and on the unlawfulness of evidence, and proposed that the Constitutional Court dismisses the appeals.

35. In its reply, the Prosecutor's Office of BiH challenged the appeals on all counts presented in both of the appeals, stating that the presented facts justify in no way the allegations of violations of rights. As to the allegations on the lawfulness of detention, the Prosecutor's Office of BiH points out that the Court of BiH „stated clearly both the valid reasoning and the assessment of the evidence it had before it", and that these pieces of evidence „corroborated the existence of a reasonable suspicion that [the appellant] had committed the criminal offense he was charged with". Also, the Prosecutor's Office of BiH states that the Court of BiH has already considered all of the appellant's objections in

relation to the existence of a reasonable suspicion, which the appellant raised in his appeal, and that „the assessment of evidence was made so as to compare evidence as a whole, to take into account details, and their substantiation and consistency with other evidence, which exceeds the standards required in the decision-making on the existence of the reasonable suspicion at this stage of the proceedings". The Prosecutor's Office also challenged the appellant's allegations on the lack of jurisdiction of the Court of BiH, on the appellant's objection to the unlawfulness of evidence and on the allegations relating to „the creation of a preconception in the public on the existence of the appellant's culpability", thus it proposed that the Constitutional Court rejects the appeal as inadmissible or to „reject it because of the lack of merits in the allegations that the provisions of the Constitution of BiH, in particular, Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, have been violated by the decisions of the Court of BiH". Also, the Prosecutor's Office proposed that the Constitutional Court dismisses the appellant's request for the issuance of an Interim Measure.

V. Relevant Law

36. The **Criminal Code of Bosnia and Herzegovina** (*Official Gazette of BiH nos*. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07 and 8/10) as relevant, reads:

Basic terms

Article 1

[...] 17. Organized criminal group is a structured group of at least three or more persons, existing for a period of time and acting in concert with the aim of perpetrating one or more criminal offenses for which a punishment of imprisonment of three years or a more severe punishment may be imposed under the laws of Bosnia and Herzegovina.

Article 250
Organized crime

(1) Whoever perpetrates a criminal offense prescribed by the law of Bosnia and Herzegovina as a member of an organized criminal group, unless a heavier punishment is foreseen for a particular criminal offense,

[...]

(3) Whoever organizes or directs at any level an organized criminal group which by joint action perpetrates or attempts to perpetrate criminal offense prescribed by the law of Bosnia and Herzegovina,

shall be punished by imprisonment for a term not less than ten years or a long-term imprisonment.

37. The **Criminal Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of FBiH nos*. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10 and 42/11) as relevant, reads:

Article 342
Organized crime

(1) Whoever perpetrates a criminal offense prescribed by law in the Federation as a member of an organized criminal group, unless a specific punishment is foreseen for a particular criminal offense,

[...]

(3) Whoever, as a member of an organized criminal group, perpetrates a criminal offense prescribed by law in the Federation for which a punishment of imprisonment of three years or a more severe punishment may be imposed, unless a specific punishment is foreseen for a particular criminal offense,

shall be punished by imprisonment for a term not less than five years.

.Article 380
Accepting Gifts and Other Forms of Benefits

An official or responsible person in the Federation, including also a foreign official person, who demands or accepts a gift or any other benefit, or who accepts a promise of a gift or a benefit, in order to perform within the scope of his authority something which he ought not perform, or for omitting something which he ought perform,
shall be punished by imprisonment for a term between one and ten years.

An official or responsible person in the Federation, including also a foreign official person, who demands or accepts a gift or any other benefit, or who accepts a promise of a gift or a benefit, in order to perform within the scope of his authority something which he ought perform, or for omitting something which he ought not perform,
shall be punished by imprisonment for a term between six months and five years.

The punishment referred to in paragraph 2 of this Article shall be imposed on an official or responsible person in the Federation, including also a foreign official person, who demands or accepts a gift or any other benefit following the performance or omission referred to in paragraphs 1 and 2 of this Article, and in relation to it.

The accepted gift or material gain shall be forfeited.

Article 383
Abuse of Office or Official Authority

(1) An official or responsible person in the Federation who, by taking advantage of his office or official authority and by exceeding the limits of his official authority or by

failing to perform his official duty, acquires a benefit to himself or to another person or causes damage to another person or seriously violates the rights of another,

shall be punished by imprisonment for a term between six months and five years.

[...]

38. The **Constitution of the Federation of Bosnia and Herzegovina** (*Official Gazette of FBiH* nos. 1/94, 13/97, 16/02, 22/02, 52/02, 60/02, correction, 18/03, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05, 32/07 and 88/08) as relevant, reads:

Article IV.B. 7.

Unless specifically provided otherwise in this Constitution:

(a) The President shall be responsible for:

[...]

(VII) granting pardons for offenses against Federation law, except for war crimes, crimes against humanity, and genocide.

(b) The Vice-President shall be responsible for:

[...]

(II) cooperating with the President in those situations in which the latter is required to seek his concurrence [...]

39. The **Law on Pardon** (*Official Gazette of the Federation of BiH* no. 22/09), as relevant, reads:

Article 2

The President of Bosnia and Herzegovina shall grant pardons. Prior to adopting a decision on pardon, the President shall conduct consultations with the Vice-Presidents of the Federation of Bosnia and Herzegovina.

40. The **Criminal Procedure Code of Bosnia and Herzegovina** (*Official Gazette of BiH* nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09) as relevant, reads:

Article 6
Rights of a Suspect or Accused

(1) The suspect, on his first questioning, must be informed about the offense that he is charged with and grounds for suspicion against him and that his statement may be used as evidence in the further course of the proceeding.

Article 20
Basic Terms

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

a) The term „suspect" refers to a person with respect to whom there are grounds for suspicion that the person may have committed a criminal offense.

[...]

m) The term „reasonable suspicion" refers to a higher degree of suspicion based on collected evidence leading to the conclusion that a criminal offense may have been committed

Article 47
The Right of a Defense Attorney to Inspect Files and Documentation

(1) During an investigation, the defense attorney has a right to inspect the files and obtained items that are in favor of the suspect. This right can be denied to the defense attorney if the disclosure of the files and items in question would endanger the purpose of the investigation.

(2) Notwithstanding Paragraph 1 of this Article, when the suspect or the accused is in pre-trial custody, the Prosecutor shall submit the evidence to the preliminary proceeding judge or preliminary hearing judge for the purpose of informing the defense attorney.

Article 119
Materials Received through the Measures and Notification of the Measures Undertaken

(1) Upon the completion of the application of the measures referred to in Article 116 of this Code, all information, data and objects obtained through the application of the measures as well as a report must be submitted by police authorities to the Prosecutor. The Prosecutor shall be bound to provide the preliminary proceedings judge with a written report on the measures undertaken. On the basis of the submitted report the

[...]

(3) The preliminary proceedings judge shall forthwith and following the undertaking of the measures referred to under Article 116 of this Code inform the person against whom the measures were undertaken. That person may request from the Court a review of legality of the order and of the method by which the order was enforced.

Article 123
Types of Measures

(1) Measures that may be taken against the accused in order to secure his presence and successful conduct of the criminal proceedings shall be: summons, apprehension, house arrest, bail and custody.

(2) When deciding which of the above mentioned measures is to be applied, the competent body shall meet certain conditions for application of the measures, attempting not to apply more severe measure if the same effect can be achieved by application of a less severe measure.

(3) These measures shall also be cancelled ex officio immediately after the reasons for their application cease to exist, or they shall be replaced with a less severe measure when the conditions for it are created.

(4) The provision of this Chapter shall be applied to the suspect as well, as appropriate.

Article 131
Ordering Pre-trial Custody

(1) Custody may be ordered only under the conditions prescribed by this Code and only if the same purpose cannot be achieved by another measure.

(2) The duration of custody must be reduced to the shortest necessary time. It is the duty of all bodies participating in criminal proceedings and of agencies extending them legal aid to proceed with particular urgency if the suspect or the accused is in custody.

(3) Throughout the proceedings, custody shall be terminated as soon as the grounds for which it was ordered cease to exist, and the person in custody shall be released immediately.

Article 132
Grounds for Pre-trial Custody

(1) If there is a grounded suspicion that a person has committed a criminal offense, custody may be ordered against him:

a) if he hides or if other circumstances exist that suggest a possibility of flight;

b) if there is a justified fear to believe that he will destroy, conceal, alter or falsify evidence or clues important to the criminal proceedings or if particular circumstances indicate that he will hinder the inquiry by influencing witnesses, accessories or accomplices;

[...]

d) if the criminal offense is punishable by a sentence of imprisonment of ten (10) years or more, where the manner of commission or the consequence of the criminal offense

requires that custody be ordered for the reason of public or property security. If the criminal offense concerned is the criminal offense of the terrorism, it shall be considered that there is assumption, which could be disputed, that the safety of public and property is threatened.

(2) In a case of Item b), Paragraph 1 of this Article, custody shall be cancelled once the evidence for which the custody was ordered has been secured.

Article 135
Duration of Custody

(1) Before taking a decision ordering custody, the preliminary proceedings judge shall review whether there are grounds for a motion to order custody. Upon the decision of the preliminary proceedings judge, custody may last no longer than one (1) month following the date of deprivation of liberty. After that period, the suspect may be kept in custody only on the basis of a decision extending the custody.

VI. Admissibility

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

42. In accordance with Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies available under the law against a judgment or 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.

43. In examining the admissibility of an appeal in respect of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, the Constitutional Court invoked the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(1) and (4)(14) of the Rules of the Constitutional Court.

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

The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

Article 16(1) and (4)(14) of the Rules of the Constitutional Court reads as follows:

1) The 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.

4) An appeal shall also be inadmissible in any of the following cases:

(14) the appeal is premature.

44. The appellant challenges the Decision of the Court of BiH no. S1 2 K 012709 13 Kv of 3 May 2013 ordering his detention, alleging, *inter alia*, that this decision 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. In connection with these allegations by the appellant, the Constitutional Court recalls that the question as to whether the appellant has or is going to have a fair trial before the ordinary courts may not be answered while the proceedings are pending. Pursuant to the case-law of the Constitutional Court and the European Court, the issue of whether the principle of a fair trial has been complied with ought to be considered on the basis of the procedure as a whole. Given the multi-instance criminal proceedings, any likely failures and deficiencies showing up at one stage of the proceedings may be corrected at some of the subsequent stages of the very same proceedings. In view of this, it is not possible, in principle, to establish whether the criminal proceedings have been fair until the proceedings are finalized by a legally binding decision (see, the European Court of Human Rights, *Barbera, Meeseque and Jabardo v. Spain*, judgment of 6 December 1988, Series A no. 146, paragraph 68; the Constitutional Court, Decision no. *U 63/01* of 27 June 2003, paragraph 18, published in the *Official Gazette of Bosnia and Herzegovina* no. 38/03). The Constitutional Court holds that these positions may also apply to the present case, both to the issue of the lawfulness of evidence and to the issue of the subject-matter jurisdiction of the Court of BiH in handling the case against the appellant.

45. Namely, the lawfulness of the collection of evidence is, as one of the conditions of the right to a fair trial, the issue that will have to be taken into account even in the possible forthcoming stages of the proceedings. In particular, the Constitutional Court indicates that the provision of Article 233(1)(c) of the Criminal Procedure Code of BiH stipulates a possibility to raise a preliminary objection to the indictment to challenge the lawfulness of evidence, and the same objection may be raised during the possible trial, which the court must be mindful of, because a court's decision on criminal liability of a person may not be exclusively based upon the unlawfully obtained evidence (see *mutatis mutandis*, the Constitutional Court, Decision on Admissibility and Merits no. AP 635/04 of 23 March 2005, paragraph 24, published in the *Official Gazette of BiH* no. 32/05). As for the issue of

the subject-matter jurisdiction of the Court of BiH, the Constitutional Court indicates that, by following the case law of the European Court, in the case no. AP 785/08, it indicated that the Criminal Procedure Code of BiH stipulated the duty of the court to be mindful of its the subject-matter jurisdiction during the course of the entire proceedings as well as its obligation to declare its lack of jurisdiction „as soon as it observes that it has no competence" and that once such a decision has become legally binding, it shall forward the case to the competent court (Article 28 of the Criminal Procedure Code of BiH), and that any opposite conduct shall constitute an essential violation of the provisions of the criminal procedure under Article 297(1)(g) of the Criminal Procedure Code of BiH. The Constitutional Court also indicated that this provision unambiguously relates to the duty of the court to be mindful of the subject-matter jurisdiction at any stage of the proceedings (see, the Constitutional Court, Decision on Admissibility no. AP 785/08 of 31 January 2009, paragraphs 28-29).

46. In view of all of the aforementioned, the Constitutional Court indicates that in the present case the criminal proceedings against the appellant have not been concluded yet, and only a decision ordering his detention has been issued. Therefore, the allegations stated in the appeal relating to the violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention are premature.

47. However, the appellant also challenges the foregoing decisions on account of the violation of the right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention. In connection with those allegations, the Constitutional Court observes that there are no other effective legal remedies available under the law against the Decision of the Court of BiH no. S1 2 K 012709 13 Kv of 3 May 2013, which the appellant challenged. Considering that the appeal against the foregoing decision was lodged on 13 May 2013, it follows that it was lodged within the 60-day time limit, as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal, relative to these allegations, meets the conditions under Article 16(2) and (4) of the Rules of the Constitutional Court, because it is not manifestly (*prima facie*) ill-founded and there are no other formal reasons rendering the appeal inadmissible.

48. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that the present appeal meets the admissibility requirements in respect of the allegations under Article 5 of the European Convention.

VII. Merits

49. The appellant challenges the mentioned decisions claiming that those decisions violated the rights to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 (1)(c) and (3) of the European Convention.

Article II(3) of the Constitution of Bosnia and Herzegovina, as relevant, reads as follows:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

d) The rights to liberty and security of person.

Article 5 of the European Conventions, as relevant, reads:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

[...]

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offense or when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so; [...]

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer 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.

50. The appellant holds that decisions ordering his detention are contrary to Article 5 paragraph 1(c) and paragraph 3 of the European Convention because, as he stated: 1) the Court of BiH failed to correctly establish that there are sufficient evidence justifying the assertion that there is „a reasonable suspicion" in the present case that the appellant had perpetrated the criminal offenses he was charged with; and 2) the Court of BiH failed to specify the existence of a real threat that the appellant might flee, if he remains at large, or that he might, by influencing witnesses and possible co-perpetrators, hinder the criminal procedure, or that the appellant's release might provoke agitation among the public, as reasoned by the Court of BiH.

The existence of „a reasonable suspicion" within the meaning of Article 5 (1)(c) of the European Convention

51. In relation to this question, the Constitutional Court indicates that the European Court took a position in its case-law that the existence of „a reasonable suspicion", on which the deprivation of liberty is based, constitutes an essential part of the guarantees against arbitrary arrest and represents *conditio sine qua non* for ordering or extending the detention. The existence of „a reasonable suspicion" presumes the existence of facts or information on the basis of which, as the European Court indicated, an objective observer is going to conclude that the person in question might have perpetrated the criminal offense which he/she was charged with. What is considered „reasonable" will depend upon all the circumstances of the case. The European Court indicated that sometimes particular circumstances may be concerned, such as the fight against terrorism, as a special category of criminal offenses regarding which police and other prosecution bodies are required to act urgently for the sake of protecting the public security interests, and particularly for the sake of reducing a serious risk of the loss of human lives. However, the European Court stated that the extension of the meaning of the term of „a reasonable suspicion" in a way violating the very essence of the guarantees provided by Article 5(1) of the European Convention cannot be taken as acceptable, not even in cases where states are facing difficulties in countering and detecting the criminal offenses of terrorism. Even in such cases, the public authority must offer at least some facts or information on the basis of which one can see that there was a reasonable suspicion that the person deprived of liberty had perpetrated a criminal offense which he/she was charged with (see, the European Court, *Fox, Campbell and Hartley vs. The United Kingdom*, judgment of 30 August 1990, Series A, no. 182, paragraphs 32-34, and *Stepuleac vs. Moldavia*, judgment of 6 November 2007, Application no. 8207/06, paragraph 68).

52. Also, the European Court noted that the standards imposed by Article 5(1)(c) of the European Convention do not presume that police, at the time of arrest, has sufficient evidence necessary for an indictment to be issued. It is precisely the objective of the interrogation of the suspect, who was detained on the basis of the mentioned article, to advance further investigation so as to either confirm or reject concrete suspicions on which the arrest was based. Therefore, as the European Court indicated, the facts causing the suspicion and which may be sufficient at the time of the arrest, do not need to be at the same level as those necessary for a decision to be made at the forthcoming stages of the procedure, e.g. for issuing an indictment (see, the European Court, *O'Harra vs. The United Kingdom*, judgment of 16 October 2001, Application no. 37555/97, paragraph 36). However, as far as the detention goes, the European Court stated that Article 5(1)

(c) requires the existence of „a reasonable" and not of „an honest" or *bona fide* suspicion (ibid. *Fox, Campbell and Hartley*, paragraph 31). Also, in the cases concerning the fight against organized mafia in Italy, the European Court took a position that the statements of anonymous informants, who were themselves a part of such an organization, must be corroborated by other evidence, and the „hearsay" evidence by objective evidence. Namely, the European Court noted that one cannot disregard the risk of a person becoming a suspect and getting arrested, solely on the basis of such unsubstantiated evidence obtained from the persons who can have clear personal interests (see, the European Court, *Labita vs. Italy*, judgment of 6 April 2000, Application no. 26772/95, paragraphs 157-158).

53. By applying the mentioned standards in the case at hand, the Constitutional Court observes that the appellant was charged with committing serious criminal offenses of organized crime in connection with the criminal offense of abuse of office and corruption. Countering organized crime and corruption, as the forms of criminal offenses, which systemically weaken the society and state, represents a serious task of the public authority and, therefore, requires a serious, systemic and strategic approach of all the public authority bodies, particularly the criminal prosecution bodies. However, despite the seriousness of such offenses and their detrimental effect on the social relations, the Constitutional Court holds that it cannot be concluded that such offenses give rise to a special risk for the public security or a risk of inflicting some other irreparable damage, such as for instance the loss of human lives, as is the case with terrorism. It is particularly impossible to conclude so in the present case, given the circumstances according to which the appellant is suspected of having organized a criminal group to grant pardons to the convicts in return for favors in the form of accepting bribes. In view of the aforementioned, the Constitutional Court holds that the criminal offenses that the appellant has been charged with do not represent „particular circumstances" in terms of the standards that the European Court established in relation to the fight against terrorism as a special form of criminal offenses. In view of the aforementioned, there are no reasons to interpret the standards of the European Court in relation to „a reasonable suspicion" in the present case more flexibly than usual.

54. In view of the aforementioned, the Constitutional Court notes that the Court of BiH, deliberating at two instances, concluded that it follows from the evidence presented to the court by the Prosecutor's Office of BiH that there is „a reasonable suspicion" that the appellant had committed the mentioned criminal offenses. The Court of BiH reasoned such a conclusion by providing the following arguments, which it found to be crucial: 1) that the appellant, within a short period of time, issued 142 (there is a mention of 147 elsewhere) decisions on the pardons of the persons who had been convicted of various criminal offenses by legally binding court judgments; 2) that during the same period only

one decision on pardon was adopted at the level of the state of BiH and the Republika Srpska each; 3) that when adopting such decisions the appellant failed to consult with the Vice-Presidents of the Federation of BiH, as prescribed by Article 2 of the Law on Pardon; 4) that the witness Armin Kulovac stated that „in an attempt to get the pardon for his brother [...] he tried to reach the appellant", for whom he stated that he „heard that in some cases he helped people to get pardons", and that „from a conversation with one of those who had received pardons [...] he learnt that he had paid for his pardon BAM 48,000", and that this witness „addressed a petition to [the appellant]"; 5) that the suspect Ivan Jurčević stated that „on 29 March 2013 he had spoken with one of the suspects, Kulosman, and that he told him that Adi was taken care of and that '[the appellant] should finish it for Adi'"; 6) that the witnesses Armin Kulovac and Ramiz Brajlović stated that „the suspect Barišić was the contact person for [the appellant]" and 7) that during the search the amount of BAM 5,900 was found in the appellant's possession.

55. Analyzing the reasons pointed out in the challenged decisions of the Court of BiH, on which it based its conclusion on the existence of the reasonable suspicion as a condition for the detention, the Constitutional Court holds that it is impossible to observe a clear connection, based on evidence or firm indications, between the mentioned reasons and the conclusion on the existence of „the reasonable suspicion" that the appellant had committed the criminal offenses he was charged with. Firstly, the Constitutional Court points out that the action of the criminal offense of organized crime, as referred to in Article 250(3) of the Criminal Code of BiH in conjunction with Article 342(3) of the Criminal Code of the FBiH, which the appellant has been charged with, entails organizing a crime group, as defined in Article 17(1) of the Criminal Code of BiH, acting with the aim of committing or attempting to commit the criminal offenses provided by the laws of BiH or the FBiH. Therefore, in order for this act to be classified as such, it is necessary that it involves organizing or directing an organized a crime organization acting in concert with the aim of committing or attempting to commit a criminal offense. In addition, the appellant is also suspected of committing the criminal offense of organized crime in conjunction with the criminal offense of abuse of office or authority, as referred to in Article 383 of the Criminal Code of FBiH. The Constitutional Court points out that it follows from the said provision of the Criminal Code of FBiH that there are three ways of perpetrating the action of this criminal offense: by taking advantage of a public office or authority; by exceeding the limits of official authority; and by failing to discharge official duties. And where taking advantage of the office is concerned, an official discharging his/her public authorities is not guided by the public office interests, instead he/she bases his/her decisions on his/her or on someone else's interest and, although acting within the scope of his/her official authority, he/she abuses them. Furthermore, the limits of official authority are exceeded if an official

acts beyond the scope of his/her powers and beyond his/her actual official authority, or acts without a prior approval or consent of the other official, which is necessary in a given case. The third way of committing this criminal offense, namely the failure to discharge official duties, shall exist where an official fails to discharge his/her official duty, which he/she has the obligation to perform, or where an official performs his/her official duty only formally, but not substantially. However, this criminal offense shall be considered as completed only if some of the mentioned actions yield gains for oneself or for another, or where they inflict damage on another or where they seriously violate the right of another. Also, the appellant is suspected of committing the criminal offense of organized crime in conjunction with the criminal offense of accepting gifts or other forms of benefits referred to in Article 380(1) of the Criminal Code of FBiH. The action of this criminal offense consists of demanding or accepting a gift or any other benefit, or accepting a promise of a gift and accepting a promise of any other benefit for that matter.

56. Therefore, in order to speak about the existence of a reasonable suspicion that the appellant committed the aforementioned criminal offenses, within the meaning of Article 132(1) in conjunction with Article 20 of the Criminal Procedure Code of BiH and Article 5(1)(c) of the European Convention, and in order to impose a measure of the detention on that ground, it is necessary that the reasons given in the court decision on the detention be brought into connection with the actions of the perpetration of the criminal offenses the appellant was charged with. The Constitutional Court holds, however, that neither the BiH Prosecutor's Office in its motion for the ordering of the detention, nor the Court of BiH in its respective decisions, made such an implication.

57. Namely, the Constitutional Court indicates that the appellant is the President of the Federation of BiH and that the Constitution of the Federation of BiH bestows upon him the exclusive power to make decisions on the pardons of the convicted persons. Also, the Constitutional Court of BiH observes that the Law on Pardons prescribes in Article 2 that the President of the Federation of BiH, prior to adopting a decision on pardon, „will engage in consultations with the Vice-Presidents". However, on the basis of the mentioned provision one cannot conclude in any way that the Law on Pardon, by way of the mentioned provision, has neither limited in any way nor brought into question the appellant's constitutional responsibility to decide on pardons, nor has it prescribed that the opinion of the Vice-Presidents should be binding on the President of the Federation of BiH in any way whatsoever. Namely, this provision does not require that the President of the Federation of BiH gets the consent of the Vice-Presidents with respect to discharging his authority to grant pardons. In addition, the Vice-President Svetozar Pudarić stated in his statement that he used to receive written materials and already prepared proposals

from the Commission of Pardons, on which he used to give his opinion in the form of an official record, because the appellant „neither contacted him nor asked for his opinion". The Constitutional Court indicates that this witness essentially claims that he had a chance to give opinion about the proposals for pardons, not directly to the appellant though, but in writing. In this respect, the Constitutional Court holds that the appellant correctly indicates that „consultations" in terms of the Law on Pardon do not have to imply either a personal contact or the accepting of opinions and suggestions of the Vice-Presidents of the Federation of BiH.

58. However, what is even more important is that the Constitutional Court observes that the Court of BiH did not reason and argue in any way as to why the alleged lack of consultations with the Vice-Presidents was anyway one of the crucial reasons for the existence of a reasonable suspicion that the appellant had committed criminal offenses of organized crime in connection with the abuse of office and corruption. Also, the Court of BiH did not provide any arguments whatsoever in the reasoning of the challenged decisions on the basis of which, on the grounds of the purported lack of consultations of the appellant with the Vice-Presidents of the Federation of BiH, „an objective observer" might conclude that the appellant might have committed the mentioned criminal offenses, and under Article 5(1)(c) of the European Convention it was obliged to provide such arguments. The Constitutional Court cannot spot a clear connection between this reason and the conclusion of the Court of BiH on the existence of „a reasonable suspicion" in the present case. Also, the Constitutional Court notes that the failure to engage in the consultations of this sort might possibly be the basis for some political responsibility on the part of the appellant, however that is not relevant for the issue that is under consideration here.

59. Also, the Constitutional Court observes that not even the mentioned statements of witnesses on which the Court of BiH based its conclusion on the existence of „a reasonable suspicion" that the appellant had committed the criminal offenses do not constitute „facts on the basis of which an objective observer might conclude that [the appellant] might have committed the criminal offenses he was suspected of committing". The Constitutional Court observes that the statements, which the Court of BiH referred to, were general in nature and that they fell in the category of the „hearsay" evidence. Such statements of witnesses were not corroborated by other objective evidence, as required by the standards in relation to the existence of a reasonable suspicion, which the Constitutional Court has already explained. Further, on the basis of such statements one cannot see in any way what the reason was for the Court of BiH to conclude, as stated in the second-instance decision, that these statements indicate, along with other evidence, „that the perpetration

of the criminal offense had occurred in a way that the suspects had established a network of mediators, who got in touch with the convicted persons or members of their respective families, who submitted petitions for pardons", as well as that „the roles of certain members of the organized crime group were clearly determined with specified and shared roles in arranging the profit share, which can all be clearly observed from the statements of the heard witnesses, as well as from the transcript of the intercepted telephone conversations". The Constitutional Court holds that such an assertion by the Court of BiH is arbitrary, as such a thing cannot be deduced from the evidence on which the Court of BiH based its conclusion on the existence of the reasonable suspicion. Besides, if the mentioned facts and indications could constitute „the basis for the suspicion" which was sufficient for a criminal investigation to be initiated, the Constitutional Court holds that at the stage of the decision-making on the appellant's detention the same statements could not satisfy the degree of „a reasonable suspicion" without which no detention may be ordered under Article 132(1) of the Criminal Procedure Code of BiH and Article 5(1)(c) of the European Convention.

60. Next, one of the reasons that the Court of BiH referred to as an argument justifying the existence of a reasonable suspicion that the appellant had committed the criminal offenses he was charged with is that, during the search of his official premises, the amount of BAM 5,900.00 was found in the appellant's possession. The Court of BiH did not elaborate on this specifically, neither did it explain in any way how and why this fact can well-foundedly and objectively indicate that the appellant had committed the criminal offenses he was charged with. Also, the Constitutional Court observes that the appellant claims that during the search he explained the origins of the mentioned amount of money, and along with the appeal he submitted a receipt issued by the Accounting Department of the Office of the President of the Federation of BiH on his being issued the total amount of BAM 6,000.00. So, although finding the mentioned amount in the appellant's possession was considered as one of the reasons for the existence of a reasonable suspicion as a condition for ordering the detention, the Constitutional Court observes that the Court of BiH failed in full to explain this reason and to implicate it in the perpetration of the criminal offenses that the appellant was charged with. The same also applies to the notion that the appellant has issued 142 (or 147) decisions on pardons in the period in which only one such decision was issued by each at the state level of BiH and in the Republika Srpska. The Constitutional Court cannot observe any connection whatsoever between these facts and the reasonable suspicion that the appellant had committed the criminal offense of organized crime in connection with corruption, neither did the Court of BiH reason it in such a manner as to clarify where the said court found such a possible connection.

61. In view of the aforementioned, the Constitutional Court holds that the Court of BiH failed to truly and convincingly verify all the facts and information on which it based its conclusion on the existence of the reasonable suspicion that the appellant had committed the criminal offenses he was charged with. Therefore, the Constitutional Court holds that the challenged decisions and the available information do not give rise to the basis for one to conclude that there is „a higher degree of suspicion based on the evidence collected, which leads to a conclusion that the criminal offense was committed", as Article 20 of the Criminal Procedure Code of BiH defines „a reasonable suspicion", which, under Article 132(1) of the Criminal Procedure Code of BiH, is necessary for the detention to be ordered in a legal manner. Further, the Constitutional Court considers that it does not follow from the reasoning of the challenged decisions that there are „the facts or information on the basis of which an objective observer may be able to conclude that the person in question may have committed the criminal offense he was charged with", as required by Article 5(1)(c) of the European Convention. The reasons which the Court of BiH referred to in the reasoning of the challenged decisions are not, according to the opinion of the Constitutional Court, *per se* sufficient for one to conclude that there exists „a reasonable suspicion" within the meaning of the Criminal Procedure Code of BiH and Article 5(1)(c) of the European Convention. Therefore, the Constitutional Court holds that such reasoning in the challenged decisions do not meet the condition for the existence of a reasonable suspicion according to the definition referred to in the Criminal Procedure Code of BiH and the condition under Article 132(1) of the Criminal Procedure Code of BiH, or minimum standards of Article 5(1)(c) of the European Convention in relation to this condition without the existence of which the detention cannot be considered legal.

62. Given the aforementioned, the Constitutional Court holds that the challenged decisions violated the appellant's right referred to in Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(c) of the European Convention. Given such a conclusion, the Constitutional Court does not find it necessary to examine the justification of the special conditions for the detention and the possible violation of Article 5(3) of the European Convention.

VIII. Conclusion

63. The Constitutional Court concludes that there is a violation of the right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(c) of the European Convention, whereby the Court of BiH ordered the detention against the appellant, although it follows from the challenged decisions that the basic legal condition was not met, namely that there exists a reasonable suspicion that the appellant had committed

the criminal offenses he was charged with, as it cannot be deduced from the challenged decisions that the standard relating to the existence of „a reasonable suspicion" has been met as defined by Article 20 of the Criminal Procedure Code of BIH, or that there are „the facts or information on the basis of which an objective observer may conclude that the person in question may have committed the criminal offense he was charged with", as required by the standards of Article 5(1)(c) of the European Convention.

64. Pursuant to Article 16(4)(14), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of the present decision.

65. Given the decision of the Constitutional Court in this case, there is no need to consider separately the appellant's motion for the adoption of an interim measure.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP 325/08

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Zoran Damjanović against the Verdict of the Court of Bosnia and Herzegovina no. X-KRŽ-05/107 of 19 November 2007 and the Verdict of the Court of BiH no. X-KR-05/107 of 18 June 2007

Decision of 27 September 2013

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina *(Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić,

Ms. Constance Grewe,

Mr. Mirsad Ćeman,

Ms. Margarita Tsatsa-Nikolovska,

Mr. Zlatko M. Knežević

Having deliberated on the appeal of Mr. **Zoran Damjanović** in case no. **AP 325/08** at its session held on 27 September 2013, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. Zoran Damjanović is hereby granted.

A violation of Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Verdicts of the Court of Bosnia and Herzegovina nos. X-KRŽ-05/107 of 19 November 2007 and X-KR-05/107 of 18 June 2007 are hereby quashed because of the violation of Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The case shall be referred back to the Court of Bosnia and Herzegovina, which shall take, in an expedited procedure, a new decision, in accordance with Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court of Bosnia and Herzegovina is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 90 days from the date of delivery of this Decision, of the measures taken with the aim of executing this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 29 January 2008, Zoran Damjanović („the appellant"), represented by Fahrija Karkin, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Verdict of the Court of Bosnia and Herzegovina („the Court of BiH") no. X-KRŽ-05/107 of 19 November 2007 and the Verdict of the Court of BiH no. X-KR-05/107 of 18 June 2007. Along with his appeal, the appellant submitted a request for an interim measure, whereby the Constitutional Court would postpone the enforcement of the prison sentence pending the final decision on the appeal.

II. Procedure before the Constitutional Court

2. The Constitutional Court adopted a Decision on an interim measure no. AP 325/08 of 14 February 2008 dismissing the appellant's request for an interim measure.

3. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 2 April 2010 the Court of Bosnia and Herzegovina („the Court of BiH") and the Prosecutor's Office of Bosnia and Herzegovina („the Prosecutor's Office") were requested to submit their respective replies to the appeal.

4. The Court of BiH and the Prosecutor's Office submitted their replies to the appeal on 13 April and 8 April 2010 respectively.

5. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were forwarded to the appellant on 17 June 2010.

III. Facts of the Case

6. The facts of the case, as they arise from the appellant's allegations and the documents submitted to the Constitutional Court, may be summarized as follows:

7. The Verdict of the Court of BiH no. X-KR-05/107 of 18 June 2007, found the appellant guilty and sentenced to imprisonment for a term of 10 years and six months for the criminal offence of war crime against civilians under Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina („the Criminal Code of BiH"). After conducting the proceedings, the Court of BiH established that on 2 June 1992 the appellant, together with Goran Damjanović, in the settlement of Bojnik, as a member of the Army of the Serb Republic of Bosnia and Herzegovina, armed and in military uniform, had participated actively in the beating of a group of 20 to 30 male prisoners of Bosniac ethnicity, who had either surrendered or had been captured. On that occasion the appellant, using a rifle, had beaten up Elvir Jahić, a witness D. and other unidentified persons, because they had engaged in the resistance during the attack of the Serb forces on the place of Ahatovići. After the beating of the victims, the appellant, together with other persons, had placed the victims on board the buses taking them to the „Rajlovac" camp.

8. According to the reasoning of the first instance verdict it follows that the Court, in the evidentiary proceedings, presented numerous evidence at the proposal of the Prosecutor's Office and the appellant's defense. Having examined all the presented evidence, individually and by interlinking them, the Court of BiH established that the appellant, together with Goran Damjanović, had committed the criminal offences closely specified in the enacting clause of the verdict. In the reasoning of the verdict it was stated that the Court of BiH gave full credence to the heard witnesses, as the witnesses' testimonies deposited before the Prosecutor's Office and at the main hearing were clear and convincing, as well as mutually consistent and in concord. The Court of BiH further stated that it was established that witnesses „C" and „D" had been captured on 2 June 1992 by the Serb military forces during the attack on the settlement of Ahatovići and had been put out of action because they had either surrendered or had been captured. Some of them had been wounded, as had been the case with the witness Elvir Jahić and witnesses „C" and „D". The Court of BiH also stated that the testimonies of the mentioned witnesses could not add up in full, which is completely normal and acceptable due to the psychological mechanisms of the perspective of human perception. Therefore, the Court of BiH, as part of its discretion in assessing evidence, considered some inconsistencies or departures in the testimonies in their entirety in terms of substance and sense. The total credibility of the witnesses was also assessed comprehensively and systematically. Some testimonies of the witnesses are not identical, but they are consistent and correspond in their basic and important elements,

that is, in respect of the essence of the respective criminal offence. The Court of BiH held that the testimonies were reliable, evidence credible, and that minor departures cannot be sufficient to find the entire testimony as unreliable. Actually, according to the Court of BiH the mentioned differences were not decisive, since some departures in their testimonies entirely represent the expected and normal differences in observations of persons with different ability to observe, memorize and remember information, particularly taking into account the fact that all of them had experienced very stressful and traumatic events during which they could not have observed identically all the important and consistent details, and it would not have been reasonable to expect such precision from witnesses.

9. In addition, the Court of BiH noted that the appellant and his brother Goran Damjanović had been very well known to their victims, to the mentioned witnesses that is, as they had been neighbors and had gone to school together. On the basis of the aforementioned, the Court of BiH reached a conclusion that the witnesses were reliable and that they spoke the truth when they said that the appellant and his brother Goran Damjanović had been at the crime scene and that they had committed the criminal offences related to the incriminated event.

10. As to the appellant's alibi, the Court of BiH established that the appellant could not have been in the encirclement in Potkraj, as he said in his defense, since there is no evidence showing that the Bosnian Serbs had to leave their homes and be in hiding. The evidence given by the witness Zoran clearly indicated that Serbs had controlled Rakovica and the area around Rakovica in April, May and June 1992, which also followed from the statements of the prosecution witnesses Ibrahim Baberović, Abdulah Koldžo and Elza Livančić. All these witnesses stated that it was not possible that any single Serb family in the area of the entire local community of Rakovica could have been captured or blocked in the period from 6 April to July 1992 and that Serbs could freely move around during that period. The fact relating to the injury of Luka Damjanović did not support the appellant's alibi, because, based on the statements of the defense witnesses, the stories about how the appellant had learned about the wounding of his father and when he had actually left Potkraj to go to Bojnik to visit him were rather unclear, confusing and inconsistent. Given the aforementioned, the Court of BiH decided as stated in the operative part of the verdict.

11. As to the application of the substantive law, the Court of BiH found that two legal principles – the principle of legality (Article 3 of the Criminal Code of BiH) and the principle of time constraints regarding the applicability of the Criminal Code (Article 4 of the Criminal Code of BiH) were relevant. The principle of legality is prescribed by Article 7(1) of the European Convention and Article 15(1) of the International Covenant on Civil and Political Rights („the ICCPR"). This provision, as indicated by the Court

of BiH, provides for the prohibition of imposing a heavier penalty without prescribing a mandatory application of a more lenient law for the perpetrator in comparison to the penalty applicable at the time of the perpetration of the criminal offence. However, Article 7(2) of the European Convention and Article 15(2) of the ICCPR comprise the provisions which are exceptions to the rule established by Article 7(1) of the European Convention and Article 15(1) of the ICCPR. In addition, the same exception is contained in Article 4(a) of the Criminal Code of BiH, which stipulates that Articles 3 and 4 of the Criminal Code of BiH shall not prevent the trial and punishment of any person for any act or omission to act which, at the time when it was committed, constituted a criminal offence in accordance with the other principles of the international law. Thus, the provisions of Article 7(2) of the European Convention Article 15(2) of the ICCPR were practically taken over, which enabled exceptional departure from the principle under Article 4 of the Criminal Code of BiH, as well as the departure from the mandatory application of a more lenient law in the proceedings constituting criminal offences according to the international law. The Court of BiH concluded that this was the case in the respective proceedings, because it concerned incrimination involving the violation of international law rules.

12. Furthermore, the Court of BiH clarified that Article 173 of the Criminal Code of BiH prescribes „a war crime against civilians" (grave breaches of the 1949 Geneva Convention) as a criminal offence, and so does Article 2 of the ICTY Statute. At the critical time, a war crime against civilians was also strictly prescribed by the Criminal Code of SFRY, which had been in force in Bosnia and Herzegovina at the time. The fact that the criminal offences prescribed by Article 173 of the Criminal Code of BiH can also be found in Article 142(1) of the Criminal Code of SFRY allows one to conclude that the criminal offence of war crimes against civilians was prescribed by law. However, as the provisions suggest, the pronounced punishment prescribed by Article 173 of the Criminal Code of BiH is surely more lenient than the death penalty stipulated by Article 142 of the Criminal Code of SFRY, which was applicable at the time the criminal offence had been committed. Finally, in relation to Article 7(1) of the European Convention, the Court of BiH noted that the application of Article 4(a) of the Criminal Code of BiH was still justified and met the principle of time constraints regarding the applicability of the criminal code, in other words the application of a more lenient law for the perpetrator.

13. Also, the Court of BiH pointed out that, at the time the criminal offences had been committed, Bosnia and Herzegovina as a successor of the state of SFRY was a signatory to all the relevant international conventions on human rights and international humanitarian and criminal law. Likewise, the customary status of punishability of crimes against humanity and holding individuals criminally liable for the perpetration thereof since 1992 was acknowledged by the UN Secretary-General, the International Law Commission, and

the jurisprudence of the ICTY. These institutions have established that punishability of crimes against humanity constitutes a peremptory norm of the international law or *jus cogens*. Therefore it is indisputable that crimes against humanity in 1992 constituted a part of the customary international law. Therefore, as the Court of BiH concluded, the criminal offence of a crime against humanity may in any case be subsumed under „the general principles of the international law" referred to in Article 3 and Article 4(a) of the Criminal Code of BiH. That is why, regardless of the fact of whether it is viewed from the standpoint of the customary international law or „the principles of the international law", it is indisputable that a crime against humanity constituted a criminal offence at the incriminated time, that is to say that the principle of legality was complied with.

14. In meting out the punishment for the appellant the Court accepted as extenuating circumstances the fact that the appellant acted correctly and conducted himself properly before the Court, that he was a family man with no criminal record to date, and that he was a father of a minor child. The Court did not find particularly extenuating circumstances which, within the meaning of Article 49(1)(b), would indicate that the purpose of punishment might be attained by a lesser punishment. The Court found no aggravating circumstances relating to the appellant.

15. The appellant lodged an appeal with the Court of BiH, the Appellate Division Panel of Section I for War Crimes („the Appellate Division"). By its Verdict no. X-KRŽ-05/107 of 19 November 2007, the Appellate Division dismissed the appeal as unfounded and upheld the first instance verdict, which had imposed on the appellant the sentence of imprisonment for a term of 10 years and six months for the criminal offence of a war crime against civilians under Article 173(1)(c) of the Criminal Code of BiH, which prescribes that a perpetrator of this criminal offence (a war crime against civilians under Article 173) … *shall be punished by imprisonment for a term not less than ten years or long-term imprisonment*…. The Appellate Division established that the challenged verdict contained a valid analysis of all the decisive facts and that the presented pieces of evidence were assessed in the manner stipulated by the Criminal Procedure Code of BiH. The Appellate Division underlined that the fact that the first instance panel had not assessed evidence in the manner in which the defense wanted it to be assessed, and that it had not separately analyzed each sentence of the statements given by the witnesses either during the numerous hearings of various persons at the investigation stage, or at the main hearing, did not make the verdict deficient and incomplete, but clear and focused on the essential elements of the criminal offence he was tried for. The assessment of evidence, as an important element of the contents of the verdict, should contain the reasoning as to why and on what basis the Court established (or did not establish) the existence of essential elements of a criminal offence and in which manner it assessed the contradictory

evidence presented in that context, but that does not mean that the Court was obliged to clarify separately each and every, even the smallest inconsistency in the statements of the witnesses. What is important is that their testimonies correspond in all essential elements related to the event concerned, which the first instance panel correctly concluded as well, while certain differences only corroborate the conclusion that they testified about the event they had experienced and not about the event they learned about subsequently. In the present case, the witnesses unanimously confirmed that after they had been captured, they were taken in front of the supermarket in Bojnik where the soldiers, amongst whom the appellant and Goran Damjanović were, beat them with automatic rifles and batons, broke bottles against their heads and such like. The Appellate Division also found that the inconsistencies in the witnesses' statements were not of such a nature as to challenge the credibility and reliability of the witnesses' statements, and shared the conclusion of the first instance panel that the statements were sufficiently precise with regards to all crucial moments and essential elements of the criminal offence concerned, while minor discrepancies only reinforced the position of the Court that the witnesses were honest who recounted before the Court the facts and details which they could objectively memorize.

16. Furthermore, the second instance court stated that the defense of the appellant regarding the alibi he referred to is not convincing, while, on the other hand, all decisive facts relating to the appellant's guilt have been convincingly established and clearly reasoned. Namely, when compared to the prosecution witnesses, the defense witnesses who were heard regarding these circumstances appeared completely unconvincing and they evidently adjusted their statements to the needs of the alibi for the appellant. There were many discrepancies in their statements, both with regard to the alleged encirclement of Potkraj and with regard to the appellant's stay in that place at the time covered by the Indictment. The defense thesis was that the accused had been in the encirclement in Potkraj and that because of that he had been unable to visit his wounded father, let alone be in front of the supermarket in Bojnik on the relevant occasion. However, the witnesses whom the Court heard in relation to these circumstances, including the appellant himself, seriously challenged the sustainability of such a thesis. This refers in the first place to the fact that the appellant himself, when asked how the inhabitants of Potkraj obtained food while they were in the alleged encirclement, admitted that they could go to Rakovica freely. Furthermore, the statement of the appellant's father-in-law that he lived with him in the house at the time of the incriminated event, given their family ties, in comparison with the precise allegations by the Prosecution witnesses, is by no means sufficiently reliable for the Court to grant it unconditional credibility. Besides, the defense witness Salem Koldžo, who had stayed in the house of the appellant's father-in-law precisely during the time covered by the Indictment, said in his statement that he had not seen the appellant in the

house. In view of the aforementioned, the Appellate Division concluded that the evidence on which the defense based the alibis for the accused is not reliable, so that the objections in the appeals suggesting the opposite are unfounded and, therefore, dismissed as such.

IV. Appeal

a) Allegations of the Appeal

17. The appellant asserts that 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 („the European Convention") and his right not to be punished without law under Article 7 of the European Convention have been violated.

18. The appellant sees a violation of his right to a fair trial in the arbitrary assessment of evidence and in the violation of the provisions of the Criminal Procedure Code. In the appeal, while analyzing in detail the verdicts of the first instance and the second instance courts, the appellant stated that the Trial Chamber and the Appellate Division of the Court of BiH arbitrarily assessed the presented evidence and that, based on the evidentiary proceedings conducted in such a manner, they arbitrarily and erroneously established the facts of the case. The appellant holds that the courts should not have refused the presentation of evidence by hearing defense witnesses, which would contribute to the establishment of the real truth surrounding the event for which the appellant was found guilty and sentenced to imprisonment. Therefore, the appellant holds that the Court of BiH has violated the provisions of the Criminal Code Procedure, as it failed to assess completely and truthfully the aggravating facts and those which are favorable for him.

19. As to the violation of his right under Article 7 of the European Convention, the appellant underlines that he was sentenced by a legally binding verdict for the criminal offence of a war crime against civilians referred to in Article 173(1)(c) in conjunction with Article 180(1) of the Criminal Code of BiH. The appellant holds that the courts, through an incorrect interpretation of the mandatory application of a more lenient law, applied the criminal law which was more severe to the appellant and which was enacted 10 years after the criminal offence for which the appellant was sentenced had been committed. The appellant points out that Article 7 of the European Convention, as well as Article 4(1) of the Criminal Code of BiH, clearly stipulate that the criminal indictment and verdict might only be based on the norm that has been in force at the time the incriminated act had occurred, and that a heavier punishment cannot be imposed than the one that had been applicable at the time of the when the act concerned had been committed. In addition, Article 4(2) of the Criminal

Code of BiH prescribes that *if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied*. Furthermore, the appellant emphasizes that he was sentenced for the criminal offence committed on 2 June 1992, *i.e.* at the time when the acts he was charged with had been incriminated under Article 142 of the Criminal Law of SFRY, which Bosnia and Herzegovina took over in 1992, and that after the end of the war the criminal legislation has been amended on several occasions so that, for a certain period of time (1998-2003), the substance of „war crimes" had been regulated by the Entity laws and after that by the Criminal Code of BiH. However, the identical criminal act for which the appellant was sentenced existed in the national legislation also at the time of the perpetration as well as at the time of the trial for that offence and, therefore, in the appellant's opinion, all the mechanisms of criminal law and guaranteed constitutional rights as well as the rights safeguarded by the European Convention should have been applied.

20. In the view of the appellant, the reference that the Court of BiH made to Article 7(2) of the European Convention is not of relevance in the case at hand. The appellant underlines that Article 7(2) of the European Convention has, primarily, a function to „cover" the criminal prosecution for the violation of the Geneva Conventions before the international bodies established for such cases, such as the International Criminal Tribunal for the former Yugoslavia and Ruanda and „to cover" the cases before the national courts where the national legislation failed to provide for such incriminations as criminal acts, *i.e.* where it failed to cover all the elements of those acts under the Geneva Conventions, which is not the case here. The appellant further states that the basic issue here is which law is more lenient as the identical criminal offence existed (Article 142 of the taken over Criminal Law of SFRY with a prescribed sentence provided for was 5 years of imprisonment or the death penalty) in the previous criminal legislation of the former Yugoslavia, which Bosnia and Herzegovina had taken over by its Decree in 1992, as well as in the new legislation applied to the present case (Article 173 of the Criminal Code of BiH, punishment of 10 years of imprisonment or long term imprisonment). At first glance, the more lenient is the law of 2003 as it does not provide for the death penalty. However, since the death penalty has been abolished already from the date of the entry into force of the Constitution of the Federation of BiH in 1994, which was confirmed in the Constitution of BiH of 1995, and having in mind the opinions of the ordinary courts in Bosnia and Herzegovina, the Entities and the Brčko District of BiH (the Supreme Court of the Federation of BiH, the Supreme Court of Republika Srpska and the Appellate Court of the Brčko District) that the death penalty may not be imposed (such a position had also been taken by the Human Rights Chamber in the case of *Damjanović and Herak v. the Federation of Bosnia and Herzegovina*), it follows that the law of 1992 is the more lenient law. In view of the above,

the appellant holds that his right guaranteed by Article 7(1) of the European Convention has been violated as he was sentenced under the more severe law.

b) Reply to the Appeal

21. In its reply to the appeal, the Court of BiH underlines that the appellant's allegations on the violation of his rights under Articles 6 and 7 of the European Convention are unfounded. As to the appellant's allegations relating to the violation of his right to a fair trial under Article 6 of the European Convention, the Court of BiH holds that, contrary to the appellant's allegations, it offered clear and comprehensible reasons on which it relied in adopting its decisions in both verdicts. The first instance verdict, which was upheld in the part relating to the appellant, is a result of a logical and psychological evaluation of evidence, individually and by interlinking them, whereby the Trial Chamber took into account the legality and the principle of the free evaluation of evidence. In so doing, the Trial Chamber relied only upon the assessment of the relevant evidence necessary for the adoption of the verdict, with a remark that the fact that it did not deal with a piece of evidence individually for which it found to be of secondary importance, does not mean that it was neglected or arbitrarily evaluated, which is consistent with the case-law of the ICTY. Therefore, the Court of BiH holds ill-founded the appellant's allegations relating to the violation of the right to a fair trial.

22. As to the appellant's allegations relating to the violation of his right safeguarded by Article 7 of the European Convention, the Court of BiH notes that in the present case, bearing in mind that the act for which the appellant was found guilty represented a part of the general principles of the international law, the Trial Chamber and subsequently the Appellate Division Panel applied the Criminal Code of BiH. Namely, Article 4(a) of the Criminal Code of BiH prescribes that Articles 3 (the principle of legality) and 4 (the principle of time validity of the Criminal Code) of the Criminal Code of BiH shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, constituted a criminal offence in accordance with the general principles of the international law. In that sense, the Court of BiH referred to the Decision of the Constitutional Court in the case no. *AP 1785/06*.

23. In addition, the Court of BiH points out that the appellant's allegation that the death penalty, as a punishment, had been abolished by the enactment of the 1994 Constitution of FBiH, is not correct having in mind that the death penalty was abolished only in 2002 by way of Article 1 of Protocol No. 13 to the European Convention and that it still remained in force under the law applicable at the time of the perpetration of the criminal offence. However, even if the death penalty were abolished, it is not possible through simple

elimination of a sanction (the death penalty in the present case) to apply other, more lenient, sanctions, thereby leaving the most serious crimes inadequately sanctioned, which is the case here. As a result, in the opinion of the Court of BiH, the principles of fairness and the rule of law would be violated.

24. In its reply to the appeal, the Prosecutor's Office states that the Court of BiH correctly applied the Criminal Code of BiH and fully answered the question relating to the application of „the more lenient law". These assertions are corroborated by the conclusion taken by the Constitutional Court in the case no. *AP 1785/06* in relation to the application of Article 7 of the European Convention. Namely, there is no doubt, and the appellant does not claim otherwise, that the war crime against civilians under Article 173 of the Criminal Code of BiH is a criminal offence under the customary international law, *i.e.* the general principles of the international law. Therefore, it is clear that Article 4(a) of the Criminal Code of BiH is applicable to the present case and that the international criminal offences are exempted from the provision stipulating a more lenient punishment contained in Article 4 of the Criminal Code of BiH and, consequently, the appellant's allegations are irrelevant. Therefore, the Prosecutor's Office concluded that the appellant's allegations are unfounded in their entirety.

V. Relevant Law

25. The **Criminal Code of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, nos. 37/03, 54/04, 61/04, 30/05, 53/06, 55/06 and 32/07), in the relevant part, reads as follows:

Article 3
Principle of Legality

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

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

Article 4
Time Constraints Regarding Applicability

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

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

Article 4a
Trial and punishment for criminal offences pursuant to the general principles of international law

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

Article 42
Imprisonment punishment

(1) Imprisonment may not be shorter than thirty days or longer than twenty years.

(2) For the gravest forms of serious criminal offences perpetrated with intent, imprisonment for a term of twenty to forty-five years may be exceptionally prescribed (long-term imprisonment).

(3) Long-term imprisonment may never be prescribed as the sole principal punishment for a particular criminal offence.

(4) Long-term imprisonment cannot be imposed on a perpetrator who has not reached twenty-one years of age at the time of perpetrating the criminal offence.

(5) Juvenile imprisonment may be imposed under the conditions prescribed by Chapter X (Rules Relating to Educational Recommendations, Educational Measures and Punishing Juveniles) of this Code. Juvenile imprisonment is in its purpose, nature, duration and manner of execution a special punishment of deprivation of liberty.

(6) Imprisonment shall be imposed in full years and months; however, the punishment of imprisonment for a term not exceeding six months may also be measured in full days. Long-term imprisonment shall be imposed only in full years.

(7) If long-term imprisonment has been imposed, amnesty or pardon may be granted only after three-fifths of the punishment has been served.

Article 173
War Crimes against Civilians

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

c) Killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhuman treatment, biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health;

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

26. The **Criminal Code of the SFRY** (*Official Gazette of the SFRY*, nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90), in the relevant part, reads as follows:

Article 37

(1) The death penalty may not be imposed as the only principal punishment for a certain criminal act.

(2) The death penalty may be imposed only for the most serious criminal acts when so provided by the statute.

(3) The death penalty may not be imposed on a pregnant woman or on a person who was not aged 18 or over at the time of the commission of a criminal act.

(4) The death penalty may be imposed on an adult person who was under 21 years of age at the time of the commission of a criminal act, under conditions referred to in paragraph 2 of this article, only for criminal acts committed against the bases of the socialist self-management social system and security of the SFRJ, for criminal acts against humanity and international law, and for criminal acts against the armed forces of the SFRJ.

(5) The death penalty shall be executed by shooting, without members of the public present.

Article 38(1), (2) and (3)

(1) The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years.

(2) The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty.

(3) For criminal acts committed with intent for which the punishment of fifteen years imprisonment may be imposed under statute, a punishment of imprisonment for a term of 20 years may be imposed when so provided by statute.

Chapter XVI – Criminal Act against Humanity and International Law

(Note: encompassed, inter alia, the following criminal offences: Article 141 – Genocide; Article 142 – War crime against the civilian population; Article 143 - War crime against the civilian population; Article 144 – War crime against prisoners of war; Article 145 - Organizing a group and instigating the commission of genocide and war crimes;

Article 146 - Unlawful killing or wounding of the enemy; Article 147 – Marauding; Article 154 - Racial and other discrimination; Article 155 - Establishing slavery relations and transporting people in slavery relation).

Article 142
War crime against the civilian population

(1) Whoever in violation of rule of international law applicable at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts,

shall be punished with a sentence of imprisonment for not less than five years or by the death penalty.

(2) Punishment defined under paragraph 1 of this Article shall be pronounced also on those who in violation of rules of international law applicable in the time of war, armed conflict or occupation, order: that an attack be launched against objects specifically protected by the international law as well as objects and facilities with dangerous power, such as dams, embankments and nuclear power stations; that civilian objects which are under specific protection of the international law, non-defended places and demilitarized zones be indiscriminately targeted; long-lasting and large-scale environment devastation which may be detrimental to the health and survival of the population, or whoever commits some of the aforementioned acts.

(3) Whoever in violation of rules of international law applicable in the time of war, armed conflict or occupation, orders or carries out as an occupier the resettlement of parts of his/her civilian population into the occupied territory,

shall be punished with a sentence of imprisonment for not less than five years.

27. The **Criminal Procedure Code of BiH** (*Official Gazette of Bosnia and Herzegovina*, nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09 and 16/09), in the relevant part, reads as follows:

Article 3
Presumption of Innocence and In Dubio Pro Reo

(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 offence 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 favourable for accused.

Article 14
Equality of Arms

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

Article 15
Free Evaluation of Evidence

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

V. 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 other court in Bosnia and Herzegovina.

29. According to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective legal remedies available under the law against a judgment/decision challenged by the appeal were 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.

30. In the instant case, the subject-matter challenged by the appeal is the Verdict of the Court of BiH no. X-KRŽ-05/107 of 19 November 2007, against which there are no other effective legal remedies available under the law. Next, the appellant received the challenged verdict on 3 December 2007 and the appeal was lodged on 29 January 2008, *i.e.* within a time-limit of 60 days as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(2)

and (4) of the Rules of the Constitutional Court, because it is neither manifestly (*prima facie*) ill-founded, nor is there any other formal reason rendering the appeal inadmissible.

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

VII. Merits

32. The appellant challenged the mentioned verdicts, claiming that they were in violation of 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 and that Article 7 of the European Convention was violated to his detriment.

33. The Constitutional Court will first examine whether Article 7 of the European Convention has been violated.

Article 7 of the European Convention

34. Article 7 of the European Convention reads as follows:

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

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

35. According to the allegations set forth in the appeal, the challenged decisions of the Court of BiH are not in accordance with Article 7 of the European Convention given that the appellant was convicted under the provisions of the Criminal Code of BiH, whereas he (the appellant) holds that he should have been convicted under the provisions of the Criminal Code of SFRY, because that law was in force at the time of the perpetration of the criminal offence in question (war crime against civilians) and because that law, allegedly, prescribes a more lenient punishment for the criminal offence in question, so that it is more favorable, i.e. more lenient to the appellant. Therefore, the Constitutional Court will examine the challenged decisions from the aspect of their compatibility with Article 7 of the European Convention.

36. The Constitutional Court recalls that the relevant cases in its hitherto case-law relating to the war crimes, wherein the Constitutional Court examined the challenged court decisions in accordance with the standards of Article 7 of the European Convention are the following: *AP 1785/*06 of 30 March 2007 (Decision on Admissibility and Merits published in the *Official Gazette of BiH* no. 57/07*,* hereinafter referred to as *Maktouf*) and *AP 519/07* of 29 January 2010 (Decision on Admissibility and Merits published in the *Official Gazette of BiH* no. 20/10, hereinafter referred to as *Samardžić*).

37. Furthermore, the Constitutional Court observes that on 18 July 2013 the European Court of Human Rights rendered a judgment in the case of the applicants Abduladhim Maktouf and Goran Damjanović (see ECHR, *Maktouf and Damjanović v. Bosnia and Herzegovina,* Applications nos. 2312/08 and 34179/08, Judgment of 18 July 2013) wherein it has found the violation of Article 7 of the European Convention.

38. In the aforementioned judgment the European Court of Human Rights has noted, first and foremost, that some crimes, notably crimes against humanity, were introduced into the national law only in 2003 so that the courts, therefore, have no other option but to apply the 2003 Criminal Code of BiH in such cases. However, the court noted that the respective applications raise the issues entirely different from those in the *Šimšić* case given that the war crimes committed by the applicants Maktouf and Damjanović constituted criminal offences under the national law at the time when committed (paragraph 55).

39. The European Court of Human Rights noted that is not its task to review *in abstracto* whether the retroactive application of the 2003 Criminal Code of BiH in the war crimes cases was, *per se*, incompatible with Article 7 of the European Convention and that this matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each individual case and, particularly, whether the domestic courts had applied the law the provisions of which were most favorable to the defendant (paragraph 65).

40. The cited decision further reads that the definition of war crimes is the same in Article 142(1) of the 1976 SFRY Criminal Code, which was applicable at the time the respective criminal offences were committed, and in Article 173(1) of the BiH Criminal Code, which was applied retroactively in this particular case. It was noted, however, that these two Criminal Codes provide for different sentencing frameworks regarding war crimes. In that respect it was noted that the applicant Damjanović was sentenced to 11 years' imprisonment, slightly above the minimum of ten years prescribed by the BiH Criminal Code. While, under the SFRY Criminal Code, it would have been possible to impose a sentence of only five years. (paragraphs 67- 68).

41. The European Court of Human Rights did not accept the argumentation that the BiH Criminal Code was more lenient to the applicants than the SFRY Criminal Code, given the absence of the death penalty. In that respect, it was noted that only the most serious instances of war crimes were punishable by the death penalty under the SFRY Criminal Code. As neither of the applicants was held criminally liable for any loss of life, the crimes of which they were convicted obviously did not fall in that category. Moreover, the applicant Maktouf received the lowest sentence possible and the applicant Damjanović a sentence which was only slightly above the lowest level set for war crimes by the BiH Criminal Code. In those circumstances, the European Court of Human Rights held that it was of particular significance in the mentioned case to establish which Code was more lenient in respect of the minimum sentence, and this was, without any doubt, the SFRY Criminal Code (paragraph 69).

42. The European Court of Human Rights further noted that the sentences imposed on the applicants were within the latitude of sentencing provided by both the SFRY Criminal Code and the BiH Criminal Code. It thus cannot be claimed with certainty that either applicant would have received lower sentences had the 1976 SFRY Criminal Code been applied. In addition, however, the European Court of Human Rights noted that: *What is crucial, however, is that the applicants could have received lower sentences had that Code (note: SFRY Criminal Code) been applied in their cases* (paragraph 70). In that sense the European Court of Human Rights referred also to the case-law of the Court of BiH in its more recent war crimes cases in which they applied the SFRY Criminal Code rather than the BiH Criminal Code, specifically with a view to applying the most lenient sentencing rules (*note: Kurtović*). Considering the aforementioned, the European Court of Human Rights concluded that *(...) since there exists a real possibility that the retroactive application of the 2003 Code operated to the applicants' disadvantage as concerns the sentencing, it cannot be said that they were afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7 of the Convention* (paragraph 70).

43. Furthermore, the European Court of Human Rights did not agree with the argument that if an act was criminal under „the general principles of law recognized by civilized nations" within the meaning of Article 7(2) of the European Convention at the time when it was committed, then the rule of non-retroactivity of criminal legislation did not apply. Namely, the European Court of Human Rights noted that this argument is inconsistent with the *Travaux préparatoires* which imply that Article 7(1) can be considered to contain the general rule of non-retroactivity and that Article 7(2) is only a contextual clarification of the liability limb of that rule, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed

during that war. It is thus clear that the drafters of the European Convention did not intend to allow for any general exception to the rule of non-retroactivity, and the European Court of Human Rights has held, in that respect, in a number of cases that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner (paragraph 72).

44. The European Court of Human Rights did not accept the argument that a duty of a state under the international humanitarian law to punish war crimes adequately required that the rule of non-retroactivity be set aside in this case. In that respect it was noted that the rule of non-retroactivity of crimes and punishments also appears in the Geneva Conventions and their Additional Protocols. Moreover, as the applicants' sentences were within the compass of both the 1976 Criminal Code and 2003 Criminal Code, the European Court of Human Rights held that the argument that the applicants could not have been adequately punished had the 1976 Code been applied is a clearly unfounded argument (paragraph 74).

45. In view of all the aforementioned, the European Court of Human Rights concluded that there has been a violation of Article 7 of the European Convention with respect to both applicants. However, the European Court of Human Rights clearly emphasized that that does not mean that lower sentences ought to have been imposed in the applicants' cases, but simply that the 1976 SFRY Criminal Code should have been applied.

46. The Constitutional Court, first and foremost, notes that the case of the appellant Zoran Damjanović, as regards both the factual substrate and the legal issue, is not different from the case of *Maktouf and Damjanović,* which was considered by the European Court of Human Rights in the aforementioned decision. In that respect the Constitutional Court notes that the appellant Zoran Damjanović too was found guilty and convicted of the same crime by the same Verdict of the Court of BiH as the applicant Goran Damjanović. Furthermore, the appellant Zoran Damjanović was convicted of a criminal offence of a war crime against civilians in accordance with Article 173 of the BiH Criminal Code, although it was an offence which had been committed on 2 June 1992, that is at the time when the SFRY Criminal Code had been in force, which prescribed the same criminal offence in Article 142 in an identical manner. Thus, the BiH Criminal Code was applied retroactively also in the appellant's case (see, *Maktouf and Damjanović*, paragraph 67).

47. The Constitutional Court further observes that based on the reasons adduced in support of the challenged verdicts it follows that the Court of BiH based the application of the substantive law, specifically the BiH Criminal Code, and the assessment that this law was more lenient to the appellant, on argumentation which may be subsumed as follows: that Article 7(2) of the European Convention allows for an exception to the general rule of

non-retroactivity contained in paragraph 1 of the same Article; that, given the prescribed punishment, the BiH Criminal Code was more lenient law to the appellant, as the provisions of Article 173 of that law do not prescribe the death penalty for the respective criminal offence, unlike the provisions of Article 142 of the SFRY Criminal Code, which had been in force and applicable at the time the respective criminal offence had been committed, and that a duty of a state under the international humanitarian law to punish war crimes adequately required that the rule of non-retroactivity be set aside in this case.

48. Thus, these are identical arguments as those considered before the European Court of Human Rights in the case of *Maktouf and Damjanović* (paragraphs 69-74). Accordingly, the Constitutional Court holds that there is no reason not to accept, in this part, the reasons and reasoning provided by the European Court of Human Rights in the present case.

49. Namely, the appellant Zoran Damjanović was sentenced to ten years and six months' imprisonment under the provisions of Article 173(1)(c) of the BiH Criminal Code. The Constitutional Court observes that the imposed sentence falls within the latitude of both the BiH Criminal Code and the SFRY Criminal Code. Pursuant to the SFRY Criminal Code, war crimes were punishable by imprisonment for a term of five to fifteen years or, for the most serious cases, the death penalty, instead of which a twenty-year prison term could have also been imposed. Pursuant to the BiH Criminal Code, war crimes attract imprisonment for a term of ten to twenty years or, for the most serious cases, long-term imprisonment for a term of twenty to forty five years. Further, the Constitutional Court observes that based on the challenged verdicts it follows that the offences which the appellant Zoran Damjanović was found guilty of having committed and punished do not belong to the category of the most serious war crimes cases *(loss of life)* for which it was possible, under the SFRY Criminal Code, to impose a death penalty. Namely, the Court of BiH found the appellant guilty and convicted him for having actively participated in the beating of the group of captured men of Bosniac ethnicity. Thus, these do not concern the most serious cases of the respective criminal offence, for which it was possible to impose on the appellant the maximum prescribed penalty for the respective criminal offence. Moreover, the appellant received an imprisonment penalty slightly above the minimum provided for by the BiH Criminal Code for war crimes (ten years and six months), wherefrom one may conclude that the court's intention was to impose a more lenient sentence on the appellant. Therefore, it was not necessary to establish in the present case which Code provided a more lenient maximum penalty, instead it was necessary to establish which Code was more lenient in respect of the minimum sentence (see, *Maktouf and Damjanović*, paragraph 69). Given that the minimum sentence of imprisonment under the SFRY Criminal Code was five years, and under the BiH Criminal Code ten

years, it unambiguously follows that, in the circumstances of the present case, the SFRY Criminal Code was more lenient, irrespective of the fact that, given the prescribed range of the prison term, this does not mean that the appellant would have received a lower imprisonment sentence had the SFRY Criminal Code been applied in his case. Namely, it is of crucial importance that the appellant *could have* received a lower sentence had this Code been applied (see, *Maktouf and Damjanović*, paragraph 70).

50. The Constitutional Court recalls that guarantees contained in Article 7 of the European Convention constitute one of the fundamental factors of the rule of law and occupy a prominent position in the system of the exercise of rights safeguarded by the European Convention. The importance of Article 7 of the European Convention is reflected also in the fact that, in accordance with Article 15 of the European Convention, no derogation from the application of the guarantees set forth in Article 7 of the European Convention shall be allowed either in the time of war or other public threat. Article 7 of the European Convention must be construed and applied in such a manner as to ensure successful protection against arbitrary prosecution, conviction and punishment. Furthermore, the Constitutional Court recalls that Article 7(1) guarantees not only the principle of non-retroactivity of more stringent criminal laws but also, implicitly, the principle of retroactivity of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and the criminal laws which were enacted and entered into force thereafter but before a final judgment was rendered, the courts must apply the law which provisions are most favorable to the defendant (see, ECHR, *Scoppola v. Italy, No. 2,* Judgment of 17 September 2009, paragraph 109). Lastly, according to the standpoint of the European Court of Human Rights, States are free to decide their own penal policy, they must however comply with the requirements of Article 7 of the European Convention in doing so (see, *Maktouf and Damjanović*, paragraph 75).

51. By interlinking the circumstances of the present case to the aforementioned standpoints of the European Court of Human Rights, and the positions taken in the case of *Maktouf and Damjanović,* the Constitutional Court holds that there is a realistic possibility in the present case that the retroactive application of the BiH Criminal Code was to the detriment of the appellant in respect of the sentencing, which is contrary to Article 7(1) of the European Convention.

52. The Constitutional Court concludes that the challenged verdicts of the Court of BiH have violated Article 7(1) of the European Convention, due to the erroneous application of law in relation to the guilt and punishment, thus the challenged verdicts must be quashed in full.

Other allegations

53. In view of the conclusion in relation to the violation of Article 7 of the European Convention and the order for the ordinary court to adopt a new decision in a new proceeding, the Constitutional Court holds that it is not necessary to examine separately the portion of the appeal relating to the right to a fair trial referred to in Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.

VIII. Conclusion

54. The Constitutional Court concludes that there has been a violation of Article 7(1) of the European Convention, on the ground that there is a realistic possibility in the present case that the retroactive application of the BiH Criminal Code was to the detriment of the appellant in respect of the sentencing, which is contrary to Article 7(1) of the European Convention, irrespective of the fact that, given the prescribed range of the prison term, this does not mean that the appellant would have received a lower imprisonment sentence had the SFRY Criminal Code been applied in his case. Namely, it is of crucial importance that the appellant could have received a lower sentence had this Code been applied.

55. Pursuant to Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 3329/10

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Željko Vidović against the Ruling of the Court of Bosnia and Herzegovina no. X-KRN-07/351 of 8 July 2010, 30 June 2010, 8 June 2010 and 21 May 2010 respectively

Decision of 9 October 2013

CONTENTS

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(4)(9), Article 59(2)(2), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Grand Chamber and composed of the following Judges:

Ms. Valerija Galić, President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić

Mr. Mirsad Ćeman

Having deliberated on the appeal of **Mr. Željko Vidović,** in case no. **AP 3329/10**, at its session held on 9 October 2013, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Željko Vidović is partly granted.

A violation of *the right to property* under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Rulings of the Court of Bosnia and Herzegovina no. X-KRN-07/351 of 8 June 2010 and 21 May 2010 are hereby quashed.

The case shall be remitted to the Court of Bosnia and Herzegovina which is obliged to take a new decision in an expedited procedure, in accordance with Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of the delivery of this Decision, of the measures taken with a view to enforcing this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal lodged by Mr. Željko Vidović against the Rulings of the Court of BiH no. X-KRN-07/351 of 8 June 2010 and 21 May 2010 and the Rulings of the Court of BiH no. X-KRN-07/351 of 8 July 2010 and 30 June 2010 *in relation to the right to a fair trial* under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby rejected as inadmissible, for being *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 3 August 2010, Mr. Željko Vidović („the appellant") from Bratunac lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Ruling of the Court of Bosnia and Herzegovina („the Court of BiH") no. X-KRN-07/351 of 8 July 2010, 30 June 2010, 8 June 2010 and 21 May 2010 respectively.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Court of BiH and the Prosecutor's Office of Bosnia and Herzegovina („the Prosecutor's Office") were requested on 3 August 2012 to submit their respective replies to the appeal.

3. The Prosecutor's Office submitted its reply to the appeal on 12 April 2012, and the Court of BiH did so on 25 April 2012 respectively.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 8 May 2012.

5. By its letter of 10 July 2013, the Constitutional Court requested from the Court of BiH to submit the information on whether an investigation was ongoing in the Case no. X-KRN-07/351. The Court of BiH submitted the requested information to the Constitutional Court on 22 July 2013.

III. Facts of the Case

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

7. On 12 September 2008, the Prosecutor's Office initiated an investigation against the appellant over the existence of a reasonable suspicion that he had committed a criminal act of organized crime under Article 250(2) in conjunction with the criminal act of abuse of office or authority under Article 220(3) of the Criminal Code of Bosnia and Herzegovina („the CC BiH").

Temporary seizure of objects

8. By the Order of the Court of BiH no. X-KRN-08/493 of 16 September 2008 and 17 September 2008, the following objects were temporarily seized from the appellant: money, cellphones, computer, pistol, bank and credit cards, identification card issued in the Republic of Serbia, notebooks, house and office keys etc. („the seized objects"). After being registered in the Book of Seized Objects of the Court of BiH, the objects were transmitted to the Prosecutor's Office.

9. The Ruling of the Court of BiH – the Preliminary Proceedings Judge, no. X-KRN-07/351 of 21 May 2010, which was upheld by the Ruling of the Interlocutory Panel of the Court of BiH no. X-KRN-07/351 of 8 June 2010, *dismissed as ill-founded the proposal of the appellant* and his defense counsel for the restitution of the temporarily seized objects upon the order of that court no. X-KRN-08/493 of 16 September 2008 and 17 September 2008.

10. In the reasoning of the ruling, the Court of BiH stated that the appellant indicated in the request for the restitution of the temporarily seized objects that the seized objects had no significance so as to apply Article 65 of the Criminal Procedure Code of Bosnia and Herzegovina („CPC BiH") to them, and that they were the objects relevant for everyday communication, as well as for the schooling of the family, and that the seized money was necessary for the existence of the family. In its reply to the request, the Prosecutor's Office noted, as the court further alleged, that the investigation was still ongoing and that the objects seized from the appellant were still relevant for the criminal proceedings and were considered possible evidentiary material.

11. The Court of BiH cited Article 74 of the CC BiH, and noted that in order for the temporarily seized objects to be restored to the owner before the completion of the proceedings, it is necessary to become obvious that there is no more need or grounds for the retention thereof. In the case at hand, the investigative procedure is still ongoing and the law did not prescribe the time limit during which an investigation must be finalized (except for cases concerning

detention), *so the court considered ill-founded the appellant's objection that 18 months passed since the objects had been seized*. For as long as the investigation is ongoing, the Prosecutor's Office is authorized to decide which objects are relevant for the procedure, that is to say which objects can serve as a piece of evidence in a criminal procedure. Given the allegations of the Prosecutor's Office that it intended to use the temporarily seized objects as evidence in a criminal procedure against the appellant, the Court of BiH could not disregard such an assessment and enable the restitution of objects. The assessment of the Prosecutor's Office was that the temporarily seized objects were relevant for the criminal procedure, thus the Court of BiH held that the appellant's allegation was ill-founded in that it read that the seized objects could not be included under the provisions of Article 65 of the CPC BiH and concluded that conditions provided for by Article 74 of the CPC BiH were not met.

12. The Interlocutory Panel of the Court of BiH alleged in the reasoning of the ruling that the respective objects were seized from the appellant in accordance with Article 64 of the CPC BiH *and that it was a correct conclusion in the first-instance ruling reading that the temporarily seized objects may be reinstated to the owner before the completion of the criminal procedure only in the event when it becomes obvious during the proceeding that there is no more need or grounds to retain them.* Bearing in mind the allegations of the Prosecutor's Office presented in the first-instance ruling (that the seized objects would be used in a criminal procedure against the appellant and other suspects), as well as the fact that the case is still in the investigation stage, namely in the stage during which the Prosecutor's Office decides which evidence to use, that is to say which evidence may serve in order to prove certain facts, the Court concluded that at that stage of the procedure the temporarily seized objects cannot be reinstated to the owner and that the provision of Article 74 of the CPC BiH was correctly applied.

Measure prohibiting meetings

13. The Ruling of the Court of BiH – the Preliminary Proceedings Judge, no. X-KRN-07/351 of 30 June 2010, which was upheld by the Ruling of the Panel of the Court of BiH no. X-KRN-07/351 of 8 July 2010, established that circumstances still persisted that are indicative of the justifiability of the measure prohibiting meeting with certain people under Article 126(a)(1)(c) of the CPC BiH so as to prohibit the appellant and the rest of the suspects to engage in mutual contact or to interfere in any way with this criminal case, and the said measure was imposed on the appellant and on the suspects V.L. and V.S. by the Ruling of the mentioned curt no. X-KRN-07/351 of 10 September 2008.

14. The Court of BiH stated in the reasoning that, in accordance with the provision of Article 126(b)(6) of the CPC BiH, since the proceedings in the case at hand is still ongoing, upon the end of two month period after the adoption of the ruling ordering the measure of

the prohibition of meeting with certain persons, it reviews whether the imposed measure is still needed. Upon inspecting that case-file the court established that circumstances and facts that existed at the time of the adoption of the latest ruling on the measures of prohibition still exist, i.e. that they were not altered either formally or substantially. It was noted that circumstances still exist that warrant the continuation of the measure, which are reflected in the fact that the appellant and other suspects are charged with a serious criminal act for which a long-term imprisonment sentence is stipulated. The Court of BiH particularly emphasized that it concerned a huge and complex case with a large number of suspects, and the nature of incriminating actions and the seriousness of incrimination suggest a certain degree of concern that the suspects might engage in mutual contact, which would have a detrimental effect on the continued course of investigation, and that it is still necessary to apply the measures of prohibition that prohibit the suspects (that the ruling applies to) to meet with one another. The Court of BiH, in the end, emphasized that the mentioned measure inflicts no objective damage on the suspects, and it restricts their rights to the smallest degree possible, yet to a sufficient degree so as to ensure as efficient finalization as possible of the complex investigation.

15. In the reasoning of the ruling the Panel of the Court of BiH, it was indicated that the first-instance ruling is correct and based on the law and that, in terms of Article 123(2) of the CPC BiH, during the adoption of the decision it was made sure not to apply a graver measure if the same purpose could be achieved through more lenient measures, thus it concluded that only so defined measures could ensure successful completion of the investigation in the present case.

a) Allegations stated in the appeal

16. The appellant complains that the challenged rulings violated his rights safeguarded by Article II(3)(a), (b), (c), (d), (e), (k) and (m) of the Constitution of Bosnia and Herzegovina, as well as rights safeguarded by Articles 2, 3, 4, 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), and under Article 1 of Protocol No. 1 to the European Convention as well as under Article 2 of Protocol No. 4 to the European Convention. As to the challenged rulings dismissing his request to reinstate the temporarily seized objects, the appellant stated that the seized objects did not stem from any criminal act or some illegal activity, and that there was no valid legal ground to retain them further, and the Prosecutor's Office was unable to get hold of the relevant evidence on criminal origin of the seized objects, or on the need for their further retention. The appellant emphasized that he meant in particular the money which he needs for his and his family's „bare existence", for children's schooling, and for medical treatments that himself and his wife need. Also, he indicated in the request for the restitution of objects that the Prosecutor's Office had enough time to check whether

the seized objects had anything to do with the respective criminal procedure such as, for instance, computers, which certainly contain no evidence, without which his children „were pushed back half a century". The situation is the same with other seized objects such as cellphones, personal weapons, keys, credit and bank cards, and the identification card issued in the Republic of Serbia needed for the purpose of regulating status-related matters in Serbia. The appellant considers the challenged rulings dismissing his request to reinstate the temporarily seized objects to be illegal and unsustainable for the reason that the court failed to engage in establishing the purposefulness of facts and thus to resolve the request on the merits, instead it „complied with the mere opposition on the part of the Prosecutor's Office and based the decision thereon".

17. As to the challenged rulings establishing the continued existence of the circumstances that are indicative of the justifiability of the measure prohibiting meetings with certain people under Article 126(a)(1)(c) of the CPC BiH so as to prohibit the suspects to engage in mutual contact or to interfere in any way with this criminal case, the appellant indicated that the challenged rulings were based on a blanket position of the Prosecutor's Office which „resorted to excuses by citing the extensiveness of the case". The court failed to decisively specify „whether I knew any of the suspects, save for V.S., and whether they had any knowledge about our contacts, especially criminal contacts, that is to say to explain any reasons whatsoever justifying the adoption of the mentioned measure". The connection between the suspects, as the appellant stated, „is evident solely in their coming from the same Earth hemisphere".

b) Reply to appeal

18. In its reply to the appeal, the Court of BiH stated that during the adoption of the challenged rulings dismissing the appellant's request to reinstate the temporarily seized objects it relied on the facts that the case was in the investigation stage, that the Prosecutor was the one who had the case and took a decision which objects to use as evidence. It further stated that the provision of Article 74 of the CPC BiH was correctly applied, as there were objective circumstances justifying the decision dismissing the proposal to reinstate the temporarily seized objects. Rather decisively and clearly were reasoned the circumstances pointing to the justifiability of continued retention of the seized objects by the Prosecutor's Office pending the completion of the investigation, that is until such time it becomes obvious that there is no more need to retain them. Also it was mentioned that the appellant's allegations were ill-founded in that they read that the rulings on the control of the measure of prohibition of meetings were unlawful, because not all relevant circumstances were assessed, such as the duration of the prohibition and the fact whether the suspects eve know each other, given that the rulings were reasoned in detail and all

reasons laid out. Thus the court indicated specifically that the prohibition measures were not linked to the moment of the completion of the investigation, rather they can exist at later stages, up until such time the procedure is finalized by a legally binding decision.

19. In the reply of the Prosecutor's Office to the appeal, it was indicated that the challenged decisions did not violate the mentioned rights, and decisions of the court were adopted in accordance with the CPC BiH including the correct assessment of evidence and facts of the case, and fully observing human rights, thus the appeal should be dismissed as ill-founded.

V. Relevant Law

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

Article 65
Order for Seizure of Objects

(1) Objects that are the subject of seizure pursuant to the Criminal Code or that may be used as evidence in the criminal proceedings shall be seized temporarily and their custody shall be secured pursuant to a Court decision.

(2) The seizure warrant shall be issued by the Court on the motion of the Prosecutor or on the motion of authorized officials who have been approved by the Prosecutor.

(3) The seizure warrant shall contain the name of the Court, legal grounds for undertaking the action of seizure of objects, indication of the objects that are the subject of seizure, the name of the person from whom objects are to be seized, and the timeframe within which the objects are to be seized.

(4) The authorized official shall seize objects on the basis of the issued warrant.

[...]

(8) When articles are seized, a note shall be made of the place where they were found, and they shall be described, and if necessary, establishment of their identity shall also be provided for in some other manner. A receipt shall be issued for articles seized.

[...]

Article 74
Return of the Seized Property

Objects that have been seized during the criminal proceedings shall be returned to the owner or possessor once it becomes evident during the proceedings that their retention

runs contrary to Article 65 of this Code and that there are no reasons for their seizure (Article 391).

Article 123
Types of Measures

(1) Measures that may be taken against the accused in order to secure his presence and successful conduct of the criminal proceedings shall be: summons, apprehension, prohibiting measures, bail and custody.

(2) When deciding which of the above mentioned measures is to be applied, the competent body shall meet certain conditions for application of the measures, attempting not to apply more severe measure if the same effect can be achieved by application of a less severe measure.

(3) These measures shall also be cancelled ex officio immediately after the reasons for their application cease to exist, or they shall be replaced with a less severe measure when the conditions for it are created.

(4) The provision of this Chapter shall be applied to the suspect as well, as appropriate.

Article 126a
Other Prohibiting Measures

(1) When the circumstances of the case so indicate, the Court may order one or more of the following prohibiting measures:

[...]

c) prohibition from meeting with certain persons,

Article 126b
Imposing the Prohibiting Measures

(1) The Court may impose the house arrest, travel ban and other prohibiting measures by a reasoned decision upon the proposal of a party or the defense attorney.

(2) When deciding on custody, the Court may impose the house arrest, travel ban and other prohibiting measures ex officio, instead of ordering or prolonging the custody.

(3) In the decision imposing the prohibiting measures, the suspect or accused shall be warned that the custody may be ordered against him or her if he/she violates the obligation under the imposed measure.

(4) In the course of an investigation, the prohibiting measures shall be ordered and revoked by the preliminary proceedings judge and after the issuance of an indictment – by a preliminary hearing judge and after the case has been referred to the judge or the Panel for the purpose of scheduling the main trial – by that judge or the presiding judge.

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(5) The prohibiting measures may last as long as they are needed, but not later than the date on which the verdict becomes legally binding if a person was not pronounced the sentence of imprisonment and at the latest until the person has been committed to serve the sentence if a person was pronounced the sentence of imprisonment. Travel ban may also last until the pronounced fine is paid in full and/or the property claim and/or confiscation of material gain enforced in full.

(6) The preliminary proceedings judge, preliminary hearing judge, the judge, or the presiding judge must review every two months whether the imposed prohibiting measure is still needed.

(7) A decision ordering, extending or revoking the prohibiting measures may be appealed by a party or the defense attorney, while the Prosecutor may also appeal a decision rejecting his motion for the ordering of a measure. An appeal shall be decided by the Panel referred to in Article 24 Paragraph (7) of this Code within three days of receipt of the appeal. An appeal shall not stay the execution of decision.

Article 391
Forfeiture of Items

(1) The items that need to be forfeited under the Criminal Code of Bosnia and Herzegovina shall be forfeited also when the criminal proceedings were not completed by a verdict finding the accused guilty, if so required by the interests of general security and ethics, on which a separate decision shall be issued.

(2) The decision referred to in Paragraph 1 of this Article shall be issued by the judge or Panel at the moment when the proceedings are completed or dismissed.

[...]

VI. Admissibility

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

22. In accordance with Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

Admissibility as to decisions adopted in a procedure of temporary seizure of objects and decisions adopted in the procedure of control of the justifiability of the measure prohibiting meetings with certain persons in relation to the right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention

23. While examining the admissibility of the present appeal in relation to the allegations as to the violation of this right, the Constitutional Court considered the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, and Article 16(4)(9) of the Rules of the Constitutional Court.

Article 16(4)(9) of the Rules of the Constitutional Court reads as follows:

4. An appeal shall also be inadmissible in any of the following cases:

9) the appeal is ratione materiae incompatible with the Constitution;

24. The Constitutional Court observes that the appellant complained that his right to a fair trial was violated by the ruling no. X-KRN-07/351 of 21 May 2010 and of 8 June 2010 dismissing his proposal for the restitution of the temporarily seized objects and the ruling no. X-KRN-07/351 of 30 June 2010 and of 8 July 2010 establishing that the circumstances still existed that are indicative of the justifiability of the measure of prohibiting meetings with certain persons.

25. In order to establish the applicability of Article 6(1) of the European Convention to the present case, it is necessary to answer the question whether the procedure regarding the appellant's proposal for the restitution of the temporarily seized objects, as well as the procedure of control of the justifiability of the measure prohibiting meetings with certain persons, constituted procedures in which the *well-foundedness of criminal charges against him was being established*, within the meaning of Article 6(1) of the European Convention.

26. In that respect, the Constitutional Court holds that the respective proceedings (the proceeding regarding the appellant's motion for the restoration of the temporarily seized objects and the proceeding on the control of the justifiability of the measure prohibiting meetings with certain persons) do not concern the decision-making on the well-foundedness of the criminal charges against the appellant, instead they concern exclusively the decision-making on the existence of legal conditions for possible restoration of the seized objects, i.e. the legal justifiability of the duration of the measure prohibiting meetings with certain persons. Therefore, the Constitutional Court holds that the respective proceedings of deciding the appellant's motion for the restoration of the temporarily seized objects and the procedure of control of well-foundedness of the imposed measure prohibiting meetings

with certain persons did not concern the establishment of well-foundedness of criminal charges against the appellant in terms of Article 6(1) of the European Convention, so that Article is not applicable in the present case. Since Article II(3)(e) of the Constitution of Bosnia and Herzegovina does not provide a wider scope of protection than Article 6 of the European Convention, it follows that the allegations stated in the appeal in relation to the violation of the right to a fair trial are incompatible *ratione materiae* with the Constitution of Bosnia and Herzegovina.

Admissibility as to decisions adopted in a procedure of temporary seizure of objects and decisions adopted in the procedure of control of the justifiability of the measure prohibiting meetings with certain persons in relation to the right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention

27. In the present case, the Constitutional Court observes that the subject-matter challenged by this part of the appeal is the Ruling of the Court of BiH no. X-KRN-07/351 of 8 June 2010, which upheld the Ruling of the said court no. X-KRN-07/351 of 21 May 2010, namely it dismissed in essence the appellant's request for the restoration of the temporarily seized objects, against which no other effective legal remedies exist under the law. Next, the appellant received the challenged ruling on 10 July 2010, and the appeal was lodged on 3 August 2010, i.e. within the time limit of 60 days, as prescribed by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal in this part meets the requirements referred to in Article 16(2) and (4) of the Rules of the Constitutional Court, as it is not manifestly (*prima facie*) ill-founded, nor is there any other formal reason rendering the appeal inadmissible. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, and Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the relevant appeal meets the admissibility requirements in the mentioned part.

VII. Merits

28. The appellant holds that the challenged rulings of the Court of BiH dismissing his motion for the restoration of the temporarily seized objects violated his right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

29. Article II(3) of the Constitution of Bosnia and Herzegovina, in the relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

k) The right to property.

Article 1 of Protocol No. 1 to the European Convention, in the relevant part, reads:

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

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

30. First and foremost, 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 sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third rule, stated in paragraph 2 of the same article, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. All three rules are interlinked and are not mutually contradicting. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property (see, European Court of Human Rights, *Holy Monasteries v. Greece*, Judgment of 9 December 1994, Series A no. 301-A, paragraph 51).

31. When considering whether the challenged rulings violated Article 1 of Protocol No. 1 to the European Convention, it must be established first whether the seized objects constitute the appellant's property within the meaning of Article 1 of Protocol No. 1 to the European Convention. In that respect, the Constitutional Court notes that it is undisputed that the appellant is the owner of the temporarily seized objects, therefore, *the seized objects constitute the appellant's property within the meaning of Article 1 of Protocol No. 1 to the European Convention*.

32. Further, the Constitutional Court ought to establish whether the appellant's property was interfered with, whether the interference was in accordance with the law and in the public interest and whether the interference was proportionate to the legitimate aim, that is to say whether it strikes a fair balance between the appellant's right and the general interest.

33. In connection thereto, the Constitutional Court observes that the European Court of Human Rights („the European Court") in a number of its decisions established that the seizure of property for the purpose of legal proceedings is usually linked to the control of the use of property that falls under the scope of Article 1(2) of Protocol No. 1 to the

European Convention (see, decisions of the European Court, *Raimondo vs. Italy*, of 22 February 1994, Series A no. 281-A, *Adamczyk vs. Poland*, no. 28551/04 of 7 November 2006, and *Simonjan-Heikinheino vs. Finland*, no. 6321/03 of 2 September 2008). Also, the Constitutional Court observes that the European Court, in the case of *Smirnov vs. Russia* (see, the European Court, *Smirnov vs. Russia*, Application no. 71362/01, judgment of 7 June 2007, paragraph 54), concluded that the situation where an investigative body ordered that a computer be kept as physical evidence in criminal case until such time the trial chamber adopted a decision, namely judgment, while deciding on it as evidentiary means in the present case, it ought to be examined as part of the right of the state to control the use of property in accordance with the general interest, that is within the meaning of Article 1(2) of Protocol No. 1 to the European Convention.

34. Taking into account the mentioned case-law of the European Court, and observing that the challenged rulings did not deprive the appellant of his property (in terms of definite seizure without a likelihood of restoring the property), the Constitutional Court holds that the present case is about the control of the use of property within the meaning of Article 1(2) of Protocol No. 1 to the European Convention.

35. The next question that the Constitutional Court needs to answer is whether the interference with the appellant's right to property was in accordance with the law.

36. In this respect, the Constitutional Court observes that the challenged rulings dismissed as ill-founded the appellant's request for the restoration of the temporarily seized objects, with a reasoning that the temporarily seized objects were needed as evidence in the investigation conducted against the appellant and other suspects over the existence of the grounds for suspicion that they had committed the criminal offence of organized crime under Article 250(2) in connection with the criminal offence of abuse of office or authority under Article 220(3) of the Criminal Code of BiH and that the Prosecutor's Office decides which evidence to use or which evidence may serve as evidence in order to prove certain facts, thus the temporarily seized objects cannot be restored to the owner at that stage of the proceedings. The Constitutional Court observes that the challenged rulings were adopted in accordance with the relevant provisions of the Criminal Procedure Code, in particular the provisions of Articles 65 and 74 of the Criminal Procedure Code, wherefrom it follows that the objects, which were temporarily seized, will be restored to the owner, or possessor, once it becomes obvious that they constitute objects to be seized under the Criminal Code, or which may serve as evidence in a criminal procedure, and there are no reasons for their seizure within the meaning of Article 391 of the same Law.

37. The legal basis for adopting the challenged decisions follows from the aforementioned, prescribed in the mentioned relevant law, which meets requirements regarding availability,

i.e. accessibility (published in the official gazette, which is a public gazette) and clarity (given that the cited provisions of the Criminal Code and the Criminal Procedure Code were sufficiently clearly phrased in a sense that everyone can estimate the consequences of his/her behavior). In view of the aforementioned, *the Constitutional Court concludes that „the interference" with the appellant's right to property was done in accordance with the law*.

38. Next, the Constitutional Court holds that dismissing the appellant's request for the restoration of the temporarily seized objects, that is to say keeping the material evidence may be necessary in the interest of valid administration of justice, which constitutes a legitimate aim in the general interest (see, the European Court, *Smirnov v. Russia*, Application no. 71362/01, judgment of 7 June 2007, paragraph 57). Namely, the Constitutional Court finds it indisputable that the public interest exists in the case where objects are being seized for the purpose of conducting an investigation in a criminal procedure.

39. However, a question arises as to whether the control of the appellant's property is proportionate to that legitimate aim sought to be achieved, i.e. that is to say as to whether it strikes a fair balance between the appellant's right and the general interest.

40. In that respect, the Constitutional Court observes, first and foremost, that in the case of *Smirnov v. Russia*, Application no. 71362/01, judgment of 7 June 2007, the European Court considered the application by the applicant whose computer central unit was, *inter alia*, seized as evidence in a criminal procedure against the third persons. In the respective judgment, the European Court concluded that a computer itself is not an object, an instrument or a product of any criminal offence, and that for an investigation in that case the information stored on a hard drive were valuable, which investigator inspected and which were printed and included in the case-file. In the given circumstance the European Court was unable to recognize any obvious reason for continued retention of the central computer unit, and it noted that such a reason was not given in the domestic proceedings, or in the proceedings before that court, but that the domestic authorities, nevertheless, kept the computer until the adoption of the judgment, namely for over six years. Also, the European Court noticed in connection thereto that the computer was the applicant's instrument for work, which he used to draft legal documents and store clients files, thus it concluded that the retention of the computer caused to the applicant not only personal unpleasantness, but it also diminished his professional activities, which could have repercussions on the rule of law. In view of the aforementioned, *the European Court noted that the Russian authorities failed to strike „a fair balance" between the general interest and the protection of the applicant's right to peaceful enjoyment of property, which is the reason why it concluded that Article 1 of Protocol No. 1 to the European Convention was violated*.

41. The Constitutional Court observes that this case is similar to the mentioned case of the European Court. Namely, the Constitutional Court observes that the Court of BiH, by the challenged rulings, dismissed as ill-founded the appellant's motion for the restoration of the temporarily seized objects, holding that, for as long as the investigation is ongoing, the Prosecutor's Office is authorized to decide which objects are relevant for the proceedings, namely which can serve as evidence in a criminal procedure. Thus, given that the Prosecutor's Office assessed that it intended to use the temporarily seized objects as evidence in a criminal procedure against the appellant, the Court of BiH notes that could not disregard such an estimate and enable the restoration of objects.

42. However, the Constitutional Court observes that the Court of BiH, apart from general statement that the temporarily seized objects would serve as evidence during the investigation and that it could not disregard the estimate of the Prosecutor's Office that the temporarily seized objects were relevant for the criminal proceedings, failed to provide specific facts for which it held that there were justified reasons for further retention of the seized objects. Next, the Constitutional Court emphasizes that the appellant was prevented since 16 September 2008 and 17 September 2008, the date when the Court of BiH issued an order on the temporary seizure of objects, from disposing with objects and that such a situation has persisted up to the moment of the adoption of this decision, namely *for five years already*, which is a rather long period. In addition, the Constitutional Court observes that the Court of BiH stated in the second-instance ruling that the case was still at the investigation stage where the Prosecutor's Office decides which evidence to use, that is to say which evidence it can use to prove certain facts, and that the temporarily seized objects cannot be restored to the owner at this stage of the proceedings. However, the Constitutional Court observes that the investigation, which the Prosecutor's Office instituted on 12 September 2008 over the reasonable suspicion that the appellant had committed the criminal offence of organized crime under Article 250(2) in connection with the criminal offence of abuse of office or authority under Article 220(3) of the Criminal Code of BiH, is still pending and that it is uncertain when it will be finalized given that the provisions of the Criminal Procedure Code did not provide a time limit within which it must be finalized.

43. Eventually, the Constitutional Court recalls that the same factual and legal issue had already been considered in the Decision on Admissibility and Merits no. *AP 1986/08* of 13 July 2012 (published in *the Official Gazette of BiH*, no. 81/12) wherein it established the violation of the right to property whereby the decisions of an ordinary court violated the balance between the public interest and the appellant's interest, by placing an exaggerated personal burden that the appellant suffers in the form of making it impossible to freely dispose of his property.

44. In view of all the aforementioned, the Constitutional Court holds that the challenged rulings of the Court of BiH failed to strike „a fair balance" between the general interest and the appellant's right, that is to say that an exaggerated burden was placed on the appellant in terms of preventing him from freely disposing of his property, and the burden of uncertainty as to whether he would and/or when be restored that property, thereby violating the appellant's right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

Other allegations

45. The Constitutional Court observes that the appellant complains about the violations of the rights referred to in Article II(3)(a), (b), (c), (d) and (m) of the Constitution of Bosnia and Herzegovina, as well as the rights safeguarded under Articles 2, 3, 4, 5 of the European Convention and Article 2 of Protocol No. 4 to the European Convention, but that he failed to specify what the violations entailed. However, bearing in mind the conclusion of the Constitutional Court on the violation of the right to property, as well as the legal remedy established by this decision, the Constitutional Court does not find it necessary to examine separately the allegations as to the violation of the rights guaranteed by the mentioned instruments for the protection of human rights and fundamental freedoms.

VIII. Conclusion

46. The Constitutional Court concludes that there is a violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention where the interference with the appellant's right to property was effected in such a way that the decisions of the Court of BiH violated the balance between the public interest and the appellant's interest, by placing an exaggerated personal burden that the appellant bore in the form of preventing him from freely disposing his property.

47. Pursuant to Article 16(4)(9), Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP 2511/07

RULING

Appeal of Mr. Darko Janković
and Mr. Stojan Petrušić

Ruling of 25 March 2011

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In accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(3) and Article 74(6) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), the Constitutional Court of Bosnia and Herzegovina, sitting in Plenary, composed of the following Judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Mr. Mirsad Ćeman,

Ms. Margarita Tsatsa-Nikolovska

in case no. **AP 2511/07,** at its session held on 25 March 2011, adopted the following

R U L I N G

It is hereby established that the Basic Court in Banja Luka failed to enforce the Decision of the Constitutional Court of Bosnia and Herzegovina no. AP 2511/07 of 29 June 2010.

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

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

Reasoning

1. By its decision no. AP 2511/07 of 29 June 2010, the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") granted the appeal of Mr. Darko Janković and Mr. Stojan Petrušić and established a violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") with regard to the enforcement procedure in the case no. I-3481/04 pending before the Basic Court in Banja Luka („the Basic Court"). By the respective Decision, the Constitutional Court ordered the Basic Court to complete, without further delay, the enforcement procedure in the case no. I-3481/04, in accordance with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention. Also, it ordered the Basic Court to inform the Constitutional Court, within 90 days from the date of the delivery of that decision, of the measures taken to enforce this decision, in accordance with Article 74(5) of the Rules of the Constitutional Court (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09, „the Rules of the Constitutional Court").

2. Paragraph 28 of the mentioned Decision of the Constitutional Court reads as follows: *With respect to the aforementioned, the Constitutional Court holds that the obligation of the court to approve and execute the enforcement, which, according to the relevant provisions of the Law on Enforcement Procedure, was determined on the basis of the legally binding decision, has not been exhausted solely by adopting a ruling on enforcement and by communicating it to the authority for enforcement (in the present case that is the Sector for Treasury, which is located within the Ministry of Finance of RS), which has the monetary funds of the debtor, but this obligation of the court is consisted of also undertaking further measures and actions, which result in the completion (finalization) of the enforcement procedure. In this respect, the Constitutional Court recalls that, in accordance with Article 64 of the Law on Enforcement Procedure, the enforcement procedure shall be considered completed following the legally binding decision rejecting or dismissing the proposal for enforcement, upon conducting the activity of enforcement completing the enforcement or by suspending the enforcement. In the present case, on the basis of all the evidence presented to the Constitutional Court, it is apparent that a decision, which legally binding nature would render the respective enforcement procedure completed, has not been adopted, within the meaning of the mentioned legal provision.* Also, paragraph 29 of the respective Decision reads as follows*: By assessing the aforementioned, the Constitutional Court holds that the appellants' right to a fair trial under Article II(3)(e) of*

the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention was violated, because the Basic Court failed to adopt a decision in the present case, on the basis of which the respective enforcement procedure could be considered completed, in accordance with the relevant provisions of the Law on Enforcement Procedure.

3. On 22 September 2010, the Basic Court received the Constitutional Court's Decision no. AP 2511/07 dated 29 June 2010, which means that the time limit for the enforcement of the relevant decision expired on 21 December 2010.

4. On 7 October 2010, the Basic Court submitted a letter to the Constitutional Court wherein, among other things, it stated that on 7 April 2005 it adopted a ruling on enforcement in the case no. I-3481/04 and that the Basic Court, by its ruling of 1 July 2005, dismissed the objection raised by the debtor against the ruling on enforcement. Also, the Basic Court stated that no appeal had been lodged against that ruling, so the ruling on enforcement became legally binding and was forwarded on 16 December 2005 to the Ministry of Finance – Treasury of the Republika Srpska for enforcement. The Basic Court concluded that this brought its involvement in the case to an end, pursuant to Article 64 of the Law on Enforcement Procedure, given that the action bringing procedure to an end, had been completed.

5. After that, by its letter dated 4 January 2011, the Constitutional Court requested from the Basic Court to submit the information on the enforcement of the Decision no. AP 2511/07 of 29 June 2010, including the relevant decision corroborating the enforcement of the decision of the Constitutional Court. The Basic Court failed to submit the requested information.

6. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, decisions of the Constitutional Court shall be final and binding. In addition, pursuant to Article 74(1) of the Rules of Constitutional Court, every physical and legal person shall be obliged to comply with the Constitutional Court's decisions and pursuant to paragraph 2 of the same Article, all authorities shall be obliged to enforce decisions of the Constitutional Court within the scope of their respective competences established by the Constitution and law.

7. In its Decision no. AP 2511/07 of 29 June 2010, the Constitutional Court set the time limit and the manner of enforcement of its decision. In doing so, the Constitutional Court specifically indicated that while adopting the respective decision, it took into account the facts stated in the letter of 7 October 2010 by the Basic Court. So, the mentioned facts were known to the Constitutional Court while adopting the respective decision, and the references made once again by the Basic Court to the same facts, on the grounds of

which the violation of the appellant's right to a fair trial was established, constitute non-compliance with the decision of the Constitutional Court.

8. Pursuant to Article 74(6) of the Rules of the Constitutional Court, in the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Constitutional Court about the measures taken, the Constitutional Court shall render a ruling in which it shall establish that the decision of the Constitutional Court has not been enforced

9. In view of the aforementioned, the Constitutional Court establishes that the Basic Court failed to enforce the Constitutional Court's Decision no. AP 2511/07 of 29 June 2010.

10. In accordance with Article 74(6) of the Rules of the Constitutional Court, this Ruling shall be submitted to the competent Prosecutor's Office of Bosnia and Herzegovina.

11. Pursuant to Article 74(6) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this ruling.

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

Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

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