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OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA NO. 4

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INTRODUCTION

The advantages of e-communication and e-media, which make the use and transfer of information and knowledge and such like faster and much simpler, are indisputable and it is almost unimaginable how the present world would look like without that form of technical and communication means and achievements. Therefore, by following that trend, the Constitutional Court of Bosnia and Herzegovina has for some time been presenting and communicating with everyone interested in its constitutional position and responsibilities, work and decisions via its website and publications in e-format.

Relatively rich editing production of the Constitutional Court is available in full on the website of the Court in e-format. In addition to the decisions that the Court has adopted over the period of 20 years of operation in the post-Dayton period (around 30,000 decisions deciding more than 60,000 cases), those who are interested may access a number of permanent or occasional publications such as the Bulletin, the Digest in the local languages and in English, collections, monographs, etc.

However, irrespective of the possibilities and advantages of e-communication, the classical form of printed publications is still, if not irreplaceable, then a desirable form (especially for certain categories of users). Therefore, deeming that interest and need still exist for such form of publication, starting in 1997, the Constitutional Court has published 28 volumes of the Bulletin in the local languages (Bosnian, Croatian and Serbian languages), which include the selection of decisions from 1997 to 2017. A significant number thereof has been translated into the English language too.

Being guided by the importance of the constitutional law issues addressed in certain decisions and the case-law and standards affirmed and established through them, the Constitutional Court continues the practice of publishing the most significant decisions in the form of a special issue - Bulletin, in the English language occasionally, which is also available in the e-format (www.ustavnisud.ba).

The first issue of the Bulletin in English was published in 2006. Three volumes have been published so far (2006, 2011 and 2016), which incorporate the relevant decisions adopted in the period from 1997 to 2005 (volume no. 1), i.e. from 2006 to 2009 (volume no. 2), and from 2010 to 2013 (volume no. 3). The volume no. 4, which is right before you, covers the period from 2014 to 2017.

Concerning the volume and number roughly the same number of decisions was included in certain issues of the bulletin (for 2006 and 2011 50, the issue from 2016 contains 42 decisions, while the one from 2018 contains 36 decisions). All four issues of the bulletin in English contain a total of 178 decisions. These are, naturally, the most important or characteristic decisions (from among thousands of decisions) establishing, upholding and, in some, admittedly seldom, cases, challenging the case-law and establishing the standards of the Constitutional Court of Bosnia and Herzegovina.

The data on the number of the cases received, cases pending and cases decided, i.e. adopted decisions are a dynamic category and they vary from year to year. Unlike the first several years since the beginning of its operation, for the past 10 years the number of the cases before the Constitutional Court has been constantly and rapidly growing and mainly reaches over 5,000 cases annually. That number went for instance from 16 cases received in 1997 (13 solved) to 6,056 cases received in 2010, which has been so far the highest number of cases received in a year. In 2016 the largest number of cases so far has been solved - 7,946 cases.

On this occasion the updated statistics for the past year was presented, which illustrated not only the work of the Constitutional Court, but indicated the volume of materials from which, *inter alia*, the selection of decisions for this issue of the bulletin was made, i.e. for the period from 2014 to 2017.

Namely, the relevant statistics for 2017 show that in 2017 the Constitutional Court received 5,606 cases, 11 of which were requests for the review of constitutionality and such like and 5,595 cases from within the appellate jurisdiction. The figure of 3,129 pending cases were transferred from the previous years so that in 2017 there were a total of 8,735 cases pending. Of the said number in 2017 the Constitutional Court resolved 5,408 cases, 19 of which were „U" and 5,389 „AP" cases.

Naturally, the number of cases received on a monthly basis varies too. Lately that number has not dropped below 350 cases, however, for instance in January 2018 we received a record 648 cases in one month (642 cases from within the appellate jurisdiction and 6 cases from within the so-called abstract review of constitutionality).

In addition to the fact that the Constitutional Court of BiH continues in this way and continuously expands its publishing production (observing the principle of the public aspect of the work as a high democratic standard), the special objective and purpose of the bulletin in English is for the international general, professional and academic public to get familiar, through the presentation of specific court decisions in this language, with the responsibilities and case-law, which actually means with the work, operation and mission of the Constitutional Court of Bosnia and Herzegovina, its specific constitutional position and the role in the state and society. Therefore, in order to better understand not only the

constitutional position of the Constitutional Court but also the judicial system in Bosnia and Herzegovina overall, as well as relations in Bosnia and Herzegovina in general, this time around it is important to recall, in an outline at least, the history of the constitutional justice in Bosnia and Herzegovina, as well as to refer in more detail to the responsibilities of the Constitutional Court under the applicable Constitution.

The current Constitutional Court of Bosnia and Herzegovina is one of the six (five as a matter of fact) 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 existed up until 2006 which and ceased to exist meanwhile through the process of reform in Bosnia and Herzegovina, although formally it remained to exist as a (historic) constitutional category).

The history of constitutional justice in Bosnia and Herzegovina dates back to the middle of the XX century. In 1963, the enactment of a new federal and republic constitutions brought about the establishment of constitutional courts - Federal Constitutional Court and Republic Constitutional Courts, and the constitutional courts of the provinces at a later point. Bosnia and Herzegovina was one of the six republics/federal units making up the SFR Yugoslavia up until 1992 when it gained independence and international personality as the 177th member state of the Organization of the United Nations (OUN).

As the former Constitutional Court of Bosnia and Herzegovina started to work the year after, in 1964, it follows that the tradition of constitutional justice in Bosnia and Herzegovina has been in place for more than half a century. However, the present Constitutional Court of Bosnia and Herzegovina, 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 justice in Bosnia and Herzegovina. The monograph „Constitutional Court of Bosnia and Herzegovina 1964-2014" was published on that occasion (both in the local languages and English). As befitting of such a concept of publication, the monograph presented an extensive overview of the case-law of the Constitutional Court of Bosnia and Herzegovina through the phases of its existence, activities and development (it is available on the website of the Court). Furthermore, the publication of reporting and monograph type published by the Constitutional Court in 2017 on the occasion of 20 years of operation in the post-Dayton period (admittedly only in the local languages and alphabets), among other things, offers a very extensive and illustrative insight into the relevant statistics for the entire period, and the overview of the case-law by providing distinctive examples. This made available the case-law of the Constitutional Court of Bosnia and Herzegovina, the gist thereof from

the very outset of the constitutional justice in Bosnia and Herzegovina, to the national and international public.

Although, as mentioned above, all decisions have been continuously published on the website of the Court (www.ustavnisud.ba), which makes them accessible to the public at large, we are convinced that publications as this one still have multiple, first and foremost practical significance as informative as well as educational reading.

Namely, „by upholding" the Constitution of Bosnia and Herzegovina, the Constitutional Court interprets, safeguards and builds constitutional law standards in Bosnia and Herzegovina, thereby, by following the standards under the Convention, namely the case-law of the European Court of Human Rights in Strasbourg, establishing itself as a key address and mechanism for the transmission thereof into the BiH legal system, order, legal culture and practical application.

New or confirmed legal positions, presented in this publication, will contribute, we are certain, to the better understanding of the constitutional reality in Bosnia and Herzegovina, the rule of law and the exercise of the standards of the state of law. That is our intention and expectation. In the broadest sense this is how we, as a matter of fact, promote and safeguard human rights and fundamental freedoms, and most certainly contribute to the development of a democratic society as a whole.

By following the standard pattern, which proved to be a good solution for this type of publication, the Bulletin this time incorporated decisions, which were classified according to the responsibilities of the Court as defined by the Constitution, and then they were placed in chronological order. The Bulletin also contains registers in which decisions were classified according to the responsibilities, according to the criteria of admissibility and according to the catalogue of rights. Alongside registers, there is an alphabetical index of key words, which makes possible and substantially facilitates the search.

This extensive case-law, along with the contents from previous volumes of bulletins, certainly shows that the contribution of the Constitutional Court of Bosnia and Herzegovina to the exercise of human rights in Bosnia and Herzegovina and, in that context, to the harmonization of the case-law of ordinary courts is very significant.

All the 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 local languages. The largest number of cases and 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) of the Constitution of BiH). Out of the total number of decisions taken, there is a small number of cases and decisions 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 from 2004 to 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[1]. That Commission decided approximatively 9,000 cases pending before the Human Rights Chamber after its term expired in 2003.

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

1 Human Rights Chamber was „a judicial body" which was established under Annex 6 - Article II of the Dayton Peace Agreement. Together with the Office of the Ombudsman the Chamber was an integral part of the Commission on Human Rights set up to protect human rights in Bosnia and Herzegovina. The Chamber had 14 members, namely 8 internationals who were appointed by the Committee of Ministers of the Council of Europe and 6 national (4 from FBiH and 2 from the RS). The Chamber had the mandate to consider alleged and apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and alleged and apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the Convention and 15 other international agreements listed in the Appendix to Annex 6. Particular priority was given to allegations of especially severe or systematic violations, as well as to those founded on alleged discrimination on prohibited grounds. It was initially envisaged for the Chamber to operate for 5 years, however, starting from 16 March 1996, it operated up to 31 December 2003. The Human Rights Commission was set up within the Constitutional Court and was the successor institution to the Human Rights Chamber (it should not be confused with the Commission on Human Rights referred to in Article II of Annex 6 to the Dayton Peace Agreement). It operated from 1 January 2004 to 31 December 2006 when it ended its work on the cases left behind the Human Rights Chamber.

Thus, within the scope of 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 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[2] 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[3].

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) further 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

2 Note: 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 providing the reasoning that „the substantial term of responsibility determined in the very Constitution of Bosnia and Herzegovina contains a titulus in itself for such a responsibility of the Constitutional Court", and particularly the role of the Constitutional Court as a body upholding the Constitution of Bosnia and Herzegovina.

3 The Constitutional Court, therefore, has no jurisdiction to act in the line of duty, i.e. ex officio.

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 neighbouring state[4].

Pursuant to 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 of this possibility. Indeed, there are some initiatives and proposals in this regard, although without sufficient support in the Parliament for the time being.

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 local languages. This is one more reason for the translation and publication of decisions and bulletins, as well as other publications in the English language.

By interpreting the Constitution all this time the Constitutional Court of Bosnia and Herzegovina has established the constitutional standards and, by following the European Convention standards and the case-law of the European Court of Human Rights in Strasbourg, it represents one of the key institutions and mechanisms in Bosnia and Herzegovina for their promotion and practical application. This is of great importance for the constitutional instruments for the protection of human rights and fundamental freedoms, democracy and rule of law in general. This is why this Bulletin, just like the previous ones, represents a yet another possibility for all those who are interested in it and, above all, legal practitioners to familiarize themselves with the work method and results of the Constitutional Court of Bosnia and Herzegovina. We are convinced that new or well-established legal positions 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.

4 The international judges have come from the following states: Austria, Sweden, France 3x, Great Britain, Moldova, Macedonia and Italy, in the following periods: Prof. Dr. Joseph Marko 1997-2002, Austria; Dr. Hans Danelius 1997-2002, Sweden; Prof. dr. Louis Favoreu 1997-2002, France; Prof. Didier Maus 2002-2003, France; Prof. David Feldman 2003-2011, Great Britain; Tudor Pantiru 2002- to present, Moldova; Constance Grewe 2004-2016, France; Margarita Tsatsa-Nikolovska 2011- to present, Macedonia; and Giovanni Grasso 2016- to present, Italy.

Without any intention to suggest certain decisions incorporated in this Bulletin and the reasons why they are particularly interesting (anyway, all decisions selected for this publication are selected for sufficient reasons, primarily because of the constitutional issue addressed in them), nevertheless we would like to refer to some of them, such as:

- U 5/16 – on the conformity of a number of provisions of the Criminal Procedure Code of Bosnia and Herzegovina with the Constitution of Bosnia and Herzegovina;
- AP 1020/11 – wherein the Constitutional Court considered for the first time the case in which the Association Q bringing together LGBTIQ persons complained about the violations of a number of rights, including the issue of the freedom of assembly and conduct of an effective investigation in the cases of violence against the members of the association;
- AP 1634/16 - wherein the Constitutional Court re-emphasized the obligation to respect substantive and procedural rules of the national law in the cases of deprivation of liberty;
- AP 548/17 - wherein the Constitutional Court discussed the issue of state ownership;
- AP 4207/13 - wherein the Constitutional Court dealt with the issue of a differential treatment of common-law partners and marriage partners in the area of inheritance;
- U 23/14 – relating to the review of constitutionality of the Election Law of Bosnia and Herzegovina in the context of the election of delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina.

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 to the constitutional development in Bosnia and Herzegovina on the basis of the specific constitutional text – Constitution, which is an annex, i.e. a part of the international peace agreement.

The emphasis is placed on the following decisions:

- U 5/98 – the Decision on „the Constituent Status of all Three Peoples in Bosnia and Herzegovina" throughout the entire territory of Bosnia and Herzegovina;
- U 9/00 - the Constitutional Court concluded, *inter alia*, 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;

- AP 286/06 - this was the first time that the issue of the application of the canon law was raised;
- AP 325/08 – addresses the issue of retroactive application of the Criminal Code of Bosnia and Herzegovina in the context of a criminal offense of war crime;
- U 1/11 - 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 Entity of the Republika Srpska and under the Disposal Ban;
- U 9/07 – related to negotiations about the Stabilisation and Association Agreement between the European Communities and their Member States and BiH and to the process of meeting commitments referred to in „the Road Map", wherein the Constitutional Court dealt with the issue of the conformity of the Law on Statistics of BiH with the Constitution of Bosnia and Herzegovina;
- U 15/11 – the issue of the constitutionality if the relevant provisions of the FBiH Law on Sale of Apartments with Occupancy Right (adopted in accordance with the judgment of the European Court in the Case of Đokić *v. Bosnia and Herzegovina* – Yugoslav People's Army apartments).

This brief review of interesting decisions and constitutional issues in the Bulletin no. 4, which you are reading right now, as well as the reminder of some of those published in the previous three issues of the Bulletin in the English language illustrate how the Constitutional Court of Bosnia and Herzegovina resolved meanwhile some of its own constitutional dilemmas on how to understand the constitutional text in relation to the establishment of jurisdiction, admissibility etc. and such like. Namely, notwithstanding all restraint and caution, which the court has exercised at all times, the Court 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 in general, as was done and still is by the constitutional courts in some countries with considerably longer constitutional tradition.

Finally, we would like to recall once again that all decisions of the Constitutional Court of Bosnia and Herzegovina have been continuously posted on the website of the Constitutional Court (www.ustavnisud.ba) in the official languages and alphabets of Bosnia and Herzegovina, while a number of them have been published in the English

language too. Also, this issue of the Bulletin and the ones published earlier in the local languages and in the English language may be found on the website of the Constitutional Court (www.ustavnisud.ba).

The Constitutional Court of Bosnia and Herzegovina extends its thanks to the AIRE Centre from London, and the HM Treasury of the United Kingdom of Great Britain and Northern Ireland for their financial support in printing this publication. This has been but one form of cooperation between the Constitutional Court of Bosnia and Herzegovina and the AIRE Centre lately.

Sarajevo, April 2018

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

FOREWORD FROM THE AIRE CENTRE

Dear readers,

It has been a great honour and pleasure to cooperate with the Constitutional Court of Bosnia and Herzegovina (Constitutional Court) in publishing the fourth issue of the Constitutional Court's Bulletin. This Bulletin includes a selection of Constitutional Court's decisions, notably 36 decisions, adopted over a four-year period (from 2014 to 2017). Selected decisions tackle some of the key areas of human rights protection, including criminal justice and detention standards, prohibition of discrimination and property rights.

Cooperation of the AIRE Centre and the Constitutional Court of BIH is part of the project *"Legal Reform: Preparing State and Entity Court Systems for EU Accession"* which aims to strengthen the independence and professionalism of the judiciary in Bosnia and Herzegovina, for it to exercise its role in implementing the rule of law, fighting corruption and organised crime and meeting the demands of European integration with the focus on Chapter 23 of the EU accession process. In addition, this project provides a framework for regional cooperation in the Western Balkans between the most senior courts and judicial training institutes, who are facing similar challenges in bringing their legal and judicial systems into line with EU standards. The project is supported by the British Government via British Embassy in Sarajevo.

The project is being implemented by the AIRE Centre and its partners the Constitutional Court of Bosnia and Herzegovina (Constitutional Court of BIH), the Court of Bosnia and Herzegovina (Court of BIH), the High Judicial and Prosecutorial Council and the Judicial Training Centres of the Federation of Bosnia and Herzegovina and Republika Srpska in the period between 2016 and 2019.

The AIRE Centre has over the past few years established close cooperation with the Constitutional Court of BIH on activities in the context of judicial reform. As of 2016, the project raised this cooperation to a higher level, with the Constitutional Court, a partner on the project, actively and wholeheartedly engaged in numerous project activities.

This publication will contribute 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 3/17

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Bariša Čolak, the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for review of the regularity of the procedure, i.e. request for determination of existence or lack of the constitutional grounds for declaring the Proposal for the Law to Amend the Election Law of Bosnia and Herzegovina no. 02-02-1-1133/17 of 28 April 2017 detrimental to the vital interest of the Bosniac people

Decision of 6 July 2017

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(f) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina – consolidated text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru

Ms. Valerija Galić

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Mr. Giovanni Grasso

Having deliberated on the request of **Mr. Bariša Čolak**, **Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina**, in the case no. **U 3/17**, at its session held on 6 July 2017 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

It is hereby established that the Statement of the Bosniac Caucus in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina on destructive consequences upon the vital national interest of the Bosniac people in Bosnia and Herzegovina in the Proposal for the Law to Amend the Election Law of Bosnia and Herzegovina no. 02-02-1-1133/17 of 28 April 2017 has met the requirements as to the procedural regularity under Article IV(3)(f) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the vital national interest of the Bosniac people in Bosnia and Herzegovina is not violated by the Proposal for the Law to Amend the Election Law of Bosnia and Herzegovina no. 02-02-1-1133/17 of 28 April 2017.

The procedure of passing the Law to Amend the Election Law of Bosnia and Herzegovina no. 02-02-1-1133/17 of 28 April 2017 shall be carried out to comply with the terms of the procedure under Article IV(3)(d) of the Constitution of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 8 May 2017, Mr. Bariša Čolak, the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the applicant") lodged with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") a request for review of the regularity of the procedure, i.e. request for determination of existence or lack of the constitutional grounds for declaring the Proposal for the Law to Amend the Election Law of Bosnia and Herzegovina („the Proposal for the Law") no. 02-02-1-1133/17 of 28 April 2017 detrimental to the vital interest of the Bosniac people.

II. Request

a) Allegations stated in the request

2. The applicant stated that at the 28th session of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the House of Peoples"), held on 4 May 2017, the request of delegates Ljilja Zovko, Bariša Čolak, Zdenko Džambas, Martin Raguž and Marijo Karamatić, („the request of the delegates") was considered for consideration of the Proposal of the Law (the request of delegates was attached to the Request for review) under urgent procedure in accordance with Article 124 of the Rules of Procedure of the House of Peoples.

3. After granting the request for consideration of the Proposal for the Law under urgent procedure, the delegates of the Bosniac Caucus: Halid Genjac, Safet Softić, Sead Kadić, Fahrudin Radončić and Sifet Podžić, pursuant to Article 177 of the Rules of Procedure, declared the mentioned Proposal for the Law detrimental to the national interest of the

Bosniac people. After declaring the Proposal for the Law detrimental to the vital interest of Bosniac people the discussion was terminated and the voting commenced on whether the Proposal for the Law is destructive to the vital interest of the Bosniac people. The Serb Caucus, with three votes „for" and two votes „abstained", voiced its opinion that it did not consider the Proposal for the Law detrimental to the vital national interest of the Bosniac peoples. The Croat Caucus, with five votes „against" voiced its opinion that it did not consider the Proposal for the Law detrimental to the vital national interest of the Bosniac peoples. The Bosniac Caucus did not voice its opinion again given the fact that all five delegates from the Bosniac Caucus, in its letter no. 02-02-1-1132/17 of 4 May 2017, whereby they had declared the Proposal for the Law detrimental to the vital interest of the Bosniac people, voiced their opinion that they consider the proposed law detrimental to the vital interest of the Bosniac people.

4. Furthermore, the applicant stated that given that the majority of delegates from both the Croat People and Serb People Caucuses stated that they are against the claim that the Proposal for the Law to Amend the Election Law of Bosnia and Herzegovina is detrimental to the vital interest of the Bosniac people, the Joint Commission for Resolution of Issue of Vital Interest („the Joint Commission") was established and it comprises three delegates of whom one member is elected by Bosniac delegates, one by Croat delegates and one by Serb delegates for the purpose of resolution of issue in dispute. The Joint Commission met on 4 May 2017 and held the session at which the members of the Joint Commission Bariša Čolak and Sredoje Nović remained supportive of their positions that they are against the statement that the mentioned Proposal for the Law is detrimental to the vital national interest of the Bosniac people. The Joint Commission concluded that it did not reach the solution and, pursuant to the provisions of the Constitution of Bosnia and Herzegovina and Rules of procedure of the House of Peoples, established that the case should be referred to the Constitutional Court of Bosnia and Herzegovina for further proceeding (the applicant submitted the Minutes from the session of the Joint Commission of 4 May 2017.

5. It follows from the Statement of the Bosniac Caucus of 4 May 2017 signed by Halid Genjac, Safet Softić, Sead Kadić, Fahrudin Radončić and Sifet Podžić, (the copy of the Statement attached to the Request) that the statement makers submitting the statement declare the Proposal for the Law detrimental to the vital interest of the Bosniac people.

6. In the reasons for the decision the statement makers pointed out that Article 1 of the Proposal for Law amends Article 8.1 of the Election Law of Bosnia and Herzegovina („the Election Law"), which is related to election of the members to the Presidency of Bosnia and Herzegovina („the Presidency of BiH"). It is further stated that it is proposed that one

Croat and one Bosniac would be elected, as it is now, but the election is conditioned upon the majority given in the „electoral area" consisting, mainly, of a group of municipalities where at least 2/3 of population belong to the same ethnic group as the candidate. According to the applicable regulations of the Election Law, the entire entity, namely the Federation of BiH is the constituency for the election of the members to the Presidency, and the Bosniac member who receives the highest number of votes among Bosniac candidates shall be elected to the Presidency of BiH, and the Croat member who receives the highest number of votes among Croat candidates shall be elected to the Presidency of BiH.

7. Furthermore, it was noted that in the judgment of the European Court of Human Rights in the case of *Sejdić and Finci vs. Bosnia and Herzegovina* of 22 December 2009, a violation of the Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") was established, as well as in the provisions of the Constitution of Bosnia and Herzegovina („the Constitution of BiH") and Election Law, as they prevent the citizens of the Federation of BiH that are not Croats or Bosniacs from standing as candidates for election to the Presidency of Bosnia and Herzegovina. In this connection, it was noted that the the proposed amendment does not remove the violation of the European Convention (which is a post-accession obligation of Bosnia and Herzegovina as a member of the Council of Europe), and the adoption of such a modification would create a situation being more unfavourable than the present one with regards to the European Convention for the Protection of Human Rights: the Croat member and the Bosniac member of the Presidency are elected exclusively from the ethnically determined „electoral areas" (Bosniac or Croat). Thus, the proposed solution is contrary to the legally binding judgment of the European Court of Human Rights and its adoption would cause detrimental consequences for Bosnia and Herzegovina, and, thus, Bosniacs, as one of the constituent peoples.

8. Further, in the reasons the applicant pointed to Article 13 of the Proposal for the Law relating to amendment to Article 20.16A, paragraph 2 of the Election Law. The offered solution is, as stated, aimed at implementing the Decision of the Constitutional Court no. *U 23/14* of 1 December 2016. Finally, it was noted that by the mentioned Article the number of delegates is suggested (Serbs, Croats, Bosniacs and Others) that are elected from the cantons to the House of Peoples of the Parliament of FBiH.

9. The Statement makers pointed out that the proposed number of delegates per canton is argued by „taking into account the last census". According to the proposal for sub-paragraph a) of the amended para 2 of Article 20.16 A, the Bosniac delegates to the House of Peoples of the Parliament of the Federation of BiH would be elected in a manner in

which the Bosniacs from Livno Canton, Posavina Canton and West Herzegovina Canton could not be elected to the House of Peoples of the Parliament of the Federation of BiH. It is noted in the statement that according to the last census, there are 8252 Bosniacs in Posavina Canton, and 8037 Bosniacs in Canton 10. It should be noted that Chapter IV, Article 8(3) of the Constitution of the Federation of BiH stipulates as follows*: In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body and that so far* significant number of delegates from Bosniac people have been elected to the assemblies of the mentioned cantons in the previous elections. Therefore, they point out that preventing Bosniacs from the mentioned cantons from being elected to the House of Peoples of the Parliament of the Federation of BiH would constitute a flagrant discrimination which had already been found in the *Pilav v. BiH* judgment of the European Court of Human Rights. In view of the aforesaid, they consider that Article 13 of the Proposal for the Law proposes the amendments which would prevent Bosniacs from the territory of three cantons of the Federation of Bosnia and Herzegovina to be elected to the House of Peoples of the Parliament of the Federation of BiH, which is indisputably detrimental to the vital interest of the Bosniac people.

10. It follows from the Statement of the delegate of the Croat Caucus, Bariša Čolak, the member of the Joint Commission (the Statement of 4 May 2017 attached to the Request) that the Proposal for the Law is not detrimental to the interest of the Bosniac people and that there are no constitutional and grounds referred to in the Rules of Procedure that the representatives from the Bosniac People Caucus, Halid Genjac, Safet Softić, Sead Kadić, Fahrudin Radončić and Sifet Podžić raise the vital national interest issue.

11. It follows from the Statement of the delegate of the Serb Caucus, Sredoje Nović, the member of the Joint Commission, (the Statement of 4 May 2017 attached to the Request) that he remains fully with his position and position of the Serb People Caucus and their statement from the 28th session of the House of Peoples of the Parliamentary Assembly of BiH held on 4 May 2017 and that he considers that there are no constitutional and grounds referred to in the Rules of Procedure that the representatives from the Bosniac People Caucus, Halid Genjac, Safet Softić, Sead Kadić, Fahrudin Radončić and Sifet Podžić raise the vital national interest issue.

12. It follows from the Statement of the delegate of the Bosniac Caucus, Halid Genjac, the member of the Joint Commission, (the Statement of 4 May 2017 attached to the Request) that he remains fully with his position and position of the Bosniac People Caucus and their statement from the 28th session of the House of Peoples of the Parliamentary Assembly of

BiH held on 4 May 2017 and that he considers that there are constitutional and grounds referred to in the Rules of Procedure that the representatives from the Bosniac People Caucus, Halid Genjac, Safet Softić, Sead Kadić, Fahrudin Radončić and Sifet Podžić raise the vital national interest issue.

b) Reply to Request

13. The Constitutional Court established that in the case at hand the requirement of the adversarial proceeding before the Constitutional Court was met as the applicant attached to the request the statements of the following delegates: the Croat Caucus, Bariša Čolak, the member of the Joint Commission, the Serb Caucus, Sredoje Nović, the member of the Joint Commission, who in their names and in the name of the Croat Caucus and Serb Caucus have challenged the allegations of the Statement makers and for that reason the Constitutional Court did not ask for the opinion about the request from the delegates of the Croat Caucus and Serb Caucus.

III. Relevant Law

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

Article 1

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 5
Presidency

The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.

The term of the Members of the Presidency elected in the first election shall be two years; the term of Members subsequently elected shall be four years. Members shall be eligible to succeed themselves once and shall thereafter be ineligible for four years.

15. The **Constitution of Federation of Bosnia and Herzegovina** (*Official Gazette of F BiH*, 1/94, 1/94, 13/97, 13/97, 16/02, 22/02, 52/02, 52/02, 60/02, 18/03, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05, 32/07 i 88/08) as relevant reads:

IV. STRUCTURE OF THE FEDERATION GOVERNMENT

A. The Federation Legislature

1. The House of Peoples

Article 6
Composition of the House of Peoples and Selection of Members

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

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

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

Article 8

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

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

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

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

16. The **Election Law of Bosnia and Herzegovina** (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 i 31/16) so far as relevant reads:

Article 8.1

The members of the Presidency of Bosnia and Herzegovina directly elected from the territory of the Federation of Bosnia and Herzegovina– one Bosniak and one Croat shall be elected by voters registered to vote for the Federation of Bosnia and Herzegovina. A voter registered to vote in the Federation may vote for either the Bosniac or Croat Member of the Presidency, but not for both. The Bosniak and Croat member that gets

the highest number of votes among candidates from the same constituent people shall be elected. The member of the Presidency of Bosnia and Herzegovina that shall be directly elected from the territory of RS-one Serb shall be elected by voters registered to vote in the Republika Srpska.

The candidate who gets the highest number of votes shall be elected.

Article 20.16. A

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

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

1) *from the Legislature of Canton number 1, Una-Sanai Canton, five (5) delegates, including two (2) Bosniacs, one (1) Croat and two (2) Serbs shall be elected.*
2) *from the Legislature of Canton number 2, Posavina Canton, three (3) delegates, including one (1) Bosniac, one (1) Croat and one (1) Serb shall be elected.*
3) *from the Legislature of Canton number 3, Tuzla Canton, eight (8) delegates, including three (3) Bosniacs, one (1) Croat, two (2) Serbs and two (2) Others shall be elected.*
4) *from the Legislature of Canton number 4, Zenica-Doboj Canton, eight (8) delegates, including three (3) Bosniacs, two (2) Croats, two (2) Serbs and one (1) Other shall be elected.*
5) *from the Legislature of Canton number 5, Bosnian-podrnije Canton – Gorazde, three (3) delegates, including one (1) Bosniac, one (1) Croat and one (1) Serb shall be elected.*
6) *from the Legislature of Canton number 6, Central Bosnia Canton, six (6) delegates, including one (1) Bosniac, three (3) Croats, one (1) Serb and one (1) Other shall be elected.*
7) *from the Legislature of Canton number 7, Herzegovina-Neretva Canton, six (6) delegates, including one (1) Bosniac, three (3) Croats, one (1) Serb and one (1) Other shall be elected.*
8) *from the Legislature of Canton number 8, West Herzegovina Canton, four (4) delegates, including one (1) Bosniac, two (2) Croats and one (1) Serb shall be elected.*
9) *from the Legislature of Canton number 9, Canton Sarajevo, eleven (11) delegates, including three (3) Bosniacs, one (1) Croat, five (5) Serbs and two (2) Others shall be elected.*

10) from the Legislature of Canton no. 10, Canton 10, four (4) delegates, including one (1) Bosniac, two (2) Croats and one (1) Serb shall be elected.

17. **Decision on Admissibility and Merits of the Constitutional Court of Bosnia and Herzegovina no. 23/14 of 1 December** 2016 (*Official Gazette, 1/17),* as relevant reads:

(...)

It is established that the provision of Sub-chapter B, Article 10.12 (2), in part stating that each of the constituent peoples shall be allocated one seat in every canton and the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A (2), items a-j of the Election Law of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13 and 7/14) are not in conformity with Article I (2) of the Constitution of Bosnia and Herzegovina.

The Parliamentary Assembly of Bosnia and Herzegovina is ordered to harmonise, not later than six months from the day of delivery of this decision, the provision of Sub-chapter B, Article 10.12 (2), in part stating that each of the constituent peoples shall be allocated one seat in every canton, and the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A(2) items a-j of the Election Law of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13 and 7/14) with Article I (2) of the Constitution of Bosnia and Herzegovina.

18. The **Proposal for the Law to Amend the Election Law of Bosnia and Herzegovina no. 02-02-1-1133/17 of 28 April 2017** so far as relevant reads:

Article 1

In the Election Law of Bosnia and Herzegovina (Official Gazette of BiH, 23/01,7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 4/14 and 31/16), in Chapter 8, Presidency of Bosnia and Herzegovina, Article 8.1 is hereby amended to read:

Article 8.1

(1) The members of the Presidency of Bosnia and Herzegovina („the Presidency of BiH") directly elected from the territory of the Federation of Bosnia and Herzegovina – one Bosniac and one Croat - shall be elected by voters registered in the Central Voters Register to vote in the Federation of Bosnia and Herzegovina. A voter registered in the Central Voters Register to vote in the Federation may vote for either the Bosniac or Croat Member of the Presidency, but not for both.

(2) For the purpose of election of the members of the Presidency of BiH directly elected from the territory of the Federation of Bosnia and Herzegovina, there shall be created three ad hoc electoral areas: A, B and C.

Electoral area A shall include all basics constituencies in which, according to the data of the last census, reside more than 2/3 of the Bosniac People.

Electoral area B shall include all basics constituencies in which, according to the data of the last census, reside more than 2/3 of the Croat People.

Electoral area C shall include all other basics constituencies.

Until the implementation of the new regulation, the composition of three ad hoc electoral areas A, B and C shall be as follows:

a) Electoral area A shall include the following basics constituencies: Novi grad Sarajevo, Novo Sarajevo, Centar Sarajevo, Stari Grad Sarajevo, Ilidža, Ilijaš, Vogošća, Hadžići, Trnovo (FBiH), Tuzla, Živinice, Srebrenik, Lukavac, Gradačac, Ćelić, Banovići, Gračanica, Kladanj, Kalesija, Doboj-Istok, Teočak, Sapna, Zenica, Kakanj, Maglaj, Tešanj, Zavidovići, Visoko, Breza, Olovo, Doboj-Jug, Bihać, Sanski Most, Velika Kladusa, Cazin, Bosanska krupa, Ključ, Bužim, Konjic, Jablanica, Bugojno, Donji Vakuf, Goražde, Pale (FBiH) and Foča (FBiH).

b) Electoral area B shall include the following basics constituencies: Široki Brijeg, Ljubuški, Posušje, Grude, Livno, Tomislavgard, Kupres, Čapljina, Čitluk, Prozor-Rama, Neum, Ravno, Orašje, Domaljevac-Šamac, Kreševo, Dobretići and Usora.

c) Electoral area B shall include the following basics constituencies: City of Mostar, Stolac, Travnik, Vitez, Jajce, Kiseljak, Novi Travnik, Busovača, Gornji Vakuf-Uskoplje, Fojnica, Odžak, Žepce, Vareš, Drvar, Bosansko Grahovo, Bosanski Petrovac and Brčko District BiH-option FBiH.

(3) The Bosniac member who receives the highest number of votes among Bosniac candidates shall be elected to the Presidency of BiH, provided that he/she has received a higher number of votes in the area consisting of ad hoc electoral areas A and C than in the area consisting of ad hoc electoral areas B and C. In the event that the candidate, who has received the highest number of votes, does not satisfy the aforementioned requirement, the next candidate on the list of Bosniac candidates who has received the highest number of votes, and so on throughout the list until the requirement is satisfied, shall be elected.

If no Bosniac candidate satisfies the aforementioned requirement, the candidate that receives the highest number of votes shall be elected.

(4) The Croat member who receives the highest number of votes among Croat candidates shall be elected to the Presidency of BiH, provided that he/she has received a higher number of votes in the area consisting of ad hoc electoral areas B and C than in

the area consisting of ad hoc electoral areas A and C. In the event that the candidate, who has received the highest number of votes, does not satisfy the aforementioned requirement, the next candidate on the list of Croat candidates who has received the highest number of votes, and so on throughout the list until the requirement is satisfied, shall be elected.

If no Croat candidate satisfies the aforementioned requirement, the candidate that receives the highest number of votes shall be elected.

(5) The member of the Presidency of Bosnia and Herzegovina that shall be directly elected from the territory of RS - one Serb shall be elected by voters registered in the Central Voters Register to vote in the Republika Srpska. The candidate who receives the highest number of votes shall be elected.

(6) The mandate for the members of the Presidency of Bosnia and Herzegovina shall be four (4) years.

Article 13

In Chapter 20, Transitional and Final Provisions, Article 20.16A paragraph 2 shall be amended to read:

Article 20.16 A

(2) The number of delegates from each constituent people and group of Others per cantons, taking into account the last census, shall be arranged as follows:

a) 17 delegates from among the Bosniac People shall be elected from the Legislature of the cantons as follows: Tuzla Canton shall elect four delegates, Sarajevo Canton shall elect four delegates, Zenica-Doboj Canton shall elect three delegates, Una-Sana Canton shall elect three delegates, Herzegovina-Neretva Canton shall elect one delegate, Central Bosnia shall elect one delegate and Bosnian-Podrinje Canton shall elect one delegate.

b) 17 delegates from among the Croat People shall be elected from the Legislature of the cantons as follows: Herzegovina-Neretva Canton shall elect five delegates, Central Bosnia shall elect four delegates, West Herzegovina Canton shall elect three delegates, Herzeg-Bosnia Canton shall elect two delegates, Zenica-Doboj Canton shall elect one delegate, Posavina Canton shall elect one delegate and Tuzla Canton shall elect one delegate.

c) 17 delegates from among the Serb People shall be elected from the Legislature of the cantons as follows: Sarajevo Canton shall elect four delegates, Herzeg-Bosnia Canton shall elect three delegates, Una-Sana Canton shall elect three delegates, Tuzla Canton shall elect two delegates, Herzegovina-Neretva Canton shall elect two delegates, Zenica-Doboj Canton shall elect two delegates and Central Bosnia shall elect one delegate.

d) 7 delegates from among the group of Others shall be elected from the Legislature of the cantons as follows: Sarajevo Canton shall elect three delegates, Tuzla Canton shall elect two delegates, Zenica-Doboj Canton shall elect one delegate and Una-Sana Canton shall elect one delegate.

IV. Admissibility

19. The request was lodged by the Chairman of the House of Peoples and so in terms of the authorized applicant, the request meets one of the admissibility criteria. As to the rest of the admissibility criteria, the Constitutional Court holds that they are contingent 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.

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

21. 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 to a vital national interest of a constituent people comprises an invocation of Article IV(3)(e) of the Constitution of Bosnia and Herzegovina by a majority of delegates from among the caucus of one constituent people (a minimum of three delegates). The consequence thereof is the stricter voting criterion, i.e. the adoption of such a decision requires agreement in the House of Peoples, as voted for by the majority of delegates of all three constituent peoples who are present and voting. This makes it possible for the parliamentary procedure to carry on despite the objection of destructiveness to a vital national interest of one constituent people, under the stricter democratic requirements though, as the notion of parliamentary majority gets another dimension. If the House of Peoples fails to reach a required majority, the decision cannot pass through the parliamentary procedure in the House of Peoples, as it does not have the confidence thereof. However, if there is no voting, because the majority of delegates from among one of the constituent peoples object by invoking the vital national interest, the voting procedure on the proposed decision shall be suspended and the House of Peoples shall proceed in accordance with Article IV(3)(f) of the Constitution of Bosnia and Herzegovina.

22. So, on the basis of the relevant provisions of the Constitution of Bosnia and Herzegovina it clearly follows that the procedure of the protection of vital national interests of one people has been clearly and decidedly prescribed by the quoted provisions and that the said procedure must be complied with. In this respect, the Constitutional Court observes that the Statement by the Bosniac Caucus, Halid Genjac, Safet Softić, Sead Kadić, Fahrudin Radončić and Sifet Podžić, which means that all delegates are the delegates of the Bosniac People Caucus. The Serb People Caucus (with three votes „against" and two votes „abstained") and the Croat People Caucus (with five voted „against") voted against that Statement. The Constitutional Court established those facts based on the applicant's allegations and documents attached to the Request. Further, following the vote by which no agreement has been reached on the Proposal for the Law being detrimental to the vital national interest of the Bosniac people, a Joint Commission has been formed consisting of: Mr. Bariša Čolak, Mr. Halid Genjac, and Mr. Sredoje Nović, which met on 4 May 2017. However, the Joint Commission failed to find a solution and established 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 stated by the applicant and on the basis of the Minutes from the session of the Joint Commission of 4 May 2017, which the applicant has also attached to the request. After that, on 4 May 2017, the Serb People Caucus, the member of the Joint Commission and Croat People Caucus, and the member of the Joint Commission gave, on 4 May 2017, the written statements, in which they stated that they fully remain supportive of their position and positions of their respective caucuses presented at the session of the House of Peoples of 4 May 2017. It follows that the admissibility requirement, in relation to the procedure of referring cases to the Constitutional Court for decision-making, has been met.

23. On the other hand, it clearly follows from the cited provisions that this type of dispute arises out of a situation in which the representatives of constituent peoples cannot reach an agreement on whether a decision is destructive to the vital national interest of one of the peoples. This results in a blockage of the work of the Parliamentary Assembly since the proposed decision cannot get the confidence of a majority of delegates of certain people. In this regard, the role of the Constitutional Court as the guardian of the Constitution of Bosnia and Herzegovina (Article VI(3) of the Constitution of Bosnia and Herzegovina) is to contribute to de-blocking the work of the Parliamentary Assembly of Bosnia and Herzegovina by its decision on the merits, if the Parliamentary Assembly is not capable to overcome the problem by itself. This procedure is urgent in nature since the prompt intervention of the Constitutional Court is necessary to enable the work of the legislative body. This second role of the Constitutional Court, *i.e.* adoption of the decision on the

merits regarding whether or not the decision is destructive to the vital national interest of one people, is very important in a situation when the state needs a decision to regulate certain field, whereas voting on that decision is blocked by the objection raised with regard to a vital national interest of one people.

24. The mechanism of protection of vital national interests of one people is very important in the states with multiethnic, multilingual and multi-religious communities or communities which are distinctive due to their differences. On the other hand, each invocation of vital national interest has for a consequence a stricter criterion for adoption of general acts (Article IV(3)(e) of the Constitution of Bosnia and Herzegovina) or, as a last resort, procedure before the Constitutional Court. The consequences are the interruption of parliamentary procedures, which may have an adverse effect on the work of the legislative body and functioning of the state. For that reason, the procedure under Article IV(3)(f) of the Constitution of Bosnia and Herzegovina should be invoked if there is a reason for the opinion that the proposed decision of the Parliamentary Assembly is destructive to the vital national interest of constituent peoples or if there is a serious controversy in opinions or a doubt about whether the procedures from Article IV(3)(e) and (f) have been complied with (see, the Constitutional Court, Decision on the Merits no. *U 7/06* of 31 March 2006, paragraphs 19 to 25 with further references, published in the *Official Gazette of BiH*, 34/06).

25. In the instant case, the essence of the reasons set forth in the Statement on destructiveness relates to the opinion that the Proposal for the Law neglects and does not remove from the domestic legal system the provisions of discriminatory character regarding the candidates running for the position of the member to the Presidency of BiH as defined by the judgment of the European Court of Human Rights in the case of *Sejdić and Finci* that by the offered solution regarding the manner in which the members of the Presidency of BiH are elected even worse situation is created in relation to the European Convention and such situation would cause detrimental consequences to BiH, and, thus, to the Bosniacs, as one of the constituent peoples. Also, the Statement makers claim that preventing Bosniacs from the mentioned cantons from being elected to the House of Peoples of the Parliament of the Federation of BiH would constitute discrimination against the Bosniacs and such matter was already judged in the judgment of the European Court of Human Rights, in the case of *Pilav vs. Bosnia and Herzegovina.* Having regard to the aforesaid, the Constitutional Court considers that the Request and the Statement contain reasons for which the statement makers are of the opinion that the Proposal for the Law is destructive to the vital interest of the Bosniac people. Therefore, the Constitutional Court holds that even this requirement for admissibility of the request has been met.

26. Taking into account the aforesaid, the Constitutional Court concludes that the request at issue has been lodged by an authorized person, that the procedural regularity within the meaning of Article VI(3)(e) and (f) of the Constitution of Bosnia and Herzegovina has been complied with and that the formal requirements under Article 16(2) of the Rules of the Constitutional Court have been met.

V. Merits

27. The applicant requests the Court to examine the regularity of the procedure, i.e. to determine whether there are constitutional grounds for the Statement that the Proposal for the Law is considered detrimental to the vital national interest of the Bosniac people.

28. In the Statement it is indicated that the discriminatory provisions on the candidates running for the position of the member to the Presidency of BiH are not removed by the Proposal for the Law as it is established in the binding judgement of the European Court of Human Rights, in the case of *Sejdić and Finci vs. Bosnia and Herzegovina*, that the offered solution creates even more unfavourable situation in relation to the European Convention and such situation would cause detrimental consequences to BiH, and, thus, to the Bosniacs, as one of the constituent peoples. Also, it is stated in the Statement that preventing Bosniacs from the mentioned cantons from being elected to the House of Peoples of the Parliament of the Federation of BiH would constitute discrimination against the Bosniacs and such matter was already judged in the judgment of the European Court of Human Rights, in the case of *Pilav vs. Bosnia and Herzegovina.*

Notion of a Vital National Interest of the Constituent Peoples

29. According to the Constitutional Court's case-law with regards to Article VI(3)(f) of the Constitution of Bosnia and Herzegovina, the Constitutional Court has never dealt with the enumeration of the elements of the vital national interest of one people. Instead, the Constitutional Court has noted that the notion of vital national interest of a constituent people is the functional category and that it should be dealt with from that aspect. In that sense, the Constitutional Court has noted through its case-law relating to this issue that several factors shape the perception of the mentioned term. First, the notion of vital national interest is the functional category which cannot be viewed separately from the notion „constituency of peoples" whose vital national interests are protected under Article IV(3)(e) and (f) of the Constitution of Bosnia and Herzegovina. In connection therewith, the Constitutional Court has indicated that the notion of constituent status of peoples is not an abstract notion but it incorporates certain principles without which a society with differences protected under its respective constitution, could not function

efficiently. Furthermore, the Constitutional Court has also noted that the meaning of „vital national interest" is partially shaped by Article I(2) of the Constitution of Bosnia and Herzegovina, which provides that Bosnia and Herzegovina shall be a democratic state so that in that connection the interest of constituent peoples to participate in full capacity in the government system and in the activities of public authorities may be viewed as a vital national interest. Therefore, according to the case-law of the Constitutional Court, the efficient participation of constituent peoples in adopting political decisions in terms of prevention of absolute domination of one people over the other, represents the vital national interest of each constituent people. Furthermore, the Constitutional Court has also noted that the state authorities should, in principle, be a representative reflection of advanced co-existence of all peoples in Bosnia and Herzegovina, including minorities and others. On the other hand, „efficient participation of constituent peoples in the authorities", if it falls outside the constitutional framework, must never be carried out or imposed at the expense of efficient operation of the state and its authorities (for further details, see *op. cit. U 7/06,* paragraphs 33-37*,* with further references).

30. Furthermore, according to the jurisprudence relating to the same issue it was emphasized that, according to Article VI(3)(1) of the Constitution of Bosnia and Herzegovina, the Constitutional Court safeguards the Constitution and is limited thereof with regard to the functional interpretation. In this connection, in the consideration of any specific case, the Constitutional Court shall apply, within the assigned constitutional framework, the values and principles essential to a free and democratic society that incorporates, *inter alia*, the inherent dignity of every person and accommodates a wide range of diversity in beliefs and respect for the cultural identity of a person or groups as well as the confidence in social and political institutions that are promoting the participation of individuals and groups in the society. On the other hand, the protection of vital national interest must not imperil the state sovereignty and its functionality, which is closely related to the neutral and essential notion of citizenship, as the criterion of affiliation to a „nation". In other words, the protection of vital national interest must not lead to unnecessary disintegration of civil society, as the indispensable element of modern statehood (*ibid.* paragraph 38).

Destructiveness to the vital interest

31. First and foremost, the Statement makers indicate that Article 1 of the Proposal for the Law, whereby the manner in which the members to the Presidency are elected is modified - one Croat and one Bosniac from the Entity of F BiH, does not remove the discriminatory provisions relating to the candidates standing in election to the Presidency of BiH as established in the binding judgement of the European Court of Human Rights in the case of *Sejdić and Finci vs. Bosnia and Herzegovina*, and that the offered solution creates even

worse situation than the existing one in relation to the European Convention and that such situation may have detrimental consequences to BiH and, thus, to the Bosniacs, as one of the constituent peoples.

32. The Constitutional Court reminds that the European Court of Human Rights, in the case of *Sejdić and Finci vs. Bosnia and Herzegovina* (see, the European Court of Human Rights, judgments of 22 December 2009) established (see paragraph 56): „(…) that the constitutional provisions which render the applicants ineligible for election to the Presidency must also be considered discriminatory and a breach of Article 1 of Protocol No. 12."

33. Furthermore, in the case of *Zornić vs. Bosnia and Herzegovina* (see, the European Court of Human Rights, the judgment of 17 July 2014), the European Court of Human Rights noted (see, paragraph 36): „…In *Sejdić and Finci* (ibid., §56) the Court has already found that the constitutional provisions which rendered the applicants ineligible for election to the Presidency of BiH were discriminatory and in breach of Article 1 of Protocol No. 12. The Court does not see any reason to depart from that jurisprudence in the present case.

34. Finally, in the case of *Pilav vs. Bosnia and Herzegovina* (see, the European Court of Human Rights, the judgment of 9 July 2016), noted (see, paragraphs 41 and 42): „The Court observes that in accordance with the Constitution of Bosnia and Herzegovina only persons declaring affiliation with a „constituent people" are entitled to stand for election to the Presidency, which consists of three members: one Bosniac and one Croat, each directly elected from the Federation of Bosnia and Herzegovina, and one Serb directly elected from the Republika Srpska. The applicant, a Bosniac living in the Republika Srpska is as a result excluded. Similar constitutional precondition has already been found to amount to a discriminatory difference in treatment in breach of Article 1 of Protocol No. 12 in the quoted judgment in the case of *Sejdić and Finci* (paragraph 56), which relates to impossibility of the applicants, of whom one is the member of Roma people and the other one of Jewish people, to stand as candidates at election of the member to the Presidency of BiH. In the judgment in the case of Zornić (quoted above, paragraphs 36-37 and paragraph 43), which is related to the applicant, who does does not declare affiliation with any of the „constituent peoples", but she declares as a citizen of Bosnia and Herzegovina, the Court reached the same conclusion with regards to her ineligibility to stand as candidate at elections to the Presidency."

35. Furthermore, the Constitutional Court reminds that in the Decision on Admissibility and Merits no. *U 14/12* of 26 March 2015 (available at www.ustavnisud.ba) noted (see,

paragraphs 73 and 74): „(…) from it unambiguously follows from the *Sejdić and Finci* judgment of the European Court that the Constitution of BiH should be amended. In this connection, the Constitutional Court outlines that the European Court noted in the case of *Zornić v. Bosnia and Herzegovina* (see para 40): „(…) It emphasises that the finding of a violation in the present case was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the judgment in *Sejdić and Finci*. The failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the Constitution and the electoral law with Article 14, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery (see *Broniowski*, cited above, § 193, and *Greens and M.T.*, cited above, § 111)". However, it is impossible to foresee the scope of those changes in this moment. The Constitutional Court will not quash the aforementioned provisions of the Constitutions of the Entities and the Election Law, it will not order the Parliamentary Assembly of BiH, National Assembly and Parliaments of the Federation to harmonize the aforementioned provisions until the adoption, in the national legal system, of constitutional and legislative measures removing the current inconsistency of the Constitution of Bosnia and Herzegovina and Election Law with the European Convention, which was found by the European Court in the quoted cases".

36. Having regard to the aforesaid, it follows that the enforcement of the judgment in the *Sejdić and Finci* case, which was expressly invoked in the Statement, as well as the judgments in the *Zornić and Pilav* cases, implies first the modification of the provisions of the Constitution of BiH, which were found to be discriminatory, and only then the appropriate modification of the Election Law, as noted in the Decision No. *U 14/12* of the Constitutional Court.

37. The Constitutional Court recalls that Article IV(3)(e) of the Constitution of BiH stipulates that a proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb Delegates. It follows unambiguously from the cited constitutional provision that the mechanism of vital national interest is an instrument afforded only to the constituent peoples for the purpose of protection against possible destruction of the interest of the specific constituent people. Thus, for example, the Constitution of BiH does not make it possible for the delegates from among Bosniac people to declare a decision detrimental to the interest of the Croat people or Serb people and *vise versa* by availing themselves of the mechanism of vital national interest. The

Constitutional Court notes that the implementation of the judgment in the *Sejdić and Finci* case relates to the exercise, protection and further advancement of one of the fundamental principles being the basis of the State of BiH, i.e. free and democratic elections. As such it indisputably constitutes the interest of the society as a whole and all those living in BiH, and notably those who declare themselves as members of one of the constituent peoples. Furthermore, the implementation of the mentioned decision, as already noted in this Decision, relates to the modification of the Constitution of BiH, whereupon the modification of the provisions of the Election Law will be possible in that regard. This is the reason why the implementation of the judgment in the *Sejdić and Finci* case cannot constitute only the interest of members of the Bosniac people, the protection of which is exercised through the mechanism of vital national interest.

38. Furthermore, the Constitutional Court notes that the Proposal for the Law was not submitted with the aim of implementing that judgment (*Sejdić and Finci*) but it rather relates to the issues of electoral procedure provided for in the present Election Law. This clearly follows from Reasons for the Proposal for the Law, wherein the proponents indicate the enforcement of the Decision of the Constitutional Court, *No. U 23/14* of 1 December 2016 (available at www.ustavnisud.ba), and compliance with the general principle of democracy, namely that one people does not elect the representative of the other one, as the reason for its adoption.

39. Furthermore, the Proposal for the Law is based on the same principles provided for in the Constitution of BiH and Election Law as the current solution, according to which one Bosniac and one Croat from the territory of the Federation are elected to the Presidency of BiH. Only the procedure for their election is regulated differently by the proposed solution, which should ensure, as stated in the Reasons for the Proposal for the Law, the general principle of democracy, namely that one people does not elect the representatives of the other one, i.e. that each constituent people elects by itself its own representatives of the legislature.

40. The Constitutional Court notes that Article 31 of the Rules of the Constitutional Court determines the scope of examination by the Constitutional Court, since the Constitutional Court examines only those violations that are stated in the request. Given the fact that Article 1 of the Proposal for the Law, which amends Article 8.1. of the Election Law, does not lead to the implementation of the mentioned judgment of the European Court and that it does not resolve the problem of discriminatory provisions on the candidates running for the position of the member of the Presidency of BiH, that the resolution of that issue should be resolved only after the modification of the Constitution and that the proposal in question resolves some other issues, one cannot speak of the detrimental consequences

to Bosnia and Herzegovina, including Bosniacs as one of the constituent peoples thereof, which would result, as alleged by the Statement makers, in the violation of the vital interest. Finally, given the principles set forth in the Constitution of BiH and the general principle of democracy, namely that one people does elect the representatives of the other one, the proposed solution regulates differently only the procedure for the election of members of the Presidency of BiH from the Federation of BiH as one Bosniac and one Croat from the Federation of BiH will still be elected as members to the Presidency of BiH.

41. Having regard to the aforesaid, it follows that the proposed solution provided for in Article 1 of the Proposal for the Law, which amends Article 8.1 of the Election Law, does not violate the vital interest of the Bosniac people in the manner alleged by the Statement makers.

42. Furthermore, the Constitutional Court notes that a part of the Transitional Provisions of the Election Law, more specifically paragraph 2 of Article 20.16A, which determines the number of delegates elected to the House of Peoples of the Parliament of the Federation of BiH by the cantons, is amended by Article 13 of the Proposal for the Law. According to the allegation of the Statement makers, the proposed solution, wherein Bosniacs from Canton 10, Posavina Canton and West Herzegovina Canton could not be elected to the House of Peoples of the Parliament of the Federation of BiH, amounts to discrimination, as also established in the European Court's judgment in the mentioned case of *Pilav v. Bosnia and Herzegovina.* In support of this allegation, the applicants allege that Chapter IV, Article 8(3) of the Constitution of the Federation of BiH prescribes that „in the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body" and that so far a significant number of delegates from Bosniac people have been elected to the assemblies of the mentioned cantons in the previous elections.

43. The Constitutional Court notes that the Election Law, in its Chapter 10, Subchapter B (House of Peoples), regulates, *inter alia*, the allocation of seats by constituent people. However, Article 20.16A, para 1, of Chapter 20 of the Election Law (Transitional Provisions) stipulates that until Annex 7 of the GFAP has been fully implemented, the allocation of seats by constituent people normally regulated by Chapter 10, Subchapter B of this law shall be done in accordance with this Article. Para 2 of the mentioned Law stipulates that until a new census is organized, the 1992 census shall serve as a basis so that each Canton will elect the prescribed number of delegates from each constituent people and Others.

44. The Constitutional Court notes that Article 13 of the Proposal for the Law amends the Transitional Provisions of the Election Law, more specifically Article 20.16A. According

to the proposed solution, para 1 of the mentioned Article remains unchanged. However, para 2 of the mentioned Article is amended so as to stipulate that the number of delegates from each constituent people and group of Others per cantons, taking into account the last census, shall be arranged as follows: 17 delegates from among the Bosniac People shall be elected from the Legislature of the enumerated cantons, excluding Posavina Canton, Canton 10 and West Herzegovina Canton; 17 delegates from among the Croat People shall be elected from the Legislature of the enumerated cantons, excluding Bosnia-Podrinje Canton, Una-Sana Canton and Sarajevo Canton; 17 delegates from among the Serb People shall be elected from the Legislature of the enumerated cantons, excluding Bosnia-Podrinje, Una-Sana Canton and Sarajevo Canton and 7 delegates from among the group of Others shall be elected from the Legislature of the enumerated cantons, excluding Bosnia-Podrinje Canton, Posavina Canton, West Herzegovina Canton, Herzegovina-Neretva Canton, Central Bosnia Canton and Canton 10. The determination of the cantons wherein 17 delegates from each constituent people are elected or wherein delegates for each constituent people will not be elected is based on the proportional representation of each constituent people in cantons, taking into account the last census.

45. The Constitutional Court notes that the reason for the proposed solution, as indicated in the Reasons for the Proposal for the Law, is the enforcement of the decision of the Constitutional Court, *No. U 23/14* so as to ensure that House of Peoples of the Parliament of the Federation of BiH is a house of legitimate and legal representatives of peoples.

46. The Constitutional Court recalls that it noted in its Decision *No. U 23/14* that the House of Peoples of the Parliament of the Federation of BiH represents a House of constituent peoples, not the House of cantons as federal units which form the Federation of BiH. Therefore, the right to participate in democratic decision-making, which is exercised through legitimate political representation, has to be based on the democratic election of the delegates to the House of Peoples of the Federation by the constituent people represented and whose interests are represented (see, *op. cit.* Decision on Admissibility and Merits *No. U 23/14*, paras 50 and 51). In this connection, the Constitutional Court took into account the fact that the composition of the House of Peoples is determined on a party basis by the Constitution of the Federation of BiH so that each constituent people, not canton, has equal number of delegates, 17 delegates each constituent people, and 7 delegates Others. Furthermore, the Constitution of the Federation of BiH stipulates that the delegates to the House of Peoples shall be elected by the Cantonal Assemblies from among their representatives in proportion to the ethnic structure of the population, not in proportion to the ethic structure of their delegates. Moreover, the number, structure and manner of election of delegates are determined by the law. Finally, the Constitution of

the Federation of BiH stipulates that in the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body. In this case, it is a conditional option, i.e. it is necessary that at least one Croat, one Bosniac or one Serb is elected as representative at the direct elections for cantonal assembly.

47. The Constitutional Court notes that the proposed solution, just like the previous one, is based on the identical principles, i.e. delegates are elected from the legislatures of the cantons according to the last census. The proposed solution, just like the previous one, ensure the representation on the parity basis, i.e. 17 delegates for each constituent people. Furthermore, based on the last census, the proposed solution determines the proportional representation of each constituent people in the cantons, based on which it is determined which canton, out of 10 cantons, shall elect 17 delegates of each constituent people. Finally, under the criterion of the proportional representation of members of the constituent peoples in the total number of inhabitants of cantons, each constituent people is excluded from the allocation of mandates in precisely determined cantons. Having regard to the aforesaid, it follows that that the criterion of proportional representation of each constituent people in the total number of inhabitants of the cantons is applied equally to all constituent peoples and results in the same restriction applied to all constituent peoples, i.e. each constituent people elects delegates in precisely determined cantons, although not in all cantons.

48. The Constitutional Court notes that the House of Peoples of the Federation of BiH represents a house of constituent peoples, not the house of cantons as federal units which form the Federation of BiH. The main function of the House of Peoples is the protection of constituent status of peoples (*op. cit*. Decision on Admissibility and Merits, *No. U 23/14*, paragraph 51). In particular, the Constitution of the Federation of BiH determines the composition of the House of Peoples on the parity basis so that each constituent people, not canton, has equal number of delegates, each constituent people has 17 delegates, and Others 7 delegates. Furthermore, the delegates to the House of Peoples shall be elected by the Cantonal Assemblies from among their representatives in proportion to the ethnic structure of the population, not in proportion to the ethic structure of their delegates. Moreover, the number, structure and manner of election of delegates are determined by the law. Moreover, the Constitution of the Federation of BiH stipulates that in the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body. In this case, it is a conditional option, i.e. it is necessary that at least one Croat, one Bosniac or one Serb is elected as representative at the direct elections for cantonal assembly.

49. The Constitutional Court notes that the proposed solution amends the Transitional Provisions, more specifically Article 20.16.A of the Election Law, which apply until Annex 7 of the GFAP has been fully implemented. Paragraph 1 of the mentioned Article, which remains unmodified, stipulates that until Annex 7 of the GFAP has been fully implemented, the allocation of seats by constituent people normally regulated by Chapter 10, Subchapter B of this law shall be done in accordance with this Article. The proposed solution amends para 2 of the mentioned Article so as to determine the number of delegates of each constituent people and Others per cantons to the House of Peoples of the Federation of BiH, taking into account the last census from 2013.

50. Therefore, the proposed solution, just like the previous one, is based on the identical principles, i.e. delegates are elected from the legislatures of the cantons and proportionally based on the last census. By the equal application of the mentioned principles to all constituent peoples, the number of delegates to the House of Peoples of the Parliament of the Federation of BiH from each constituent people and group of Others per cantons is determined so as to ensure the representation on the parity basis, namely 17 delegates from each constituent people, so that the number of delegates per canton is determined proportionally taking into account the last census. In this connection, the Constitutional Court notes that it did not deal with the accuracy of the mathematical calculation based on which the number of delegates elected in the cantonal assemblies is determined in the Proposal for the Law.

51. Taking into account the fact that the House of Peoples is the house of constituent peoples, not cantons, and that the delegates to the House of Peoples are elected by the cantonal assemblies from among their delegates in proportion to the ethnic structure of the population of the cantons, not in proportion to the ethnic structure of the cantonal assemblies' delegates from among whom the delegates to the House of Peoples are elected, the proposed solution, which is based on the criterion of the proportional representation taking into account the last census, which is indisputably applied equally to all, does not place the members of the Bosniac people in a less favourable position compared to two other constituent peoples, which would result in the violation of the vital national interest, which was alleged by the Statement makers.

52. Finally, whether the proposed solution relating to the allocation of mandates raises an issue of harmonization with the Constitution of the Federation of BiH, which the Statement makers suggested by referring to specific provisions of the Constitution of the Federation of BiH, is not an issue in relation to the issue of possible destructiveness of vital national interest, as these are two separate issues (see, among other authorities,

Decision on Admissibility and Merits, *No. U 32/13* of 23 January 2014, para 31, available at www.ustavnisud.ba).

53. Having regard to the foregoing, it follows that Article 13 of the Proposal for the Law, wherein para 2 of Article 20.16 A of the Election Law is amended, is not in violation of the vital interest of the Bosniac People, which was alleged by the Statement makers.

54. The Constitutional Court concludes that the Statement makers' allegations that the Proposal for the Law is destructive of the vital interest of the Bosniac people are not founded.

55. In accordance with this Decision, the House of People should pursue the procedure for adoption of the Proposal for the Law in accordance with Article IV(3)(e) of the Constitution of Bosnia and Herzegovina.

VI. Conclusion

56. The Constitutional Court concludes that the Law Proposal for the Law to Amend the Election Law of Bosnia and Herzegovina no. 02-02-1-1133/17 of 28 April 2017 is not in violation of the vital interest of the Bosniac People.

57. Pursuant to Article 59(1) and (5) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

58. Under Article 43 of the Rules of the Constitutional Court, President Mirsad Ćeman gave a statement of dissent to the majority 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.

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

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

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Case No. U 10/14

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Bakir Izetbegović, the Chairman of the Presidency of Bosnia and Herzegovina at the time of filing the request, and Mr. Željko Komšić, Member of the Presidency of Bosnia and Herzegovina at the time of filing the request, seeking to be established that the Decision on Verification of the Accuracy and Authenticity of Data during the Registration of Permanent Residence in the territory of the Republika Srpska (the *Official Gazette of the Republika Srpska,* no. 31/14) is in contravention of the provisions of the Constitution of Bosnia and Herzegovina

Decision of 4 July 2014

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article IV(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), 59(1) and (2) and Article 61(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina*, 22/14), in plenary and composed of the following judges:

Mr. Valerija Galić, President

Ms. 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. Bakir Izetbegović, Chairman of the Presidency of Bosnia and Herzegovina, and Mr. Željko Komšić, Member of the Presidency of Bosnia and Herzegovina**, in case no. **U 10/14**, at its session held on 4 July 2014, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Mr. Bakir Izetbegović, the Chairman of the Presidency of Bosnia and Herzegovina and Mr. Željko Komšić, Member of the Presidency of Bosnia and Herzegovina, is hereby granted.

It is hereby established that the Decision on Verification of the Accuracy and Authenticity of Data during the Registration of Permanent Residence in the territory of the Republika Srpska (the *Official Gazette of the Republika Srpska,* 31/14) is in contravention of Article III(3)(b) of the Constitution of Bosnia and Herzegovina and Article I(2) of the Constitution of Bosnia and Herzegovina.

The Decision on Verification of the Accuracy and Authenticity of Data during the Registration of Permanent Residence in the territory of the Republika Srpska (*the Official Gazette of the Republika Srpska*, 31/14) is hereby quashed in its entirety pursuant to Article 61(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The quashed Decision on Verification of the Accuracy and Authenticity of Data during the Registration of Permanent Residence in the territory of the Republika Srpska (*the Official Gazette of the Republika Srpska*, 31/14) shall cease to be in force on the day following the day of its publishing in *the Official Gazette of Bosnia and Herzegovina*, pursuant to Article 61(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 9 and 13 May 2014, Mr. Bakir Izetbegović, the Chairman of the Presidency of Bosnia and Herzegovina, and Mr. Željko Komšić, Member of the Presidency of Bosnia and Herzegovina („the applicants"), filed the requests with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court"), seeking to be established that the Decision on Verification of the Accuracy and Authenticity of Data during the Registration of Permanent Residence in the territory of the Republika Srpska (*the Official Gazette of the Republika Srpska*, 31/14) is in contravention of the provisions of the Constitution of Bosnia and Herzegovina. The applicants also requested that the Constitutional Court adopt an interim measure ordering the suspension of implementation of the challenged decision pending a final decision of the Constitutional Court on the requests. The requests in question were registered under nos. *U 10/14* and *U 12/14*.

II. Proceedings before the Constitutional Court

2. Pursuant to Article 32(1) of the Rules of the Constitutional Court, the Constitutional Court took a decision on joinder of the aforementioned cases in which the Constitutional

Court would conduct one set of proceedings and would take a single decision under number *U 10/14*.

3. Pursuant to Article 16(1)(a) of the Rules of the Constitutional Court (*the Official Gazette of Bosnia and Herzegovina*, 22/14), the Government of the Republika Srpska („the RS Government") was requested on 12 and 15 May 2014 to submit its replies to the requests in question.

4. On 11 June 2014, the RS Government submitted its replies to the requests in question.

5. Pursuant to Article 16(3) of the Rules of the Constitutional Court, on 2 June 2014 the Judge-Rapporteur invited the Office of the High Representative in Bosnia and Herzegovina („the OHR") to submit its written observations with reference to the requests in question.

6. On 25 June 2014 the OHR submitted its written observations with reference to the requests in question.

III. Request

a) 1. Allegations in Request no. *U 10/14*

7. The applicant refers to the provisions of Articles I(2) and I(7) of the Constitution of Bosnia and Herzegovina, Article II(5) of the Constitution of Bosnia and Herzegovina taken alone and in conjunction with Article II(4) of the Constitution of Bosnia and Herzegovina, Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Additional Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), Article 1 of Additional Protocol No. 12 to the European Convention with reference to the right to register permanent residence referred to in Article 4 of the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina*, 31/14 and 56/08), Article IV(4)(a) of the Constitution of Bosnia and Herzegovina, Article III(3)(a) and III(5)(a) of the Constitution of Bosnia and Herzegovina in conjunction with Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina. The applicant primarily sought that the request in question be considered as the request for resolution of the dispute with the RS Government, stemming from the challenged decision. If the Constitutional Court does not decide in this manner, the applicant sought that the request in question be considered as a request for review of the constitutionality of the challenged decision. In addition, the applicant pointed out that in 2001 the Parliamentary Assembly of Bosnia and Herzegovina had adopted the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina,*

32/01 and 56/08; „the Law on Residence"), which regulated uniformly two issues as follows: the registration of permanent and temporary residence of citizens of Bosnia and Herzegovina and the so-called facilitated registration of displaced persons in Bosnia and Herzegovina. In the applicant's opinion, uniformity of this legal solution throughout the territory of Bosnia and Herzegovina lies in the fact that legal solutions must be uniform and equal for all citizens of Bosnia and Herzegovina. Permanent residence secures the exercise of one of the rights (the right to register permanent and temporary residence) inherent to all citizens of Bosnia and Herzegovina under Article I(7) of the Constitution of Bosnia and Herzegovina. The applicant points out that in Bosnia and Herzegovina there is not a law or bylaw regulating the same issue at the level of the Entities.

8. Furthermore, the applicant stated that the challenged decision regulated in a legally binding manner the conditions under which a particular citizen of Bosnia and Herzegovina is entitled to register his/her permanent residence. The challenged decision, in the applicant's opinion, flagrantly violates the Constitution of Bosnia and Herzegovina in terms of its prerogatives, but it also breaches the rights of its citizens, which derive from the constitutional and legal framework of Bosnia and Herzegovina. The applicant states that the dispute arose when the Government of Republika Srpska adopted the legal act, *i.e.* the challenged decision, whereby the Entity made an „incursion" into the constitutional and legal rights of Bosnia and Herzegovina, *i.e.* its responsibilities, which amounts to the violation of the Constitution of Bosnia and Herzegovina, *i.e.* the rights and freedoms which the citizens of Bosnia and Herzegovina enjoy under the Constitution of Bosnia and Herzegovina. It is pointed out that as to the prerogatives of the State this primarily refers to the Ministry of Civil Affairs of Bosnia and Herzegovina. In the applicant's view, the challenged decision makes difficult the exercise of the rights of citizens of Bosnia and Herzegovina and of the responsibilities of Bosnia and Herzegovina.

9. According to the applicant, the challenged decision specifies alternative pieces of evidence, which a citizen of Bosnia and Herzegovina must provide to confirm that the registration of his/her place of residence is well-founded. At the same time, the issue of permanent residence is regulated by the Law on Residence, and the constitutional responsibility of Bosnia and Herzegovina clearly follows from the constitutional provisions of Article IV(4)(a), Article II(5) of the Constitution of Bosnia and Herzegovina, as well as from Article III(5)(a) of the Constitution of Bosnia and Herzegovina in conjunction with Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina and Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of the Additional Protocol No. 4 to the European Convention.

10. In the applicant's view, the constitutional authorization for regulating this matter represents the so-called exclusive legal authority in favour of Bosnia and Herzegovina. This includes not only exhaustive normative competence but also a formal authority to elaborate this law through bylaws, which is also afforded to the Ministry of Civil Affairs of Bosnia and Herzegovina, as an Institution of the State (Article 32(2) of the Law on Residence). The applicant states that the dispute at issue relates to several issues under the Constitution of Bosnia and Herzegovina as follows: a) what is the character of the challenged decision of the Entity and is it in conformity with the standards set forth in Article I(2) of the Constitution of Bosnia and Herzegovina, b) does the Republika Srpska have any constitutional and legal authority to regulate the substantive and legal issues of permanent and temporary residence under the Constitution of Bosnia and Herzegovina, and c) if the answer under (b) is affirmative, has the Republika Srpska exceeded its authority? The applicant underlines that the issue of registration of the place of residence is an extremely important constitutional and administrative issue, and that this dispute is a serious constitutional dispute deserving priority attention by the Constitutional Court of Bosnia and Herzegovina.

11. The applicant mentioned that if the present request for resolution of the dispute was rejected for formal reasons, than it should be considered as a request for review of the constitutionality of the challenged decision within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

12. Furthermore, the applicant alleges that in the present case the entity of the Republika Srpska, putting this act under the veil of a fictitious legal norm, intends to circumvent the jurisdiction of the Constitutional Court to review the act. In this respect, the applicant recalls that the public authorities of the entity of Republika Srpska recently passed legislative acts in the form of directives or rulebooks or rules of procedure that were „inaccessible" in the context of jurisdiction of the Constitutional Court of Bosnia and Herzegovina (Decisions of the Constitutional Court of Bosnia and Herzegovina nos. *U 58/02* of 27 June 2003, para. 15; *U 7/10* of 26 November 2010, para. 22, *et seq*.) In the applicant's opinion, the Constitutional Court cannot ignore the outcome of the analysis showing that the entity of Republika Srpska has been circumventing the mechanism of control of the constitutional judicial authority of the State by providing false forms to legal acts. Such conduct violates the basic standards of a legal State.

13. Furthermore, the applicant invokes the provision of Article 43(3) of the Law on the Government of Republika Srpska, and alleges that it clearly follows from the aforementioned provision that a decision always resolves certain individual and concrete situations. In addition, the applicant states that the content of the challenged decision

constitutes a typical *materiae legis*, a legal act in terms of substantive law. The above assertion is corroborated by simple comparison with the BiH Law on Residence (Articles 6 and 8) by the applicant. In the applicant's opinion, the mentioned criteria are not elaborated but supplemented by the challenged decision. Accordingly, the RS Government actually supplemented and, therefore, amended the State law by the challenged decision. In the view of the appellant, different legal arrangements could be considered so that the law is amended by the forum which enacted it and in accordance with the procedure prescribed, but not to supplement, correct or amend it in the manner contrary to the Constitution of Bosnia and Herzegovina. Therefore, the challenged decision, although being nominally defined as an individual administrative act, is in substance a *materiae legis.* In addition, the challenged decision it is not in substance an administrative act (Decree), since it does not elaborate, but supplement, a legal matter. Thus, the formal nature of the challenged act must not be obstacle to the acceptance of the jurisdiction of the Constitutional Court in the present case. In particular, the challenged decision, although representing an administrative decision from a formal point of view, must be the subject of review by the Constitutional Court of Bosnia and Herzegovina, as it flagrantly violates very important human rights and freedoms. In this connection, the applicant refers to the Constitutional Court's decision in its case *U 7/10*.

14. The applicant notes that the Parliamentary Assembly of Bosnia and Herzegovina adopted the Law on Permanent and Temporary Residence of Citizens of BiH and that the given Law uniformly and thoroughly prescribes the requirements for registration of the permanent residence of all citizens of Bosnia and Herzegovina. The Law on Permanent and Temporary Residence of Citizens of BiH meets necessity to ensure a uniform conduct by competent authorities in order to improve freedom of movement, including freedom to choose the place of permanent residence and the right of refugees and displaced persons to return. It is pointed out that the legislator left some room for elaboration of the Law on Residence though bylaws. However, the aforementioned formal authorization was afforded to the State institutions, more precisely to the Ministry of Civil Affairs of Bosnia and Herzegovina (Article 32(2) of the Law on Residence). Therefore, the entity of Republika Srpska does not have any legislative jurisdiction to enact bylaws as far as the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina is concerned. The applicant highlights that the entity of Republika Srpska has the exclusive responsibility to implement the State law, but not to elaborate or supplement it. It is pointed out that the relationship between the lower and higher level of authorities, as such, is quite common in a complex state, particularly those of Central Europe. Therefore, the issue of permanent residence is the issue of shared responsibility of the State and Entity. However, the legislative responsibility is exclusively afforded to Bosnia and Herzegovina.

Having acted contrary to the foregoing, the Entity violated the aforementioned provisions of the Constitution of Bosnia and Herzegovina, which are the basis for the legislative responsibility of the State insofar as the permanent residence is concerned.

15. The applicant notes that it is quite legitimate that the entity of Republika Srpska wants to include its justified interests in the legal arrangements of the State law. Precisely the Constitution of Bosnia and Herzegovina contains the provisions guaranteeing the members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (Article IV(3)(d)) of the Constitution of Bosnia and Herzegovina) to protect the interests of the Entities when adopting decisions by that authority. However, in the present case, the entity of Republika Srpska erroneously articulates those interests as it considers that those interests may be met by taking over the State prerogatives and by adopting its own decisions instead of following the procedure and forums provided for by the Constitution. The fact that the entity of Republika Srpska is of the opinion that the State does not respect those interest does not change the aforementioned conclusion. In such a case, other law and/or constitutional procedures are initiated (such as the institution of a procedure before the Constitutional Court of Bosnia and Herzegovina). This is the only reason why the legal State functions; otherwise a legal violence is imposed.

16. The request also underlined that given the lack of competence to regulate this matter, it would be superfluous to deal with the violation of certain provisions of the Constitution of Bosnia and Herzegovina (Decision of the Constitutional Court of Bosnia and Herzegovina, no. *U 1/11* of 13 July 2012). However, the applicant alleges that, as a precaution, he shall explain why the challenged decision of the entity of Republika Srpska does not constitute any „verification of accuracy and authenticity" of the registration of permanent residence but imposes new criteria for registration of permanent residence.

17. In this connection, the applicant notes that Article 3(1)(7) of the Law on Permanent and Temporary Residence of Citizens of BiH regulates that „permanent residence is a municipality or district within which a citizen establishes his/her habitual place of living with the intention of residing there permanently". In Article 6 of the mentioned Law, the legislator at the State level enumerates the data which a citizen of Bosnia and Herzegovina must submit to the relevant institution referred to in Article 5 of the Law to register successfully his/her place of permanent residence. In Article 8 of the mentioned Law, the legislator imposes an obligation on BiH citizens registering their permanent residence, so that they are bound to provide correct and authentic data. According to the definition itself, the intention of the person registering his/her place of permanent residence is important, whereas it is considered that the place of permanent residence is the municipality where the person has his/her address registered. The legislator does not absolutely prescribe

the requirement that there must be a legal and property relation between the person registering his/her permanent residence and property where the person is going to live. That conclusion particularly applies to the refugees and displaced persons who fall under the facilitated registration regime within the meaning of Article 16 *et seq*. of the Law on Permanent and Temporary Residence of Citizens of BiH.

18. The applicant holds that the prescription of obligation to submit the pieces of evidence referred to in item II(1)(1) – 1(4) of the challenged decision imposes a new legal and administrative obstacle. It may be defined as a financial obstacle as all pieces of evidence are related to certain administrative and notary procedures and fees. Finally, it is clear that a regulated property situation of individuals is required through those pieces of evidence, which can pose a considerable problem to a number of citizens, since it is generally known that a number of pre-war real properties do not have proper documentation (destroyed or disappeared during the war, lack of land books or organization of the Ledger of Deposited Contracts, unfinished construction works, physical planning, *etc*.).

19. Furthermore, the applicant points out that it is quite clear that Bosnia and Herzegovina, particularly its Entities, did not make it possible for refugees and displaced persons the so-called sustainable return, which would include not only the return of property but also economic, social and other conditions so as to make it possible for that population to live at full capacity in their permanent place of residence, having prospects of continuing living. Therefore, a number of refugees and displaced persons have been renovating their destroyed facilities even today, conducting administrative and court proceedings in order to prove the right to return of property, concluding employment contracts where employment is offered, exercising social rights where they have acquired them during the recent 20 years, going to the schools where they are not discriminated against, staying or residing where they are not physically threatened or where there is an elementary infrastructure for living, *etc*. However, all these obstacles to the sustainable return must not represent the reason to allow the relevant authorities in the field to deny the statement of such refugees and displaced persons that they whish to take up residence at an address with the intention to permanently live there. Therefore, no wonder that Article 20 of the Law on Residence prescribes only two requirements to register permanent residence: evidence to prove identity of a person and evidence to prove that a particular person lived at that address before the war. The obligations and ownership relations relating to property (ownership, possession, lease…) are not of significance.

20. The applicant notes that it should not be forgotten that a number of civil and political rights, including, but not limited to, the right to vote are related to the place of residence. If pieces of evidence proving the property are required to establish a relation between

a displaced person /refugee and the property in which he/she had lived before the war, then such persons, who were subject to brutal ethnic cleansing on those territories, are prevented from having political influence on the creation of „peace, justice, tolerance and reconciliation" (line 2 of the Preamble of the Constitution of Bosnia and Herzegovina). In other words, the Entity authority imposed additional obstacles on returnees to having influence on the creation of opportunities and environment for sustainable return through democratic election. This contributes to the creation of vicious circle of obstacles to sustainable return.

21. Another form in which the challenged decision has violated the norms of the Constitution is that it discriminated against Bosniacs and Croats in the Republika Srpska. In this connection, the Constitutional Court of Bosnia and Herzegovina indicated in its *Decision U 5/98 III* (of 1 July 2000, para. 79) that discrimination exists not only when the law formally treats differently without justification but also when „legislation and administrative practices with discriminatory intent or effect" are enacted. The applicant points out that the Constitutional Court indicated several ways of such discrimination in its decision mentioned above. Similar description of discrimination is given in Explanatory Report for Protocol No. 12 to the European Convention (ETS no. 177, para. 22), wherein it is stated that discrimination exists not only in case of the so-called formal discrimination but also if the State factually acts in a discriminatory manner, when the State exercise its discretionary power in a discriminatory manner, or by any other act.

22. The applicant states that it is correct that the wording of the challenged decision does not discriminate against individuals or groups on the ground of ethnic origin. However, the applicant holds that in reality the challenged decision contains inherent distinctions of ethnic nature if viewed in the historic context. Distinctions between individuals and groups were made in the past when citizens of Bosnia and Herzegovina, mostly Bosniacs and Croats, were expelled from Republika Srpska (compare statistical data indicated in *Decision* of the Constitutional Court no. *U 5/98 III*, of 1 July 2000, para. 129 *et seq*). Presently, when the same refugees and displaced persons attempt to register permanent residence in their pre-war places, unjustified legal and administrative obstacles have been created, which do not have legal grounds, as already explained. The applicant, therefore, holds that the challenged decision is not compatible with the standards of the right of return of refugees and displaced persons, taken alone and in conjunction with prohibition of discrimination, and it unjustifiably restricts the right to register permanent residence. In the applicant's opinion the aforesaid amounts to the violation of Article II(5) of the Constitution of Bosnia and Herzegovina in conjunction with Article II(4) of the Constitution of Bosnia and Herzegovina, Article II(3)(m) of the Constitution of

Bosnia and Herzegovina and Article 2 of the Additional Protocol No. 4 to the European Convention and Article 1 of Additional Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with the right to register permanent residence under Article 4 of the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina,* 32/01 and 56/08).

23. In relation to the request for an interim measure, the applicant alleges that the challenged decision entered into force on the date when it was published. Thus, its effective application commenced. In this respect, the applicant states that the reports from the field show that all police stations (for example, Srebrenica, Doboj, Rogatica, Bosanska Gradiška, Bosanska Dubica…) published information that citizens of Bosnia and Herzegovina must submit*, inter alia*, one of the pieces of evidence referred to in item II of the challenged decision (information issued by the Police Station of Srebrenica is attached to this request). Therefore, in the applicant's opinion, numerous consequences for citizens of Bosnia and Herzegovina have occurred, particularly for the refugees and displaced persons who wish to register their place of residence. We would like to note that this is mostly the population that lived at the pre-war addresses trying to regulate its legal and administration status. The applicant points out that every dismissal of application for registration of the place of residence has double effect. On the one hand, it makes it impossible for a person and his/her family members to regulate this administrative and legal issue, which is connected to a number of other issues (social assistance, education, tax collection and other revenues, registration at the Employment Agency, *etc*.). On the other hand, the „echo" of every single case in which the registration of place of residence is refused is the discouraging environment for return. It is stressed that for the refugees and displaced persons every single day is of importance, especially during this spring and summer period. Finally, the applicant points out that the consequences, which will occur if the request for an interim measure is dismissed and the request is granted as well-founded, will be more serious than the consequences which will occur if the application of the challenged decision is temporarily suspended, but the request is dismissed upon the completion of the proceedings before the Constitutional Court of Bosnia and Herzegovina. This test of the so-called double hypothesis also justifies the imposition of interim measures. Furthermore, the applicant proposed that the request at issue be dealt urgently.

a) 2. Allegations in Request no. *U 12/14*

24. The applicant refers to Articles I(2), III(3)(b) in conjunction with lines 2 and 6 of the Preamble of the Constitution of Bosnia and Herzegovina, Articles I(4), II(2) (Article 2,

Protocol No. 4 to the European Convention, Article II(3)(m), Article II(5), Article III(5)(a), Article IV(4)(a)), Article X(2) of the Constitution of Bosnia and Herzegovina and item 7 of Annex I to the Constitution of Bosnia and Herzegovina (Article 12 of the International Covenant on Civil and Political Rights).

25. The applicant holds that the entity of Republika Srpska had no constitutional basis, or any other legal basis, for passing the challenged decision. The reason being that the Parliamentary Assembly of Bosnia and Herzegovina adopted the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina*, 32/01 and 56/08), whereas exercising its constitutional responsibilities under Article IV(4)(a) of the Constitution o Bosnia and Herzegovina, in conjunction with, *inter alia*, Article I(4), Article II(2), Article II(3)(m), Article II(5), Article III(5)(a) and item 7 Annex I to the Constitution of Bosnia and Herzegovina (Article 12 of the International Covenant on Civil and Political Rights). In the applicant's opinion, the enactment of that law responded to the necessity to ensure uniformity of the conduct of competent State and Entity authorities with the aim of improving freedom of movement, which includes liberty of movement and residence and right of refugees and displaced persons to return. In this connection, the issue of permanent and temporary residence of Bosnia and Herzegovina is regulated at the State level, whereas the competence to adopt rules, guidelines and instructions, including those contained in the challenged decision of the Government of Republika Srpska, is afforded to the Ministry of Civil Affairs, as prescribed by the Law (Article 32 of the Law), whereas implementation of certain issues only is reserved for the competent authorities of the Entities, without affording the authority to such bodies to regulate such matters.

26. In view of the above, the applicant holds that the challenged decision must be declared unconstitutional as it regulates, in normative terms, the matter which is not afforded to the Entities under the Constitution of Bosnia and Herzegovina. The applicant holds that there is no constitutional basis for taking such Decision, *i.e.* within the meaning of the responsibility of the Republika Srpska to regulate the aforementioned matter, as it is outside the scope of competence of the executive power but also outside the scope of competence of the legislative power of the Republika Srpska, since, according to the Constitution of Bosnia and Herzegovina, the State of Bosnia and Herzegovina has the responsibility to regulate this matter in accordance with Articles I(4), Article II(2), Article II(3)(m), Article III(5)(a), Article IV(4)(a) and item 7 of Annex I to the Constitution of Bosnia and Herzegovina.

27. It is pointed out that Article III(5)(a) of the Constitution of Bosnia and Herzegovina distinguishes three independent hypothesis that Bosnia and Herzegovina shall assume

responsibility (1) for such other matters as are agreed by the Entities; (2) matters provided for in Annexes 5 through 8 to the General Framework Agreement; or (3) which are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina under Articles III(3) and III(5) of the Constitution. Therefore, the applicant holds that the matter of permanent residence falls within the scope of competence of the institutions of Bosnia and Herzegovina, as the aforementioned matter includes the issue of permanent and temporary residence of displaced persons in Bosnia and Herzegovina, which is in direct conjunction with Annex 7 of the General Framework Agreement.

28. In addition, the applicant notes that the adoption of the Law Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina is not the exclusive responsibility of the institutions of Bosnia and Herzegovina but additional responsibility of the institutions of Bosnia and Herzegovina, more precisely, of the Parliamentary Assembly of Bosnia and Herzegovina. The reason being that Article III(3) (a) of the Constitution of Bosnia and Herzegovina contains the provision according to which Bosnia and Herzegovina shall assume responsibility for such other matters (...) provided for in Annexes 5 through 8 to the General Framework Agreement. Therefore, Annex 7 - the Agreement on Refugees and Displaced Persons - forms integral part of the Constitution of Bosnia and Herzegovina so that the Parliamentary Assembly is the only one having the responsibility to decide on the enactment of that law. It is pointed out that the challenged decision, which was taken by the Government of Republika Srpska, deprives refugees and displaced persons of their right to return. In this respect, according to Annex 7, all refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina.

29. Furthermore, the applicant alleges that the challenged decision of the Government of Republika Srpska is in violation of the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina for the following reasons:

1) The Parliamentary Assembly of Bosnia and Herzegovina and/or the Ministry of Civil Affairs is entrusted with the regulation of the matter covered by the Decision of the Republika Srpska, in accordance with Article 32 of the Law on Permanent and Temporary Residence of Bosnia and Herzegovina;

2) Item II of the challenged decision extends the requirements and/or imposes additional requirements to register permanent residence (without legal basis in the State law), violating thus the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina;

3) The challenged decision of the Government of Republika Srpska has violated the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina, since that Decision, unlike the Law at the State level, does not prescribe the special requirements to be imposed on returnees and displaced persons. Therefore, the challenged decision has been in violation of Article I(2) and Article III(3)(b), in conjunction with lines 2 and 6 of the Preamble of the Constitution of Bosnia and Herzegovina, Article I(4), Article II(2) (Article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms), Article II(3)(m), Article, Article II(5), Article III(5), Article IV(4)(a) and item 7 of Annex I to the Constitution of Bosnia and Herzegovina (Article 12 of the International Covenant on Civil and Political Rights).

30. The applicant recalls the jurisprudence of the Constitutional Court (Decisions of the Constitutional Court nos. *U 14/04*, *U 2/11* and *U 25/13*) according to which inconsistencies between Entities and State laws raises an issue of compatibility with Article I(2) and Article III(3)(b) and may constitute a violation of the Constitution of BiH. However, in order for such laws to be unconstitutional, such an act must also amount to a violation of the constitutional responsibilities of the State under the Constitution. In this regard, the applicant points out that the regulation of the matter of permanent residence falls within the scope of responsibilities of the State in accordance with lines 2 and 6 of the Preamble of the Constitution of Bosnia and Herzegovina, Article I(4), Article II(2) (Article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms), Article II(3)(m), Article II(5), Article III(5)(a), Article IV(4)(a) and item 7 of Annex I of the Constitution of Bosnia and Herzegovina (Article 12 of the International Covenant on Civil and Political Rights).

31. In addition, it is noted that the challenged decision is in violation of Article I(4) in conjunction with Article II(3)(m) and Article II(5) of the Constitution of Bosnia and Herzegovina, as additional and stricter requirements for registration of permanent residence, which are not prescribed by the Law on Permanent an Temporary Residence of Citizens of Bosnia and Herzegovina, are imposed and specific requirements for registration of permanent residence of displaced persons and refugees are not included.

32. Furthermore, the applicant states that the statements of the highest officials of the legislative and executive powers of the Republika Srpska and the political context within

which the challenged decision was taken, such as the reasons given by the Prime Minister of the Government of Republika Srpska, imply that a general measure was taken with the aim of preventing returnees and displaced persons form registering their permanent residence based on the State law, which is contrary to Article II(5) of the Constitution of Bosnia and Herzegovina. Furthermore, it may be considered that the aforementioned Decision was taken with the aim of restricting the right to vote of the citizens of Bosnia and Herzegovina that wish to exercise their voting rights in the territory of the Republika Srpska. The challenged decision is also in violation of the provisions of Article I(4) and II(3)(m) of the Constitution, as it jeopardizes uniformity of the State regulatory framework in the manner that stricter requirements contrary to the State law are prescribed, which amounts to the violation of freedom of movement and right to liberty of movement and residence guaranteed by the Constitution and applied in accordance with the State law. Moreover, the challenged decision, political context and motive for taking that Decision constitute a violation of Article II(4) and Article II(5) of the Constitution of Bosnia and Herzegovina.

33. In relation to the request for an interim measure, the applicant underlines that the circumstances surrounding the case raise very serious and complex issues relating to the constitutionality of the challenged decision, including, notably, the violation of certain provisions of the Constitution of Bosnia and Herzegovina. In addition, the implementation of the challenged decision may lead to irreparable detrimental consequences for a very large number of BiH citizens (including refugees and displaced persons who do not possess their property in the Republika Srpska and/or live abroad due to the war in Bosnia and Herzegovina). The implementation of the challenged decision my also jeopardize the entire system of registration of permanent residence, and it may also call into question the organization and conduct of the election procedure for the 2014 General Elections. There is also a risk that the challenged decision will be implemented in a discriminatory manner.

34. As to the grounds for admissibility, the applicant refers to the Constitutional Court's Decision no. *U 4/05*, wherein it was concluded that the Constitutional Court could review the constitutionality of legal acts of lower rank than a law if such acts raise the issue of violation of human rights and freedoms safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention. In respect of the aforesaid, the applicant holds that, given that Article VI(3)(a) does not prescribe such a distinction, the interpretation by the Court restricts its obligation to uphold the Constitution in a number of disputes which may arise between different levels of authorities under Article VI(3)(a) of the Constitution, where it concerns unconstitutional bylaws passed by the authorities. As a result, potential disputes cannot be resolved before the competent Constitutional Court as final arbiter, the

effect of which is ineffectiveness of a number of provisions of the Constitution of Bosnia and Herzegovina.

35. In the present case, the applicant notes that the challenged decision of the RS Government was taken in the context of efforts of the National Assembly of Republika Srpska to enact a law in the field of permanent residence, which was the result of a dispute between political actors within the Parliamentary Assembly of Bosnia and Herzegovina and represents a regulatory decision with the aim of achieving the effect similar to the intended conduct of the National Assembly of Republika Srpska. Moreover, such a standpoint of the Constitutional Court impedes the effectiveness of Article III(3)(b) of the Constitution of Bosnia and Herzegovina, as a violation of the provisions of the State law, through bylaws passed by different authorities of the Entity, could not be claimed before the Constitutional Court.

36. Therefore, the applicant holds that the challenged decision of the RS Government should be declared unconstitutional, as it normatively regulates the matter that is not afforded to the Entities under the Constitution of Bosnia and Herzegovina. In the applicant's View, there is no constitutional basis for taking such a decision, as the entire matter is outside the scope of competence of the executive authorities as well as of the legislative authorities of the Republika Srpska, as the State of Bosnia and Herzegovina, under the Constitution of Bosnia and Herzegovina, has the responsibility to regulate this matter.

b) Reply to the request

b) 1) Reply to Request no. U 10/14

37. In its reply to the request, the RS Government indicates that the hitherto case-law of the Constitutional Court has been directed at the review of general legislative acts, and not the acts of executive and administrative authorities. In this respect it referred to the Decision of the Constitutional Court no. *U 58/02* of 27 June 2003. It is pointed out that the State of Bosnia and Herzegovina and its Entities have a joint obligation to ensure the highest level of the protection of human rights and to guarantee the equal implementation of these rights, and that the challenged Decision pursues this legitimate aim (the right to the freedom of movement of persons together with other freedoms), the overcoming of the created vacuum, *i.e.* the legal gap and legal situation resulting from the failure to adopt laws at the level of Bosnia and Herzegovina. It is indicated that the constitutional ground for the issuance of the challenged Decision is contained in Article 21 of the Constitution of the Republika Srpska, Amendment XXXII paragraph 1 items 10 and 18 to Article 68 of

the Constitution of the Republika Srpska, Article 43(3) of the Law on the RS Government (the Offic*ial Gazette of the RS,* 118/08), Article I(4) of the Constitution of Bosnia and Herzegovina, as well as Article 1 of Annex 7 to the Agreement for Peace in Bosnia and Herzegovina.

38. In that sense the RS Government emphasizes that the provisions of the challenged Decision are identical to the specific provisions of the Law Amending the Law on Permanent and Temporary Residence of the Citizens of Bosnia and Herzegovina, which entry into force was obstructed during the procedure it had gone through. It is indicated that the Draft and proposed amendments to the law received the approval of the competent institutions at the level of Bosnia and Herzegovina: the House of Representatives of the Parliamentary Assembly of BiH, the Ministry of Civil Affairs of BiH, the Legislation Office of the Council of Ministers of BiH, the Ministry of Justice of BiH, the Directorate for European Integration, the Ministry of Human Rights and Refugees of BiH and the Personal Data Protection Agency of BiH.

39. In the opinion of the RS Government, the challenged decision has not taken away the prerogatives of the State of Bosnia and Herzegovina, because the Law on Permanent and Temporary Residence of the Citizens of Bosnia and Herzegovina (*the Official Gazette of BiH,* 32/01 and 56/08) exists at the state level, regulating throughout the entire territory of the state the permanent and temporary residence of the citizens of BiH and the stay of displaced persons in BiH and not a single legal provision may be interpreted so as to restrict the right to free choice of one's place of permanent residence.

40. It is pointed out that the challenged decision does not constitute *materiae legis*, a legal act in terms of substantive law, as the applicant stated, since it relates to procedural issues of verification of the accuracy of data, *i.e.* the evidence relating to the registration of the place of permanent residence. It is indicated that the Government of the Brčko District of BiH has adopted an identical decision (*the Official Gazette of the Brčko District of BiH,* 56/10) as well as the Decision no. 01.11-1031DS-10/13 of 5 July 2013.

41. In the opinion of the RS Government, the challenged decision did not amount to the violation of individual norms of the Constitution of Bosnia and Herzegovina, because it constitutes „verification of the accuracy and authenticity" of the registration of permanent residence and it does not impose new criteria for the registration of permanent residence. In that respect, it indicates that Article 6 of the Law on Permanent and Temporary Residence of the Citizens of BiH the legislator specified accurately the data a citizen of Bosnia and Herzegovina has to submit to the competent institution under Article 5 of the Law for the purpose of a successful registration of permanent residence. Furthermore, Article 8 of the

Law imposed an obligation upon a citizen of BiH registering his/her permanent residence to submit accurate data. It is indicated that the challenged decision does not discriminate against Bosniacs and Croats in the Republika Srpska, as alleged by the applicant.

42. It is stated that the challenged decision contains not a single provision whatsoever that places in a more or less favorable position any one of the constituent peoples, neither does it affect the constitutional right to the return of refugees and displaced persons, instead it prevents abuses in the registration of permanent residence for political and other purposes. Namely, it was indicated that situations existed where citizens used to register permanent residence at the addresses of public institutions, religious facilities, non-existent addresses, in a single housing unit of 10 m^2 as many as 27 persons were registered, as well as in places which were absolutely inhabitable, namely a meadow, a hill, and such like.

43. It is pointed out that the provision of Article 5(1) of the Law on Permanent and Temporary Residence of the Citizens of BiH prescribes that registration and deregistration of permanent residence and of address of stay shall be performed, within their respective competence, by the Cantonal Ministries of the Interior in the Federation of BiH, by the RS Ministry of the Interior in the Republika Srpska, and in the Brčko District of BiH by the competent authority which functions as a state institution. Furthermore, Article 8(1) of the law explicitly prescribes that when registering and deregistering permanent or temporary residence, citizens shall be obliged to provide accurate and authentic data, while Article 8a. stipulates that if the competent authority, in the proceedings carried out *ex officio* or upon a request of a party who has legal interest, establishes that a citizen of BiH has registered his/her permanent or temporary residence in contravention of the provisions of Article 8(1) of the Law, such a place of residence shall be annulled by a decision. Therefore, in the opinion of the RS Government, it is undisputed that the right of the competent Entity authority stems from the aforesaid provisions to carry out verification of the accuracy and authenticity of data during the registration of permanent residence in the territory of the Republika Srpska in a purposeful manner that does not exceed the constitutional and legal framework, without compromising the rights and personal integrity of the citizens of BiH.

44. The RS Government alleges that there have been attempts at the state level to amend the Law on Permanent and Temporary Residence of the Citizens of BiH and to bring it closer to the examples from the European case-law with a view to overcoming gaps in this area and the activities commenced on the implementation of the Public Administration Reform Strategy in the Council of Ministers and the House of Representatives, which were halted by the Party of Democratic Action (SDA) in the House of Peoples, due to the politicization of the issue of permanent residence in Bosnia and Herzegovina.

45. That the aforementioned in true proves the Decision of the Constitutional Court of BiH no. *U 27/13* of 29 November 2013, establishing that the Statement of the Bosniac Caucus in the House of Peoples of the Parliamentary Assembly of BiH on the destructivity to the vital interest of the Bosniac people in BiH, in the Draft Law Amending the Law on Permanent and Temporary Residence of the Citizens of BiH of 17 July 2013, meets the requirements of procedural regularity under Article VI(3)(f) of the Constitution of Bosnia and Herzegovina, and that the Draft Law Amending the Law in question does not violate the vital interest of the Bosniac people in BiH. In the above Decision, the Constitutional Court indicated that the mentioned Draft Law does not put into a more or less favorable position any of the constituent peoples, the Bosniac people in the present case, neither does it affect the constitutional right to return of refugees and displaced persons, as a result of which the vital interest of the Bosniac people has not been violated.

46. The aforementioned, in the opinion of the RS Government, indicates that the present request does not relate to the legal but to the political issue. Therefore, the RS Government points out that, having regard to the jurisdiction of the Constitutional Court of BiH referred to in Article VI(3) of the Constitution of Bosnia and Herzegovina, this Court lacks jurisdiction to resolve disputes / to offer advices and opinions, and that the respective request should be rejected in that part. In the part requesting the review of constitutionality of the challenged decision, the RS Government proposes that the request be dismissed, since there has been no violation of the Constitution of Bosnia and Herzegovina in terms of the jurisdiction of the Constitutional Court of BiH under Article VI(3)(a), (b) and (c) of the Constitution of Bosnia and Herzegovina.

b) 2. Reply to the request no. U 12/14

47. In its reply to the request, the RS Government alleges that the request challenges the act of lower legal force than a law, a decision by an executive authority, the RS Government that is. In that sense, the RS Government recalls the hitherto case-law of the Constitutional Court directed at the review of general legislative acts, and not by-laws (Decision of the Constitutional Court no. *U 3/04*). Moreover, it refers to the Decision of the Constitutional Court no. *U 4/05*.

48. It was indicated that the subject of these proceedings is a by-law of lower rank which, by its nature, is of instructive character and relates to the segment of the matter regulating the issue of permanent and temporary residence of the citizens living in the territory of the Republika Srpska. Therefore, it is indicated that the challenged decision is not of the same logical type as law, that it relates to a small portion of the given matter and that it does not constitute a basic general act.

49. The RS Government states that it is beyond dispute that the Constitutional Court may carry out the control of constitutionality of legal acts of lower rank than laws when such acts raise issues of violation of human rights and fundamental freedoms protected by the Constitution of BiH and the European Convention, as already done by the Constitutional Court in its Decision no. *U 4/05* of 22 April 2005. However, the Constitutional Court may exercise such a control only if the condition referred to in Article VI(3)(c) of the Constitution of Bosnia and Herzegovina has been met.

50. The RS Government emphasizes that the challenged decision does not violate human rights and fundamental freedoms prescribed by Article I(2) and Article III(3) (b) in conjunction with lines 2 and 6 of the Preamble to the Constitution of Bosnia and Herzegovina, Article I(4), Article II(2) (Article 2 of Protocol No. 4 to the European Convention), Article II(3)(m), Article II(5), Article III(5)(a), Article IV(4)(a) and item 7 of Annex 1 to the Constitution of Bosnia and Herzegovina (Article 12 of the International Covenant on Civil and Political Rights).

51. The challenged decision, in the opinion of the RS Government, does not violate the freedom of movement, because it does not compromise rights of citizens guaranteed by the Constitution of Bosnia and Herzegovina, neither does it prevent citizens from registering their respective place of permanent and temporary residence in accordance with law. However, the challenged decision does prevent citizens from falsely registering their place of permanent residence, *i.e.* from supplying inaccurate and false data.

52. The RS Government points to the provisions of Article 3(1)(7), and 8 and 8.a of the Law on Permanent and Temporary Residence of the Citizens of BiH. It is pointed out that a permanent residence is not and cannot be a municipality in which a citizen has not taken up residence and has no intention to live in, but wishes to register there a permanent residence in order to be able to vote for representative bodies of the municipality, Entity and BiH, or to exercise any other rights arising from or relating to the registration of permanent residence, but only the municipality in which a citizen has taken up residence with the intention of living there. The notion of „taking up residence with the intention of living there" implies that a person has moved into a housing unit adequate for living in which they intend to live. Every person who has moved into a habitable apartment or a house has a legal ground in the form of a proof of ownership if they are the owners, or a proof that they have rented the apartment or house if they are subtenants.

53. Submitting the mentioned pieces of evidence, in the opinion of the RS Government, constitutes a proof that such a person has taken up residence in the territory of the municipality in which he or she is registering their permanent residence, hence that they have provided accurate and authentic data when registering their permanent residence.

54. Given that the challenged decision relates to verification of the accuracy and authenticity of data during the registration of permanent residence, it is in accordance with the above-mentioned articles of the State law.

55. It is pointed out that the Decision of the RS Government does not and cannot render ineffective any article of the Law, rather it gives instructions by specifying evidence on which basis the accuracy and authenticity of data provided by citizens during the registration of permanent and temporary residence are established. The conditions set out in the challenged decision are not stricter than those stipulated by the Law, because they are the same conditions that constitute the basis for the annulment of the registration of permanent residence. In the opinion of the RS Government, requesting from citizens to provide a proof of the accuracy and authenticity of data during the registration of permanent residence does not restrict rights and freedoms of citizens, but makes impossible the „electoral engineering" of political parties and the exercise of such rights they are not entitled to, as well as any abuse for that matter.

56. It is pointed out that the Decision of the RS Government applies to all citizens and makes no distinction on ethnic, racial, religious, sexual or any other grounds, neither does it place in a more favorable position local population to the detriment of the category of the population of returnees, since it does not interfere with the rights of returnees to facilitated registration of their permanent residence as stipulated by the State law. Neither does it regulate different provisions from those provided for by the law relating to displaced persons and refugees.

57. It is indicated that the provision of Article 5(1) of the Law on Permanent and Temporary Residence of the Citizens of BiH established that the RS Ministry of the Interior, the Brčko District Police and the Cantonal Ministries of the Interior, shall have the competence to carry out the registration and deregistration of permanent residence and of home address, and to keep records thereof, that the Ministry of Civil Affairs of BiH shall have a supervisory and appellate competence in the procedure of the registration and deregistration of permanent residence, and that under the Constitution of Bosnia and Herzegovina the matter of the registration and deregistration of permanent residence has not been prescribed as an original responsibility of BiH, *i.e.* that the present case concerns a divided responsibility of BiH and its Entities, created by transferring a part of the mentioned responsibility from the Entities to the institutions of BiH, in respect of supervisory and appellate jurisdiction. It is further stated that the RS Government, pursuant to Article 43 of the Law on the Government, shall have the competence to adopt decisions within the scope of its competency, and that the challenged decision is not inconsistent, in

substantive terms, with the provisions of the Constitution of BiH and the provisions of the Law on Permanent and Temporary Residence of the Citizens of BiH.

58. Moreover, the RS Government holds that the request for an interim measure is ill-founded, since the challenged decision cannot lead to irreparable detrimental consequences for citizens, particularly for refugees and displaced persons, as already stated. It was indicated that the challenged decision does not discriminate against anyone and cannot bring into question the organization and implementation of the election process for the General Elections in BiH in 2014. Therefore, in view of all the aforesaid, the RS Government proposes, due to the inadmissibility of the request for the review of constitutionality and the lack of jurisdiction of the Constitutional Court of BiH, that the request be rejected, as well as the request for an interim measure.

c) Observations by the OHR

59. In its opinion, the OHR states that the challenged decision was adopted while the Draft Law on Permanent and Temporary Residence in Republika Srpska has been introduced into the parliamentary procedure with the aim to suspend the application of the Law on Permanent and Temporary Residence of the Citizens of Bosnia and Herzegovina (*the Official Gazette of BiH,* 32/01 and 56/08) in the territory of Republika Srpska. The Draft Law on Permanent and Temporary Residence in Republika Srpska was then conceived as a response to the failure on the part of the Parliamentary Assembly of Bosnia and Herzegovina to adopt amendments to the existing State law on Permanent and Temporary Residence that were proposed by the Council of Ministers of BiH in July 2013.

60. It was pointed out that the High Representative and the international community at large have expressed their concern over the situation that concerns the compliance with decisions taken by the institutions of BiH, that could also have an impact on the conduct of the elections, on the freedom of movement throughout Bosnia and Herzegovina as well as on other rights guaranteed under the Constitution of Bosnia and Herzegovina. In this respect, references were made to the Joint Statement issued on 8 May 2014 by the European Union Special Representative/Delegation of the European Union, the Embassy of the United States and the OHR, whereby they expressed their concern in relation to the adoption of the challenged decision. The mentioned statement, *inter alia*, reads that „the regulation of residency is a state-level issue and requires a political and legal solution at that level. It is important that Bosnia and Herzegovina amends its existing legislation and bring it closer in line with the European best practices, in order to address existing gaps. At the same time, the rights of returnees to return and freedom of movement of all citizens of Bosnia and Herzegovina must be respected. Standards must be uniform across the entire

territory of Bosnia and Herzegovina and authorities in all parts of the country should implement existing and future legislation equally among all citizens, without any form of discrimination, in a way that builds public confidence. Existing state-level legislation regulating residency must be respected until it is amended. Unilateral attempts to regulate this matter at Entity level, such as the Republika Srpska recent decision… go beyond existing legislation and are not acceptable. It is equally unacceptable for other political actors to block the functioning of state institutions, such as the BiH House of Peoples, thus preventing the normal democratic interplay between various interests that would enable compromises for potential amendments of the BiH Law on residence to be found".

61. Moreover, the opinion refers also to the 45th Report of the High Representative on the Implementation of the Peace Agreement for Bosnia and Herzegovina to the Secretary General of the United Nations.

62. The OHR contends that the state of Bosnia and Herzegovina has competence in this matter and that the Parliamentary Assembly of BiH enacted the Law on Permanent and Temporary Residence while exercising such constitutional responsibilities. Permanent and Temporary Residence of citizens of Bosnia and Herzegovina is regulated at the state level and the responsibility for enactment of rulebooks, directives and instructions, including those contained in the challenged decision of the RS Government is vested, by law, in the Ministry of Civil Affairs of BiH (Article 32 of the Law), while the role in the implementation of certain provisions is given to the competent entity bodies.

63. In the opinion of the OHR, by establishing conditions which apply exclusively in one part of the country, namely in the territory of the Republika Srpska, the challenged decision raises the issue of compliance with the principle of the freedom of movement of persons / the right to freedom of movement and residence guaranteed under Article I(4) and Article II(3)(m) of the Constitution of Bosnia and Herzegovina, and raises the issue of compliance with the provisions of the Constitution of Bosnia and Herzegovina guaranteeing the right to return of refugees and displaced persons under Article II(5).

64. It was indicated that the freedom of movement of all persons in Bosnia and Herzegovina is an essential element of citizenship of Bosnia and Herzegovina. In that regard, the challenged decision creates new barriers to mobility across the entire territory of BiH, whereas the state-level laws aim at eliminating or reducing barriers to free movement, and at encouraging the actual use of common rights to freedom of movement. In that respect it was indicated that, according to the UNHCR official indicators, there are still 84,500 internally displaced persons and 27,419 refugees wishing to return to their pre-war municipalities. Therefore, the bulk of new requests for re-registration of permanent residence in the Republika Srpska is likely to be initiated by those vulnerable groups.

65. The OHR states that the State law on Permanent and Temporary Residence reflects the legal obligation stemming from Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina and Article II(5) of the Constitution of BiH, and contains an entire chapter regulating the so-called regime of facilitated registration for returnees. The aim of this chapter is to remove obstacles to the return of refugees and displaced persons and the implementation of Annex 7 to the General Framework Agreement for Peace, as one of the most important goals for resolving the conflict in Bosnia and Herzegovina. In the OHR's opinion, the decision of the RS Government on carrying out control ignores these provisions of the State law and fails to include specific conditions for the facilitated registration of permanent residence for refugees and displaced persons, as foreseen in the State law. In so doing, the challenged decision could have detrimental effect on refugees and displaced persons seeking to return to their pre-war municipalities in the Republika Srpska in particular.

66. It is further stated that the challenged decision brings into question the uniformity of the state regulatory framework, and that, by providing additional and stricter conditions for the registration of permanent residence of citizens which are applicable exclusively in the territory of the Republika Srpska, it restricts the freedom of movement of persons as well as the right to freedom of movement and permanent residence guaranteed under the Constitution, and is implemented under the State law. In addition, the failure to include specific conditions for the facilitated registration of permanent residence for returnees, as foreseen in the State law, could have detrimental effects on returnees in particular.

67. The opinion of the OHR is that if the challenged decision is not rendered ineffective, Article I(2) and III(3)(b) of the Constitution of Bosnia and Herzegovina would become ineffective. Accepting that the challenged decision remains in force would lead to recognizing the possibility for an Entity to substitute the institutions of BiH in cases where the representatives elected from that Entity into the institutions of BiH are not in a position to make their views prevail. Accordingly, it would constitute a substitute to the need to seek compromise between the Entities and constituent peoples (along with Others) on the issues that have to be regulated at the state level.

68. The OHR contends that, should the Constitutional Court not decide on the merits of the present case at its next session, the Court should consider issuing an interim measure at that session suspending the application of the contested decision pending the final decision of the Constitutional Court. This being so for the reason that the implementation of the mentioned decision may lead to irreparable harmful consequences for a number of persons, in particular refugees and displaced persons who as a result of the war in Bosnia

and Herzegovina are not in possession of their property in the Republika Srpska and/or live abroad, and who might face administrative obstacles in attempting to register their permanent residence in the Republika Srpska. Furthermore, the implementation of the disputed decision could bring into question the principle of legal certainty under Article I(2) of the Constitution of Bosnia and Herzegovina. Moreover, in the opinion of the OHR, the challenged decision may also have a negative impact on the organization and conduct of the electoral process for the 2014 General Elections, since permanent residence is the key element for the registration of citizens of Bosnia and Herzegovina who have the right to vote. In this respect, it is indicated that the Election Law of Bosnia and Herzegovina specifically defines the meaning of permanent residence in order to precisely determine the categories of voters.

IV. Relevant Law

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

Article I
Bosnia and Herzegovina

[...]

2. Democratic Principles

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

Article III

Responsibilities of and Relations between the Institutions of Bosnia and Herzegovina and the Entities

[...]

3. Law and Responsibilities of the Entities and the Institutions

[...]

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

Article IV
Parliamentary Assembly

[...]

4. Powers

The Parliamentary Assembly shall have responsibility for:

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

[...]

Article VI(3)(a)

The Constitutional Court shall uphold this Constitution.

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

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

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

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

Law on Permanent and Temporary Residence of the Citizens of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina,* 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 2

Data processed under this Law shall be processed, stored, used and forwarded with the intention of serving the needs of BiH citizens in the enjoyment of their rights and the performance of their duties, and shall be used to monitor population stock and flow in Bosnia and Herzegovina. The collection of data pursuant to this Law shall proceed in accordance with the BiH Law on Protection of Personal Data and the BiH Law on Central Registers and Data Exchange.

Article 4

All Citizens shall register and de-register their permanent and temporary residence in accordance with this Law.

The registration and de-registration of permanent residence, including home address, is compulsory for all citizens, except in cases referred to in Article 9(4) of this Law.

Registration and de-registration of temporary residence is voluntary, unless otherwise regulated by this Law.

Citizens may only register one place of permanent residence within the territory of BiH.

Article5

Registration and de-registration of permanent and temporary residence and of home address shall be performed in the Federation of BiH by the Police Administrations within the Cantonal Ministry of Internal Affairs, in Republika Srpska by public security stations within the RS Ministry of Internal Affairs, and in Brčko District by the competent authority which operates as a state institution.

Competent authorities of the entities shall act as the second-instance authorities in an appellate procedure addressing decisions of the authorities competent for issuance, revocation and replacement of ID cards.

A party dissatisfied with the decision of the second instance authority decision may file an appeal with the BiH Ministry of Civil Affairs and Communications (hereinafter: MCAC).

Article 6

A citizen who registers his/her permanent or temporary residence shall provide the following information to the competent authority in his/her new place of permanent or temporary residence:

1. Unique Master Citizen Number;
2. Name;
3. Surname;
4. Sex;
5. Date of Birth;
6. Place of Birth;
7. Municipality of Birth;
8. Country of Birth;
9. Place of Permanent or Temporary Residence;
10. Post Code;
11. Street of Residence;
12. House/Apartment Number;
13. Entity;
14. Canton of Residence;
15. BiH Citizenship;
16. Entity Name;
17. Change of Name;
18. Status of Residence (Permanent or Temporary).

The citizen shall not be obliged to de-register, in person, in his/her previous place of temporary or permanent residence. De-registration shall be carried out in his/her previous place of permanent or temporary residence by an authorised person.

Citizens shall notify the competent authority of change of the home address.

Citizens shall not be obliged to register a change of home address that results from a decision by local authorities to rename his/her street or change his/her house/apartment number. In such a case, the competent authority will record ex officio the change of permanent and temporary residence in the relevant register.

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.

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

If the competent body establishes, in the procedure conducted ex officio or upon the request of a party that has a legal interest, that the citizen of BiH has registered his/her permanent or temporary residence contrary to the provisions of Article 8(1) of this Law the residence shall be annulled by the ruling.

Article 11

In accordance with the Law on Central Registers and Data Exchange, the MCAC shall keep and maintain a central register containing data on citizens' permanent and temporary residence through electronic data processing (hereinafter: central register).

Entity ministries of interior may maintain electronic register of data on temporary and permanent residence within the entities.

Each competent authority shall keep and maintain a local register containing data on citizens' permanent and temporary residence through electronic data processing (hereinafter: local register).

The data listed in Article 6 of this Law shall be maintained in the central, entity and local registers.

Article 12

The competent authority shall be bound to provide the body keeping the central register (MCAC) on a regular basis with the data kept in its local register. The MCAC shall provide the competent authority with the data kept in the central register for the purpose of carrying out the competent authority's duties under this Law.

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 pre-conflict 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 32

Supervision over the implementation of this Law shall be carried out by the MCAC by:

1. controlling the legality of administrative acts and actions by the competent authorities;

2. proposing or initiating a procedure for assessing the legality of administrative acts issued by

the competent authorities;

3. instructing the competent authorities to fulfil the obligations imposed on them by this Law;

4. issuing guidelines and instructions for the uniform actions of the competent authorities.

The MCAC shall, within 90 days after publishing of this Law issue by-laws regulating:

a) a single form for registration and de-registration according to the provisions of this Law;

b) a rule book concerning the exercise of supervision over the enforcement of this Law;

c) all other matters necessary for implementation of this Law.

Body keeping the central records, in accordance with the Law regulating the field of the central registers and exchange of data in BiH, shall adopt the following regulations within 60 days period after the adoption of the present Law:

a) on data protection in the central records, in accordance with the law regulation the protection of data in BiH;

b) on the manner of data transmittal;

c) on the manner of data exchange between the bodies keeping the central records and the competent bodies.

Decision of the Government of the Republika Srpska on Verification of the Accuracy and Authenticity of Data during the Registration of Permanent Residence in the territory of the Republika Srpska (*the Official Gazette of the Republika Srpska*, 31/14 of 24 April 2014), as relevant, reads:

Item I.

This Decision shall determine the manner of verifying the accuracy and authenticity of data during the registration of permanent residence in the territory of the Republika Srpska.

Item II.

During the procedure of registration of permanent residence in the territory of the Republika Srpska, with the aim of verifying the accuracy and authenticity of data provided by applicants, the applicants are to submit one of the following pieces of evidence:

1) Proof that he/she is an owner or co-owner or possessor of an apartment, house or some other residential facility;

2) Certified lease agreement or tenancy agreement, along with a proof of ownership or co-ownership or possession certified by the landlord;

3) Proof that a proceeding relating to an ownership dispute is conducted before the competent authority or that a proceeding for legalization or registration of a facility, apartment or house at the address to be registered is initiated;

4) Landlord's statement as proof of residence if it follows from the statement that the landlord fulfils the requirements referred to in items (1), (2) and (3) of this paragraph and

that the landlord gives consent to the person to register the place of residence at his/her address.

Item III.

The Ministry of the Interior of the Republika Srpska is entrusted with the task of implementing this Decision.

Item IV.

This Decision shall enter into force the day after the day it is published in the Official Gazette of the Republika Srpska.

V. Admissibility and Merits

70. The Constitutional Court firstly notes that, given the complexity of the requests and the issues raised therein, it will consider the admissibility and merits of the requests together.

71. Having regard to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the Constitutional Court notes that the requests in question have been filed by the authorized persons.

72. Given that the requests in question challenge the decision of lower legal force than a law, the Constitutional Court recalls its jurisprudence in similar cases. In this respect, the Constitutional Court points out that in the cases where the issue of compatibility of a general act not explicitly specified in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina was raised, it assessed the circumstances of each case as to the jurisdiction of the Constitutional Court under the said Article. Thus, in case no. *U 4/05*, taking into account the wording in Article VI(3)(a) of the Constitution *including but not limited to*, the Constitutional Court concluded that it had jurisdiction to review the constitutionality of the acts of lower legal force than laws when such acts raise an issue of violation of human rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 4/05*, of 22 April 2005, published in the *Official Gazette of BiH,* 32/05). In case no. *U 7/10*, the Constitutional Court established that the relevant request primarily raised an issue of incompatibility of the Rules of Procedure of the Constitutional Court of RS with the Constitution of RS and concluded that it did not have jurisdiction under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina (see, the Constitutional Court, Decision on Admissibility no. *U 7/10* of 26 November 2010, published in *the Official Gazette of BiH*, 24/11). Furthermore, in case no. *U 1/09*, the

Constitutional Court concluded that it did not have jurisdiction to review three by-laws and the decision of the FBiH Government, as it concerned the enforcement regulations facilitating the implementation of the Law on Settlement of Debts Arising from Old Foreign Currency Savings, based on which the State of BiH had taken over liabilities and responsibility for payment of old foreign currency savings (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 1/09* of 20 May 2009, available at www.ccbh.ba).

73. In the present case, although two requests have been filed, the Constitutional Court notes that the essence of both requests comes down to the fact that the adoption of the challenged decision by the entity of Republika Srpska, *i.e.* the Government of Republika Srpska is incompatible with the Constitution of Bosnia and Herzegovina, given that the issue of permanent and temporary residence has been regulated by the Law on Permanent and Temporary Residence of the Citizens of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina*, 32/01 and 56/08), passed by the Parliamentary Assembly of Bosnia and Herzegovina. In the applicants' view, therefore, the issue of permanent and temporary residence falls within the exclusive jurisdiction of the institutions of Bosnia and Herzegovina, *i.e.* the Parliamentary Assembly of Bosnia and Herzegovina and not of the Entities.

74. In view of the above, the Constitutional Court is to answer the question as to whether the challenged decision of the RS Government may raise an issue of existence of a constitutional dispute or an issue of conflict of jurisdiction between the entity of Republika Srpska and the institutions of Bosnia and Herzegovina to regulate the issue of permanent residence.

75. The Constitutional Court recalls its Decisions nos. *U 15/08* and *U 15/09,* wherein it pointed out the Constitutional Court, pursuant to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, has exclusive jurisdiction to decide any dispute arising under this Constitution between Bosnia and Herzegovina and one of its Entities. In the aforementioned decisions the Constitutional Court concluded that that a series of formal acts and activities undertaken by one of the Entities may raise an issue of existence of a dispute between the Entity and Bosnia and Herzegovina over an issue under the Constitution of Bosnia and Herzegovina in respect of which the Constitutional Court of BiH has sole jurisdiction to decide (see, the Constitutional Court, Decision on Admissibility and Merits nos. *U 15/08* and *U 15/09*, published in the *Official Gazette of BiH*, 73/09 and 84/10).

76. In view of the above, in the present case the Constitutional Court has to answer the question whether a conflict of competences, relating to level of government in Bosnia

and Herzegovina that is responsible for adoption of certain legal acts, may give rise to a dispute in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, in respect of which the Constitutional Court has exclusive jurisdiction to decide under the mentioned provision. The Constitutional Court will decide this issue primarily through the interpretation of the relevant provisions of the Constitution of Bosnia and Herzegovina.

77. Generally speaking, the issue of the conflict of competencies between different levels of government in Bosnia and Herzegovina in relation to the constitutional responsibility (responsibility under the Constitution of Bosnia and Herzegovina) for the issuance of certain legal acts may give rise to a constitutional dispute under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. Namely, in view of the text of second line of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, it is evident that the Constitutional Court has jurisdiction to decide a dispute in which it is claimed that certain *law* is inconsistent with *this Constitution*, for the authorized applicant claims that the *law* is issued by an unauthorized body and that it violates the constitutional provisions relating to the division of responsibilities. However, the issue is whether a constitutional dispute may arise if the authorized applicant claims that an unauthorized body adopted a *by-law*, giving rise to the violation of the Constitution of Bosnia and Herzegovina with respect to the division of responsibilities under the Constitution. This issue is raised primarily because *by-laws* are not specified in the text of second line of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. It only specifies *„…constitution or law…"*

78. In the opinion of the Constitutional Court, it follows from the relevant constitutional provisions that the question what constitutes a dispute under the Constitution of Bosnia and Herzegovina has not been exhausted through lines 1 and 2 of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. It is precisely the last part of the sentence of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reading *including but not limited to* that entitles the Constitutional Court to decide in each case, outside the scope of what is explicitly regulated by lines 1 and 2 of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, what is a dispute within the meaning of the aforementioned Article of the Constitution of Bosnia and Herzegovina.

79. Therefore, the issue relating to a conflict of responsibilities between different levels of government in Bosnia and Herzegovina as to the constitutional responsibility to pass (also) by-laws may give rise to the constitutional dispute within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. Given the provisions of Article VI(3) under which *the Constitutional Court shall uphold this Constitution* as well as the provision of the same Article reading, as relevant, *…including but not limited to…*, in respect of which the Constitutional Court considers also the provisions on division of

responsibilities under Article III of the Constitution of Bosnia and Herzegovina, and in view of the constitutional principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina, the Constitutional Court finds that it may establish its jurisdiction to decide the constitutional dispute in which it is claimed that the authority *passed the by-law* for the adoption of which it had no jurisdiction under the Constitution of Bosnia and Herzegovina. In the view of the Constitutional Court, the aforementioned constitutional provisions would be meaningless if the lower instances of government passed by-laws that fall within the jurisdiction of the State level of government or, *vice versa*, if the State level of government passed laws and by-laws that fall within the jurisdiction of the Entities or lower levels of government.

80. In view of the above and given the context of the relevant requests, the Constitutional Court notes that the Parliamentary Assembly of Bosnia and Herzegovina, in accordance with its responsibilities under Article IV(4)(a) of the Constitution of Bosnia and Herzegovina, passed the Law on Permanent and Temporary Residence of the Citizens of Bosnia and Herzegovina, which was published in *the Official Gazette of Bosnia and Herzegovina*, 32/01 and 56/08. The aforementioned Law certainly represents the decision of the institutions of Bosnia and Herzegovina in terms of Article II(3)(b) of the Constitution of Bosnia and Herzegovina. The provision of Article 1 of the Law on Permanent and Temporary Residence stipulates that it will regulate the permanent and temporary residence of citizens of Bosnia and Herzegovina, including the temporary residence of displaced persons in Bosnia and Herzegovina. It also stipulates that all provisions of the Law will apply equally to all citizens, unless otherwise prescribed by the Special Provisions in Chapter IV of the Law. In addition, it stipulates that no provision of the Law may be interpreted so as to restrict the right of citizens to freely choose their place of residence. Article 6 of the said Law enumerates the types of information to be given by a citizen registering his/her permanent or temporary residence to the competent authority. Furthermore, Article 8 of the Law prescribes that citizens, when registering or de-registering permanent or temporary residence, will be bound to provide correct and authentic data. Moreover, the provision of Article 18 of the Law provides the right to facilitated re-registration to a returnee who, before the Law came into force, had de-registered or had been *ex officio* de-registered from his/her pre-war place of permanent residence. Finally, Article 32 of the Law stipulates that the supervision over the implementation of the Law will be carried out by the Ministry of Civil Affairs and Communications and that the said Ministry is authorized to pass by-laws required for implementation of the Law.

81. In view of the above, it follows that the State law, passed by the Parliamentary Assembly of Bosnia and Herzegovina, regulates the issue of both permanent and

temporary residence of the citizens of Bosnia and Herzegovina. This law prescribes the method of registration and de-registration of permanent and temporary residence, records of permanent and temporary residence, right to facilitated re-registration of returnees and supervision of the State Ministry over the implementation of the relevant Law.

82. However, the Constitutional Court notes that on 17 April 2014 the RS Government adopted the challenged decision determining the manner of verifying the accuracy and authenticity of data to be provided by applicants during the registration of permanent residence in the territory of the Republika Srpska. Thus, the challenged decision prescribes additional evidence the applicants must provide during the registration of their place of residence. This involves four pieces of evidence as follows: evidence that he/she is an owner or co-owner or possessor of an apartment, house or some other residential facility; certified lease agreement or tenancy agreement, along with proof of ownership or co-ownership or possession certified by the landlord, proof that a proceeding relating to an ownership dispute is conducted before the competent authority or that a proceeding for legalization or registration of a facility, apartment or house at the address to be registered is initiated, and landlord's statement as proof of residence. Hence, the relevant Decision prescribes the requirements for registration of residence in the territory of the Republika Srpska through the submission of additional pieces of evidence. The Ministry of Internal Affairs of the Republika Srpska is responsible for realization of the challenged decision.

83. Having regard to the applicable Law on Permanent and Temporary Residence of the Citizens of BiH, and correlating this Law with the challenged decision, the Constitutional Court observes that the challenged decision does not elaborate on the existing State law, but it supplements the mentioned law by prescribing the additional conditions for the registration of permanent residence in the territory of the Republika Srpska. The Constitutional Court cannot accept the allegations stated in the reply of the RS Government reading that the challenged decision does not impose new criteria for the registration of permanent residence. In this respect, the Constitutional Court points out that paragraph II of the challenged decision explicitly states that *during the procedure for the registration of permanent residence ... , the applicants are to submit one of the following pieces of evidence: ...* This has not been prescribed by the provisions of Articles 5 and 6 of the State law, which provisions the RS Government refers to in its reply. Therefore, the subject-matter of the challenged decision is the issue which has been indisputably regulated by the provisions of the State law. It, therefore, follows that the challenged decision regulates the legal matter, which has already been regulated by the State law, and that, as such, it does not constitute a by-law, but can be viewed as a law. At the same time, the Constitutional Court observes that the State law does not contain conditions established by the challenged

decision. In this respect, the Constitutional Court cannot either accept the argument of the RS Government that the challenged decision relates only to the procedural issues, as well as to a small portion of the matter regulated by the State law, which is the reason why the challenged decision does not have the character of law. As already emphasized, in the opinion of the Constitutional Court, the challenged decision indisputably regulates the legal matter by prescribing conditions for the registration of permanent residence which are not contained in the State law.

84. Therefore, the very fact that the issue of permanent and temporary residence of the citizens of BiH has been regulated by the State law, which was passed by the Parliamentary Assembly of BiH, suffices for the Constitutional Court to conclude that this particular issue is within the responsibility of the State and its institutions in terms of Article III(3) (b) of the Constitution of Bosnia and Herzegovina. Having regard to the aforesaid, the entity of Republika Srpska cannot regulate the issue of permanent residence by way of the challenged decision, since this amounts to the RS exceeding the framework of the existing State law, thereby violating the constitutional principle of the responsibilities of the Entities under Article III(3)(b) of the Constitution of Bosnia and Herzegovina as well as the constitutional principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina, which implies the harmonization of legal regulations in the legal system according to their hierarchy in which the Constitution of Bosnia and Herzegovina occupies the highest position.

85. The Constitutional Court emphasizes that, if there was a need to introduce new conditions for the registration of permanent residence, it was necessary to do so by challenging the existing State law or by amending the existing State law through a procedure established under the law by a competent body, *i.e.* the Parliamentary Assembly of BiH. Possible lack of a positive solution or a failure in that respect cannot serve as a justification to adopt the challenged decision introducing new conditions not contained in the existing State law. Namely, the Constitutional Court indicates that the law is a general legal act of the state, which is adopted in the predetermined legislative procedure by its legislative body, whereas by-laws are acts of lower legal force than the laws and they develop certain legal issues. The competence of bodies to adopt by-laws is prescribed by law itself. By linking this to the context of the particular case, the Constitutional Court emphasizes that the existing State law, which regulates the issue of permanent and temporary residence was passed by the Parliamentary Assembly of BiH and that the issuance of by-laws, in terms of implementing the law, is within the exclusive competence of the Ministry of Civil Affairs and Communications of BiH (Article 32 of the Law). Thus, the Entities have no authority to amend the State law by their respective by-laws

and laws by introducing new conditions for the registration of permanent residence. In this respect, the Constitutional Court refers to its position taken in its Decision no. *U 16/11* reading that possible problems in the implementation of the regulations passed by Bosnia and Herzegovina cannot be solved by having the Republika Srpska enact a law which would *de facto* derogate the regulation of Bosnia and Herzegovina. The Constitutional Court stressed that such a situation leads to the violation of the Constitution of Bosnia and Herzegovina. In that regard, the Constitutional Court emphasizes that there are established procedures and possibilities for amending the regulations enacted by the authorities of Bosnia and Herzegovina (even concrete decisions of the Council of Ministers), which could and should be used in such and similar situations (see Constitutional Court, Decision on Admissibility and Merits, no. *U 16/11 of* 13 July 2012, paragraph 47, published in *the Official Gazette of BiH,* 105/12). The Constitutional Court similarly stressed in its Decision no. *U 1/11*, in which it noted that an Entity law must be declared unconstitutional if that law normatively regulates the matter, which does not belong to that Entity under the Constitution of Bosnia and Herzegovina, regardless of the fact that the Entity has invoked a certain constitutional basis under its Constitution (see, Constitutional Court, Decision on Admissibility and Merits, no. *U 1/11* of 13 July 2012, paragraph 68, published in *the Official Gazette of BiH*, 24/11). Therefore, the principle is that amendments to the law are to be made exclusively in accordance with the prescribed procedure for amendments to a law, by the competent authority which enacted the law in question. Anything else leads to the violation of the Constitution of Bosnia and Herzegovina. The OHR followed that line of reasoning in its Opinion where it emphasized that the existing law at the state level regulating the issue of permanent residence must be respected until it is amended. A unilateral attempt to regulate this matter at the Entity level, as the challenged decision does, exceeds the framework of the existing law so that it is unacceptable. Furthermore, it was emphasized that the competence to adopt rulebooks, guidelines and instructions, including those contained in the challenged decision, is vested, under the law, in the Ministry of Civil Affairs of Bosnia and Herzegovina (Article 32 of the Law).

86. Therefore, in view of all the aforementioned, the Constitutional Court holds that the issue of permanent residence falls within the exclusive responsibility of the state of Bosnia and Herzegovina in terms of Article III(3)(b) of the Constitution of Bosnia and Herzegovina, since the existing State law regulating the issue of permanent residence constitutes a decision of the institutions of Bosnia and Herzegovina. Consequently, it follows that the entity of the Republika Srpska, notwithstanding an authority of the Entity concerned, has no competence to regulate the issue of permanent residence by the challenged act, since the mentioned issue is within the exclusive responsibility of the

institutions of Bosnia and Herzegovina. Therefore, the Constitutional Court concludes that the entity of the Republika Srpska has violated Article III(3)(b) of the Constitution of Bosnia and Herzegovina in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina by adopting the challenged decision. In doing so, the Constitutional Court observes that, although the request registered under no. *U 10/14* does not explicitly allege the provision of Article III(3)(b) of the Constitution of Bosnia and Herzegovina, that request points to the mentioned provision through the allegations on the division of responsibilities between the institutions of Bosnia and Herzegovina and the Entities.

87. The fact, which the RS Government points to in its response, reading that the Government of the Brčko District of Bosnia and Herzegovina has adopted an identical decision, does not have a bearing on the mentioned conclusion of the Constitutional Court. This is so because the decision of the Government of the Brčko District of Bosnia and Herzegovina has not been challenged before the Constitutional Court, as is the case with the challenged decision of the RS Government. Thus the Constitutional Court is not called upon to examine this decision *ex officio* if there is no request challenging it.

88. Having regard to the above conclusions, the Constitutional Court holds that it is not necessary to consider the relevant requests in relation to other allegations indicated by the applicants.

VI. Conclusion

89. The Constitutional Court concludes that the Decision on Verification of the Accuracy and Authenticity of Data during the Registration of Permanent Residence in the Territory of the Republika Srpska (*the Official Gazette of the RS,* 31/14) is in contravention of Article III(3)(b) of the Constitution of Bosnia and Herzegovina, in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina, since the issue of permanent residence is regulated by the State law, wherefrom it follows that this issue is within the exclusive responsibility of the institutions of Bosnia and Herzegovina, and not of any of the bodies of the entity of the Republika Srpska.

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

91. Having regard to the Decision of the Constitutional Court in this case, it is not necessary separately to consider the applicants' request for an interim measure.

92. Pursuant to Article 43 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of Vice-President Miodrag Simović, joined by Judge Zlatko Knežević, shall make an annex to this decision.

93. 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 MIODRAG SIMOVIĆ JOINED BY JUDGE ZLATKO KNEŽEVIĆ

I am unable to accept the position taken by the Constitutional Court in the present case with regards to „the admissibility of the case", wherein the majority of the Constitutional Court Judges takes the wording of Article VI(3)(a) of the Constitution of BiH (*including but not limited to*) as a starting point and concludes that it has jurisdiction to review the constitutionality of the acts of lower legal force than laws where such acts raise an issue of violation of human rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention. Whatever the case may be, I note the following:

(1) Taking into account the responsibilities of the Constitutional Court under Article VI(3) of the Constitution of Bosnia and Herzegovina, the previous case-law of the Constitutional Court primarily relates to the review of laws and not of acts adopted by executive authorities or administrative bodies. The acts of the Government of Republika Srpska cannot be subject to constitutional review by the Constitutional Court within the meaning of Article VI(3)(a) of the Constitution of BiH, because the Constitutional Court only reviews the constitutionality of laws.

I recall that, according to a classic rule, the place of laws in a hierarchy of legal acts is immediately below the Constitution and above decrees and other general acts adopted by executive authorities. In the system of a formal constitution, laws are the main subject-matter of constitutional review. When constitutional justice is mentioned, the first thing that comes to mind is constitutional review of laws.

(2) Decision of the Government of Republika Srpska on Verification of the Accuracy and Authenticity of Data during the Registration of Permanent Residence in the territory of the Republika Srpska does not constitute a legal matter so as to be the subject-matter of constitutional review by the Constitutional Court.

(3) This decision of the Constitutional Court once again raises an issue as to whether this Court can follow the path of unrestricted, *i.e.* „new judicial activism" and to what extent is the present position of the Constitutional Court fully compatible with the role and mission of constitutional-judiciary institutions in contemporary societies, as independent state bodies the role of which is, *inter alia*, to subsume politics under law, *i.e.* the Constitution. More precisely, the question is how far and to what extent can the process of increasing „reliance" of political institutions on the Constitutional Court be

acceptable, that is to say, what are the limits of meeting expectations of political actors – having this Court, referring to the Constitution of Bosnia and Herzegovina and law, take over and resolve the biggest and most complex conflicts in the country, *i.e.* disputes with mostly political content, but without impeding its position of the autonomous and politically neutral authority controlling compliance with the Constitution.

Therefore, the Constitutional Court, as all constitutional courts in countries in transition, has to find an answer to this, in my view, key question in order to determine the actual extent and method of its future operation, never forgetting its mission established under the Constitution, which must not be in the shadow of the political authorities or general public expectations. Namely, the question is how to ensure that the Constitutional Court does not slip into politics or that it does not start to exercise the duties and responsibilities of legislative, executive and judicial authorities or can this Court be positive that in such circumstances it will have sufficient strength to remain autonomous and impartial. The Constitutional Court must be restrained not only by the Constitution, but also it has to exercise self-restraint and to act restrainedly in any sense.

Case No. U 13/14

DECISION ON ADMISSIBILITY AND MERITS

Request of thirty four (34) delegates of the National Assembly of the Republika Srpska, for the review of constitutionality of the Law on the Rights of Returnees to Their Pre-War Place of Permanent Residence in the Entity of Republika Srpska and the Brčko District of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, 35/14)

Decision of 4 July 2014

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and (c), Article 61(2) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 22/14), 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

Mr. Mato Tadić,

Ms. Constance Grewe,

Mr. Mirsad Ćeman,

Ms. Margarita Caca-Nikolovska,

Mr. Zlatko M. Knežević,

Having deliberated on the request of **thirty four (34) delegates of the National Assembly of the Republika Srpska**, in case no. **U 13/14**, at its session held on 4 July 2014, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by thirty four (34) delegates of the National Assembly of the Republika Srpska is hereby granted.

It is hereby established that the Law on the Rights of Returnees to Their Pre-War Place of Permanent Residence in the Entity of Republika Srpska and the Brčko District of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, 35/14) is not in conformity with Articles III(2)(c) and III(3)(b) of the Constitution of Bosnia and Herzegovina.

The Law on the Rights of Returnees to Their Pre-War Place of Permanent Residence in the Entity of Republika Srpska and the Brčko District of Bosnia and Herzegovina (*Official Gazette of the Federation of*

***BiH*, 35/14) shall be quashed, in accordance with Article 61(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina.**

The quashed Law on the Rights of Returnees to Their Pre-War Place of Permanent Residence in the Entity of Republika Srpska and the Brčko District of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, 35/14) shall cease to be in force on the day following the day of the publication of this decision in the *Official Gazette of Bosnia and Herzegovina*, in accordance with Article 61(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 20 May 2014, thirty four (34) delegates of the National Assembly of the Republika Srpska („the applicant"), lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for the review of constitutionality of the Law on the Rights of Returnees to Their Pre-War Place of Permanent Residence in the Entity of Republika Srpska and the Brčko District of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, 35/14; „the challenged Law").

2. The applicant requested for an Interim Measure to be issued prohibiting the application of the challenged Law, pending the finalization of the proceedings on the review of constitutionality before the Constitutional Court.

II. Procedure before the Constitutional Court

3. Pursuant to Article 23 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 were requested on 23 May 2014 to submit their respective replies to the request.

4. The House of Representatives submitted the Statement of Opinion on the Case no. *U 13/14* on 10 June 2014, accompanied with a note that the Constitutional Commission

of the House of Representatives of the Parliament of the Federation of BiH will take a final stance on this case, which will be forwarded to the Constitutional Court right away. However, by the time of the adoption of this decision the final stance, as stated, has not been communicated.

5. The House of Peoples submitted a reply to the request on 12 June 2014. The House of Peoples supplemented its reply on 19 June 2014.

III. Request

a) Allegations from the Request

6. The applicant holds that the Federation of Bosnia and Herzegovina („the FBiH"), by adopting the Law on the Rights of Returnees to Their Pre-War Place of Permanent Residence in the Entity of Republika Srpska and the Brčko District of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, 35/14), namely Article 1 through to Article 20 („the challenged Law"), violated Articles III(2)(c) and III(3)(b) of the Constitution of Bosnia and Herzegovina. Besides, the applicant holds that the challenged Law changes the status and the definition of the term returnee contained in all the relevant regulations, both in the territory of the Republika Srpska („the RS") and in the territory of the Federation of Bosnia and Herzegovina („the FBiH"), as well as in the Bill on Refugees from Bosnia and Herzegovina, Returnees and Displaced Persons, which is in the procedure of adoption before the Parliamentary Assembly of BiH.

7. The applicant indicates that Article 3 of the Law on Displaced Persons, Returnees and Refugees in the Republika Srpska („the Law on Returnees of the RS") regulates that the RS shall prescribe the manner of and conditions for establishing the status of the mentioned categories of persons, and shall see to the exercise of their rights in accordance with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol on the Refugees Status, other international documents in the area of humanitarian law, and shall ensure the full legal protection of these persons in accordance with Annexes VI (*Agreement on Human Rights*) and VII (*Agreement on Refugees and Displaced Persons*) of the General Framework Agreement for Peace. In this respect it was indicated that the Bill on Refugees from BiH prescribes that the competent bodies for the implementation of this Law are the bodies of the Entities, Brčko District, cantons, towns and municipalities, and that the status of a displaced person and returnee shall be regulated in accordance with the entity legislation and other regulations of the entities and cantons on the basis of this Law.

8. The applicant indicates that the provisions of the challenged Law on Returnees, who fall within the competence of the RS, stipulate that the competence of the FBiH shall be maintained (only) with regards to some of the status-related rights, which results not only in the interference with the responsibilities of the Entity of the RS, but the status unity of the rights of returnees is split into the rights that the returnees exercise in one Entity and the rights that they exercise in another Entity. According to the applicant, not only does this violate the provisions on the division of responsibilities, but it creates a chaotic situation with regards to the status-related rights of this category of persons, and, in the end, it generates the situation of legal uncertainty that is in contravention of the principle of the rule of law being one of the basic principles in accordance with which the State of BiH functions.

9. Furthermore, in support of their claim the applicant explicitly pointed to certain legal solutions referred to in the challenged Law.

10. The applicant holds that the solution referred to in Article 1 of the challenged Law, according to which this Law „shall regulate the conditions, manner and procedure for the exercise and use of the rights acquired under the FBiH laws and regulations on the returnees to the Entity of the RS and the Brčko District, in the area of social protection and the protection of families with children, veteran disability insurance, health care and the rights in the area of income tax", obviously there are attempts to create the conditions for the applicability of the FBiH laws and regulations in the territory of the RS and the Brčko District, which is in contravention of the constitutional provisions on the division of responsibilities.

11. The applicant holds that the solution referred to in Article 2, paragraph 1 of the challenged Law, which defines the term of a „returnee" so as to represent „a person who has effected or will effect the return from the FBiH to the Entity of the RS or the Brčko District, with the compulsory registration of the place of permanent residence in the place of return, without restrictions regarding the date of the registration of the place of permanent residence in the place of the previous residence", introduces parallelism with regards to the exercise of the already existing rights of the returnees' population envisaged by the system of protection that is valid in the area of the RS, which, also, is not in compliance with the constitutional provisions on the division of responsibilities. In support of the aforementioned, the applicant indicates that, according to the applicable Law on the Returnees of the RS, it is stipulated that „the RS shall regulate the system of protection of displaced persons, refugees and returnees, prescribe the method of and conditions for the determination of the status of this category of persons and shall see to the exercise of their rights".

12. The applicant indicates that the solution referred to in Article 3, paragraph 3 of the challenged Law, according to which, the persons who shall have the rights under this law are the persons who „prior to the entry into force of this law have had a place of temporary or permanent residence in the FBiH, provided that they do not exercise those rights under the regulations of the RS and the Brčko District", creates a realistic possibility for manipulation and abuses in the form of double use of rights, legal chaos and uncertainty, which is unacceptable from the aspect of the principle of legal certainty. It was indicated in support of this claim that given that the regulation of the rights of returnees is within the competence of the Entities, there are no unified records on the use of the rights of returnees, so as to ask a question in relation to this article as to which body would control whether an individual uses the related rights in the territory of one or both Entities.

13. The applicant indicates that the solution referred to in Article 4, paragraph 4 of the challenged Law, according to which tax relieves are established for the returnees with the registered place of permanent residence in the territory of the RS or the Brčko District, with respect to the „income from employment and occupation with an employer on the territory of the Federation of BiH", interferes not only with the provisions on the rights of returnees but also with the economic and financial regulations, which are, again, within the competence of the Entities. In that respect it was indicated that such a solution, from a legal point of view, is irrational, because it is impossible in factual and in legal terms for one person to have a place of permanent residence, i.e. to be permanently residing in the territory of one Entity, and to effect the tax relieves in respect of their income in the territory of another Entity.

14. The applicant indicates that the solutions referred to in Article 8, paragraph 2 of the challenged Law, which regulates that the returnees from the FBiH into the RS and the Brčko District may exercise the right to primary and specialist-consultative health care in the municipality of their last place of permanent or temporary residence in the FBiH, or in another municipality of their own choice, which is communication-wise nearest to their place of return, and in paragraph 3 of the same article reading that „they may exercise the right to hospital health care according to their last place of permanent or temporary residence prior to their return to the RS or the Brčko District", are devoid of legal reason, because they do not stimulate the return in terms of facilitating the life of this population, instead they create additional burden and living costs in terms of living in the territory of one Entity and receiving medical treatment in the territory of another Entity. In support of the aforementioned it was indicated that, for instance, a returnee to Trebinje would have to go for a hospital treatment to Bihać, for instance, if that was his/her last place of permanent or temporary residence in the FBiH prior to return, that it is unclear whether

the FBiH or the Canton Healthcare Insurance Fund would incur an obligation to make a refund in the event a returnee was provided a health care in any form in the RS, and, finally, it is unclear how all this would be possible at all given that the RS regulations stipulate that the returnees exercise the right to health care in the territory of the RS as the rest of the population.

15. Finally, in their opinion, the applicant, as the most manifest example of the violation of the constitutional provisions on the division of responsibilities, points out Article 16 of the challenged Law, which stipulates that the individually enumerated FBiH ministries, within their respective jurisdiction, shall conduct supervision over the application of the Law, and that the FBiH relevant inspection bodies shall conduct inspection-related supervision. According to the applicant's claim, the aforementioned solutions place the inhabitants of the RS under the supervision of the institutions of the other Entity, for which no legal basis exist in the Constitution of BiH, which violates the constitutional provisions on the division of responsibilities. It was stated in support of the aforementioned that, for the sake of illustration, if a person decides to use the right to health care in both Entities, there is no possibility for any Entity to effect supervision or punishment. Instead, on the contrary, it leaves a possibility for fraudulent behavior whereby persons may use the rights, doubly so, in the same area, thereby putting these persons in an illegal and legally unacceptable privileged position.

16. The applicant particularly emphasizes that the Constitution of BiH determines that the constitutional system of BiH is based on guarantees and protection of human rights and freedoms in accordance with the international standards, one of them being the standard relating to the notion of a returnee, and the obligation of the authority with territorial competence in relation to the place of return to secure the rights guaranteed by the international norms in the manner determined by the Constitution. Considering that unhindered functioning of the system of the protection of fundamental human rights of the returnees' population entails the regulation of their status by an Entity to which territory they returned, the applicant holds that the exceeding of the division of responsibilities as established by Articles III(2)(c) and III(3)(b) of the Constitution of BiH is inadmissible, as done by the FBiH legislator, which, by exceeding the scope of its competence in substantive terms, passed the challenged Law and thereby unfoundedly and unconstitutionally interfered with the area of personal rights of returnees to the RS, which falls in its exclusive competence.

17. The applicant further indicates that the challenged Law transfers certain issues relating to the protection of returnees to the RS and the Brčko District to the level of the institutions of the other Entity, whereas the legal regulations of the RS and the

Brčko District are to be applied to the issues relating to the creation of other obligations relating to this population. According to the applicant's opinion, this not only derogates the provisions of the Constitution of BiH on the division of responsibilities, but it also interferes in a legally unacceptable manner with the responsibility of the RS authorities. In that respect it was indicated that the exercise of rights relating to a personal status of an individual in all states is linked to their place of permanent residence, irrespective of whether the former and the current place of permanent residence may be different as regards arrangements relating to the exercise of status-related rights of an individual. Furthermore, it was indicated that the legislation of the RS contains not a single provision putting the returnees in a discriminatory position when compared to the rest of the population and that, therefore, „the alleged concern" of the FBiH legislator „to stimulate the return to the RS and the Brčko District" in this way is a political improvisation which has no place in the legal system of BiH.

18. Finally, in support of their allegations, the applicant referred to the stance of the European Court of Human Rights in the case of *Carson and Others v. the United Kingdom,* according to which the systems of pension and social benefits are inseparably linked to a place of living, *i.e.* a place of permanent residence of an individual, and that the personal rights are primarily designed „to serve the needs in respect of the place of residence" and „in accordance with a standard of living in the relevant area". In their opinion, the challenged Law fully cancels the mentioned principles enunciated in the judgment of the European Court of Human Rights, which compliance with certainly represents one of the standards of the internationally recognized rights and freedoms, within the meaning of Article II(4) of the Constitution of BiH, which must be fully complied with also by the Constitutional Court itself.

19. The applicant requested that the challenged Law be found unconstitutional in its entirety and, as such, be rendered ineffective.

20. Finally, the applicant requested the adoption of an interim measure prohibiting the application of the challenged Law pending the completion of the procedure of review of the constitutionality, because of immeasurable consequences that the temporary application thereof might give rise to.

b) Reply to request

21. The House of Representatives in the Statement of Opinion on the Case no. *U 13/14* informed the Constitutional Court that an expert group of the Constitutional Commission of this chamber, following consultations, holds that there is a valid constitutional basis for

the adoption of the challenged Law, that the Constitutional Commission, as a competent body, will hold a session in full composition regarding this problem-area (the members of the Commission from amongst the delegates and experts) within the shortest time possible, and take a final stance, which will be binding on this House before the Constitutional Court, that the authorized persons, whom the House has designated for representation in this case, will present in writing and verbally the final stance on this case, as well as that all the stances will be communicated in in a timely fashion prior to scheduling the first discussion on this case.

22. The House of Peoples, in its reply to the request, first and foremost indicated that the request for the adoption of an interim measure is unfounded, given that the allegations relating to „immeasurable consequences" without mentioning what they entailed, in its opinion, cannot be accepted as reasons within the meaning of Article 77, paragraph 1 of the Rules of the Constitutional Court. Also, it was indicated that the RS would only benefit from the application of the challenged law, and, finally that the granting of the request for an interim measure *de iure* and *de facto* would only result in the damage to the returnees, being the most vulnerable category, as their exercise of acquired rights would be thwarted.

23. Furthermore, references to Article III(2)(c) of the Constitution of BiH were assessed as unfounded, as the challenged Law is not in contravention of the mentioned constitutional provision. It was indicated in support of this stance that the challenged Law was fully compatible with the Constitution of BiH and the European Convention, and that it observed Article 1 of Protocol No. 1 to the European Convention. Also, it was indicated that the mentioned provision guarantees the right of any natural and legal person to unhindered enjoyment of property, and that property entails pecuniary compensations for disability in the area of social welfare (disabled persons, civilian victims of war) as well as in the area of veteran-disability insurance. Finally, it was indicated that, in accordance with Article 2 of Protocol No. 4 to the European Convention, anyone who stays legally in a territory of a state shall have the right to the freedom of movement and the freedom of choosing one's temporary residence.

24. Also the contesting of the definition of a returnee and references to the law undergoing a parliamentary procedure were assessed as unfounded. In that respect, it was indicated that the definition of a returnee in the challenged Law was given so as to encompass the persons who have exercised the right to return and persons who will exercise that right without restrictions as to the date of the registration of the place of permanent residence, which eliminated discrimination as to the time of return, which is in conformity with the European standards.

25. Also the assertion that the challenged Law „interferes with the responsibility" of the Entity of the RS was assessed as unfounded. In that respect, it was indicated that the right to compensation on the basis of disability is the fundamental human right established in all democratic societies and that it follows the beneficiary irrespective of the place of permanent residence, i.e. that it is the right referred to in Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4 to the European Convention. Therefore, persons who have exercised that right under the regulations of the FBiH shall continue to use it even after the voluntary return to the RS.

26. Also the assertion that the challenged Law endeavors to create conditions for the applicability of the FBiH laws in the territory of the RS was assessed as unfounded. In that respect, it was indicated that the rights in the area of social welfare, disability and veteran-disability insurance were exclusively linked to the status of the beneficiary of the concerned right. Namely, the children of the war veterans and disabled persons, killed and demobilized combatants of the RBiH Army and the HVO (Croatian Defense Council) cannot use the right to scholarships, the right to free textbooks, exemptions from paying school fees, precisely because of the status of their parents. In the opinion of the House of Peoples this present case concerns the discriminatory regulations of the RS, and the European Convention prohibits any form of discrimination. Finally, it was indicated that all rights in the area of the veteran-disability insurance in the Entity of the RS are exclusively ensured for the members of the RS Army.

27. Also the assertion of a possible introduction of parallelism in respect of the already existing rights of the returnees' population and the double use of the same rights was assessed as unfounded. In that respect references were made to Article 11 of the challenged Law, which prohibits the use of the same rights under the RS regulations. Also, it was indicated that the municipalities of both Entities keep records on the beneficiaries of rights and that they will exchange data in accordance with the principle of the extending of legal assistance and cooperation.

28. Further, it was indicated that it is unclear why they challenge the right of returnees to the use of health care in the FBiH as determined by Article 8 of the challenged Law, that is to say within the scope and in the manner in which they had exercised that right prior to the voluntary return. In that respect it was indicated that the institutions of the Entity of the RS, being unable to provide adequate health care, address the institutions outside the country, that is to say that the persons from the territory of the Eastern Bosnia are referred for additional medical examinations and tests to the institutions in the Republic of Serbia. In the opinion of the House of Peoples such conduct is in contravention of Annex

VII of the Dayton Peace Agreement, that is to say there is no room for such treatment of the returnees especially, and in particular of the old and decrepit, who find it closer and easier to exercise their right in the territory of the FBiH, which clinical centers possess all the resources for the provision of adequate health care. Finally, it was indicated that the referral of the returnees to another state is in contravention of the obligation referred to in the Agreement on Refugees and Displaced Persons, according to which the parties will ensure that refugees and displaced persons are permitted to return in safety, without, amongst other things, risk of harassment, and that by referring them to another state for the effectuation of health care the returnees are precisely exposed to the risk of harassment.

29. Also the assertions in relation to the legal solution referred to in Article 16 of the challenged Law, according to which the supervision of the implementation thereof was entrusted with the FBiH authorities, were assessed as unfounded. In that respect, it was indicated that the intention of this article is to exercise supervision over the work of authorities and institutions in the territory of the FBiH, which conduct procedures and decide on the rights referred to in Article 1 of the challenged Law. Also, it was indicated that the challenged Law is in favor of the citizens of the RS and of the Entity of the RS, thus the delegates of the National Assembly need not „worry" about the personal rights of the returnees who are „allegedly threatened" by the adoption of the challenged Law. Finally, it was indicated that the challenged Law does not burden the budget of the Entity of the RS, instead it brings relief, as the FBiH assumes the obligations for those persons who would otherwise have an unresolved status.

30. The House of Peoples, in support of the assertion that the challenged Law is in conformity with the Constitution of BiH and the European Convention, noted that the basic principle of this law is that the rights are exercised on the basis of the request of a party, i.e. upon a free choice and commitment. In view of the aforesaid, the invocation of the judgment of the European Court of Human Right by the applicant is considered as ill-founded and this judgment does not relate to this specific case and cannot have *erga omnes* effect and, finally, that assuming the legal and financial obligations by the RS in connection with the rights arising from the challenged Law, would be a positive act to protect the acquired rights of the returnees to the RS.

31. It was also noted that the institutions in the RS that provide protection relating to the exercise of the rights guaranteed under the challenged Law do not comply with the obligation on proportional representation of the employees according to ethnic affiliation. Therefore, in the opinion of the House of Peoples, there is no affirmative action to open a room in which, in communication with returnees, the persons coming from amongst

the returnees would talk on behalf of these institutions. That is why they cannot have the trust of the community. In this connection, it was indicated that there is a large number of persons that are directly affected by the sufferings and war crimes and these persons did not build sufficient trust in the institutions of local community which they returned to after the war. That means they *de facto* do not exercise their rights in the local community. Therefore, there is a justified reason for securing for them the access to alternative sources of institutional protection, i.e. the access to the institutions in which they have trust. It follows from the practice that those institutions are the institutions located in the FBiH and its cantons.

32. Finally, it was pointed out that the challenged Law gives a fuller contribution to the implementation of Annex VII, whereby the signatory parties confirmed their commitment to and respect for the rights of refugees and displaced persons and returnees.

33. In addition to the reply to the request, the House of Peoples submitted the reasons for the Proposal of the challenged Law which was drafted by the Government of the FBiH, in which, in part titled „I Constitutional Basis", it is stated that: „There is no explicit constitutional basis for passing this law, but the provision of Article IV.A.20 (1)(d) of the Constitution of the Federation of Bosnia and Herzegovina could serve as a basis. This provision provides that the Parliament of the Federation of BiH, in addition to other powers, shall be competent to pass laws on the execution of duties by the FBiH authorities. Since the relevant law regulates the conditions, the manner and the procedure of the exercise and use of the rights acquired pursuant to the FBiH laws and other regulations relating to the returnees to the Entity of the Republika Srpska and Brčko District of Bosnia and Herzegovina (…) in the field of social welfare and care for families with children, care for disabled veterans, healthcare and rights arising from in the area of taxes, which falls within the scope of the duties of the Federation of BiH authorities, the mentioned constitutional provision, in our opinion, represents a constitutional basis for passing the law in question."

34. Furthermore, the Opinion on the Draft of the challenged Law was attached to the reply and this opinion was issued by the FBiH Ministry of Displaced Persons and Refugees in which, *inter alia*, the viewpoint quoted above on the constitutional basis for passing this law was presented and an opinion has been expressed regarding some arrangements which have been incorporated into the challenged Law.

35. Finally, the House of Peoples attached to the reply to the request also the Statement of Opinion of the Working Group relating to the Opinion of the Office of the Government of the Federation of Bosnia and Herzegovina for Legislation and Harmonization with the

European Union Regulations about the Draft of the challenged Law. It follows from the Statement of Opinion that the opinion of the Office was considered and that it was agreed „to incorporate the constitutional basis into the reasons for the law (…)".

36. In the supplement to the reply dated 19 June 2014 the House of Peoples submitted the Statement of Opinion to the request of the FBiH Ministry of Displaced Persons and Refugees. The Statement of Opinion carries identical allegations as those stated in the reply to the request submitted by the House of Peoples, which were supplemented as follows.

37. Accordingly, as regards the unfoundedness of the request for the adoption of an interim measure, and in support of the assertion that precisely the returnees would be the only ones to suffer damage, references were made to the Law on the Protection of Civilian Victims of War (*Official Gazette of the RS*, 24/10), which explicitly prescribes in Article 35 that a person who has acquired a certain right as a civilian victim of war or a family member of a civilian victim of war under the regulations of the FBiH, or some other neighboring state, shall have no right to file a request for the recognition of rights under this law. Considering this provision, as well as a series of other administrative obstacles that the returnees encounter and the time constraints established by Articles 35 through to 38 of the mentioned law, the returnees as citizens of the RS, as stated, are denied an equal right to protection, thereby exposing them to discrimination in the exercise of their rights. Also, it was indicated that this is about rights of citizens who have been repeatedly deprived of rights and traumatized, that Associations of Civilian Victims of War addressed to the institutions of both Entities, and to the national and international organizations for the protection of human rights alike, on a number of occasions requests for the overcoming of problems resulting from the fact that a returnee, upon return, loses the right in the Entity of the FBiH, whereas he/she has no right to file a request in the Entity of the RS in order to exercise the concerned right. In doing so, particular references were made to the victims of wartime rape, sexual abuse and torture who, according to the regulations in the RS, must have suffered a minimum of 60% damage in order to obtain compensation, although this type of trauma needs not cause damage to the organism, that is to say that in the FBiH victims of wartime rape exercise their right to pecuniary protection based on evidence that they had been through that experience and not based on the damage inflicted to the organism. Also, it was indicated that the UN Committee against Torture, in its reports and recommendations, always deals with the issue of the position of the civilian victims of war, in particular the victims of wartime rape and torture, insisting on a more prompt settlement of the issues that this population faces, as well as that there is no uniform basis for the support and protection of this group of citizens. Thus the Entity of the FBiH

considers it justified, within the scope of the available legal options, to render support, especially to the victims of wartime rape who should exercise the right in the place or before the persons affiliated to those difficult experiences.

38. Further, in support of unfoundedness of assertions relating to the solutions from the challenged Law concerning health care, and the supervision over the implementation of this law (Article 16), it was indicated that the rights referred to in this law shall be exercised exclusively upon a request of a party and that a party, of one's will and voluntarily, decides whether he/she wishes to use the rights in accordance with the challenged Law. Also, it was indicated that the regulation of the issues of tax relieves arising from salaries is within the jurisdiction of an Entity in which territory a person earns an income. Finally, in support of the conclusion that the challenged Law is in conformity with the Constitution of BiH and the European Convention, it was indicated that the term of property, within the meaning of Article 1 of Protocol No. 1 to the European Convention, implies also pecuniary compensations for disability in the area of social welfare and veteran and disability insurance, that is to say that under Article 2 of Protocol No. 4 to the European Convention, any person who is staying legitimately in a territory of a state, shall have in that territory the freedom of movement and the freedom of choosing one's place of temporary residence.

IV. Relevant Law

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

Article I:
Bosnia and Herzegovina

(...)

2. Democratic Principles

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

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 II:
Human Rights and Fundamental Freedoms

(...)

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 VII 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.

6. Implementation

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

Article III:
Responsibilities of and Relations Between the Institutions of Bosnia and Herzegovina and the Entities

1. Responsibilities of the Institutions of Bosnia and Herzegovina

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

(...)

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

(...)

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. (...)

40. **Annex VII to the General Framework Agreement for Peace – Agreement on Refugees and Displaced Persons** reads in its relevant part as follows:

The Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska (the „Parties") have agreed as follows:

Article I: Rights of Refugees and Displaced Persons

(...)

The Parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons. (...)

(...)

Choice of destination shall be up to the individual or family, and the principle of the unity of the family shall be preserved. The Parties shall not interfere with the returnees' choice of destination, nor shall they compel them to remain in or move to situations of serious danger or insecurity, or to areas lacking in the basic infrastructure necessary to resume a normal life. (...)

Article II: Creation of Suitable Conditions for Return

The Parties undertake to create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group. (...)

41. The **Law on Refugees from Bosnia and Herzegovina and Displaced Persons in Bosnia and Herzegovina** (*Official Gazette of BiH*, 23/99, 21/03 and 33/03) reads in its relevant part as follows:

Article 1

This Law shall regulate the acquisition and cessation of the status of refugees from Bosnia and Herzegovina (hereinafter: refugees from BiH), displaced persons in Bosnia and Herzegovina (hereinafter: displaced persons), returnees, the rights of refugees from BiH, displaced persons, returnees, the method of exercising their rights and means of support in creating conditions for the return of refugees from BiH and displaced persons, as well as other issues relating to refugees from BiH, displaced persons and returnees.

Article 2

Refugees from BiH, displaced persons and returnees shall, in addition to the rights they are entitled to under this Law and Entity laws, enjoy in full equality the same rights and freedoms guaranteed by international provisions and BH and Entity laws as do other

citizens, and shall not be discriminated against in the enjoyment of any right on any ground whatsoever.

Article 8

Returnees are refugees from BiH, or displaced persons, who have, to the competent bodies, expressed their wish to return to their former habitual residence, and who are in the process of the return, as well as refugees from BiH and displaced persons who have already returned to their former habitual residence.

The status and cessation of the status of a returnee shall be acquired on the basis of this Law and pursuant to the procedure prescribed by Entity laws.

The status of a returnee shall cease upon the expiration of a six months period, counting from the day of his/her re-establishment in his/her former habitual residence, i.e. of his/her settling permanently elsewhere in BiH.

Article 12

By choosing another place of permanent residence, refugees from BiH and displaced persons shall not confine those refuges from BiH and displaced persons who have decided to return to their former habitual residence, in their right to return.

Article 19

Refugees from BiH and displaced persons shall exercise their rights defined in Chapter III of this Law, under the conditions and according to the procedure stipulated by regulations passed on the basis of Annex VII of the General Framework Agreement for Peace in BiH.

42. The **Law on Displaced Persons and Returnees in the Federation of Bosnia and Herzegovina and Refugees from Bosnia and Herzegovina** (*Official Gazette of FBiH*, 15/05) reads in its relevant part as follows:

Article 1

This Law shall regulate: basic rights and obligations of displaced persons and returnees, the acquisition and cessation of their status, their return to permanent residences where they have been expelled from (hereinafter: the residence), method of keeping registers of those persons, provision of resources for the return and exercise of other rights, as well as other issues with regard to the rights and obligations of those persons in the territory of the Federation of Bosnia and Herzegovina (hereinafter: the Federation).

Article 2

The issues regarding displaced persons and returnees in the Federation and refugees from Bosnia and Herzegovina shall be regulated in accordance with the Law on Refugees from Bosnia and Herzegovina and Displaced Persons in Bosnia and Herzegovina (BiH Official Gazette, 23/99, 21/03 and 33/03), this Law and Cantonal regulations.

Article 5

A returnee is a refugee from Bosnia and Herzegovina or a displaced person who has expressed wish to return to his/her former place of residence to the responsible body and who is in the process of returning, as well as a refugee from Bosnia and Herzegovina and a displaced person who has returned to his/her former place of residence.

Article 41

The application of this Law, as well as of the regulations governing its application, shall be supervised by the Federation Ministry and the responsible Cantonal body, each within its own jurisdiction.

43. The **Law on Displaced Persons, Returnees and Refugees in the Republika Srpska** (*Official Gazette of the RS*, 42/05 and 52/12) reads in its relevant part as follows:

Article 1

This Law shall regulate the rights of displaced persons, refugees and returnees in Republika Srpska (hereinafter: RS), refugees from Bosnia and Herzegovina (hereinafter: refugees from BiH), determination and cessation of status of displaced persons and returnees, their social reintegration and return, bodies and organizations responsible for implementing this Law, manner of financing and provision of funds for exercising these rights, as well as other issues relevant for the protection of this category of persons in RS.

Article 2

(...)

A returnee, under this Law, is a citizen of BiH, who has, as a refugee from abroad and/or a displaced person in BiH, returned to the territory of RS, to his/her former place of permanent residence, as well as a displaced person who has expressed his/her wish to return to the competent bodies and is in the process of returning.

(...)

Article 3

Republika Srpska shall regulate the system of protection of displaced persons, refugees and returnees, shall prescribe the manner of and conditions for determining

the status of this category of persons, and shall take care of exercising of their rights in accordance with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, as well as other international documents on human rights, and shall ensure the full legal protection of those persons in accordance with Annexes 6 and 7 of the General Framework Agreement for Peace in BiH (hereinafter: Dayton Agreement).

Article 10

The status of returnee shall cease by the expiration of the 6-month deadline, counting from the day when the competent body issued certificate on returnee status.

Returnees, refugees and displaced persons have the right to health insurance for 6 months after the cessation of the status, if they cannot realize that right on other basis.

A returnee shall not lose the right to renovation and reconstruction of his/her property after the cessation of the status or the right to participate in the Government's programmes of the social reintegration of displaced persons and returnees.

Article 29

Supervision of the implementation of this Law, which falls within the competence of the RS, shall be done by the Ministry.

44. The **Law on the Rights of Returnees to their Pre-War Place of Permanent Residence in the Republika Srpska Entity and the Brčko District of Bosnia and Herzegovina** (*Official Gazette of FBiH*, 35/14) reads in its relevant part as follows:

Article 1
(Subject of the Law)

This law shall regulate the conditions, manner and procedure for realization and use of the rights acquired under federal laws and other regulations by the returnees to the Republika Srpska Entity and the Brčko District of Bosnia and Herzegovina („the Brčko District"), in the area of social welfare and families with children welfare, veteran disability insurance, health care and the rights in the area of income tax.

Article 2
(Definitions)

(1) For the purpose of this Law a returnee shall be is a person who has acquired or will acquire the right to return from the Federation of Bosnia and Herzegovina („the Federation") to the Republika Srpska Entity and the Brčko District, with compulsory registration of permanent residence in the place of return, without any restrictions concerning the date of registration of permanent residence in the place of pre-war residence.

(...)

Article 3
(Persons who can realize or continue to use the acquired rights)

(1) The rights under this law may be realized by persons who returned voluntarily and registered their permanent residence in their pre-war place of residence in the Entity of the Republika Srpska and the Brčko District and who used to have the place or permanent or temporary residence in the Entity of the Federation on the bases of the status of a displaced person.

(...)

(3) Persons referred to in paragraph (1) of this article shall retain the use of acquired rights and realize rights in accordance with this law if prior to the entry into force of this law they had a place of temporary or permanent residence in the entity of the Federation, provided that they do not realize those rights under the regulations of the Republika Srpska and the Brčko District.

Article 16

(1) The supervision of the implementation of this law shall be performed by: the Federal Ministry of Displaced Persons and Refugees, the Federal Ministry of Veterans and disabled Veterans, the Federal Ministry of Health, the Federal Ministry of Finance and the Federal Ministry of Labor and Social Policies, each within its competences.

(2) Inspection supervision over the implementation of this law shall be performed by competent federal compartmental inspections.

V. Admissibility

45. 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.

46. 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:

(...)

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 Constitutional Court indicates that the applicant, thirty four delegates of the National Assembly of the RS, requests the review of constitutionality of the Law passed by the FBiH Parliament, because they hold that the provisions of the Constitution of BiH have been violated in that way. Besides, the present case concerns „a dispute that arises under this Constitution between the two Entities", which was brought by an authorized applicant, within the meaning of the constitutional provisions cited above. This constitutional dispute relates to the conflict of responsibilities between the two Entities, namely the RS and the FBiH. In this constitutional dispute the Entity of the RS claims that the Entity of the FBiH, by passing the challenged Law, violated the responsibilities of the Entity of the RS that the Constitution of Bosnia and Herzegovina assigned to it. Also it is claimed that by passing the challenged Law the Entity of the FBiH violated the provisions of the Constitution of Bosnia and Herzegovina relating to the division of responsibilities between the Entities and between an Entity or Entities and the State, and that, therefore, the challenged Law is unconstitutional and is not in conformity with the Constitution of Bosnia and Herzegovina.

48. Bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court established that the respective request is admissible, as it was filed by an authorized entity, and that there is not a single formal reason whatsoever under Article 19 of the Rules of the Constitutional Court rendering this request inadmissible.

VI. Merits

49. The applicant states that the challenged Law is not in conformity with Articles III(2)(c) and III(3)(b) of the Constitution of Bosnia and Herzegovina.

50. The Constitution of Bosnia and Herzegovina reads in its relevant part as follows:

Article III:
Responsibilities of and Relations between the Institutions of Bosnia and Herzegovina and the Entities

(...)

2. Responsibilities of the Entities

(...)

c) The Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for the

internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as appropriate.

3. Law and Responsibilities of the Entities and the Institutions

(...)

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

51. The Constitutional Court holds that the respective request essentially raises the issue of whether the Federation of BiH, in accordance with the responsibilities that the Constitution of BiH assigned to the Entities, could pass the challenged Law to regulate the issues concerning the rights and obligations of the returnees to the Entity of the Republika Srpska.

52. The Constitutional Court indicates that immigration, refugee, and asylum policy and regulation, in accordance with Article III(1)(f) of the Constitution of BiH, are the responsibility of the institutions of BiH.

53. In that respect the Constitutional Court recalls that it has already taken a position in its case-law that the institutions of BiH, while regulating the issues within the exclusive jurisdiction, within the meaning of Article III of the Constitution of BiH, must comply with the Constitution of BiH, particularly so with the provisions on the division of responsibilities between the State and its administrative and territorial units and the functional circle of operation of individual organs, in order not to assume the responsibilities which do not fall under the state responsibilities and thereby violate the principle referred to in Article I(3) of the Constitution of Bosnia and Herzegovina, or in order not to assume the responsibilities of other organs and thereby violate the principle of the separation of power, as an inherent element of the principle of the rule of law referred to in Article I(2) of the Constitution of Bosnia and Herzegovina (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 3/08* of 4 October 2008, paragraph 61, available at the website of the Constitutional Court, www.ustavnisud.ba). The Constitutional Court holds that there is no reason to depart from the mentioned position also when it comes to Article III of the Constitution of BiH in the part regulating the responsibility of the Entities. In that sense the Entities' authorities established to carry out responsibilities referred to in the cited constitutional provision cannot assume responsibilities from within the jurisdiction

of the State or another Entity, that is to say responsibilities of State authorities or another Entity's authorities. This conclusion is undoubtedly suggested by Article III(2)(c) of the Constitution of BiH, according to which the Entities will meet all the requirements for legal certainty, and by Article III(3)(b) which stipulates that the Entities and any subdivisions thereof shall comply fully with this Constitution, and with the decisions of the institutions of BiH.

54. Further, the Constitutional Court indicates that, pursuant to Article III(1)(f) of the Constitution of BiH, the Parliamentary Assembly of BiH, as far back as 1999, had passed the Law on Refugees from BiH, Displaced Persons and Returnees to BiH („the Law on Returnees of BiH"), as well as the Law on Immigration and Asylum.

55. The Law on Returnees of BiH, in Article 2, amongst other things, prescribes that a returnee shall, in addition to the rights they are entitled to under this Law and Entity laws, enjoy in full equality the same rights and freedoms guaranteed by international regulations and BiH and Entity laws as other citizens do, and shall not be discriminated against in the enjoyment of any right on any ground whatsoever. Article 8 defines the term of a returnee according to which returnees are refugees from BiH, or displaced persons, who have expressed to the competent bodies their wish to return to their former habitual residence, and who are in the process of the return, as well as refugees from BiH and displaced persons who have already returned to their former habitual residence. The same article stipulates that the status and cessation of the status of a returnee shall be acquired on the basis of this Law and pursuant to the procedure prescribed by Entity laws. Also, this provision regulates that the status of a returnee shall cease upon the expiration of a six months period, counting from the day of his/her re-establishment in his/her former habitual residence. Chapter III of the Law stipulates the rights that this law guarantees to returnees (the right to return, the right to choose another permanent residence, the right to have their property returned, the right to recover occupancy right), and under Article 18 the rights that a returnee shall have while holding this status. Article 19 of the Law regulates that refugees from BiH and displaced persons shall exercise their rights defined in this Law, under the conditions and according to the procedure stipulated by regulations passed on the basis of Annex VII of the General Framework Agreement for Peace. The Constitutional Court recalls that, under Article 1, paragraph 3 of Annex VII, BiH, FBiH and RS undertook an obligation to take all necessary steps to prevent activities within their respective territories which would hinder or impede the safe and voluntary return of refugees and displaced persons, and under Article 2, to create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious integration without preference for any particular group.

56. The Constitutional Court observes that on the basis of the catalogue of rights guaranteed under the Law on Returnees of BiH it follows that they do not relate to the rights in the areas such as the pension insurance, health care, protection of civilian victims of war, veteran disability insurance, income taxation and such like. This solution is understandable when one bears in mind that they concern the issues which, pursuant to Article III(3)(a) of the Constitution of BiH, are the exclusive responsibility of the Entities, and it consistently follows the principle under Article I(3) of the Constitution of BiH. Therefore, Article 2 of the Law on Returnees of BiH, amongst other things, regulates that, in addition to the rights expressly guaranteed by this law, this population enjoys the same rights and freedoms guaranteed by the Entity laws to all other citizens (the citizens living in the territory of the Entities). This solution follows also the obligation assumed under Annex VII that each Party will undertake to create in their respective territory the political, economic and social conditions conducive to the voluntary return.

57. In view of the aforementioned, and in accordance with the powers referred to in the Law on Returnees of BiH, both Entities also passed laws regulating this area in their respective territory. In doing so, both Entities consistently complied with, amongst other things, the principle contained in Article III(2)(c) of the Constitution of BiH of meeting all the requirements necessary for legal certainty and the protection of persons within their respective jurisdiction, as part of the responsibility of the Entities established by this provision, as well as principles contained in Articles I(2) and I(3) of the Constitution of BiH. Accordingly, the Law on Displaced Persons and Returnees in the Federation of Bosnia and Herzegovina and Refugees from Bosnia and Herzegovina stipulates in Article 1 the following: *This Law shall regulate: basic rights and obligations of displaced persons and returnees, the acquisition and cessation of their status, their return to permanent residences where they have been expelled from (hereinafter: the residence), method of keeping registers of those persons, provision of resources for the return and exercise of other rights, as well as other issues with regard to the rights and obligations of those persons in the territory of the Federation of Bosnia and Herzegovina*. The Law on Displaced Persons, Returnees and Refugees in the Republika Srpska, in Article 1, regulates as follows: *This Law shall regulate the rights of displaced persons, refugees and returnees in Republika Srpska (hereinafter: RS), refugees from Bosnia and Herzegovina (hereinafter: refugees from BiH), determination and cessation of status of displaced persons and returnees, their social reintegration and return, bodies and organizations responsible for implementing this Law, manner of financing and provision of funds for exercising these rights, as well as other issues relevant for the protection of this category of persons in RS.*

58. The Constitutional Court indicates that it follows from the provisions of the State and the Entities' laws on returnees alike that the acquisition of the status of a returnee is regulated in a uniform fashion in all laws, i.e. that it is a person who has returned to his/her pre-war place of permanent residence, or a person who has expressed to the competent bodies his/her wish to return and is in the process of returning. Also, the cessation of this status has been regulated in a uniform fashion, i.e. upon the expiration of a six months period, counting from the day of his/her re-establishment in his/her former place of permanent residence. This is understandable when one bears in mind that such solutions were established by the Law on Returnees of BiH which, within the meaning of Article III(3)(b) of the Constitution of BiH, constitutes a decision of the institutions of BiH, which the Entities must comply with, which determined the framework within which the Entities may operate. Further, in accordance with this power referred to in the Law on Returnees of BiH, both Entities regulated in their respective Laws the procedure for the acquisition and cessation of this capacity in their respective territory. In doing so, while regulating these issues the Law on Returnees of BiH did not assign the responsibility to the Entities to define the term of a returnee in relation to the exercise of other rights save for those determined by this Law. This conclusion is unambiguously suggested by Article 2 of the Law on Returnees of BiH which stipulates that, in addition to the rights stipulated under this Law, the returnees shall enjoy the same rights guaranteed by the Entity laws as all other citizens do. Also, the mentioned Law (the Law on Returnees of BiH) did not assign to the Entities the power to regulate by their respective laws the status and the cessation of the status of returnees in the territory of another Entity, or the rights and obligations of this population in the territory of another Entity, even when they concern the issues which, under Article III of the Constitution of BiH, are their exclusive responsibility.

59. On the basis of the challenged Law it follows that it regulates conditions, method and procedure for the exercise and use of rights acquired on the basis of the FBiH laws and other regulations of the returnees in the Entity of the RS in the area of social welfare and the protection of families with children, veteran disability insurance, health care and the rights in the area of income tax. Further, the term of a returnee means a person who has exercised or will exercise the right to return from the FBiH to the RS with a compulsory registration of the place of permanent residence in the place of return i.e. in the place of pre-war place of permanent residence without restrictions as to the date of the registration of the place of permanent residence. The challenged Law stipulates also that the rights referred to in this law may be exercised by persons who have voluntarily returned and registered the place of permanent residence in the RS and who had the registered place of permanent or temporary residence in the FBiH. Finally, the challenged Law stipulates that these persons shall retain the acquired rights and exercise rights in accordance with this

law if prior to the entry into force of this law they had a place of temporary or permanent residence in the FBiH, provided that they do not exercise those rights under the regulations of the RS.

60. Furthermore, it follows from the challenged Law that it stipulates the status of returnees for persons who acquire that status in the procedure prescribed by the law of an Entity which they are returning to, that is to say to persons who had already acquired that status under the regulations of an Entity in which they have exercised the right to return, and which, under the laws on returnees ceases within the time period of six months. Further, the challenged Law regulates the status of returnees also for persons who are in the process of returning, which, under the relevant provisions of all three laws on returnees, is effected under the conditions and in the procedure prescribed by the law of an Entity to which a person is returning. In both cases a compulsory registration of a place of permanent residence in the place of return is prescribed as a requirement without restrictions as to the date of the registration of the place of permanent residence. Finally, in addition to the compulsory registration of the place of permanent residence in the place of return, the previous registration of the place of permanent or temporary residence in the Federation of BiH is prescribed as a condition for the exercise of the established rights.

61. By means of the challenged Law, the Federation of BiH has regulated the issues which are, pursuant to the constitutional division of responsibilities under Article III of the Constitution of BiH, indisputably the responsibility of the Entities, i.e. these are the issues where the Entities enjoy a wide margin of appreciation in choosing the measures to be applied and to be guided by in regulating these matters. In addition, pursuant to Article I(2) of the Constitution of BiH, this supremacy relates, primarily and as a rule, to the territory of the respective Entity, which means that the laws apply to persons, property and events within the territory of the respective Entity.

62. Furthermore, pursuant to Article III(2)(c) of the Constitution of BiH, the Entities shall provide a protection for all persons in their respective jurisdictions and, in the opinion of the Constitutional Court, the returnees returning to one of the respective Entities are indisputably under the jurisdiction of the respective Entity. In view of the aforesaid, the Constitutional Court considers that the challenged Law, which regulates the rights of returnees to the RS and BD is not in conformity with Article III(2)(c) of the Constitution of BiH as in the challenged law the FBiH has regulated the relevant matter with regard to persons that are not under its jurisdiction and thus infringed upon the obligation to secure legal certainty, which is an inherent element of the principle of the rule of law within the meaning of Article I(2) of the Constitution of BiH. In view of the aforesaid, it follows that the challenged law is not in conformity either with Article III(3)(b) of the Constitution of

BiH, which provides that the Entities and all their respective administrative units shall fully comply with this Constitution and with the decisions of the institutions of BiH.

63. The Constitutional Court indicates that, while taking this viewpoint, it also took into account Article II(5) of the Constitution of BiH. The mentioned provision stipulates that all refugees and displaced persons have the right freely to return to their homes of origin. Pursuant to Annex VII, BiH, FBiH and RS undertook to provide for safety in their territories and to create the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons. Bearing in mind that the policy and the matters of refugees and displaced persons referred to in Article III of the Constitution are the sole responsibility of the State, it was primarily an obligation of the State to regulate this matter. In this regard the Law on Returnees of BiH was enacted and this law defines the right to return *(the refugees and displaced persons have the right freely to return to their previous place of permanent residence).* This Law defines that the aforementioned right shall be exercised under the conditions and according to the procedure determined by the regulations passed on the basis of Annex VII and that the returnees shall acquire the status of a returnee and that the status of a returnee shall cease on the basis of this law. According to the Law on Returnees of BiH, the acquisition and cessation of the status of a returnee is associated precisely with the exercise of the right to return, including other rights determined by this law. Finally, the acquisition and cessation of this status cannot be prescribed and determined for the purpose of exercising other rights as well. Furthermore, pursuant to Article 2 of the Law on Returnees of BiH, in addition to the rights they are entitled to under this law, the returnees shall enjoy in full equality the rights guaranteed under the Entity laws on an equal footing as all other citizens. This kind of solution is obviously in accordance with the obligation undertaken under Annex VII that BiH, FBiH and RS shall provide in their territories, in addition to safety and political, economic, and social conditions conducive to the voluntary return, for the harmonious reintegration of refugees and displaced persons.

64. In view of the aforesaid, Article II(5) of the Constitution of BiH does not create a basis for an exclusive jurisdiction on the part of the FBiH, which could justify passing the challenged Law.

65. Furthermore, in the opinion of the Constitutional Court, neither the House of Representatives nor the House of Peoples, in their replies to the allegations of the applicant, offered any reason or argument to support the conclusion that the Constitution of BiH provides the Entities, i.e. the FBiH in this case, with the basis to pass the challenged Law. In that sense, the conclusion of the House of Representatives cannot be accepted to the effect

that the expert group of the Constitutional-Legal Commission of this House considers that „there is a valid constitutional basis to pass the challenged Law", nor could the conclusion of the House of Peoples be accepted to the effect that the challenged Law, i.e. any part of it, is in contravention of Article III(2)(c) of the Constitution of BiH. In this respect, the Constitutional Court observes that based on the presented reasoning for the proposal for the passing of the challenged law it follows that there is no explicit constitutional basis for the passing thereof. Further, the Constitutional Court indicates that based on the analysis of the existing legal framework which regulates the issues of importance for the returnees, it has established that a returnee is a person who is under the jurisdiction of the Entity he/she returns to. In view of the aforesaid, the conclusion was made that the challenged Law is inconsistent with Article III(2)(c) of the Constitution of BiH. In doing so, the Constitutional Court emphasizes that it limited itself to the examination solely of the existence of jurisdiction within the meaning of the mentioned constitutional provision without dealing with the issue as to whether certain legal arrangements are well-founded, enforceable or justified, which issue was pointed to, for major part, in the request for the review of the constitutionality of the challenged Law as well as in the replies to the request. In this manner, the Constitutional Court followed the previously expressed viewpoint that the protection of public interest, even when it indisputably exists in the broadest of terms, cannot justify the passing of regulations which violate the provisions on division of responsibilities under the Constitution of BiH (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 1/11* of 13 July 2012 (Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban) and Decision on Admissibility and Merits no. *U 16/11* of 13 July 2012 (Law on the Implementation of Annex „G" of the Agreement on Succession Issues in the Territory of the Republika Srpska), which are available at the website of the Constitutional Court: www.ustavnisud.ba).

66. Finally, the Constitutional Court observes that it is indicated in the replies to the request that the actual legal solutions, i.e. the practice in Republika Srpska, discriminate against the returnees in that Entity, particularly the victims of the war so that the challenged Law was enacted with the aim of removing such discrimination. In this regard, the Constitutional Court notes that if such a situation exists (which is the issue that the Constitutional Court did not deal with as it limited its examination to the constitutional powers for enacting the challenged Law), it must be rectified through the challenging of the constitutionality of the specific law arrangements, which created such a situation, in order to secure equal treatment to the victims of the war throughout BiH. Accordingly, such a situation cannot be rectified by enacting the laws in one Entity, regulating certain

matters in the other one, thus violating the constitutional provisions relating to the division of responsibilities. Finally, with regards to the allegations set forth in the replies to the request that the challenged Law creates the conditions to protect acquired property rights, the Constitutional Court notes that the property rights are safeguarded by Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention which is applied directly throughout the territory of Bosnia and Herzegovina, regardless of the adoption of the challenged Law.

VII. Conclusion

67. The Constitutional Court concludes that the Law on the Rights of Returnees to their Pre-War Place of Permanent Residence in the Entity of the Republika Srpska and the Brčko District of Bosnia and Herzegovina (*Official Gazette of the FBiH,* 35/14) is not in conformity with Articles III(2)(c) and III(3)(b) of the Constitution of Bosnia and Herzegovina.

68. Pursuant to Article 61(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as set out in the enacting clause of the present decision.

69. Taking into account the decision of the Constitutional Court in this case, it is not necessary to separately examine the applicant's proposal as to the request to issue an interim measure.

70. Pursuant to Article 43 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of the Judge Mirsad Ćeman shall make an annex of this Decision.

71. 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

The review of the constitutionality of laws (in other systems of other acts as well, and as the review of legality) constitutes a primary responsibility of constitutional courts, and other courts or bodies that, depending on constitutional and legal tradition, carry out constitutional control. Most frequently they concern rather complex constitutional issues. The authority of the decisions of constitutional courts as supreme interpreters of constitutions, mainly contributes to the harmonization of legislation at the level of principles and in general, as well as in specific terms, with the „highest law" in the country, thereby ensuring compatibility and functionality of the system, or the order as a whole (the decisions of constitutional courts shall be „final and binding"). That is how it is in societies and states, which have a well-developed institution of a constitutional court and the practice of independent constitutional justice.

Under Article VI(3) of the Constitution of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina will „uphold this Constitution". As part of the responsibility (and mission) so established, the Constitutional Court of BiH demonstrated through its hitherto case-law, with noticeable caution and self-restraint, a respectable degree of extensive understanding and interpretation of the constitutional text („a letter and spirit" of the constitutional norm), and contributed more-or-less to the establishment of high standards in the legislation at all levels of the authority in Bosnia and Herzegovina.

One of the vivid examples is, certainly, the acceptance of admissibility in the cases of the review of the constitutionality of laws enacted by the Parliamentary Assembly of BiH. Namely, although the text of the Constitution of BiH does not read explicitly (???!!!) that the Constitutional Court of BiH, „by upholding this Constitution", carries out constitutional control of laws enacted by the Parliamentary Assembly of BiH, through its interpretation of the Constitution, by applying positive judicial activism (taking into account the features of the very text of the Constitution), the Constitutional Court of BiH, besides Entities' Constitutions and a number of laws, reviewed „the conformity with this Constitution" of a considerable number of laws enacted at the BiH level.

Although such an interpretation of the Constitution (founding the responsibility/admissibility) received objections (in some earlier procedures before this constitutional court), regarding the objection that it cannot (at all – added by M.Ć.) consider the constitutionality of laws of Bosnia and Herzegovina, the Constitutional Court of BiH took a logical stance, which was upheld in a number of its decisions, emphasizing that, although the provision of Article V(3)(a) of the Constitution of Bosnia and Herzegovina does not provide for explicit jurisdiction of the Constitutional Court to review the constitutionality

of laws or the provisions of the laws of Bosnia and Herzegovina, the substantial term of the powers stipulated by the very Constitution of Bosnia and Herzegovina contains in itself a *titulus* of the Constitutional Court to such a jurisdiction (see, e.g. Decisions nos. *U 1/99, U 16/99, U 9/00, U 1/01, U 14/02, U 2/11, U 3/12* etc.).

Why is it important at all to point that out and to emphasize it in the context of the case concerned here, i.e. where the Constitutional Court, in the present case, reviewed the constitutionality of an Entity's law?! Because of the fact that constitutional courts (this is an already established case-law), as supreme interpreters of constitutions, must find in the constitutional text and assign it (with the necessary caution certainly) with such meanings that realistically follow from the totality of its norms, even in such cases where, only seemingly, it appears to be contrary. That is especially the case in BiH, given that the constitutional text includes not only „Annex IV" (formally titled the Constitution), but, formally and substantially, the constitutional text includes also a series of the international documents (the European Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols thereto – Article II(2) of the Constitution, and Annex I – Additional Agreements…), which are directly applied as a constitutional norm. Namely, all of them, together with „Annex IV", have far broader normative capacity, significance, contents and meaning than that afforded through the reductionist approach, comprehension and interpretation (with academic and particularly political motivation behind it).

Hitherto sporadically challenged (not seriously though) case-law of the Constitutional Court of BiH confirms that the Constitutional Court of BiH, in understanding the text of the Constitution, following the principle of „effective protection of the Constitution" (see, e.g. *U 25/00*, paragraph 23), i.e. through the application of positive constitutional and legal activism, demonstrated in a number of cases a rather enviable and founded interpretative width and responsibility. Contrary to that, in the present case (*U 13/14*) the Constitutional Court took a completely opposite approach to the constitutional and legal issue.

Without intention and need to repeat the argumentation and stances of the author of the challenged law or those of the applicant, as they were correctly conveyed, and interpreted in the decision, my reasons and explanation for voting contrary to the position and decision of the majority are the same as those stated in „the Reply to the Request" (paragraph 21 et seq. of the reasoning of the Decision) of the Parliament of the Federation of BiH.

Nevertheless, I wish to emphasize the following:

In the key stances related in the reasons for the decision, among other things (paragraphs 61 and 62), the Constitutional Court stated that, by means of the challenged

law, the Federation of BiH „… regulated issues which are, according to the constitutional division of responsibilities referred to in Article III of the Constitution of BiH, indisputably within the jurisdiction of the Entities…", thereby emphasizing that „… pursuant to Article I(2) of the Constitution of BiH, this supremacy primarily and as a rule relates to the territory of the Entities, i.e. laws are applied to persons, property, events occurring in the territory of the respective Entity". The Constitutional Court further argues that the Entities, „pursuant to Article III(2)(c) of the Constitution of BiH, have the competence to provide protection to persons under their respective jurisdiction, and, according to the opinion of the Constitutional Court, the returnees who return to a certain Entity are indisputably under the jurisdiction of that Entity. Accordingly, the Constitutional Court holds that the challenged law regulating the rights of returnees to the RS and the Brčko District is not in conformity with Article III(2)(c) of the Constitution of BiH, because the FBiH, by means of the challenged law, regulated the issues related to the persons who are not under its jurisdiction and thus violated the obligation to protect the legal certainty that is the inherent element of the principle of the rule of law within the meaning of Article I(2) of the Constitution of BiH. In view of the aforementioned, it follows that the challenged law is also not in conformity with Article III(3)(b) of the Constitution of BiH, which stipulates that the Entities and their administrative units will fully conform to this Constitution, as well as to the decisions of the BiH institutions".

Following this I hold that it is very important to recall that the challenged law regulates conditions, method and procedure for the exercise and use of the rights acquired on the basis of the FBiH laws and other regulations on returnees to the Entity of the RS in the area of social welfare and protection of families with children, veteran disability insurance, health care and rights in the area of income tax (Article 1), only „…provided that such rights are not exercised under the regulations of the Republika Srpska or the Brčko District" (Article 3).

Also, it is necessary to point again to the relevant provisions of the Constitution of BiH and Annex VII – the General Framework Agreement for Peace – Agreement on Refugees and Displaced Persons (see the Relevant Law, paragraphs 39 and 40 of the reasoning for the decision).

Thus, it indisputably follows from the provisions of Annex VII and the Constitution of BiH that the state of BiH, the Entities, the Brčko District of BiH, as well as all other forms and levels of the government in BiH, are under an obligation to create „political, economic and social conditions conducive to voluntary return and harmonious reintegration of refugees and displaced persons, without giving preference to any certain group", (…) that is to say that „Bosnia and Herzegovina, and all courts, institutions, authorities, and bodies

indirectly governed by the Entities, or that operate within the Entities, are subject to, that is to say they apply human rights and fundamental freedoms referred to in paragraph 2 (of Article II of the Constitution)". In this context it should be pointed to Article I(4) of Annex VII: „…The Parties shall not interfere with the returnees' choice of destination, nor shall they compel them to remain in or move to situations of serious danger or insecurity, or to areas lacking in the basic infrastructure necessary to resume a normal life (...)".

In my opinion it is obvious that it follows from the mentioned provisions that any encouragement, that is to say stimulation through the creation of realistic conditions for voluntary return of refugees and displaced persons is a **legitimate goal** (which is a prevailing position, that is to say the policy in the Federation of BiH, and that follows from the fact of the enactment of the law itself) and is as such in conformity with the Constitution of BiH (as it can be, irrespective of whether we agree or disagree with it, also the so-called possible voluntary „return", which is, obviously, a prevailing position and the policy in the RS).

Thus, by enacting the challenged law the Federation of BiH made, according to its own estimate, a necessary additional step toward the realization of a legitimate goal – the implementation of Annex VII, and that cannot be unconstitutional. The challenged law clearly prescribes that it regulates „… conditions, method and procedure for the exercise and use of rights acquired on the basis of the FBiH laws and other regulations of returnees" (Article 1), and that these rights are exercised „provided that those rights are not exercised under the regulations of the Republika Srpska or the Brčko District" (Article 3). The Entity of FBiH does not expand its jurisdiction, by means of the law, to the territory of another entity or to the Brčko District, but only (as part of its legitimate goals, orientation and capacities) guarantees the already acquired rights or enables the acquisition of other rights to persons who had lived for some time and acquired those rights in the territory under its jurisdiction. That (granting of rights to citizens outside its territory and jurisdiction, and corresponding control within and by its respective institutions) is not unusual in inter-state relations (to the contrary), and especially should not be so within one state. What is more, even if restrictions/conditions under Article 3 of the challenged law had not existed, i.e. „if those rights had not been exercised under the regulations of the Republika Srpska or the Brčko District", such a solution could not be unconstitutional. Rather, possibly, it may be referred to as a desirable but limited „positive discrimination" which, in itself and considering its specific contents of rights, is not contrary to the Constitution. The enactment of such a law and obligations of the Federation of BiH arising therefrom may, possibly, be the subject of the review of purposefulness, or of the critical?! consideration of the scope of financial or other possibilities within the very Entity (any Entity in this or similar situation) in relation to, primarily, obligations of this and/or similar type to the

citizens of that Entity. However, that is not the obligation of the Constitutional Court, or of the other Entity. It is logical to presume that the FBiH legislator had all that in mind when passing the challenged law.

And, finally, considering that such grants „coming from outside" do not relieve the Entity of the RS in the present case to regulate in the area of its jurisdiction the rights of returnees (which was done by the enactment of the Law on Displaced Persons, Returnees and Refugees to the Republika Srpska (*Official Gazette of the RS*, 42/05 and 52/12), and to recognize to this category of citizens (who were covered by the challenged FBiH law) all the enumerated rights or only some rights, it is clear that the present case did not concern unconstitutional interference by the Federation of BiH with the responsibility of the other Entity. Instead, first and foremost, it concerns the right, within its capacities, to grant **more (rights)** than bound so under the Constitution of BiH, Annex VII, or the state law in this area. The present case does not concern either the redefinition of the term of a returnee or the change of the status of this category, as the obligation (of BiH, the Federation of BiH and the RS) still remains to protect within the area of their respective jurisdiction the security, to ensure political, economic and social conditions conducive to voluntary return and harmonious reintegration of refugees and displaced persons. The use of the definition of returnees and displaced persons in the challenged law from the state or the FBiH law is, obviously, only „an auxiliary operative definition" for identification, or specification of persons that the challenged law applies to.

Having decided that the Law on the Rights of Returnees to their Pre-War Place of Permanent Residence in the Republika Srpska Entity and the Brčko District of Bosnia and Herzegovina (*Official Gazette of FBiH*, 35/14) is not in conformity with Articles III(2)(c) and III(3)(b) of the Constitution of Bosnia and Herzegovina, the majority in the Constitutional Court of BiH, instead of interpreting the constitutional norm creatively and *dynamically*, acted in an unacceptable formalistic manner. Caution and self-restraint that the Constitutional Court employed in the present case through such interpretation of the Constitution, in my opinion, most certainly are in contrast with the need as well as the obligation for this high body, in not infrequently complex issues of the review of constitutionality (even in cases with far-reaching effect and repercussions on the relations in Bosnia and Herzegovina), to show more courage and dynamism, as the body which indeed upholds the Constitution in the totality of the meaning of its norms.

Therefore, as I have already mentioned, with due respect, I was unable to agree with the opinion, stance, conclusions and decision of the majority. Consequently, I denied my vote in favor of such a decision of the Constitutional Court – I voted against.

CONTENTS

Case No. U 19/14

DECISION ON ADMISSIBILITY AND MERITS

Request of ten delegates to the Council of Peoples of the Republika Srpska for review of the constitutionality of the provisions of Article 6, items a), b) and e) and Articles 13 and 16 of the Law on Cemeteries and Funeral Services (*Official Gazette of the Republika Srpska*, 31/13 and 6/14)

Decision of 24 September 2014

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 22/14 and 57/14), 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 a request lodged by **ten delegates to the Council of Peoples of the Republika Srpska** in case no. **U 19/14**, at its session held on 24 September 2014 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request for review of the constitutionality of the provisions of Article 6 paragraph 1, items a), b) and e) and Articles 13 and 16 of the Law on Cemeteries and Funeral Services (*Official Gazette of the Republika Srpska*, 31/13 and 6/14), lodged by ten delegates to the Council of Peoples of the Republika Srpska, is hereby dismissed as ill-founded.

It is hereby established that the provisions of Article 6, items a), b) and e) and Articles 13 and 16 of the Law on Cemeteries and Funeral Services (*the Official Gazette of the Republika Srpska*, 31/13 and 6/14) are in conformity with Article II(3)(g), II(3)(k) and III(3)(b) 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 27 June 2014 ten delegates to the Council of Peoples of the Republika Srpska („the applicant") filed a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of the provisions of Article 6, items a), b) and e) and Articles 13 and 16 of the Law on Cemeteries and Funeral Services (*Official Gazette of the Republika Srpska*, 31/13 and 6/14; „the Law").

2. The applicant requested that the Constitutional Court adopt an interim measure suspending the application of the Law pending a decision on the request by the Constitutional Court.

II. Procedure before the Constitutional Court

3. Pursuant to Article 23 of the Rules of the Constitutional Court, the Council of Peoples of the Republika Srpska was requested on 8 July 2014 to submit a reply to the request.

4. On 25 July 2014 the Council of Peoples of the Republika Srpska submitted the reply.

III. Request

a) Allegations stated in the request

5. The applicant holds that Article 6(1), items a), b) and e) and Articles 13 and 16 of the Law on Cemeteries and Funeral Services are not in conformity with Article II(3)(g), Article II(3)(k) and Article III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention for the Protection of Human Rights („the European Convention") and Article 1 of Protocol No. 1 to the European Convention.

6. As to Article 6(1)(a) of the Law, the applicant points out that the adoption of decisions by local self-management units in the territory of the Republika Srpska, which will prescribe the conditions for erection of tombstones and inscriptions thereon, and taking into account that the relevant provision also relates to the cemeteries owned by

religious communities (including the Islamic Community in BiH), constitutes a violation of the right to freedom of religion under Article 9 of the European Convention and Article II(3)(g) of the Constitution of BiH. In addition, the applicant underlines that methods and techniques for arranging and organising funerals and making inscriptions on tombstones are prescribed by regulations and practises of religious communities and, according to the applicant, any interference of state bodies with decision-making on these issues constitutes a violation of the right to freedom of religion.

7. The applicant corroborates the allegations by reference to the judgement of the European Court of Human Rights in the case of *Kokkinakis v. Greece* of 25 May 1993, establishing as follows: *As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a „democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it*.

8. The applicant notes that in the present case the entity of Republika Srpska, by its Law, and the local community, by its regulation that has lower legal force than laws, may not interfere with freedom of religion, *i.e.* the right of anyone to decide upon the shape of tombstone of his/her family member or his/her own tombstone (specified in the will before his/her death), and to decide what should be inscribed *on* the tombstone. Taking into account limitations on the freedom to manifest one's religion or belief set out in Article 9(2) of the European Convention, the applicant holds that in the present case such interference has a direct impact on freedom of religion and cannot be considered to be proportionate to the legitimate aim pursued and that such interference is not necessary in a democratic society.

9. The applicant points out that the local self-government units in the Republika Srpska, *i.e.* the municipal assemblies that adopt decisions in terms of Article 6 of the Law on Cemeteries and Funeral Services, are composed mainly of members of the Serb people and, therefore, there is justified fear that their decisions would not respect the rights of believers of different national origin to choose tombstones and inscriptions thereon in the cemeteries owned by religious communities. In addition, it is highlighted that the RS National Assembly, at its 29th session held on 18 July 2013, adopted the Law Amending the Law on Cemeteries and Funeral Services, so that new paragraph (2) was added to Article 6, which reads: *A local self-government unit prescribing the conditions referred to in paragraph 1 of this Article shall ensure respect for religious norms and traditions*. However, this does not mean that in this way the right to freedom of religion under

the European Convention and the Law on Freedom of Religion and the Legal Status of Churches and Religious Communities in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 5/04) has been complied with. The applicant also refers to Article 14(1) of the Law on Freedom of Religion and the Legal Status of Churches and Religious Communities in Bosnia and Herzegovina, which stipulates the following: *The State shall not interfere with the internal organisation and affairs of churches and religious communities.*

10. Furthermore, the applicant underlines that the European Court of Human Rights has highlighted in its judgments that the autonomous existence of religious communities is indispensable for pluralism in a democratic society. In this context, the applicant refers to the judgement of the European Court of Human Rights in the case of *Metropolitan Church of Bessarabia and others v. Moldova* of 13 December 2001, as follows: *Moreover, since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.* Besides, the applicant highlights that the European Commission for Democracy through Law (Venice Commission), in its Opinion no. 271/2004 of 11 June 2004, relating to autonomy/self-determination of religious/belief organisations, established as follows: *It is reasonable to suggest that the State should be very reluctant to involve itself in any matters regarding issues of faith, belief, or the internal organisation of a religious group.*

11. In the view of the applicant, a justified question is raised in the present case: What are the real reasons for which the RS National Assembly, by such legal regulations, wants to exercise certain control over the affairs of religious communities and to interfere with the right to freedom of religion by prescribing the conditions for erection of tombstones and inscriptions thereon (including the cemeteries owned by religious communities). In the view of the applicant, such an interference with the right to freedom of religion is certainly in contravention of Article 9(2) of the European Convention.

12. As to Article 6(1)(b) of the Law (the management, development and maintenance of cemeteries), the applicant points out that the mentioned provision is also in violation of the right to freedom of religion under Article 9 of the European Convention and the right to property under Article 1 of Protocol No. 1 to the European Convention. In the opinion

of the applicant, decision-making by a local self-government unit about the management, development and maintenance of cemeteries owned by religious communities amounts to an interference with the right to freedom of religion. The applicant refers to Article 12(2) of the Law on Freedom of Religion and the Legal Status of Churches and Religious Communities in Bosnia and Herzegovina, which stipulates as follows: *Churches and religious communities may own property and property rights, which they shall be free to use and administer*. It is further mentioned that the Republika Srpska, by the challenged provision, sets up the control over managing the cemeteries that are the private property of religious communities, among which are mostly the cemeteries owned by the Islamic Community in Bosnia and Herzegovina. Since the right to manage is one of the property rights, the applicant considers that the regulation that a local self-government unit is to adopt the specific decision prescribing the details of conditions relating to the management, development and maintenance of cemeteries constitutes an interference with the right of religious communities to peaceful enjoyment of their property and, therefore, there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised in the present case. As a result, according to the applicant, there is a violation of Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention.

13. As to Article 6(1)(e) of the Law (the manner of burying and excavating the dead bodies), the applicant states that a local self-management unit, based on the mentioned provision, interferes with the right to freedom of religion under Article 9 of the European Convention and that such interference cannot be deemed to be proportionate to a legitimate aim pursued by such a legal regulation, nor is the interference necessary in a democratic society. In addition, according to the applicant, such an interference by the entity of Republika Srpska and the bodies of local communities composed mainly of members of the Serb people causes fear in the believers belonging to other religious groups, which fear that they would be deprived of their right to determine the manner of burial in accordance with their religious tradition and that certain abuses could occur as regards excavations of the dead bodies.

14. As to Articles 13 and 16 of the Law, which stipulate that a disused cemetery or a part thereof may be used for other purposes determined by an adequate document of urban development of the local self-management unit after the period of mandatory rest of the grave has ended and that the competent body of the local self-management unit may adopt a decision to relocate the disused cemetery or the part thereof before the period of mandatory rest of the grave has ended, the applicant holds that the mentioned Articles are in violation of the right to freedom of religion under Article 9 of the European Convention and the right to property under Article 1 of Protocol No. 1 to the European Convention.

According to the applicant, the cemeteries of religious communities, as places where the souls of the deceased rest in peace, have infinite value for their believers and believers in general and they represent homeland for family memorials that are a sustaining source of comfort to the living and in Bosnia and Herzegovina those cemeteries have existed intact for centuries. Taking into account horrible experiences of the last war, the applicant holds that this Law makes it possible for the municipal assemblies in the entity of Republika Srpska to decide on a relocation of the cemeteries of religious communities, based on an adequate document of urban development adopted by a local self-management unit. Such legal regulations would create room for relocating certain cemeteries and eliminating all traces of the people against whom the genocide was committed.

15. The applicant corroborates the allegations by reference to the views of the Inter-Religious Council of Bosnia and Herzegovina, consisting of representatives of the Islamic Community in BiH, Serbian Orthodox Church, Catholic Church and Jewish Community in BiH, expressed during its session held on 9 April 2013: *In adopting regulations on cemeteries and funeral services, it must be taken into account that the burial of a dead person is principally a religious ritual and any authorisation granted to local self-management units or other state authorities to decide on conditions and methods of burials or shape of tombstones amounts to a violation of the right to freedom of religion. We hereby propose that the following principle should be respected when adopting the aforementioned regulations:*

- Churches and religious communities shall manage and dispose of the cemeteries owned by them and shall determine the conditions in which burial sites, inscriptions thereon and tombstones shall be organised and defined, as well as methods and techniques for arranging and organising funerals and other religious rituals. Churches and religious communities are obligated to comply with all sanitary and technical regulations relating to the cemeteries.

- The local self-management units that manage the cemeteries owned by them are to comply with norms and tradition when making decisions…

16. The applicant also refers to a written opinion of 24 September 2013, provided by Mr. Emil Vlajki, a Vice-President of the Republika Srpska, as to the adoption of the Law on Cemeteries and Funeral Services. The written opinion includes, *inter alia*, the following: *It appears that the authorities are particularly uncomfortable with inscriptions on tombstones, the content of which is decided by the family of the dead. The government must be told that they are not to control religious culture and tradition of any people. Religious communities of the Bosniaks or other peoples are entitled to manage and to stipulate the procedures, conditions and methods and techniques for arranging and*

organising funerals and other religious rituals in accordance with their norms and practices as regards the cemeteries that are owned by them or that have been given to be managed and maintained by them.

17. Also, the applicant states that the challenged provisions are in contravention of Article III(3)(b) of the Constitution of BiH, as the principle of normative hierarchy safeguarded by this Article of the Constitution of BiH imposes an obligation on the Entities and any subdivision thereof to comply fully with the procedures and principles established by state laws. In the present case, the right to freedom of religion and the right to property of churches and religious communities, as established under the Law on Freedom of Religion and the Legal Status of Churches and Religious Communities in Bosnia and Herzegovina, must be fully respected also in entity laws regulating the relations reflected in the exercise of this fundamental human right. The applicant corroborates the above by a reference to Articles 14(1), item 2 and 12(2) of the aforementioned Law.

18. The applicant requested that the Constitutional Court adopt the Decision establishing that Article 6, items a), b) and e) and Articles 13 and 16 of the Law are not in conformity with Article II(3)(g), Article II(3)(k) and Article III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention and Article 1 of Protocol No. 1 to the European Convention.

19. Finally, the applicant requested that the Constitutional Court, in order to prevent detrimental consequences that may occur as a result of the application of the challenged provisions, adopt an interim measure prohibiting the application of the challenged provisions of the Law, pending a decision by the Constitutional Court.

b) Reply to the request

20. In its reply to the request, the National Assembly of the Republika Srpska alleges that there are formal deficiencies in the request as the applicant's citation of the challenged provisions is incorrect. Namely, it is pointed out that the applicant failed to quote the legal norms as they stand after the amendments thereto, although, in the request in question, the applicant refers to the *Official Gazette of the Republika Srpska*, 6/14, in which the amendments were published. For this reason, it is suggested that the request should be declared inadmissible. In addition, it is emphasised that the applicant's assertions are irrelevant after the adoption of the amendments to the Law.

21. In addition, it is stated that in case that the Constitutional Court decides to make an assessment of the merits of the request, the request in question should be dismissed

as unfounded. As to Article 6(1), item a) (construction of cemeteries, burial plots and tombstones and inscriptions thereon) and (6)(1), item b) (management, development and maintenance of cemeteries), it is emphasised that the aforementioned provisions, from a human rights perspective, are not and cannot be disputable, as a country governed by the rule of law determines the conditions for the construction of cemeteries and burial plots in accordance with the town planning regulations; otherwise, cemeteries, burial plots and tombstones could be built anywhere and by anyone. It is pointed out that Article 6(2) of the Law stipulates that a local self-management unit is obliged, when determining the mentioned conditions, to ensure the respect for religious norms and customs; therefore, any possibility of arbitrariness by a local self-management unit is removed with regard to the limitations on the right of individuals to freedom of religion, *i.e.* the right of religious communities as a whole. In addition, it is stated that the only aspect of Article 6 that could possibly be viewed as legally relevant is item e) of Article 6(1), which stipulates that a local self-management unit is entitled to prescribe the conditions as to the manner of burying and excavating the dead bodies. However, as stated in the reply, the limitation contained in paragraph 2 of Article 6 of the Law, stipulating that a local self-management unit is *obliged to ensure the respect for religious norms and customs*, applies. Furthermore, the following issue is raised in the reply: Is there any country in the world that does not prescribe the conditions relating to the manner of burying and excavating the dead bodies? It is underlined that in the case that local communities (local self-management units) fail to take sanitation and hygiene measures and to prescribe conditions relating to burials and excavations, bodies will be buried or corpses would be exhumed without a legal regulation, which is unacceptable in civilizational and legal terms. It is also stated that Article 9(2) of the European Convention includes possible limitations on the right to freedom of religion and that the applicant disregarded the fact that the public interest includes the protection of health, obliging the local communities to determine the conditions relating to burials and exhumations of the dead bodies.

22. As to Articles 13(1) and 16(1) of the Law, it is stated in the reply that the reasons to address the Constitutional Court no longer exist, as the amendments to the aforementioned provisions have been adopted. It is pointed out that the amendments to the Law prescribe the establishment of the general interest and that the wording „in accordance with a special regulation" provides for a possibility of regulating exceptions, even where it concerns the application of the norm as amended. In addition, the conclusion of the National Assembly is pointed out in the reply that the applicant has addressed the Constitutional Court not because of the unconstitutionality of legal regulations but for the political position that could not be formalised before the Constitutional Court of the Republika Srpska in a proceeding concerning the protection of vital interest of the Bosniac People.

23. Furthermore, the applicant's allegations that the challenged provisions of the Law are inconsistent with Article 14(1) of the Law on Freedom of Religion and the Legal Status of Churches and Religious Communities in BiH, stipulating that *the State shall not interfere with the internal organisation and affairs of churches and religious communities*, are assessed as unfounded. It is emphasised that though the applicant makes no reference to any inconsistency between the Laws, it is necessary to give an answer and to clarify that establishing the conditions, regulating funeral services, by a local self-management unit does not amount to an interference with the affairs or internal organisation of religious communities, as Article 6(2) of the Law provides that all the activities referred to in paragraph 1 of Article 6 are to be carried out so to *ensure the respect for religious norms and customs*. Contrary to the applicant's allegations, the public interest referred to in the aforementioned Article is not given a dominant role but the public interest is set forth so that it must be proportionate to the right to freedom of religion.

24. According to the reply, the applicant's reference to the property rights is ill-founded. In this connection, the National Assembly recalls the consistent case-law of the European Court of Human Rights that there is no violation of property rights where a fair balance is struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, as confirmed by the applicant, too. In addition, in Article 6 of the Law the legislator clearly underlines the obligation not to interfere with property and legal affairs relating to burial plots and the cost of maintenance of the cemeteries owned by religious communities (Article 6(3) of the Law), in full compliance with the religious communities' right to property.

25. As to the request for an interim measure, it is proposed that the request should be dismissed as ill-founded, since the National Assembly sees no possibility that the application of the challenged provisions of the Law could be to a person's detriment.

Decisions of the Panel for the Protection of Vital Interest within the Constitutional Court of the Republika Srpska

26. Upon a request by the Bosniak Caucus in the Council of Peoples of the Republika Srpska, the Panel for the Protection of Vital Interest within the Constitutional Court of the Republika Srpska adopted Decision no. UV-1/13 of 27 March 2013, establishing that the Law adopted at the session of 13 December 2012 by the RS National Assembly is not in breach of a vital national interest of the Bosniak People. In the reasoning for the Decision it is stated that the request contains no specific reference as to a violation of the collective rights of the Bosniak People, but it just points out the need to amend the legal text in terms

of the restrictions on the authority of local self-management units to regulate the matters relating to the cemeteries of religious communities.

27. In Decision no. UV-3/13 of 6 November 2013, the Panel for the Protection of Vital Interest within the Constitutional Court of the Republika Srpska established that the Law Amending the Law adopted on 18 July 2013 by the RS National Assembly was not in breach of a vital national interest of the Bosniak People. In the reasoning for the Decision it is stated that the amendments to Article 6 (paragraphs 2 and 3 added) specify the arrangements of the basic law concerning the autonomy of religious communities in respect of funeral services, as the major reason for which the Law has been challenged. The Panel established that the provision of Article 6 of the basic text of the Law, which had already been considered by the Panel, was amended by the challenged provision of Article 1 of the Law Amending the Law and that that provision, *inter alia*, underlined the autonomy of religious communities in respect of funeral services in order to stipulate a clear legal framework for the protection of religious communities' rights. The Panel established that such a provision constituted a firm basis for carrying out funeral services in accordance with the historic and religious traditions of citizens of the Republika Srpska; therefore, the allegations in the request that the challenged provisions of the Law were in violation of the vital national interest of the Bosniak People were inadmissible. In addition, the Panel found that the Law was to be applied equally to all legal persons involved in funeral services and contained no national or religious determinants in terms of authorising a body of a local self-management unit to apply differential treatment in respect of the exercise of rights of the Islamic Community or other religious communities.

IV. Relevant Law

28. The **Law on Cemeteries and Funeral Services** (*Official Gazette of the Republika Srpska*, 31/13 and 6/14; note: the consolidated text of the challenged provisions of the Law has been made for the purpose of the present decision), as relevant, reads:

Article 6(1), items a), b) and e) and 6(2) and (3)

(1) A local self-management unit shall adopt a specific decision prescribing the details of conditions of the following:

a) construction of cemeteries, graves and tombstones and inscriptions thereon;

b) management, development and maintenance of cemeteries;

e) manner of burying and excavating the dead bodies;

(2) In stipulating the conditions referred to in paragraph 1 of this Article, the local self-management unit is obliged to ensure the respect for religious norms and customs.

(3) Religious communities shall determine the method of formation of prices and the reservation and sale of burial plots and the method of formation and payment of the cost of maintenance of the cemeteries.

Article 13

(1) A disused cemetery or a part thereof may be used for other purposes determined by an adequate document of urban development of the local self-management unit after the period of mandatory rest of the grave has ended, if the general interest is determined, with the exception of the cemeteries with cultural and historic status or natural resources status as defined by special regulations.

(2) The period of mandatory rest of the grave referred to in paragraph 1 of this Article shall be no less than 100 years from the date on which the last burial has taken place.

Article 16

(1) As an exception to Article 13(1) of this Law, where it is necessary for urban development and other justifiable reasons, the competent body of the local self-management unit may adopt a decision to relocate a disused cemetery or a part thereof before the period of mandatory rest of the grave has ended, but only 10 years after, in case that the land is dried, or 20 years after, in case that the land is wet, the date on which the last burial has taken place.

(2) The procedure for publication of the decision and the transfer of exhumed human remains shall be carried out in accordance with the provisions of Article 15 of this Law.

(3) In the case referred to in paragraph 1 of this Article, the local self-management unit is obliged to provide, to the owner of the burial plot in respect of which the period of mandatory rest of the grave has not expired, free of charge another burial plot in the same or in another cemetery with the same or approximately the same location conditions.

Other provisions of the Law, as relevant, read:

Article 1

This Law shall regulate types, construction, use and management of cemeteries, funeral services and other issues relating to cemeteries and funeral services.

Article 2

Funeral service is a public utility encompassing the maintenance of cemeteries and crematoriums and providing funeral services and all works relating to a burial of the dead body, such as the preparation of burial plots, the care and preparation of the body,

transporting the body, the co-ordination of ceremonies with respect to the burial of the dead body, i.e. cremation, development and maintenance of graves and grave plots.

Article 3(1)

A local self-management unit may establish a public utility for providing funeral services in accordance with the law or may designate or give consent for providing funeral services to religious communities, provided that they are registered for providing funeral services in accordance with specific regulations and that they fulfil the requirements under this law.

Article 7

1. According to the mode of establishment and the purpose of funerals, cemeteries may be public or special.

2. Public cemeteries are owned by local self-management units and used for burials of all deceased persons, irrespective of their religious or national origin.

3. Special cemeteries may be owned either by local self-management units or the entities referred to in Article 3 of this Law, managing the special cemeteries, and they are used for burials of the deceased persons who have acquired a specific status in accordance with special regulations or of those who belong to a particular religion, and they may be:

d) cemeteries of religious communities (...).

Article 14

1. After the expiry of the time limit specified in Article 13(2) of this Law, disused cemeteries or the parts thereof may be relocated for the purposes specified in Article 13(1) of this Law.

3. Local self-management units shall pay all costs incurred during the relocation of disused cemeteries or the parts thereof.

29. The **Public Utilities Law** (*Official Gazette of the Republika Srpska*, 124/11), as relevant, reads:

Article 1

This Law defines a public utility considered vital to the public interest and the mode of securing the public interest, the organisation of services provided by the public utility and the mode of financing the public utility.

Article 2(1) item z

1. Public utilities considered vital to the public interest in terms of this Law shall be:

z) funeral services

30. The **Urban Development and Building Law** (*Official Gazette of the Republika Srpska*, 40/13), as relevant, reads:

Article 1

This Law shall regulate a system of urban development and development, the preparation, design and adoption of urban development documents.

Article 10

Urban development is an integral part of the single system of planning and programming of the development and an obligation and continuous activity of the Republic and all local self-management units ... .

Article 12

Urban development includes the following:

a) investigation, inspection and assessment of the possibilities of sustainable development in the territory of the Republic;
b) protective measures and management method;
c) development and adoption of urban development documents and ...

Article 22(1)

Urban development shall be under jurisdiction of the Government and National Assembly of the Republika Srpska, as well as of the assembly of local self-management units, and planning shall be carried out through the adoption of urban development documents and other documents and regulations determined by this Law.

Article 23

The Ministry shall be responsible for the preparation of urban development documents considered vital to the Republic and for the implementation thereof, whereas the bodies of local self-management units carrying out the activities in the field of urban development shall be responsible for the preparation of urban development documents vital to the local self-management unit.

31. The **Law on Freedom of Religion and the Legal Status of Churches and Religious Communities in Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 5/04), as relevant, reads:

Article 12(2)

Churches and religious communities may own property and property rights, which they will freely use and manage.

Article 14(1), item 2

The state shall not have the right to interfere with the affairs and internal organization of churches and religious communities.

V. Admissibility

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

33. 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.

34. The Constitutional Court notes that the applicant seeks the review of constitutionality of the challenged provisions of the Law. In addition, the Constitutional Court recalls its case no. *U 15/07*, where it is concluded that one fourth of the members of the RS Council of Peoples was considered to be an authorized entity to file a request (see, Constitutional Court, Decision no. *U 15/07* of 4 October 2008, paragraph 17, available at: www.ccbh.ba). Taking into account that the Council of Peoples consists of 28 delegates and that the request in question was filed by 10 delegates, the Constitutional Court concludes that the present request was filed by an authorised entity under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

35. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the Constitutional Court 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 19 of the Rules of the Constitutional Court rendering this request inadmissible.

VI. Merits

36. The applicant considers that Article 6(1), items a), b) and e) and Articles 13 and 16 of the Law on Cemeteries and Funeral Services are not in conformity with Article II(3)(g), Article II(3)(k) and Article III(3)(b) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention and Article 1 of Protocol No. 1 to the European Convention.

Freedom of thought, conscience, and religion

37. Article II(3)(g) 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:

g) Freedom of thought, conscience, and religion.

38. Article 9 of the European Convention reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

39. In the view of the Constitutional Court, the present request raises an issue as to whether the challenged provisions of Articles 6, 13 and 16 of the Law are in violation of the right to manifest one's religion, as safeguarded by Article 9 of the European Convention.

40. As to the objection in its reply to the request by the RS National Assembly that the applicant quoted incorrectly the provisions of Articles 6, 13 and 16 of the Law and that the applicant failed to quote the legal norms as they stand after the Law had been amended,

the Constitutional Court points out that the applicant specified the Official Gazettes of the Republika Srpska in which the basic text of the Law and the amendments thereto contested by the applicant had been published and that the applicant referred to Article 6(2) amending the Law and specified the reasons for which the mentioned provisions were challenged. The aforementioned constitutes a sufficient ground for the Constitutional Court to examine the applicant's allegations on the merits.

41. The Constitutional Court notes that after the National Assembly had adopted the Law on 13 December 2012 (the Law entered into force on 23 April 2013), it adopted amendments to the Law on 18 July 2013 (the amendments entered into force on 14 February 2014), so that paragraphs 2 and 3 were added to Article 6, and Articles 13 and 16 of the Law were amended. As to the basic text of the Law and the amendments thereto, the Panel for the Protection of Vital Interest within the Constitutional Court of the Republika Srpska, upon the request by the Bosniak Caucus in the Council of Peoples of the Republika Srpska, established in its decisions of 27 March and 6 November 2013 that the Law was not in breach of the vital national interest of the Bosniak People.

42. The Constitutional Court takes into account that the freedom safeguarded by Article 9 of the European Convention is one of the foundations of a democratic society. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it (see, ECtHR, *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A, no. 260-A, p. 17, paragraph 31). According to the ECtHR, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate (see, ECtHR, *Manoussakis and Others v. Greece*, judgment of 26 September 1996, *Reports of Judgments and Decisions* 1996-IV, paragraph 47). While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion. Bearing witness in words and deeds is bound up with the existence of religious convictions.

43. The European Court of Human Rights, referring to its case-law concerning the place of religion in a democratic society and a democratic State (see, ECtHR, *Refah Partisi (the Welfare Party) and Others v. Turkey*, judgment of 13 February 2003, *Reports on Judgments and Decisions* 2003-II, paragraphs 90-94), has defined the role of a state as that of a neutral and impartial organizer of the exercise of various religions, faiths and beliefs and stated that this role is conductive to public order, religious harmony and tolerance in a democratic society. The European Court has also considered that the State's duty of

neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs and that it requires the State to ensure mutual tolerance between opposing groups.

44. In the mentioned judgment, the European Court has referred to the case-law of the Convention institutions and expressed the view that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the European Convention (see, ECtHR, *Refah Partisi (the Welfare Party) and Others v. Turkey*, judgment of 13 February 2003, *Reports on Judgments and Decisions* 2003-II, paragraph 92).

45. In considering the relationship between religious and civil law, the European Court has reiterated that freedom of religion, including the freedom to manifest one's religion in worship and observance, is primarily a matter of individual conscience, and stressed that the sphere of individual conscience is quite different from the field of „private law", which concerns the organisation and functioning of society as a whole. Article 9 of European Convention provides for everyone the right to freedom of religion to be manifested in private. On the other hand, the state may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy (see, ECtHR, *Refah Partisi (the Welfare Party) and Others v. Turkey*, judgment of 13 February 2003, *Reports on Judgments and Decision* 2003-II, paragraph 128).

46. The freedom to manifest religion or beliefs does not constitute an exclusively individual right. It also constitutes a collective dimension recognized by Article 9 of the European Convention in the wording „in community with others". The Human Rights Chamber for Bosnia and Herzegovina, by upholding the case-law of the Convention institutions, has also acknowledged that a religious community may be a right holder under Article 9 of the European Convention (see Human Rights Chamber, case no. CH/96/29, *the Islamic Community in Bosnia and Herzegovina vs. the Republika Srpska*, Decision on Admissibility and Merits delivered on 11 May 1999, paragraph 128). In that decision, the Human Rights Chamber for Bosnia and Herzegovina referred to the case-law of the European Commission of Human Rights, which has also concluded that an ecclesiastical body or association with a religious and philosophical mission may have and exercise rights contained in Article 9 of the European Convention, and even act on behalf of its members (see *Chappell v. the United Kingdom*, Decision of 14 July 1987, *Decisions and Reports* of the European Commission of Human Rights, no. 53, pp. 241, 246; *X. and the*

Church of Scientology v. Sweden, Decision of 5 May 1979, *Decisions and Reports* of the European Commission of Human Rights no. 16, pp. 68, 70).

47. A burial in accordance with religious customs certainly falls within the scope of manifestation of religious beliefs. According to the position taken by the Human Rights Chamber for BiH, a burial in accordance with religious customs clearly falls within the ambit of Article 9 of the European Convention in so far as it relates to freedom of religion, including in particular freedom to manifest one's religion in practice and observance. Equally, any interference with the grave by exhumation or an order for exhumation of the deceased after such a burial has taken place must be considered to fall within the ambit of Article 9 (see, Human Rights Chamber for BiH, *Dževad Mahmutović v. the Republika Srpska*, case no. CH/98/892, Decision on Admissibility and Merits of 8 October 1999, paragraph 85).

48. Article 9 of the European Convention is structured so that the first paragraph defines the protected freedoms and the second paragraph contains the so-called restrictive clause, meaning that it prescribes circumstances under which the public authority may restrict the enjoyment of protected freedoms. Article 9(1) lists a number of forms to manifest one's religion or belief in worship, teaching, practice and observance. Nevertheless, Article 9 of the European Convention does not protect every act motivated or inspired by a religion or belief (see ECtHR, *Kalaç v. Turkey*, judgment of 1 July 1997, *Reports on Judgments and Decisions*, 1997-IV, paragraph 27).

49. The limitations referred to in Article 9 paragraph of the European Convention enable states to decide to restrict the scope of enjoyment of these rights and freedoms only in cases when such intervention by the state is in compliance with the law, *i.e.* when it is prescribed by law and necessary in a democratic society, for the sake of protecting fundamental values of every state, such as public security, protection of public order, health or moral, or the protection of rights and freedoms of other persons. Thus, the state is allowed to restrict the exercise of these rights in general and social interest, and not to suspend them.

50. By applying the aforementioned principles to the present situation, the Constitutional Court will first establish whether the issues regulated by challenged Articles 6, 13 and 16 of the Law fall within the scope of Article 9 of the European Convention. According to the applicant's complaints, the challenged provisions are in violation of the rights of the religious communities, which possess their own cemeteries (including the Islamic Community in BiH), and the rights of individuals to manifest their religion freely. The Constitutional Court holds that burials in accordance with religious customs and exhumations of the dead buried in accordance with religious customs, erection of tombstones and inscriptions

thereon and development and maintenance of cemeteries of religious communities fall within the scope of rights safeguarded by Article 9 of the European Convention, in so far as they relate to the freedom to manifest one's religion through „worship, observance, practice and teaching".

51. The next issue raised in the present case is whether the freedom to manifest one's religion is restricted by the challenged provisions of the Law and, if so, whether the possible restriction is justified within the meaning of Article 9(2) of the European Convention. Therefore, the Constitutional Court should examine whether the mentioned limitations are in accordance with the law and whether the limitations are necessary in a democratic society to achieve one or more legitimate aims referred to in Article 9(2) of the European Convention, *i.e.* whether the limitations are proportionate to the legitimate aim pursued in terms of the standards of the European Convention.

52. As to challenged Article 6(1), items a), b) and e) of the Law, the Constitutional Court notes that the relevant provisions stipulate that a local self-government unit will adopt the specific decision prescribing the details of conditions relating to a) construction of cemeteries, graves and tombstones and inscriptions thereon; b) management, development and maintenance of cemeteries; and e) manner of burying and excavating the dead bodies; and will ensure the respect for religious norms and customs (Article 6(2) of the Law). In addition, the Constitutional Court notes that the burials in accordance with religious customs and the erection of tombstones and their maintenance are an important aspect of the public manifestation of religion, requiring the respect for religious norms and customs. Therefore, the Constitutional Court concludes that the challenged provision of Article 6 of the Law, authorising a local self-government as public authority to prescribe the details relating to the public manifestation of religion, imposes the limitation on the right to freedom of religion safeguarded by Article 9(1) of the European Convention.

53. Furthermore, the Constitutional Court points out that for a „limitation" to be justified, it has to be „prescribed by the law". Considering the principle of legality of the limitation of freedoms safeguarded by Article 9 of the European Convention, the European Court has referred to its case-law in connection with Articles 8 and 11 of the European Convention (see *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000, application no. 30985/96, paragraph 84). In that sense, the condition of legitimacy, in accordance with the meaning of a notion of the European Convention, consists of several elements: (a) any limitation must be based on domestic or international law; (b) the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case; and (c) the law must be formulated with sufficient precision to enable the individual to regulate his conduct (see, ECtHR, *Sunday Times v.*

the United Kingdom, judgment of 26 April 1979, Series A, no. 30, paragraph 49). Taking into account the aforementioned principles, the Constitutional Court concludes that the relevant limitations are prescribed by the law.

54. As to the question whether the limitations prescribed by Article 6 of the Law pursue a legitimate aim, the Constitutional Court notes that the issues included in the challenged provision require the regulation of conditions of urban town development, as well as the hygienic and sanitary and technical conditions in the interests of public safety and for the protection of public health, or for the protection of the rights and freedoms of others. In the view of the Constitutional Court, the challenged provisions of Article 6 of the Law pursue the legitimate aims referred to in Article 9(2) of the European Convention.

55. The next question to be answered by the Constitutional Court is whether the relevant limitations are necessary in a democratic society to achieve one of the legitimate aims referred to Article 9(2) of the European Convention. Necessary in this context means that the „limitation" corresponds to a „pressing social need" and that there is a reasonable relationship of proportionality between the limitation and the legitimate aim pursued.

56. The Constitutional Court notes that the burial of deceased persons and the construction and maintenance of cemeteries is an important public interest activity. Funeral services are determined under the law of the Republika Srpska as an activity that serves the specific public interest and encompasses the maintenance of cemeteries and crematoriums and providing funeral services and all works relating to a burial of deceased persons, such as the preparation of burial plots, the care and preparation of the body, transporting the body, the coordination of ceremonies with respect to the burial of the dead body, *i.e.* cremation, the development and maintenance of graves and grave plots, *etc*. (Article 2 of the Law and Article 2(1), item z of the Public Utilities Law). In addition, funeral services in the Republika Srpska may be carried out, *inter alia*, by public utility companies or religious communities. Furthermore, as the Constitutional Court has already emphasised, burials of deceased, erection of tombstones and their maintenance is an important aspect of the public manifestation of religion. The Constitutional Court underlines that the process of burying a dead person in a grave includes the preparation of the body for burial and disposal of the body or ashes of the deceased, all followed by a ritual or religious ceremony. In addition, religious funeral ceremonies (a codified pattern of behaviour with the aim of producing a symbolic effect on the physical world) and rituals (a system of the rules determining one's behaviour with a symbolic effect on the physical world) are the essential aspects of the manifestation of religion and characterise religions and require the respect for religious norms and customs. Furthermore, the Constitutional Court notes that the applicant has failed to specify the manifestations of religion expressed through

a ceremony or performance of religious duties or rituals that are essentially breached by challenged Article 6 of the Law. In the view of the Constitutional Court, the applicant's allegations that the local self-management units are composed mainly of members of the Serb people and that the believers belonging to other religious groups fear that they would be deprived of their religious rights are seen to be prejudging a decision in an unacceptable manner. The Constitutional Court notes that challenged Article 6 of the Law regulates the disputed issues in a general manner and equally relates to all religious communities and other legal persons involved in funeral services. In addition, the authority of local self-management units as a public body regulating the disputed issues is restricted by the obligation to ensure „respect for religious norms and traditions". However, in the event that there is a specific case alleging that the Law has been applied in violation of the constitutional rights, the courts and the Constitutional Court, as the domestic court of last resort, will be in a position to provide appropriate protection. In view of the above, the Constitutional Court holds that the limitations on the right to freedom of religion under the challenged provisions of Article 6 of the Law correspond to a pressing social need in a democratic society and that there is a reasonable relationship of proportionality between the limitations and the legitimate aim pursued.

57. The Constitutional Court also points out that the applicant alleges that the provisions of Article 13 and 16 of the Law are in violation of the right to freedom of religion, as safeguarded by Article 9 of the European Convention. It is underlined that the cemeteries of religious communities, „as places where the souls of the deceased rest in peace", have an infinite value for believers and religious communities.

58. The Constitutional Court notes that challenged Article 13 of the Law stipulates that a disused cemetery or a part thereof may be used for other purposes determined by an adequate document of urban development of the local self-management unit after the period of mandatory rest of the grave (100 years) has ended. Article 14 of the Law stipulates that local self-management units will pay all costs incurred during the relocation of disused cemeteries or the parts thereof. Challenged Article 16 of the Law prescribes that where it is necessary for urban development and other justifiable reasons, the competent body of the local self-management unit may adopt a decision to relocate a disused cemetery or a part thereof before the period of mandatory rest of the grave has ended, but only 10 or 20 years after the date on which the last burial has taken place, as specified in the Law. Also, paragraph 3 of Article 16 of the Law stipulates that the local self-management unit is obliged to provide to the owner of the burial plot, in respect of which the period of mandatory rest of the grave has not expired, free of charge another burial plot in the same or in another cemetery with the same or approximately the same location conditions.

59. The Constitutional Court holds that the issues relating to the exhumation of the dead bodies buried in accordance with religious regulations and practice fall within the ambit of Article 9(1) of the European Convention (see, *op. cit.* Human Rights Chamber for BiH, *Dževad Mahmutović v. the Republika Srpska*, case no. CH/98/892). Furthermore, the Constitutional Court holds that the provisions of Articles 13 and 16 of the Law amount to a restriction, *i.e.* an interference with the rights safeguarded by Article 9(1) of the European Convention (the right to have the deceased's souls rest in peace, as specified by the applicant).

60. As to the question whether the mentioned restriction is in accordance with the law, the Constitutional Court concludes that the restrictions imposed by the challenged provisions of Articles 13 and 16 of the Law meet the requirement of lawfulness, since they are based on the Law that is adequately accessible and formulated with sufficient precision and clarity. In addition, the Constitutional Court has to establish whether the mentioned restriction of the guaranteed rights and freedoms is necessary to achieve one of the legitimate aims referred to Article 9(2) of the European Convention, *i.e.* whether the restriction corresponds to a pressing social need and whether there is a reasonable relationship of proportionality between the restriction and the legitimate aim pursued.

61. The Constitutional Court notes that in the present case the possibility of using the cemeteries, including the cemeteries owned by religious communities, for other purposes, as well as their relocation, is determined by an adequate document of urban development of the local self-management unit, where the public interest is established in accordance with the law. The Constitutional Court notes that the Urban Development and Building Law of the Republika Srpska sets forth that urban development and the adoption of urban development documents will be under jurisdiction of local self-management units (Articles 22 and 23) based on the urban development principles and arrangements determined by the law.

62. As to the case-law of the European Court, the Constitutional Court notes that the European Court, in the cases concerning the limitations under Article 9(2) of the European Convention, has consistently underlined that the Contracting States enjoy a certain margin of appreciation in planning matters. In the case of *Christian Religious Community v. Germany*, the European Court considered that the challenged decision, dismissing the request of the Christian Religious Community to authorise construction of the cemetery on its land, could be construed as a restriction of the right to manifest one's religion within the meaning of Article 9(2) of the European Convention in so far as the manner of burying the dead and cemetery layout represents an essential aspect of the religious practice of

the first applicant and its members. The domestic authorities justified their refusal to authorise construction of the cemetery on the basis of provisions relating to planning, environmental protection and services, and particularly by the fact that there was no other building in the zone in question. The European Court concluded that the restriction was justified in principle and proportionate to the aim pursued (protection of the rights and freedoms of others) and, accordingly, the interference was in conformity with Article 9(2) of the European Convention (see, ECtHR, *Christian Religious Community v. Germany (Johannische Kirche) v. Germany*, Application no. 41754/98, judgment of 10 July 2001). In the case of *Vergos v. Greece*, the applicant was not granted a permit to build a place of worship on land belonging to him. The applicant's request was rejected on the grounds that the erection or construction of such structures was not permitted by town planning and that the applicant was the sole member of the relevant religious community in his town. The planning authorities thus concluded that there was not a pressing social need to justify plan modifications in order to issue the permit to build the place of worship. The European Court considered whether the interference was „necessary in a democratic society" and established that the criterion applied by the domestic authorities, as regards the relationship of proportionality between the applicant's freedom to manifest his religion and the public interest for rational planning, could not be deemed to be arbitrary (see, ECtHR, *Vergos v. Greece*, Application No. 65501/01, judgment of 24 June 2004).

63. In the present case, the Constitutional Court notes that the general legal norm, equally relating to all the cemeteries, including those owned by religious communities, provides for the possibility of using the cemeteries for other purposes and their relocation for the purpose of urban development and where the public interest is established, with specific exceptions prescribed by law (the cemeteries that have cultural and historic status and natural resources). In addition, Article 14 of the Law provides for the possibility of relocation of a cemetery and development of grave plots at the expense of local self-management units. The Constitutional Court concludes that in the present case the restriction on the freedom to manifest one's religion corresponds to the pressing social need of urban development in order to meet the needs in the public interest. The Constitutional Court holds that the issues relating to the change of the purpose of cemetery areas and their relocation, as regulated by challenged Articles 13 and 16 of the Law, pursue the legitimate aims within the meaning of Article 9(2) of the European Convention (the protection of the rights of others) and that there is a reasonable relationship of proportionality between the limitation and the legitimate aim pursued.

64. In view of the above, the Constitutional Court concludes that the provisions of Articles 6, 13 and 16 of the Law are not in contravention of the freedom to manifest one's

religion under Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention.

Right to property

65. The applicant alleges that challenged Articles 13 and 16 of the Law and Article 6(1) item b) of the Law are in violation of the religious communities' right to property.

66. 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

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

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

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

67. The essence of challenged articles of the Law and allegations stated in the request require answers to the three questions that follow hereafter. First, may cemeteries owned by religious communities (special cemeteries under Article 7(3)(d) of the Law) be considered „property" within the meaning of Article 1 of Protocol No. 1 to the European Convention; second, if the said real properties may be considered property, do the challenged articles of the Law interfere with the right to property so as to include the protection of Article 1 of Protocol No. 1 to the European Convention; and third, if Article 1 of Protocol No. 1 to the European Convention is included, is the interference under the challenged articles of the Law justified under Article 1 of Protocol No. 1 to the European Convention?

68. As to the question whether the relevant cemeteries are considered property within the meaning of Article 1 of Protocol No. 1 to the European Convention, the Constitutional Court underlines that the notion of „property" implies a large scope of property interests to be protected (see judgment of the former European Commission for Human Rights, *Wiggins v. the United Kingdom*, Application No. 7456/76, published in *Decisions and Reports 13*, paragraphs 40-46 (1978)), which constitutes an economic value. In view of the above, the Constitutional Court holds that cemeteries owned by religious communities

referred to in Article 7(3)(d) of the Law, undoubtedly, constitute property within the meaning of Article 1 of Protocol No. 1 to the European Convention.

69. Challenged Articles 13 and 16 of the Law foresee the change of the purpose of cemetery areas and the possible relocation thereof. In the view of the Constitutional Court, the challenged Articles of the Law amount to an interference with the relevant rights *i.e.* deprive the religious communities as owners of the real properties (disused cemeteries) of their right to manage and dispose of their property, which, certainly, includes protection of Article 1 of Protocol No. 1 to the European Convention. A question arises in this regard as to whether the mentioned deprivation is justified under Article 1 of Protocol No. 1 to the European Convention, in terms of being prescribed by law and being in the public interest.

70. As to the third question, *i.e.* is the interference under the challenged Articles of the Law justified under Article 1 of Protocol No. 1 to the European Convention, the Constitutional Court recalls that according to the case-law of the European Court, 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 ECtHR, *Sporrong and Lönnorth v. Sweden*, judgment of 23 September 1982, Series A no. 52, paragraph 61; and *Scollo v. Italy*, of 28 September 1995, Series A, no. 315-C, paragraph 26 with further references). Any interference with the right under the second or the third rule must be provided for by law, must serve a legitimate goal, and must strike a fair balance between the right of the holder of the right and the public and general interest. In other words, justified interference may not be imposed solely by a legal provision which meets requirements of the rule of law and serves a legitimate goal in the public interest, but it also has to uphold a reasonable proportionality between the means used and the goal sought to be achieved, in order to avoid abuse. Interference with the right must not go beyond what is necessary to achieve a legitimate goal, and the owners of real property must not be subjected to arbitrary treatment and they must not be requested to shoulder excessive burden in achieving a legitimate goal. The right to property has been violated if the answer to either of the following questions is negative: is there interference with the right, and is control of use of property pursuant to law in place; is interference

for the sake of legitimate goal in the public or general interest; is there proportionality between means used and goal sought to be achieved?

71. Interference is lawful only if the law, which is the basis for interference, is (a) accessible to citizens, (b) is precise to such an extent as to allow citizens to determine their actions, (c) is in accordance with the principle of the legal state, which implies that freedom to make decisions which has been vested by law in the executive authority must not be unrestricted, for the law must provide adequate protection for citizens against arbitrary interference (see, ECtHR, *Sunday Times*, judgment of 26 April 1979, Series A, no. 30, paragraph 49; see also ECtHR, *Malone*, of 2 August 1984, Series A no. 82, paragraphs 67 and 68). In view of the above, the Constitutional Court points out that the relevant Law has been published in the official gazette and that its provisions, including the challenged provisions, are formulated with sufficient precision. The Constitutional Court notes that the challenged provisions of Articles 13 and 16 clearly prescribe the conditions under which it is possible to change the purpose of cemetery areas and to relocate cemeteries, as well as the rights of cemetery plot owners. The Constitutional Court concludes that the relevant Law meets the mentioned standards within the meaning of the European Convention.

72. As to the question whether the interference is in the public interest, the European Court expressed its position that the national authorities enjoy a wide margin of appreciation in making decisions related to depriving individuals of their property rights due to direct knowledge of society and its needs. A decision to seize property oftentimes involves consideration of political, economic and social issues, on which opinions in a democratic society may largely differ. Therefore, a judgment of national authorities shall be respected, unless it is manifestly ungrounded (see, ECtHR, *James et al.,* judgment of 21 February 1986, Series A no. 98, paragraph 46).

73. The Constitutional Court notes that the challenged provisions of Articles 13 and 16 of the Law foresee that a disused cemetery or a part thereof may be used for other purposes determined by an adequate document of urban development where the general interest is established. In addition, the Law prescribes specific exceptions for the cemeteries of cultural and historical significance. The Constitutional Court has already mentioned that the Urban Development and Building Law prescribes that urban development and the adoption of urban development documents will be under jurisdiction of local self-management units. All the said competences of the units of local self-government may be tracked down in the RS Constitution (Article 102), according to which a municipality, through its bodies and in accordance with the law, shall, among other things, adopt a development program, a town-planning document, regulate and provide for the use of construction land and business

premises, be responsible for the construction, and provide for the needs of citizens and social welfare. All of the provisions of the mentioned regulations clearly point out the need for interference on the part of the state with private property when it comes to general interest, and for the sake of realization of the said interest, it shall restrict the rights to property in an appropriate manner. To that end a principle of interference for the sake of the general interest raises a question of proportionality. Proportionality presupposes striking a fair balance between the owner of real property and the public interest.

74. In deciding on whether the challenged Articles of the Law have stricken a fair balance or a reasonable relationship of proportionality between the right of the owner of real property and the general interest, it is necessary for the Constitutional Court to consider two questions first and foremost. First, does the interference with the right go beyond what is necessary to achieve a legitimate goal? Second, do the challenged Articles of the Law impose on the owners of real property (disused cemeteries) an unfavourable treatment in comparison with others, in a sense that they are required to carry an excessive burden in achieving a legitimate goal?

75. As to the question relating to the necessary scope of interference with the rights, the Constitutional Court notes that the Law allows an „interference" only when it is determined by an adequate document of urban development where the general interest is established. The Constitutional Court notes that the constitutional competencies of local self-management units in the area of urban development are affirmed by the mentioned Urban Development and Building Law. Based on these laws and the Expropriation Law, local self-management units, by adequate documents of urban development, establish and realise the general interest issues relating to urban development. In view of the aforesaid facts, the Constitutional Court holds that there are no grounds to conclude that the legislator has interfered with the rights to a degree exceeding the degree necessary to achieve a legitimate goal in the present case.

76. As to the question regarding arbitrary treatment and imposition of excessive burden, the Constitutional Court notes that the provisions of Articles 13 and 16 of the Law equally relate to all cemeteries, including those owned by religious communities. In addition, the relevant Law provides for the possibility of relocation of a cemetery and development and maintenance of grave plots at the expense of local self-management units.

77. In view of the aforementioned provisions of the Law, the Constitutional Court holds that the interference with the rights of religious communities as owners of cemeteries is proportionate to the legitimate aim (to ensure urban development in respect of which a general interest is established, with exceptions applicable to the cemeteries that have

cultural and historic status). However, in the event that there is a specific case alleging that the Law has been applied in violation of the constitutional rights, the courts and the Constitutional Court, as the domestic court of last resort, will be in a position to provide appropriate protection.

78. Furthermore, the Constitutional Court points out that the applicant alleges that Article (6)(1), item b) (management, development and maintenance of cemeteries) is in violation of the right to property of religious communities. The Constitutional Court notes that paragraph 3 of Article 6 of the Law (stipulating that religious communities will determine the method of formation of prices and the reservation and sale of burial plots and the method of formation and payment of the cost of maintenance of the cemeteries) regulates the religious communities' rights that have a direct effect on religious communities' property. Taking into account that the applicant has failed to specify the reasons based on which the applicant alleges that Article (6)(1), item b) of the Law is in violation of the property rights and, in particular, in connection with the rights determined in paragraph 3 of Article 6 of the Law, the Constitutional Court decides that the allegations concerned are unfounded.

79. In view of the above, the Constitutional Court concludes that the challenged provisions of the Law are not in violation of the constitutional right to property referred to in Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

Law on Freedom of Religion and the Legal Status of Churches and Religious Communities

80. According to the applicant's allegations, there is a violation of Article III(3)(b) of the Constitution of Bosnia and Herzegovina, since the right to freedom of religion and the right to property of churches and religious communities are not respected in a consistent manner by Article 6(1), items a), b) and e) and Articles 13 and 16 of the Law, *i.e.* as established by Articles 14(1), item 2 and 12(2) of the Law on Freedom of Religion and the Legal Status of Churches and Religious Communities.

81. Article III(3)(b) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

b) The Entities and any subdivisions thereof shall comply fully with this Constitution …, and with the decisions of the institutions of Bosnia and Herzegovina …

82. The Constitutional Court notes that, generally speaking, the form of protection and restriction of freedom of religion in Bosnia and Herzegovina is defined by the Law on

the Freedom of Religion and the Legal Position of Churches and Religious Communities (*Official Gazette of BiH*, 5/04). This law, in addition to incorporating the provision of Article 9 of the European Convention, also elaborates the legal position of religious communities in the democratic and secular social system of Bosnia and Herzegovina.

83. The Constitutional Court also notes that, taking into account the content of the challenged provisions of the Law and the content of the aforementioned Articles of the Law on Freedom of Religion and the Legal Status of Churches and Religious Communities, Article 12(2) (*Churches and religious communities may own property and property rights, which they shall be free to use and administer*) and Article 14(1) item 2 (*The state shall not have the right to interfere in the affairs and internal organization of churches and religious communities*), the challenged provisions of the Law do not raise an issue in respect of the general right of churches and religious communities to possess property, nor do they raise an issue in respect of the affairs and internal organization of churches and religious communities. Accordingly, the Constitutional Court concludes that the applicant's allegations that the challenged provisions of the Law are inconsistent with the Law on Freedom of Religion and the Legal Status of Churches and Religious Communities are ill-founded.

VII. Conclusion

84. The Constitutional Court concludes that the provisions of Article 6, items a), b) and e) and Articles 13 and 16 of the Law on Cemeteries and Funeral Services (*Official Gazette of the Republika Srpska*, 31/13 and 6/14) are in conformity with Article II(3)(g), II(3)(k) and III(3)(b) of the Constitution of Bosnia and Herzegovina.

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

86. Given the decision of the Constitutional Court in this case, there is no need to consider separately the applicant's request for an interim measure.

87. 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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Case No. U 14/12

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina at the time of filing the request, for review of the constitutionality of the following provisions:

Article 80(2)(4), (Item 1(2) of the Amendment LXXXIII) and Article 83(4) of the Constitution of the Republika Srpska (Item 5 of the Amendment XL as amended by Item 4 of the Amendment LXXXIII),

Article IV.B.1, Article 1(2) (amended by the Amendment XLI) and Article IV.B.1, Article 2(1) and (2) (amended by the Amendment XLII) of the Constitution of the Federation of Bosnia and Herzegovina, and

Articles 9.13, 9.14, 9.15, 9.16, 12.1, 12.2 and 12.3 of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13 and 7/14)

Decision of 26 March 2015

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

Ms. Valerija Galic, 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. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina at the time of filing the request**, in case no. **U 14/12**, at its session held on 26 March 2015, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Mr. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina at the time of filing the request, is partly granted.

It is hereby established that Article 80(2)(4) (Item 1(2) of the Amendment LXXXIII) and Article 83(4) (Item 5 of the Amendment XL as amended by Item 4 of the Amendment LXXXIII) of the Constitution of the Republika Srpska, Article IV.B.1, Article 1(2) (amended by the Amendment XLI) and Article IV.B.1, Article 2(1) and (2) (amended by the Amendment XLII) of the Constitution of the Federation of Bosnia and Herzegovina, and Articles 9.13, 9.14, 9.16 and 12.3 of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05,

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52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13 and 7/14) are not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The request for review of the constitutionality of Articles 9.15, 12.1 and 12.2 of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13 and 7/14) lodged by Mr. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina at the time of filing the request, is hereby dismissed as ill-founded.

It is hereby established that Articles 9.15, 12.1 and 12.2 of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13 and 7/14) are in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 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 23 November 2012, Mr. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina at the time of filing the request („the applicant"), lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of the following provisions:

- *Article 80(2)(4), (Item 1(2) of the Amendment LXXXIII) and Article 83(4) of the Constitution of the Republika Srpska (Item 5 of the Amendment XL as amended by Item 4 of the Amendment LXXXIII),*

- Article IV.B.1, Article 1(2) (amended by the Amendment XLI) and Article IV.B.1, Article 2(1) and (2) (amended by the Amendment XLII) of the Constitution of the Federation of Bosnia and Herzegovina, and

- Articles 9.13, 9.14, 9.15, 9.16, 12.1, 12.2 and 12.3 of the Election Law of Bosnia and Herzegovina (Official Gazette of BiH, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13 and 7/14 - „the Election Law").

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the Parliamentary Assembly of BiH, the House of Representatives and the House of Peoples, the National Assembly of the Republika Srpska („the National Assembly"), the Parliament of the Federation of Bosnia and Herzegovina, the House of Representatives and the House of Peoples, were requested on 14 January 2013 and on 6 December 2012 to submit their respective replies to the request.

3. 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") was requested on 21 February 2013 to submit its expert opinion in writing in relation to the respective request.

4. The Constitutional-Legal Committee of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina („the Constitutional-Legal Committee") submitted its reply to the request on 14 February 2013 and the National Assembly did so on 21 December 2012.

5. The Parliament of the Federation of Bosnia and Herzegovina failed to submit its reply to the request.

6. The Office of the High Representative submitted its opinion in relation to the respective request on 16 April 2013.

7. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were transmitted to the applicant on 8 May 2013.

8. At the Plenary session held on 5 July 2013 the Constitutional Court decided to hold a public hearing in this case. The public hearing was held on 29 November 2013.

III. Request

a) Allegations from the Request

9. The applicant holds that the challenged provisions of the Constitutions of the Entities and of the Election Law are not in conformity with Article 1 of Protocol No. 12 to the European Convention; Article II(4) of the Constitution of BiH in conjunction with the International Convention on the Elimination of All Forms of Racial Discrimination and its Article 5, as well as the International Covenant on Civil and Political Rights and its Articles 2, 25 and 26; Article 14 in conjunction with Article 3 of Protocol No. 1 to the European Convention.

10. The applicant noted that the Constitution of Bosnia and Herzegovina differentiates between „the constituent peoples" (persons who declare themselves as Bosniacs, Croats and Serbs) and the „Others" (members of ethnic minorities and persons who do not declare themselves as members of any group because of the mixed marriages, mixed marriages of their parents or for other reasons). However, only the persons who declare themselves as members of one of „the constituent peoples" may run for office of the President or Vice-Presidents of the Republika Srpska (the RS") and of the Federation of Bosnia and Herzegovina („the FBiH").

11. The applicant holds that the challenged constitutional provisions of the Entities, according to which the Presidents and Vice-Presidents must come from among the constituent peoples (explicit provisions when considered in the light of the Election Law), constitute a violation of the Constitution of Bosnia and Herzegovina and the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") in relation to the members of „Others". Besides, the applicant holds that the challenged provisions are contrary to the Decision of the European Court of Human Rights in the case of *Sejdić and Finci* (see, the European Court, *Sejdić and Finci v. Bosnia and Herzegovina, Applications nos. 27996/06 and 34836/06, Judgment of 22 December 2009*), since they make it impossible for „Others" to participate equally in the exercise of these public functions. In that respect, the applicant noted that the state of Bosnia and Herzegovina, in the process of preparations for becoming a member of the Council of Europe in 2002, and when signing the Stabilization and Association Agreement with the European Union in 2008, assumed an obligation to review the election legislation in the light of the norms of the Council of Europe and to make amendments where necessary (see the Opinion 234 2002, the Parliamentary Assembly of the Council of Europe, dated 22 January 2002, paragraph 15(iv)(b)), that is to say to „make amendments to the election legislation in respect of the number of the Members of the BiH Presidency and the

number of Delegates in the House of Peoples in order to secure full compatibility with the European Convention and the post-accession obligations towards the Council of Europe" (see Annex to the Decision of the Council 2008/211/EU, of 18 February 2008, on the principles, priorities and conditions contained in the European Partnership with BiH and the annulment of the Decision 2006/55/EU, *Official Gazette of the EU*, L80/21(2008)).

12. The applicant noted that the central objective of the General Framework Agreement for Peace and of the Constitution of Bosnia and Herzegovina is the prohibition of discrimination. In that respect he referred to Article II(4) of the Constitution of Bosnia and Herzegovina, which guarantees all persons the enjoyment of rights and freedoms without discrimination under Article II as well as under 15 international instruments enumerated in the Annex I to the Constitution of Bosnia and Herzegovina, which also make up a part of the Constitution of Bosnia and Herzegovina. The applicant holds that these constitutional provisions have priority over the law of the State and the Entities, which include all the laws as well as the Constitutions of the Entities.

13. The applicant holds that the existence of differential treatment and analogous situation in the challenged provisions of the Entities' Constitutions and the Election Law is reflected in the fact that each person is guaranteed the right to run for office in the elections without discrimination, but that, in accordance with the challenged provisions of the Entities' Constitutions and the Election Law, the persons not belonging to the constituent peoples cannot appear on the lists of candidates for the President and Vice-Presidents, that is to say such persons are prevented from running for any of the mentioned offices.

14. The applicant further mentions that such solutions do not have objective and reasonable justification. One cannot accept the argumentation that such solutions are acceptable given the specific quality of BiH and its ethnic composition, because it neglects the existence of the citizens who are not members of any of „the constituent" peoples. Such a situation in a multiethnic society with a high level of normative human rights protection is incompatible with the constitutional principles referred to in Article II of the Constitution of Bosnia and Herzegovina, the European Convention, Annex I to the Constitution of Bosnia and Herzegovina and the Judgment in the case of *Sejdić and Finci*. In this respect, the applicant cited extensively the positions of the European Court taken in the case of *Sejdić and Finci*, *inter alia*, the following: „In the present case, bearing in mind the applicants' active participation in the public life, it was totally justified for the applicants to consider running for office in the House of Peoples and the Presidency. The applicants may therefore claim to be the victims of the alleged discrimination. The fact that the respective case raises the issue of the compatibility of the national Constitution with the Convention is irrelevant in this regard (see, by analogy, *Rekvény v. Hungary*

[GC], no. 25390/94, ECHR 1999-III). Notwithstanding the fact that they are the citizens of Bosnia and Herzegovina, the applicants are denied all rights to stand for election to the House of Peoples and the Presidency on the grounds of their racial/ethnic background (the Court held the discrimination on ethnic ground to be a form of racial discrimination in the case of *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII)".

15. The applicant holds that the challenged provisions of the Entities' Constitutions and the Election Law essentially establish a situation identical to that considered in the case of *Sejdić and Finci,* which exists at the BiH level. Namely, both cases concern the exercise of the right to stand for election to the executive authority bodies, which right is denied to each and every person not declaring themselves as members of one of the constituent peoples. Therefore, in his opinion, the reasoning of the judgment in the case of *Sejdić and Finci* can be applied also to the particular situation, as practical effects are identical for the persons not belonging to the constituent peoples. Through this conduct, in the applicant's opinion, BiH and both of its Entities engage in discrimination against their citizens who have the right to stand for election under Article 3 of Protocol No. 1 to the European Convention, 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 the International Convention on the Elimination of All Forms of Racial Discrimination and its Article 5, as well as the International Covenant on Civil and Political Rights and its Articles 2, 25 and 26 and Article 14 of the European Convention in conjunction with Article 3 of Protocol No. 1 to the European Convention.

b) Replies to request

b)1. National Assembly

16. The National Assembly noted that the particular case did not concern the review of constitutionality of the articles of the RS Constitution and the Election Law, but the review of compatibility of those articles with Article 3 of Protocol No. 1, Article 14 of the European Convention and Article 1 of Protocol No. 12, so that it would provide the reply to request with regards to the applicability and admissibility of the mentioned articles of the European Convention and Protocols thereto.

17. The National Assembly noted that Article 3 of Protocol No. 1 to the European Convention may be applied only in cases concerning the election of legislature, and the positions of the President and Vice-Presidents of the RS fall, neither by their function nor by their powers, within the scope of legislature. Bearing in mind that Article 14 of the European Convention is not independent, rather it may be applied solely in connection

with the enjoyment of rights and freedoms ensured by the European Convention, Article 14 is not applicable in the present case.

18. Further, according to the National Assembly, the respective request is inadmissible, because the issue of national affiliation of an individual as a condition for running for public office, which was raised precisely in the respective request, is the subject of deliberation in another five cases pending before the European Court. Besides, the judgment in the case of *Sejdić and Finci* has not been implemented even three years after its adoption and it is uncertain when and how it will be implemented. Due to the mentioned circumstances, the National Assembly holds that entering into the merits of the request by the Constitutional Court would constitute the prejudging of the manner of implementation of the judgment in the case of *Sejdić and Finci*. The National Assembly also holds that the challenged provisions of the Entities' Constitutions and of the Election Law are in conformity with the Constitution of BiH which is still in force, so that granting the request would open the issue of compatibility of the Entities' Constitutions with the Constitution of BiH, whereby the legal system of BiH, as well as its state and legal organization, would be called into question in their entirety. For all the aforementioned reasons, the National Assembly points out that the request is inadmissible for being premature.

Further, in support of the inadmissibility of the request, the National Assembly stated that the Constitutional Court had already decided in the case no. *AP 2678/06* (see, the Constitutional Court, Decision on Admissibility and Merits no. *AP 2678/06* of 29 September 2006, available at www.ccbh.ba), on the issue of ethnicity as a condition for running for public office, thus by entering into the merits of the respective request the Constitutional Court would act contrary to the legal principle of deciding the same matter again. It was noted that this could result in the revision of the positions already taken and in the conduct contrary to the case-law of the Constitutional Court. Besides, the National Assembly stated that the challenged provisions of the RS Constitution were the result of the implementation of the Third Partial Decision of the Constitutional Court no. *U 5/98* („the Decision on Constitutionality"), so by entering into the review thereof, as the applicant requested, the Constitutional Court would enter into the review of the mentioned decision. Besides, the National Assembly noted that the challenged constitutional solutions were imposed by the decision of the High Representative, and as the applicant insisted on the review of the challenged provisions in conjunction with the international documents, the Constitutional Court would enter into the review of compatibility of the decisions of the High Representative with the international documents.

19. Next, the National Assembly stated that, if the Constitutional Court, despite the objection to inadmissibility, entered nevertheless into the decision-making on the merits

of the request, it was appropriate to give a reply only in relation to Article 1 of Protocol No. 12 in conjunction with Article II(4) of the Constitution of Bosnia and Herzegovina. The challenged constitutional and legal provisions are the direct consequence of the implementation of the Decision on Constitutionality, and of amendments imposed by the High Representative. Before the adoption of the Decision on Constitutionality the provisions of the RS Constitution did not contain an ethnic determinant, however the Decision on Constitutionality rated such a situation as a „systematic, long-term, intentional discriminatory practice of the public authorities of the RS". In accordance with that decision, and according to the Decision of the High Representative, the RS Constitution was amended, which made the declaration of belonging to one of the constituent peoples a condition for one to run for one of these offices. Prior to the amendments, the provisions of the RS Constitution did not have any discriminatory feature and were replaced by the challenged provisions introduced indirectly by the Constitutional Court, which the applicant considers discriminatory. The respective request creates an absurd situation, especially when one bears in mind that these provisions ought to be considered again by the Constitutional Court.

20. In addition, the National Assembly recalls the position of the European Court that in the period of political turmoil the public authorities need time to reassess the measures necessary for the preservation of the achieved stability and the assessment of the needs of their society (see, the European Court, *Zdanoka v. Latvia* [GC], no. 58278/00, paragraph 131, ECHR 2006-IV), and that it is up to the Member State to set the course of its democratic development, whereby they must be considerate of the differences in historical development, cultural diversity and differences in political thought (see, the European Court, *Hirst v. the United Kingdom (no. 2),* no. 74025/01, paragraph 61, ECHR 2005-IX). The National Assembly refers to the position of the Constitutional Court stating that a differential treatment does not constitute *a priori* discrimination, but one can talk about the existence of discrimination only in cases where the differential treatment lacks objective and reasonable justification. In this respect it was noted that the Decision on Admissibility and Merits no. *AP 2678/06* analyzed the justification of constitutional restrictions, according to which the appellant, on account of his ethnicity/nationality, was unable to run for office of a Member of the Presidency, and that the Constitutional Court concluded that such a restriction was reasonable, justified and proportionate, that is to say that the restriction was proportionate to the objective of the social community at large, in terms of the preservation of the established peace and the continuation of a dialogue.

21. According to the National Assembly there is no basis for one to take a different position in the particular case, all the more so that all the alleged restrictions were the

result of the Decision on Constitutionality and the Decision of the High Representative on Amendments to the RS Constitution of 25 April 2002, and not of the arbitrariness on the part of the domestic authorities. Besides, ethnic minorities have been represented in the work of the legislature bodies (the number of their representatives exceeds their percentage in the population figures), and that within those bodies, as the legislative ones, they can affect the amendments to the regulations which the applicant challenges, which indeed is the essence and the goal of the democratic process of decision-making. In this respect, there was a reference to the position of the European Court that the state was entitled to apply the measures ensuring the stability of the order in the country even when they constitute restriction or total exclusion from the participation in the exercise of public affairs for a certain category defined by ethnic/national affiliation (see, the European Court, *Sadak and Yumak v. Turkey,* Case no. 10226/03 of 8 July 2008).

22. The National Assembly proposed that the Constitutional Court adopt a decision granting the preliminary objections, and declaring inapplicable Article 3 of Protocol No. 1 in conjunction with Article 14 of the European Convention, and declaring the rest of the respective request inadmissible. Should the Constitutional Court decide to enter into the merits, the National Assembly proposed that the request be dismissed, *i.e.* that it be established that there is no discrimination in relation to the provisions of the Constitution of the RS and of the Election Law.

2. Constitutional-Legal Committee

23. The Constitutional-Legal Committee stated that, following the discussion, it supported the request by four votes „in favor", three votes „against" and none abstained.

c) Opinion given in the capacity of *amicus curiae*

24. The Opinion indicated that certain provisions, which the applicant challenges, were issued by the High Representative without ever getting adopted thereafter by the relevant legislative bodies, however according to the case-law of the Constitutional Court in the Decision no. 9/00 of 3 November 2000, the High Representative is not against the review of amendments to the Entities' Constitutions to be done by the Constitutional Court.

25. Further, the chronology of events was indicated and so was the procedure of the implementation of the Decision of the Constitutional Court no. *U 5/98*, as well as the Agreement on various elements necessary for the implementation of the Third Partial Decision no. *U 5/98* of 27 March 2002. The said Agreement contained the provision

concerning the distribution of the positions of the President and Vice-Presidents of the Entities among the constituent peoples, as follows: *the President of the Entity shall have two Vice-Presidents coming from among different constituent peoples. They shall be elected according to the Entities' Constitutions*. The emphasis was more on ensuring the equitable distribution of these positions among the constituent peoples with the aim of achieving viable power-sharing arrangements, rather than on ensuring a system that would give equal chances to all candidates regardless of their ethnic background. The said provision was therefore seen as a prohibition to the representatives of the constituent peoples to hold more than one of the three positions, rather than a prohibition for the representatives of Others to hold any of those positions. However, it was noted that a strictly literal interpretation of the said provision referred to in the Agreement leaves no room for a conclusion that the representatives of Others may hold those positions.

26. Furthermore, it is indicated in the Opinion that the differential treatment between the persons belonging to the group of Others and the persons belonging to the constituent peoples is evident in the legal provisions that are challenged. Therefore, in the specific and fairly exceptional conditions prevailing in BiH, not only at the time of the enactment of amendments, but most importantly in the present, a question arises as to whether such differential treatment may be justified. The distribution of posts in the Entities' Presidencies among the constituent peoples was the central element of the implementation of the Decision of the Constitutional Court no. 5/98, which required the Entities to amend their Constitutions in order to ensure the full equality of the constituent peoples. Also, this Agreement on the power-sharing was a central tenet of the General Framework Agreement for Peace which made peace in Bosnia and Herzegovina possible. In that respect, it was noted that the Venice Commission, in its opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative, stated the following: *(...) In such a context it is difficult to deny the legitimacy to norms which may be problematic from the point of view of non-discrimination, but necessary to achieve peace and stability and to avoid further loss of human lives. The inclusion of such rules in the text of the Constitution at that time, therefore, does not deserve criticism, even though they run counter to the general thrust of the Constitution aiming at preventing discrimination (...)* However, it was noted that the Venice Commission also pointed out the following: *(...) This justification has to be considered, however, in the light of developments in BiH since the entry into force of the Constitution. BiH has become a member of the Council of Europe and the country has, therefore, to be assessed according to the yardstick of common European standards. It has now ratified the European Convention on Human Rights and its Protocol No. 12. As set forth above, the situation in BiH has evolved in a positive sense, but there remain circumstances requiring a political system that is not a*

simple reflection of majority rule, but one which guarantees the distribution of power and positions among ethnic groups. It therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups (...).

27. Also, the Opinion pointed out that the enactment of amendments relied on the assumption that a certain degree of interference with the rights to stand for elections could have been justified in the light of the margin of appreciation given to states. In that regard references were made to the positions of the European Court, according to which the states were left a particularly wide margin of appreciation in the area of electoral legislation (see, the European Court, *Mathieu-Mohin and Clerfazat v. Belgium* of 2 March 1987 and *Melnychenko v. Ukraine* of 19 October 2004). The aim being pursued, in particular the implementation of a decision of the Constitutional Court recognizing „the constitutional principle of collective equality of the constituent peoples arising from the designation of Bosniacs, Croats and Serbs as constituent peoples", which „prohibits any special privileges for one or two of these peoples, any domination in the governmental structures and any ethnic homogenization through segregation based on territorial separation" (Decision of the Constitutional Court no. 5/98), supports that conclusion.

28. Moreover, it is pointed out that the Office of the High Representative has no intention to determine whether such an interference is also justified in 2013 nor is it its obligation to do so. In that regard a reference was made to the position of the Constitutional Court in the Decision no. *U 9/09* reading that it is on the Constitutional Court to decide whether there exists an objective and reasonable justification in each individual case within the meaning of Article II(4) of the Constitution of Bosnia and Herzegovina. Finally, it is pointed out that the legal situation in respect of the issue raised before the Constitutional Court has changed, particularly so in the light of the entry into force of Protocol No. 12, which expands the scope of protection to „all the rights set forth by law", which introduces a general prohibition of discrimination.

IV. Public Hearing

29. Pursuant to Article 46 of the Rules of the Constitutional Court, at the plenary session held on 5 July 2014 the Constitutional Court decided to hold a public hearing to discuss the relevant request. Pursuant to Article 47(3) of the Rules of the Constitutional Court, at the plenary session held on 27 September 2013 the Constitutional Court decided to summon the following representatives to the public hearing: the representative of the applicant, the Parliamentary Assembly of BiH, the National Assembly, the Council of Peoples of the Republic Srpska („the Council of Peoples"), the Parliament of F BiH, the

Office of the High Representative, the Helsinki Committee for Human Rights in BiH, the Faculty of Law of the University in Sarajevo, the Faculty of Law of the University in Mostar, the Faculty of Law of the University „Dzemal Bijedic" Mostar and the Faculty of Law of the University in Banjaluka. On 29 November 2013 the Constitutional Court held the public hearing attended by the representatives of the National Assembly (the members of the commission for constitutional issues), the representative of the Council of Peoples (the employee of the Legal Office), the representatives of the Bosniac Caucus in the Council of Peoples, the representative of the Helsinki Committee for Human Rights in BiH, the representative of the Faculty of Law in Sarajevo and the Faculty of Law of the University in Mostar.

30. The representatives of the National Assembly presented their arguments which were mainly within the frame of the response to the request. The representative of the Council of Peoples presented the objection relating to the applicability of Article 3 of Protocol No. 1 and prematurity of the request in question as the decision of the European Court of Human Rights in the case of *Sejdić and Finci* had not been implemented yet. According to the standpoint of the Council of Peoples, by considering the merits of the request the Constitutional Court would review the decision *U 5/98*, *i.e.* it would engage in reviewing the decision of the High Representative, whereby it would engage in reviewing the compatibility of the decisions of the High Representative with the relevant provisions of the European Convention and its Protocols.

31. The representatives of the Bosniac Caucus in the Council of Peoples analyzed the provisions of the Constitution of Bosnia and Herzegovina and challenged provisions of the Entity laws and pointed out that those provisions were restrictive as they provide only for the members of the constituent people to stand as candidates for the mentioned positions. They concluded that the request was well-founded and that the challenged provisions should be declared unconstitutional.

32. The representative of the Helsinki Committee supported the request pointing out that the request served the purpose of building the principle of equality of all peoples in BiH and expressed his expectations that the Constitutional Court, when deciding the request in question, would be in „line" with introduction of this principle.

33. The representative of the Faculty of Law of the University in Sarajevo pointed out that the request raised essentially the same issue as the one raised in the case of the European Court of Human Rights *Sejdić and Finci v. Bosnia and Herzegovina*. Therefore, the challenged provisions are in contravention of the European Convention and international documents applicable in BiH.

IV. Relevant Law

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

Article 80(2)(4)

The President shall have two Vice-Presidents from among different constituent peoples

(Item 1(2) of the Amendment LXXXIII).

Article 83(4)

The President of the Republic and Vice-presidents of the Republic shall be directly elected from the list of the candidates for the President of the Republika Srpska so that a candidate who wins the highest number of votes shall be elected President while the Vice-presidents shall be elected candidates from the other two constituent peoples who win the highest number of votes after the elected President of the Republic.

(Item 5 of the Amendment XL as supplemented with Item 4 of Amendment LXXXIII)

35. The **Constitution of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 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), in its relevant part, reads:

Article IV.B(1) Article 1(2)

(2) The President of the Federation shall have two Vice-Presidents who shall come from different constituent peoples. They shall be elected in accordance with this Constitution.

(amended by Amendment XLI)

Article IV.B(1) Article 2(1) and (2)

(1) In electing the President and two Vice-presidents of the Federation, at least one third of the delegates of the respective Bosniac, Croat or Serb caucuses in the House of Peoples may nominate the President and two Vice-presidents of the Federation.

(2) The election for the President and two Vice-presidents of the Federation shall require the joint approval of the list of three nominees, by a majority vote in the House

of Representatives, and then by a majority vote in the House of Peoples, including the majority of each constituent people's caucus.

(amended by Amendment XLII)

36. The **Election Law of BiH** (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32 /10 and 18/13 and 7/14), in its relevant part, reads:

CHAPTER 9A

PRESIDENT AND VICE- PRESIDENT

OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

Article 9.13

In election of the President and Vice-Presidents of the Federation of Bosnia and Herzegovina, at least one third of the delegates of the constituent peoples' caucuses to the House of Peoples of the Federation shall nominate delegates for the office of the President and Vice-Presidents.

Article 9.14

(1) The joint slates for the office of President and Vice-Presidents of the Federation of Bosnia and Herzegovina shall be formed from among the candidates referred to in Article 9.13.

(2) The House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina shall vote on one or several joint slates composed of three candidates including one candidate from among each constituent people. The slate which receives the majority of votes in the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina shall be elected if it gets majority of votes cast in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina including majority of votes of each constituent peoples' caucuses.

Article 9.15

If the joint slate presented by the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina does not receive the necessary majority in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, this procedure will be repeated. If in the repeated procedure the joint slate which receives majority of votes in the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina is rejected again in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina that joint slate shall be considered to be elected.

Article 9.16

The delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina from the rank of Others may participate in the election of candidates for the President and Vice-President of the Federation of Bosnia and Herzegovina. However, on this occasion, no caucus of Others shall be formed and their vote shall not be counted in calculating the specific majority in the caucuses of the constituent peoples.

CHAPTER 12

PRESIDENT AND VICE- PRESIDENT OF REPUBLIKA SRPSKA

Article 12.1

The President and two Vice-Presidents of Republika Srpska shall be directly elected from the territory of Republika Srpska by voters registered in the Central Voting Register to vote for Republika Srpska.

Article 12.2

A voter registered in the Central Voting Register to vote in the elections for the President of the Republika Srpska may vote for one candidate only.

Article 12.3

The candidate from each constituent people receiving the highest number of votes shall be elected. Among these three (3) candidates, one from each constituent people, the candidate receiving the highest number of votes shall be elected President, and the two candidates receiving the second and third highest number of votes shall be elected Vice Presidents.

V. Admissibility

37. 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 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.

38. In the particular case the request was filed by Mr. Željko Komšić, a Member of the Presidency of Bosnia and Herzegovina. Bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court notes that the respective request is admissible, as it was filed by an authorized entity, and that there is not a single reason whatsoever under Article 19 of the Rules of the Constitutional Court rendering this request inadmissible.

VI. Merits

39. The applicant holds that the challenged provisions of the Constitutions of the Entities and of the Election Law are not in conformity with: Article 1 of Protocol No. 12 to the European Convention; Article II(4) of the Constitution of BiH in conjunction with the International Convention on the Elimination of All Forms of Racial Discrimination and its Article 5, and the International Covenant on Civil and Political Rights and its Articles 2, 25 and 26; as well as the international instruments referred to in Annex I to the Constitution of BiH and Article 14 in conjunction with Article 3 of Protocol No. 1 to the European Convention.

40. In the first part the Constitutional Court will provide the answers to the objections raised by the National Assembly in connection with the respective request.

41. The National Assembly holds that the respective request primarily raises the issue of compatibility of the challenged provisions with the European Convention, and that the European Court has five cases pending, which raise the issue of the national/ethnic affiliation of an individual as a condition for running for public office. In that respect the decision-making on the merits would imply the overlapping of the jurisdiction between the European Court and the Constitutional Court in the cases having the same legal grounds. The Constitutional Court does not accept the mentioned objection. Namely, the respective request raises the issue of compatibility of the challenged provisions with Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12. Further, in accordance with Article VI(3)(a) of the Constitution of BiH, the Constitutional Court shall have exclusive

jurisdiction to review the compatibility of the Entities' Constitutions and laws with the Constitution of BiH. On the other hand, the European Convention has emerged as an expression of the concurrence of the states to secure in their respective territory rights and freedoms provided therein for all who come under their jurisdiction. Therefore, the system of human rights protection refers, first and foremost, to the protection of human rights at the national level. The protection exercised through the Convention mechanisms has a subsidiary character. Therefore, the fact that an issue, which falls within the jurisdiction of the Constitutional Court in accordance with the constitutional competencies, or within the jurisdiction of the European Court in accordance with the European Convention, may be raised simultaneously before both courts does not restrict and exclude the competencies of the Constitutional Court referred to in the mentioned provision of the Constitution of BiH, given that the protection of human rights must be primarily secured at the national level.

42. The National Assembly notes that the respective request should be rejected as premature given that the decision-making on it would prejudge the implementation of the decision of the European Court in the case of *Sejdić and Finci* and the outcome of the constitutional and legal reform of the Constitution of BiH which is in progress. The Constitutional Court does not accept this objection. Namely, the Constitutional Court indicates that the subject of „the dispute" before the European Court were the provisions of the Constitution of BiH on the election of the Members of the Presidency of BiH and the Delegates to the House of Peoples of the Parliamentary Assembly of BiH. The respective request raises the issue of compatibility of the provisions of the Entities' Constitutions and of the Election Law on the election of the President and Vice-Presidents of the Entities with the Constitution of BiH and the international documents applicable in BiH. The Constitution of BiH does not contain a single provision whatsoever regulating the election to the mentioned offices. As the applicant has referred to Article II(4) which, according to Article X(2) of the Constitution of BiH, may not be amended in any case, the Constitutional Court holds that there is no obstacle for considering the compatibility of the challenged provisions with the Constitution of BiH, that is Article II(4) of the Constitution of BiH.

43. In that respect, the possible amendments to the Constitution of BiH in the wake of the implementation of the decision in the case of *Sejdić and Finci* in no way limit or prevent the Constitutional Court from considering the respective request and the compatibility of the challenged provisions with the Constitution of BiH, in particular with Article II(4), which, according to Article X(2) of the Constitution of BiH, may not be amended in any case.

44. Furthermore, the National Assembly holds that the respective request raises the identical issue on which the Constitutional Court has already decided in the decision no. *AP 2678/06* cited above. The Constitutional Court does not accept this objection. In the mentioned case the Constitutional Court examined the *restriction* imposed in relation to the standing for election of *the constituent peoples to the office of the Members of the Presidency of BiH*, considering their national/ethnic affiliation and the Entity they come from, which was established by the Election Law consistent with the solutions set forth in Article V of the Constitution of BiH. However, the respective request raises the issue of *the exclusion of „Others" from the running for office of the President and Vice-Presidents of the Entities*, as established by the challenged provisions of the Entities' Constitutions and, as such, in line with the Election Law.

45. The National Assembly points out that the challenged provisions of the Constitutions of the Entities are the result of the implementation of the Third Partial Decision no. *U 5/98* (see, the Constitutional Court, Partial Decision no. *U 5/98 III* of 1 July 2000, published in the *Official Gazette of BiH*, 23/00), so by reviewing it the Constitutional Court would enter into the review of its own decision. The Constitutional Court does not accept this objection. Namely, it is indisputable that the challenged provisions of the Entities' Constitutions and the Election Law arose from the implementation of the Third Partial Decision no. *U 5/98,* which promoted the constitutional principle of equality of the three constituent peoples throughout BiH, and, in that respect, the distribution of public offices among the constituent peoples. However, the Third Partial Decision no. *U 5/98* did not address the rights of „Others", and the respective request raises precisely the issue of participation of „Others" in the distribution of the public offices thereby ensuring the guarantees under Article II(4) of the Constitution of BiH. Besides, the respective request must be considered also in connection with the changes that have followed after the adoption of the Decision no. *U 5/98*, first and foremost, that BiH has become a full-fledged member of the Council of Europe, that it has ratified the European Convention and Protocols thereto, and that it has ratified Protocol No. 12 which introduces the general prohibition of discrimination.

46. Furthermore, the National Assembly holds that the challenged provisions were imposed as constitutional solutions by the decision of the High Representative, and that by reviewing them the Constitutional Court would, considering the allegations made in the request for review of the compatibility with the European Convention and the International Convention on the Elimination of All Forms of Racial Discrimination, enter into reviewing the compatibility of the decisions of the High Representative with the international documents. The Constitutional Court does not accept the mentioned objection. Namely,

as already stated in this decision, the respective request raises the issue of compatibility of the challenged provisions with Article II(4) of the Constitution of BiH. The Constitutional Court recalls that where the High Representative intervenes in the legal system of Bosnia and Herzegovina, substituting the domestic authorities, they act as an authority of Bosnia and Herzegovina, and the laws they enact have the nature of domestic laws, and must, therefore, be considered the laws of Bosnia and Herzegovina, which conformity with the Constitution of Bosnia and Herzegovina is subject to the control by the Constitutional Court (see the Constitutional Court, Decision no. *U 9/00* of 3 November 2000, published in the *Official Gazette of BiH*, 1/01, Decision no. *U 16/00* of 2 February 2001, published in the *Official Gazette of BiH*, 13/01 and Decision no. *U 25/00* of 23 March 2001, published in the *Official Gazette of BiH*, 17/01).

47. The National Assembly points out that the challenged provisions of the Entities' Constitutions and the Election Law are in conformity with the Constitution of BiH, which is in force and, if the request were granted, an issue of compatibility of the Entities' Constitutions with the Constitution of BiH would be raised, whereby the legal system of BiH as well as its state and legal organization in their entirety would be called into question. The Constitutional Court does not accept the mentioned objection. Namely, it is indisputable that the challenged provisions of the Entities' Constitutions and the Election Law reflect the identical principle as the provisions of the Constitution of BiH (*Article V of the Presidency of BiH*), which, just as the challenged provisions, exclude the possibility for „others" to stand for election to one of the mentioned offices. In addition, it is indisputable that the Constitutional Court, in its case-law, decided the request relating to the issue of compatibility of the provisions of the Constitution of BiH with Article 14 of the European Convention and Article 3 of Protocol No. 1 to the European Convention (*U 5/04*). The Constitutional Court concluded that that did not concern „the dispute arising under this Constitution" within the meaning of Article VI(3) of the Constitution of BiH, but a possible conflict between the national and the international law, that is to say that the rights referred to in the European Convention cannot have a superior status in relation to the Constitution of BiH, given the fact that the European Convention entered into force on the basis of the Constitution of BiH. Also it is indisputable that the Constitutional Court decided the request raising the issue of compatibility of the provisions of the Election Law (the exclusion of the possibility for „Others" to run for office of the Members of the Presidency of BiH) on the standing for election as Members of the Presidency of BiH with Article 3 of Protocol No. 1 to the European Convention, Article 1 of Protocol No. 12 to the European Convention and Article 2(1)(c) and Article 5(1)(c) of the International Convention on the Elimination of All Forms of Racial Discrimination (*U 13/04*). As the challenged provision of the Election Law is based on Article V of the Constitution of

Bosnia and Herzegovina, the Constitutional Court took a stance that, by entering into the merits of the request, it would engage in reviewing the compatibility of the provisions of the Constitution of Bosnia and Herzegovina with the provisions of the European Convention and the International Convention on the Elimination of All Forms of Racial Discrimination.

48. However, the respective request challenged the provisions of the Entities' Constitutions, and not of the Constitution of BiH, as was the case in the case no. *U 5/04*, that is to say the challenged provisions are not identical to any provision of the Constitution of BiH, as was the case in the case no. *U 13/05*. The Constitutional Court recalls that in accordance with Article VI(3)(a) of the Constitution of BiH it has exclusive jurisdiction to decide whether any provision of an Entity's Constitution or law is consistent with *this Constitution*. Thereby, in interpreting the term *this Constitution and the obligation of the Constitutional Court to uphold this Constitution*, one must take into account 15 international human rights agreements referred to in Annex I to the Constitution of BiH, which are directly applied in BiH, and the position that the rights referred to in the European Convention and the Protocols thereto occupy in the constitutional order of the state. Namely, the rights set forth in the European Convention and the Protocols thereto not only are directly applied in BiH, but, in accordance with Article II(2) of the Constitution of BiH, have priority over all other law. Finally, in accordance with Article II(4) of the Constitution of BiH, the enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution will 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 significance of Article II of the Constitution of BiH regulating human rights and freedoms is determined by Article X(2) of the Constitution of BiH according to which *no amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph*. To that end the terms *this Constitution and the obligation of the Constitutional Court to uphold this Constitution* in the area of the exercise and protection of human rights and freedoms guaranteed by the Constitution imply first and foremost Article II of the Constitution of BiH in its true meaning, in the interpretation of which the Constitutional Court may not eliminate or diminish rights and freedoms guaranteed by this article. Also, the fact that this concerns not only rights and freedoms specifically enumerated in the mentioned provision of the Constitution of BiH, but also the rights and freedoms contained in the international documents, does not diminish the character of Article II as the provision

of the Constitution of BiH, which includes *this Constitution and the obligation of the Constitutional Court to uphold this Constitution*. Besides, the Constitutional Court recalls that it took the following position in the Third Partial Decision no. *U 5/98* „(…) it cannot be concluded that the Constitution of BiH provides for a general institutional model, which could be transferred to the Entity level or that similar, ethnically-defined institutional structures on an Entity level, that need not meet the overall binding standard of non-discrimination in accordance with Article II(4) of the Constitution of BiH (…)". Accordingly, the fact that the challenged provisions of the Entities' Constitutions and the Election Law reflect the principle identical to that contained in Article V of the Constitution of BiH does not prevent the Constitutional Court from reviewing the challenged provisions in relation to *the overall binding standard of non-discrimination of the Constitution of BiH under Article II(4) of the Constitution of BiH*.

49. The Constitutional Court will consider the alleged violation of Article 14 of the European Convention in conjunction with Article 3 of Protocol No. 1 to the European Convention, since, according to the allegations of the applicant, „Others" are denied the right to run for office of the President and Vice-Presidents of the Entities solely on the ground that they are not members of one of the constituent peoples.

50. Article 14 of the European Convention reads as follows:

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

51. Article 3 of Protocol No. 1 to the European Convention reads as follows:

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.

52. The Constitutional Court recalls that Article 14 of the European Convention is applicable to the cases in which there is a differential treatment based on prohibited grounds of a person or group of persons in a similar situation in respect of a right under the European Convention and its Protocols, where there is not an objective or reasonable justification for such treatment. Therefore, in order for Article 14 to be applicable, a rule, act or omission must fall within the ambit of a substantive right under the European Convention. The applicant holds that the challenged provisions fall under the scope of Article 3 of Protocol No. 1 to the European Convention.

53. The Constitutional Court notes that the European Court, in case of *Boskoski v. the former Yugoslav Republic of Macedonia* (see, ECtHR, *Boskoski v. the former Yugoslav Republic of Macedonia*, Application no. 11676/04 of 2 September 2004) noted as follows: „The Court reiterates that Article 3 of Protocol No. 1 guarantees the „choice of the legislature" and that the word „legislature" does not necessarily mean the national parliament. That word has to be interpreted in the light of the constitutional structure of the State in question (see, *mutatis mutandis*, *Mathieu-Mohin and Clerfayt v. Belgium* judgment of 2 March 1987, Series A no. 113, p. 23, § 53; and *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I, § 40). In two earlier cases the Commission held that the powers of the Head of the State could not as such be construed as a „legislature" within the meaning of Article 3 of Protocol No. 1 (see *Baskauskaite v. Lithuania*, no. 41090/98, Commission decision of 21 October 1998; and *Habsburg-Lothringen v. Austria*, no. 15344/89, Commission decision of 14 December 1989, Decisions and Reports 64, p. 211). The Court does not exclude, however, the possibility of applying Article 3 of Protocol No. 1 to presidential elections. It reiterates that this provision enshrines a characteristic of an „effective political democracy", for the ensuring of which regard must not solely be had to the strictly legislative powers which a body has, but also to that body's role in the overall legislative process (see the *Matthews v. the United Kingdom* judgment cited above, §§ 42 and 49). Should it be established that the office of the Head of the State had been given the power to initiate and adopt legislation or enjoyed wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities, then it could arguably be considered to be a „legislature" within the meaning of Article 3 of Protocol No 1."

54. Turning to the instant case, the Constitutional Court notes that according to the relevant provisions of the Constitution of the Republika Srpska, the President of the Republika Srpska may refuse the promulgation of the law adopted by the National Assembly as a basic body passing laws, and may request the National Assembly to vote again on the law. However, the President of the Republic is bound to promulgate the law passed for the second time by the National Assembly. Moreover, in a state of war or emergency declared by the institutions of Bosnia and Herzegovina, and if the National Assembly is unable to convene, the President of the Republic, upon the proposal of the Government or on his/her own initiative, having consulted the President of the National Assembly, will issue decrees with the force of law regarding matters in the jurisdiction of the National Assembly, and will appoint and recall those officials who are normally appointed and recalled by the National Assembly. The President of the Republic will submit these decrees with the force of law, and the decisions of appointments and recalls, to be voted by the National Assembly as soon as it is able to convene. Furthermore, in a state of war or in a state of emergency,

the President of the Republic, if the National Assembly is unable to convene, may pass extraordinary legal acts, which will be valid only for the duration of such a state and will suspend certain provisions of the Constitution related to the passing of laws, except for those relating to certain freedoms and rights. Therefore, the aforementioned applies exclusively in special circumstances (the state of war and emergency). Furthermore, the President of the Government of the Republika Srpska and its members are appointed by the majority of votes of delegates in the National Assembly. If the President of the Republic assesses that a crisis has arisen in the functioning of the Government, he may request, upon the initiative of at least 20 deputies and upon hearing the opinion of the President of the National Assembly and the President of the Government, the resignation of the President of the Government. Should the President of the Government refuse to resign, the President of the Republic may dismiss him.

55. Furthermore, the Constitutional Court notes that according to the relevant provisions of the Constitution of the Federation of Bosnia and Herzegovina, when the President of the Federation of BiH determines that the houses as basic legislatures are unable to enact necessary legislation, he may with the concurrence of the Vice-President of the Federation of BiH dissolve either of each house, provided that a house may not be dissolved within of one year of being first convened. The President of the Federation of BiH will have the exclusive authorization to dissolve both houses when they fail to adopt the budget of the Federation of BiH before the start of the budgetary period. Furthermore, the President of the Federation of BiH in agreement with both Vice-Presidents of the Federation will appoint the Government of the Federation, as a basic legislature, upon consultation with the Prime Minister or a nominee for that function. The Government will be elected after its appointment has been confirmed by a majority vote of the House of Representatives of the Federation. If it does not confirm the appointment of the Government, the entire procedure must be repeated. Furthermore, the President of the Federation with the concurrence of the Vice-President may remove the Government of the Federation of BiH or by a vote of no confidence adopted by a majority in each house of the Parliament of the Federation of BiH.

56. The Constitutional Court holds that the aforementioned analysis does not indicate that the President of the Republika Srpska and President of the Federation of BiH have powers to initiate or adopt laws or that they have more extensive powers to control the adoption of laws or powers to control basic legislative bodies in order to hold that there is a „legislature" within the meaning of Article 3 of Protocol No. 1. Taking into account the aforesaid, the request in question does not raise an issue under Article 14 of the European Convention in conjunction with Article 3 of Protocol No. 1 to the European Convention. In this respect, the Constitutional Court dismisses this part of the request as ill-founded.

57. Furthermore, it follows from the applicant's allegations that the challenged provisions of the Entities' Constitutions and the Election Law introduced discrimination against „Others" with respect to their exercising the right to stand for election and to be possibly elected, being the right guaranteed by law. „Others" are denied the right to run for office of the President and Vice-Presidents of the Entities solely on the ground that they are not members of one of the constituent peoples. The aforesaid, according to the applicant's allegations, runs counter to Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention.

58. **Article II(4) of the Constitution of BiH**, as relevant, reads:

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.

59. **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, 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.

60. **The Election Law of Bosnia and Herzegovina**, as relevant, reads:

Article 1.4

(1) Each citizen of Bosnia and Herzegovina (hereinafter: the citizen of BiH) who has reached the age of eighteen (18) shall have the right to vote and stand for election (hereinafter: the voting right) pursuant to this Law.

61. The Constitutional Court recalls that the right to vote and to stand for election makes up the basis of an effective political democracy. The states enjoy a broad margin of appreciation in establishing and regulating the election system to be applied. There are

numerous and various ways of organizing and carrying out elections. This difference is conditioned upon the historical development, cultural diversity and the development of political thought in the state. Therefore, the legislation regulating the elections must be considered in the light of the political evolution of the country concerned, as the features which are unacceptable in the context of one system may be acceptable at a given time within the context of another. In that context, the states are free to choose the purpose on account of which they will impose restrictions on the rights to vote and to stand for election. However, this freedom is restricted by an obligation that the purpose of the restriction must be in keeping with the principle of the rule of law and justified by specific circumstances (see, the European Court, *Sitaropoulos and Giakoumopoulos v. Greece*, Judgment of 15 March 2012 (paragraphs 63 through 68). Finally, one of the factors in assessing a broad margin of appreciation which the states enjoy in this area is whether or not other ways and means exist for one to achieve the same goal (see, the European Court, *Glor v. Switzerland*, Application no. 13444/04, Judgment of 30 April 2009, paragraph 94).

62. The Constitutional Court points out that the Election Law in Article 1.4 guarantees to all the citizens of BiH who have reached the age of 18 the right to vote and to stand for election. In that respect this concerns the right guaranteed by law within the meaning of Article 1 of Protocol No. 12 which enjoyment must be secured without discrimination on any ground and regarding which the public authorities must not discriminate against anyone.

63. Furthermore, the Constitutional Court points out that regarding the interpretation of the notion of discrimination, in terms of Article 1 of Protocol No. 12, in the Decision of *Sejdić and Finci* (paragraph 55) the European Court stated: „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 (as regards the case-law of the UN Human Rights Committee on Article 26 of the International Covenant on Civil and Political Rights, a provision similar – although not identical – to Article 1 of Protocol No. 12 to the Convention, see Nowak, CCPR Commentary, N.P. Engel Publishers, 2005, pp. 597-634)".

64. In view of the aforementioned, the Constitutional Court must answer the question whether the challenged provisions, which make it impossible for „Others" to exercise their right to stand for election as candidates and to be possibly elected to the office of the President and Vice-Presidents, because they do not come from among the constituent peoples, establish the differential treatment without objective and reasonable justification against the persons who are in a similar position.

65. The Constitutional Court observes that Article 1.4 of the Election Law guarantees the right to vote and to stand for election to all the citizens of BiH. Article 3 of the Law on Citizenship stipulates that all citizens of BiH enjoy the same human rights and fundamental freedoms as laid down in the Constitution of BiH and enjoy the protection of these rights throughout BiH, under the same conditions. On the basis of the mentioned provisions it follows indisputably that the notion of the citizens of BiH, which guarantees the rights to vote and to stand for election in terms of Article 1.4 of the Election Law, implies constituent peoples and „Others". In that respect, the challenged provisions of the Entities' Constitutions and the Election Law, which exclude the possibility for „Others" as citizens of BiH to run for office of the President and Vice-Presidents of the Entities, guaranteeing that possibility exclusively to the constituent peoples as the citizens of BiH, establish the differential treatment „between the persons who are in a similar (or the same) position", based on ethnic origin.

66. The next question to be answered is whether the differential treatment was established without objective and reasonable justification. In that respect, the Constitutional Court points out that the European Court in the case of *Sejdić and Finci* (paragraphs 43 and 44) took a position which may be summarized as follows: „discrimination on account of a person's ethnic origin is a form of racial discrimination, which is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII, and *Timishev*, cited above, § 56). 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)". Finally, the Constitutional Court indicates that the European Court of

Human Rights was guided by the same principles contained in the judgment *Azra Zornić v. Bosnia and Herzegovina*, where it examined the case of inability of the person concerned to stand as candidate for the office of the member of the Presidency of BiH or delegate in the House of Peoples as she has not declared her affiliation with any constituent people or any ethnic group (Application no. 3681/06, judgment of 15 July 2014).

67. The Constitutional Court recalls that the distribution of positions in the state bodies among the constituent peoples was the central element of the Dayton Agreement in order to secure peace in BiH. In that context it is hard to deny the legitimacy of norms that may be problematic from the point of view of non-discrimination, but which were necessary in order to secure peace and stability and to avoid further loss of human lives. The challenged provisions of the Entities' Constitutions and the Election Law on the distribution of the offices of the President and Vice-Presidents of the Entities among the constituent peoples, although built into the Entities' Constitutions in the process of the implementation of the Third Partial Decision no. *U 5/98* serve the same goal. In that respect, the Constitutional Court observes that the legitimacy of the goal, which was reflected in securing the peace, was not called into question by the European Court in the light of the European Convention (see, *Sejdić and Finci*, paragraph 46).

68. However, this justification must be considered in connection with the development of events in Bosnia and Herzegovina following the Dayton Agreement. In that regard, the Constitutional Court points out that the European Court pointed out the following in the case of *Sejdić and Finci* (see, paragraph 47): *(...) the Court observes significant positive developments in Bosnia and Herzegovina since the Dayton Peace Agreement. It is true that progress might not always have been consistent and challenges remain (see, for example, the latest progress report on Bosnia and Herzegovina as a potential candidate for EU membership prepared by the European Commission and published on 14 October 2009, SEC/2009/1338). It is nevertheless the case that in 2005 the former parties to the conflict surrendered their control over the armed forces and transformed them into a small, professional force; in 2006 Bosnia and Herzegovina joined NATO's Partnership for Peace; in 2008 it signed and ratified a Stabilization and Association Agreement with the European Union; in March 2009 it successfully amended the State Constitution for the first time; and it has recently been elected a member of the United Nations Security Council for a two-year term beginning on 1 January 2010. Furthermore, whereas the maintenance of an international administration as an enforcement measure under Chapter VII of the United Nations Charter implies that the situation in the region still constitutes a „threat to international peace and security", it appears that preparations for the closure of that administration are under way (see a report by Mr Javier Solana,*

EU High Representative for the Community and Common Foreign and Security Policy, and Mr Olli Rehn, EU Commissioner for Enlargement, on EU's Policy in Bosnia and Herzegovina: The Way Ahead of 10 November 2008, and a report by the International Crisis Group on Bosnia's Incomplete Transition: Between Dayton and Europe of 9 March 2009)". Also, the European Court pointed out the following as well (see, paragraph 49): „(...) by becoming a member of the Council of Europe in 2002 and by ratifying the Convention and the Protocols thereto without reservations, the respondent State has voluntarily agreed to meet the relevant standards. It has specifically undertaken to „review within one year, with the assistance of the European Commission for Democracy through Law (Venice Commission), the electoral legislation in the light of Council of Europe standards, and to revise it where necessary" (see paragraph 21 above). Likewise, by ratifying a Stabilization and Association Agreement with the European Union in 2008, the respondent State committed itself to „amend[ing] electoral legislation regarding members of the Bosnia and Herzegovina Presidency and House of Peoples delegates to ensure full compliance with the European Convention on Human Rights and the Council of Europe post-accession commitments" within one to two years (see paragraph 25 above).

69. The Constitutional Court points out that it is undisputed that a positive progress has been made in the development of BiH as a democratic state and in the democratic institutions achieved on the basis of the functioning of the system of power-sharing, which excluded the members of „Others" in accessing a number of public offices, as regulated by the challenged provisions. It is indisputable that such a system has a justification in the legitimate goal reflected in the preservation of peace, which is a value in the service of the society as a whole. It is in the service of the establishment and preservation of security and stability, as a precondition for the preservation of the progress achieved and of the further development and the building of the society and the building of trust between the former conflicting parties. In this respect, the Constitutional Court indicates that the European Court, while noting the progress made following the signing of the Dayton Agreement, pointed out the following (see, paragraph 48): (…) *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 stance of the Venice Commission supports the aforementioned, which was imparted in the Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative, which stated as follows: *Bosnia and Herzegovina has become a member of the Council of Europe and the country has therefore to be assessed according to the yardstick of common European standards. It has now ratified the [European Convention on Human Rights] and Protocol No. 12 [thereto]. As set forth above, the situation in Bosnia and Herzegovina has evolved*

in a positive sense but there remain circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups. It therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups (...).

70. In view of the aforementioned, the next question to be answered is whether the only way to achieve the legitimate goal determined in such a way is by imposing restrictions as in the challenged provisions with respect to a certain group regarding the exercise of the right established under the law, which is guaranteed to everyone without discrimination.

71. The Constitutional Court recalls that, in accordance with Article I(2) of the Constitution of BiH, Bosnia and Herzegovina is defined as a democratic state operating under the rule of law and with free and democratic elections. In accordance with Article II(1) of the Constitution of BiH, Bosnia and Herzegovina and both Entities will ensure the highest level of internationally recognized human rights and fundamental freedoms. Besides, in accordance with Article II(4) of the Constitution of BiH, rights and freedoms provided for in Article II or in the international agreements listed in Annex I to this Constitution will be secured to all persons in Bosnia and Herzegovina without discrimination on any ground. These provisions suggest the establishment of the principle of a democratic state, the rule of law and free elections, which will have that same specific significance as in the developed democratic countries with a long-standing practice of the establishment thereof. The legitimate goal which is reflected in the preservation of peace for a country after the war represents the permanent value which the society as a whole must be dedicated to, which significance cannot be diminished by the lapse of time and the progress made in the democratic development. In that respect the Constitutional Court cannot accept that at this point in time the existing power-sharing system, which is reflected in the distribution of the public offices among the constituent peoples, as regulated by the challenged provisions, and which serves the legitimate goal of the preservation of peace, can be abandoned and replaced by a political system reflecting the rule of majority. However, the question that arises is whether the only way to achieve the legitimate goal and preserve peace is still the exclusion of „Others" from standing for election as candidates for, particularly, the office of the President and Vice-Presidents of the Entities. When one considers, on the one hand, the principles of the rule of law, the standards of human rights and the obligation of non-discrimination in their enjoyment and protection, the positive development made by BiH ever since the signing of the Dayton Agreement, the international obligations it assumed also in the area of exercising and protecting human rights, and the clear commitment to the further democratic development, the exclusion of „Others" from exercising one of the human rights which constitutes the foundation of a democratic society can no longer

represent the only way in which to achieve the legitimate goal reflected in the preservation of peace. Particularly so when one bears in mind that such an exclusion was established expressly on ethnic affiliation, which cannot be objectively justified in the contemporary democratic societies built on the principles of pluralism and respect for different cultures, which BiH society is and which it aspires to. The Preamble of the Constitution of BiH, according to which the Constitution of BiH is based on respect for human dignity, liberty, and equality, and it indicates that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society, is also suggestive of this conclusion.

72. In view of the positions presented in the foregoing text of the decision, the Constitutional Court concludes that the provisions of Article 80(2)(4) (Item 1(2) of the Amendment LXXXIII) and Article 83(4) (Item 5 of the Amendment XL as amended by Item 4 of the Amendment LXXXIII) of the Constitution of the Republika Srpska, Article IV.B.1, Article 1(2) (amended by the Amendment XLI) and Article IV.B.1, Article 2(1) and (2) (amended by the Amendment XLII) of the Constitution of the Federation of Bosnia and Herzegovina, and Articles 9.13, 9.14, 9.16 and 12.3 of the Election Law are in contravention of Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention. In this respect, the Constitutional Court emphasizes that the exclusion of the possibility for the members of „Others" who are, as well as the constituent peoples, citizens of BiH who are guaranteed by law the right to stand for election without discrimination and restrictions in running for office of the President and Vice-Presidents of the Entities, no longer represents the only way to achieve the legitimate goal, which is the reason why it cannot have a reasonable and objective justification. Namely, in exercising the right guaranteed by law, the mentioned provisions of the Entities' Constitutions and the Election Law establish the differential treatment of „Others" which is based on ethnic affiliation and result in the discrimination in contravention of Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention.

73. Finally, the Constitutional Court notes that it unambiguously follows from the *Sejdić and Finci* judgment of the European Court that the Constitution of BiH should be amended. In this connection, the Constitutional Court outlines that the European Court noted in the case of *Zornić v. Bosnia and Herzegovina* (see para 40): „(…) It emphasises that the finding of a violation in the present case was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the judgment in *Sejdić and Finci*. The failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the Constitution and the electoral law with Article 14, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 is not

only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery (see *Broniowski*, cited above, § 193, and *Greens and M.T.*, cited above, § 111)".

74. However, it is impossible to foresee the scope of those changes in this moment. The Constitutional Court will not quash the aforementioned provisions of the Constitutions of the Entities and the Election Law, it will not order the Parliamentary Assembly of BiH, National Assembly and Parliaments of the Federation to harmonize the aforementioned provisions until the adoption, in the national legal system, of constitutional and legislative measures removing the current inconsistency of the Constitution of Bosnia and Herzegovina and Election Law with the European Convention, which was found by the European Court in the quoted cases.

75. The Constitutional Court concludes that the challenged provisions of Articles 9.15, 12.1 and 12.2 of the Election Law are in conformity with Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention. Namely, the Constitutional Court observes that these provisions, although in the service of the regulation of the election process of the President and Vice-Presidents of the Entities, do not *per se* restrict and exclude the members of „Others" from exercising their right to stand for election, being the right guaranteed by law, which would result in the discrimination contrary to Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention.

Other allegations

76. Given the conclusion in respect of Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention, the Court holds that there is no need to examine separately the applicant's allegations about the violation of Article II(4) of the Constitution of BiH in conjunction with the International Convention on the Elimination of All Forms of Racial Discrimination and its Article 5, as well as the International Covenant on Civil and Political Rights and its Articles 2, 25 and 26.

VII. Conclusion

77. The Constitutional Court concludes that the provisions of Article 80(2)(4) (Item 1(2) of the Amendment LXXXIII) and Article 83(4) (item 5 of the Amendment XL as amended by item 4 of the Amendment LXXXIII) of the Constitution of the Republika Srpska, Article IV.B.1, Article 1(2) (amended by the Amendment XLI) and Article IV.B.1, Article

2(1) and (2) (amended by the Amendment XLII) of the Constitution of the Federation of Bosnia and Herzegovina, and Articles 9.13, 9.14, 9.16 and 12.3 of the Election Law are in contravention of Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention.

78. The Constitutional Court concludes that the challenged provisions of Articles 9.15, 12.1 and 12.2 of the Election Law are in conformity with Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention.

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

80. Pursuant to Article 43 of the Rules of the Constitutional Court, a Joint Partly Dissenting Opinion of President Valerija Galić, Vice-President Miodrag Simović, and Judges Mato Tadić and Zlatko M. Knežević has been annexed to the present decision (concerning the part of the decision granting the request).

81. 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

Joint Partly Dissenting Opinion of President Valerija Galić, Vice-President Miodrag Simović and Judges Mato Tadić and Zlatko M. Knežević

We are unable to agree with the decision granting the request, for the following reasons:

1. The request for review of the constitutionality of the challenged provisions of the Constitution of the Federation of BiH and of the Constitution of the Republika Srpska and of the challenged provisions of the Election Law of Bosnia and Herzegovina is essentially based on the Decision of the European Court of Human Rights in the case of *Sejdić and Finci*.

2. Without contesting the Decision of the European Court of Human Rights, we are of the opinion that, in assessing the constitutionality of the challenged provisions of the Entities' Constitutions and the Election Law of BiH, the starting point should be that the Constitutional Court of BiH is a national court and that its primary task is *to uphold this Constitution*, as stipulated by Article VI(3) of the Constitution of BiH, unlike the European Court of Human Rights, which has the task to monitor whether the Member States of the Council of Europe meet their obligations under the European Convention. The Constitution of BiH contains neither provisions nor principles relating to the election of a president or vice-president of an Entity, but it contains the provisions relating to the election of Members of the Presidency of BiH and the provisions governing the composition of the Presidency of BiH in an identical manner as regulated by the Entities' Constitutions. In such a situation, we are certain that this request will be premature as long as the Decision of the European Court of Human Rights in the case of *Sejdić and Finci* is not implemented. It is undisputed that it unambiguously ensues from the *Sejdić and Finci* Decision that the Constitution of BiH ought to be amended. Only after amending the Constitution of BiH in accordance with the said Decision, can the constitutionality of the challenged provisions be assessed. Accordingly, we are of the opinion that in order for the Constitutional Court not to turn into a framer of the constitution, *i.e.* a legislator, substituting it in the true sense of the word, the Constitutional Court cannot intervene in a case where the framer of the constitution, *i.e.* the legislator failed to regulate a social relationship that is, in the present case, where it failed to implement the *Sejdić and Finci* Decision.

3. In addition, in a number of its decisions the Constitutional Court has taken the position that it is not a constitution maker and that its role is to *uphold this Constitution* and that it may not amend the Constitution regardless of certain contradictions in the constitutional arrangements and of contradictions between the Constitution of BiH and the European Convention.

4. Furthermore, the European Convention is not above the Constitution of BiH, since the European Convention has a constitutional status based on the Constitution of BiH, as already stated in a number of the decisions of the Constitutional Court.

5. The present constitutional structure and challenged arrangements contained in the Entities' Constitutions fit well into the general institutional system of the Entities, which is actually a consequence of the implementation of the Decision of the Constitutional Court no. *U 5/98* (Decision on Constitutionality) and of amendments imposed to the Entities' Constitutions by the High Representative for BiH and now, given that no provision of the Constitution of BiH has been amended, the Constitutional Court of BiH is actually changing its Decision on Constitutionality.

6. In view of the above, we hold that the present request should have been declared premature and, in case that the Entities' Constitutions, after the implementation of the *Sejdić and Finci* Decision, remain not harmonised in this part, the Constitutional Court ought to reserve the right *ex officio* to continue the proceedings for review of the constitutionality.

Case No. U 26/13

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Željko Komšić, the Chairman of the Presidency of Bosnia and Herzegovina at the time of lodging the request, for review of the constitutionality of the Law on Primary Education and Upbringing in the Republika Srpska (the *Official Gazette of the Republika Srpska*, 74/08 and 71/09), Law on Secondary Education and Upbringing in the Republika Srpska (the *Official Gazette of the Republika Srpska*, 74/08, 106/09 and 104/11), Laws on Primary Education and Upbringing, Laws on Secondary Education and Upbringing in all ten cantons in the Federation of Bosnia and Herzegovina (Una-Sana Canton, Posavina Canton, Tuzla Canton, Zenica-Doboj Canton, Bosnian-Podrinje Canton, Central Bosnia, Herzegovina-Neretva, Western-Herzegovina, Canton Sarajevo and Canton 10)

Decision of 26 March 2015

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

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. Željko Komšić**, **the Chairman of the Presidency of BiH at the time of lodging the request**, in case No. **U 26/13**, at its session held on 26 March 2015, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Mr. Željko Komšić, the Chairman of the Presidency of BiH at the time of lodging the request, for review of the constitutionality of the Law on Primary Education and Upbringing in the Republika Srpska (*the Official Gazette of the Republika Srpska*, 74/08 and 71/09), Law on Secondary Education and Upbringing in the Republika Srpska (*the Official Gazette of the Republika Srpska*, 74/08, 106/09 and 104/11), Laws on Primary Education and Upbringing, Laws on Secondary Education and Upbringing in all ten cantons in the Federation of Bosnia and Herzegovina (Una-Sana Canton, Posavina Canton, Tuzla Canton, Zenica-Doboj Canton, Bosnian-Podrinje Canton, Central Bosnia, Herzegovina-

Neretva, Canton Sarajevo and Canton 10), 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 29 October 2013, Mr. Željko Komšić, the Chairman of the Presidency 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 the constitutionality of the Law on Primary Education and Upbringing in the Republika Srpska *(the Official Gazette of the Republika Srpska*, 74/08 and 71/09), Law on Secondary Education and Upbringing in the Republika Srpska *(the Official Gazette of the Republika Srpska*, 74/08, 106/09 and 104/11), Laws on Primary Education and Upbringing, Laws on Secondary Education and Upbringing in all ten cantons in the Federation of Bosnia and Herzegovina (Una-Sana Canton, Posavina Canton, Tuzla Canton, Zenica-Doboj Canton, Bosnian-Podrinje Canton, Central Bosnia, Herzegovina-Neretva, Western-Herzegovina, Canton Sarajevo and Canton 10).

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 11 November 2013, the National Assembly of Republika Srpska, Government of Republika Srpska, Ministry of Education and Culture of Republika Srpska and Assembly of all 10 Cantons in the Federation of BiH were requested to submit their respective replies to the request.

3. The National Assembly of Republika Srpska submitted its reply on 27 November 2013, Una-Sana Canton, Tuzla Canton, Zenica-Doboj Canton, Bosnian-Podrinje Canton, Herzegovina-Neretva, Western Herzegovina, Canton Sarajevo and Canton 10 submitted their respective replies to the request within period from 27 November 2013 to 6 January 2014. The Government of Republika Srpska, Ministry, Posavina Canton and Central Bosnia Canton failed to submit their replies to the request.

III. Request

a) Statements from the request

4. The applicant states that the reason for filing the request is discrimination in the education system in the Republika Srpska and cantons in the Federation of BiH. Namely, the members of the constituent peoples in some regions of Bosnia and Herzegovina are prevented from being educated in the manner in which language, culture and religion of those pupils are respected. The applicant indicates that the legislator at the State level determined the frameworks which must be applied to the education system at all levels. Thus, the Framework Law on Primary and Secondary Education in Bosnia and Herzegovina *(the Official Gazette of BH*, 18/03; „the Framework Law") clearly prescribes the general principles and aims of education deriving from generally accepted, universal values of democratic society and own value systems based on specificities of national, historic and cultural and religious tradition of peoples and national minorities living in Bosnia and Herzegovina.

5. The applicant referred to the general objectives of the state law as follows: promoting respect for human rights and fundamental freedoms, developing awareness of commitment to the State of BiH, one's own cultural identity, language and tradition, ensuring equal possibilities for education and the possibility to choose at all levels of education, regardless of gender, race, nationality, social and cultural background. He referred to the provisions of Articles 1, 7, 10, 12, 23, 25, 34, 35, 36 and 42 of the Framework Law.

6. He emphasizes that following the adoption of the Framework Law and conclusion of the Agreement on the Joint Core Curricula in Republika Srpska and ten cantons in the Federation of BiH, laws on primary and secondary education were enacted. The applicant finds that the Republika Srpska and cantons in the Federation of BiH failed to put in place the mechanisms enabling minimum standards whereby the State would respect the rights of parents to provide such education and classes for their children that are in accordance with their religious and philosophical beliefs. In some laws (for example, Articles 9, 11, 12 and 14 of the Law on Primary Education and Upbringing in the Republika Srpska, Article 7 of the Law on Primary Education of the Canton of Sarajevo), it is nominally indicated that the rights to mother tongue and religion of the constituent peoples, even in some cases of national minorities (Article 8(6) and (7) of the Law on Primary Education and Upbringing of the Tuzla Canton (*the Official Gazette of the Tuzla Canton*, 6/04, 7/05 and 17/11), will be respected in the system of primary or secondary education in Bosnia and Herzegovina.

7. The applicant further states that the legislation relating to primary and secondary education does not provide for the norms which would clearly stipulate the mechanisms and conditions under which the constituent peoples in Bosnia and Herzegovina, where a constituent people is less numerous than the other one, have the systemic possibility of having education and classes in accordance with their own religious and philosophical beliefs. All challenged laws provide that the competent ministry of education passes a curriculum (in cooperation with the Institute for Education and Pedagogy). The applicant refers to the unacceptable widespread practices to the effect that powers are being given to the executive authority through bypassing the legislative body, which interferes with the competence of the legislator to decide on important matters which represent the engine of every democratic society - system of education, and the possibility of changing the essence of the legislator's will by passing by-laws and, in the society of Bosnia and Herzegovina, as a particularly vulnerable society, the possibility of avoiding the mechanisms of protection of collective rights safeguarded by the Constitution.

8. In the applicant's opinion the decision relating to the use of languages of the constituent peoples in education must not and cannot be left to the minister or the Government, as this is a constitutional category and it interferes with the essence of the constitutional order – the existence of the constituent peoples and existence of official languages. Any law which defines the matters in that way, particularly in such a sensitive area, namely the education of the youngest population, cannot restrict the rights safeguarded by the Constitution. That must not be allowed through the formal dissimulation of such interference with the essence of freedoms safeguarded by the Constitution through the form of bylaw, because in essence the law provided for the executive authorities such powers and, therefore, the law does not satisfy the requirements of foreseeability, nor does it meet the criteria of quality required by the standards established in the case-law of the European Court of Human Rights.

9. Furthermore, the applicant points out that the national minorities, as well as the citizens of Bosnia and Herzegovina „who do not declare themselves as members of any constituent people" are not provided with education and classes corresponding to their own religious and philosophical convictions through laws, curriculum, teaching practice in large parts of the BiH territory (with the exception of the Tuzla Canton – Article 8, paragraphs 6 and 7 of the Law on Primary Education and Upbringing *(the Official Gazette of the Tuzla Canton*, 6/04, 7/05 and 17/11). The aforementioned implies at least minimal mechanisms which the State could prescribe and implement in the manner prescribed by Article 29 of the Convention on the Rights of the Child, which directs the parties not to restrict the freedom of bodies to establish and direct educational institutions, subject

always to the observance of the principle of respect for human rights and fundamental freedoms and respect for principles enshrined in the Charter of the United Nations.

10. In the applicant's opinion, the minimum standards as may be laid down by the State imply at least obligatory introduction into legislation of regular curricula of the so-called „ethnic-related group of subjects" (mother tongue, literature, history, geography, social and nature lessons, religious education or alternative subject). In addition, the applicant finds it necessary to include in the legislation the solutions which would secure the efficient implementation of introduction of „ethnic-related group of subjects" and possibility of having classes of „ethnic-related group of subjects" for the children who, according to the curriculum applicable in their place of residence, do not have that possibility. In his opinion, the aforementioned procedures should be prescribed in such a manner that classes of „ethnic-related group of subjects" are made possible upon the parents' request. In this way, the provisions of Article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") would be fully respected.

11. In addition to the „ethnic-related group of subjects", the applicant finds that the children should have classes in multicultural classrooms regardless of their affiliation to the constituent peoples or a group of those who are not affiliated with the constituent peoples („Others"), which fully derives from Article 29(1)(d) of the Convention on the Rights of the Child, as an international instrument set forth in Annex I of the Constitution of Bosnia and Herzegovina in conjunction with Article II(4) of the Constitution of Bosnia and Herzegovina. This is the reason why the applicant holds that such laws on primary and secondary education and upbringing of Republika Srpska and cantons of the Federation of Bosnia and Herzegovina are not foreseeable to the sufficient extent for every citizen who, because of that lack of foreseeability, suffers the consequences of discrimination and non-compliance with the international conventions signed by Bosnia and Herzegovina. Furthermore, the applicant holds that Republika Srpska and cantons of the Federation of BiH violated Article III(3)(b) of the Constitution of BiH by enacting those laws. In this connection, he holds that the Republika Srpska and cantons in the Federation of BiH did not introduce the mechanisms providing for minimum standards whereby the State would respect the right of the children's parents to ensure such education and classes for their children in accordance with their own religious and philosophical convictions.

12. The applicant refers to Annex 4 of the Constitution of Bosnia and Herzegovina, Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention, Article 1 of Protocol No. 12 to the European Convention, Article 2 Protocol

No. 1 to the European Convention – the right to education and the right of parents to have their children educated in conformity with their religious and philosophical convictions. In the applicant's opinion both sentences of Article 2 of Protocol No. 1 to the European Convention must be read not only in the light of each other but also, in particular, of Articles 8, 9 and 10 of the Convention, which determine the right of anyone, including parents and children, „to respect for their private and family life", to „freedom of thought, conscience and religion" and to „freedom (…) to receive and impart information and ideas". Thus Article 2 applies to all educational areas.

13. The second sentence of Article 2 implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum are conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded. Such an interpretation is consistent at the same time with the first sentence of Article 2 of the Protocol as well as with Articles 8 to 10 of the European Convention, an instrument designed to maintain and promote the ideas and values of a democratic society.

14. The applicant indicates that Article II(1) of the Constitution of Bosnia and Herzegovina comprises the guarantees to everyone under the jurisdiction of the State of Bosnia and Herzegovina. This provision clearly shows the constitutional commitment to human rights protection with a view to achieving highest values in democratic societies. A special place for the realization of this objective, inherent to all developed democracies, is given in Article II(2), which promotes the European Convention for the Protection of Human Rights and „gives" it a special position in the constitutional order of Bosnia and Herzegovina, so that the European Convention has priority over all other laws, including the constitutions of the Entities and any law adopted at any level. The applicant emphasizes that the Constitutional Court of Bosnia and Herzegovina has an obligation to uphold the Constitution of Bosnia and Herzegovina and, consequently, to protect those values, as proved on many occasions by the case-law of the Constitutional Court, more precisely, in the Partial Decision of the Constitutional Court of Bosnia and Herzegovina, No. *U 5/98* of 10 March 2000. The applicant refers to paragraphs 79(a), (b) and (d) and 80 of the mentioned decision.

15. The applicant proposes that the Constitutional Court should establish that the challenged laws are inconsistent with the provisions of Articles II(1), II(4) and III(3)(b) of the Constitution of Bosnia and Herzegovina, Article 1 of Protocol No. 12 to the European

Convention, Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 5 of the International Convention on Elimination of All Forms of Racial Discrimination, Articles 2, 25 and 26 of the International Covenant on Civil and Political Rights, Articles 3, 12, 14, 28 and 29 of the Convention on the Rights of the Child, and international instruments listed in Annex 1 to the Constitution of Bosnia and Herzegovina; as well as that they are inconsistent with Article 14 in conjunction with Article 2 of Protocol No. 1 to the European Convention and Protocol No. 12 to the European Convention.

b) Reply to the request

16. In its reply, the National Assembly of the Republika Srpska alleges that the applicant failed to specify the provisions of the challenged law on primary and secondary education of the Republika Srpska that are inconsistent with the provisions of the Constitution and international instruments referred to by the applicant. Therefore, as applicant failed to give precise provisions which he considers to be discriminating, the National Assembly of the Republika Srpska finds that it cannot give an answer as to the issue of objectivity or legitimacy of a certain legal norm.

17. In its reply to the request, the Assembly of the Una-Sana Canton alleges that the applicant failed to give precise provisions of the law on primary and secondary education of that canton which are inconsistent with the Framework Law, Constitution of BiH and international instruments. Other Assemblies of the Cantons, (Tuzla Canton, Zenica-Doboj Canton, Bosnian-Podrinje Canton, Herzegovina-Neretva Canton, Western-Herzegovina Canton, Canton Sarajevo and Canton 10) have essentially stated in their replies that the challenged cantonal laws on primary and secondary education are in compliance with the provisions of the Constitution of Bosnia and Herzegovina and international instruments, as well as that they are in compliance with the goals and principles referred to in the Framework Law.

IV. Relevant Laws

18. The **Constitution of Bosnia and Herzegovina:**

Article II
Human Rights and Fundamental Freedoms

1. Human Rights

Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there

shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

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
Responsibilities of and Relations between the Institutions of Bosnia and Herzegovina and the Entities

3. Law and Responsibilities of the Entities and the Institutions

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

Article VI(3)(a)

3. Jurisdiction

The Constitutional Court shall uphold this Constitution.

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

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

- Whether any provision 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.

19. The **Framework Law on Primary and Secondary Education in Bosnia and Herzegovina** *(the Official Gazette of BiH*, 18/03), in its relevant part, reads:

Article 1

This Law regulates the principles of preschools, elementary and secondary education and upbringing, adult education and the establishing and functioning of institutions providing services in education in Bosnia and Herzegovina, as well as supplementary education for the children of BiH citizens abroad.

(...)

Education authorities competent to organize education system in Brčko District of BiH, Republika Srpska, Federation of BiH and Cantons in accordance with the constitution (hereinafter referred to as: Competent Educational Bodies), institutions that are registered according to the valid laws in Bosnia and Herzegovina for providing educational services in the area of preschool, elementary and secondary education (hereinafter referred to as: the schools) and other expert institutions in the area of education, are obliged to implement and respect the principles and norms set forth in this Law and ensure educational services under equal conditions for all students.

Principles and standards defined and based on this Law may not be reduced.

Article 2

The purpose of education is to contribute to the creation of a society based on the rule of law and respect of human rights through an optimum intellectual, physical and social development of the individual, according to her potential and abilities, and to contribute to the economic development, which will secure the best life standard for all citizens.

Article 3

General objectives of education result from generally accepted, universal values of democratic society, as well as its own value system based on specific qualities of national, historical, and cultural tradition of nations and national minorities living in Bosnia and Herzegovina.

General objectives of education are:

(...)

c) promoting respect for human rights and fundamental freedoms, and preparing each person for a life in a society which respects the principles of democracy and the rule of law;

d) developing awareness of commitment to the State of BiH, one's own cultural identity, language and tradition, in a way appropriate to the legacy of the civilization, learning about others and different by respecting the differences and cultivating mutual understanding and solidarity among all peoples, ethnic groups and communities in BiH and in the world.

e) ensuring equal possibilities for education and the possibility to choose in all levels of education, regardless of gender, race, nationality, social and cultural background and status, family status, religion, psycho-physical and other personal characteristics;

Article 4 paragraph 1

Every child has a right of access and equal possibility to participate in appropriate educational process, without discrimination on whatever grounds.

Article 6

School has the responsibility to contribute to the creation of a culture, which respects human rights and fundamental liberties of all citizens in own areas, as set forth in the Constitution and other international documents from the human rights area, signed by Bosnia and Herzegovina.

Article 7

The use of languages of the constituent peoples of BiH in all schools shall be in accordance with the Constitution of BiH.

All students shall learn scripts that are officially used in Bosnia and Herzegovina in all schools.

Article 9

Schools shall promote and protect religious freedom, tolerance and dialogue in BiH.

Having in mind diversities of beliefs/convictions within BiH, pupils shall attend religious classes only if the latter match their beliefs or beliefs of their parents.

The School cannot undertake any measures or activities aimed at limiting freedom of expressing religious beliefs or meeting other and different beliefs.

Students who do not wish to attend religious education classes shall not in any way be disadvantaged compared to other students.

Article 10

During educational or other activities in school, didactic or other material must not be used or exposed, nor are teachers and other school personnel allowed to give

any statements that could reasonably be rendered offensive to the language, culture and religion of students that belong to any ethnic, national or religious group.

It is the responsibility of the entity, canton and Brčko District educational authorities to form a body that will supervise the educational process regarding violations that might occur in schools by breaking the principle stated in the previous and other paragraphs.

The bodies and authorities referred to in the paragraph 2 of this Article shall reach binding decisions and recommendations. Composition, manner of operation and other issues significant for the work of these bodies shall be established in the founding acts.

Article 23

Parents have the right and obligation to take care of the education of their children.

It is a right of the parents to choose the type of education their children will acquire, according to their belief on what is in the best interest of their children and subject to availability, provided that such a choice exercises the right of a child to appropriate education.

Article 34

A school teaches its students and regularly examines and rates their educational progress, in order to ensure that students acquire an education suitable to their needs and possibilities.

It implements its role and functions in a motivating environment for acquiring knowledge; respectful and supportive towards the individuality of every student, as well as towards his or her cultural and national identity, language and religion; safe and free of any form of intimidation and abuse, physical punishment, insults, humiliation and degradation and damage to health including damage caused by smoking, or by the use of any other intoxicating or illegal substances.

Article 35

The school must not discriminate against children as regards their access to education or their participation in educational process on the basis of race, colour, gender, language, religion, political or other belief, national or social origin, on the basis of special needs status, or on any other basis.

In the sense of paragraph 1 of this Article, the competent educational authorities and institutions, together with schools, are especially responsible for providing for functional accommodation and supporting infrastructure for children with special needs, young people and adults, to allow for unrestricted access to education.

Article 42

There shall be a joint core curricula for all public and private schools in Bosnia and Herzegovina.

Article 43 paragraphs 1, 2 and 3

The joint core curricula shall consist of the curricula and syllabi of all subjects of primary and general secondary education of BiH that have an agreed joint core that is as broad as possible.

The joint core curricula is developed by a special ad hoc temporary body. Members of this body are appointed by the Ministers of Education of the Entities, Cantons and of the District of Brčko, and one member is appointed by the Minister of Civil Affairs.

Pursuant to the proposal of the temporary body of the preceding paragraph, the Agreement on the Joint Core Curricula is adopted and signed by the Ministers of Education of the Entities, Cantons and of the District of Brčko.

The joint core curricula shall:

a) ensure that, positive relations and a feeling of commitment to the State of BiH are developed through the pedagogic-educational process.

b) guarantee and provide for education meeting high standards for all children and achieving satisfactory standard of knowledge, skills and abilities;

c) provide for consistency of educational standard quality in all schools and at all levels of education;

d) provide for satisfactory harmonization of educational curricula, as well as their adaptability, in accordance with specific needs of school and local community;

e) provide for application of curricula that correspond to the developmental needs of the children concerned, their age and special interests with an emphasis on the promotion of healthy way of life that is in the best interest of the student or pupil, parents, teachers, professors, and the society;

f) secure the freedom of movement;

g) guarantee economy and efficiency in financing and work of school.

Article 44

A substantial majority of the pedagogic activity in schools shall be comprised of subjects and curricula and syllabuses provided for in the joint core curricula.

In the framework of the joint core curricula, public and private schools have the freedom to create and realize educational contents of their own will, in accordance with Articles 3, 7, 8, 10, 34, 36 and 41 of this Law.

Article 59 paragraphs 3 and 4

All State, Entity, Cantonal and District of Brčko laws, as well as other relevant regulations in the area of education, shall be harmonized with the provisions of this Law within six (6) months at the latest as of the date when this Law comes into force.

With the aim of achieving adequate quality of education and standards of knowledge, as well as their comparability at domestic and international levels, the competent educational authorities are obliged to ensure that, by the beginning of school year 2003/2004 at the latest, teaching in all schools in the territory of Bosnia and Herzegovina shall be realized on the basis of the joint core curricula, as defined by this law.

20. The **Law on Primary Education and Upbringing of the RS** *(the Official Gazette of Republika Srpska*, 74/08, 71/09 and 104/11), in its relevant part, reads:

Article 9

(1) Every child has a right of access and equal possibility to participate in appropriate educational process, without discrimination on whatever grounds.

(2) Equal access and equal possibilities signify ensuring equal conditions and opportunities for everyone, to start and further pursue education.

(3) Right referred to in paragraph 1 of this Article shall be exercised in accordance with pedagogical standards.

Article 10

Foreign citizens and citizens without citizenship shall have the right to education in accordance with the conventions and agreements Bosnia and Herzegovina concluded with other countries or international organizations.

Article 11

(1) No discrimination of children, teachers and other staff shall be carried out in primary education on the grounds of race, gender, language, political or other opinion, national or social origin, based on disability or any other grounds.

(2) School shall have responsibility to contribute in the area it acts to the creation of culture that respects human rights and fundamental freedoms of all citizens as it is established in the Constitution and other international documents relating to human rights as signed by Bosnia and Herzegovina.

(3) Republic and local self-government units together with the school shall be responsible for provision of school premises, equipment and accompanying infrastructure

for easy access and participation of the persons with special education needs in the educational process.

Article 12

(1) The classes in primary education shall be carried out in official languages of constituent peoples with the use of both official letters, Cyrillic and Latin.

(2) No discrimination shall be carried of teachers or any other employee upon appointment, terms of employment, advancement or in any other decision relating to the fact that he/she uses any of the languages of the constituent peoples in either written or oral communication.

(3) No discrimination shall be carried out of the students upon enrolment, participation in activities of the school or any other decision that relates to that student, based on the fact that he/she uses any of the languages of the constituent peoples in written or oral communication.

(4) Language and culture of national minorities in the Republika Srpska shall be respected and used in school to the most possible degree, in accordance with the Framework Convention for the Protection of the National Minorities (the Official Gazette of Republika Srpska, 2/05).

(5) A more detailed regulation on organizing and conducting classes in languages of national minorities shall be adopted by the Government, upon proposal of Ministry.

Article 13

(1) Religious freedom, tolerance and dialogue in BiH shall be protected in primary education.

(2) Pupils shall attend religious classes only if latter match their beliefs or beliefs of their parents, caregivers or adoptee parents („parents").

(3) Students who do not wish to attend religious education classes shall not in any way be disadvantaged compared to other students.

Article 14

During educational or other activities in school, didactic or other material must not be used or exposed, nor are teachers and other school personnel allowed to give any statements that could reasonably be rendered offensive to the language, culture and religion of students that belong to any ethnic, national or religious group.

Article 33

(1) Curriculum under which the educational process is exercised shall be adopted by the Minister upon proposal of the Republic Pedagogical Institute, in accordance with the

Joint Core Curricula referred to in Articles 42 and 43 of the Framework Law on Primary and Secondary Education in Bosnia and Herzegovina (the Official Gazette of BiH, 18/03; „the Framework Law").

(2) Curriculum for the subject of religious education classes shall be adopted by the minister upon proposal of the competent body of appropriate church or religious community.

21. The **Law on Secondary Education in the Republika Srpska** *(the Official Gazette of RS*, 74/08, 106/09 and 104/11), in its relevant part, reads:

Article 5 paragraph 1

No discrimination shall be carried out in secondary education in terms of access of children to education, on the grounds of race, gender, language, political or other opinion, national or social origin, based on disability or any other grounds.

Article 9

(1) The classes in secondary education shall be carried out in official languages of constituent peoples with the use of both official letters, Cyrillic and Latin.

(2) No discrimination shall be carried out in schools of the students upon being admitted, participation in activities of the school or any other decision that relates to the student, based on the fact that he/she uses any of the languages of the constituent peoples in written or oral communication.

(3) No discrimination shall be carried out of teachers or any other employee upon appointment, terms of employment, advancement or in any other decision relating to the fact that he/she uses any of the languages of the constituent peoples in written or oral communication.

Article 11

Language and culture of national minorities in the Republic shall be respected in secondary education in accordance with the Framework Convention for the Protection of the National Minorities.

Article 31 paragraphs 1, 8, 9 and 10

(1) Programs of secondary education shall be exercised based on curriculum.

(...)

(8) Curricula need to be comparable to other curricula of the countries of the European Union and promote the idea of the life-time learning.

(9) Curriculum must be harmonized with the joint core curricula referred to in Articles 42 and 43 of the Framework Law on the Primary and Secondary Education in Bosnia and Herzegovina (the Official Gazette of Bosnia and Herzegovina, 18/03).

(10) By the Rule Book, the Minister shall determine the curriculum for the high school, arts school, vocational training school, vocational school and school for students with special needs upon proposal of the Republic Pedagogical Institute, while the curriculum for religious education schools shall be adopted upon proposal of the appropriate religious community.

22. The **Provisional Agreement on Meeting Special Needs and Rights of Returnee Children** of 5 March 2002, as relevant, reads:

Considering all the more increased number of returnee families, their constitutional rights and rights of their children to adequate education, and having in mind that the lack of adequate education is often cited as one of the fundamental obstacles for return, the Ministry of Education of the BH Entity observe the need for meeting special needs and rights of returnee children within framework of the Agreement that shall offer equal provisional solutions for all and guarantee rights of all constituent peoples. The Ministry of Education of BH entity have agreed upon the following:

1. All children shall learn general subjects based on the local curriculum where they are located and wherever they and their families return (this implies curriculum of the RS in RS and cantonal curriculum in F BiH);

2. With regards to so called „ethnic-related group of subjects" (mother tongue and literature, history and geography - „natural sciences" in beginning classes of primary school and religious education classes), the parents shall have the possibility to choose between Entity or Cantonal or curriculum of their own choice. The priority shall be given to employment of returnee teachers to teach ethnic-related group of subjects. (...)

5. Both Entity Ministers of Education shall be immediately assigned to find more permanent solutions for issue of education of returnees and meeting special needs and rights of all constituent peoples, which will require, for example, adoption of new laws in area of education, creation of new curricula, as well as textbooks that shall not contain any disputable subject-maters, general respect of human rights of pupils/students, parents and teachers, and reemployment of teachers in schools in which they taught before the war. This Agreement shall remain in effect until all the conditions referred to herein are fulfilled.

23. The **Agreement on the Joint Core Curricula**, which was signed on 4 June 2003, as relevant, reads:

I

The Ministers of Education of the Entities and Cantons and the Director of the Department for Education of the Brčko District hereby adopt the Agreement on the Joint Core Curricula.

II

The Ministers of Education of the Entities and Cantons and the Director of the Department for Education of the Brčko District undertake to include the Joint Core Curricula into the curricula which are adopted and studied on the territories under their jurisdiction.

III

The Signatory Parties to this Agreement undertake to ensure that the courses are taught based on the curricula which encompass the Joint Core Curricula in all schools in Bosnia and Herzegovina starting from the school year 2003/04.

IV

By implementing this Agreement the Signatory Parties endeavour to act in compliance with the Plan for Implementation of the Joint Core Curricula, which is made in accordance with the Memorandum of Understanding of the Steering Board for the Joint Core Curricula and Working Groups for Certain Subjects, which is attached to this Agreement.

V. Admissibility

24. The Constitutional Court notes that the applicant requested a review of the constitutionality of the Law on Primary Education and Upbringing in the Republika Srpska *(the Official Gazette of the Republika Srpska*, 74/08 and 71/09), Law on Secondary Education and Upbringing in the Republika Srpska *(the Official Gazette of the Republika Srpska*, 74/08, 106/09 and 104/11), Laws on Primary Education and Upbringing and Laws on Secondary Education and Upbringing in all ten cantons in the Federation of Bosnia and Herzegovina (Una-Sana Canton, Posavina Canton, Tuzla Canton, Zenica-Doboj Canton, Bosnian-Podrinje Canton, Central Bosnia, Herzegovina-Neretva, Western-Herzegovina, Canton Sarajevo and Canton 10).

25. In the present case, the Constitutional Court will review the constitutionality of the Law on Primary Education and Upbringing in the Republika Srpska *(the Official Gazette of the Republika Srpska*, 74/08 and 71/09) and the Law on Secondary Education and Upbringing in the Republika Srpska *(the Official Gazette of the Republika Srpska*, 74/08,

106/09 and 104/11), as the observations on the mentioned laws will also apply to the cantonal laws that have been challenged. In that regard, the Constitutional Court will invoke the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

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

The Constitutional Court shall uphold this Constitution.

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

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

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

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

27. The Constitutional Court observes that the request was submitted by the Chairman of the Presidency of Bosnia and Herzegovina (at the time of lodging the request), meaning that the request was filed by an authorized person pursuant to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

28. Bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19(1)(a) 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 19(1) of the Rules of the Constitutional Court rendering this request inadmissible.

VI. Merits

29. In essence, the applicant considers that the challenged laws of the entity of the Republika Srpska have a discriminatory effect, as they lack the mechanisms for providing minimum standards guaranteeing the right of parents to have their children educated in conformity with their religious and philosophical convictions. In addition, the applicant

makes reference to studying the „ethnic-related group of subjects" and multicultural classrooms. He considers that after the competent ministry of education (in coordination with educational-pedagogical institutes) regulates this matter by curricula in accordance with bylaws, there is a possibility for changing the essence of the will of the legislator. Therefore, it is obvious that the challenged laws do not satisfy the criteria of foreseeability and quality of law within the meaning of standards of the European Convention.

30. Article 2 of Protocol No. 1 to the European Convention reads:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

31. 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.

32. Article 1 of Protocol No. 12 to the European Convention reads:

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.

33. The Constitutional Court recalls that Article 1 of Protocol No. 12 to the European Convention contains a general principle of non-discrimination and guarantees the enjoyment of all rights under the law 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. Furthermore, the provisions of Protocol No. 12 to the European Convention imply that the public authorities will also refrain from any act of discrimination against any person on any ground. This means that the basic principle of non-discrimination has been extended to include domestic laws and not only the rights guaranteed by Article 14 of the European Convention.

34. Furthermore, according to the case-law of the European Court, 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 realized (see, the 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).

35. In addition, the Constitutional Court recalls that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective. In this regard, the European Court of Human Rights has 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 difference of 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).

36. Furthermore, the Constitutional Court recalls that the right to education, as set out in the first sentence of Article 2 of Protocol No. 1, guarantees everyone within the jurisdiction of the Contracting States „a right of access to educational institutions existing at a given time", but such access constitutes only a part of the right to education. For that right „to be effective, it is further necessary that, *inter alia*, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form

or another, official recognition of the studies which he has completed" (see, European Court for Human Rights, *Oršuš et al. v. Croatia,* judgment of 16 March 2010, paragraph 146; *Case „Relating to certain aspects of the laws on the use of languages in education in Belgium*" (merits), 23 July 1968, pp. 30-32, §§ 3-5, Series A No. 6 – „the '*Belgian linguistic' case*"; *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 52, Series A No. 23; and *Leyla Şahin v. Turkey* [GC], No.4474/98, § 152, ECHR 2005-XI).

37. The right to education guaranteed by the first sentence of Article 2 of Protocol No. 1 by its very nature calls for regulation by the State, but such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols (see, European Court for Human Rights, the „*Belgian Linguistic*" case, *op. cit.* p. 32, paragraph. 5). As regards its second sentence, the European Court of Human Rights, in its judgment *Campbell and Cosans v. United Kingdom*, explained the meaning of words „philosophical convictions" within the meaning of the second sentence of Article 2. Namely, in its ordinary meaning the word „convictions", taken on its own, is not synonymous with the words „opinions" and „ideas", such as are utilized in Article 10 of the European Convention, which guarantees freedom of expression; it is more akin to the term „beliefs" (in the French text: „convictions") appearing in Article 9 (art. 9) - which guarantees freedom of thought, conscience and religion - and denotes views that attain a certain level of cogency, seriousness, cohesion and importance (see, European Court of Human Rights, *Campbell and Cosans v. the United Kingdom,* judgment of 25 February 1982, Series A No. 48, page 16, paragraph 36).

38. Also, according to the European Court of Human Rights, as regards the adjective „philosophical", it is not capable of exhaustive definition and little assistance as to its precise significance is to be gleaned. Having regard to the Convention as a whole, including Article 17, the expression „philosophical convictions" in the present context denotes, in the Court's opinion, such convictions as are worthy of respect in a „democratic society" (see, European Court of Human Rights, *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, p. 25, paragraph 63), and are not incompatible with human dignity. In addition, those convictions must not conflict with the fundamental right of a child to education, the whole of Article 2 being dominated by its first sentence. Furthermore, pursuant to the case-law of the European Court of Human Rights, Article 2 encompasses all functions of the State relating to education and teaching and it does not allow for the difference to be made between the religious teaching and other subjects. It prescribes that the State must respect the convictions of parents regardless of whether those convictions are religious or philosophical within the entire State education system.

39. All the principles and norms set forth in the European Convention regarding discrimination and the right to education are supported in the case-law of the Constitutional Court. Furthermore, the Constitutional Court considers that in complex states such as Bosnia and Herzegovina there should be the education system that will not be in contradiction to the aforementioned principles. Namely, it is necessary that the education system respects the right of parents to ensure such education for their children that will be in conformity with their own religious and philosophical convictions that are worthy of respect in a „democratic society" without discrimination on any ground. Only that kind of education is in the democratic spirit Bosnia and Herzegovina strives for, while all other types of education would be illusory.

40. The Constitutional Court recalls that, according to the constitutional division of responsibilities, the elementary and secondary education in the Republika Srpska falls within the responsibility of the Entity (Article 68 paragraph 12), while in the Federation of BiH it is within the responsibility of the cantons (Article III(4)(b) of the Constitution of the Federation of Bosnia and Herzegovina). In this connection, the Constitutional Court holds necessary in this decision to make an overview of the legal background of the education system in Bosnia and Herzegovina.

41. The Constitutional Court observes that on 5 March 2002 the Ministers of Education of the Republika Srpska and the Federation of Bosnia and Herzegovina signed the „Provisional Agreement on Meeting Special Needs and Rights of Returnee Children". In the preamble of that Agreement it is stated that the Agreement will offer equal interim arrangements for all and guarantee the rights of all constituent peoples. The Agreement determines that all children will study all general subjects on the basis of local curriculum at whichever place they are and whichever place they and their parents return to (that means the curriculum of RS in the territory of RS and respective cantonal curricula in the territory of FBiH). It is further determined that, as regards the so-called „ethnic-related group of subjects" (language, literature, history, geography - science and social studies in the beginning classes of elementary schools and religious education), the parents will be given a possibility to choose either the Entity or cantonal curriculum, or the curriculum of their own choice. It is determined that as regards the employment, the priority will be given to the returnee teachers who will teach ethnic-related group of subjects. So, the need for studying the ethnic-related group of subjects is introduced by the mentioned Provisional Agreement, which clearly determines which subjects make the ethnic-related group of subjects. The Agreement determines that both Entity Ministries of Education will immediately engage themselves in order to find more permanent solutions to the issue of education of returnees and meeting of special needs of all constituent peoples, which will

require, for instance, passing of new laws in the area of education and drafting of new curricula and textbooks. It is determined that the mentioned agreement will be in effect until the mentioned requirements are met.

42. Furthermore, on 13 November 2002 the Ministers of Education of Entities and Cantons (except for Canton 10), supported by OSCE and OHR, signed the Implementation Plan for Provisional Agreement. The Plan refers to the preamble of the Provisional Agreement in which it is stated that the Agreement will offer equal provisional arrangements for all and guarantee the rights of all constituent peoples. It is further stated that it is clear that the Agreement will be implemented in favour of all children and teachers (both returnees and domiciles). It is pointed out that the possibility of choosing the curriculum for teaching the so-called „ethnic-related group of subjects" relates to the children (returnees and domicile children) who live in certain administrative area (municipality, canton, entity), wherein they are minority. The conditions for studying ethnic-related group of subjects are precisely prescribed in the Plan as regards the number of pupils, premises and teaching staff who will be conducting the teaching courses.

43. Subsequent to the mentioned Provisional Agreement and Implementation Plan, the Framework Agreement was passed at the level of Bosnia and Herzegovina and it was published in the *Official Gazette of BiH*, 18/13. The Framework Law regulates the general principles and objectives related to education, including respect for human rights and fundamental freedoms and access to education and equal opportunities in education and the possibility of choice at all levels of education regardless of sex, race, ethnic affiliation, social and cultural origin and status, family status, religion, psycho-physical and other personal qualities. Article 7 of this Law stipulates that the use of languages of the constituent peoples in BiH in all schools will be in accordance with the Constitution of BiH and that all students will learn alphabets that are officially used in Bosnia and Herzegovina in all schools.

44. The Framework Law also stipulates the right of parents to choose the type of education their children will acquire, according to their convictions. (Article 23). While doing so, the parents must not exercise the right to choose their child's education in a manner that promotes their prejudice on racial, gender, ethnic, language, religious and any other ground and a manner inconsistent with the law. This law also stipulates an obligation of the school to be respectful of individuality of every student, as well as towards his or her cultural and ethnic identity, language and religion (Article 34). The school will also refrain from discrimination on any grounds as to a child's access to education or a child's participation in educational process (Article 35).

45. Further, Article 42 of the Framework Law stipulates that there will be a joint core curricula for all public and private schools in Bosnia and Herzegovina. The joint core curricula will consist of the curricula and syllabi of all subjects of primary and general secondary education of BiH that have an agreed joint core as broad as possible (Article 43). The same Article provides what the joint core curricula should guarantee and secure. Article 59 of the Law stipulates that all laws of the State, Entity, Cantons and the District of Brčko, as well as other relevant regulations in the area of education, must be harmonized with the provisions of the Framework Law.

46. Thus, the Framework Law sets out the general principles and objectives in the area of education, including an obligation that this is a part of the legislation of the Entity and Cantons.

47. Considering the Provisional Agreement and the Framework Law, the Constitutional Court notes that the Provisional Agreement was signed in 2002, meaning that it was signed before the adoption of the Framework Law (2003). The Provisional Agreement was signed at the time when there were no regulations in the area of education that would guarantee the right of parents to have their children educated in conformity with their religious and philosophical convictions. Therefore, in order to meet the needs of all constituent peoples and, particularly, the needs of the then returnees, the so-called „ethnic-related group of subjects" was included in education by the Provisional Agreement. Namely, at that time the positive legal regulations were not harmonised with international instruments and standards prohibiting discrimination and promoting human rights. Hence, the Provisional Agreement itself stipulates an obligation that the entity ministries of education are to find permanent solutions for issues related to the education of returnees as well as for special needs and rights of all constituent peoples, and the aforementioned required that new legislation in the area of education had to be passed and that new curricula had to be developed and that the human rights of students, parents and teachers had to be generally recognised and respected. It was foreseen that the Provisional Agreement would be in effect until the mentioned requirements were satisfied.

48. On the other hand, the Framework Law stipulates the joint core curricula that has to be an integral part of each curriculum adopted by the competent ministers of education. Article 43 of the Framework Law prescribes also all that must be guaranteed and ensured by the joint core curricula.

49. The Constitutional Court notes that, pursuant to the provisions of Article 43 paragraph 3 and Article 59 paragraph 4 of the Framework Law, on 4 June 2003 the Ministers of Education of the Entities, Cantons and of the District of Brčko signed the Agreement on

the Joint Core Curricula. Therefore, the Framework Law stipulates the obligation that the Agreement has to be signed (Article 43), so that the joint core curricula has to be included in the curricula adopted by the relevant ministers of education.

50. Following the Framework Law and Agreement on the Joint Core Curricula adoption, the challenged laws on primary and secondary education were adopted in the Republika Srpska and cantons. All the disputed laws contain provisions that prohibit discrimination and promote respect for human rights and fundamental freedoms, and it is not disputed by the applicant. Also, the applicant did not dispute that all the challenged laws contain the provisions stipulating that the curricula should be adopted by the competent ministries of education in cooperation with the professional bodies competent for issues of pedagogy and education (pedagogical institutes, *etc*.). However, the applicant raises an issue in respect of the provisions of the challenged laws whereby the legislator gives the executive bodies an authorisation to design the curricula (Article 33 of the Law on Primary Education and Upbringing of the RS and Article 31 of the Law on Secondary Education in the Republika Srpska).

51. As already stated, the applicant finds that the challenged laws of the Entity of the Republika Srpska do not have the mechanisms for providing minimum standards guaranteeing the right of parents to have their children educated in conformity with their religious and philosophical convictions through the so called „ethnic-related group of subjects" and multicultural classrooms. He finds that if the competence to adopt the curricula in cooperation with pedagogical institutes is granted to the executive authorities, this may lead to changing the essence of the will of the legislator. Ultimately, this may lead to the situation where the challenged laws do not satisfy the criteria of foreseeability and of the quality of the law in terms of the standards of the European Convention.

52. In the present case, the Constitutional Court will first assess whether the challenged laws are discriminatory and whether the legislator can authorise the executive bodies, *i.e.* the competent ministry of education and the expert bodies to develop curricula. In this regard, the Constitutional Court notes that the challenged laws on primary and secondary education in the Republika Srpska stipulate clear and specific provisions that prohibit discrimination on any ground and that promote respect for human rights and fundamental freedoms and differences. Therefore, the challenged laws, in the opinion of the Constitutional Court, contain high standards and principles, thereby ensuring the equal right of access to education and equal opportunities in education and upbringing, without discrimination on any ground. However, the Constitutional Court notes that the challenged laws do not contain the provisions regulating the issue of studying the „ethnic-

related group of subjects", as it was foreseen by the Provisional Agreement. Accordingly, the Constitutional Court will establish whether the challenged laws are unconstitutional in that respect. In the view of the Constitutional Court, that would be unconstitutional only if the provisions of the challenged laws, stipulating that the executive bodies are authorised to develop curricula, were unconstitutional.

53. In this connection, the Constitutional Court recalls the position of the European Court related to the determination of „autonomous term of law" under which in order for a general act to be considered a law, not only formally, but also in terms of contents, that law, or its norms must be formulated with sufficient precision, clarity and foreseeability, so that the subjects the law refers to can regulate their conduct with the law, so as to prevent them from being denied their guaranteed rights or legal interest due to imprecise and insufficient norms. In addition, under the case-law of the European Court the expression „law" does not relate to the mere existence of law, but also relates to the quality of law, requiring that a law is in compliance with the rule of law and that its norms are sufficiently precise, clear and foreseeable (see European Court, case *Silver and Others v. Great Britain*, judgment of 25 March 1983, *Sunday Times v. Great Britain*, judgment of 26 April 1979, *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000). Furthermore, under the case-law of the European Court, the expression „prescribed by law" and the expression „in accordance with the law" not only require that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question. Thus, a law must be equally accessible and foreseeable, formulated with sufficient precision to enable a citizen to regulate his/her conduct. In order to meet these requirements, it must offer certain measure of legal protection from arbitrary interference of public authorities in the rights protected by the Convention. Law must give the sufficiently clear scope of any discretionary right given to public authorities as well as the manner in which it is executed (see *Rotaru v. Romani*, judgment of 4 May 200, paragraph 52; *Rekvenyi v. Hungary*, judgment of 20 May 1999, paragraph 34).

54. Bringing all of the aforesaid into context with the request in question, the Constitutional Court finds that the general principles in the area of primary and secondary education of entity of the Republika Srpska are clearly determined by the Framework Law, the Agreement on the Joint Core Curricula and the challenged laws. The executive authorities have an obligation, when developing and adopting curricula, to comply with all of those principles and standards. The established principles should be implemented through curricula by the executive authorities, and the curricula should include everything to ensure everyone the equal right of access to education, without discrimination on any ground and in conformity with their religious and philosophical convictions. In this connection,

the Constitutional Court notes that a curriculum covers a specialised and extensive area. In a process of its development, guidelines and pedagogical and educational objectives are observed as well as students' development, taking into account all changes related to the society, politics, information and communication technologies, globalisation, *etc*. The curricula are moulded in accordance with the fundamental principles of a contemporary curriculum that is to be open, democratic, inclusive, subject-integrated, and uniform, and harmonised with the European educational paradigms and achievements. The curricula elaborate and define program elements for each school subject, as follows: pedagogical and educational objectives (outcomes), tasks of individual school subjects in connection with the educational unit of the curricula, the content or subject-matter of learning a specific school subject, suggestions for didactic-methodical processing of teaching topics to improve the process of learning and teaching. In the adoption and practical application of curricula, the focus is being placed on students *i.e.* the diversity of life and cultural circumstances and the achievement of pedagogical and educational outcomes harmonised with students' possibilities, needs and interests in the processes of their complete upbringing and education. Furthermore, curricula elaborate practical issues related to the school subjects to be offered, the syllabus for each subject, teaching time, the number of classroom hours per week and per year as well as the contents according to which teaching a class in primary and secondary schools will be performed. Therefore, it follows that the curricula deal with and elaborate very important, specialised and practical issues related to the organisation of the education area. For that reason, the development of curricula cannot be a legal matter that ought to be thoroughly regulated by the legislator but it ought to be regulated by the competent ministry of education in cooperation with expert bodies and, certainly, in accordance with the established legal principles.

55. In view of the Constitutional Court, in case that the executive authorities failed to comply with the established legal principles related to the prohibition of discrimination and promotion of human rights and freedoms when designing curricula or adopting any decision in that respect, persons whose rights are violated by decisions of the executive authorities have the possibility to seek the protection of their rights before the relevant ordinary courts. Therefore, in the present case it is not the task of the Constitutional Court, in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, to review the constitutionality of decisions of the executive authorities through curricula, but to review the constitutionality of the challenged laws, so that it should establish whether the challenged laws are in violation of the established legal principles related to the prohibition of discrimination and promotion of human rights and freedoms. In view of the above, the Constitutional Court is of the opinion that the authorisation granted to the

executive authorities and expert bodies for the curricula development, in itself, does not reduce the quality of laws in terms of its autonomous meaning in accordance with the standards set forth in the case-law under the European Convention.

56. The Constitutional Court recalls its case-law in Decision No. *U 10/05*, based on Article VI(3)(f) of the Constitution of Bosnia and Herzegovina, wherein the Constitutional Court pointed out that it would not deal with the implementation of laws. Namely, in that decision the Constitutional Court states that *the claims that the Draft Law is destructive of the vital interests of the Croat people in Bosnia and Herzegovina cannot be used as an argument that the existing television stations of the Federation of Bosnia and Herzegovina and of the Republika Srpska are de facto television stations in the Bosnian and Serb languages and satisfy the needs of the Bosniak and Serb peoples. The Constitutional Court does not accept that argument. The Constitutional Court considers that the programming principles and standards defined in Articles 26 and 27 of the Draft Law (with particular stress on equal representation of all three official languages, two scripts, and the culture and traditional heritage in program broadcasting) must be applied to all broadcasters at all levels (state, entity, cantonal, municipal). If it is properly implemented, the Draft Law should help to ensure that all television and radio broadcasters are increasingly open to the languages, cultures and traditions of all three constituent peoples. The Constitutional Court therefore would not consider the Draft Law to be destructive to the vital interests of the Croat people even if it is correct to say that, at present, the other state-owned channels prefer to broadcast programs for the other two constituent peoples (as to which no evidence has been presented to the Constitutional Court),* (see, Constitutional Court, Decision on Admissibility and Merits No. *U 10/05* of 22 July 2005, published in the *Official Gazette of BiH*, 64/05, paragraph 46).

57. In view of the above, the Constitutional Court holds that in this case the provisions of the disputed laws on primary and secondary education of the entity of the Republika Srpska, stipulating that curricula are adopted by the competent ministries in cooperation with the pedagogical institutions, are not in itself discriminatory if the aim were achieved that the disputable laws, that are abundant in provisions on prohibition on discrimination on any ground, are implemented in a proper manner and in the spirit of the disputable laws. In the opinion of the Constitutional Court, these laws contain the general principles of international law, referred to by the applicant, within the meaning of Articles II(1) and III(3)(b) of the Constitution of BiH, as these provisions stipulate and guarantee a very high degree of protection of human rights and fundamental freedoms without discrimination in the area of education. This was an obligation of the entity of the Republika Srpska according to the Framework Law that sets up the general principles and objectives in

the educational system in BiH. However, the manner in which the provisions of the law are implemented in practice by the competent ministries that adopt bylaws as well as the implementation of those acts cannot be an issue that the Constitutional Court ought to deal with when reviewing the constitutionality of the challenged laws within the meaning of Article VI(3)(a) of the Constitution of BiH.

58. The Constitutional Court therefore concludes that the provisions of the challenged laws in the context of the request in question are not inconsistent with the provisions of Articles II(1), II(4) and III(3)(b) of the Constitution of BiH, Article 14 of the European Convention in conjunction with provisions of Article 2 of Protocol No. 1 to the European Convention and Article 1 of Protocol No. 12 to the European Convention.

59. Given the mentioned conclusions, the Constitutional Court will not examine the allegations of the applicant about possible discrimination in relation to other international instruments referred to by the applicant, as the request in question was examined in terms of Article 1 of Protocol No. 12 to the European Convention that contains the general principle of non-discrimination. In addition, the Constitutional Court will not examine the applicant's allegations related to the so called „multicultural classrooms", as the applicant, apart from arbitrary allegations in that respect, failed to give details on those allegations.

60. Having regard to the conclusions from the previous paragraphs of the present decision, the Constitutional Court will not examine separately the applicant's allegations related to the cantonal laws on primary and secondary education, as these allegations are essentially the same as the allegations stated in the request for review of the constitutionality of the Law on Primary Education and Upbringing of the Republika Srpska (*the Official Gazette of RS*, 74/08 and 71/09) and the Law on Secondary Education and Upbringing of the Republika Srpska (*the Official Gazette of Republika* Srpska, 74/08, 106/09 and 104/11), which have already been elaborated on in this decision. Therefore, the Constitutional Court finds that these allegations of the applicant are ill-founded and that the request should be dismissed in that part, too.

VII. Conclusion

61. The Constitutional Court concludes that the Law on Primary Education and Upbringing in the Republika Srpska (*the Official Gazette of RS*, 74/08 and 71/09), the Law on Secondary Education and Upbringing of Republika Srpska (*the Official Gazette of RS*, 74/08, 106/09 and 104/11), the Laws on Primary Education and Upbringing and the Laws on Secondary Education and Upbringing of all 10 Cantons in the Federation of Bosnia and Herzegovina (Una-Sana Canton, Posavina Canton, Tuzla Canton, Zenica-

Doboj Canton, Bosnian-Podrinje Canton, Central Bosnia, Herzegovina-Neretva, Sarajevo Canton and Canton 10), in the context of the request in question, are not inconsistent with the provisions of Articles II(1), II(4) and III(3)(b) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention in connection with the provisions of Article 2 of Protocol No. 1 to the European Convention, and Article 1 of Protocol No. 12 to the European Convention.

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

63. 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. U 18/14

DECISION ON ADMISSIBILITY AND MERITS

Request of thirty-eight (38) Deputies of the National Assembly of the Republika Srpska for review of the constitutionality of the provisions of Article 4(2) and (3), Article 5, Article 6(3), Article 9(1), Article 10, Article 11(1)(d), Article 17, Article 18(1) and Article 21(1) of the Law on the Collective Management of Copyright and Related Rights (*Official Gazette of BiH*, 63/10) and the lawfulness of Articles 4, 5 and 6 of the challenged Law in respect of the provisions of the Law on Copyright and Related Rights (*Official Gazette of BiH*, 63/10) and in respect of Article 10 of the Law on Obligations

Decision of 9 July 2015

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 19(a), Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe

Ms. Seada Palavrić,

Having deliberated on the request of **Thirty-eight (38) Deputies of the National Assembly of the Republika Srpska**, in case no. **U 18/14**, at its session held on 9 July 2015, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Thirty-eight (38) Deputies of the National Assembly of the Republika Srpska for a review of constitutionality of the provisions of Article 4(2) and (3), Article 5, Article 6(3), Article 9(1), Article 10, Article 11(1)(d), Article 17, Article 18(1) and Article 21(1) of the Law on the Collective Management of Copyright and Related Rights (*Official Gazette of BiH*, 63/10) is hereby dismissed.

It is hereby established that the provisions of Article 4(2) and (3), Article 5, Article 6(3), Article 9(1), Article 10, Article 11(1)(d), Article 17, Article 18(1) and Article 21(1) of the Law on the Collective Management of Copyright and Related Rights (*Official Gazette of BiH*, 63/10) are compatible

with Article II(3)(i) and (k) and Article II(4) of the Constitution of Bosnia and Herzegovina.

The request lodged by Thirty-eight (38) Deputies of the National Assembly of the Republika Srpska for a review of lawfulness of Articles 4, 5 and 6 of the Law on the Collective Management of Copyright and Related Rights (*Official Gazette of BiH*, 63/10) in respect of the Law on Copyright and Related Rights (*Official Gazette of BiH*, 63/10) and Article 10 of the Law on Obligations (*Official Gazette of the SFRY*, 29/78, 39/85, 45/89, 57/89, *Official Gazette of the RBiH*, 2/92, 13/93 and 13/94, *Official Gazette of the FBiH*, 29/03 and 42/11 and *Official Gazette of the RS*, 17/93, 3/96, 39/03, 74/04) is hereby rejected, as the Constitutional Court 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 24 June 2014, thirty-eight (38) Deputies of the National Assembly of the Republika Srpska („the applicants") lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of the provisions of Article 4(2) and (3), Article 5, Article 6(3), Article 9(1), Article 10, Article 11(1)(d), Article 17, Article 18(1) and Article 21(1) of the Law on the Collective Management of Copyright and Related Rights (*Official Gazette of BiH*, 63/10; hereinafter referred to as the challenged Law). Furthermore, the applicants requested that the Constitutional Court examine the lawfulness of Articles 4, 5 and 6 of the challenged Law in respect of the provisions of the Law on Copyright and Related Rights (*Official Gazette of BiH*, 63/10) and in respect of Article 10 of the Law on Obligations. Finally, the applicants also requested that the Constitutional Court impose an „interim measure to forbid the application of the impugned provisions" of the challenged Law.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, on 18 September 2014 the House of Representatives and House of Peoples of the Parliamentary Assembly of BiH were requested to submit their replies to the request.

3. The Constitutional-Legal Committee of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina submitted its reply to the request on 5 March 2015. The House of Representatives failed to do so.

III. Request

4. The applicants allege that the impugned provisions of the challenged Law regulate the field of collective management of copyright and related rights in the manner which is contrary to Article II(3)(i) and (k) and Article II(4) of the Constitution of Bosnia and Herzegovina and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and Article 1 of Protocol No. 1 to the European Convention. Furthermore, the applicants allege that there has been discrimination in contravention of Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 in conjunction with Article 11 of the European Convention and in conjunction with Article 1 of Protocol No. 1 to the European Convention.

a) Complaints with regard to the right to property

5. In the reasons for their complaints, the applicants allege that the copyright, as defined in the Law on Copyright and Related Rights is „a single right to the copyright work, which comprises exclusive personal/legal authorizations (moral rights of an author), exclusive property authorizations (property rights of an author) and other authorizations of an author (other rights of an author)" and as such it is primarily individual, *i.e.* the right of an individual/an author. According to Article 14 of the same Law, as further alleged by the applicants, it emerges and belongs to the author based on the creation itself of the author's work and does not depend upon the fulfilment of any of the formalities or requirements related to its content, quality or purpose. Thus, as concluded by the applicants, the copyright is „property" within the meaning of Article 1 of Protocol No. 1 to the European Convention.

6. The applicants further allege that on the other hand, Article 4(2) of the challenged Law stipulates that the copyright management must be carried out collectively in the cases prescribed by the law. Such a limitation, according to the applicants, is contrary to the right to property as laid down in Article 1 of Protocol No. 1 to the European Convention,

since the right to freely dispose of property is encompassed by the right to property. Moreover, the applicants allege that the Law on Copyright and Related Rights allows the author to dispose of his/her property authorizations or other rights by entering into contracts or through other legal transactions, „including both *inter vivos* and *mortis causa* legal transactions". However, the provisions of the challenged Law „oblige the author to collectively exercise" certain copyrights rights, which is, as alleged by the applicants, incompatible with the basic principles of the right to property. Furthermore, the applicants, by referring to Article 14 of the Law on Copyright and Related Rights, allege that the copyright belongs to the author, not to the organization for collective management of copyright and related rights („the collective organization"), which could use such a right irrespective of the author's will, without his/her consent.

7. The next limitation on the author's right to freely decide on the use, management and disposal of his/her property is imposed, as alleged by the applicants, by the provisions of Article 4(3) and Article 9(1) of the challenged Law. In particular, the applicants explain that the aforementioned provisions stipulate that the collective organization exercises the right under Article 4(2) without a contract with the author. However, as noted by the applicants, Article 147(1) of the Law on Copyright and Related Rights stipulates that the author may exercise his/her rights by himself or through his/her representative (a natural or legal person) and that the author may exercise his/her rights in respect of each individual copyright work or several copyrights works (collective management) (Article 147(2) of the Law on Copyright and Related Rights). In the applicants' opinion, in that manner, „the interference with someone else's property is legalized, *i.e.* the use of someone else's property right without consent of the right-holder is allowed, although there is no general (public) interest, which could justify it".

8. Furthermore, the applicants allege that Article 18(1) of the challenged Law includes the presumption that the collective organization, within the scope of the right and work for which it is specialized, is authorized *ipso iure* to act for the account of all authors, while the consent by the author is not imposed as a requirement. The applicants consider that such a presumption of existence of the author's consent is „in contravention of the core and essence of the subjective authorizations of the holder of property rights and constitutes a flagrant violation of the provisions of Article 1 of Protocol No. 1 to the European Convention". In this connection, the applicants explain that such a presumption makes it possible for a third person, *i.e.* the collective organization to use the author's property rights without his prior consent, *i.e.* without a contract with the author, „although the same law stipulates that the contract is to contain information on the type of the work/s and copyright exercised for the account of author". Thus, as noted by the applicants, „it is

obvious that the legal rules laid down in the same Law are completely inconsistent, which jeopardizes legal certainty and paves the way to mass violations of property rights within the scope of copyrights".

9. Furthermore, the applicants allege that the provision of Article 17 of the challenged Law stipulates that a member of the collective organization may not exempt its particular rights or particular forms of the use of such works from the collective management of rights, except in the case when it is stipulated in the contract between him and the collective organization. Unlike the aforesaid, as further noted by the applicants, Article 4(2) of the challenged Law stipulates that certain copyrights may be exercised on the collective basis only, and Article 4(3) and Article 9(1) of the challenged Law stipulate that the collective organization may manage the copyrights without a contract with the author. Given the aforesaid, the applicants conclude that whether the collective organization will take over the management of the author's copyrights and without a contract with him depends only on the will of the collective organization.

10. Given the aforesaid, the applicants hold that such law arrangements are, „in addition to their mutual inconsistency", contrary to the principle of legal certainty and the author's free will in respect of the property authorizations and right to property, since they deprive the authors of the right to freely dispose of their property.

b) Complaints with regard to the right to freedom of association

11. The applicants hold that the provision of Article 6(3) of the challenged Law is contrary to „the idea of freedom of association". In particular, that provision stipulates that there may be only one collective organization for the collective management of copyrights relating to the same type of rights in the same category of works, which, as prescribed by Article 8 of the challenged Law, has the status of an association. Thus, as alleged by the applicants, the challenged Law establishes a monopoly position of the collective organization. Such a monopoly position, as noted by the applicants, is „determined" through a license (a ruling) issued by the State administrative organization – the Intellectual Property Institute of BiH („the Institute"), as defined in Article 5 and Article 10(1) of the challenged Law.

12. Furthermore, the applicants allege that Articles 10 and 11 of the challenged Law prescribe the requirements which an organization/association must fulfil if it wants to perform the activity of collective management of copyrights. In that manner, as claimed by the applicants, „the impression is that from the legal aspect there is a possibility of founding several different organizations and that the author must choose the one he/she wants to join". However, such an impression is „wrong as the legislator does not allow

several organizations/associations to perform the activity of collective management of copyrights insofar as the same type of the copyright is concerned". The applicants hold that in this manner „other associations to which the authors transferred or would transfer their authorization to manage their copyrights by concluding an agreement are not allowed to act on an equal footing, which confirms the monopoly position of the collective organization (as alleged by the applicants, presently, the AMUS from Sarajevo). Therefore, as alleged by the applicants, there is discrimination against „all potential associations which could fulfil the requirements under Article 10 and Article 11" of the challenged Law.

13. The applicants allege that the provision of Article 11(1)(d) of the challenged Law stipulates that the such a legal status granted to the existing collective organization will be withdrawn and will be allocated to another organization if the latter organization proves that „it will offer a more comprehensive repertoire of protected works to the users". The applicants hold that this is evidence demonstrating „discrimination among associations in respect of the number of authors and the number of works encompassed by their repertoire". In this connection, the applicants allege that the question arises as to whether the Institute „is established to protect the rights and interests of authors or those of users (as the Law prescribes the following criterion: evidence demonstrating that the users shall be provided with a larger repertoire of protected copyrights works)". Furthermore, the applicants allege that the provision of Article 66(2) of the Law on Copyright and Related Rights gives the possibility „not only for the collective organization (the associations that were granted such a status by the ruling of the Institute) but also professional associations and trade union associations established with the aim of protecting copyrights, to have the right of action on behalf of their members in order to claim protection of their rights". However, as further noted by the applicants, it follows from the provisions of the challenged Law that „the one who may exercise the right to the protection of its members (in judicial and other proceedings) cannot, at the same time, exercise the rights of its members when the one is entrusted with it through a valid legal transaction".

14. The applicants allege that given the aforesaid, it may be concluded that the mechanism of collective management of copyrights is not regulated in the manner so as to serve the rights and interest of authors, but quite the contrary. The authors' free will is limited and reduced, or the manner of exercise of their rights is fully dictated, whereas the monopoly position is provided for the collective organization as well as a certain model of collection of remunerations. Moreover, the applicants note that the authors who establish an association with the aim of protecting copyrights and related rights, „which is not institutionalized as a collective organization in a decision of the Institute, cannot exercise their rights, despite the fact that the association has been established with the aim of

achieving lawful objectives, the exercise of their rights". In that manner, the membership of an organization, which is not a collective organization, places them in an inferior position compared to those authors who are the members of the collective organization, as they cannot participate in distribution of revenues which, on their behalf and without their consent, are earned by the collective organization. The outcome of such a situation is the fact that they must become members of the collective organization, which, as alleged by the applicants, amounts to a violation of the freedom of association safeguarded by the Constitution of BiH and European Convention.

c) Complaints with regard to alleged discrimination

15. The applicants consider that the impugned provisions „are discriminatory, *i.e.* they create the legal basis for discrimination in the context of the right to property and freedom of association with regard to a circle of persons having the status of authors who do not join the collective organization". The applicants allege that the provision of Article 20(3) of the Law on Copyright and Related Rights stipulates that the author will be entitled to special remuneration for any form of exploitation of the author's work by another person, unless otherwise prescribed by this Law or by an agreement. However, pursuant to Article 4(2) and (3) and Article 9(1) of the challenged Law, the copyrights are managed by the collective organization, including the right to remuneration without an agreement with the author, and it is presumed that the collective organization is authorized to act on behalf of all those authors creating the same type of work. Thus, as alleged by the applicants, „the application of the provisions [of the challenged Law] constitutes in this part unlawful interference with the relevant provisions of the Law on Copyright and Related Rights".

16. Furthermore, the applicants argue that the collective organization distributes the revenues that it earned with the authors who have concluded an agreement on the collective management of copyrights with the organization, and not with other authors. According to the applicants, this means that, pursuant to Article 4(2) and Article 9(1) of the challenged Law, the collective organization „has the exclusive right to manage the copyrights and remunerations for the usage of the copyrights of all authors creating a certain type of the work, and then, to share the revenues exclusively with its members, not with other authors that the organization represents by force of law, whose rights are restricted and jeopardized in the sense of their exercise (Article 21(1) [of the challenged Law]. The applicants allege that „even if the assumption that the contract on the collective management of copyrights has been concluded with the authors that are not the members thereof was interpreted in the manner that the latter ones were the members of the collective organization, the question arises as to how it is possible to share the remunerations with other authors, *i.e.*

the authors that are not the members of the organization, since it is not certain who they are and what the works are in respect of which the remunerations are collected".

17. The applicants also consider that there is discrimination against the authors who establish an association with the aim of protecting the copyrights and related rights, „which is not institutionalized as a collective organization in a decision by the Institute". They claim that the membership of another organization „places them in an inferior position compared to the authors who are the members of the collective organization" and that they are prevented from „freely deciding on the association of their choice, on one hand, and their property rights, on the other hand".

d) Complaints with regard to incompatibility between the provisions of the challenged Law and other laws

18. The applicants further allege that the provisions of Articles 4, 5 and 6 of the challenged Law are contrary to the general rules laid down in the Laws on Obligations of both Entities, notably freedom of contract under Article 10 of the Law on Obligations. Furthermore, they claim that the same provisions are contrary to the provision of Article 64(3) of the Law on Copyright and Related Rights stipulating that the author is entitled to transfer individual property rights and other rights of the author to another person through an agreement or other legal transaction, unless otherwise prescribed by that Law. Moreover, the applicants claim that the provisions of the Law on Copyright and Related Rights allow the author to dispose of his/her legal property rights and other rights of the author during his/her lifetime and in the event of death. However, the provisions of the challenged Law „oblige the author to collectively exercise certain property rights deriving from the copyright, which is in contravention of the basic principles of the property right".

19. Furthermore, the applicants claim that the provisions of the challenged Law are contrary to Article 73 of the Law on Copyright and Related Rights, since they put limitations on the transfer of the author's individual property rights as they „force the author to exercise some of them through the collective organization, even without his/her consent or knowing". The applicants claim that incompatibility between those two laws apparently follows from the fact that the provisions of the Law on Copyright and Related Rights stipulate that the author is entitled to remuneration for any form of usage of copyright work, unless otherwise prescribed by that law or agreement, whereas the challenged Law prescribes that the copyrights „are exercised by the collective organization, including the right to remuneration and without agreement with the author".

20. Taking into account all the foregoing, the applicants propose that the Constitutional Court should first impose an interim measure prohibiting any further application of the challenged Law, and then should take a decision to declare „the impugned provisions[of the challenged Law] unconstitutional/unlawful" and render them ineffective.

e) Reply to the request

21. In reply to the request the Constitutional-Legal Committee of the House of Peoples of the Parliamentary Assembly of BiH alleged that the Committee had considered the request at the session held on 4 March 2015 and concluded that „[the Parliamentary Assembly of the BiH] adopted [the challenged Law], that it was published in the *Official Gazette of BiH,* 63/10" and that „the Constitutional Court of Bosnia and Herzegovina received the request for review of the constitutionality of the aforementioned law on 24 June 2013". Following a discussion, „the Constitutional-Legal Committee unanimously decided that Constitutional Court of Bosnia and Herzegovina would be informed of the aforementioned facts, which would decide, in accordance with its jurisdiction, on the compatibility of the law in question with the Constitution of Bosnia and Herzegovina".

IV. Relevant Laws

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

Article VI(3) Jurisdiction

The Constitutional Court shall uphold this Constitution.

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

(...)

- Whether 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. The **Law on Collective Management of Copyright and Other Related Rights** (*Official Gazette of BiH*, 63/10), as relevant, reads:

Article 4
(Mandatory Collective Management of Rights)

(...)

(2) Copyright management shall be carried out only collectively in the case of:

a) resale of original works of fine arts (resale right),

b) collection of remuneration for private and other internal use of the works,

c) cable retransmission of the works, unless the own broadcasts of broadcasting organizations are concerned, irrespective of whether such rights of broadcasting organizations are their own rights or the rights transferred to them by another right holders,

d) right to reproduction of actual newspaper and similar articles on current issues in such press reviews (clipping).

(3) The rights referred to in paragraph (2) of this Article shall be managed by a competent collective organization without a contract with the author.

Article 5
(Individual Management of Rights in Exceptional Cases)

The rights which may be managed only collectively under Article 4 of this Law may be managed individually until such time as the Institute grants an authorization for the collective management thereof to a particular legal entity.

Article 6
(Collective Organization)

(1) A collective organization shall be a legal entity which, having the authorization granted by the Institute, shall carry out the tasks referred to in Article 3 of this Law as its only and non-profit activity, on the basis of a contract with the author or by virtue of this Law.

(...)

(3) There may be only one collective organization for the collective management of copyright relating to the same type of rights in the same category of works.

Article 7
(Operational Standards of Collective Organizations)

(1) A collective organization shall carry out all the tasks within the scope of its activity in such a manner as to ensure the achievement of the maximum possible level of effectiveness, good business practice, economic efficiency and transparency.

(2) A collective organization shall deduct from its total revenue only the funds for covering the expenses of its own operation, and it shall distribute all other funds to its members. Exceptionally, the Statute of a collective organization may explicitly stipulate that a particular portion of such funds shall be allocated for cultural purposes and for the improvement of the pension, health and social status of its members. The amount of funds allocated for such purposes shall not exceed 10% of the net income of the collective organization.

(3) A collective organization shall adhere to the international and generally accepted rules, standards and principles which apply to collective rights management in practice, in particular to those which relate to professional support service, determination of remuneration rate for the use of works, documentation and the international exchange thereof, as well as to the calculation and distribution of remunerations to the domestic and foreign authors.

Article 8
(Legal Form of a Collective Organization)

(1) A collective organization shall be a legal entity having the status of an association operating within the entire territory of Bosnia and Herzegovina.

(2) In the case of conflict between the provisions of this Law and the law governing incorporation and operation of associations, the provisions of this Law shall apply.

Article 9
(Legal Basis for Collective Rights Management)

(1) A collective organization may manage copyright on the basis of a contract with the author, unless this Law explicitly stipulates the possibility of collective rights management only on the basis of the law itself (paragraph (3) of Article 4 of this Law).

(2) The contract referred to in paragraph (1) of this Article shall contain in particular:

a) the provision on the exclusive transfer of a respective economic right of the author to a collective organization;

b) the instruction by the author to a collective organization to manage the rights as transferred in its name and for the account of the author;

c) the type of a work and rights managed by a collective organization for the account of the author;

d) term of a contract which may not exceed five years; upon expiration, the contract may be extended indefinitely for equal terms;

(3) If a collective organization manages the rights on the basis of the law, items b), c) and d) of paragraph (2) of this Article shall apply mutatis mutandis.

(4) If the management of rights has been transferred to a collective organization under the law or contract, the author may not manage such rights individually by himself, except in the case referred to in Article 5 of this Law.

Article 10
(Application for the Grant of Authorization)

(1) A legal entity may operate as a collective organization only on the basis of the authorization granted by the Institute.

(2) The procedure for the grant of the authorization to carry out the tasks related to the collective copyright management shall be initiated by the written request of a legal entity filed with the Institute. With such request, the legal entity shall file:

(...)

c) data on the number of authors who have authorized a legal entity to manage the rights in their works, as well as a list of works included in the repertoire of the collective organization;

(...)

Article 11
(Grant of Authorization)

(1) The Institute shall grant an authorization for carrying out the collective management of copyright to a legal entity which filed an application in accordance with Article 10 of this Law if it establishes that:

(...)

d) no other collective organization exists for the same category of works and management of the same rights, unless the legal entity filing a request proves that it will offer to the users a more comprehensive repertoire of protected works than the already existing collective organization, as well as that it may ensure more effective and more economical management of rights.

(2) When assessing the sufficiency of economic circumstances of a legal entity or assessing the provision of more efficient and more economical rights management referred to in paragraph (1) of this Article, the Institute shall take into account in particular: the number of authors who are nationals of Bosnia and Herzegovina or who have residence or principal place of business in Bosnia and Herzegovina and who authorized the collective organization to manage their rights, the total number of their works to be included

in the repertoire of the collective organization, the presumed extent of the use of such works or the possible number of their users, the ways and means by which the collective organization intends to carry out its activities, its ability to manage the rights of foreign authors, its ability to manage the rights of domestic authors abroad, and the assessment of the expected amount of collected remunerations and operating expenses.

Article 15
(Obligation to Accept Collective Management of Rights)

(1) A collective organization may not refuse a request for the conclusion of contract for the collective management of rights in the area of its activity.

(2) The provision of paragraph (1) of this Article shall not apply if the author has already concluded a contract for the collective management of his rights in Bosnia and Herzegovina with a foreign collective organization.

Article 16
(Membership in a Collective Organization)

The authors who have entrusted the management of their rights to a collective organization shall be the members thereof. The types of membership and the rights in connection therewith shall be determined by the Statute of the collective organization.

Article 17
(Prohibition to Exempt Works)

The member of a collective organization may not exempt from the collective management of rights its particular rights or particular forms of the use of such works, except in the case when it is stipulated in the contract between him and the collective organization.

Article 18
(Presumption of Collective Management of Rights)

(1) It shall be presumed that a collective organization is authorized to act for the account of all authors, within the framework of the type of rights and category of works for which it is specialized.

(2) The author who does not wish his rights to be managed collectively shall notify the relevant collective organization of that in writing.

(3) A collective organization shall treat the authors who failed to communicate a notification to the effect that they would manage their rights individually on equal terms with the authors who have concluded with it the contract referred to in article 9 of this Law.

Article 21
(Rules Pertaining to Distribution of Revenue of a Collective Organization)

(1) Taking into account the provision of paragraph (2) of Article 7 of this Law, a collective organization shall distribute the entire revenue derived from its activity to the authors who concluded with it the contract referred to in Article 9 of this Law, as well as to those who manage their rights in Bosnia and Herzegovina on the basis of the contract concluded between that collective organization and a foreign collective organization, in accordance with the annual plan adopted by the Assembly of the collective organization.

(2) A collective organization shall distribute the funds derived from the royalties of its members according to the distribution rules as adopted.

(3) The basic principles and rules of the distribution of revenue shall be specified by the Statute of the collective organization, they shall ensure that the distribution is proportional, appropriate and equitable, and they shall effectively prevent any arbitrariness.

24. The **Law on Copyright and Related Rights** (*Official Gazette of BiH*, 63/10), as relevant, reads:

Article 14
(Origins of Copyright)

Copyright stems from and belongs to the author by mere creation of a work and it is not conditioned by the fulfilment of any formalities or requirements in respect of the contents, quality or purpose thereof.

Article 15
(Content of Copyright)

Copyright is a single right to the copyright work, which comprises exclusive personal/legal authorizations (moral rights of an author), exclusive property authorizations (property rights of an author) and other authorizations of an author (other rights of an author).

Article 20
(Content of Rights)

(1) The property rights of an author comprise the exclusive authorization of an author to forbid or allow the usage of his/her work and copies of such a work, unless otherwise proscribed by this Law.

(2) The copyright work may be used by another person only upon a consent by the author, unless otherwise prescribed by this Law.

(3) The author shall be entitled to special remuneration for any form of exploitation of the author's work by another person, unless otherwise prescribed by this Law or by agreement.

(4) Property right of an author shall include:

a) right of reproduction;

b) rental right;

c) right to communicate the work to the public;

d) right to make an adaptation of the work;

e) right of audio-visual adaptation (Article 110);

f) right of translation.

Article 63
(Succession of copyright)

With the exception of the right to repent, the copyright as a whole shall be the subject to succession. The regulations on succession shall apply to the transfer of copyright, unless otherwise prescribed by this Law.

Article 64
(Transferability of copyright)

(...)

(3) The author shall be entitled to transfer individual property authorizations (the author's property rights) and other rights of the author to another person though agreement or other legal affair, unless otherwise prescribed by this Law.

Article 66
(Locus standi)

(...)

(2) According to this Law, collective organizations, trade union organizations and professional associations established for the purpose of protecting the copyright and related rights shall have the right of action with the aim of protecting the rights of their members in court and other official proceedings.

Article 73
(The scope of transferability of copyright)

The transfer of individual property rights of the author or other individual rights of the author may be limited in terms of the content, space and time.

Article 147
(The manner of exercise of copyright)

(1) The author may exercise his/her copyrights by himself/herself or through his/her representative. The representative may be a natural or legal person authorized by the author.

(2) The copyrights may be exercised in respect of each individual copyright work (individual management of copyrights) or in respect of several copyrights works of several authors together (collective management of copyrights).

(3) The collective management of copyright shall be regulated in a special law in compliance with the appropriate application of this Law.

Article 148
(Individual management of copyright through a representative)

Individual management of copyrights through a representative includes the representation of authors in their legal transactions with users, i.e. the parties ordering their works, including the collection of copyright fees and representation of authors in court or other official proceedings with the aim of protecting their copyrights.

25. The **Law on Obligations** (*Official Gazette of the SFRY*, 29/78, 39/85, 45/89, 57/89, *Official Gazette of the R BiH*, 2/92, 13/93, 13/94, *Official Gazette of the F BiH*, 29/03 and 42/11 and *Official Gazette of the RS*, 17/93, 3/96, 39/03, 74/04), as relevant, reads:

Article 10 of the Law on Obligations (in the Federation of BiH)

The parties to the contractual relations are free regulate their relations, within the limits of the Constitution of Bosnia and Herzegovina, coercive regulations and social morality.

Article 10 of the Law on Obligations (in the Republika Srpska)

The parties to obligations are free to regulate their relations in accordance with their own will within the framework of coercive regulations, public order and good business practices.

V. Admissibility

26. 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 and Article 19(a) of the Rules of the Constitutional Court.

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

Article VI(3)

The Constitutional Court shall uphold this Constitution.

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

(...)

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

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

Article 19(a) of the Rules of the Constitutional Court reads as follows

Article 19

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

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

(...)

a) As to the part of the request for review of lawfulness

27. The applicants *inter alia* request that the Constitutional Court examine whether the provisions of Article 4(2) and (3), Article 5, Article 6, Article 9(1), Article 10, Article 11(1)(d), Article 17, Article 18(1) and Article 21(1) of the challenged Law are compatible with the Law on Copyright and Related Rights and Article 10 of the Law on Obligations.

28. With regard to the review of lawfulness as specified in the mentioned request, the Constitutional Court notes that the provision of Article VI(3) of the Constitution of Bosnia and Herzegovina stipulates the competence of the Constitutional Court to review lawfulness in general terms. At an earlier point, in the case-law of the Constitutional Court, the question arose as to whether inconsistency of the provisions of a challenged Entity law with a law at the level of Bosnia and Herzegovina amounted to the incompatibility with

the Constitution of Bosnia and Herzegovina, and consequently, with the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina.

29. In answering this question, the Constitutional Court took the view that „the laws of Bosnia and Herzegovina passed by the Parliamentary Assembly of Bosnia and Herzegovina are being considered decisions of the institutions of Bosnia and Herzegovina under Article III(3)(b) of the Constitution of Bosnia and Herzegovina, and the adoption of the laws by the entities or any subdivisions thereof in Bosnia and Herzegovina contrary to the procedure prescribed by the State laws might challenge the issue of compliance with Article III(3)(b) of the Constitution of Bosnia and Herzegovina, pursuant to which the Entities and any subdivisions thereof are obliged to comply, *inter alia,* (and) with the decisions of the institutions of Bosnia and Herzegovina. Therefore, the Entities (and subdivisions thereof) must comply with the obligations imposed on them through the laws passed by the institutions of Bosnia and Herzegovina. The fact that such obligations have not been complied with might arise to the breach of the provisions of the Constitution of Bosnia and Herzegovina (see, Constitutional Court, Decision on Admissibility and Merits, no. *U 2/11* of 27 May 2011, paragraph 52, published in the *Official Gazette of BiH*, 99/11).

30. It follows from the aforesaid that, first, the Constitutional Court does not have competence to review consistency of a law passed at the level of Bosnia and Herzegovina with a law passed at the level of an Entity, which was requested by the applicants (review of compatibility of the provisions of the challenged Law with Article 10 of the Law on Obligations), but quite the contrary. Furthermore, the second part of the request for review of lawfulness relates to the examination of consistency of two laws of the same rank, namely the challenged Law and LC, which were passed by the Parliamentary Assembly of BiH. It does not follow from the linguistic interpretation of the provision of Article VI(3) (a) of the Constitution of Bosnia and Herzegovina and well-established case-law of the Constitutional Court that the Court has competence to examine mutual consistency of the decisions of the institutions of Bosnia and Herzegovina, unless the case relates to a dispute between, *inter alia*, institutions of Bosnia and Herzegovina. The case at hand relates to two laws passed by the same „institution", namely the Parliamentary Assembly of BiH. Thus, the case at hand does not relate to two „institutions of Bosnia and Herzegovina" that could have competitive jurisdictions over the same issue. It therefore follows that that there is no „dispute" over that issue. Moreover, according to the case-law of the Constitutional Court, a „dispute" " cannot arise from ordinary and positive legal regulations but it must relate to certain issues regulated by the Constitution of BiH itself (see, Constitutional Court, Decision on Admissibility, *no. U 12/08* of 30 January 2009, published in the *Official Gazette of BiH*, 62/09, paragraph 7). Given the aforesaid, the Constitutional Court holds

that the case at hand does not relate to a „dispute" between „the institutions of Bosnia and Herzegovina" within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and, thus, the Constitutional Court does not have competence to examine mutual consistency of two laws passed by the Parliamentary Assembly on this ground.

31. Given the aforesaid, the Constitutional Court concludes that it does not have competence to decide on the request for review of lawfulness of the challenged Law compared to the provisions of the Law on Copyright and Related Rights and Law on Obligations. Therefore, the Constitutional Court, pursuant to Article 19(a) of the Rules of the Constitutional Court, concludes that this part of the request is not admissible.

b) As to the part of the request for review of constitutionality

32. With regard to the part of the request that relates to the review of compatibility of certain provisions of the challenged Law with the right to property and freedom of association as safeguarded under Article II(3)(i) and (k) of the Constitution of Bosnia and Herzegovina and Article 11 of the European Convention and Article 1 of Protocol No. 1 to the European Convention, and prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina, the Constitutional Court notes that the request was filed by an authorized person, as it was filed by thirty-eight (38) Deputies of the National Assembly of the Republika Srpska.

33. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court notes that this part of the request is admissible as it was filed by an authorized person, and there is no other formal reason under Article 19 of the Rules of the Constitutional Court that would render this part of the request inadmissible.

VI. Merits

34. The applicants allege that the provisions of Article 4(2) and (3) an Article 5, Article 6, Article 9(1), Article 10, Article 11(1)(d), Article 17, Article 18(1) and Article 21(1) of the challenged Law are incompatible with Article II(3)(i) and (k) and Article II(4) of the Constitution of Bosnia and Herzegovina and rights under Article 11 of the European Convention and Article 1 of Protocol No. 1 to the European Convention and that there is discrimination in contravention of Article 14 in conjunction with Article 11 of the European Convention and Article 1 of Protocol No. 1 to the European Convention.

a) As to the legal nature of the mechanism for collective management of copyright and related rights and as to this mechanism as regulated in comparative law

35. Before analysing the compatibility of the provisions of the challenged Law with the Constitution of Bosnia and Herzegovina, the Constitutional Court will consider the legal nature of the mechanism for collective management of copyright and related rights and its regulation in comparative law.

36. This mechanism is regulated in comparative law in two manners: through a special regulation (the *lex specialis* approach; for example, Portugal, Sweden, Netherlands, Austria, Belgium, Slovenia, Croatia, Serbia etc.), or within the framework of the laws regulating comprehensively the matter of copyright protection (for example, Hungary, the Czech Republic, Slovakia). Furthermore, a number of legislations prescribe that collecting societies should be of non-profit character (Austria, Hungary, Portugal, Spain, Italy, Slovenia, etc.). However, some countries do not impose such a requirement (Great Britain, Ireland, Malta, Greece, etc.) so that collecting societies in those countries may be profit societies. Irrespective of the legislator's approach to the regulation of this matter and irrespective of whether a society is a profit or non-profit organisation, the characteristics of this mechanism are the same in all countries.

37. Certainly, the copyright is the property right in all comparative laws. Thus, no matter where, it is regulated in the manner so as to allow the author to exercise his/her right independently or through a representative authorized to undertake certain actions on his behalf and for his benefit. However, such an individual engagement of the author has a purpose only in respect to some categories of works. With regard to the works, the use of which is characterized by high frequency and diffusion and the users of which are numerous and various (most frequently, the musical works), both in theory and practice (in the laws regulating this matter), there is a mechanism of collective management of copyright through societies, organizations or associations for collective management of copyright (hereinafter referred to as the collective organizations). It is important to note that the author's property rights imply the protection of the author in the domain of economic exploitation of the author's work, and also the right to remuneration for the use of the author's work (the author's right to allow or forbid the use of the work, copying that work, selling the original work or copies thereof, reproducing, distributing, renting out, translating etc.). The term „the exercise of copyrights" relates only to the management of property rights, including the right to remuneration, not the moral rights of an author (the author's right to decide when his work will be published and in which form, the author's right to be recognized as a creator of the work, to mention his name or pseudonym on the

work, the right to oppose the alteration of the work or the use thereof if such an alteration or use could subvert his reputation or dignity etc.).

38. Furthermore, the Constitutional Court notes that the collective organizations perform activities on behalf of a number of authors together and their role consists of concluding contracts with users with regard to the use of works, supervision over the use of works, collection of remunerations for the use of works and distribution of remunerations to the authors of works. A collective organization may manage the copyrights based on letter of authorization, contract or *ex lege* (in the cases explicitly prescribed by the law).

39. The mandatory collective management of certain copyrights prescribed by the law is related exactly to the author's right to remuneration for the use of his/her work. The aim of such an arrangement in various legislations is the same: to ensure the most favourable and efficient manner for the authors to exercise their right to remuneration in the case when it is difficult, even impossible, for the authors to exercise their rights individually. This is particularly important when the author is not the holder of the exclusive property right but only the right to remuneration, thus, when the author does not have the possibility to expressly allow or forbid certain form of exploitation of his/her work, but the user may exploit it based on a licence prescribed by the law, by paying a remuneration to the author. In particular, in such cases, the author is not aware of the circle of persons using such a lawful authorization and, virtually, he does not have a possibility independently to establish who exploit his work. Thus, given the lack of contract with each potential users, his remunerations often remain unpaid. On the other hand, the collective organizations have more funds and technical possibilities to control the use of the works, identify users and enter into contracts related to remunerations and collection thereof. It is important to note that a collective organization, unlike a representative of author in case of individual management of rights, acts on its behalf and for the benefit of the author.

40. Furthermore, even in case of exclusive property rights of an author, the mandatory collective management of rights exists in comparative law and serves a purpose. In particular, there may be an actual possibility of individual management of rights in such cases also due to the interest of the public or users in mass use of a work in a specific manner (again, most frequently in case of musical works). In such cases, the legislator opts for the mandatory collective management of rights in order to strike a balance between the interests of the author and those of the users. This is the reason why the regulations governing the issue of mandatory collective management of rights in certain cases have been passed in the European Union (for example, Council Directive 93/83/EEZ on the coordination of certain rules concerning copyright and rights related

to copyright applicable to satellite broadcasting and cable retransmission, available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31993L0083, published in the *Official Journal of the European Communities* L 248 of 6 October 1993, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:1993:248:TOC).

41. Thus, as presented in this short overview of comparative law, the aim and spirit of the collective management of rights is to ensure the conditions guaranteeing the appropriate remuneration for the holders of copyright and related rights, as the result of economic exploitation of the subject of the protection that they have created. This mechanism has been established both for the benefit of the author, who could not or who could hardly exercise their rights in certain cases, and for the benefit of users, who know in such cases that they must address the collective organization if they want to exercise the right of use of works, which all together secures legal certainty in selling the copyrights and related rights.

b) As to the constitutionality of the provisions of Article 4, Article 9(1), Article 17 and Article 18(1) of the challenged Law with regard to Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention

42. Article II(3) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads:

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:

...

k) The right to property.

43. 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.

44. The applicants claim that the provisions of Article 4(2) and (3), Article 9(1), Article 17 and Article 18(1) of the challenged Law are incompatible with the constitutional

rights to property for the following reasons: 1) the mandatory collective management of copyright, as prescribed by the law, restricts the legal property authorizations of the author, which is contrary to Article 1 of Protocol No. 1 to the European Convention, since „the right to freely dispose of such a property forms an integral part of the right to property"; 2) Article 14 of the Law on Copyright and Related Rights stipulates that the copyright belongs to the author, not to the collective organization, „which could use that right irrespective of the author's will, i.e. without his/her consent"; 3) the impugned provisions stipulate that the collective organization shall exercise the rights under Article 4(2) without concluding a contract with the author, „although Article 147(1) [of the Law on Copyright and Related Rights] stipulates that the author may exercise his/her rights by himself/herself or through a representative … and that the copyrights may be exercised in respect of each individual copyright work or in respect of several copyrights works (collective management of copyrights)"; 4) Article 18(1) of the challenged Law includes the presumption that the collective organization has an authorization *ipso iure* to act for the benefit of all authors, and that the author's consent is not a requirement, which is „in contravention of the core and essence of the subjective authorizations of the holder of property rights and constitutes a flagrant violation of the provisions of Article 1 of Protocol No. 1 to the European Convention".

45. The Constitutional Court first notes that the legislator decided to regulate the issue of collective management of copyright by imposing a special law, and it did so by adopting the Law on Copyright and Related Rights. In particular, as correctly alleged by the applicants, Article 147 of the Law on Copyright and Related Rights stipulates the manner of exercise of rights by allowing the authors to exercise his/her copyrights by himself/herself or through a representative (para 1), that the copyrights may be exercised in respect of each individual work (individual management of rights) or in respect of several copyright works of several authors together (collective management of rights, para 2). However, only paragraph 3 of Article 147 of the Law on Copyright and Related Rights stipulates that the collective management of the rights under paragraph 2 of the same Article shall be regulated in a special law „in compliance with the appropriate application of this Law". Thus, the Law on Copyright and Related Rights itself prescribes the *lex specialis* approach to the regulation of the issue of collective management of rights, which in no way diminishes the essence of copyrights, nor does it poses a problem *per se* in the sense of protection of that right. As already noted, the legislator enjoys a wide margin of appreciation as to whether it will regulate this matter in such a manner or comprehensively, within the framework of one law. What is important is that the copyright is, at any rate, appropriately protected.

46. Furthermore, the Constitutional Court notes that Article 4 of the challenged Law prescribes mandatory collective management of rights in four cases only, which are explicitly enumerated in that Article, para. 2, sub-paragraphs a) through d) thereof. Thus, the legislator chose a restrictive list of cases in which the copyright must be exercised through a collective organization, two of which being based on the appropriate regulations of the European Union: resale right under Article 4(2)(a) (Directive 2001/84/EZ of 27 September 2001 relating to the resale right for the benefit of the author of an original work of art, available at: http://www.ipr.gov.ba/images/direktive_eu/direktiva_2001_84_ez.pdf) and cable retransmission (Directive mentioned in para. 40 of this Decision). Thus, the aforementioned two cases relate to the *acquis communautaire*. Given the fact that Bosnia and Herzegovina aspires to become a member of the European Union and the fact that Bosnia and Herzegovina signed the Stabilization and Association Agreement in 2008, it must be ready to accept *acquis* as a whole and, which is very important, must be capable of implementing it. Therefore, the Constitutional Court holds that such arrangements are the result of those efforts. The remaining two cases are the result of the legislator's efforts to ensure for the authors the exercise of their rights, which otherwise they could not exercise or could hardly exercise, as noted above.

47. Thus, in the present case, the right-holders' freedom to choose the manner of exercise of copyrights and related rights is restricted by the imposition of mandatory management of copyrights and related rights in the cases precisely prescribed by the law. However, the Constitutional Court cannot conclude that such a law arrangement fully restricts the author's property authorizations, *i.e.* that it restricts the right to dispose of that right, which was alleged by the applicants. In particular, the restriction imposed in Article 4 of the challenged Law, as already noted, relates solely to four prescribed cases, where the legitimate aim of such a restriction of the author's free will is the management of his/her property authorizations (collection of remuneration), not the deprivation of copyrights. The Constitutional Court notes that such a restriction relates only to the manner of collecting the remuneration for the use of the author's work and it is established, as already noted, in the interest of the holder's copyright and related rights and, consequently, in the general interest. Therefore, the Constitutional Court holds that such an arrangement serves a legitimate aim and that the measure undertaken is proportionate to that aim, as required by Article 1 of Protocol No. 1 to the European Convention. The same conclusion follows from the legal nature of collective management of rights and collective organization which, as already noted, acts on its behalf and exclusively for the benefit of the author. This additionally confirms the legislator's choice under Article 8 of the challenged Law, which stipulates that the collective organization has the status of an association, thus, it is allowed to act as a non-profit organization only.

48. Furthermore, the impugned provisions of Article 9(1), Article 17 and Article 18(1) do not call into question in any way whatsoever the very essence of the copyright, which was alleged by the applicants. The copyright still belongs to the author and there is nothing to indicate that the impugned provisions enable the collective organization to use the copyright „against the author's will" or to dispose of it as it wishes. The Constitutional Court notes that the provision of Article 9(1) stipulates that the collective organization shall manage the copyrights based on a contract with the author, except in the cases of mandatory collective management under Article 4 of the challenged Law. However, it is important to emphasize again that the management of the copyright and related rights within the meaning of that provision implies solely the collection of remunerations on behalf of the author. Moreover, the provision of Article 18(1) of the challenged Law provides for a presumption that the collective organization, within the scope of the right and type of work for which it is specialized, is authorized to act for the benefit of all authors. However, the Constitutional Court notes that this is not an irrefutable presumption. In particular, para. 2 of the same Article stipulates that the author who does not wish to exercise his/her rights on a collective basis is obliged to inform the appropriate collective organization of it. Moreover, despite such a legal requirement, the author may choose to exercise his/her right individually (independently or through a representative). In such a case, the collective organization is excluded. Certainly, such a possibility relates to the situations laid down in Article 4, prescribing the collective management of rights.

49. The Constitutional Court also notes that Article 15 of the challenged Law stipulates that the collective organization may not refuse a request for the conclusion of contract for the collective management of rights, which, again, protects the author who wishes to regulate his relationships with the collective organization by concluding a contract. Furthermore, Article 17 of the challenged Law prescribes the prohibition to exempt particular works or particular forms of the use of such works from the collective management of rights, unless otherwise stipulated in the contract between the author and the collective organization. The Constitutional Court notes that the aim of such a provision, generally forbidding the authors to decide arbitrarily which rights they will exercise collectively and which of them they will exercise individually, is to facilitate the implementation of collective management of rights for the collective organizations and users of works. In particular, the positive sides of the existence of one collective organization for a particular category of right-holders would be significantly diminished if the users had to search whom to address or to claim their rights and whom to pay remunerations in respect of each individual work, namely a collective organization or authors themselves. Thus, the Constitutional Court holds that this provision does not restrict either the very essence of the copyright, but it establishes order and legal certainty in the field of management of that right (collection of remuneration). On

the other hand, the prohibition under Article 17 of the challenged Law is not final, since an author and collective organization may reach a different agreement, which means that the author is the one who decides on the manner of exercise of his/her right.

50. The Constitutional Court holds that the impugned provisions do not indicate anything which would lead to the conclusion that the authors are deprived of their right as defined in the relevant provisions of the Law on Copyright and Related Rights or to the conclusion that the collective organization, based on the impugned provisions, may dispose of the author's right without his/her consent. Quite the contrary, what is regulated by the impugned provisions relates exclusively to the management of the author's rights, *i.e.* the collection of remuneration through a collective organization, and these are the relationships which the author still can regulate with the organization which acts exclusively for his/her benefit.

51. Taking into account the aforesaid, the Constitutional Court concludes that the law arrangements regulating the exercise of copyrights and related rights through the mechanism for collective management of rights, the mandatory collective management of copyright and related rights in certain cases (Article 4), the imposition of a legal basis for collective management of rights (Article 9(1)), the prohibition of exemption of certain works (Article 17), the legal presumptions of collective management of rights (Article 18(1)), as prescribed by the challenged Law, do not constitute such a restriction of the copyright and related rights that would be contrary to the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.

c) As to the issue of discrimination in the context of the right to property

52. The applicants claim that the impugned provisions amount to discrimination contrary to Article 14 of the European Convention, in conjunction with Article 1 of Protocol No. 1 to the European Convention, *i.e.* that „they create a legal basis for discrimination in the context of the right to property … with regard to a circle of persons having the status of authors who have not joined a collective organization". In particular, the applicants allege that the challenged Law enables the collective organization, pursuant to the presumption of collective management of the rights under Article 18(1) of the challenged Law, to collect remunerations without concluding a contract with the author. However, as they further allege, according to the rules on distribution of revenues under Article 21 of the challenged Law, the collective organization distributes all collected revenues solely to the authors who have entered into contracts with it. Thus, the applicants claim that these

provisions of the challenged Law discriminate against the authors who have not concluded a contract with the collective organization, since they are not treated as the authors who have concluded such a contract.

53. Article II(4) of the Constitution of Bosnia and Herzegovina reads as follows:

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

54. Article 14 of the European Convention reads as follows:

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

55. The Constitutional Court notes that Article 14 of the European Convention essentially guarantees that the persons in similar situations will be treated in similar manner in respect to the rights under the European Convention, unless there are objective and justified reasons for different treatment (see, for example, ECtHR, the *Muñoz Díaz v. Spain* judgment, Application no. 49151/07, of 8 March 2010). Furthermore, discrimination may also exist in the situations in which it arises as the consequence of the same treatment of the persons in different situations, *i.e.* „when States, without an objective and reasonable justification, failed to treat differently persons whose situations were different" (see, ECtHR, the *Thlimmenos v. Greece* judgment, (2001) 31. E.H.R.R. 15). Furthermore, in such cases it is not the treatment that differs but rather the effects of that treatment, which will be felt differently by people with different characteristics (indirect discrimination). The applicants, as seen above, complain about direct discrimination against those authors who did not enter into contracts with the collective organization, compared to the authors who entered into such contracts with regard to the distribution of revenues collected by the collective organization.

56. Furthermore, the Constitutional Court notes that such a differential treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, ECtHR, the *Burden v. The United Kingdom* judgment, of 29 April 2008, para 60). Furthermore, the Constitutional

Court notes that the right under Article 14 of the European Convention is qualitative in nature, and not absolute, and that the States may enjoy in that sense a wide margin of appreciation. Whether the margin of appreciation will be broad or narrow depends on: a) the nature of a particular right (it is broader in case of social and economic rights – see, for example, ECtHR, *Stec v. The United Kingdom* judgment, of 12 April 2006, and very narrow in case of fundamental rights); b) the extent of interference (whether a measure amounts to the full or partial deprivation of a right; see, ECtHR, *the Aziz v. Chypre* judgment, (2002) 35 E.H.R.R.; and c) the public interest (for example, the strong public interest in fighting against differential treatment on the ground of sex or race requires greater degree of justification for different treatment).

57. Turning to the instant case, the Constitutional Court notes that the proposer of the challenged Law, when submitting the proposal for the challenged Law to the legislative procedure, also submitted a reasoning for the proposal for the law, which is available at https://www.parlament.ba/sadrzaj/zakonodavstvo/ranije_usvojeni/default.aspx?id=26801&langTag=bs-BA&pril=b). It follows from the reasoning that the main aim of the challenged Law was to achieve harmonization of the regulations in this matter with *acquis communautaire*, and that the concrete aim of the provision related to the distribution of revenues collected by the collective organization was to achieve proportionality, appropriateness, equality and to avoid arbitrariness whatsoever, as stipulated in the provision of Article 21(3) of the challenged Law. The Constitutional Court holds that it is obvious that these are legitimate aims sought to be achieved. The next question is whether there is a justified proportionality between the prescribed measure and these legitimate aims.

58. In answering this question, the Constitutional Court reiterates that there is the presumption prescribed by the law that a collective organization, within the scope of rights and type of work for which is specialized, is authorized to act for the benefit of all authors. However, as already noted, as the rights at issue may be nevertheless exercised individually, such a presumption may cease to be applicable and produce legal effects from the moment when the author who does not want his rights to be managed collectively inform the relevant collective organization of that in writing (Article 18(2) of the challenged Law). On the other hand, the provision of Article 16 of the challenged Law stipulates that the authors who have entrusted the management of their rights to a collective organization shall be the members thereof, and Article 21(1) stipulates that a collective organization shall distribute the collected revenue only to the authors who concluded with it such a contract „in accordance with the annual plan adopted by the Assembly of the collective organization" and „in accordance with its Rules Pertaining to Distribution of Revenue".

Thus, in order to participate in the distribution of remunerations collected by the collective organization, the authors must be the members of such an organization, *i.e.* must conclude a contract with it, which is an implicit requirement.

59. The Constitutional Court considers that such an arrangement has a reasonable justification. In particular, the collective organization should carry out all the tasks within the scope of its activity in such a manner as to ensure the achievement of the maximum possible level of effectiveness, good business practice, economic efficiency and transparency, as laid down in the provision of Article 7(1) of the challenged Law. Furthermore, the provision of Article 21(1) constitutes the next part of the provision of Article 7(2) of the challenged Law, which imposes an explicit obligation of the collective organization to set clear rules on the distribution of collected revenues in its Statute. It would be practically difficult, even impossible, for the collective organization to know the total number of authors for the benefit of whom it performs the activities, to distribute revenues to such authors and to protect their right to remuneration in an effective manner without concluding such contracts with them, nor could a control over its work be carried out in an efficient manner. On the other hand, the Constitutional Court notes that the only obligation of the authors who want the collective organization to act for their benefit is to conclude a contract with that organization, which, according to the Constitutional Court, cannot be considered an excessive burden placed on them. Moreover, in that manner, not only that the authors have the possibility of regulating their relationships with the collective organization, but also they can participate effectively in the distribution of funds, and, what is more, exercise other rights of the members thereof: they may request from it the annual financial report, report of the supervisory board or request it to carry out an audit of its operations (Article 19 of the challenged Law), participate in decision-making *etc*. Furthermore, the collective organization has the status of an association and the provisions of the Law on Associations and Foundations of Bosnia and Herzegovina (*Official Gazette of BiH*, 32/01, 42/03, 63/08 and 76/11) are applied to it in appropriate manner and provided that it is not in contravention of the challenged Law. According to that law, all members of the association constitute the assembly of the association, which is a managing and mandatory body of the association, unless otherwise prescribed by the Statute. Moreover, it should be noted again that the collective organization cannot refuse the request for concluding a contract with the author in the field of its activity, so that whether an author will conclude such a contract and become member of the collective organization, which entails rights and obligations, depends exclusively on the author's will.

60. Furthermore, the Constitutional Court notes that these are solely the authors who have not exclusively declared that they would exercise their rights individually, so that

the collective organization, pursuant to the presumption prescribed by Article 18(1) of the challenged Law, manages those rights for their benefit. As the applicants notice themselves in their request, even if those authors were considered members of the collective organization, an objective „question would arise, namely, how it is possible to distribute remuneration to other authors, *i.e.* the authors who are not the members thereof, since it is not certain who they are and what the works are in respect of which the remunerations are collected?" It would be certainly impossible to foresee the number of authors on the entire territory on which the collective organization performs its activities and the number of works in respect of which it collects remunerations. This is the reason why the authors themselves need to identify themselves either through a request for conclusion of a contract with the collective organization, or through a declaration to the effect that they want the collective organization to act for their benefit. Furthermore, in order for an association to have the status of a collective organization, *i.e.* a license granted by the Institute to act as a collective organization, it must submit, along with the request, the indication of the number of authors who have authorized a legal entity to manage the rights in their works, as well as a list of works included in the repertoire of the collective organization (Article 10(2)(c)). These are in a way the authors/founders of the collective organization. However, after obtaining a license, a collective organization may not refuse a request for the conclusion of contract for the collective management of rights in the area of its activity (Article 15 of the challenged Law), so that it cannot prevent the author in any way whatsoever from concluding a contract in order to become its member. Thus, the obligation of the collective organization under Article 18(3) of the challenged Law, namely the obligation to treat equally the authors who are the members and the authors who are not the members (the authors who failed to communicate a notification to the effect that they would manage their rights individually) should be comprehended by applying teleological interpretation, in the context of all the aforesaid, not by applying the linguistic interpretation solely and independently, which was done by the applicants.

61. Taking into account all the aforesaid, the Constitutional Court holds that the impugned provisions, seen as a whole, enable the collective organization to respect the principles on the distributions of funds under Article 7(2) of the challenged Law and to perform its activity in the efficient and transparent manner and for the benefit of the author as the holder of the right for the benefit of whom it acts. Thus, the Constitutional Court considers that such a measure – the implicit request for the authors to enter into contracts in order to become members of the collective organization and, *inter alia*, to participate in distributions of revenues – is not disproportionate to the aim sought to be achieved (see, para 57 of this Decision), and that there has been no discrimination in contravention of

Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention, in conjunction with Article 1 of Protocol No. 1 to the European Convention.

d) Constitutionality of Articles 5, 6(3), and Articles 10 and 11 of the challenged Law in relation to Article II(3) of the Constitution of Bosnia and Herzegovina and Article 11 of the European Convention

62. Article II(3) of the Constitution of Bosnia and Herzegovina reads:

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:

[...]

i) Freedom of peaceful assembly and freedom of association with others.

63. Article 11 of the European Convention reads:

1. 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.

2. 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.

64. The applicants hold that the provisions of the mentioned articles violate the right to freedom of assembly, because the law prescribes the monopoly position of the collective organization, and that the challenged Law leaves the impression that „there is a possibility of founding several different organizations of which the author might choose which one to join". However, „such an impression is wrong", as only one organization may receive a license to perform the activity of collective management of copyrights insofar as the same type of copyrights is concerned. Therefore, they hold that there is discrimination in relation to the right to freedom of assembly.

65. The Constitutional Court observes that Article 6 of the challenged Law prescribes conditions under which a certain legal person with a status of association may become „a

collective organization" within the meaning of the said article. One of those conditions is a license issued by the competent state authority, and that, under the challenged Law, is the Institute for Intellectual Property of BiH („the Institute"). The license is, therefore, a constitutive element for the existence of a collective organization. Also, under Article 6(3) of the challenged Law, only one organization may obtain a license for the collective management of copyrights relating to the same type of rights in the same category of works. Thus, the Constitutional Court observes that the challenged Law, indeed, establishes the territorial monopoly (for the territory of the entire state) of one collective organization.

66. While analysing the question as to whether the monopoly imposed by law is contrary to the right to freedom of association in the present case, the Constitutional Court observes that the legal or at least *de facto* establishment of the monopoly of collective organizations is also present in the comparative law (Germany, Austria, Slovenia, Croatia *etc.*). Namely, the basic rule that was developed in the practice of the collective management of rights (*de facto* monopoly), which was explicitly introduced into some legislatures (legal monopoly) is that in situations where a number of associations for collective management of the same category of rights exist within a given state, no relationship of competition should exist with respect to managing the same category of rights on the same works with copyrights. So, coexisting collective organizations ought to specialize in managing different rights on individual works and each collective organization ought to have a monopoly in managing rights within the scope of its own specialization. The reason being in the fact that the monopoly position of collective organizations, as explained in theory, is favourable to the efficiency of the performance of all the functions that organization performs. Namely, the exercise of this activity requires an appropriate infrastructure for collecting and distributing fees, appropriate technical and legal service, and it implies assuming full responsibility for the affairs of collective management of rights entrusted to a collective organization. Besides, the monopoly position of collective organizations simplifies relations among the right holder, collective organization and a user, and it also positively affects the balance of power during negotiations for entering into a contract and determining fees, and avoiding the so-called „war of fees" between collective organizations which results in the manipulation of organization by users.

67. On the other hand, the Constitutional Court observes that there are also those opposing the standpoint that the factual and legal monopoly of collective organizations is always a guarantee of a good functioning of the system of collective management. In that sense, the Constitutional Court observes that the European Commission, by means of its Recommendation on collective cross-border management of copyright for legitimate online services (published in the Official Journal of the European Union no. L276/54 of

21 October 2005, also available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2005.276.01.0054.01.ENG), in a way opened the door to free competition between collective organizations in that area. In so doing, as the Recommendation suggests, the following was taken into account, that the licensing of online rights is often restricted by territory, which is the reason why „commercial users negotiate in each Member State with each of the respective collective rights managers for each right that is included in the online exploitation." However, as further stated, „in the era of online exploitation of musical works, however, commercial users need a licensing policy that corresponds to the ubiquity of the online environment and which is multi-territorial." It is therefore „appropriate to provide for multi-territorial licensing in order to enhance greater legal certainty to commercial users." Also, „freedom to provide collective management services across national borders entails that right-holders are able to freely choose the collective rights manager for the management of the rights necessary to operate legitimate online music services across the Community. That right implies the possibility to entrust or transfer all or a part of the online rights to another collective rights manager irrespective of the Member State of residence or the nationality of either the collective rights manager or the rights-holder". The professional literature, still, shows that the consequence of such an approach may pose a sort of a threat to the existence of small collective organizations and to their role as guardians of cultural tradition, and contribute to the authors drain from national to large European societies for collective rights management and the fees battle for users to the detriment of rights holders.

68. Also, the Constitutional Court indicates that the European Court of Justice, in the Case no. C-351/12 of 27 February 2014, in relation to the statutory monopoly concluded the following:

72. […] legislation […] which grants a collecting society […] a monopoly over the management of copyright in relation to a category of protected works in the territory of the Member State concerned – must be considered as suitable for protecting intellectual property rights, since it is liable to allow the effective management of those rights and an effective supervision of their respect in that territory.

[…]

76. Furthermore, the observations submitted to the Court have not shown […] that – as European Union Law stands at present – there is another method allowing the same level of copyright protection as the territory-based protection and thus territory-based supervision of those rights, a method of which legislation such as that at issue in the main proceedings forms a part.

77. Moreover, the debate before the Court has shown that – in circumstances such as those at issue in the main proceedings – to allow a user of protected works to obtain authorisation for the use of those works and pay fees due through any collecting society established in the European Union would, as European Union law stands at present, give rise to significant monitoring problems relating to the use of those works and the payment of the fees due.

78. In those circumstances, it cannot be found that legislation such as that at issue in the main proceedings, because it prevents a user of the protected works […] from benefiting from the services provided by a collecting society established in another Member State, goes beyond what is necessary in order to attain the objective of protecting intellectual property rights.

[…]

82. Therefore, the mere fact that a Member State grants a collecting society […] such as OSA, a monopoly over the management of copyright relating to a category of protected works in the territory of that Member State is not, as such, contrary to Article 102 TFEU.

[…]

87. Where such a collecting society imposes fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position within the meaning of Article 102 TFEU. In such a case it is for the collecting society in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States […].

88. Likewise, such an abuse might lie in the imposition of a price which is excessive in relation to the economic value of the service provided [...].

89. Moreover, if such an abuse were found and if it were attributable to the legislation applicable to that collecting society, that legislation would be contrary to Article 102 TFEU and Article 106(1) TFEU, as is clear from the case-law cited in paragraph 83 above (see: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd746cd02a4d174d89b114b3fbd1c02a90.e34KaxiLc3qMb40Rch0SaxuPb310?text=&docid=148388&pageIndex=0&doclang=HR&mode=req&dir=&occ=first&part=1&cid=66825).

69. Thus, it is possible to conclude that the monopoly position of collective organizations is not *per se* inadmissible, quite the contrary. However, once that question is raised, it is

necessary to be considered from the legal and factual point of view, taking into account all specific circumstances. In view of all the aforementioned, the Constitutional Court holds that the question, as to whether, in the case at hand, the statutory monopoly constitutes the unacceptable restriction of the right to freedom of association, cannot be answered solely through linguistic interpretation of the provisions that the applicants challenged, rather it is necessary to take into account other relevant provisions of the challenged Law, and then to provide a teleological interpretation of such a solution.

70. Therefore, Article 6(3) of the challenged Law established the monopoly position of a collective organization for the same type of rights in the same category of works, and the challenged Articles 10 and 11 of the challenged Law prescribed conditions and procedure for obtaining/granting a license, which, under Article 2 of the challenged Law, is granted by the Institute. However, the Constitutional Court indicates that the provision of Article 7 of the challenged Law prescribed the standards of operation of a collective organization, under which a collective organization shall carry out all the tasks within the scope of its activity in such a manner as to ensure the achievement of the maximum possible level of effectiveness, good business practice, economic efficiency and transparency (paragraph 1), and it is obliged to adhere to the international and generally accepted rules, standards and principles which apply to collective rights management in practice of collective rights management (paragraph 3). Besides, under the challenged Law, a collective organization may perform the activity of collective management of copyright and related rights as its sole activity not for profit, and thus acts in its name, but exclusively for the account of the author.

71. Also, it is rather important that the challenged Law prescribed the control of the work of a collective organization through independent supervision by an author (Article 19) and through the state control (Articles 12, 13 and 14). Under these provisions, the Institute carries out the oversight of the work of a collective organization, it may request a report on the management of affairs at any time, and a collective organization must provide the Institute with information referred to in Article 12(4) of the challenged Law. In the event that it finds irregularities, Article 13 of the challenged Law prescribed measures that the Institute may order to remove thereof, and such measures include the revocation of a license from a collective organization. The Constitutional Court also observes that the proponent of the challenged Law, in the reasoning of the proposal of the text of the Law, stated that this monopoly status of collective organizations is necessary for the very nature of their business and for the greater efficiency and rationalization of their business operations. Also, it was noted that such a position „greatly facilitates the position of works users, who can obtain in a simpler and quicker way the necessary rights and to pay for the

use thereof – thus, as a rule at least, they should respect the copyrights to a greater degree as a result" (see, the reasoning of the proposal of the Law, paragraph 57 of this decision).

72. The Constitutional Court also observes that the protection against the abuse of monopoly position may be exercised also on the basis of the Competition Act (*Official Gazette of BiH*, 48/05, 76/07 and 80/09). Under this Law, a procedure may be instituted before the Council of Competition of Bosnia and Herzegovina („the Council of Competition") for the establishment of a prohibited agreement and the abuse of a dominant position. In that respect, the Constitutional Court indicates that the Council of Competition, by the Decision no. 06-26-3-004-41-II/13 of 11 June 2013, established that the collective organization, Association of Composers – Music Creators (AMUS) , „abused the dominant position by entering into a prohibited agreement thereby imposing purchase and selling prices or other trading conditions which restrict competition […], applying dissimilar conditions to equivalent or similar transactions with other parties, thereby placing them at unequal and unfavourable competitive position […] thereby causing the other party to accept additional obligations which, by their nature or according to commercial practice, have nothing to do with a subject of such an agreement". Based on the aforementioned, the collective organization AMUS was banned from engaging in such and similar future conduct and was fined. The reasoning of this ruling reads, among other things, that AMUS has *de facto* and *de iure* the monopoly position on the relevant market and, as a result thereof, it carries a special responsibility in respecting and implementing the provisions of the Competition Act, and that it must secure an equal position on the relevant market to all the registered electronic broadcasters (available at: http://bihkonk.gov.ba/datoteka/RjesenjeSineQuo-None-Amus-11613-bos.pdf).

73. Therefore, in view of all the aforementioned, the Constitutional Court concludes that the legislator, as part of its wide margin of appreciation, decided that in the present factual and legal circumstances it is purposeful to apply a model that is well-known in a large number of other countries, and to grant the monopoly position to such an organization. In addition, the Constitutional Court observes that the legislator prescribed and established the mechanisms of control of the monopoly position of a collective organization in an appropriate manner, both, in the challenged Law and procedure-wise in the Competition Act.

74. In a situation like this, bearing in mind the aforementioned general goal of the challenged Law, the Constitutional Court holds that such a method of managing copyrights and related rights that the legislator opted for is of such a nature that it can enable effective exercise of such rights as well as the effective oversight of the adherence thereto in the territory of Bosnia and Herzegovina. Besides, the applicants failed to

present any argumentation whatsoever on the basis of which the Constitutional Court could conclude that, in the given circumstances, some other method existed that would enable the achievement of the same degree of copyrights protection as is the case with the challenged ruling, which is based on the territorial protection and territorial oversight.

75. Further, as to the objection reading that authors are not free to assemble and to entrust the management of their respective rights to some other organization, the Constitutional Court again recalls that an author who does not wish for his/her rights to be managed by a collective organization, should notify the relevant collective organization of that in writing, unless these concern a mandatory collective rights management (Article 18(2) of the challenged Law). So, right holders need not, but in exceptional cases, manage their rights through a collective organization. Also, the challenged Law carries nothing that may be construed as impossibility for a specific number of authors to found their own association or other type of organization and to transfer to it the authorization to manage their respective rights (except for cases where mandatory collective management is prescribed). That is regulated by Article 147(1) of the Law on Copyright and Related Rights as individual exercise of rights by themselves or through their representatives, which has already been talked about. Therefore, if authors deem that in so doing they would more efficiently and better protect their rights, there is nothing in the challenged Law preventing them from assembling themselves in such a manner. However, such an organization cannot, by the very act of founding, be constituted as „a collective organization" in terms of the challenged Law due to the monopoly position of a collective organization, which the Constitutional Court has already examined on account of the need to obtain an appropriate license from the competent Institute.

76. The sole legal restriction of authors to transfer the exercise of their respective right to some other organization relates to a mandatory collective rights management under Article 4(3) of the challenged Law, thus the applicants find Article 5 of the challenged Law to be unconstitutional also. This Article prescribes that in such cases rights may be managed individually until such time as the Institute grants a license for the collective management thereof to a particular legal entity. Since the Constitutional Court has already established that the mechanism of a mandatory collective rights management is not contrary to the Constitution of Bosnia and Herzegovina, it holds that there is no need to examine separately the provision of Article 5 of the challenged Law, which constitutes a sort of a transitional provision for cases referred to in Article 4(3) of the challenged Law.

77. On the other hand, the Constitutional Court indicates that the fact that an association was granted a collective organization status, *i.e.* a license from the Institute for the Collective Management of Rights, does not mean that it would retain the status indefinitely,

irrespective of the manner in which it exercised its activity. Namely, the provisions of Article 11(1)(d) of the challenged Law prescribe that the Institute may grant a license to a new organization if it „proves that it will offer to the users a more comprehensive repertoire of protected works than the already existing collective organization, as well as that it may ensure more effective and more cost-efficient management of rights". In this manner, although it did prescribe a monopoly position of a collective organization, the legislator left a reasonable possibility for some other association to prove that it can perform the activity better than the licensed association, all for the benefit of both authors and users.

78. In view of the aforementioned, the Constitutional Court concludes that prescribing the monopoly position of a collective organization for managing copyrights and related rights has a legitimate goal – the effective exercise of rights and the protection of an author and a user, and that such a solution is proportionate to the goal sought to be achieved. The reason being that reasonable mechanisms of oversight of the work of a collective organization are secured and measures prescribed for preventing the abuse of the monopoly position. In addition, the challenged Law carries nothing leading to a conclusion that such a solution, limiting the number of collective organization for the collective management of the same type of rights on the same type of works, constitutes a restriction on the freedom of assembly, and especially not such a restriction that would go against Article 11(2) of the European Convention, or Article II(3)(i) of the Constitution of Bosnia and Herzegovina.

79. In view of all the aforementioned, the Constitutional Court holds that there is no need to consider separately the issue of purported discrimination in relation to the right to freedom of assembly, since all the aforementioned fails to suggest that there is a likelihood of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article14 in conjunction with Article 11 of the European Convention.

VII. Conclusion

80. The Constitutional Court concludes that prescribing a mandatory collective management of copyrights and related rights in specific cases in the challenged Law (Article 4), legal basis for the collective rights management (Article 9(1)) and presumption of collective management of rights (Article 18(1)), does not constitute such a restriction of copyrights and related rights as to be contrary to the right to property under Article II(3)(k) and Article 1 of Protocol No. 1 to the European Convention. Also, the Constitutional Court concludes that the implicit request to the authors in the challenged Law to enter into a contract in order to become members of a collective organization and, among other things,

to participate in the distribution of funds, is not a measure that is disproportionate to the legitimate goal sought to be achieved, which is the reason why there is no discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention and in conjunction with Article 1 of Protocol No. 1 to the European Convention.

81. The Constitutional Court concludes that prescribing the monopoly position of a collective organization for managing copyrights and related rights in the challenged Law has a legitimate goal – the effective exercise of rights and the protection of an author and a user, and that such a solution is proportionate to the goal sought to be achieved. The reason particularly being that reasonable oversight mechanisms of the work of a collective organization are secured and measures prescribed for preventing the abuse of the monopoly position. In addition, the challenged Law carries nothing suggesting that such a solution, limiting the number of collective organizations for the collective management of the same type of rights on the same type of works, constitutes a restriction on the freedom of assembly, and especially not such a restriction that would go against Article 11(2) of the European Convention, or Article II(3)(i) of the Constitution of Bosnia and Herzegovina. In view of this conclusion, the Constitutional Court holds that there is no likelihood of discrimination in this case, thus it did not consider separately the respective allegations.

82. Having regard to Article 19(a), Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

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

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

CONTENTS

Case No. U 25/14

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Željko Komšić, the Member of the Presidency of Bosnia and Herzegovina at the time of filing the request, for the review of the constitutionality of Article 22(3)(a) and Article 24(2) of the Competition Act (the *Official Gazette of BiH*, 48/50, 76/07 and 80/09)

Decision of 9 July 2015

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

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Having deliberated on the request of **Mr. Željko Komšić, the Member of the Presidency of Bosnia and Herzegovina at the time of filing the request**, in case no. **U 25/14**, at its session held on 9 July 2015, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Mr. Željko Komšić, the Member of the Presidency of Bosnia and Herzegovina at the time of filing the request, for the review of constitutionality of Article 22(3)(a) and Article 24(2) of the Competition Act (*Official Gazette of Bosnia and Herzegovina*, 48/05, 76/07 and 80/09) is hereby dismissed.

It is established that Article 22(3)(a) and Article 24(2) of the Competition Act (*Official Gazette of Bosnia and Herzegovina*, 48/05, 76/07 and 80/09) are compatible with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 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 30 October 2014, Mr. Željko Komšić, the Member of the Presidency of Bosnia and Herzegovina at the time of filing the request („the applicant"), lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for the review of the constitutionality of Article 22(3)(a) and Article 24(2) of the Competition Act (*the Official Gazette of BiH*, 48/50, 76/07 and 80/09).

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, on 10 November 2014 the Parliamentary Assembly of Bosnia and Herzegovina, the House of Representatives and the House of Peoples were requested to submit their respective replies to the request.

3. The Constitutional-Legal Committee of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the Constitutional-Legal Committee") submitted its reply to the request on 5 March 2015.

III. Request

a) Allegations from the request

4. The applicant alleges that the provisions of Article 22(3)(a) and 24(2) of the Competition Act are not compatible with Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), Article II(4) of the Constitution of Bosnia and Herzegovina in connection with Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 2, 25 ad 26 of the International Covenant on Civil and Political Rights and Article 14 of the European Convention.

5. In introductory part, the applicant cited the relevant provisions of the Constitution of Bosnia and Herzegovina, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights as well as the relevant provisions of the European Convention. The applicant noted that the Constitution of Bosnia and Herzegovina distinguishes between the „constituent peoples"

(the persons who declare themselves as Bosniacs, Croats and Serbs) and „Others" (the members of ethnic minorities and persons who do not declare themselves as members of any group due to mixed marriages, mixed marriages of their parents or for other reasons). Giving preference to the representatives of the „constituent peoples" constitutes a violation of the Constitution of Bosnia and Herzegovina and of the European Convention and is contrary to the Decision of the European Court of Human Rights (see, ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, judgment 22 December 2009), since it prevents „Others" from participating on an equal footing in holding public offices. In this connection, the applicant pointed out that the State of Bosnia and Herzegovina signed and ratified the Stabilization and Accession Agreement with the European Union in 2008 and thus undertook the obligation to fulfill the priorities from the European Partnership, namely the elimination of discrimination to ensure full compliance with the European Convention and the Council of Europe post-accession commitments (see Annex to the Council Decision 2008/211/EZ of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with BiH and repealing Decision 2006/55/EZ, Official Journal of the European Union L80/21(2008)).

6. In addition, the applicant pointed to the case-law of the European Court, according to which an act or regulation is discriminatory if it treats differently a person or group of persons in the same situation, where it is of no relevance whether discrimination is the consequence of a different legal treatment or the application of the law itself (see, ECtHR, *Ireland v. The United Kingdom*, judgment of 18 January 1978, Series A no. 25, paragraph 226). The applicant pointed out that the challenged legal solutions rather clearly define discriminatory activity of the State against individuals insofar as the guarantees are concerned implying that every person is entitled, without any discrimination, to access to public services and equal valuation in the decision-making in the public institutions.

7. Article 22(3) of the Competition Act, as further alleged by the applicant, stipulates that the appointment of three members of the Competition Council that are appointed by the Council of Ministers of Bosnia and Herzegovina („the Council") shall be carried out so that three members of the Competition Council shall be appointed by the Council*, with one member from amongst each of the three constituent people*s. The State of Bosnia and Herzegovina, as further alleged by the applicant, through the Council and in accordance with the challenged provisions, is forced to remove the persons who do not belong to the constituent peoples from the list of the persons who applied for a position advertised and to prevent them from having access to the given position. In other words, as the applicant pointed out, *all those who are not the members of the constituent peoples shall not have any legal right to be selected during the competition for the advertised position on the basis of their professional qualifications and work experience.*

8. As to the challenged provision of Article 24 of the Competition Act, the applicant pointed out that the challenged Article stipulates discriminatory limitations with regards to the decision-making. Namely, the provision of Article 24(1) stipulates a high quorum to take a decision, namely five out of a total of six members of the Competition Council, and that, according to paragraph 2, decisions shall be taken by the majority vote provided that at least one member from among each constituent people must vote for each decision, which constitutes discrimination in the decision-making process, as it places the members of the Competition Council from among the constituent peoples in more favorable position. The applicant further alleges that there is a theoretical possibility for the Government of the Federation of Bosnia and Herzegovina and the Government of the Republika Srpska to appoint members of the Competition Council from among „Others". However, in that case, there is a possibility that a decision of the four members of the Competition Council, one of whom is from among the constituent peoples, is not valid although it is taken by the majority. This would happen if one or two members of the Competition Council from among constituent peoples were against a decision or if they did not form part of the quorum for decision-making. The applicant noted that such a situation constitutes a greater value of the vote of the members of the Competition Council from amongst the constituent peoples solely on the ground of ethnic affiliation, which is not relevant to the application of the competition law. Also, the applicant pointed out that the last sentence of Article 24(2) stressed that *a member of the Competition Council cannot abstain from voting*… which further renders senseless the decision-making on the basis of ethnic principle, because the potential members of the Competition Council that could be appointed by the Entities from among „Others" *are forced to vote on decisions while their vote is of no value whatsoever even when it makes that majority, if that majority does not contain the vote of the members of the Competition Council from among all three constituent peoples*.

9. The applicant further pointed out that the arguments in favor of adopting such a legal solution are the particularity of Bosnia and Herzegovina and its ethnic composition, disregarding, however, at the same time the existence of those citizens who do not belong to any of the constituent peoples, who were prevented thus from becoming experts in the competition law. There is no objective and reasonable justification, by means of which the Council could deny the citizens of Bosnia and Herzegovina not coming from among the constituent peoples the possibility to participate on an equal footing in the decision-making procedure and in the implementation of regulations protecting the competition on the market of Bosnia and Herzegovina and in the implementation of the demands of the European Union in the matters of the competition policy and law defined in Articles 87-89 of the Lisbon Treaty, namely Articles 101-109 according to the new numeration under the Lisbon Treaty, and the Council Regulation EC 1/2003. The aforementioned Articles

of the Lisbon Treaty and the Council Regulation EC 1/2003, according to the *acquis communautaire,* have a direct effect in the Member States thereby surpassing the concept of national and ethnic.

10. Article 36(2) of the Interim Agreement on Trade and Trade-Related Matters between the European Community and Bosnia and Herzegovina, which entered into force in 2008, *Competition and Other Economic Provisions*, stipulates as follows: „2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community (hereinafter referred to as „the EC Treaty") and interpretative instruments adopted by the Community institutions." In this respect, as the applicant alleged, it would be irrational to make the validity of the implementation of the regulations on the market competition conditional upon ethnic origin of the members of the body taking decisions by applying the Competition Act and the Competition Rules of the EU.

11. The challenged provisions of the Competition Act disregard a group of citizens who refuse to declare their ethnic affiliation or declare their ethnic affiliation other than the constituent peoples. The existence of the challenged legal provisions, as further alleged by the applicant, is incompatible with the constitutional principles under Article II of the Constitution of Bosnia and Herzegovina, the European Convention and the judgment of the European Court of Human Rights in the case of *Sejdić and Finci v. Bosnia and Herzegovina*. It follows from the aforementioned that there is no single objective and reasonable justification whatsoever for the lack of possibility for the members of „Others" and the citizens of Bosnia and Herzegovina to apply under equal conditions in the competition procedure for the mentioned positions in the public institutions. Such solutions, as further pointed out by the applicant, deprive *de facto* and *de iure* this group of citizens of Bosnia and Herzegovina of the guarantee for equal participation in managing public affairs at all levels and of the right to have access, on general terms of equality, to public services. Furthermore, there is no reasonable and objective justification for the validation of the vote of a member of the Competition Council from among the constituent peoples when taking decisions in the Competition Council. The challenged provisions essentially relate to the identical situation as that in the mentioned judgment of the European Court, and the reasons given in the aforementioned judgment can therefore be applied analogously to the mentioned situation, i.e. the impossibility of having access to public offices, because the practical effects on the persons who are not the members of the constituent peoples are identical.

12. Finally, the applicant quotes the constitutional guarantees under Article II(1) and II(2) of the Constitution of Bosnia and Herzegovina and outlines that Bosnia and

Herzegovina and both Entities, through such treatment, discriminate against its citizens, which is inconsistent with Article 1 of Protocol No. 12 to the European Convention and Article II(4) of the Constitution of BiH in conjunction with Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination and Articles 2, 25 and 26 of the International Covenant on Civil and Political Rights and Article 14 of the European Convention.

b) Reply to the reqest

13. The Constitutional-Legal Committee alleged in its reply to the request that it had considered the request at the session held on 4 March 2015 and concluded unanimously after discussion to „inform the Constitutional Court of the aforementioned facts which would decide, in accordance with its responsibilities, on the compatibility of the respective law with the Constitution of Bosnia and Herzegovina".

IV. Relevant Laws

14. The **Competition Act** (*Official Gazette of BiH*, 48/05, 76/07 and 80/09), in its relevant part, reads as follows:

Article 1
(Subject-matter)

This Act regulates the rules, measures and methods of protection of market competition, the jurisdiction and the way of operation of the Competition Council on protection and promotion of market competition in Bosnia and Herzegovina.

Article 20
(Competition Council)

(1) Body for implementation of protection of market competition in terms of this Act is the Competition Council.

(2) The composition of the Competition Council includes the offices for competition in the Federation of Bosnia and Herzegovina and in Republika Srpska, as organizational units outside the seat of the Competition Council.

Article 21
(Status of the Competition Council)

(1) The Competition Council is an independent body which shall ensure consistent implementation of this Act on the whole territory of Bosnia and Herzegovina and has the exclusive competence in making decisions on the presence of prohibited competition practices in the market.

(2) The Competition Council has a legal person status and its seat is in Sarajevo.

(3) Funds for the implementation of the competencies and conducting the activities of the Competition Council shall be provided from the Budget of the Institutions of Bosnia and Herzegovina.

Article 22
(The composition of the Competition Council)

(1) The Competition Council consists of six members who are appointed for a term of six years with the possibility of another re-election. The mandate of the members of the Competition Council can not be terminated before the expiry of the prescribed period, except in cases specified in Article 23 of this Act.

(2) The Members of the Competition Council shall be elected from among recognized experts in the relevant field, with administrative status equal to that of the judges which is incompatible with the performance of any direct or indirect, permanent or temporary functions, with the exception of academic activities and work in professional and scientific bodies.

(3) Appointment of the Competition Council is carried out in the following way:

a) three members of the Competition Council shall be appointed by the Council of Ministers of Bosnia and Herzegovina, with one member per each of the three constituent peoples;

b) two members shall be appointed by the Government of the Federation of Bosnia and Herzegovina;

c) one member shall be appointed by the Government of the Republika Srpska.

Article 24
(Modus operandi and decision-making of the Competition Council)

(1) The Competition Council may make valid decisions if the session is attended by at least five members of the Competition Council.

(2) Decisions of the Competition Council shall be made by majority vote of members present, provided that at least one member from among the constituent peoples must vote for each decision. A member of the Competition Council can not abstain from voting.

V. Admissibility

15. 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.

16. 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.

17. As the request for the review of constitutionality of the state law was lodged by the Chairman of the Presidency of Bosnia and Herzegovina, the Constitutional Court notes that the present request was filed by an authorized person under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

In addition, the Constitutional Court observes that the subject-matter of the request is the review of constitutionality of a law enacted by the Parliamentary Assembly of BiH. In this connection, the Constitutional Court emphasizes that it adopted a position in its hitherto case-law that the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina does not prescribe the explicit jurisdiction of the Constitutional Court to review the constitutionality of laws or of the provisions of the laws of Bosnia and Herzegovina. However, the substantial notion of the jurisdiction as specified by the very Constitution of Bosnia and Herzegovina contains in itself the title for the Constitutional Court to have such jurisdiction, in particular when one takes into account the role of the Constitutional Court as the body upholding the Constitution of Bosnia and Herzegovina (see the Constitutional Court, Decision *no. U 2/11* of 16 November 2010, paragraph 44, available on the website of the Constitutional Court: www.ustavnisud.ba).

18. Bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Constitutional Court's Rules, the Constitutional Court establishes that the present request is admissible, as it was filed by an authorized entity, and that there is not a single formal reason under Article 19 of the Constitutional Court's Rules rendering this request inadmissible.

VI. Merits

19. The applicant claims that Article 22(3)(a) and Article 24(2) of the Competition Act are not compatible with Article 1 of Protocol No. 12 to the European Convention and Article II(4) of the Constitution of BiH in conjunction with Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 2, 25 and 26 of the International Covenant on Civil and Political Rights and Article 14 of the European Convention.

General remarks

20. The Constitutional Court, first and foremost, recalls that the creation of a single economic space is the necessary requirement on the path of Bosnia and Herzegovina towards the European integration. The Competition Act enacted in 2001 regulates for the first time the competition policy in Bosnia and Herzegovina. However, on 27 July 2005 a „new" Competition Act entered into force, which constitutes a legal framework for the protection of the market competition in Bosnia and Herzegovina and which is the basic and general regulation regulating this area in Bosnia and Herzegovina. This law regulates the rules, measures and procedures for the protection of the market competition, and the Competition Council is established as an independent body with the status of a legal person in accordance with the provisions of Articles 20 and 21 of the Competition Act. The Competition Council has the exclusive competence to take decisions on the existence of prohibited competition practices on the market of Bosnia and Herzegovina, including the prevention of prohibited market practices of business entities which is reflected in the entry into prohibited contracts/agreement (cartel arrangements), concerted practices, the implementation of measures to prevent the abuse of dominant position of business entities and other practices, the aim or the cause of which are the prevention, restriction or distortion of the market competition, for which purpose the Competition Act is being consistently applied. The Competition Council, by implementing the Competition Act, ensures the promotion of the principle of free market competition and prevents, by means of the established measures, certain business entities from being placed unjustly in a more favorable position over others.

As to Article 22(3)(a) and Article 24(2) of the Competition Act

21. The applicant holds that, due to the challenged provision of Article 22(3)(a) of the Competition Act, the persons who are not the members of the constituent peoples do not have any legal right to be selected for the position of member of the Competition Council on the basis of their professional qualifications and work experience. Giving preference to

the representatives of the „constituent peoples" constitutes a violation of the Constitution of Bosnia and Herzegovina and of the European Convention and it is contrary to the Decision of the European Court in the case of *Sejdić and Finci*, since „Others" as a group of citizens refusing to declare their ethnic affiliation or declaring to belong to an ethnic group other than the constituent peoples are prevented from participating on an equal footing in holding public offices.

22. In addition to the aforesaid, the applicant claims that the provision of the challenged Article 24(2) of the Competition Act determines „discriminatory limitations in taking decisions", as it determines a high quorum to take a decision (five out of a total of six members) provided that at least one member from among each constituent people must vote for each decision, thereby „constituting a greater value of the vote of a member of the Competition Council coming from among the constituent peoples solely on the ground of ethnic affiliation which is not relevant to the application of the competition law. According to the allegations of the applicant, the aforesaid is inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention.

23. **Article II(4) of the Constitution of BiH** reads as follows:

Article II(4)

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

24. **Article 1 of Protocol No. 12** to the European Convention reads as follows:

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.

25. Having examined the allegations of the applicant, the Constitutional Court emphasizes that Article 1 of Protocol No. 12 to the European Convention provides for the general

principle of prohibition of discrimination and guarantees the enjoyment of all rights set forth by the 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. Furthermore, the provision of Article of Protocol No. 12 to the European Convention stipulates that no one shall be discriminated against by any public authority on any ground. Thus, the basic principle of non-discrimination encompasses not only the rights guaranteed by the European Convention but also the national laws, as stipulated by Article 14 of the European Convention.

26. Furthermore, the Constitutional Court indicates that in respect of the interpretation of the term of discrimination within the meaning of Article 1 of Protocol No. 12, the European Court, in its decision *Sejdić and Finci* (see ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06 of 22 December 2009, paragraph 55), indicated as follows: „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 these provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraph 18 of the Explanatory Report to Protocol No. 12). 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 (as regards the case-law of the United Nations Human Rights Committee on Article 26 of the International Covenant on Civil and Political Rights, a provision similar – although not identical – to Article 1 of Protocol No. 12 to the Convention, see Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, N.P. Engel Publishers, 2005, pp. 597-634)".

27. Turning to the instant case, the applicant claims that the challenged provisions of the Competition Act are discriminatory, because the members of Others are prevented from being appointed as members of the Competition Council on an equal footing as members of the constituent peoples, and because they are prevented from voting under the same conditions on the decisions of the Competition Council.

28. The Constitutional Court indicates that in decision *no. U 8/04* (see, the Constitutional Court, Decision no. *U 8/04* of 25 June 2004, published in *the Official Gazette of BiH*, 40/04) it stated as follows: „Finally, the issue of the interpretation of the notion of „effective participation of the constituent peoples in state authorities", which was already mentioned

in this decision, by applying it beyond the constitutional provisions quoted above, should be applied functionally and in line with the provision of Article IX(3) of the Constitution of Bosnia and Herzegovina, under which „officials appointed to offices in the institutions of Bosnia and Herzegovina, as a rule, shall be representative of the makeup of the peoples of Bosnia and Herzegovina". On the one hand, this means that the state authorities should, in principle, be a representative reflection of an advanced co-existence of all peoples in Bosnia and Herzegovina, including national minorities and Others. On the other hand, „effective participation of the constituent peoples in the authorities", if it exceeds the constitutional framework, must never be carried out or imposed to the detriment of effective functioning of the state and its authorities (*op. cit*., *U 8/04*, paragraph 33). To that end, the Constitutional Court reasoned that „no single provision whatsoever of the Constitution allows for a conclusion that these special rights for the representation and participation of the constituent peoples in the institutions of BiH may be applied also for other institutions or procedures. On the contrary, insofar as these special collective rights might violate the non-discrimination provisions, […] they are legitimized solely by their constitutional rank and, therefore, have to be narrowly construed. In particular, it cannot be concluded that the Constitution of Bosnia and Herzegovina provides for a general institutional model which could be transferred to the Entity level, or that similar, ethnically-defined institutional structures on an Entity level need not meet the overall binding standard of non-discrimination of the Constitution of Bosnia and Herzegovina under Article II(4) of the Constitution of Bosnia and Herzegovina, or the constitutional principle of equality of the constituent peoples" (*op. cit*., *U 5/98 III*, paragraph 68). „Accordingly, a correct conclusion to be inferred from this is that this is the only way to establish a compromising relationship between the affiliation with one constituent people and a citizen's option" (*op. cit. U 8/04*, paragraph 33*).*

29. Also in the decision *no. U 4/05*, the Constitutional Court noted that the constitutional principle of the constituent status of peoples throughout the whole territory of Bosnia and Herzegovina was violated in the events where the participation in a representative body was not guaranteed to one constituent people, which was guaranteed to the two other constituent peoples (see, the Decision of the Constitutional Court no. *U 4/05* of 22 April 2005, published in the *Official Gazette of Bosnia and Herzegovina*, 32/05). The Constitutional Court referred on that occasion to its view taken in the Decision on the Constituent Status of Peoples no. *U 5/98* of 1 July 2000 *(ibid,* paragraph 115), reading as follows: „However, if a system of government is established which reserves all public offices only to the members of certain ethnic groups, the 'right to participate in elections, to take part in government as well as in the exercise of public affairs at any level and to have equal access to public services' is seriously infringed upon for all those persons or

citizens who do not belong to those ethnic groups, insofar as they are denied the right to stand as candidates for such governmental or public offices".

30. Turning to the present case, the Constitutional Court is to answer the question whether the provision of Article 22(3)(a) of the Competition Act discriminates against „Others" as well as citizens when compared to the members of the constituent peoples, because, as the applicant alleges, they are prevented from participating on an equal footing in holding public offices, in particular from being appointed as members of the Competition Council. The Constitutional Court observes that Article 22(1) of the Competition Act stipulates that the Competition Council is composed of six members, and paragraph 3 of the same Article prescribes the manner of appointing the members of the Competition Council, it prescribes that *three members of the Competition Council shall be appointed by the Council of Ministers, one member from among each of the three constituent peoples* (item (a)). Items (b) and (c) prescribe that *two members of the Competition Council shall be appointed by the Government of the Federation of Bosnia and Herzegovina and one member shall be appointed by the Government of the Republika Srpska.* Thus, the Constitutional Court observes that it follows from the aforementioned legal provision that three members of the Competition Council appointed by the Governments of the Entities may be (also) from among „Others" and/or citizens. In addition, the Constitutional Court observes that the Law on Ministerial, Government and Other Appointments of the Federation of BiH (*Official Gazette of the Federation of BiH,* 12/03 and 34/03) and the Law on Ministerial, Government and Other Appointments of the Republika Srpska (*Official Gazette of the Republika Srspka*, 25/03, 41/03 and 104/06) provide for the general and specific requirements to be fulfilled by the candidates for appointment to the regulated bodies such as the Competition Council, and the provision of Article 22(2) of the Competition Act provides for equal requirements (profession, independence, incompatibility with the performance of any other function which could amount to the conflict of interests) to be fulfilled both by the members of the constituent peoples and Others and/or citizens in order to be appointed as members of the Competition Council.

31. Furthermore, the applicant claims that the provision of Article 24(2) of the Competition Act determines discriminatory limitations in decision-making, because decisions shall be taken by majority vote provided that at least one member from among each constituent people must vote for each decision, which creates discrimination in the decision-making process as it places the members of the Competition Council from among the constituent peoples in a more favorable position. The Constitutional Court observes that Article 24 of the Competition Act prescribes the *modus operandi* and the method of decision-making of the Competition Council. Accordingly, paragraph 1 thereof prescribes that the

Competition Council may make valid decisions if the session is attended by a minimum of five members of the Competition Council, whereas paragraph 2, which the applicant challenged, prescribes that Decisions of the Competition Council shall be made by majority vote of the members present, provided that at least one member from among the constituent peoples must vote for each decision, and that a member of the Competition Council cannot abstain from voting. Thus, a decision of the Competition Council will not be valid if five members of the Competition Council have not voted for it (as „the Competition Council may take valid decisions if the session is attended by a minimum of five members") provided that the three votes out of five must come from among the constituent peoples. Given that the Constitutional Court has established in the foregoing paragraphs of this Decision that the Competition Council' composition may also include three members from among Others and/or citizens, it follows that a decision will not be valid if two out of three possible members from among Others and/or citizens have not voted for it as well. It follows that the provisions of Article 24(2) of the Competition Act do not give greater value to the votes of the members from among the constituent peoples.

32. Taking into account the aforesaid, it follows that the members of „Others" and/or citizens are not prevented from being appointed as members of the Competition Council on an equal footing as members of the constituent peoples, nor are they prevented from voting on the decisions of the Competition Council on an equal footing as the members of the constituent peoples. In the present case, the established guarantees in favor of the constituent peoples (three members of the Competition Council must be from among the constituent peoples and the validity of the decisions is conditional upon the votes of the constituent peoples, whereby three members of the Competition Council may also come from among „Others" and/or citizens, in which case they are not prevented from voting on decisions on an equal footing) are in keeping with the principle referred to in Article IX(3) of the Constitution of Bosnia and Herzegovina, namely that the State authorities should be a representative reflection of the advanced coexistence of all the peoples in Bosnia and Herzegovina, including national minorities and Others and/or citizens.

33. The Constitutional Court considers as unfounded the applicant's allegations holding that the contested provisions of the Competition Act „are essentially identical to a situation as that in the judgment of the European Court in the case of *Sejdić and Finci v. Bosnia and Herzegovina*. In particular, in the aforementioned case of the European Court, the two applicants complained about discrimination on the ground of their Roma and Jewish origin respectively, which made them ineligible to stand for election to the Presidency of BiH or to the House of Peoples of the Parliamentary Assembly of BiH. The European Court, in the *Sejdić and Finci* decision (see ECtHR, *Sejdić and Finci v. Bosnia*

and Herzegovina, Applications nos. 27996/06 and 34836/06 of 22 December 2009) did not deny the fact that the disputable constitutional rule of excluding Others at the time when it was adopted made it possible for the establishment of peace and dialogue, which constitutes one of the aims of the European Convention. However, taking into account the positive development of Bosnia and Herzegovina since the signing of the Dayton Peace Agreement, the European Court concluded that the constitutional provisions which have rendered the applicants ineligible for election to the House of Peoples and the Presidency of BiH for a long term for not declaring their affiliation with a „constituent people" has no objective and acceptable justification, and they (constitutional provisions) constitute a discriminatory differential treatment in breach of Article 14 in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 to the European Convention.

34. Thus, in the case of the European Court, the reasoning of which is invoked by the applicant, despite the fact that they are citizens of Bosnia and Herzegovina the applicants have been deprived of the right to be elected, i.e. they were deprived of the right to stand for elections to the House of Peoples and the Presidency of Bosnia and Herzegovina on the ground of their racial/ethnic origin. However, in the present case, as reasoned in the foregoing paragraphs of this Decision, the members from among Others and/or citizens are neither limited nor prevented from having access to public services under equal conditions as members of the constituent peoples, or to be appointed as members of the Competition Council, nor are they prevented from voting on the decisions of the Competition Council under equal conditions as the members of the constituent peoples.

35. In view of the aforementioned, the Constitutional Court concludes that the provisions of Article 22(3)(a) and (24)(2) of the Competition Act are compatible with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention, as the members of Others and/or citizens are not prevented from being appointed as members of the Competition Council under equal conditions as the members of the constituent peoples, nor are they prevented from voting on the decisions of the Competition Council under equal conditions as members of the Competition Council.

36. With regards to the applicant's allegations that a high quorum for decision-making was determined, namely five out of a total of six, and that decisions shall be taken by the majority vote, which constitutes discrimination according to the applicant, the Constitutional Court recalls that the regulation of the issue whether a decision shall be taken by a majority vote or qualified majority falls within the scope of a free margin of appreciation of the legislator and is considered justified and permissible for as long as it does not raise an issue of violation of the rights safeguarded by the Constitution.

In the proceedings relating to the abstract control of constitutionality, the Constitutional Court does not have the task to review whether certain legal solution is good or bad, but exclusively to review certain legal provisions or the law as a whole in comparison to the constitutional arrangements, specifically whether the mentioned provisions adopted by the legislator amounted to discrimination. The Constitutional Court has already established that the legislator did not impose discrimination.

37. Given the conclusion relating to Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention, the Constitutional Court holds that it is not necessary to separately examine the applicant's allegations on the violation of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 2, 25 and 26 of the International Covenant on Civil and Political Rights.

VII. Conclusion

38. The Constitutional Court concludes that the provisions of Articles 22(3)(a) and 24(2) of the Competition Act are not inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 Protocol No. 12 to the European Convention, as the members of Others and/or citizens are neither limited nor prevented from being appointed as members of the Competition Council under equal conditions as members of the constituent peoples, and they are neither limited nor prevented from voting on decisions of the Competition Council under equal conditions as members of the constituent peoples.

39. Having regard to Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

40. Pursuant to Article 43 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of the Vice-President Margarita Tsatsa-Nikolovska and the Judge Constance Grewe shall make an annex of this Decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of Judge Constance Grewe joined by Vice-President Margarita Tsatsa-Nikolovska

I – In the present case the Constitutional Court of Bosnia and Herzegovina has decided:

- to dismiss the request of Mr. Željko Komšić,
- to declare Article 22(3)(a) and Article 24(2) of the Act on Competition (*Official Gazette of Bosnia and Herzegovina*, 48/05, 76/07 and 80/09) compatible with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

II – The scope of dissent

I agree with the majority on the admissibility of the request (§§ 15 to 19). But I respectfully dissent on the constitutional conformity of Articles 22(3)(a) and 24(2) of the Act on Competition (§§ 22 to 38). In my opinion the Court should have granted the request and stated the discrimination against the Others and/or citizens.

II – The incompatibility of Articles 22(3)(a) and 24(2) of the Act on Competition with Article II.4 of the Constitution of Bosnia and Herzegovina and with Article 1 of Protocol 12 to the ECHR

1. Like in case *U 26/14*, the majority relies on the assumption that, beside the three members of the Competition Council coming from the constituent peoples, three Others and/or citizens would be appointed although this is not prescribed by the Act on Competition. Only the constituent peoples have such a guarantee or such a privilege. The majority infers from this premise that the Others and/or citizens can accede to the Competition Council under equal conditions as the members of the constituent peoples which is obviously wrong.

2. Likewise the decision making in the Competition Council is valid only when five members out of six are present, vote in favor and when each constituent people gives at least one favorable vote. If three Others and/or citizens are appointed, it is clear that in order to reach the required majority, two at least must consent. But again: this is not prescribed by the Competition Act; there is no condition relating to the votes of the Others whereas the support of the constituent peoples is mandatory. Therefore in the decision

making neither, the Others and/or citizens are not treated under equal conditions as the members of the constituent peoples.

In this regard, the majority invokes the margin of appreciation of the legislator when it comes to determine the necessary majority (simple or qualified). It holds this decision to be „justified and permissible for as long as it does not raise an issue of violation of the rights safeguarded by the Constitution"(§ 37). This is precisely the risk in the case at hand depending on the effective appointments.

3. Given the aforesaid, the question arises whether the unequal treatment of the Others and/or citizens amounts to discrimination. Neither the legislator nor the majority give any reasonable and objective justification although the European Court of Human Rights considers the monopoly of the constituent peoples in the power sharing - but not the power sharing as such - to be discriminatory against the Others.

In conclusion, the fact that the Others and/or citizens are not guaranteed to be appointed in the Competition Council and that therefore their consent to the adopted decisions is not necessary leads to the conclusion that the legislator has disregarded the requirements of Article IX(3) of the Constitution of Bosnia and Herzegovina.

For all these reasons I hold that in this case the Court should have granted the request as to Articles 22(3)(a) and 24(2) of the challenged Act on Competition.

Case No. U 3/13

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Bakir Izetbegović, a Member of the Presidency of Bosnia and Herzegovina, for review of constitutionality of Article 2(b) and Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, 43/07; „the Law on Holidays").

Decision of 26 November 2015

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2), Article 61(4) and Article 63(1)(d) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 94/14 – Revised text), in Plenary and composed of the following Judges:

Mr. Mirsad Ćeman, President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska,Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Having deliberated on the request of **Mr. Bakir Izetbegović**, **a Member of the Presidency of Bosnia and Herzegovina**, in the case no. **U 3/13**, at its session held on 26 November 2015, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request for review of constitutionality of Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, 43/07) lodged by Mr. Bakir Izetbegović, a Member of the Presidency of Bosnia and Herzegovina, is granted.

It is hereby established that Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, 43/07) is not in conformity with Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1(1) and Article 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of the Republika Srpska is ordered to harmonize Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska,* 43/07) with the Constitution of Bosnia and Herzegovina within a time limit of six months from the date of delivery of this Decision.

Pursuant to Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of the Republika Srpska is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within the time limit given in the previous paragraph, of the measures taken to enforce this Decision.

The proceedings upon the request for review of constitutionality of Article 2(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska,* 43/07) lodged by Mr. Bakir Izetbegović, a Member of the Presidency of Bosnia and Herzegovina, are terminated as the applicant has withdrawn the request.

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

Reasoning

I. Introduction

1. On 17 January 2013, Mr. Bakir Izetbegović, a Member 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 constitutionality of Article 2(b) and Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, 43/07; „the Law on Holidays").

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 („the National Assembly") was requested on 30 January 2013 to submit its reply to the request.

3. Pursuant to Article 15(3) of the Rules of the Constitutional Court, the European Commission for Democracy through Law (Venice Commission) was requested on 20 June 2013, and the Bosniac, Croat, Serb, and „Others" Caucuses in the Council of Peoples of the Republika Srpska and the Legal Department of the Office of the High Representative in BiH were requested on 7 April 2015 to submit their respective written expert opinions on the request in question.

4. The National Assembly submitted its reply to the request on 12 February 2013.

5. The Venice Commission submitted its written expert opinion on 18 October 2013.

6. The Bosniac, Serb, Croat and „Others" Caucuses in the Council of Peoples of the Republika Srpska submitted their respective expert opinions in writing on 11 May 2015.

7. The Legal Department of the High Representative in BiH informed the Constitutional Court on 11 May 2015 that it would not participate in the proceedings before the Constitutional Court.

8. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were delivered to the applicant on 16 April 2013.

9. At the plenary session held on 22 January 2015, the Constitutional Court decided to hold a public hearing in this case.

10. The public hearing was held on 29 September 2015.

III. Request

a) Allegations from the Request

11. The applicant holds that Article 2(b) and Article 3(b) of the Law on Holidays, which stipulates that one of the republic holidays is the Day of the Republic marked on 9 January, are not in conformity 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 II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1(1) and Article 2(a) and c) of the International Convention on the Elimination of All Forms of Racial Discrimination („the International Convention").

12. The applicant claims that the Day of the Republic, which is marked on 9 January, had been instituted as a holiday by „the Assembly of the Serb People of Bosnia and Herzegovina" as far back as 1992 without Bosniacs and Croats taking part in its

composition, which undoubtedly shows that Bosniacs and Croats in the Republika Srpska, as well as Others, that is, other citizens of Bosnia and Herzegovina, are treated differently when compared to the Serbs in the Republika Srpska, contrary to Article 1(1) and Article 2(a) and (c) of the International Convention. The applicant particularly points to Article 2(d) and (e) of the mentioned Convention, which, in his opinion, prescribe that effective measures of „national and local policies" must be taken to quash or annul any laws and regulations which objective is unequal or discriminatory treatment.

13. The applicant further notes that the Assembly of the Serb People in Bosnia and Herzegovina adopted on 9 January 1992 a Declaration Proclaiming the Republic of the Serb People of Bosnia and Herzegovina („the Declaration"), which provided for the „territorial demarcation between them and political communities of other peoples of Bosnia and Herzegovina". In his opinion it clearly follows from this document that the intent was to establish a state of predominantly one people - the Serb people, thereby absolutely excluding and discriminating against all other people and denying their rights. According to the allegations of the applicant, that would be proven later during „[…] the aggression against BiH, when a systemic and planned ethnic cleansing had been conducted on that territory against all those who were not Serbs, along with a number of other violations of international humanitarian law, which culminated in a genocide committed against the Bosniacs in Srebrenica".

14. The applicant holds that any stipulation of holidays in the Entities, which symbolize only one, or only two out of the three constituent peoples in Bosnia and Herzegovina, constitutes the measures aimed at differentiating, excluding, restricting or giving priority, on the grounds of ethnic or national origin and their goal is to violate or compromise recognition, enjoyment or exercise of human rights and fundamental freedoms in all areas of life under equal conditions.

15. Further, the applicant indicates that the Republika Srpska, by adopting on 30 March 2007 the Law on Holidays, which determined 9 January as the Day of the Republic, „got around" the Decision of the Constitutional Court on Admissibility and Merits no. *U 4/04* (Second partial decision). In that respect, he noted that the Constitutional Court established in the mentioned decision that the provisions of the Law on the Family Patron-Saint's Days and Church Holidays of the Republika Srpska („the Law on the Family Patron-Saint's Days and Church Holidays") which, among other things, was stipulated as a holiday and the Day of the Republic, which was marked on 9 January, are not in conformity with the Constitution of Bosnia and Herzegovina. The applicant points out that during the course of the adoption of the Law on Holidays in 2007, which provisions he challenges, the Bosniac Caucus in the Council of Peoples of the National Assembly raised

an objection in respect to the vital national interest, but the Constitutional Court of the Republika Srpska rejected the objection because it did not contain any arguments for such allegations. The applicant alleges that despite that, the National Assembly persevered in promoting the date which is not and never will be the date to be accepted by all citizens of the Republika Srpska. In that respect he noted that according to the census in 1991 (in the area of the present day Republika Srpska) there were 43% of non-ethnic Serb population, including Bosniacs and Croats, but also the other citizens of the Republika Srpska.

16. The applicant holds that January 9th cannot even in formal and legal terms be determined as the Day of the Republic. In this respect he notes that the Constitutional Court of the Republic of Bosnia and Herzegovina, as a court of the then already internationally recognized state, by its decision from October 1992, established that the Assembly of the Serb People in BiH constituted an illegal and informal body, annulled all acts issued by such a body, including the Declaration and the Constitution of the Republika Srpska, as well as all implementing regulations. The applicant holds that the Declaration and the Decision of the Constitutional Court of the Republic of Bosnia and Herzegovina must be viewed in correlation with Article I(2) of Annex 2 to the Constitution of Bosnia and Herzegovina. In view of the aforementioned, the applicant alleged that it holds that the Republika Srpska had not even existed before the date of the signing of the General Framework Agreement for Peace, which established that Bosnia and Herzegovina is composed of two Entities: the Federation of Bosnia and Herzegovina and the Republika Srpska.

17. Further, the applicant points to the discriminatory character of the challenged Article as it is impossible, for the members of non-Serb peoples, to celebrate the day when the bodies of the Republika Srpska, which not only committed the Srebrenica genocide but also other war crimes on the territory of Bosnia and Herzegovina with the aim of destroying the non-Serb population, had been instituted. The applicant alleges that the Judgment of the International Court of Justice in The Hague, following a lawsuit of Bosnia and Herzegovina against Serbia and Montenegro over a genocide in Bosnia and Herzegovina, established that the armed forces of the Republika Srpska, which had been formed on 9 January 1992, according to the applicant's allegations, had committed the actions of genocide in Srebrenica, and that the function of the RS Army officers was to act in the name of the authorities of the Bosnian Serbs, especially of the Republika Srpska. In this respect he pointed also to the judgments of the International Criminal Tribunal for the former Yugoslavia, which also point to the human rights violations and war crimes committed, and to the UN Resolutions, which on a number of occasions condemned the actions of the official military and police bodies of the Republika Srpska on the territory of Bosnia and Herzegovina, pointing to violations of the wartime and humanitarian law and the complete abolishment of any rights whatsoever of the members of non-Serb peoples.

18. The applicant indicates that following the adoption of the Decision of the Constitutional Court no. *U 5/98 III* of 1 July 2000, Article 1 of the Constitution of the Republika Srpska determined that the Republika Srpska is one of the two equal Entities in BiH, and that the Serbs, Bosniacs and Croats, as constituent peoples, Others and citizens, equally and without discrimination shall participate in exercising the authority in the Republika Srpska. On the basis of the aforementioned, the applicant concludes that the Republika Srpska is not „a state of the Serb people and citizens living in it" as written in „the 1992 Constitution of the Republic of Srpska", which was based on the Declaration dated 9 January 1992, rather it is an Entity wherein all three constituent peoples, Others and citizens of BiH, must be equally represented. The applicant concluded that on the basis of the aforementioned it follows clearly that Articles 2(b) and 3(b) of the Law on Holidays brought about discrimination against non-Serbs in the Republika Srpska.

19. The applicant also cited the position of the Constitutional Court in the Decision on Admissibility and Merits no. *U 4/04* of 31 March 2006, which was taken while reviewing the constitutionality of the Entities' laws on the flag, coat of arms and anthem (paragraph 131), according to which the official symbols of an Entity must reflect its multi-ethnic composition. In this respect, the applicant claims that the same approach must be applied also to holidays, which, in his opinion, also have a symbolic meaning. The applicant noted that one must bear in mind that this is the holiday marked as the Day of the Republic which applies to all citizens, bodies, organizations, local self-government units, enterprises, institutions and organizations and persons who perform professionally service-related and product-related activities, as prescribed in Article 1 of the challenged Law on Holidays.

20. The applicant indicates that this date (9 January) is celebrated in the Republika Srpska as the date exclusively tied to the Serb people. In this respect he noted that they organize church festivities to mark this holiday, that on that date they also celebrate the Patron Saint of the Republika Srpska – Saint Archdeacon Stefan, which all clearly points to the official connection and attitude of the Republika Srpska towards exclusively one religious group – Orthodox Christian, thereby neglecting all other groups and individuals living in the Republika Srpska. Also, it was noted that the Orthodox priests actively participate in the ceremonies marking this holiday, and that the religious ceremonies give additional weight to this date thereby letting the members of other peoples know that this is not their holiday, rather that this is solely the holiday of the members of the Serb people. In support of the aforementioned, the applicant attached an official invite for the celebration of the Day of the Republic on 9 January, wherefrom it follows that the ceremony marking the holiday consists of the church and secular festivities.

21. The applicant concludes that it would be much more appropriate that the date of the Republika Srpska be celebrated on some of the dates which are tied to the formal and legal recognition of the Republika Srpska, and that by adopting 9 January as the Day of the Republic, all other peoples in the Republika Sprska were put in an inferior and discriminatory position. Thereby, in his opinion, one should particularly bear in mind the events that followed after 9 January 1992, which brought no good whatsoever to any single citizen of Bosnia and Herzegovina, especially not so to non-Serbs.

22. The applicant requested that the Constitutional Court adopts a decision establishing that Article 2(b) and Article 3(b) of the Law on Holidays are not in conformity with the Protocol No. 12 to the European Convention, with Article II(4) of the Constitution of Bosnia and Herzegovina, in conjunction with Article 1(1) and Article 2(a) and (c) of the International Convention, and that the National Assembly be ordered to bring the challenged provisions in line with the Constitution of Bosnia and Herzegovina.

b) Reply to request

23. Pointing to the case-law of the European Court in the cases of *Abdulaziz, Cabales and Balkandali v. The United Kingdom, Petrović v. Austria,* and *Sahin v. Germany*, the National Assembly emphasized that the respective case cannot be about the applicability of Article 14 of the European Convention, given that the mentioned article serves only for the establishment of discrimination in relation to the rights and freedoms protected by the rest of articles of the European Convention and Protocols thereto.

24. Further, the National Assembly noted that the respective request constitutes the abuse of the right to address the Constitutional Court. According to the assessment of the National Assembly, the applicant claims that the Day of the Republic represents a day when the bodies of the Republika Srpska were founded, which committed not only the genocide in Srebrenica but also other serious war crimes on the territory of Bosnia and Herzegovina with the aim of destroying the non-Serb population. According to the National Assembly, the offensiveness of the indicated allegation is reflected in the fact that genocide, in the Convention on the Prevention and Punishment of the Crime of Genocide, and in theory in general, in the legislation of Bosnia and Herzegovina, and in the case-law of the Tribunal for the former Yugoslavia, constitutes an individual criminal offence and the bodies of the Republika Srpska, particularly in its present multi-ethnic composition (which adopted the Law on Holidays) could not commit it collectively.

25. The National Assembly holds that the part of the request concerning the harmonization with the European Convention and the International Convention is unacceptable and

ratione materiae. In this respect it was indicated that the right to celebrate holidays, *per se*, in the broader theoretical concept, could be considered one of the human rights, but as such it has not been regulated either in the European Convention or its Protocols, or in the International Convention, as one the fundamental rights.

26. Finally, the National Assembly notes in relation to the admissibility of the request that the respective request is manifestly ill-founded. The National Assembly noted that it is indisputable that January 9th is celebrated as a religious holiday and St. Stefan's Day, but that the rest of the Republic Holidays (New Year, May 1st, the Day of the Victory over Fascism, and the Day of the General Framework Agreement) also coincide with religious holidays from the Orthodox and Catholic calendar. Finally, it was indicated that the Law on Holidays does not specify the Day of the Republic (January 9th) as a religious holiday, that is that finding a date on which no religious holiday is marked would actually be impossible, given their great number in religious calendars.

27. As to the merits of the request, the National Assembly stated that the request does not contain the legal reasons, or an answer to the question as to what constitutes the interference or discrimination against an individual in the exercise of rights by way of marking January 9th as the Day of the Republic. The National Assembly holds that the applicant failed to offer any reasoning whatsoever or a proof that the marking of the Day of the Republic, which coincides with a religious holiday, establishes a differential treatment, which accordingly threatens anyone's rights, that is, that it amounts to discrimination on any ground.

28. The National Assembly indicates that the applicant claims that that the celebration of the Republic Day on 9 January (which is at the same time the religious holiday of Eastern Orthodox believers) leads to the discrimination of the other two constituent peoples, that is that it follows from the request that there is no discrimination against the members of other ethnicities, or atheists and agnostics. In this respect the following was noted: „The applicant's frustration and his very subjective perception that the Republic Day is celebrated according to the religious or philosophical convictions of whosoever is not understandable and even if it was understandable […] 'the subjective perception in itself is not sufficient to establish a breach of the rights provided for in the European Convention'" (see the European Court, *Lautsi v. Italy*, the judgment of 18 March 2011, paragraph 66).

29. Furthermore, the National Assembly pointed out that, under Article 1 of Protocol No. 12 to the European Convention it is necessary that the right in respect of which the alleged discrimination has occurred should be provided for in the law, and that the same solution be followed by the International Convention. According to the assessment of the National

Assembly, the applicant believes that the case relates to the right to observe the Republic Day, which, according to his understanding, is enjoyed only by Serbs who are Eastern Orthodox Christians. According to the National Assembly, there is no right provided for by law in respect of which the alleged discrimination is carried out, and accordingly there is no differential treatment, which is the basis of all international documents on the prohibition of discrimination.

30. The National Assembly noted that the Law on Holidays, which provisions are challenged by the applicant, was passed after the implementation of Decision no. *U 5/98*, that it was passed by the National Assembly which composition reflected the changes which occurred following the mentioned decision, i.e. it was multi-ethnic, that Bosniac Caucus in the Council of Peoples initiated a mechanism for the protection of the vital national interest, and that the Constitutional Court of the Republika Srpska (the Council, the composition of which was multi-ethnic, was presided over by a representative of the Bosniac people from among the judges of the Constitutional Court of the Republika Srpska), in a ruling dated 10 May 2007 declared the request inadmissible, because it did not specify what the violation of the vital national interest of the Bosniac people in the Law on Holidays consisted of, and that it was mentioned in general that the issue of protection of the vital national interest of the Bosniac people in the respective Law was initiated. According to the National Assembly, the same is reiterated in the respective request which does not state what discrimination consisted of, that is there is no legally relevant reasoning.

31. Furthermore, the National Assembly found the applicant's allegation to be inappropriate in that the Republic Day is celebrated as the date exclusively tied to the Serb people, whereby they organize church festivities to mark this holiday, and that on that day the Patron Saint of the Republika Srpska is celebrated. In this respect it was noted that the Republic Day was not marked as a religious holiday in the Law on Holidays, and that the ceremonial part of the holiday is not determined in the text of the law, and therefore it cannot be designated as „legal" or „illegal", i.e. „lawful" or „unlawful". In this respect it was indicated that the Law on Holidays particularly regulated religious holidays which respect the three leading religious groups, or other religions. Finally, it was indicated that the Republika Srpska Government can determine, by a decision, the marking of other dates as well, considering historical, cultural and traditional heritage of the constituent peoples of the Republika Srpska. Accordingly, it was concluded that the applicant did not establish the legal connection between the state and religious holidays and thereby reasoned the alleged discrimination.

32. Finally, the National Assembly proposed that its preliminary objections be granted and that it be established that Article 14 of the European Convention is not applicable to the present case, and that the remainder of the request be found inadmissible. If, however, the Constitutional Court decides to consider the merits of the request with regards to the application of Article 1 of Protocol No. 12 to the European Convention, and Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1(1) and (2) (a) and (c) of the International Convention, it was proposed that the request be dismissed, i.e. that a decision be adopted reading that there is no discrimination with regards to the application of the challenged provisions of the Law on Holidays.

c) The Venice Commission *Amicus curiae* Opinion

33. The Venice Commission articulated a stance that in the specific circumstances of BiH and taking into account the case-law of the Constitutional Court of BiH, the challenged provisions may give rise to discrimination within the meaning of Article 1 of Protocol 12 to the European Convention and Article 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination in conjunction with Article II(4) of the Constitution of BiH. The Venice Commission emphasized that, irrespective of the initial intention of the creators of the Law on Holidays, it seems that both in and outside the Republika Srpska, 9 January is perceived as a holiday connected to two events: the adoption of the Declaration of the Republic of the Serb people of Bosnia and Herzegovina, and that the Day of the Republic is observed on 9 January, as well as St. Stefan Day, Orthodox Patron Saint which, unlike religious holidays stipulated by the same Law in respect of three denominations, has no counterbalance in similar holidays of other constituent peoples. The Venice Commission indicated that, although the Law on Holidays applies to all the citizens and in those terms, it is not ostensibly discriminatory, two factors must be taken into account. The first is the text of the Law itself, which proclaims the Republic Day a holiday solely associated with one constituent people, while at the same time imposing a sanctioned obligation on legal entities not to work on this day. The second factor is the specific situation of BiH after a civil war of the early 1990s, i.e. that one of the five main holidays of the Entity is a day so closely linked to the unfortunate events of the early 1990s and that as such invokes uncomfortable and humiliating sentiments among some inhabitants. Furthermore, it is noted that although no obligation to take part in formal celebrations of the Republic Day is imposed upon citizens, it is imposed as a non-working day, in case of failure to comply with it.

d) Written opinions of the Caucuses in the Council of Peoples of the Republika Srpska

34. The Caucus of Others in the Council of Peoples of the Republika Srpska, in its expert opinion in writing, which the Caucuses of Croats and Serbs agreed with in entirety, primarily noted that the request in question was not admissible.

35. In this connection, it noted that, under Article 19(1)(4) of the Rules of the Constitutional Court, the request did not contain allegations, evidence and facts on which the request was based and, under Article 32 of the Rules of the Constitutional Court, the nature of the violation to which the applicant referred in the request was neither defined nor specified, nor were the allegations of the applicant substantiated by any evidence and adequate explanation for the violation of rights referred to. Therefore, they are of the opinion that the feeling of being endangered and the feeling of indignation because of unfortunate events of the recent common past could not be, within the meaning of the cited provisions of the Rules of the Constitutional Court, the basis for challenging the act adopted in accordance with democratic principles and procedures provided for in the Constitution and prescribed by the law. Also, a stance was voiced that the Constitutional Court, bearing in mind that the request was not substantiated, by entering in the merits, it would, in a way, give the priority to political arguments, on which the legally valid request for review of constitutionality should not be based, as opposed to legal arguments, evidence and facts.

36. As to the merits of the request, it was indicated that it was not possible to conclude which rights and freedoms a possible discrimination was related to as established in the Law on Holidays, and what persons, groups or peoples it was related to, which is necessary within the meaning of Article 1 of Protocol No. 12 to the European Convention and within the meaning of the International Convention on the Elimination of All Forms of Racial Discrimination.

37. It was indicated that all citizens and representatives of all constituent peoples and Others, political, religious and other communities in the Republika Srpska were invited to observe and celebrate that holiday. Given that the Law on Holidays made a clear distinction between the Republic and religious holidays, and that everyone, without discrimination, had a possibility to celebrate religious holidays according to their own choice, it was unfounded to claim that the Republic Day was celebrated as a religious holiday of the Eastern Orthodox Christians, who are not only of the Serb origin, so that it amounted to discrimination.

38. Accordingly, the Caucuses of Others, Croat and Serb Peoples hold that Articles 2(b) and 3(b) of the Law on Holidays were compatible with the Constitution and the highest principles of the protection of human rights and fundamental freedoms and that they do not discriminate in any way whatsoever against the citizens from among constituent peoples and Others.

39. The Bosniac Caucus in the Council of Peoples of the Republika Srpska expressed its expert opinion in writing in that 9 January, as the date of the celebration of the Republic Day, would never be accepted. They stated as the reason that on 9 January 1992, the Assembly of the Serb People in Bosnia and Herzegovina adopted the Declaration on the Proclamation of the Republic of the Serb people in Bosnia and Herzegovina, wherefrom clearly followed the intention to form the state of predominantly one – Serb people with absolute exclusion of and discrimination against all other peoples, which proved, as explicitly stated: „[…] also during the aggression on BiH when a systematic and planned ethnic cleansing of all non-Serbs on that territory took place, by means of numerous other breaches of the international humanitarian law, which culminated in the genocide of Bosniacs in Srebrenica". Also, it pointed to the opinion of the Venice Commission which concluded, according to this Caucus, that the celebration of 9 January as the Republic Day was an act of discrimination against other peoples in that part of BiH. Finally, this Caucus noted that it had invoked the mechanism of the protection of vital national interest on several occasions and proposed amendments to that Law on Holidays, and that the Constitutional Court of Republika Srpska, in its ruling of 17 May 2007, had rejected the request as it did not contain arguments to substantiate the existence of the vital national interest of the Bosniac People. Therefore, the Caucus of Bosniacs holds that the request was founded and that Articles 2(b) and (3)(b) of the Law on Holidays are not compatible with Article 1 of Protocol No. 12.

IV. Public hearing

40. Pursuant to Article 46 of the Rules of the Constitutional Court, at its session held on 22 January 2015, the Constitutional Court decided to hold a public hearing to discuss this request. Pursuant to Article 47(3) of the Rules of the Constitutional Court, at the plenary session held on 27 March 2015, the Constitutional Court decided to invite to the public hearing the applicant, the National Assembly, the Organization for Security and Co-operation in Europe, Mission to BiH („the OSCE Mission to BiH"), the Helsinki Committee for Human Rights in Republika Srpska („the Helsinki Committee") and one expert from each of the Law Schools in Sarajevo, Mostar and Banja Luka respectively.

41. On 29 September 2015, the Constitutional Court held a public hearing, which was attended by the representatives of the applicant, the representatives of the National Assembly and the representatives of the OSCE Mission to BiH.

42. At the public hearing, the applicant withdrew the request for review of constitutionality in the part relating to Article 2(b) of the Law on Holidays reasoning that the right of the Entity or any other administrative unit to have its own day was not essentially contested by the request.

43. At the public hearing, the applicant remained supportive of the request for review of constitutionality of Article 3(b) of the Law on Holidays. In his opinion, the challenged provision was incompatible with, as he alleged, „lines 3 and 10 of the Preamble of the Constitution of BiH, Article 1 of Protocol No. 1 to the European Convention, Article I(2) in terms of the violation of the principle of democracy and the rule of law, Article I(2) of the Constitution of BiH in terms of the violation of the principle of secularism as an element inherent to a legal state, and Article 9 of the European Convention, and Article II(4) of the Constitution of BiH, in conjunction with Article 1.1 and 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. The applicant requested that Article 3(b) of the Law on Holidays be rendered ineffective the day following the date of the publication of the decision in the *Official Gazette of BiH*.

44. The applicant alleged that it clearly followed from the definition and the notion of state symbols that it was not only about the right of the Entity, but also about the right of citizens and collectivity to state holidays. In support of the submission that 9 January marks a historic moment of only one, the Serb people in the Republika Srpska, he presented the shorthand transcript made at the session of the National Assembly of 30 March 2007, when the Law on Holidays was adopted, and pointed to the Declaration of the National Assembly with regards to the request for review of constitutionality of the Law on Holidays before the Constitutional Court of Bosnia and Herzegovina in the case no. *U 3/03* (*Official Gazette of the Republika Srpska*, 46/15), and public appearances by the political officials from the Republika Srpska. In his opinion, all the aforesaid indisputably leads to a conclusion that 9 January, as referred to in the contested Article 3(b) of the Law on Holidays, refers to 9 January 1992 when the Assembly of the Serb People in BiH had adopted the Declaration Proclaiming the Republic of the Serb People in BiH. Further, it was indicated that the Declaration was defined as the result of the right of the Serb people to self-determination, self-organization and association, and that territorial separation from other peoples was sought. As such, according to him, it constitutes a unilateral act, which was not supported by other peoples living in the Republika Srpska, as also noted in the opinion of the Venice Commission. Also, the applicant claims that the Declaration was

perceived negatively by „non-Serbs" in BiH living in the Republika Srpska, because it reflects the philosophy of identity, territory and nation, i.e. ethno-nationalism, the exclusion of others and different ones from the process, the denial of pluralism and tolerance and the organization of the State in accordance with the principle dating from the Middle Ages, *cuius region, eius religio*. In his opinion, the date so selected is contrary to the principle of pluralism ordering the public authority to be guided by the values and principles, which are of essential importance to a free and democratic society that embodies, *inter alia*, the respect for inherent dignity of a human, the need for accommodating different beliefs, the respect for cultural identity and groups identity, the trust in social and political institutions promoting the participation of an individual and groups in the society.

45. The applicant indicated that that a seemingly neutral and secular date is celebrated as a religious traditional day, in the celebration of which the Serb Orthodox Church takes active and formal part. In this respect, the applicant pointed to the Invitation by the President of the Republika Srpska to a central celebration of 9 January. As the invitation reads, firstly the Liturgy and Patron Saint Ritual of breaking up the „slava cake" (*slavski kolač*) take place at the Orthodox Church, which is led by the high ranking officials of the Serbian Orthodox Church. It was indicated that the perception by the public and media was that the Patron Saint's Day of the Republika Srpska was celebrated on this day, in support of which it was pointed to reporting by the RTRS, the public broadcaster. Further, the applicant pointed to the official greetings by the political officials from the Republika Srpska, high ranking officials of the Serb Orthodox Church, as well as congratulations from the political officials from the Republic of Serbia, wherefrom it follows that 9 January is the day when congratulations are sent to the Republika Srpska on the Republic Day and the Patron Saint's Day St. Stefan. It was stated that the Patron Saint's Day was a specific feature only of the Saint Sava Orthodoxy preached by the Serb Orthodox Church, which is most frequently represented among the members of the Serb people. According to the applicant, such a practice of the implementation of the contested Article 3(b) of the Law on Holidays, despite its neutral wording, is unacceptable from the aspect of the principle of secularism as an inherent element of any republican and law-abiding state organisation. In this respect, it was indicated that Article 14 of the Law on Freedom of Religion and Legal Position of Churches and Religious Communities in BiH (*Official Gazette of BiH*, 5/04; „the Law on Freedom of Religion"), stipulated, *inter alia*, that churches and religious communities are separated from the state and that, therefore, the Republika Srpska violated this principle by establishing such a practice of celebrating this holiday. According to the applicant, it is clear that Orthodox Serbs have been placed in a privileged position by the celebration of a secular holiday of the Entity in a religious manner.

46. The applicant alleged that, despite the fact that this date was unacceptable for the aforementioned reasons, it was imposed on everyone by means of the Law on Holidays, under a threat of a sanction in case of a failure to comply with it.

47. Finally, the applicant requested the Constitutional Court to decide whether the practice of the implementation of the contested Article 3(b) of the Law on Holidays and the historic symbolism of the contested provision correspond to the present-day values of the libertarian, democratic constitutional system and order of BiH.

48. The National Assembly indicated that it had expressed the will and want, in the Declaration, to have its Constitution, to have its personality and to guarantee full equality of peoples and citizens before the law and protection against any form of discrimination by the Constitution as the highest legal act of the community. It was indicated that this will and want had received the confirmation of the national and international subjects alike, upon the signing of the General Framework Agreement for Peace, which accepted, *inter alia*, the Agreed Basic Principles of 8 September 1995. The National Assembly recalled that the aforementioned principles determined, *inter alia*, that BiH was composed of two Entities, namely the Federation of Bosnia and Herzegovina, established by the Washington Agreement, and the Republika Srpska, and that each Entity would continue its existence in accordance with its respective Constitutions at the time (as amended so as to be compatible with the aforementioned Basic Principles). Furthermore, it was indicated that this continuity was confirmed in Article 2 of Annex II to the Constitution of BiH, and that the Declaration Proclaiming the Republic of the Serb People of Bosnia and Herzegovina, as adopted on 9 January 1992, had never been the subject-matter of decision-making by any authority in BiH in terms of the cited constitutional provision. Finally, it was noted that the Declaration was incorporated in the Constitution of the Republika Srpska and that its Article 5 was preserved in its original form in Article 10 of the Constitution of the Republika Srpska, reading as follows: „The Constitution of the Republika Srpska shall guarantee full equality of peoples and citizens equal before the law and protection against any form of discrimination." According to the opinion of the National Assembly, the obligation of all is, in terms of the events before the General Framework Agreement, to comply with that Agreement. Finally, according to the National Assembly, 9 January, as the date of the creation of the Entity of the Republika Srpska, has the legitimacy and confirmation in Article I(3) of the Constitution of BiH, prescribing that BiH is composed of two equal Entities, namely the Federation of BiH and the Republika Srpska.

49. It was also indicated that the Law on Holidays particularly regulated the holidays of the Entity, notably the religious holidays in the manner respecting the religious affiliation

of all those living in the Republika Srpska, without discrimination. It further indicated that the Serb Orthodox Church was separated from the public authority both in accordance with the law and the Constitution, and that the representatives of any of the religious communities had not participated in drafting the Law on Holidays, nor did they participate in its implementation. In the opinion of the National Assembly, entering into discussion as to who may celebrate a religious holiday, as the issue of exclusive competence of religious institutions, would constitute a violation of Article 14 of the Law on Freedom of Religion and the interference with the issues in the exclusive competence of the church authorities.

50. Further, it was indicated that the Patron Saint's Day of the Republika Srpska was not prescribed by any law whatsoever, i.e. that it was not determined either by the Law on the Family Patron-Saints' Days and Church Holidays, which had been the subject-matter of consideration in the Second Partial Decision of the Constitutional Court, no. *U 4/04*. Finally, it was noted that the Declaration did not mention that it had been adopted on the St. Stefan's Day. Accordingly, the fact that the Invitation by the President of the Republic read that the Patron-Saint's Day of the Republika Srpska was also on 9 January constituted the conduct, which was not in accordance with the Constitution and the laws of the Republika Srpska, i.e. the conduct which could not be the subject of the proceedings concerning the review of constitutionality of a law provision. In this connection, it was indicated that the celebration of the Republic Day starts in mid-December, by a series of meetings with the representatives of different institutions, and national and international organizations, and representatives of all religious communities, and that it ends on 9 January, when the Solemn Academy is organized in the Cultural Center, which is exclusively of secular character where only the President of the Republic has a speech, followed by a solemn reception in the building of the Government. It was indicated that the organization of the celebration of the Republic Day is within the scope of responsibilities of the Office of the President of the Republic and that the Vice-President from among the Croat people participates in it, whereas the whole event is boycotted by the Vice-President and some of the political representatives from among the Bosniac people, although the Solemn Academy and the reception are attended by the Ministers in the Government of the Republika Srpska from among this people, as well as other personalities from the public and political life from among all three constituent peoples, Others and citizens, the representatives of diplomatic corps and international organizations in BiH.

51. Finally, it was indicated that the Law on Holidays did not impose on anyone the obligation to celebrate any of the holidays of the Entity. The purpose of prescribing breaches and fines for physical and legal persons engaging in business activities and working on any of the holidays of the Entity is to ensure the right of employees to a

paid leave during the days of state holidays, as regulated by the Law on Labour of the Republika Srpska.

V. Relevant Law

52. The **Law on Holidays of the Republika Srpska** (*Official Gazette of the Republika Srpska*, 43/07), in its relevant part, reads as follows:

Article 1

The Law on Holidays of the Republika Srpska („the Law") shall determine the holidays of the Republika Srpska, the manner in which they are marked and celebrated by citizens, republic bodies, organizations and institutions, enterprises and other organizations performing activities or services.

Article 2

The Holidays in the Republika Srpska, as holidays of the Republic, shall be the following:

a) New Year's Day;
b) Day of the Republic;
v) International Workers' Day;
g) Day of Victory over Fascism;
d) Day of the General Framework Agreement for Peace in Bosnia and Herzegovina.

Article 3

Holidays referred to in Article 2 of this law shall be celebrated as follows:

a) New Year's Day, January 1 and 2;
b) Day of the Republic, January 9;
v) International Workers' Day, May 1 and 2;
g) Day of Victory over Fascism, May 9;
d) Day of the General Framework Agreement for Peace in Bosnia and Herzegovina, November 21.

Article 5

(1) During the holidays of the Republic, the republic bodies and organizations, the bodies of local self-government units, companies, institutions and other organizations and persons whose professional business relates to service and production activities shall not work.

(...)

Article 9

(1) By its decision, the Government may also determine observance of other dates, showing consideration for historic, cultural and traditional heritage of the constituent peoples of the Republika Srpska.

Article 10

Legal entities, persons responsible in legal entities and persons whose business relates to service and production activities shall be deemed to have committed a misdemeanour if they work on the days of the holidays of the Republic.

Article 11

Punishment for the misdemeanour referred to in Article 10 of this Law shall be as follows:

A fine ranging from KM 2,000 to KM 15,000 for legal entities;

A fine ranging from KM 150 to KM 2,000 for persons responsible in legal entities;

A fine ranging from KM 500 to KM 1,500 for persons whose business relates to service and production activities.

53. The **Law on Freedom of Religion and Legal Position of Churches and Religious Communities in Bosnia and Herzegovina** (*Official Gazette of BiH*, 5/04), in its relevant part, reads as follows:

Article 14

Churches and religious communities are separate from the state and that means:

1. The state may not accord the status of state religion nor that of state church or religious community to church or any religious community.

2. The state shall not have the right to interfere in the affairs and internal organization of churches and religious communities.

3. Subject to clause 4) below of this Law, no church or religious community and their officials may obtain any special privileges from the state as compared with any other church or religious community or their officials, nor participate formally in any political institutions.

4. The state may provide material assistance for health-care activities, educational, charitable and social services offered by churches and religious communities, solely on

condition that the said services be provided without discrimination on any grounds, in particular on the grounds of religion or belief, by the said organizations.

5. Churches and religious communities may perform functions relating to the field of family law and the rights of the child in the form of aid, upbringing or education, in conformity with the relevant laws on the said rights and domains of law.

6. The public authorities shall not have any involvement in the election, appointment or dismissal of religious dignitaries, the establishment of the structures of churches and religious communities, or of organizations performing religious services and other rituals.

7. Freedom to manifest religion or belief may be subject only to such limitations as are prescribed by law and in accordance with international standards when it is shown by the competent authorities to be necessary in the interests of public safety, to protect health, public morals, or for the rights and fundamental freedoms of others. Churches and religious communities shall have the right of appeal against such decisions. Prior to the decision on appeal the appellate body must request from the Ministry of Human Rights and Refugees of BiH an opinion relating to such case of limitation of the freedom to manifest religion or belief.

VI. Admissibility

54. In examining the admissibility of the request the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 63(1)(d) of the Rules of the Constitutional Court.

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

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

(...)

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

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

Article 63 (1)(d) of the Rules of the Constitutional Court read as follows:

The Constitutional Court shall take a decision to terminate the proceedings when, during the proceedings:

(...)

the applicant/appellant has withdrawn the request/appeal;

(...)

55. At the public hearing held on 29 September 2015, the applicant withdrew the part of the request seeking the review of constitutionality of Article 2(b) of the Law on Holidays.

56. Having in mind the provision of Article 63(1)(d) of the Rules of the Constitutional Court, under which the Constitutional Court shall take a decision to terminate the proceedings, if the applicant has withdrawn the request during the proceedings, the Constitutional Court decided as stated in the enacting clause of this decision.

57. Bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court established that the present request in the part contesting Article 3(b) of the Law on Holidays is admissible as it was lodged by an authorized entity, and that there is not a single formal reason under Article 19 of the Rules of the Constitutional Court rendering this request inadmissible.

58. The Constitutional Court will examine the objections raised by the National Assembly relating to *ratione materiae* admissibility of the request in relation to the European Convention and the International Convention and in relation to the obvious ill-foundedness of the request, within the merits.

VII. Merits

59. The applicant claims that Article 3(b) of the Law on Holidays is inconsistent with lines „3 and 10" of the Preamble of the Constitution of BiH, Article 1 of Protocol No. 1 to the European Convention, Article I(2) in terms of the violation of principle of democracy and the rule of law, Article I(2) of the Constitution of BiH in terms of violation of principle of secularism as an inherent element in the rule of law and Article 9 of the European Convention, Article II(4) of the Constitution of BiH, in conjunction with Article 1(1) and Article 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention.

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

Article I(2)

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

Article II(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.

Article III(3)

(...)

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

(...)

61. **Article 1 of Protocol No. 12** to the European Convention reads as follows**:**

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.

62. The **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)** (adopted at the plenary session of the General Assembly of the United Nations, 21 December 1965) reads in its relevant part as follows:

Article 1(1)

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

Article 2

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

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

(...)

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

(...)

63. The Constitutional Court will first consider the issue of applicability of Article 1 of Protocol No. 12 to the European Convention, and Article 1(1) and Article 2(a) and c) of the ICERD.

64. The Constitutional Court indicates that the stipulation by the public authorities of a holiday celebrated by the social community at large, under the domestic and comparative law, falls in the domain of public law, wherein, according to the stance taken by the European Court and the Constitutional Court, the public authorities enjoy a broad margin of appreciation. Article 1 of the Constitution of the Republika Srpska stipulates that the Serbs, Bosniacs and Croats, as constituent peoples, Others and citizens, equally and without discrimination shall participate in exercising the authority in the Republika Srpska. This provision is further affirmed in Article 33 of the Constitution of the Republika Srpska (the Constitution of the Republika Srpska, II - Human Rights and Freedoms) which, among other things, stipulate that citizens shall have the right to participate in the management of public affairs. Thereby, the term citizens refers to the constituent peoples, Others and citizens of the Republika Srpska.

65. The Constitutional Court observes that the Law on Holidays (Article 1) stipulates holidays of the Republika Srpska, the manner of observing and celebrating thereof by citizens, bodies and institutions, wherefrom it follows that this concerns the issue falling within the domain of public law which concerns the interests of all in the Republika Srpska. Further, the mentioned law had been passed by the National Assembly, as a legislative authority, in accordance with the authorization to pass laws referred to in Article 70(1) (2) of the Constitution of the Republika Srpska. Accordingly, and within the meaning of Article 1 of the Constitution of the Republika Srpska the participation in regulating this issue falls within the scope of the constitutional right to exercise power, that is, within the meaning of Article 33 of the Constitution of the Republika Srpska the constitutional right to exercise public affairs. In that sense the stipulation of holidays and days of their observance falls under „the right explicitly guaranteed under the domestic law" within the meaning of Article 1 of Protocol No. 12 to the European Convention, regarding which the public authorities have committed themselves not to discriminate against anyone.

66. The Constitutional Court recalls that the ICERD, in relation to other international documents protecting and guaranteeing human rights and in relation to discrimination, sets a wider scope of protection as it is not limited to specific rights and freedoms contained in the instrument itself. The fact that Article 5 of the ICERD enumerates civil, political, economic, social and cultural rights which enjoyment the state is obliged to secure before the law without discrimination, cannot be construed so that this article establishes civil, political, social and cultural rights, rather in the manner that it presumes the existence of these rights and the recognition thereof (see the Committee on the Elimination of Racial Discrimination, General Recommendation no. XX, Non-Discriminatory Implementation of Rights and Freedoms (Article 5), adopted at the Forty Eighth Session, 1996).

67. The Constitutional Court notes that in the First Partial Decision no. *U 4/04* of 31 March 2006 (published in the *Official Gazette of BiH*, 47/06), and in the Second Partial Decision no. *U 4/04* of 18 November 2006 (published in the *Official Gazette of BiH*, 24/07), while examining the constitutionality of the then legal solutions on the flag, coat of arms and anthem, and the stipulation of holidays, it took a position that the ICERD was applicable. This conclusion was based on the fact that the ICERD was stated in Annex I to the Constitution of BiH, as one of the additional agreements which are applied in Bosnia and Herzegovina, and that the obligations under the international agreements, stated in Annex I to the Constitution of Bosnia and Herzegovina, in accordance with Article II(1) and Article II(6) of the Constitution of Bosnia and Herzegovina refer also to the entities.

68. Accordingly the Constitutional Court could not accept the objection of the National Assembly in relation to the applicability of Article 1 of Protocol No. 12 to the European Convention, and Article 1(1) and Article 2(a) and (c) of the ICERD.

69. In the instant case, the applicant's allegations on the discriminatory character of the contested Article 3(b) of the Law on Holidays or giving priority to the Serb people over the other two constituent peoples and Others, contrary to the principle of equality of constituent peoples, are essentially based on two arguments.

70. The first argument is that the Day of the Republic, which is celebrated on 9 January, is linked to the Declaration Proclaiming the Republic of the Serb People of Bosnia and Herzegovina, which was adopted by the Assembly of the Serb People in Bosnia and Herzegovina on 9 January 1992 and without participation of Bosniacs, Croats and Others. Therefore, in his opinion, 9 January represents a historical moment of exclusively Serb people as the Declaration is defined as the result of the right of the Serb people to self-determination, self-organisation and association, demanding territorial demarcation with other peoples. Finally, the applicant presented a claim that this date has also encountered a negative perception with all non-Serbs in RS because it reflects the philosophy of the identity of territory and nations, i.e. ethnic nationalism, exclusion of others and those who are different from all decision making, denial of pluralism and tolerance, multiculturalism and promotion of the medieval principle *cuius regio, eius religio*.

71. The second argument is that the Patron Saint's Day of the Republika Srpska – St. Stefan – is also observed on that same day so that the public authorities started to observe a secular date as „a religious Orthodox holiday or as a traditional Orthodox custom" that belongs exclusively to the Serb people. The applicant emphasized that the Patron Saint's Day represents a specific feature of only St. Sava's Orthodoxy (*Svetosavlje*) that is preached by the Serb Orthodox Church not evident with any other Orthodox church. Further, it was indicated that the central celebration of observing 9 January begins with the Liturgy and Patron Saint's Day Ritual with breaking the traditional bread *slavski kolac* („Slava cake"). It was also indicated that this ritual, in general, is led by the highest church officials of the Serb Orthodox Church. In this part of the request, the applicant emphasized that the perception of the public and media, political officials in the Republika Srpska, as well as officials from the Republic of Serbia, and the representatives of the Serb Orthodox Church, is that both the Patron Saint's Day of the Republika Srpska and the Day of the Republic are celebrated on the same day. In this manner, in his opinion, a seemingly neutral secular day is celebrated as a religious traditional day, while the Serb Orthodox Church takes both active and formal participation in its celebration. This, in fact constitutes a violation of the principle of secularism by the public authorities as stipulated by Article 14 of the Law on Freedom of Religion.

72. In the reply to the first argument of the applicant, the National Assembly emphasized that 9 January 1992 is the date when the Republika Srpska was created and that, by the

Declaration, the Republika Srpska expressed its will and desire to have its own Constitution, to have personality and to guarantee, by its Constitution, full equality to all peoples and citizens before the law and protection against all forms of discrimination as stated in Article 5 of the Declaration, which was included in Article 10 of the Constitution of the Republika Srpska in original form. In that regard, it was stated that this continuity has a confirmation in the Preamble of the General Framework Agreement for Peace, with the Constitution as its integral part, in which *inter alia*, it was stated that the signatory parties affirm, *inter alia*, their commitment to the Agreed Basic Principles issued on 8 September 1995, according to which BiH shall consist of two entities, i.e. of the Federation of BiH, which was established by the Washington Agreement, and the Republika Srpska, and that each entity shall continue to exist in accordance with its Constitution (amended so as to be in compliance with the Basic Principles). Finally, in the opinion of the National Assembly, 9 January, as the date of the genesis of the entity of the Republika Srpska, has its legitimacy and confirmation in Article I(3) of the Constitution of BiH that stipulates that BiH shall consist of the two equal Entities, the Federation of BiH and the Republika Srpska.

73. In the reply to the second argument of the applicant, the National Assembly indicated that the Declaration did not state whatsoever that it was adopted on the day of St. Stefan nor was that day referred to as the Patron Saint's Day of the Republika Srpska. Also it was indicated that the Patron Saint's Day of the Republika Srpska was not determined by any regulation of the Republika Srpska whatsoever. In addition, the Patron Saint's Day of the Republika Srpska was not established either by the Law on the Family Patron-Saint's Days and Church Holidays, which was the subject-matter of review in the Second Partial Decision of the Constitutional Court no. *U 4/04,* or the Law on Holidays (Article 3(b)), which was the subject-matter of this review. Considering that the Patron Saint's Day does not exist in the law, or in any other norm, the issue as to who and how can observe it is in the exclusive competence of the Serb Orthodox Church. Pursuant to Article 14 of the Law on Freedom of Religion, the public authorities cannot give their opinion about it. The National Assembly believes that this cannot be the issue the Constitutional Court can decide on. Also, it was indicated that the Law on Holidays regulates the holidays of the entities independently from religious holidays, while recognizing all three biggest religious groups, as well as that the Serb Orthodox Church is separate from the state (the entity) by the constitution, law and conduct. In the opinion of the National Assembly, the fact that some of the persons organizing the program of observing the Day of the Republic have arbitrarily stated that the Patron Saint's Day is observed on that day as well, represents actions inconsistent with the Constitution and the Republika Srpska laws, which cannot be the subject-matter of the proceedings before the Constitutional Court as

in that manner the Constitutional Court would enter into qualification and review of the case-law and not the norm and its compliance with the Constitution.

74. Having in mind the arguments presented by the applicant and the National Assembly, in answering the question whether the choice of 9 January for the observance of the Day of the Republic has discriminatory consequence for the Bosniacs and Croats, as constituent peoples, Others and citizens of the Republika Srpska, i.e. whether it results in giving privilege to the members of the Serb people in relation to the other two constituent peoples and Others, which is contrary to the principle of equality of constituent peoples, the Constitutional Court should take into account: a) whether 9 January represents a historical heritage of only one people in the Republika Srpska and b) whether the practice of observing the holiday on 9 January represents a privilege of only one people.

a) January 9th as part of the history of only one people

75. The Constitutional Court recalls that, while assessing the constitutionality of the entity's laws on the coat of arms, flag and anthem, it stated in the First Partial Decision no. *U 4/04* that (see paragraph 131): „(…) As to the symbols of the Republika Srpska, the Constitutional Court points to the fact that the symbols in question are the official symbols of a territorial unit which has the status of an 'Entity', that they constitute a constitutional category and as such must represent all citizens of the Republika Srpska, who have equal rights as recognized by the Constitution of the Republika Srpska. These symbols appear on all features of the public institutions in the Republika Srpska, that is the National Assembly of the Republika Srpska, public institutions etc. They are not the local symbols of one people, which are to reflect the cultural and historical heritage of that people only, but the official symbols of the multinational Entity, which, therefore, must reflect the character of the Entity". The Constitutional Court concluded in the mentioned decision that the challenged entity's laws are not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1(1) and Article 2(a) and (c) of the ICERD.

76. Further, the Constitutional Court emphasizes that the subject-matter of assessment in the Second Partial Decision no. *U 4/04* were the provisions of Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays, which designated as the holidays of the Republic the following: Christmas, Day of the Republic, New Year (*14 January*), Epiphany, St. Sava, First Serb Uprising, Easter, Whitsuntide, May 1st Day – Workers' Day and St. Vitus's Day, and their observance dates (the Day of the Republic was observed on 9 January). The Constitutional Court concluded that the challenged legal provisions (see paragraph 70): „are not in conformity with the constitutional principle of

equality of the constituent peoples, citizens and Others in Bosnia and Herzegovina, and have a discriminating character, thus they are not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 (a) and (c) of the ICERD. The Constitutional Court concluded that the challenged provisions of the Law on the Family Patron-Saints' Days and Church Holidays include the holidays „which only reflect and exalt the Serb history, tradition, customs and religious and national identity". Further, the Constitutional Court stated in the cited decision (see paragraph 70) that the Serb people in the Republika Srpska have the legitimate right to preserve its tradition and identity through legislative mechanisms, but an equal right must be given to other constituent peoples of the Republika Srpska and to other citizens of the Republika Srpska".

77. In the opinion of the Venice Commission, it was noted that the selection of 9 January for the observance of the Day of Republic as the holiday of an entity may raise difficulties, *inter alia*, due to the fact that the Declaration represents a unilateral act not supported by other, non-Serb peoples living in the Republika Srpska.

78. It is undisputable that the selection of 9 January to observe the Day of the Republic in the contested Article 3(b) of the Law on Holidays is inspired by 9 January 1992 when the Assembly of the Serb People in BiH was held, without participation of Bosniacs, Croats and Others. At that time, the Declaration had been adopted as an expression of political will of only one people, Serb people.

79. Therefore, the Constitutional Court holds that the selection of 9 January as the day observing the Day of the Republic does not symbolize collective, shared remembrance contributing to strengthening the collective identity as values of particular significance in a multiethnic society based on the respect for diversity as the basic values of a modern democratic society. In this connection, the selection of 9 January to mark the Day of the Republic as one of the holidays of the Entity which constitutes a constitutional category and, as such must represent all citizens of the Republika Srpska, who have equal rights according to the Constitution of the Republika Srpska, is not compatible with the constitutional obligation on non-discrimination in terms of the rights of groups as it privileges one people only, namely the Serb people, whose representatives have adopted on 9 January 1992, without participation of Bosniacs, Croats and Others, the Declaration Proclaiming the Republic of the Serb people of Bosnia and Herzegovina, that represents a unilateral act. As such, in the opinion of the Constitutional Court and according to the position of the Venice Commission it can hardly be seen as compatible with the basic values declared in the Constitution of the Republika Srpska, namely with respect for human dignity, freedom and equality, national equality, with democratic institutions, rule of law, social justice, pluralistic society, guarantees for and protection of human freedoms

and rights as well as the rights of minority groups in line with the international standards, prohibition of discrimination (Preamble)".

b) Practice of observing holidays

80. The Constitutional Court observes that the Law on Holidays or, for that matter, any other regulation in the Republika Srpska, failed to regulate the Patron Saint's Day either as a religious or a secular holiday. It did not define that the Patron Saint's Day of the Republika Srpska is indeed St. Stefan's day. This provision was not included in the Law on the Family Patron-Saint's Days that was the subject of review in the Second Partial Decision no. *U 4/04*. Also, the Declaration did not contain any details as to being adopted on the day of St. Stefan i.e. that the St. Stefan is proclaimed as the Patron Saint's Day of the Republika Srpska. Finally, the Law on Holidays, or any other regulation in the Republika Srpska, failed to regulate the manner of observing or the ceremony of celebration of any single holiday (secular or religious alike) that it recognizes.

81. Under the case-law of the Constitutional Court based on the case-law of the European Court, the discrimination occurs when a person or a group of persons who are in an analogous situation are treated differently and there is no objective or reasonable justification for such treatment. In addition, it is of no relevance whether the discrimination arose from the differential lawful treatment or from the application of the law itself (see, the European Court of Human Rights, *Ireland vs. Great Britain*, judgment of 18 January 1978, Series A, No. 25, paragraph 226).

82. Constitutional Court observes that the holiday is manifested in the public life of a community through activities undertaken by the public authority for the purpose of reminding the public of the values of significance for the community as a whole and through representation of the community towards others, from outside of the community itself. Therefore, the manner of observance of the holidays assumes a character of exercising the public authority although, as such, it is not regulated by legal or any other norm.

83. Therefore, the argument of the applicant that the public authorities, through consistent practice of observance of the holiday, began to see a secular date as a religious Orthodox holiday or as a traditional Orthodox custom raises an issue of existence of administrative practice incompatible with the Constitution of BiH, which, according to the claims of the applicant, has a discriminatory effect.

84. The European Court of Human Rights defines the notion of „administrative practice incompatible with the Convention" as accumulation of identical or analogous breaches

which are sufficiently numerous and inter-connected to represent not merely isolated incidents (exceptions), but also a pattern (system) (see European Court, cited above, *Ireland vs. Great Britain, Cyprus v. Turkey,* judgment of 10 May 2001, paragraph 115).

85. The Constitutional Court finds that in defining the notion of „administrative practice incompatible with the Constitution of BiH", it may be guided by the referenced definition, and the interpretation of the notion of discrimination referred to in the First Partial Decision no. *U 4/04.* In the referenced decision, the Constitutional Court took a position that the legal order of BiH, due to the existing Article II(4) of the Constitution of BiH that includes a general clause on non-discrimination, affords a greater protection against discrimination than the European Convention i.e. a constitutional obligation of non-discrimination in terms of a group right.

86. Considering that each holiday is observed on an annual basis (see Opinion of the Venice Commission, paragraph 32 - annual recurrent opportunity") the practice of observance of one holiday falls under the system, and not an isolated incident for the purpose of referenced definition of administrative practice.

87. The Constitutional Court observes that the manifestation of a holiday in a private life of an individual is connected to free time and does not obligate or impose any public or private participation in the very observation of the holiday. Thus, the practice of the observation of a holiday in principle could not result in discrimination in exercising one's individual rights and obligations. However, non-discrimination of individuals is not the same as the equality of groups (see, Constitutional Court, Third Partial Decision No. *U 5/98*, paragraph 70). Therefore, the principle of collective equality of constituent peoples imposes an obligation on the entities not to discriminate, primarily, against those constituent peoples who are, in reality, a minority in that particular entity.

88. The Constitutional Court notes that both the Day of the Republic and the Patron Saint's Day are congratulated on 9 January in the Republika Srpska by the political officials from among the Serb people in BiH and the Republika Srpska, and by political officials from the Republic of Serbia. In his address, at the Solemn Academy of 9 January 2015, the President of the Republika Srpska emphasized that both the Day of the Republic and the Patron Saint's Day are celebrated. The Patron Saint's Day of the Republika Srpska is congratulated by the high church officials of the Serb Orthodox Church that lead the liturgy and break the traditional bread *Slavski Kolac („*Slava cake") in the Orthodox Church and who are also present at the Solemn Academy in the Cultural Center and reception in the building of the Government of the Republika Srpska. The media report on the celebration of 9 January as the day of celebration of both the Day of the Republic and the Patron Saint's Day in the Republika Srpska.

89. The aforementioned is in support of the argument taken by the Venice Commission (see Opinion, paragraph 38) that it seems that both in the Republika Srpska and outside, the Day of the Republic of 9 January is perceived as a holiday connected with the two events at the same time: the Day of the Republic, classified as a secular and not religious holiday, and St. Stefan.

90. In its Second Partial Decision no. *U 4/04*, the Constitutional Court concluded that the holidays cannot be regulated so as to prefer any of the constituent peoples i.e. that this will be the case if regulated so as to reflect history, tradition, customs, religion and other values of only one people. The Constitutional Court considers that there is no reason to depart from such a position in relation to the practice of observing entity holidays as one segment of exercising the public authority.

91. It is undisputable that the Eastern Orthodox Christianity is predominant with the members of the Serb people and that the Patron Saint is a specific and unique feature of the St. Sava's Orthodoxy (*Svetosavsko pravoslavlje*) that is preached by the Serb Orthodox Church. Therefore, the practice of observation of Patron Saint's Day of the Republika Srpska without a doubt gives superior prominence to the Eastern Orthodox Christianity as a religion of majority in the Republika Srpska and to the Serb Orthodox Church i.e. the Serbs as people who recognize this religion as the most dominant. In that regard, the Constitutional Court indicated in the Second Partial Decision no. *U 4/04* that it is a legitimate right of the Serb people in the Republika Srpska to preserve its tradition and identity, but that an equal right must be given to other constituent peoples and other citizens of the Republika Srpska.

92. Therefore, it follows that through the well-established practice of observance of the holiday on 9 January, when both Patron Saint's Day of the Republika Srpska and the Day of the Republic are observed, notwithstanding whether it is a separate or a single celebration of these two events, the public authorities in the Republika Srpska created a public atmosphere in which the system of values and beliefs is obviously such that a priority is given to the religious heritage, tradition and customs of only the Serb people, placing it into a privileged position in relation to all three constituent peoples in the Republika Srpska who exercise their rights and obligations under equal terms and in an equal manner. Thus, the public authorities of the Republika Srpska are in violation of the constitutional obligation of non-discrimination in terms of a group right. Indeed, religious convictions and consequently tradition and rituals make a part of identity of each of the constituent peoples in BiH and it is a legitimate right of each of them to preserve it. It is an obligation of the public authorities to secure the exercise of this right equally for everyone. The practice

of the observance of 9 January as a religious holiday that represents a part of identity of only one constituent people is inconsistent with this obligation of the public authority.

93. Further, the Constitutional Court shall not enter into evaluation as to who may observe the religious holiday nor bring into question the right of anyone, including persons who take part in exercising public authority in the capacity of elected and appointed representatives, to express their religious or other affiliation or conviction individually and/or in community with others in private and public life. These rights may only be subject to limitations as necessary in a democratic society for the purpose of exercising a legitimate aim. Having this in mind, the Constitutional Court finds that this public atmosphere, in which the system of values and beliefs is obviously such that a priority is given to a religious heritage, tradition and customs of only one people, is not in compliance with the obligation of the public authority to secure, in the exercise of its functions in a neutral and unbiased manner, a manifestation of different religions, faiths and beliefs as well as religious compatibility and tolerance in a democratic society. Namely, the atmosphere so created, as promoted by the political officials of the Republika Srpska who should be particularly cautious in promoting democracy and its principles while bearing in mind that other religions and churches, such as Catholicism or Islam, in addition to the Orthodox Church and Eastern Orthodox Christianity, have always made an integral part of the multi-religious life in BiH in terms of pluralism that the Constitution of BiH and the European Convention require as a necessary prerequisite for a democratic society.

94. Also, the established practice and the created public atmosphere of the system of values and beliefs is inconsistent with the principle of secularism proclaimed by Article 14 of the Law on Freedom of Religions, which in terms of Article III(3)(b) of the Constitution of BiH represents a „decision of the institutions of BiH". The entities and all their respective administrative units are obligated to uphold it as it is in compliance with democratic principles set out in Article I(2) of the Constitution of BiH. Namely, in exercising its functions, the public authority established the practice of the observance of holiday on 9 January when both the Day of the Republic and the Patron Saint's Day of the Republika Srpska are observed. Regardless of the fact whether it involves a separate or a single celebration, it includes liturgy and breaking the traditional bread *slavski kolac* („Slava cake") in the Orthodox Church led by high church officials of the Serb Orthodox Church and the presence of the church officials during the rest of the ceremony of observance of the holiday are not in compliance with the proclaimed principle of the separation of the church from the state. Namely, under this principle, *inter alia*, the public authorities may not accord the status of state religion nor that of state church or religious community to any church or any religious community and no church or religious community and

their officials may be granted special privileges when compared to any other church or religious community, and not a single church or religious community or their officials may participate formally in the work of political institutions.

95. Finally, the Constitutional Court recalls that the Venice Commission, in support of the reasons for which the selection of January 9 as the day of observance of the Day of the Republic may be problematic, among other things, indicated that, although no obligation has been imposed on persons to participate in the formal celebration of the Day of the Republic, the very fact that that law imposes the celebration on all the inhabitants by introducing it as a day off, namely for them to refrain from work on that day, under a threat of sanction of a relatively high fine, may be problematic, and the application thereof may result in disproportionate impact on individuals/members of certain ethnic communities living in the Republika Srpska, and the communities concerned (see the Opinion, paragraph 55).

96. Therefore, the Constitutional Court holds that the practice of observance of 9 January and the Patron Saint's Day of the Republika Srpska as an Orthodox Religious Holiday afforded a preferential treatment to Serbs as one constituent people in relation to Bosniacs and Croats as constituent peoples, Others and citizens of the Republika Srpska. The public authorities of the Republika Srpska are therefore in „violation of the constitutional obligation of non-discrimination in terms of the rights of groups".

97. The Constitutional Court concludes that the contested Article 3(b) of the Law on Holidays, by designating the Day of Republic to be observed on 9 January, places the members of the Serb people in the privileged position when compared to Bosniacs and Croats, Others and citizens of the Republika Srpska, for the fact that this date represents a part of the historical heritage of only Serb people, and on account of the observance of the Saint Patron's Day of the Republika Srpska being connected to the tradition and customs of only Serb people.

98. The Constitutional Court concludes that the contested Article 3(b) of the Law on Holidays is inconsistent with Article I (2) of the Constitution of Bosnia and Herzegovina, Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and Article 2 a) and c) of the ICERD and Article 1 of Protocol No. 12 to the European Convention.

99. The Constitutional Court re-emphasizes that this decision in no way brings into question the right of the citizens of Bosnia and Herzegovina of Orthodox religion (or similar rights of citizens of any other religious community in Bosnia and Herzegovina)

to freely, in a traditional fashion, or any other appropriate fashion, observe their holidays, including the Patron Saint's Day of St. Stefan. According to the position of the Constitutional Court, such freedoms and rights, especially their free manifestation, only confirm the multi-confessional and multi-cultural character of Bosnia and Herzegovina as a state and society. Therefore, such a decision of the Constitutional Court in that context can in no way be understood differently.

Other allegations

100. Given the conclusions relating to Article II(4) of the Constitution of Bosnia and Herzegovina, Article 1 of Protocol No. 12 as well as Article 1(1) and Article 2(a) and (c) of the ICERD, the Constitutional Court does not find it purposeful to examine the challenged Article (3)b of the Law on Holidays in conjunction with lines „3 and 10" of the Preamble of the Constitution of BiH, Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 and Article 14 of the European Convention and Article 1 of Protocol No. 1 to the European Convention.

VIII. Conclusion

101. The Constitutional Court concludes that Article 3(b) of the Law on Holidays (*Official Gazette of the Republika Srpska*, 43/07) is inconsistent with Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1(1) and Article 2(a) and (c) of the ICERD and Article 1 of Protocol No. 12 to the European Convention.

102. Pursuant to Article 59(1) and (2) and Article 61(4) and Article 63(1)(d) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

103. Pursuant to Article 43(1) of the Rules of the Constitutional Court, Separate Dissenting Opinions of the Vice-President Zlatko M. Knežević and Judge Miodrag Simović make an annex of this Decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of Judge Miodrag Simović

Unfortunately, I cannot agree either with the reasoning or with the conclusions of the majority decision of the Constitutional Court regarding the unconstitutionality of Article 3(b) of the Law on Holidays of the Republika Srpska. My reasons are as follows:

(1) The mentioned Law, in Article 8 paragraph 4, recognizes that right to every citizen as the right to „a paid leave from work, up to two days of one's own choice during the calendar year, on the days of their respective religious holidays". That right, however, is not regulated by the European Convention and its protocols, or by the International Convention on the Elimination of All Forms of Racial Discrimination. Therefore, the specific request, in the segment of references to the violation of the European Convention and its protocols and the International Convention on the Elimination of All Forms of Racial Discrimination, is inadmissible *ratione materiae*.

(2) If that request were admissible, the Constitutional Court should then declare it unconstitutional, as the observance of religious holidays as state, or non-working days, is a practice that exists in a great many states throughout the world and, as such, represents a part of the tradition and civilizational development. In that respect, the European Court of Human Rights voiced its stance that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State, and that the Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development (see paragraph 68 of the Judgment of the Grand Chamber of the European Court of Human Rights in the case of *Lautsi and others v. Italy* of 18 March 2011).

The Judgment in the case of *Lautsi and others v. Italy* drew major attention of the public worldwide. It concerned a national of Italy whose children attended a state school in Italy, which classrooms had a crucifix displayed. The applicant complained that her right was violated for her children to be educated in accordance with the religious and philosophical beliefs of the parents, as provided for by the European Convention, namely Article 2 of Protocol No. 1 to the Convention, and the right to the freedom of religion under Article 9 of the Convention. The European Court of Human Rights accepted that mandatory display of crucifix on the walls of classrooms of the Italian public schools does not constitute an attack on the right of parents to secure education and upbringing of their children in accordance with their respective religious and philosophical beliefs, and that right is guaranteed under Article 2 of the First Additional Protocol to the European

Convention. The Court, further, for the reasons stated as part of the research of the rights of parents, appraised that the issues are not any different in the context of Article 9 that defends the freedom of speech, or Article 14 prohibiting discrimination in enjoying the rights guaranteed by the Convention.

Thus the European Court of Human Rights acknowledged that in the countries of Christian tradition Christianity has a specific social legitimacy that differs it from other philosophical and religious beliefs, and therefore justifies the fact that a differentiated approach can be adopted. Since Italy is a country of Christian tradition, a Christian symbol may have specific dominant visibility in the society. The Court reached a similar conclusion in other cases as well. It justified for instance the fact that Turkish schools national programs „give greater priority to knowledge of Islam than they do to that of other religions (…) this itself cannot be viewed as a departure from the principles of pluralism and objectivity which would amount to indoctrination having regard to the fact that, notwithstanding the State's secular nature, Islam is the majority religion practiced in Turkey." (European Court of Human Rights, 28 November 2004, *Zengin v. Turkey*, no. 46928/99, paragraph 63).

Therefore it is unacceptable to assess in the procedure of this constitutional case historical and political events due to which January 9th was determined as the Day of the Republika Srpska. The reason being particularly the fact that no consensus has been reached still regarding the cause, character and consequences of all the developments in the territory of BiH from 1992 to 1995. Therefore, the Constitutional Court, by entering into the merits of the decision-making on the particular request, in a way gave the primacy to political over legal arguments, evidence and facts, on which the decision on the review of constitutionality should not be based.

(3) The Law on Holidays does not mention at all the Patron Saint's Day of St. Stefan, or other Patron Saint's Days for that matter. Since only written provisions can be the subject-matter of the constitutional dispute, a question arises as to the competence of the Constitutional Court.

(4) The challenged law separated secular and religious holidays, by stipulating as republic holidays certain historical events of relevance for the Republika Srpska, and as religious holidays the most significant religions of three religions: Orthodox Christianity, Islam and Catholic Christianity. Religious holidays are celebrated for two days each, and the believers of Orthodox, Islam and Catholic religion have the right to a paid leave from work on those days. The members of other religions are given the right to a paid leave from work of their own choice, up to two days during the calendar year, on the days of their

respective religious holidays. In addition, the Government of the Republika Srpska can, by its respective decision, determine the observation of other dates, considering historical, cultural and traditional heritage of peoples living in the Republika Srpska. Therefore, religious sentiments of the members of not only constituent peoples but also of members of other peoples and religions are regulated in an identical manner.

(5) If January 9th is disputable as the Day of the Republic, then the rest of the republic holidays could be regarded as disputable as well. In essence, any date marking a holiday could be disputed by means of arguments that the date coincides with some event or personality from the calendar of religious communities in BiH.

(6) The Constitutional Court dealt with the constitutionality of holidays in the Republika Srpska in the case no. *U 4/04* of 18 November 2006, appraising the provisions of the then applicable Law on Patron Saint's Days and Church Holidays. In a certain manner and in the context of the well-known rule of *res iudicata*, the Constitutional Court dealt again with the same constitutional issue in the case no. *U 3/13*.

(7) The Law on Holidays was the subject-matter of the assessment by the Council for the Protection of the Vital Interest of the Constitutional Court of the Republika Srpska, which, by its ruling of 10 May 2007, declared as inadmissible the request filed by the Bosniac Caucus in the Council of Peoples of the Republika Srpska for the initiation of the proceedings for the establishment of existence of a vital national interest of the Bosniac people in that law. The Council for the Protection of Vital National Interest established that the applicant failed to specify what constituted a violation of the vital national interest of the Bosniac people in the Law on Holidays of the Republika Srpska. The same situation repeated itself in the request of the applicant before the Constitutional Court of BiH.

In view of the aforementioned reasons, I hold that the Constitutional Court of BiH should have dismissed the request of the applicant, and adopt a decision on lack of discrimination in relation to the disputable provision of the Law on Holidays of the Republika Srpska.

Separate Dissenting Opinion of Vice-President Zlatko M. Knežević

As, contrary to the majority opinion, I was against granting the request for review of the constitutionality of Article 3(b) of the Law on Holidays of the Republika Srpska and against the reasoning of the Decision adopted by the Court, I hereby submit my separate dissenting opinion for the following reasons.

My separate opinion is not different, but on the contrary it is in accord with the Separate Opinion of Judge Miodrag Simović; however, it contains distinct emphases placed on, in my opinion, key arguments and I certainly join and support the Judge's position on inadmissibility.

Introductory remarks

1. The request for review of the constitutionality filed by an authorised applicant („request"), having been specified, *i.e.* after the applicant has withdrawn part of the original request, and following the public hearing held in the present case, amounts to an assertion that the Republic Day (January 9th) is in violation of the norms of constitutional nature (Article 14 of the European Convention, Article 1 of Protocol No. 12 to the European Convention, and Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1(1) and Article 2(a) and c) of the International Convention on the Elimination of All Forms of Racial Discrimination, „International Convention"), because it symbolizes only one people (Serbs) and was instituted without participation of the other two peoples (Bosniacs and Croats) and because the norms, by their compulsory nature, indicate „compulsion" in relation to the observance of the holiday in issue.

2. The applicant particularly emphasises in the request, as expressly pointed out at the public hearing before the Court, that January 9th is also a religious holiday – Saint Archdeacon Stefan, which was proclaimed as the Patron Saint's Day of the Republika Srpska, and that, as pointed out in the request, the „practice" of simultaneous observance of the holiday, by itself, creates „exclusion" and „discrimination".

Particular emphasis is placed on a historical component of the origin of January 9th as holiday and Day of the Republika Srpska, as regards the historical fact on the point in time when the Assembly of the Serb People in Bosnia and Herzegovina declared and proclaimed the Republic of the Serb People in Bosnia and Herzegovina and, according to the applicant's opinion, negative value qualifications of that historical fact linked to the

emergence of the war in Bosnia and Herzegovina, war crimes, all the way to the opinion about a date that would be „more appropriate" as the Day of the Republika Srpska.

Finally, it all comes down to the assertion that Bosniacs in the Republika Srpska and the Bosniac People in Bosnia and Herzegovina (including Croats and Others, too) experience the existence of the Day of the Republika Srpska (January 9th) as discrimination in relation to their rights of the constituent peoples.

In its introductory part, the Decision mentions the detailed allegations stated in the request, a reply by the National Assembly of the Republika Srpska, a summary of the presentations given at the public hearing, the participation of the Venice Commission of the Council of Europe, as well as all other documents obtained and the relevant provisions of the Constitution of Bosnia and Herzegovina, the European Convention and other international documents, and the Law on Holidays of the Republika Srpska.

As to the Admissibility of the Request

A fundamental issue that should have been taken as a starting point in consideration of the request, in my view, is the issue of admissibility.

It is not about the admissibility in formal sense, as the request was undisputedly filed by an authorised applicant under the Constitution, but it is about the admissibility in essential sense or, more precisely, whether it involves a review of constitutionality that falls within the scope of jurisdiction of the Constitutional Court. Certainly, any request for review of constitutionality claiming and/or alleging a violation of the Constitution of Bosnia and Herzegovina, the European Convention or International Covenant ought to be examined in light of the alleged „violations" but, first of all, an issue arises as to the jurisdiction of the Constitutional Court to decide, as stated in the Rules of the Constitutional Court, whether or not the Constitutional Court is competent to take a decision.

On several occasions, during the consideration of the request, and I am reiterating it now, I have held that once all the assertions ensuing from the interpretation of constitutional norms or international conventions are laid bare, it essentially concerns the *perception*, feeling, view, conclusion and assessment of the historical fact being the source of emergence of the Day of the Republika Srpska on the precisely determined date - January 9th and the practice of observing the holiday, and it does not concern a violated constitutional norm.

Incidentally, to my regret I have to mention that, at the time when we were deciding about the participants at the public hearing before the Court, the majority failed to accept

my proposition to invite citizens of the Republika Srpska, primarily Bosniacs, but not only them, who are not political representatives but engaged in cultural, religious, educational, administrative, charitable or some other activities and whose authority and reputation in their place of residence, both before and after the Decision, have been acquired by their own integrity.

Their opinion and their *perception* is a key for assessing equality and the existence of discrimination in both date and practice of observing the holiday in question. Unfortunately, the majority of my colleagues held that it would be sufficient to hear political representatives only, which I do not contest as part of a necessary but *not sufficient* thing to do.

The Law on Holidays of the Republika Srpska and January 9th, as a date, have no ethnic or religious character. It is value-neutral and has no connection with anything religious (Family Patron Saint's Day – Saint Archdeacon Stefan), regardless of the fact that the majority (or the major part) of the Serb People are Orthodox Christians and practice the Christianity.

Therefore, it follows that we (the Constitutional Court) were actually requested to declare a non-existing norm unconstitutional!

Even the applicant himself does not hold that the overlapping of the date is disputable and, as I have understood, the observance of the religious element for those who have such a need is not disputed but the „practice" of observing the holiday.

And, it is now that we have run into the problem. Is it possible to assess, as an issue of constitutionality, something that does not exist in legal norms but, according to the applicant's view, exists in practice?!

Therefore, I am strongly convinced that the Constitutional Court, having been faced with the request to review the constitutionality of the norm that does not exist, and to do so on the basis of *perception* of other elements, was obligated to reject the request as inadmissible, as the Court has no jurisdiction to decide on something that does not exist in the norm subject to the review.

In addition, the conclusion emerges, while we are talking about the admissibility, that the Court, by its Decision no. *U 4/04,* in reviewing the then Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska, gave clear parameters the National Assembly of the Republika Srpska was obliged to comply with. The National Assembly of the Republika Srpska did so by enacting a new Law on Holidays. A paradox is that the Constitutional Court stated that the National Assembly of the Republika Srpska *met* its obligations under the Decision no. *U 4/04* and that Decision is deemed enforced!

Therefore, it was stated that the Decision had been enforced in respect of the issue that was raised again and discussed again and in respect of which a different decision was made, whereas the constitutional basis (Constitution) was not altered.

In legal theory and practice this is called *res iudicata* (a matter judged), while such a sequence of events, as regards the constitutional-legal theory, is a classic model of *constitutional-legal uncertainty* that is not tolerated or is tolerated only in exceptional circumstances of the change of social systems (transition from one political system to another, a relatively actual transition to democratic societies), and only if it concerns the most profound rights (such as equality of ownership, the right to life, *etc*.).

As to the Merits

I do not want to reiterate in the Separate opinion the introductory notes of the Decision or the appellant's allegations, and I ascertain that the Decision of the Court, in essence, accepts the arguments of the applicant. Concisely and with a risk of simplifying the complexity of the issues raised in the request, the argumentation was accepted in two directions:

- Firstly, January 9th is challenged because that date is linked with the historical fact that on that same date, *i.e.* on January 9th 23 years ago, was the Day of the Assembly of the Serb People in Bosnia and Herzegovina and that that date is undisputedly the Day of the Republika Srpska for historical reasons;
- Secondly, that „the practise of observance" of the Day of the Republika Srpska, regardless of the value-neutral norm of the law, is discriminatory for being interwoven with the religious element - Family Patron Saint's Day – Saint Archdeacon Stefan – and, as of secondary importance but emphasised in that direction, the obligation of everyone, by indicating the imperatives under the legal norm, to observe the Day of the Republika Srpska.

As regards the first „direction", I have a dilemma whether to mention that argument at all and, out of respect for the proceedings and the Decision adopted by the majority of the Judges, I will make a brief account.

Is it actually possible that a historical fact can be raised as an issue of constitutionality? This means, the fact not disputed by anyone, including the undisputed occurrence of the event. Is it actually possible, by a decision of any court, to make a historical valorisation or re-valorisation of the uncontested event? Is it possible to request a constitutional review of the history?

The logical conclusion in the specific case would be as follows: it is about a historical event for the Republika Srpska and the Republika Srpska is an integral part of Bosnia and Herzegovina, meaning that it is about a historical event for Bosnia and Hercegovina. In my view, a historical event for the Republika Srpska is a historical event for all citizens of the Republika Srpska and although „historians" are inclined to revisions, history is inclined to resist revalorisations, particularly, a change of historical facts. It is possible to have different *perceptions* of importance and/or value of events, but it does not change the existence of the event. I have already given my opinion about *perceptions* in terms of the interpretation of the Constitution and, generally, as regards the issue for review of the constitutionality of a norm.

In a way, it is a travesty that the *perception* on unacceptance is pointed out because of the first part of the name of the event – *Assembly of the Serb People ... Republic of the Serb People ...*, whereas „the full name" of the historic event is completely disregarded – *Assembly of the Serb People in Bosnia and Herzegovina ... the Republic of the Serb People in Bosnia and Herzegovina!* It seems that the sound of words Bosnia and Herzegovina „produced" in the full name of the historic event is inappropriate!

It follows that the Day of the Republika Srpska, January 9th, is inappropriate because of the *perception* on unacceptance for it marks the historic event relating to the constitutional character of Bosnia and Herzegovina in the then valid constitutional order (we need to recall that the provision on the constituent status of peoples – all three peoples - was applicable at the time), and also now, the historic event by which the constituent status of the three peoples was introduced as a constitutional principle is observed as a holiday in one part of Bosnia and Herzegovina. The famous phrase etched in the memory of my generation is the following: *It* (Bosnia and Herzegovina) *is neither Serbian, nor Croatian, nor Muslim, but rather equally Serbian, Croatian and Muslim!*

- The notion *Muslim* I expressly use as the then historical name for the Bosniac People.

The assertion in the Decision that the date itself does not reflect common values of everyone or, as stated in paragraph 79, January 9th does not symbolize collective, shared remembrance contributing to strengthening the collective identity, is ironic and unjust to contemporary Bosnia and Herzegovina.

What is the date in contemporary history that would fulfil that requirement and that would be accepted by everyone? What is the date symbolizing collective, shared remembrance contributing to strengthening the collective identity? The collective identity itself is in question in this country?! What is the shared remembrance that carries collective

symbolism? No answer is offered either by contemporary history or long past or future history?! I indicate bitterly that such a date could possibly be found in the early medieval period, which I doubt, as while some would be annoyed, for example, with crowning ceremony in the Orthodox monastery, others would be annoyed with the lily as a symbol of Catholic loyalty to a flag, whereas some would be annoyed with the historic fact relating to those who had pulled down that creation of the early medieval period!

The construction of such a sentence in the Decision is not a solution but a source of further problems for it opens the door to raise doubts that the collective identity and the symbolism of shared remembrance relate to only one (people) and not to all (peoples) or, even worse, meaning that this country is mechanically inoculated with someone else's experience, without a respect accorded to the „national" context (in terms of the state), as often said in Opinions of the Venice Commission.

This is not about the symbolism of shared remembrance, as our remembrances in Bosnia and Herzegovina, as a rule, are different. This is about something much more important – tolerance towards different understanding, and acceptance that there could exist different remembrance of a holiday, which is secular, and the existence of which we accept not because of an imaginary symbolism but because of the actual need for mutual respect and tolerance.

The aforementioned relates to this or any other holiday.

Finally, as regards this „direction" of the argumentation referred to in the request, references to the decisions of the Constitutional Court of the Republic of Bosnia and Herzegovina from the period 1992-1995 resemble to the controversial position and decision-making by the then composition of the Court not only in this case but also in many other cases that are exclusively *unilaterally and politically coloured*, so that it is much better for all of us not to open the issues on decision-making at that time.

I ignore the thesis developed in the request in respect of the historic event of January 9th, 1992 and the alleged tragic consequences which flowed therefrom, as it is not worth a comment in present Bosnia and Herzegovina and, in particular, in the future one, the country which, I guess, we build together.

The second „direction of argumentation" affects far more seriously my deliberation on the request and the decision made.

Although the „practice of observance" of the Day of the Republika Srpska, in itself, cannot amount to a constitutional violation, taken as a whole and with perception presented through religious elements on the „exclusivity" of a ceremonious character for

one historical religion and one people only, imposes the need to elaborate the „practice of observance" and its effects on the entire society in the Republika Srpska.

The aforementioned is referred to in paragraphs 80-95 of the Decision made by the majority, where it is attempted in a confused manner to clarify religious part and secular one and, at the same time, to give reasoning as to the rights of individuals, groups and collectivities to express their religious affiliation or to manifest their religion, and it is endeavoured to dispute the right in the specific case, as well as to indicate that a religious holiday cannot be imposed by a decision of the Court or to interfere with that right but, at the same time, to dispute the existence of the religious holiday to one religion.

Everything stated in those paragraphs is confusing and, regardless of my opposition to the Decision itself, the reasoning offered in that part of the Decision is at a critical point of the minimum (speaking benevolently) required for decisions of the Constitutional Court of Bosnia and Herzegovina. Such an inarticulate attempt to give the reasoning about the conflicts in respect of secularism, the preference of one religion, the practice of observance, including and even referring to elements of religious rites, such as breaking of the *slavski kolac* („Slava cake"), not only is contradictory but it also opens very dangerous abuses of such a construction.

For instance, Bosnia and Herzegovina has accumulated a very rich practice of observance of religious dates.

For many centuries all historical religions in the country have been publicly and ceremoniously marking the dates that are important to them. There is also a religious holiday that is manifested in a very ceremonious way, publicly, as an event and in a massive cavalry parade in historical costumes. Participants of the parade come from everywhere and that day is a holiday not only for that municipality but also for a wider area. In my view, that is something that represents wealth of this country but, according to the position stated in the Decision, as it is about a religious holiday of one religion, practiced mostly by members of one constituent people, and a holiday that is actually the holiday for secular area as well (I mean the area of certain administrative unit – municipality), that is subject to dispute as preference is given to one religion and to one people. So, anyone can create a *perception* that his/her right, he/she has as a member of a different religion or as a believer generally or agnostics or atheist, is violated, not to mention possible ethnic connotations and imagined feelings of discrimination on ethnic grounds?!

This illustration speaks about the absurdity of bringing down a wealth of tradition, including a wealth of religious diversities or religious existence, to a nuisance or discomfort and, particularly, to use it as *pro* and *con* arguments. When it comes to religious

connotations, it all comes down to the question whether the members of other historical religions, who are at the same time the members of the other two constituent peoples, are bothered by the existence of the religious holiday of one historical religion and of its believers, who are at the same time the members of the third constituent people. It is my deep conviction, which has been upheld on different occasions by the unanimous addresses of all those representing historical religions in this country, that mutual tolerance is the essence of their vocation of professing faith, meaning that there is no question of „nuisance".

The question that should have been answered by the Decision is whether „the practice of observance" of the Day of the Republika Srpska exceeded the boundary of secularity and, as regards the undisputable right to express or manifest religion, whether it exceeded the boundary of the importance of tolerance we apply in our dealings with others daily.

Unfortunately, the contradictions in the aforementioned paragraphs of the Decision do not offer an answer to that question and as if the change of the religious holiday were indirectly called for. We missed the opportunity to discuss, in the Decision, the level of tolerance of everyone in this country, when talking about sensitive issues and about the importance to associate tolerance not only with those who are not affiliated with the prevailing religious holiday but also with those who are part of it. For clarification of this thesis, the best thing to do is to paraphrase Marko Miljanov's saying about humanity, and in our case it is about tolerance, which, as a paraphrase, means that tolerance is that I, in exercising my right, endeavour not to hinder or discomfort another person. That would be contribution to the Constitution and constitutionality, which, unfortunately, was not realised. We missed the opportunity to discuss it with *authorities* and to make a decision about the boundaries of exercising one's right and, at the same time, about the boundaries of contesting one's right, within the frame of the unwritten constitutional principle of tolerance, which is far more important, and the *national context*!

Conclusion

In this separate opinion, my conclusion is as follows:

1. The Day of the Republika Srpska, January 9th, in itself, contains no national or religious determinants and, therefore, Article 3(b) of the Law on Holidays certainly does not amount to discrimination;
2. That date, January 9th, is a holiday of the Republika Srpska – of all its citizens – and, as such, it certainly cannot amount to discrimination;

3. As it concerns a historical date for the Republika Srpska, at the same time it is a historical fact for Bosnia and Hercegovina as a whole;

4. The assessment of *perception* of accepting the historical quality of the historical fact is not and cannot be the matter the constitutionality of which can be reviewed under the Constitution of Bosnia and Herzegovina and the Rules of the Constitutional Court and, therefore, the request is inadmissible for the Constitutional Court is not competent to decide on the request;

5. The issue of „practice of observance" could have resulted in a Constitutional Court's decision so that, by assessing the inadmissibility of the request, the principle of tolerance would have been indicated and, possibly, the public authorities could have been requested a firm separation between the secular and religious holiday in practice; however, the decision does not deal with that, apart from the described constructions that I have already commented;

6. There is no difference as to the right or obligation to observe the specific date and, therefore, in that part there is no discrimination; however, as stated in paragraph 5 of this Conclusion, the Decision could have issued recommendations to the public authorities to amend that part of the Law.

For the aforementioned reasons, as well as for the other reasons that I had presented when considering the request at the Constitutional Court's sessions, I voted against this Decision.

CONTENTS

Case No. U 28/14

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 at the time of filing the request for review of the constitutionality of Article 10 of the Rulebook Amending the Rulebook on Criteria, Procedure and Method of Allocation of International Permits for Cargo Transport to Domestic Carriers (*the Official Gazette of BiH*, 79/09; „the Rulebook") and item 2, paragraph 1 and item 2, paragraph 2 of Chapter III of the Notice on Initiation of the Process of Distribution of CEMT Permits and Bilateral Annual Permits for France and Belgium for 2015 (which was published on the website of the Ministry of Communications and Transport of Bosnia and Herzegovina, www.mkt.gov.ba)

Decision of 26 November 2015

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

Mr. Mirsad Ćeman, President,

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić

having deliberated on the request of **Mr. Staša Košarac**, **Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing the request**, in case no. **U 28/14**, at its session held on 26 November 2015 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of Mr. Staša Košarac, Deputy Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing the request is hereby granted.

It is hereby established that Article 10 of the Rulebook Amending the Rulebook on Criteria, Procedure and Method of Allocation of International Permits for Cargo Transport to Domestic Carriers (*Official Gazette of BiH*, 79/09), in the part amending Article 16(2) item a) is inconsistent with Article II(3)(k) 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.

Article 10 of the Rulebook Amending the Rulebook on Criteria, Procedure and Method of Allocation of International Permits for Cargo

Transport to Domestic Carriers (*Official Gazette of BiH*, 79/09), in the part amending Article 16(2) item a), is hereby repealed pursuant to Article 61(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The repealed Article 10 of the Rulebook Amending the Rulebook on Criteria, Procedure and Method of Allocation of International Permits for Cargo Transport to Domestic Carriers (*Official Gazette of BiH*, 79/09), in the part amending Article 16(2) item a), shall be rendered ineffective on the day following the day of its publishing in *the Official Gazette of Bosnia and Herzegovina*, pursuant to Article 61(3) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 13 November 2014, Mr. Staša Košarac, the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing the request („the applicant") lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of Article 10 of the Rulebook Amending the Rulebook on Criteria, Procedure and Method of Allocation of International Permits for Cargo Transport to Domestic Carriers (*the Official Gazette of BiH*, 79/09; „the Rulebook") and item 2, paragraph 1 and item 2, paragraph 2 of Chapter III of the Notice on Initiation of the Process of Distribution of CEMT Permits and Bilateral Annual Permits for France and Belgium for 2015 (which was published on the website of the Ministry of Communications and Transport of Bosnia and Herzegovina, www.mkt.gov.ba; „the Notice").

II. Proceedings before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 28 November 2014 the Constitutional Court requested the Ministry of Transport and Communications of BiH („the Ministry") to submit its reply to the request.

3. The Ministry failed to submit its reply.

III. Request

a) Allegations in the Request

4. The applicant holds that the impugned provisions of the Rulebook and the Notice are in violation of the constitutional principle of a market economy declared in the Preamble of the Constitution of BiH, line 4, and in contradiction of Article II(3)(k) and Article II(4) of the Constitution of BiH.

5. It is stated in the request that Article 10 of the Rulebook amended Article 16 of the Rulebook Amending the Rulebook on Criteria, Procedure and Method of Allocation of International Permits for Cargo Transport to Domestic Carriers (*Official Gazette of BiH*, 35/02). Pursuant to Article 10 of the Rulebook, one of the criteria for allocation of CEMT permits is *that international cargo transportation shall be a core activity of the carrier*. It is also stated that based on the said provision the Minister of Transport and Communications of BiH issued the mentioned Notice, establishing more lenient criteria for allocation of the 2015 CEMT permits. Thus, in Chapter III, paragraph 1(2), the criterion is established as follows: *2. Performing the road transport as a core or auxiliary activity*, and in paragraph 2(2), the following criterion is established: *As regards the carriers with transport as a core (prevailing) activity, the total number of points shall be multiplied by coefficient 1 and, as regards the carriers with transport as an auxiliary activity, the total number of points shall be multiplied by coefficient 0.3*. In the opinion of the applicant, the provision stipulating that the total number of points obtained based on the criteria for allocation of CEMT permits will be multiplied by coefficient 0.3, which is a reduction of 70% of CEMT permits for the carriers with transport as an auxiliary activity, is in contravention of the aforementioned constitutional principles. According to the applicant, it is evident that the carriers with transport as a core activity have a privileged position, *i.e.* they have a monopoly, as they, based on the mentioned fact, obtain more CEMT permits. At the same time, the carriers with road transport as an auxiliary activity are unable to work and to acquire property on an equal footing with other carriers and, consequently, they are discriminated against in respect of the ownership. Furthermore, the applicant points out that, instead of stipulating the requirements in the law or by-laws to be met by carriers as regards technical and human resources capacities for providing international transportation services, which would be subsequently checked and assessed by competent authorities (whether they have the relevant number of vehicles and licenced drivers, the appropriate infrastructure and modern vehicle inspection and repair and logistics facilities), on the basis of which a proportional number of CEMT permits would be issued, the Ministry of Transport and Communications of BiH has also prescribed, as one of the criteria, whether

or not the transportation of goods by road is a core or auxiliary activity and, on that basis, it allocates and distributes a certain number of CEMT permits, which is already limited.

6. The applicant points out the fact that the Law on International and Inter-Entity Road Transport authorises the Minister to determine criteria for distribution of CEMT permits, but that it does not mean that the criteria can be in contravention of the Constitution of BiH. In the applicant's opinion, the impugned provisions are inconsistent with the aforementioned constitutional principle and, consequently, they are in contravention of the Law on International and Inter-Entity Road Transport. According to the applicant, in addition to a violation of the constitutional principle of a market economy, the impugned provisions of the Rulebook and the Notice are in violation of the principle prohibiting a monopoly, the property right, the principle of non-discrimination based on ownership and the principle of free market economy. The applicant emphasises that the issue in the present case is why the carries with transport as an auxiliary activity, having a more numerous and modern fleet than the carriers with transport as a core activity, should not have the same rights and conditions to carry out international transport operations that require CEMT permits. It is also underlined that the Law on Commercial Enterprises does not recognise the terms „activity" or „activities", and only the Bureau of Statistics, which is to follow the economic movements, determines either a core or prevailing activity of commercial companies. Taking into account the aforementioned, the applicant points out that there is no single reason under the Law and the Constitution of BiH to place commercial companies, the carriers in the present case, in a favourable or unfavourable position depending on whether or not the activity they perform is a prevailing one.

7. The applicant suggested that the Constitutional Court render the impugned provisions of the Rulebook and the Notice ineffective for being in contravention of the aforementioned provisions of the Constitution of BiH.

IV. Relevant Law

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

Preamble

[...]

Desiring to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy, [...]

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

Article II
Human Rights and Fundamental Freedoms

[...]

3. Enumeration of Rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

k) the right to property

[...]

4. Non-Discrimination

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

9. The **Law on International and Inter-Entity Road Transport** (*the Official Gazette of Bosnia and Herzegovina*, 1/02 and 14/03), as relevant, reads:

Article 1

This Law shall provide for the manner and conditions of transportation of passengers and goods by vehicles in international road transport [...]

Article 5

A domestic carrier may carry out the international transport if it has a license for such transport operations.

License for transport operations referred to in paragraph 1 shall be issued by the competent Ministry if a domestic carriers, inter alia, meets the conditions stipulated by the European regulations in terms of:

1. technical equipment;
2. professional qualifications;
3. financial capabilities which does not include value of basic assets;
4. non-existence of lawfully pronounced ban to conduct the activity;
5. and other conditions stipulated by the Law and international treaties.
[...]

III GOODS TRANSPORT

1. International goods transport

2. 1.1. International regular goods transport

Article 26

The international regular goods transport shall be done in accordance with the law and international treaties, including bilateral and transit transport.

The international regular goods transport within the territory of Bosnia and Herzegovina shall be done on the basis of licenses for international regular transport, which shall be issued by the competent Ministry.

The license issued in accordance with paragraph 2 must be kept in the truck of local or foreign carrier during the whole transport.

A carrier which was granted a license for international regular transport shall be obliged to perform the transport in accordance with terms of the license, timetable and conditions provided by the international treaty.

1.2. International special goods transport

Article 27

For the international special goods transport a local carrier shall be obliged to obtain a license for international goods transport, which shall be issued by the competent Ministry, unless otherwise regulated by an international treaty.

Article 28

Licenses for goods transport that have been transmitted by competent authorities of other countries and the Conference of European Ministers of Transport shall be allocated to domestic carriers by the competent Ministry.

The total number of licences (quota) for transport of goods between Bosnia and Herzegovina and other countries, transport of goods in transit and transport of goods to and from third countries, as well as licence validity periods shall be determined by the competent Ministry.

[...]

The Minister shall issue more specific regulations concerning criteria, procedure and the manner of distribution of foreign licenses for goods transport to domestic carriers.

10. The **Rulebook on Criteria, Procedure and Method of Allocation of International Permits for Cargo Transport to Domestic Carriers** (*the Official Gazette of BiH,* 35/02), as relevant, reads:

Article 2

For the purpose of this Rulebook, certain terms shall mean:

3. „CEMT" means the European Conference of Transport Ministers, determining quotas and criteria to be met for using CEMT permits.

4. „CEMT permit" is a permit on the basis of which a carrier is entitled to provide international cargo transportation services between the CEMT member states, in transit through their territories and for third countries.

III-CEMT permits

3.1. Criteria for allocation of CEMT permits

Article 16

Criteria for allocation of CEMT permits shall be governed by the CEMT Rules and this Rulebook.

In distributing CEMT permits, the Ministry shall observe the following criteria:

- that the part of cargo transportation carried out by the carrier is in the interest of Bosnia and Herzegovina, which is to be assessed on the basis of contracts concluded and other documentation necessary for obtaining the permits, so that a type and amount of freight, export production, urgent deliveries, etc. are taken into account;

- that international cargo transportation services shall be the core activity of the carrier;

- that the carrier successfully used its CEMT permit in the previous year;

- that the carrier has vehicles with a gross vehicle weight above 12 tonnes and quality in accordance with the CEMT resolutions and acts;

- that the needs in certain area shall be met;

- that the carrier has fulfilled all tax obligations;

- that no prohibition measure under the Law, the Rulebook and other regulations has been imposed on the carrier;

- that the carrier has a higher percentage of the permits used for international cargo transportation and that they are used properly;

- *that rail transport has been used to some extent by the carrier*

The Ministry may determine more specific criteria and coefficients on the basis of which priorities when allocating CEMT permits shall be determined.

Article 17(1) and (2)

CEMT permits shall be distributed annually to domestic carriers by the Ministry, in accordance with the instructions by CEMT. The Ministry shall observe the criteria, procedures and methods stipulated by the Law and this Rulebook.

The Ministry, through the media, shall notify carriers about the time-limit for submitting their applications, the relevant documentation, minimum requirements and criteria for participating in the process of allocation of CEMT permits.

[...]

11. The **Rulebook Amending the Rulebook on Criteria, Procedure and Method of Allocation of International Permits for Cargo Transport to Domestic Carriers** (*Official Gazette of BiH,* 79/09), as relevant, reads:

Article 10

Article 16 shall be amended to read:

Article 16
(3.1. Permit Allocation Criteria)

(1) Criteria for allocation of CEMT permits shall be governed by the CEMT Rules and this Rulebook.

(2) In distributing CEMT permits, the Ministry shall observe the following criteria:

a) *that international cargo transportation services shall be the core activity of a carrier;*
b) *that the carrier successfully used its CEMT permit in the previous year, which is to be proved by reports on the use of the permit;*
c) *that the carrier has licenced tracked vehicles and trailers not intended for the use of fuel and derivate products transport;*
d) *that the carrier has vehicles with a gross vehicle weight above 12 tonnes or a group of vehicles with a gross vehicle weight above 16 tonnes, including trailers with a gross weight not less than 10 tonnes, and quality in accordance with the CEMT acts;*

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e) that the carrier has fulfilled all tax obligations;

f) that the carrier has paid all pension-disability insurance contributions for all of its employees

g) that no prohibition measure under the Law, the Rulebook and other regulations has been imposed on the carrier

h) that the carrier, within 20 days after the end of the calendar month, has been submitting properly filled out CEMT permits usage reports for the previous month

(3) Based on the criteria referred to in paragraph (2) of this Article, the Ministry shall determine more specific criteria and coefficients on the basis of which priorities when allocating CEMT permits shall be determined.

Article 19 is amended to read as follows:

Article 19

(1) After completing the relevant application form within the prescribed time limit, carriers shall submit to the Ministry their applications for allocation of CEMT permits (Attachment No. 5).

(2) [...]

12. The **Notice on Initiation of the Process of Distribution of CEMT Permits and Bilateral Annual Permits for France and Belgium for 2015** (published on the website of the Ministry of Transport and Communications of Bosnia and Herzegovina, www.mkt.gov.ba), as relevant, reads:

III Specific criteria for allocation of CEMT permits for 2015

Allocation of the 2015 CEMT permits shall be carried out in accordance with the following criteria:

1. number of vehicles and their quality
2. the transportation of goods by road as a core or auxiliary activity
3. proper usage of CEMT permits

Points under the specific criteria shall be awarded as follows:

2. the transportation of goods as a core or auxiliary activity

As regards the carriers with transport as a core (prevailing) activity, the total number of points shall be multiplied by coefficient 1 and, as regards the carriers with transport as an auxiliary activity, the total number of points shall be multiplied by coefficient 0.3.

13. The **Framework Law on Registration of Business Entities** (*Official Gazette of BiH*, 42/04), as relevant, reads:

III – DATA REQUIRED IN THE REGISTER

Obligatory data on the subject of entry

Article 10(1) item o)

Obligatory public data on the subjects of entry that are entered in the Main Book of Register by the competent registration court are as follows:

[...]

o) economic activity of the subject of entry with codes of activities according to the valid classification of economic activities.

V. Admissibility and Merits

14. The Constitutional Court firstly notes that, given the complexity of the request at hand and the issues raised therein, it will consider the admissibility and merits of the requests together.

15. Having regard to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the Constitutional Court notes that the request in question has been filed by an authorized person.

16. Given that the request in question challenges the acts of lower rank than a law, the Constitutional Court recalls its jurisprudence in similar cases. In this respect, the Constitutional Court recalls its hitherto case-law in the cases where the issue of compatibility of a general act not explicitly specified in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina was raised, and points out that it assessed the circumstances of each case as to the jurisdiction of the Constitutional Court under the said Article and, accordingly, took the position whether or not the specific request for review of those acts was admissible. In addition, the Constitutional Court underlines that it is the master of the characterization to be given in law to the facts of the case and that it is not bound by the characterization given by the parties (see, the Constitutional Court, Decision on Admissibility and Merits, No. *U 6/06* of 29 March 2006, paragraph 21, published in the *Official Gazette of BiH*, 40/08), and that it is a final authority as regards the interpretation and application of the Constitution of Bosnia and Herzegovina (see, the Constitutional Court, Decision on Admissibility and Merits No. *U 9/09* of 26 November 2010, paragraph 70, published in the *Official Gazette of BiH*, 48/11). Thus, in cases nos. *U 4/05* and 7/05, taking into account the wording of

Article VI(3)(a) of the Constitution *including but not limited to*, the Constitutional Court concluded that it had jurisdiction to review the constitutionality of the acts of lower rank than laws, where such acts raise an issue of violation of human rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina and European Convention (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 4/05* of 22 April 2005, published in the *Official Gazette of BiH*, 32/05; Decision on Admissibility and Merits no. *U 7/05* of 2 December 2005, published in the *Official Gazette of BiH*, 45/05). As regards the aforementioned decisions, the subject matter of the dispute related to the statutes of local self-management units (the City of Sarajevo, the Town of Istočno Sarajevo and the Town of Banja Luka). In the aforementioned cases, the Constitutional Court concluded that the requests for review of the constitutionality related to the issues arising out of the Constitution of Bosnia and Herzegovina and International Agreements that guarantee the protection and exercise of human rights and constitutional principles, such as the principle of constituent status of peoples and the right to non-discrimination, and that the Constitutional Court was competent to take decisions in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In case no. *U 7/10*, the Constitutional Court established that the relevant request primarily raised an issue of incompatibility of the Rules of Procedure of the Constitutional Court of RS with the Constitution of RS and concluded that it did not have jurisdiction under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina (see, the Constitutional Court, Decision on Admissibility no. *U 7/10* of 26 November 2010, published in *the Official Gazette of BiH*, 24/11). Furthermore, in case no. *U 1/09*, the Constitutional Court concluded that it does not have jurisdiction to review three by-laws and the decision of the FBiH Government, as the matter was about the enforcement regulations facilitating the implementation of the Law on Settlement of Debts Arising from Old Foreign Currency Savings, based on which the State of BiH took over the liabilities and responsibility for payment of old foreign currency savings (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 1/09* of 20 May 2009, available at www.ustavnisud.ba).

17. It follows from the quoted case-law that the Constitutional Court, as an institution which upholds the Constitution, has established that it has jurisdiction to review the constitutionality of acts of lower rank than laws where such acts raise an issue of violation of human rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina and European Convention. In line with the arguments concerning human rights, the Constitutional Court holds that it must, whenever this is feasible, interpret its jurisdiction in such a manner as to allow the broadest possibility of removing the consequences of human rights violations (*op. cit. U 4/05*, paragraph 16). In the case at hand, the request for review of the constitutionality relates to the issues under the

Constitution of Bosnia and Herzegovina and International Agreements that guarantee the protection and exercise of human rights and constitutional principles such as the principle of market economy, the right to property and the right to non-discrimination. In addition, the Constitutional Court notes that the applicant was the Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing the request. The request for review of the constitutionality relates to the adoption of a decision as to whether the provisions of the contested acts are consistent with the Constitution of Bosnia and Herzegovina. Finally, the request contains all the necessary facts and statements on which it is founded. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court has established that the request in question is admissible.

18. The Constitutional Court further notes that the applicant holds that the impugned provisions of the Rules and the Notice are in violation of the right to property guaranteed by Article II(3)(k) 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") and the right not to be discriminated against under Article II(4) of the Constitution of BiH and Article 14 of the European Convention in conjunction with the right to property of the carriers that provide international transportation services, but which is not their core or prevailing activity.

19. As to the allegations that there is a violation of the right to property, the Constitutional Court points to the consistent case law of the European Court as well as its own jurisprudence, pursuant to which the concept of „possessions" in Article 1 of Protocol No. 1 has an autonomous meaning, which is certainly not limited to ownership of physical goods and 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" within the meaning of Article 1 of Protocol No. 1 (see, the European Court of Human Rights, *Iatridis v. Greece* [GC], no. 31107/96, ECHR 1999-II, paragraph 54). In addition, other property rights are also protected such as the right to concession, the right to handcrafts and economic activity (see, the European Court of Human Rights, *Van Marle and Others v. the Netherlands*, Judgment of 26 June 1986, paragraph 42), the right to obtain or retain a licence (see, the European Court of Human Rights, *Tre Traktörer Aktiebolag v. Sweden*, Judgment of 7 July 1989), and goodwill (a non-property right of a company), and alike, as well as other economic interests relating to the property-legal position of a company. According to the opinion of the European Court of Human Rights, *the refusal to register the applicants as certified accountants radically affected the conditions of their*

professional activities and the scope of those activities was reduced. Their income fell, as did the value of their clientèle and, more generally, their business. Consequently, there was interference with their right to the peaceful enjoyment of their possessions (see, *op. cit. Van Marle and Others v. the Netherlands*, paragraph 42). In the case of *Anheuser-Busch Inc. v. Portugal*, the European Court of Human Rights established as follows: *... the applicant company's legal position as an applicant for the registration of a trade mark came within Article 1 of Protocol No. 1, as it gave rise to interests of a proprietary nature. It is true that the registration of the mark – and the greater protection it afforded – would only become final if the mark did not infringe legitimate third-party rights, so that, in that sense, the rights attached to an application for registration were conditional. Nevertheless, when it filed its application for registration, the applicant company was entitled to expect that it would be examined under the applicable legislation if it satisfied the other relevant substantive and procedural conditions. The applicant company therefore owned a set of proprietary rights – linked to its application for the registration of a trade mark – that were recognised under Portuguese law, even though they could be revoked under certain conditions. This suffices to make Article 1 of Protocol No. 1 applicable in the instant case…* (see, the European Court of Human Rights, *Anheuser-Busch Inc. v. Portugal*, Judgment of 11 January 2007, paragraph 78).

20. In the present case, the Constitutional Court observes that the carriers that provide international transportation services and satisfy the criteria for allocation of CEMT permits, which are prescribed and objectively determined, have an arguable claim that they will obtain the permit, which is the condition they must fulfil to operate their business and to acquire property and, consequently, Article 1 of Protocol No. 1 to the European Convention is applicable to the present case.

21. The Constitutional Court points out that international cargo transportation is an activity of vital importance for a country and, therefore, any country may prescribe the requirements to be met by a carrier to operate as an international carrier in accordance with law and international agreements. In addition, the Constitutional Court notes that the domestic carriers engaged in that activity must obtain CEMT permits *on the basis of which a carrier is entitled to provide international cargo transportation services between the CEMT member states, in transit through their territories and for third countries.* Furthermore, a limited number of the mentioned permits is issued, and the Constitutional Court notes that *licenses for goods transport that have been transmitted by competent authorities of other countries and the Conference of European Ministers of Transport (CEMT) shall be allocated to domestic carriers by the competent Ministry.* In this regard, the Constitutional Court highlights that the legal regulation of issues on which the domestic

carriers' right to be allocated permits depends is the issue of human rights and is vital for the exercise of the international cargo carriers right to a market economy. Moreover, the Constitutional Court considers that such issues should be regulated under laws, meaning that clear criteria for allocation of permits must be prescribed and determined by law, so that the individuals whom the norms refer to can adjust their conduct with the law. Besides, the Constitutional Court takes into account democratic procedures of enactment of legislation in democratic societies, where the issues to be regulated under laws are first thoroughly discussed in parliament, including both draft law and proposal of a law. On the other side, executive and administrative authorities are obliged to pass regulations prescribing modalities for enforcement of the law passed in such a procedure.

22. In the present case, the Constitutional Court notes that the Rulebook specifies the criteria for allocation of permits, including the impugned criterion that international cargo transportation services will be a core activity of the carrier. Taking into account the content of the impugned provisions, the Constitutional Court notes that they prescribe the criteria on which the domestic carriers' right to be allocated permits depends. In addition, the Constitutional Court has established that the Law on International and Inter-Entity Road Transport does not prescribe such criteria nor they are contained in the CEMT Rules (http://internationaltransportforum.org/IntOrg/road/index.html.) Taking into account the said Law and bringing the impugned provisions of the Rulebook into connection with the said Law, the Constitutional Court notes that the existing Law is not developed by the impugned provisions, but it is amended so that the additional criteria for allocation of permits are prescribed. The Constitutional Court notes that the Minister, by adopting the Rulebook including the impugned provisions, thereby taking on the role of legislator, actually prescribed the new criteria for allocation of CEMT permits in contravention of Article 28 of the Law, which stipulates that *the Minister will issue more specific regulations concerning criteria*. The Constitutional Court also notes that other laws, including the BiH Framework Law on Registration of Business Entities, do not prescribe core or auxiliary activities of business entities but they prescribe, as an obligatory public data, *an economic activity of the subject of entry with codes of activities according to the valid classification of economic activities*. Taking into account the cited provision of Article 28 of the Law on International and Inter-Entity Road Transport, the Constitutional Court concludes that the Minister, by adopting the impugned provisions, exceeded his authority under the legal framework to issue more specific regulations on the criteria for allocation of international permits for cargo transportation.

23. In addition, the Constitutional Court notes that the legal system is based on the hierarchy of legal acts, so that the Constitution has higher authority than all other laws

and by-laws and laws have supremacy over by-laws. In the present case, this relationship has been disrupted, as the impugned by-law is not subordinated to the law, and the executive branch, by establishing the criteria on which the exercise of the right depends on, took over the role of legislator. In the case at hand, a situation was created so that the executive branch had the role of legislator and regulated for the first time the issue of the impugned criterion, contrary to the discretionary powers to establish more specific regulations. The executive branch that acted in the aforementioned manner, which the domestic carriers' right to be allocated international permits for cargo transportation depends on, unconstitutionally interfered with the carriers' right to property. Therefore, the Constitutional Court concludes that in the case at hand an unlawful interference with the property right of the carriers that provide international transportation services has occurred.

24. The Constitutional Court concludes that the impugned provisions of the Rulebook are in violation of Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention.

25. As to the Notice, the Constitutional Court notes that it concerns a temporary act relating to the year 2015. In addition, the Constitutional Court notes that Article 16(3) of the Rulebook stipulates that *based on the criteria referred to in paragraph (2) of this Article, the Ministry shall determine more specific criteria and coefficients on the basis of which priorities when allocating CEMT permits shall be determined*, which is essentially the content of the Notice. In view of the above and given that the impugned provisions of the Rulebook have been declared unconstitutional and null and void and, consequently, the legal basis for passing the Notice has ceased to exist, the Constitutional Court will not consider in more detail the constitutionality of the provisions of the Notice.

26. Taking into account the aforementioned conclusions, the Constitutional Court holds that it is not necessary to consider the request in respect of other allegations referred to by the applicant.

VI. Conclusion

27. The Constitutional Court concludes that the impugned provisions of the Rulebook are in contravention of Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention, where the executive branch, by establishing the criteria to be met by a carrier to operate as an international carrier, exceeded the bounds of its legal authority and the bounds of international rules.

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

29. Within the meaning of Article 43 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of Judge Valerija Galić and Separate Dissenting Opinion of Judge Miodrag Simović joined by Vice-President Zlatko M. Knežević 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.

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of judge Valerija Galić

Pursuant to Article 43 of the Rules of the Constitutional Court of BiH (*Official Gazette of BiH,* 94/14) I hereby give my separate opinion dissenting from the decision by the majority of judges in the above case for the following reasons:

In the request for review of the constitutionality the acts of lower rank than a law have been challenged: two bylaws - Article 10 of the Rulebook Amending the Rulebook on Criteria, Procedure and Method of Allocation of International Permits for Cargo Transport to Domestic Carriers (*the Official Gazette of BiH*, 79/09) and item 2, paragraph 1 and item 2, paragraph 2 of Chapter III of the Notice on Initiation of the Process of Distribution of CEMT Permits and Bilateral Annual Permits for France and Belgium for 2015.

Pursuant to the powers from Article 28 of the Law on International and Inter-Entity Road Transport, the mentioned acts were passed by the BiH Minister for Communications and Transport.

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 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…" .

It is indisputable that starting from the wording of Article VI(3)(a) of the Constitution of BiH *including but not limited to,* the Constitutional Court concluded in its case-law that it may also review the constitutionality of legal acts lower in rank than a law **only when such acts raise an issue of violation of human rights and fundamental freedoms safeguarded under the Constitution of BiH and European Convention for the Protection of Human Rights and Fundamental Freedoms** (see, the Constitutional Court, Decision on Admissibility and Merits No. *U 4/05* of 22 April 2005, published in the *Official Gazette of BiH*, 32/05, Decision on Admissibility and Merits No. *U 7/05* of 2 December 2005 published in the *Official Gazette of BiH*, *45/05*). The subject of challenge in the mentioned decisions was the statutes of the units of local self-government (the City of Sarajevo, the Town of Istočno Sarajevo and the Town of Banja Luka). In both cases

the Constitutional Court concluded that the requests for review of the constitutionality are related to the issues arising out of the Constitution of Bosnia and Herzegovina and International Agreements that guarantee the protection and exercise of human rights and constitutional principles, such as the principle of constituent status of peoples and the right to non-discrimination, and that the Constitutional Court was competent to take decisions in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

In Case No. *U 15/08* of 3 July 2009, where the subject of review of the constitutionality were also the acts which, according to their character, do not represent the acts which are explicitly enumerated in Article VI(3)(a) of the Constitution of BiH, the Constitutional Court concludes that that it has jurisdiction to decide in this matter, as in **this Request the dispute arose between BiH and Entity of the Republika Srpska with regards to the constitutional issue of compliance with division of responsibilities under Article III(1)(a) and (b) of the Constitution of Bosnia and Herzegovina, and issues under Article III(3)(b), Article V(3)(a) and (c) and Article V(4) of the Constitution of BiH**.

In view of the aforesaid, the fact that the challenged provisions are contained in the legal acts that are not explicitly enumerated in Article VI(3)(a) of the Constitution of BiH, which is not an obstacle for the Constitutional Court to decide in the case at hand, that also does not mean that every act lower in rank than a law or the constitution of an entity may be the subject of review of constitutionality before the Constitutional Court, and that any invocation of the principles contained in the Constitution of BiH will necessarily result in dispute, which may be decided only by the Constitutional Court of BiH that has the relevant jurisdiction.

As regards the case at hand, Article 28 of the Law on International and Inter-Entity Road Transport provides that *the Minister shall issue more specific regulations concerning criteria, procedure and the manner of distribution of foreign licenses for goods transport to domestic carriers.* In the mentioned provision the legislator authorised the competent minister of communications and traffic of BiH to pass enforceable regulations, whereby the implementation of the mentioned law will be made possible in part relating to more specific criteria for distribution of CEMT permits.

Bearing in mind the aforementioned, I consider that the relevant Minister, while passing the challenged acts, acted in compliance with the legal authorisation and that in the concrete case the principle of division of power was not violated when it comes to the legislator who authorised the relevant administration body, i.e. the relevant Minister to pass more specific regulations on the criteria for distribution of permits for the purpose of implementation of law. In this connection, I am of the opinion that there is no reason

for which the challenged act would raise serious issues of violation of human rights and fundamental freedoms and constitutional principle; of market economy.

Taking the aforesaid as a starting point, unlike the majority of judges, I am of the opinion that the request in question should be rejected for the reason that the Constitutional Court of Bosnia and Herzegovina lacks jurisdiction in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 (1) (a) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

Separate Dissenting Opinion of Judge Miodrag Simović joined by Vice-President Zlatko M. Knežević

I regret that I am not able to agree with the opinion of the majority in the Constitutional Court with regards to the lack of constitutionality of Article 10 of the Rulebook Amending the Rulebook on Criteria, Procedure and Method of Allocation of International Permits for Cargo Transport to Domestic Carriers. In my opinion:

(1) The by-laws are not subject to normative review (review of constitutionality and lawfulness) by the Constitutional Court of BiH. That directly follows from the jurisdiction of the Constitutional Court explicitly determined under Article VI(3)(a) line 2 of the Constitution of BiH. In Article VI(3)(a), „the provisions of the Constitution and law" are stated as a subject-matter of abstract review of constitutionality. Nevertheless, the mentioned groups stated in Article VI(3)(a) of the Constitution of BiH are not final given the phrase „including but not limited to".

(2) Although it is natural, given that it is essentially about the same task that is regularly of less political importance and, consequently, of less sensitivity, that constitutional courts review the constitutionality of by-laws, the Constitutional Court falls within rare bodies which, as a rule, are not entitled to do that. That is the case in Italy and Spain.

(3) As regards most of the case-law involving by-laws, the Constitutional Court considered that it has no jurisdiction. Thus, in Case No. *U 1/09*, while reviewing the constitutionality of the Decision granting consent to the payment schedule for debt settlement by issuing bonds for verified old foreign currency savings accounts, the Constitutional Court found that the challenged by-laws of the FBiH Government are the enforcement regulations facilitating the implementation of the Law on Settlement of Debts and the Decisions of the BiH Council of Ministers establishing the schedule for payment of liabilities and cash payments for 2008, as well as a new time limit for verification of the claims. The Constitutional Court found that the present case does not relate to the review of constitutionality of the general acts over which this Court has jurisdiction, pursuant to Article VI(3)(a) of the Constitution of BiH.

(4) In its case-law, the Constitutional Court took a position that it may review the constitutionality of legal acts lower in rank than a law in cases where such acts raise an issue of violation of human rights and fundamental freedoms protected under the Constitution of Bosnia and Herzegovina and European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court did the same thing in Decision No. *U 4/05* of 22 April 2005 where it reviewed the constitutionality of the Statute of the

City Council of the City of Sarajevo and decisions of municipal councils on selecting councillors delegated to the City Council. However, in Case No. *U 4/05* the challenged acts raised issues of violation of human rights guaranteed under the Constitution of Bosnia and Herzegovina.

(5) In Case No. *U 28/14* there is no reason for raising the issue of violation of human rights and fundamental freedoms. Therefore, I consider that in the instant case the Constitutional Court does not have jurisdiction to review the challenged general act on the basis of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

CONTENTS

Case No. U 5/15

DECISION ON ADMISSIBILITY AND MERITS

Request of one-fourth of Delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for review of the constitutionality of Article 2 amending Article 8, paragraphs 2, 3, 4, 5 and 6, and of the provision of Article 3 amending Article 8a, paragraph 1 of the Law Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina*, 58/15)

Decision of 26 November 2015

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

Mr. Mirsad Ćeman, President,

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić

Having deliberated on the request of **one-fourth of Delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina**, in case no. **U 5/15**, at its session held on 26 November 2015 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by one-fourth of Delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for review of the constitutionality of the provision of Article 2 amending Article 8, paragraphs 2, 3, 4, 5 and 6, and the provision of Article 3 amending Article 8a, paragraph 1 of the Law Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina*, 58/15) is hereby dismissed as ill-founded.

It is hereby established that the provision of Article 2 amending Article 8, paragraphs 2, 3, 4, 5 and 6, and the provision of Article 3 amending Article 8a, paragraph 1 of the Law Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*the Official*

***Gazette of Bosnia and Herzegovina*, 58/15) are consistent with Articles II(3) (m), II(4) and II(5) 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 Brcko District of Bosnia and Herzegovina*.

Reasoning

I. Introdusction

1. On 28 August 2015, one-fourth of Delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the applicant") lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of Article 2 amending Article 8, paragraphs 2, 3, 4, 5 and 6, and of the provision of Article 3 amending Article 8a, paragraph 1 of the Law Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina*, 58/15).

II. Proceedings before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 14 September 2015, the Constitutional Court requested the House of Representatives and the House of Peoples of the Parliamentary Assembly of BiH to submit their replies to the request.

3. On 29 September 2015 the Constitutional-Legal Commission of the Parliamentary Assembly of BiH submitted its opinion, whereas the House of Representatives failed to submit its reply.

III. Request

a) Allegations in the Request

4. According to the applicant's allegations, in 2011 the Parliamentary Assembly of BiH adopted the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina („the Law on Permanent and Temporary Residence of Citizens of BiH"), and in 2015 it adopted amendments to the said Law, so that Articles 8 and 8a the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina were amended by Articles 2 and 3 of the Law Amending the Law on Permanent and Temporary

Residence of Citizens of Bosnia and Herzegovina. The applicant challenges paragraphs 2, 3, 4, 5 and 6 of Article 8, as amended, and paragraph 1 of Article 8a, as amended („the impugned provisions"). In the opinion of the applicant, the impugned provisions are in violation of the right to liberty of movement and residence under Article II(3)(m) of the Constitution of BiH and Article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and of the right not to be discriminated against under Article II(4) of the Constitution of BiH, and in violation of Article II(5) the Constitution of BiH in conjunction with Annex 7 to the General Framework Agreement for Peace in BiH (Article I(3)(a)).

5. The applicant points out that the impugned Article 2 stipulates an obligation to provide evidence that there is a legal basis for the registration of permanent residence at a specific address, and that Article 3 stipulates that competent authorities are obliged to check whether the mentioned requirements have been complied with by a citizen who has registered his/her permanent residence. It is also underlined that returnees are also subject to the checks, regardless of the fact that the returnees, until 2001 when the Law on Permanent and Temporary Residence of Citizens of BiH was adopted, had been (and still have been) entitled to facilitated re-registration in accordance with Chapter IV of the said Law. In the opinion of the applicant, it is evident that impugned Articles 2 and 3 amend Articles 8 and 8a of the Law on Permanent and Temporary Residence of Citizens of BiH so that their content is in direct contravention of entire Chapter IV of the said Law. Such contradiction between Articles 8 and 8a, as amended, and Chapter IV of the Law on Permanent and Temporary Residence of Citizens of BiH creates a situation of legal uncertainty and may expose the returnees to arbitrary treatment and tendentious interpretation of the Law on Permanent and Temporary Residence of Citizens of BiH by police authorities in applying the said Law, whereby the returnees may be exposed to discrimination. In addition, it is highlighted that the obligation to provide evidence under Article 8, as amended, of the Law Amending the Law on Permanent and Temporary Residence of Citizens of BiH creates a new legal and administrative barrier that can be defined also as a financial barrier, given that all of the evidence include administrative documents, notarial acts and fees. Furthermore, according to the applicant, many returnees are faced with great problems as they are required to provide legally valid documentation that they own real property, whereas it is generally known that for many pre-war real property there is no such documentation, due to the justified reasons (the documentation was destroyed or lost during the war, uncompleted construction, *etc*.).

6. The applicant points out that conditions for sustainable return of refugees and displaced persons in BiH are still not ensured, which imply not only the fact that the real

property is to be reinstated but also that the economic, social and other conditions allowing that the population at issue can reside in their places of residence and continue their lives there. All these barriers to sustainable returns, as stated by the applicant, must not be the reason for allowing the competent authorities in the relevant field to deny a statement of such a returnee that he/she wishes to reside at his/her pre-war address and intends to live there permanently. Therefore, the applicant concludes that it is not strange that Article 20 of the Law on Permanent and Temporary Residence of Citizens of BiH prescribes just two conditions to be met by returnees when registering their permanent residence: evidence of identity and a document in proof of pre-conflict permanent residence.

7. It is further emphasised that many civil and political rights, including but not limited to, the right to vote, are linked to a place of residence. According to the applicant, additional barriers are imposed on the returnees (who were subjected to ethnic cleansing) to prevent them to influence, through democratic elections, a creation of circumstances and ambiance for sustainable returns. In the opinion of the applicant, the application of the impugned provisions allows that the legally registered permanent residence of returnees is deleted, which is unacceptable given that the permanent residence is a basis for many rights exercised by the returnees in BiH (active and passive electoral rights, the possibility of receiving donations for reconstruction of destroyed houses, the right to apply for a vacancy, *etc*.).

8. The applicant also states that the contradiction between the impugned provisions and Chapter IV of the aforementioned Law allows a tendentious interpretation and acting in a discriminatory manner towards the returnees by the competent police authorities in applying the Law on Permanent and Temporary Residence of Citizens of BiH, which is in direct contravention of Annex 7, Article 1 paragraph 3(a), which stipulates the obligation for the Parties to create conditions suitable for return of refugees and displaced persons and to take the following measures: *the repeal of domestic legislation and administrative practices with discriminatory intent or effect*; ….

9. The applicant also considers that regardless of the fact that the formulation of the impugned provisions makes no distinction between individuals or groups in terms of their ethnic origin, the reality is that the impugned provisions contain inherent distinctions of ethnic nature, if seen in the historical context. Distinctions between individuals or groups were made in the past when the citizens of BiH, mostly Bosniacs and Croats, were expelled mainly from the territory of the RS Entity. Now, when the refugees and displaced persons make attempts to register their pre-war permanent residence, in the applicant's opinion, unjustified legal and administrative barriers are created. In view of the above, the applicant holds that the impugned provisions are in contravention of the right of refugees

and displaced persons to return in conjunction with the prohibition of discrimination and unjustified restrictions on the right to register permanent residence.

10. The applicant proposed that the Constitutional Court establish that the impugned provisions are in contravention of the Constitution of BiH and that the Constitutional Court render them ineffective.

b) Reply to the Request

11. The Constitutional-Legal Commission of the Parliamentary Assembly of BiH submitted the opinion in which it is stated that the request at issue has been filed by the Delegates of the Bosniac People Caucus in the House of Peoples and that a decision on the request will be passed by the Constitutional Court.

IV. Relevant Law

12. The **Law on Permanent and Temporary Residence of Citizens of BiH**, (*the Official Gazette of Bosnia and Herzegovina*, 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 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 pre-conflict 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.

13. The **Law Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina** (*the Official Gazette of Bosnia and Herzegovina*, 58/15), as relevant, reads:

Article 2

Article 8, as amended, reads:

Article 8, paragraphs 2, 3, 4, 5 and 6

[...]

(2) In the procedure of registering permanent residence and residential address, citizens shall be obliged to submit evidence of having valid grounds for residence at the address they are registering at. One of the following items of evidence shall be considered as evidence that a citizen has a valid basis for permanent residence at the address he/she registers as a resident:

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

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

c) Certificate proving that the ownership dispute is pending before the competent body, i.e., that the legalization or registration procedure is initiated in respect of

the facility, apartment or house at the address at which the permanent residence is registered.

(3) A verified statement of the lessor showing that the lessor meets the requirements under items a), b) and c) referred to in the previous paragraph of this Article and gives his/her consent that a certain person could be registered at his/her residential address shall be considered as a valid proof of permanent residence.

(4) Spouses or common-law partners and closest relatives (parents and children), adopters and adoptees, in the registration of residence may lodge an application for registration of residence at the address of the spouse or common-law partner that has already been registered, or at the address of a closest relative or adopter or adoptee only with a proof of the marital or common-law status, family relationship or adoption without obtaining evidence under paragraph 2 of this Article, with registration that such a relationship exists.

(5) 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 valid grounds for registration of residence at the address at which the permanent residence is registered.

(6) 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 assistance from the authorized body of social care in obtaining evidence on the valid basis for registration of residence at the address at which the permanent residence is registered.

[...]

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 for checking the fulfilment of the requirements, 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 for checking the fulfilment of the requirements, 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

New Articles 8b, 8c, 8d and 8e shall be added after Article 8a as follows:

[...]

Article 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 his/her residence by ruling.

[...]

V. Admissibility

14. 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.

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

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

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

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

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

16. Given that the request for review of the constitutionality of the impugned provisions was filed by one-fourth of the Delegates to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, the Constitutional Court notes that the request in question was filed by an authorized person under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

17. In addition, the Constitutional Court notes that the subject-matter of the request is the review of constitutionality of the law enacted by the Parliamentary Assembly of Bosnia and Herzegovina. In this context, the Constitutional Court underlines that according to the position adopted in its previous case-law, the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina does not envisage explicit jurisdiction of the Constitutional Court to review the constitutionality of laws or legal provisions of Bosnia and Herzegovina but the substantial notion of 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 taking into account the role of the Constitutional Court as the body upholding the Constitution of Bosnia and Herzegovina (see Decision of the Constitutional Court no. *U 2/11* of 16 November 2010, paragraph 44, available at: www.ccbh.ba).

18. Taking into account the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 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 19 of the Rules of the Constitutional Court that would render the request inadmissible.

VI. Merits

19. The applicant asserts that the impugned provisions are in violation of the right of returnees to liberty of movement and residence under Article II(3)(m) of the Constitution of BiH and Article 2 of Protocol No. 4 to the European Convention and the right of returnees not to be discriminated against under Article II(4) of the Constitution of BiH and the right of refugees and displaced persons freely to return to their homes under Article II(5) the Constitution of BiH in conjunction with Annex 7 to the General Framework Agreement for Peace in BiH.

Right to liberty of movement and residence

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

Article II(3)(m)

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

m) Right to liberty and movement;

[...]

21. Article 2 of Protocol No. 4 to the European Convention, as relevant, reads:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

The Constitutional Court firstly indicates that in case No. *U 27/13* the Constitutional Court was dealing with an issue as to whether the Law Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina of 17 July 2013 was destructive of the vital national interest of the Bosniac people and concluded that *…the Draft Legislation contains not a single provision whatsoever placing in a more favourable or unfavourable 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* (see, the Constitutional Court, Decision No. *U 27/13* of 29 November 2013, paragraph 27, available at www.ccbh.ba). In addition, in the aforementioned decision, the Constitutional Court established as follows: *...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. [...] Thereby, the Constitutional Court holds that the Draft Legislation contains not a single provision whatsoever placing in either a more favourable or more unfavourable position any of the constituent peoples (op. cit. U 27/13*, paragraphs 23 and 24).

22. As to the impugned provisions of Article 8, as amended, of the Law Amending the Law on Permanent and Temporary Residence of Citizens of BiH, the Constitutional Court notes that paragraph 2, items a), b) and c) define the evidence that is required in order for a citizen of BiH to have a valid legal basis for permanent residence at the address he/she

registers as a resident. According to the said provision, the valid evidence that is required to register a permanent residence are as follows: evidence of ownership, co-ownership or possession of an apartment, house or other residential facility, a verified tenancy contract or verified contract on sub-tenancy enclosed to the verified proof of the lessor's ownership, co-ownership or possession thereof, and a certificate proving that the ownership dispute is pending before the competent body, *i.e.,* that a legalization or registration procedure is initiated in respect of the facility, apartment or house at the address at which the permanent residence is registered. In addition, it is prescribed that valid evidence includes a verified statement of the lessor showing that the lessor meets the requirements under items a), b) and c) and that the lessor gives his/her consent that a certain person could be registered at his/her residential address. Furthermore, paragraph 4 prescribes that spouses or common-law partners and closest relatives (parents and children), adopters and adoptees, in the registration of residence may lodge an application for registration of permanent residence at the address of the spouse or common-law partner that has already been registered, or at the address of a closest relative or adopter or adoptee only with a proof of the marital or common-law status, family relationship or adoption without obtaining evidence under paragraph 2 of this Article, with registration that such a relationship exists. Moreover, paragraph 5 stipulates that the competent bodies of social care, nursing homes, geriatric and other specialized institutions will 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 BiH, who cannot secure the evidence under paragraph 2 of this Article in the registration process, in order to prove valid grounds for registration of residence at the address at which the permanent residence is registered. Finally, paragraph 6 stipulates that citizens of BiH 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 assistance from the authorized body of social care in obtaining evidence on the valid basis for registration of residence at the address at which the permanent residence is registered.

23. As to the impugned provisions of Article 8a, the Constitutional Court notes that paragraph 1 of the mentioned Article prescribes that the competent authorities are obliged to check, within five years from the date of entry into force of the Law Amending the Law on Permanent and Temporary Residence of Citizens of BiH (it entered into force on 29 July 2015), each permanent residence that has been registered. In this regard, electronic data collection is prescribed in respect of the data registered with other authorities, instead of citizens submitting evidence in person. In addition, paragraphs 2 and 3 stipulate that the competent authorities are obligated to take particular care and to have an understanding in assessing the evidence relating to socially disadvantaged persons and users of social

care in BiH and that, in the procedure for checking the fulfilment of the requirements, the competent authorities may use registers of birth, marriages and deaths, property records, records of employment institutes, health care, pension and disability insurance institutes, records of utility and other service providers, *etc*.

24. Furthermore, the Constitutional Court points out that on 17 July 2013 the Council of Ministers of BiH, in support of the Draft Legislation Amending the Law on Permanent and Temporary Residence of Citizens of BiH, submitted to the Parliamentary Assembly of BiH the reasoning for the amendments proposed. In the mentioned reasoning, it is stated that the reasons for adopting the aforementioned legislation include the need stemming from the practical application of the electronic signatures regulations, the need to improve the text of the law by specifying the requirements for and cancellation of registration of a permanent or temporary residence in order to prevent the abuse of the mechanism concerned. In addition, it is stated that *the Strategy for Development of Identification Documents was of vital importance for BiH in acquiring a visa-free regime. The Strategy foresees the development of a personal identification system. The starting point for the personal identification system entails the reliable evidence of temporary or permanent residence. Irrespective of the security features on identification documents in terms of the quality thereof, they will be a dead letter if they are not supported by accurate data concerning the temporary or permanent residence of the person the identification document has been issued to. International cooperation in the field of sanctions enforcement is a European standard and is inconceivable without reliable data on a temporary or permanent residence. BiH is one of few countries that has no data on its citizens residing in the territory covered by its diplomatic and consular missions.*

25. In view of the above, and given the applicant's allegations that the returnees face legal uncertainty, as there is the possibility of arbitrary and tendentious interpretation of the law by police authorities applying the impugned provisions, the Constitutional Court considers that is about the thesis that is based on assumptions relating to the possible future actions of the mentioned authorities. Besides, it is indisputable that there exists judicial protection even in the event of possible unlawful actions on the part of the mentioned authorities. As to the applicant's allegations that the impugned provisions impose financial burdens on the returnees, given that the collection of documents entails the costs of administrative documents, notarial acts and fees, the Constitutional Court notes that although the financial costs exist, there is clearly a public interest in securing accurate and true data where registering a temporary or permanent residence. In addition, the Constitutional Court points out that the laws, governing fees and other expenses of collecting, for example, cadastral data, or other public data, stipulate that socially disadvantaged persons

do not pay such expenses and that the costs at issue are equal to those paid by any citizen and, finally, that the Law in question does neither stipulate nor regulate the mentioned costs. In this regard, the Constitutional Court also highlights that Article 8(6) of the Law Amending the Law on Permanent and Temporary Residence of Citizens of BiH stipulates the following: *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 assistance from the authorized body of social care in obtaining evidence on the valid basis for registration of residence at the address at which the permanent residence is registered*. Furthermore, as to the applicant's allegations that the returnees have many difficulties in collecting the documents in question, the Constitutional Court notes that the impugned provisions of Article 8a paragraph 3 of the Law Amending the Law on Permanent and Temporary Residence of Citizens of BiH stipulate that in the procedure for checking the fulfilment of the requirements, the competent authorities may use registers of birth, marriages and deaths, property records, records of employment institutes, health care, pension and disability insurance institutes, records of utility and other service providers, *etc*.

26. The Constitutional Court points out the importance of the right to register a temporary or permanent residence as a legal basis for exercising many other rights afforded to the BiH citizens in their places of residence, including active and passive electoral rights, the right to employment, the right to public health and medical care, the possibility of receiving donations for reconstruction of destroyed houses, *etc*. The Constitutional Court accepts the reasoning offered in support of the Draft Law Amending the Law on Permanent and Temporary Residence of Citizens of BiH referred to the parliamentary procedure that the present case concerns the improvement of the text of the basic law and the specification of the requirements for the registration or the cancellation of the registration of permanent and temporary place of residence aimed at preventing abuses of this mechanism. By analysing the impugned provisions, especially from the aspect of the reasons stated in the request, the Constitutional Court cannot establish that they alter the existing legal solutions in any way as regards the freedom of movement and residence of refugees and displaced persons, nor that they have negative implications whatsoever in relation to the constitutional right to return of refugees and displaced persons to their pre-war places of residence in accordance with Article II(5) of the Constitution of BiH. In addition, the Constitutional Court holds that the applicant's allegations are ill-founded where the applicant alleges the contradiction between the impugned provisions and Chapter IV of the Law on Permanent and Temporary Residence of Citizens of BiH, which prescribes that a returnee or displaced person will be entitled to facilitated re-registration (after providing evidence of identity and a document in proof of his/her pre-war permanent residence), in

the situation where the returnees who registered their permanent residence pursuant to Chapter IV, along with all other citizens with registered permanent residence, are subject to control as regards their registered permanent residence. Furthermore, the Constitutional Court notes that the legislator, by prescribing the evidence that may constitute a valid basis for registration of permanent residence, included a broad range of evidence, which, in the view of the Constitutional Court, is reasonable and objective. Moreover, in Article 8a, paragraphs 2 and 3 of the Law Amending the Law on Permanent and Temporary Residence of Citizens of BiH, the legislator specified a facilitated registration for citizens with registered permanent residence, where the procedure for checking the fulfilment of the requirements is applied. Besides, the Constitutional Court points out that Article 1(3) of the Law on Permanent and Temporary Residence of Citizens of BiH stipulates as follows: *No provision of this Law may be interpreted so as to restrict the right of citizens to freely choose their place of residence*. In view of the above, the Constitutional Court holds that the impugned provisions impose no excessive burden on the returnees who, through the facilitated procedure, have registered their pre-war permanent residence addresses and who are subject to control as regards all registered permanent residence addresses, having regard to the public interests to secure accurate and true information about registered permanent residence addresses and the development of the personal identification system.

27. The Constitutional Court concludes that the impugned provisions are not in violation of the right of returnees to liberty of movement and residence under Article II(3)(m) of the Constitution of BiH and Article 2 of Protocol No. 4 to the European Convention.

Non-Discrimination

28. Article II(4) of the Constitution of Bosnia and Herzegovina 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 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.

29. Article II(5) of the Constitution of Bosnia and Herzegovina reads:

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.

30. The **Annex VII to the General Framework Agreement for Peace in BiH – Agreement on Refugees and Displaced Persons**, as relevant, reads:

Article I(3) item a)

[...]

The Parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons. To demonstrate their commitment to securing full respect for the human rights and fundamental freedoms of all persons within their jurisdiction and creating without delay conditions suitable for return of refugees and displaced persons, the Parties shall take immediately the following confidence building measures:

a) the repeal of domestic legislation and administrative practices with discriminatory intent or effect;

[...]

31. 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). 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.

32. The applicant holds that the impugned provisions are in violation of the right of returnees not to be discriminated against, in conjunction with the right to liberty of movement and residence under Article II(3)(m) of the Constitution of BiH, and the right of refugees and displaced persons freely to return to their homes under Article II(5) the Constitution of BiH. In addition, the applicant points out that the impugned provisions are in violation of the rights of Bosniacs and Croats, who, because of their ethnic origin, were expelled from the territory of the Republika Srpska during the war and now wish to return there. As to the aforementioned, the Constitutional Court notes that in the preceding paragraphs it has established that the impugned provisions are not in violation of the right of returnees to liberty of movement and residence. As to the applicant's allegations that Bosniac and Croat returnees to the RS are discriminated against in connection with their right freely to return to their homes, the Constitutional Court has already stated that it cannot establish that the impugned provisions alter the existing legal solutions in any way as regards the return of refugees and displaced persons and their property. Furthermore, the Constitutional Court notes that the applicant failed to offer arguments that could justify the allegations that the application of the impugned provisions have a consequence of a differential treatment of Bosniac and Croat returnees, when compared with other citizens whom the impugned provisions also apply to. In this regard, the Constitutional Court points out that Article 1(2) of the Law on Permanent and Temporary Residence of Citizens of BiH stipulates as follows: *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.*

33. In view of the above, the Constitutional Court cannot conclude that the impugned provisions raise an issue of discrimination prohibited under Article II(4) the Constitution of BiH in conjunction with the right to liberty of movement and residence and the right of refugees and displaced persons freely to return to their homes. Also, by regulating the right to permanent residence and by checking the registered permanent residence addresses in such a manner, the legislator does not call into question the right of any citizen of Bosnia and Herzegovina freely to choose his/her place of residence nor does it restrict the freedom of movement within the meaning of Article II(3)(m) and Article II(5) of the Constitution of BiH.

34. In view of the above, the Constitutional Court holds that the applicant's allegations are ill-founded, stating that the citizens of Bosnia and Herzegovina who were expelled during the war because of their ethnic origin are discriminated against based on the impugned

provisions. Accordingly, the Constitutional Court holds that the impugned Articles are not in violation of Article II(3)(m) and Article II(5) of the Constitution of BiH.

VII. Conclusion

35. The Constitutional Court concludes that the impugned provisions of the Law Amending the Law on Permanent and Temporary Residence of Citizens of BiH, which prescribe the procedure for checking the fulfilment of the requirements to be met by returnees as well as by all other citizens of Bosnia and Herzegovina who register their place of residence, are not in violation of the returnees' right to liberty of movement and residence under Article II(3)(m) of the Constitution of BiH.

36. In addition, the impugned provisions of the Law Amending the Law on Permanent and Temporary Residence of Citizens of BiH are not in violation of the right not to be discriminated against under Article II(4) of the Constitution of BiH in conjunction with Article II(3)(m) and Article II(5) of the Constitution of BiH, as the legislator, by regulating the right to permanent residence and by checking the registered permanent residence addresses in such a manner, does not call into question the right of any citizen of Bosnia and Herzegovina freely to choose his/her place of residence nor does it restrict his/her right to freedom of movement and return to his/her pre-war property in BiH.

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

38. Within the meaning of Article 43 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of President of the Constitutional Court Mirsad Ćeman makes an annex to this decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of President Mirsad Ćeman

In the case no. *U 27/13*, the Constitutional Court only examined the regularity of the proceeding, i.e. the request to establish whether there is ground for the statement that the Law Amending the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina is destructive of the vital national interest (of the Bosniac people). However, in this case (*U 5/15*), the Constitutional Court considered the request for review of constitutionality of the enacted law. It is beyond any dispute that it is about two different constitutional and legal aspects.

However, in my opinion, a crucial and constitution-related question in general, on both of these cases, is the following: what is the **relationship between the issue of constitutionality** of a law with **the rule of law principle** (legal certainty) under Article I(2) of the Constitution of Bosnia and Herzegovina in correlation with the right to the freedom of movement and residence under Article II(3)(m) of the Constitution of BiH, and **the principle of proportionality**, i.e. whether there is a **balance between legitimate interests** (arising from the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols as an integral part of the Constitution of BiH)?! All the more so as both of these principles are, **beyond any doubt, high-level constitutional categories and standards with multiple meaning**. Is it possible to claim that the law, which does not meet the standards of the rule of law and proportionality, i.e. the principle of balance between legitimate interests, is unconstitutional? In my opinion the answer is - YES.

In the Separate Opinion in Case *U 27/13*, I explained the correlation of these principles with the notion of „vital national interest". In examining the compatibility with the Constitution, the core issue is raised, in general and also with regards to this case, whether the challenged law meets strict criteria and standards of the rule of law principle (legal certainty), i.e. whether the challenged law is in conformity with the proportionality principle, i.e. whether there is a balance between the legitimate interests as irrefutable constitutional principles and standards. In my opinion the answer is - NO.

Just to remind you, the Constitutional Court, in its Decision No. *U 27/13*, considered that, among other things, the manner in which the law regulates the issue of registration of temporary and permanent residence of all citizens may have implications for the compliance with 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). In other words it may have impact on the return of refugees and displaced persons".

Bearing in mind the aforesaid and in particular the fact that the version of the law (which is subject of review) that has been adopted, i.e. the part of the law that raises dispute is, in essence, identical to the previous proposal of the law (the reason for consideration in Case No. 27/13), it is evident that for the Constitutional Court, i.e. for the majority of judges of the Constitutional Court, the wording of the enacted Law may have implications for „the compliance with 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)". In other words, it may have impact on the return of refugees and displaced persons".

Although it does not necessarily mean, I must add that given the existing relations in BiH, this „may" should, with high degree of probability, be understood as „will", particularly in some parts of BiH.

So, if the Constitutional Court infers that the challenged law provisions may have implications for the compliance with one of the fundamental human rights under the Constitution, and, at the same time, it disregards the fact that even the previous case-law regarding implementation of the relevant law was manifestly in support of making it difficult for the returnees to return to their pre-war homes (particularly in some parts of BiH), then disregarding „the quality of law", within the context of the previously stated principles on the occasion of review of constitutionality, is evidently an inconsistent act.

Therefore, in my opinion, only the law that will not make the procedure complicated when it comes to registering temporary and permanent residence, i.e. only the law which will eliminate useful, but not always necessary, administrative actions may be considered constitutional. However, that does not apply to the case at hand. What is, actually, *ratio legis* of this law?

While appreciating the position of the majority of judges and even though I am convinced that some normative arrangements have improved the quality of the challenged law, I could not support the decision.

Case No. U 7/15

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Safet Softić, Second Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for the review of constitutionality of the first sentence of Article 7(1) of the Constitution of the Republika Srpska in the part reading: „the language of the Bosniac people"

Decision of 26 May 2016

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

Mr. Mirsad Ćeman, President,

Mr. Mato Tadić, Vice-President,

Mr. Zlatko M. Knežević, Vice-President,

Ms. Margarita Tsatsa-Nikolovska, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić,

having deliberated on the request filed by **Mr. Safet Softić, Second Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina**, in case no. **U 7/15**, at its session held on 26 May 2016 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by Mr. Safet Softić, Second Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, for the review of constitutionality of the first sentence of Article 7(1) of the Constitution of the Republika Srpska in the part reading: „the language of the Bosniac people" is hereby dismissed as ill-founded.

It is hereby established that the first sentence of Article 7(1) of the Constitution of the Republika Srpska in the part reading: „the language of the Bosniac people" 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. On 9 September 2015, Mr. Safet Softić, Second Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the applicant") filed a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for the review of constitutionality of the first sentence of Article 7(1) of the Constitution of the Republika Srpska in the part reading: „the language of the Bosniac people".

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of the Republika Srpska („the National Assembly") was requested on 17 September 2015 to submit its reply to the request.

3. On 9 November 2015, the National Assembly submitted the reply to the request.

III. Request

a) Allegations stated in the request

4. The applicant holds that the challenged Article 7(1), first sentence thereof, of the Constitution of the Republika Srpska, in the part reading: „the language of the Bosniac people", is not in conformity with the Constitution of Bosnia and Herzegovina („the Constitution of BiH"). At the very outset of the presentation, the applicant emphasizes that the request for the review of constitutionality deals with the constitutional right to language, which includes the right of the group to call its language as it wishes and to use it as stipulated by international and constitutional law. It is particularly emphasized that this „it does not relate to any issue raised with regards to the content of the language, its similarity or comparison with other official languages in Bosnia and Herzegovina, the justifiableness of the existence of three languages, etc., which are primarily the questions for the linguistic sciences and, thus, outside the scope of interest of this particular request".

5. The applicant sees the unconstitutionality of the first sentence of Article 7(1) of the Constitution of the Republika Srpska, in the part prescribing that the official languages in the Republika Srpska shall be: „...the language of the Bosniac people...", through five aspects:

a) It imposes on the Bosniac people the name of the language and, thus, deprives it of the right to name its own language as an inherent element in the right to language, which is, again, the constituent element of the vital national interest of a constituent people

6. The applicant alleges that the last 10th sentence of the Preamble of the Constitution of BiH prescribes the principle of the constituent status of peoples, which comprises a number of specific collective rights of the constituent peoples. The very Constitution of BiH, as the applicant further alleges, does not stipulate that the language is a part of the principle of the constituent status of peoples. However, the right to language constitutes an integral part of the principle of the constituent status of peoples and it follows *explicite* from the provisions of the Entity Constitution. This case does not concern the individual but collective right to language as part of the vital national interest of any constituent people in terms of Article IV(3)(f) of the Constitution of BiH. Thus, in the context of the aforementioned, the applicant refers to the Decision of the Constitutional Court no. *U 10/05*. The applicant notes that the „European Convention for Regional or Minority Languages" does not apply to the constituent peoples (*U 10/05*), however it finds as unacceptable the conclusion that the access to the collective right to language does not apply to the constituent peoples, given that the State should take into account the needs and wants of the constituent peoples who use their respective languages. He emphasizes that the particular case concerns the language of the group which represents a factual minority in the Republika Srpska and refers to the Decision of the Constitutional Court, no. *U 5/98 III* of 1 July 2000 (paras 58 and 59), which he cited in full.

7. The applicant further alleges that when the notion „the right to language" is used, that right entails the right of a group to give a specified name to its language and not to have it imposed by others. The right to name its language, as the applicant alleges, represents the element inherent in the general right to language. That is so because the right to the recognition of a language also comprises the right to the recognition of the name of a language. This connection is a part of the effective protection of the right to language, as the language and its name are an expression of cultural wealth of a group (Article 7(1) line 1 of the „European Convention for Regional or Minority Languages").

8. In order to draw a conclusion, as the applicant alleges, that the Republika Srpska has violated the principle of the constituent status of peoples, by introducing in the Constitution of the Republika Srpska „the language of the Bosniac people" and not „the language of the Bosnian people", the applicant indicates that during the 1991 census, the Bosnian language, as the mother tongue, had been spoken by 37.2853 % of the population. Consequently, the Bosnian language had been the fact of the constitutional and legal system and order

of Bosnia and Herzegovina even before the currently applicable Constitution of BiH. He further alleges that the General Framework Agreement for Peace in BiH was written, *inter alia*, also in the Bosnian language, and cites Article XI(2) of the Agreement, which reads „Done at Paris, this 14 day of December, 1995, in the Bosnian, Croatian, English and Serbian languages, each text being equally authentic". Although this Agreement, as the applicant alleges, had not been published in the official languages of Bosnia and Herzegovina, this fact is indisputable. The English version clearly uses the term „Bosnian language", so that there is no dilemma as to whether it was concluded in „Bosnian" or „Bosniac" language, or in „the language of the Bosniac people". The applicant refers to the Decision of the Constitutional Court no. *U 32/01*, namely paragraph 17, which reads that „the Constitution of BiH, which text is contained in Annex 4, is an integral part of the Agreement. It can be therefore concluded that it follows from the structure of the Agreement that Annexes are of the same character and that the authors of Annexes had no intention to give rise to any conflict whatsoever", and concluded that the Constitution of BiH as well as other annexes to the General Framework Agreement for Peace in BiH, as its integral parts, were written, *inter alia*, also in the „Bosnian language". Consequently, starting from the interpretation of the General Framework Agreement and certain Annexes thereto, the „Bosnian language" is a constitutional language in Bosnia and Herzegovina and one of the three official languages. This is binding on the Republika Srpska within the meaning of Article III(3)(b) of the Constitution of BiH and the Entity does not have a discretionary right to recognize languages other than those that exist, or to change the names thereof. Furthermore, the applicant alleges an example that at the level of Bosnia and Herzegovina, all state laws are published in the „Bosnian language" in the *Official Gazette of BiH*, as the header clearly reads „Serbian, Croatian and Bosnian Language Edition". He also alleges that the Constitutional Court uses the „Bosnian language" in its work, and alleges paragraph 10 of the application form as an example.

9. The National Assembly, as the applicant alleges, after the Bosnian language had factually and legally existed and had been introduced in the General Framework Agreement, and after the Bosnian language had existed in the Federation of Bosnia and Herzegovina (the Bosnian and Croatian languages had been the official languages until the constitutional amendments), took a liberty to rename that language in „the language of the Bosniac people" without any legal or legitimate grounds for doing so. He deems that the Republika Srpska also denied and violated the collective right of the Bosniac people to call its mother tongue and one of the official languages as that people wished, which is contrary to the principle of the constituent status of peoples within the meaning of the last 10th line of the Preamble of the Constitution of BiH.

b) Engages in *de facto* discrimination against the Bosniac people when compared to the Serb people, as there is a different approach, in practice, to „the language of the Serb people" and to „the language of the Bosniac people" when it comes to the naming thereof

10. The applicant further indicates that the authorities in the Republika Srpska call in practice „the language of the Serb people" „Serbian" while not applying the same approach to „the language of the Bosniac people", in a sense that the term „Bosnian" is used in practice. Accordingly, there is a different treatment in practice of „the language of the Serb people" when compared to „the language of the Bosniac people". As an example the applicant mentioned the official page of the Supreme Court of the Republika Srpska that uses the term „Serbian language". It is clear from the official page of the RS Institute of Pedagogy, as the applicant infers, that „the Serbian language" is taught in the Republika Srpska while „the Bosnian language" does not even exist. The aforementioned is confirmed by the fact that grades are entered for the Serbian language in the students' grade reports and not for „the language of the Serb people". Furthermore, he alleges that all the websites of the public bodies in the Republika Srpska do not carry at all the title of a language that the website is displayed in to be read, thereby trying to cover up the established practice of „the Serbian language" unlike the formal and unnatural forcing of the language of „the Bosniac people" in practice. The applicant holds that this kind of practice is a reflection of a very „undemocratic and politically incorrect attitude to the collective rights of the constituent peoples in Bosnia and Herzegovina". Also, he mentions that numerous legal acts of the authorities of the Republika Srpska read that it is „Serbian" and not „the language of the Serb people". He cited as an example that in Banja Luka all documents are translated from English into „the Serbian language" as well as from „the Serbian language" into English. The media emphasize that it is „the Serbian language" and not „the language of the Serb people".

11. The applicant refers to Decision no. *U 5/98 III* wherein the Constitutional Court indicated that discrimination does not exist only when law makes formal differences without justification but also when the „legislation and administrative practices with discriminatory intent or effect" are adopted. It is also stated that there are several manners of discrimination that the applicant cited from the mentioned decision in the subsequent text of the request. He further referred to the description of discrimination referred to in the *Explanatory Report for Additional Protocol No. 12 to the European Convention*, which reads that discrimination exists not only in the case of the so-called formal discrimination but also when the State factually acts in a discriminatory manner, when the state uses its discretion in a discriminatory manner or by any other act. Although the Constitution of the

Republika Srpska treats equally all three peoples in formal and legal terms, there is a clear distinction in the factual treatment between „the language of the Serb people" and „the language of the Bosniac people", because in practice „the language of the Serb people" is used as „the Serbian language" which is the real will of the Serb people. The described *de facto* discrimination, as the applicant mentioned, happens for one reason only, and that is because the „Bosnian" language is reminiscent of the state of Bosnia and Herzegovina, of the notion indicative of something common, supranational, supra-ethnic, which does not fit concept-wise in the politics of the Republika Srpska expressed in the original version of the Constitution of the Republika Srpska (Articles 1 and 7), under which the Republika Srpska is „the state of the Serb people" in which the sole official language is „Serbian". This homophobic, ethno-nationalistic and discriminatory concept, which denies all other peoples and their rights and discriminates against them in the enjoyment of human rights, had been long since declared unconstitutional and contrary to the basic European values of pluralistic societies. The denial of the right to name the language as well as its existence, and the discrimination against the Bosniac people when compared to the Serb people and the Serbian language constitutes the infringement of the principle of the pluralist society within the meaning of the line 3 of the Preamble of the Constitution of BiH, because this constitutional notion incorporates cultural diversity that also includes a language. The applicant again referred to Decision no. *U 5/98*, wherein the Constitutional Court offered in paragraph 26 the interpretation of the Preamble of the Constitution of BiH indicating that it serves as a standard for the Constitutions of the Entities.

c) The violation of the rights of „Others" to a mother tongue as a part of the identity of the group of „Others" belonging to the Bosnian linguistic community

12. In the subsequent portion of the request the applicant gives the definition of a mother tongue stating that the use of a mother tongue is one of the basic elements of the spirituality of a human, the culture and tradition. He recalls again that during the 1991 census, according to the statistical data, a large number of persons not belonging to the present-day constituent peoples had lived in Bosnia and Herzegovina. This applied to citizens who either for objective or subjective reasons did not belong to any community or a group or who identified themselves as members of (un)recognized national minorities, but they no longer spoke the language, which is the official language in the states where those national minorities were the state-building nations (such as Jews, Polish or Austrians…). As he further states, after the reintroduction of the Bosnian language as a constitutional and legal category („which the 1991 census went on to show") all those „BH" citizens identified the Bosnian language as their mother tongue. Therefore, „the Bosnian language" plays a double role for both the „Others" and the Bosniac people. Drawing a parallel to the

constituent peoples, all members of the group of *Others* that identified Bosnian language as their native language represent a separate linguistic community, i.e. the separate group, which should have the same rights as the constituent peoples. This is so, primarily, because the category of *Others* speaking the Bosnian language is the constitutional category under line 10 of the Constitution of Bosnia and Herzegovina, the same as the constituent peoples, and they have the right to equal treatment without discrimination. Constitutional amendments in the Republika Srpska, which lead to the suspension of „the Bosnian language", brought about impossibility for the members of „Others" to identify themselves with one of the official languages in Bosnia and Herzegovina in terms of identity. That is how their right to private and family life within the meaning of Article 8 of the European Convention was endangered, as it influences the depersonalization of young people into identity. In addition to the aforementioned, the applicant referred to Article 27 of the International Covenant on Civil and Political Rights („the International Covenant"), which provides for the right of the linguistic minorities, that the members of the group of „Others" speaking the Bosnian language are and they do have the right to language and its use. In the context of the aforementioned, the applicant referred to the judgments of the European Court of Human Rights („the European Court") in the case of *Sejdić and Finci v. Bosnia and Herzegovina* and *Zornić v. Bosnia and Herzegovina* (paragraphs 30 and 31), which clearly identified the conclusion that „Others" must be equal in the enjoyment of constitutional rights and freedoms, and that the collective equality of the constituent peoples may not be exercised at the expense of the members of „Others".

13. The applicant indicates that the right to choose a mother tongue is a matter of „own self-determination of a person" and the fact that the members of „Others" identify with one language that features as an official language is a personal matter of every human being, and the cited judgment in the case of *Zornić v. Bosnia and Herzegovina* indicates that the state has no right to consider the reasons for such a choice, as that is a private matter and choice safeguarded by Article 8 of the European Convention. The applicant concludes that the first sentence of Article 7(1) of the Constitution of the Republika Srpska violates the right to a mother tongue of the citizens from among the group of „Others" who speak the Bosnian language within the meaning of an integral part of the notion of „Others" under line 10 of the Preamble of the Constitution of BiH, the right to private and family life under Article 8 of the European Convention, the right to use language under Article 27 of the International Covenant, Article 30 of the Convention on the Rights of the Child, the „European Convention for Regional or Minority Languages", the International Convention on the Elimination of All Forms of Racial Discrimination, as well as the Framework Convention for the Protection of National Minorities.

d) The violation of the right to education in the mother tongue of the Bosniac people and Others who belong to the Bosnian linguistic community

14. In the continuing part of the request the applicant starts from the premise that the constitutional principle of the constituent status of peoples incorporates and safeguards the right to mother tongue, which right comprises the right to name the mother tongue as the group concerned wishes to name it, and the premise that the members of „Others" who speak „the Bosnian language" as a mother tongue represent a special linguistic community, the group that has the right to language as part of its national identity in the same way as the members of the constituent peoples do, and asks a question whether the abolition of „the Bosnian language" constitutes at the same time a violation of the right to education within the meaning of Article 2(1), the first sentence, of Additional Protocol No. 1 to the European Convention. The applicant points to the contents of the mentioned provision, under which the right to education guarantees the right of any individual not only of access to education, but also of access to the effective education and cited the relevant judgments of the European Court. In doing so the applicant refers to the case of *Cyprus v. Turkey (*Application no. 25781/94, judgement of 10 May 2001, paras. 277-279*)*, wherein the denial of the right to education in mother tongue constitutes the denial of the essence of the right to education.

15. The applicant holds that the factor of the factual majority does not give the right to the public authorities to privilege the Serb people, and to deny the use of the mother tongue in the public education system of the other constituent peoples or to „Others", thereby referring to Partial Decision of the Constitutional Court no. *U 5/98 III* of 18 August 2000 (paragraph 34)*,* which confirms the equal use of the Bosnian, Croatian and Serbian languages not only before the Institutions of BiH but also at the level of the Entities and all of their administrative units before the legislative, executive and judicial authorities, which implies the possibility to use these languages in the education as well. By abolishing the Bosnian language, as the applicant claimed, the children and parents, returnees to the Republika Srpska, have no right to education or the right to secure for their children the education in their own mother tongue. It is unacceptable to compensate for the impossibility to receive the education in their own language by offering the children of Bosniac and Croat origin and „Others" speaking the Bosnian language to get that education in the Bosnian and Croatian languages in the territory of the Federation of Bosnia and Herzegovina. Such an alternative means the separation of children from their parents again, or the impossibility for a sustainable survival of the Bosniac and Croat families in the Republika Srpska upon the return after the war to their pre-war places of origin.

16. The applicant further alleges that the element inherent in the constituent status of the three peoples in Bosnia and Herzegovina is the national ethnic identity of the members of the constituent peoples, which includes the right to mother tongue, the Bosnian language in the case at hand. In the context of the aforementioned the applicant cited paragraph 31 of the decision of the Constitutional Court no. *U 10/05*, and concludes that ethno-national identity of the members of the constituent peoples is characterized by language, for which reason the parents in Bosnia and Herzegovina have the right to request from the education system to have their identity determination through the language respected in the public education system. The applicant mentioned the stance from the judgment of the European Court of Human Rights in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, reading that „the ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds." Accordingly, as the applicant concludes, it means that the issue of language and ethnicity cannot be detached but are fully intertwined. Besides, the applicant referred to the judgment of the European Court of Human Rights in the case of *Chapman v. the United Kingdom* of 18 January 2001, Application no. 27238/95, paragraph 93, wherein the European Court of Human Rights pointed out that „that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle". Bosnia and Herzegovina has the obligation not only to recognize the right to education in a mother tongue, which is the part of identity of the constituent peoples in BiH and *Others,* but also to affirm the pluralist society. The challenged provision of the Constitution of the Republika Srpska clearly interferes with the right of Bosniacs and *Others* who belong to the Bosnian linguistic community in such a manner that it does not guarantee to children and parents the right to education in a mother tongue, and, as alleged, raises the issue of this justification.

17. As the request progresses the applicant cites the relevant provisions of the Framework Law on the Elementary and Secondary Education in BiH (*Official Gazette of BiH*, 18/03) as well as the provisions of the Law on Elementary Upbringing and Education (*Official Gazette of RS*, 119/08 and 71/09), and concludes that the denial of the right of the Bosniac constituent peoples and members of „Others" who belong to the Bosnian linguistic community to be educated in their mother tongue in the Republika Srpska is not „lawful" in terms of the principle of legality as it is contrary to the Constitution of BiH. Therefore, it is not necessary to examine further aspects of the justifiability of the interference with the right to education in the native language: public interest, adequacy and proportionality.

e) The violation of the principle prohibiting the discrimination against the citizens from among the group of „Others" belonging to the Bosnian linguistic community in relation to the right to education in their mother tongue

18. The applicant indicates that he explained the manner in which „the language of the Serb people" functions both formally and in practice, and that he proved that „a gap exists between one and the other in such a manner that the language of the Serb people is treated as „the Serbian language" in practice, and that the citizens of the group of „Others" who speak „the Bosnian language" have the collective right to their mother tongue „Bosnian language", as they may be treated as „the linguistic community". At the moment in time when „the Bosnian language" has been kicked out of the Republika Srpska, both in normative sense and in practice, the members of „Others" speaking the Bosnian language have lost the right to their mother tongue both generally and in the area of education, which right is safeguarded by Article 2(1) of Additional Protocol No. 1 to the European Convention, thereby treating differently this group of citizens in comparison to the Serb constituent people, because they have been deprived of that right. The impossibility for „Others" who speak „the Bosnian language", to use their mother tongue in the education system, instead they have to choose one of the languages of the constituent peoples, constitutes the prohibited discrimination under Article 14 of the European Convention in conjunction with Article 2 of Additional Protocol No. 1 to the European Convention.

19. Finally, the applicant concludes that the first sentence of Article 7(1) of the Constitution of the Republika Srpska is unconstitutional as it is in violation of the following:

a) the last line 10 of the Preamble to the Constitution of BiH and its principle of the constituent status of the Bosniac people, because it imposes on that people the name of the language and in that manner deprives them of the right to name their own language as an element inherent in the right to language, which is an integral element of the vital national interest of the constituent people in terms of Article IV(3)(f) of the Constitution of BiH;

b) Article II(4) of the Constitution of BiH in conjunction with the last line 10 of the Preamble to the Constitution of BiH as it constitutes *de facto* discrimination of the Bosniac peoples in comparison to the Serb people, as the authorities in the Republika Srpska treat differently „the language of Serb people" and „the language of Bosniac people" when naming thereof is concerned;

c) Article 3 and the last line 10 of the Preamble of the Constitution of BiH, Article 8 of the European Convention, Article 27 of the International Covenant, Article 30 of the Convention on the Right of the Child, the „Framework Convention on Regional or Minority Languages", International Convention on the Elimination of All Forms of Racial

Discrimination as well as the „Framework Convention on the Rights of Minorities" in such a sense that the citizens of BiH from the group of „Others" who belong to the Bosnian linguistic community are deprived of their right to the mother tongue as a part of identity of this linguistic community;

d) Article 2 of Additional Protocol No. 1 to the European Convention as it deprives the Bosniac peoples and the members of „Others" who belong to the Bosnian linguistic community of the right to education in the mother tongue as the right to language implies the right to identify the language;

e) Article 14 of the European Convention in conjunction with Article 2 of Additional Protocol No. 1 to the European Convention, as it deprives the citizens of BiH from the among „Others" who belong to the Bosnian linguistic community of the right to education in their mother tongue when compared to the Serb constituent people, without justification, i.e. in an unconstitutional manner.

20. Also, the applicant notes that the supremacy of the Constitution of BiH arising from Article III(3)(b) of the Constitution of BiH would be illusory if the Republika Srpska abolished the constitutional standards stipulated in the Constitution of BiH, and one of these standards is also the official Bosnian language throughout the entire and for the entire Bosnia and Herzegovina, along with the Croatian and Serbian languages, so that the Constitution of the Republika Srpska, in the challenged part, also violates Article III(3)(b) of the Constitution of Bosnia and Herzegovina. The applicant proposed that the Constitutional Court of BiH declares as unconstitutional the first sentence of Article 7(1) of the Constitution of the Republika Srpska, in the part reading „the language of the Bosniac people", and to order the National Assembly to execute forthwith, and not later than 3 months from the date of publishing this decision in the *Official Gazette of BiH*, amendments to this norm so that the Constitution of the Republika Srpska, instead of words „the language of the Bosniac people" shall guarantee the Bosnian language without connotations to „the Bosniac people".

b) Reply to the request

21. In its reply to the request, the National Assembly alleges that the applicant unfoundedly indicated and envisaged that the constitutional right to the use of language and alphabet is guaranteed by Article 34(1) in conjunction with Article 49(5) of the Constitution of the Republika Srpska. Namely, Article 70, as amended by Amendment LXXVII to the Constitution of the Republika Srpska, stipulates as the vital national interest of the constituent peoples the right to use language, and Amendment LXXXII to the Constitution of the Republika Srpska ensures the protection of the vital national

interests of the constituent peoples through the Council of Peoples of the National Assembly of the Republika Srpska and the Council for the Protection of Vital Interest within the Constitutional Court of the Republika Srpska.

22. The National Assembly indicates that, in accordance with the provision of Article III(3)(b) of the Constitution of BiH and the decision of the Constitutional Court no. *U 5/98* relating to the constituent status of peoples, it conducted the harmonization with the Constitution of BiH by means of Amendment LXXI to Article 7(1) and Amendment XLIV to Article 1 of the Constitution of BiH. Thus, it was established that the constituent peoples in the Republika Srpska are Serbs, Bosniacs and Croats, who, along with Others and citizens, are guaranteed the equality without discrimination on any grounds or status, and it was established that the official languages and the languages of the constituent peoples are: the language of the Serb people, the language of the Bosniac people and the language of the Croat people, in respect of which the Venice Commission issued a positive opinion. Given the aforementioned, the National Assembly concludes that the applicant's assertion that the first sentence of Article 7 of the Constitution of the Republika Srpska in the part prescribing that „the language of the Bosniac people" is spoken as one of the three languages in the Republika Srpska is unconstitutional as it imposed on the Bosniac people the name of the language, which is an integral part of the vital national interest of a constituent people, is incorrect.

23. As further inferred by the National Assembly, the criteria referred to in the request have neither legal nor scientific nor professional basis.

24. The definition of the official languages in the Constitution of the Republika Srpska („The official languages of the Republika Srpska are: the language of the Serb people, the language of the Bosniac people and the language of the Croat people") does not impose the name of a language on any of the peoples, rather it indicates descriptively that these are the three „languages" inseparably linked to the three constituent peoples. Linguistics as a science, and lexicology in particular (the study of the meaning of words) defines a certain term in two ways: descriptively and lexically (using a term), providing an example by saying „the French language" and expressing the same substance descriptively as „the language of the French people". The Constitution of the Republika Srpska provides a descriptive definition of the three languages with „the language of the Serb people" being equal to „the language spoken by the Serb people", „the language of the Bosniac people" being equal to „the language spoken by the Bosniac people", or put terminologically it is equal to „the Bosniac language", and „the language of the Croat people" being equal to „the language spoken by the Croat people" or put terminologically it is equal to „the Croatian language". As further inferred by the National Assembly, the definition determines in the

same manner, descriptively that is, the substance of all three languages – that they are the languages of each of the peoples, the name of the language is imposed on no one, but a fact is noted „that everyone is entitled to their own language" and it introduces a universal scientific principle that the name of the language „is derived from the name of the people", because it shows that that language refers to the people concerned, since the language is the identity criterion of the people.

25. As for „the right to name their own language as they want and wish", the National Assembly indicates that the scientific study of the nine international documents (enumerated in the reply to the request) that also mentions the right to language, shows that all those documents speak exclusively about language rights of individuals and members of national minorities, and there is neither mention of language rights of peoples or states, nor the right of the people to name its language by its name. The right neither exists nor is such a right stipulated for any people, including the Bosniac people for that matter, to call their mother tongue as they wish. Thus, the assertion made by the applicant is unfounded in that it read that the right to language as wished and the manner of the use of such a language „is prescribed by the international and constitutional law". To support the mentioned assertion the National Assembly referred to the research carried out in his work by Milos Kovačević, and the opinion of the linguist Midhat Riđanovic was cited regarding the said issue.

26. Precisely in the same manner in which the Serbs and Croats were allowed the right in the Constitution of the Republika Srpska to the globally and solely scientifically known right to name the language, i.e. the links between the names of peoples and languages, so were the Bosniac people. The definition of the language reflects the principle of the link between the name of the language and the name of the people, wherefrom follows the unfoundedness of the objection of the applicant (that there is a discrimination against the Bosniac people when compared to the Serb people, because the authorities in the Republika Srpska approach differently „the language of the Serb people" and „the language of the Bosniac people" when it comes to the naming thereof) given that the authorities of the Republika Srpska make it possible for the descriptive and lexical definition of the language for all the three constituent peoples to be established in a completely equal and same manner for all three constituent peoples, which applies to all the languages in the world.

27. The linguistic solution in the Constitution of the Republika Srpska is not, as the applicant claims, the solution of the legal bodies and institutions of the Republika Srpska, instead it was imposed by Amendment LXXI on the language and alphabet of the then High Representative for Bosnia and Herzegovina, which substituted the previous constitutional norm on the language proposed by the National Assembly of the Republika Srpska

precisely in order to avoid the lack of clarity concerning the term ”Bosnian language” and to put all three peoples in the same position – the recognition of their languages and indirect links between the name of their language and their respective ethnic names.

28. The applicant, as further stated in the reply, explains the violation of the right to language and education in their own language of „the members of Others” who belong to „the Bosnian linguistic community” and there is no explanation anywhere as to what is implied by „the Bosnian linguistic community”, whether that is the community of the three languages, or the community formed on the basis of the Bosnian as the language of the country. The applicant's allegations that the present case does not concern any question raised in relation to the substance of the language, its similarities and comparisons with other official languages in Bosnia and Herzegovina, the justification of the existence of three languages, which are the questions for linguistic science, „is in contradiction to the mentioned 'European Convention for Regional and Minority Languages', i.e. European Charter for Regional or Minority Languages („the European Charter”), because the European Charter alleges what may be deemed minorities languages that include, by all means, the languages of „Others” in Bosnia and Herzegovina. The National Assembly in the text of the reply to the request cites Article 2 of the Law on the Protection of the Rights of National Minorities Members (*Official Gazette of RS*, 2/05) and Article 3 of the Law on the Protection of National Minorities Rights (*Official Gazette of RS*, 2/05), which define the notion of a national minority. Also, they cited Article 11 of the Law on the Protection of the National Minorities Rights and Article 1 of the European Charter that provides the definition of regional and minority languages. „The Bosnian language” as a minority language does not exist, as no minority in Bosnia and Herzegovina had so far qualified that language, or submitted to the competent institutions of the Republika Srpska the request for the recognition thereof as a minority language. Thus, „the note by the applicant that „Others” identify „the Bosnian language as their mother tongue” is odd and that „does not imply that citizens choose one of the mother tongues that the members of the constituent peoples speak and that are the official languages, but that this refers to their own mother tongue”. Based on the mentioned definition of the minority languages in the Strasbourg Charter, it is clear that that is not possible, as such a language must be different from the three languages of the constituent peoples of Bosnia and Herzegovina. Thus, the applicant's reference to „Others” in this request is rather a result of resourcefulness than of the claims made by the applicant based on facts.

29. The National Assembly considers as untrue and absurd the allegations stated in the request that the refusal of the name „Bosnian language” denies to the Bosniacs and „Others” „the right to education in their mother tongue”, and refers to the stance of the

Bosniac linguists (names and surnames stated in the reply) that the Bosnian language, according to the criteria of the identity 3of the language, may not be considered different when compared to the Serbian, that is to say that the Serbian and Bosnian are only different names of the same language „linguistically speaking". Also, it indicated that the European Convention for Regional or Minority Languages, as well as Article 27 of the International Covenant refer to the regional or minority languages of the member states and not to the languages of the constituent peoples, and finds that the applicant's stance is wrong in that they should be applied to the constituent peoples.

30. The National Assembly emphasizes that the harmonization of the Republika Srpska Constitution with the BiH Constitution and the European Convention was carried out with regard to the rights of the Bosniac people to language as well as the constituent status of the peoples of BiH, which was confirmed by the Venice Commission. Also, it is indicated in the reply that the failure to use the notion „Bosnian language" does not mean the denial of the right to education in a mother tongue as claimed in the request, as that right is exercised also when the language is called „Bosniac" or „Serbian" or „Croatian" or „Bosnian" for that matter. The failure to use symbolic ethnic or state name of the language does not amount to „denying a possibility to use language". The National Assembly asks a question whether it means that Americans are denied a possibility to use language or to get education in a mother tongue, because the language that they use is not called American but English. The Republika Srpska, as further indicated, guarantees to all the Bosniacs the right to a mother tongue in schools even in case the language is called „Bosniac" and not „Bosnian", because that changes nothing in the curriculum and the contents of the language as a subject taught in school.

31. The National Assembly alleges that the claim is ill-founded in that the name of the language „Bosnian" was disputable to the Bosniacs because the Republika Srpska does not accept it, as they were not prevented from calling the „language of the Bosniac people" Bosnian, which is Bosniac according to the name of the people. As an illustration of one people who did not use the name that other people chose for their language it alleged the Serbs and Bosniacs who do not call „the language of the Slovenian people" „Slavic" (bcs. *slovenski*) as Slovenians call it, but „Slovenian" (bcs. *slovenački*). The same applies to „the language of the Bosniac people" that in the Serbian language, according to the formation rules, can be only „the Bosniac language".

32. The applicant, as further indicated in the reply to the request, alleges without arguments and tendentiously that the described discrimination occurs for one reason solely, and that is namely because „the Bosnian" language is reminiscent of the state of Bosnia and Herzegovina, an expression that is indicative of something common, national

and that does not fit conceptually in the politics of the Republika Srpska. The essence of the problem regarding „the Bosnian language", as the National Assembly alleged, lies in the „supranational, supra-ethnic" character of „the Bosnian language", which threatens the equality and even the survival of the Serbian people and the Serbian language in Bosnia and Herzegovina. As to the references made by the applicant to the General Framework Agreement for Peace in Bosnia and Herzegovina, which reads that it was „Done at Paris, on the 14th day of December 1995, in the Bosnian, Croatian, English and Serbian languages, each text being equally authentic…", the National Assembly indicates that the signatories to the agreement were not national but state (republic) representatives, that they did not sign it on behalf of the Croats, Serbs and Muslims, but on behalf of the Republic of Croatia, Republic of Bosnia and Herzegovina and the Federal Republic of Yugoslavia, thus a question arises as to whether that means that each language is defined by the boundaries of its respective signatory. Does it mean that the signature of Alija Izetbegović in „the Bosnian language" implies that Bosnia and Herzegovina is the republic of „the Bosnian language" only? The filed request, as the National Assembly further notes, precisely implies that Bosnia and Herzegovina ought to be the republic of „the Bosnian language" only, which the Serbs in the Republika Srpska can never agree with.

33. The National Assembly finds unacceptable also the allegations on the violation of the Preamble of the Constitution of BiH, because the domestic legal theory does not have a uniform position on its legal nature, whether it makes an integral part of the Constitution of BiH and whether it has a normatively legally binding nature.

34. The National Assembly further indicates that it is possible to identify in the lack of harmonization between the notions „Bosniac" and „Bosnian language" the tendency of unitarization and centralization of the government at the level of Bosnia and Herzegovina and the domination of the majority people and their language. It indicated again that according to the formation rules of the Serbian language the equivalent name „Serbian language" is derived from „the Serb people", the name „Croatian language" is derived from „the Croat people", and „the Bosniac language" is the only possible name to be derived from „the Bosniac people", while the name „Bosnian language" would suit the notion of non-existing Bosnian people. Thus, as the National Assembly concludes, the name of the language is identical to the name of the people (B/H/S *nacija*), which product it is, and it can be named after the people who speak it and not after the state. It holds that it is unfounded and incorrect to substitute „the language of the Bosniac people" with the words guaranteed by the Bosnian language without connotation to „the Bosniac people", as that would amount to the identification of the notions of the people (B/H/S *nacija*) and nationality (B/H/S *državljanstvo*). In the present constitutional and judicial dispute,

as further stated, the notion people (B/H/S *nacija*) applies to the Bosniacs, however the notion nationals of Bosnia and Herzegovina, applies, in addition to them, to Croats, Serbs, Jews and Roma, and they are all, by citizenship/nationality, Bosnia-Herzegovina's nationals who speak their (ethnic) languages and therefore it is correct to say „the Bosniac language", as it is the ethnic language of the Bosniacs solely and not of all others or even of the members of „Others".

35. Relying on the fact that they do not want to be „emigrants", the Bosniac people impose a standpoint that they are „Bosnians" by ethnicity and that their mother tongue is „Bosnian", which is an indicator that the acceptance of the name „Bosnian language" threatens the right of the Serb people, and it questions the survival of not only the Serbian language but also of the Serb people in Bosnia and Herzegovina. The applicant's request to replace in the Republika Srpska Constitution „the language of the Bosniac people" so as to „guarantee the Bosnian language without connotation to the Bosniac people" means that the applicant wishes for „the Bosnian language" to be not only the language of the Bosniacs but also of the Serbs, Croats in Bosnia and Herzegovina. The National Assembly deems it unacceptable for „the Bosnian language" to constitute a wider notion than „the Bosniac people", so that it is not linked only to the language of the Bosniacs but to „the language of Bosnia and Herzegovina" so that it „covers" by its substance all constituent peoples in Bosnia and Herzegovina, and that it evokes in the consciousness „a Bosnian person" as an integrative ethnic notion. In the interaction of three names for a language, one language of the country „Bosnian" and two ethnic „Serbian" and „Croatian", the Bosnian is necessarily superior in rank and as „a language of the country" it includes as its subordinated notions the ethnic names of the languages. In the opinion of the National Assembly, if the Bosnian language was accepted in the Republika Srpska, the Serb people and their language would be discriminated against as the Bosnian language would be superior to the Serbian, and not equal. The Serbian language would only be an ethnic version of the Bosnian as „the language of the country", thus the Serb people cannot accept the name „Bosnian language", as it does not apply to „the language of the Bosniac people", but to the language of all the inhabitants of Bosnia and Herzegovina. The introduction of the notion „Bosnian language", as the National Assembly concludes, would mean the first step towards denying the equality of the Serbs and the Serbian language with the Bosniacs and the Bosnian language in the Republika Srpska, as well as in Bosnia and Herzegovina. The National Assembly eventually proposed that the request for the review of the constitutionality of the first sentence of Article 7(1) of the Constitution of the Republika Srpska be dismissed as ill-founded in the part concerning the words „the language of the Bosniac people".

IV. Relevant Law

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

Preamble

Based on respect for human dignity, liberty, and equality

[...]

Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society,

[...]

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

Article II(1)
Human Rights and Fundamental Freedoms

1. Human Rights

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

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.

Article III
Responsibilities of and Relations between the Institutions of Bosnia and Herzegovina and the Entities

3. Law and Responsibilities of the Entities and the Institutions

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.

37. **The Constitution of the Republika Srpska** (*Official Gazette of Republika Srpska*, 6/92, 8/92, 15/92, 19/92, 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02 corrigendum, 30/02 corrigendum, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05 and 48/11) reads, in its relevant part, as follows:

Article 7

The official languages of the Republika Srpska are: the language of the Serb people, the language of the Bosniac people and the language of the Croat people. The official scripts are Cyrillic and Latin.

In regions inhabited by groups speaking other languages, their languages and alphabet shall also be in official use, as specified by law.

38. **The International Covenant on Civil and Political Rights** reads, in its relevant part, as follows:

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

39. **The European Charter for Regional or Minority Languages** reads, in its relevant part, as follows:

Article 7
Objectives and Principles

In respect of regional or minority languages, within the territories in which such languages are used and according to the situation of each language, the Parties shall base their policies, legislation and practice on the following objectives and principles:

a) the recognition of the regional or minority languages as an expression of cultural wealth.

40. **The Convention on the Rights of the Child** reads in its relevant part as follows:

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall

not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

41. The **European Convention for the Protection of Human Rights and Fundamental Freedoms** reads, in its relevant part, as follows:

Article 8

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.

Article 14

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.

42. **Protocol No. 1 to the European Convention** reads, in its relevant part, as follows:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

V. Admissibility

43. 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.

44. 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.

45. In the present case, the request was filed by Mr. Safet Softić, Second Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. Bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court established that the respective request is admissible, as it was lodged by an authorized entity, and that there is not a single reason under Article 19 of the Rules of the Constitutional Court rendering this request inadmissible.

VI. Merits

46. The applicant alleges that Article 7(1), first sentence, of the Constitution of RS, in the part reading: „the language of Bosniac people" is inconsistent with the last, tenth line of the Preamble of the Constitution of Bosnia and Herzegovina and its principle of the constituent status of the Bosniac people, and Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with the last, tenth line of the Preamble of the Constitution of Bosnia and Herzegovina. In addition, the applicant holds that the challenged provision is in violation of the third and tenth line of the Preamble of the Constitution of Bosnia and Herzegovina, Article 8 of the European Convention, Article 27 of the International Covenant on Civil and Political Rights, Article 30 of the Convention on the Right of the Child, the European Charter for Regional or Minority Languages and the International Convention on the Elimination of All Forms of Racial Discrimination as well as the Framework Convention for the Protection of National Minorities. Furthermore, the applicant points out that the challenged provision of the RS Constitution is in violation of Article 2 of Protocol No. 1 to the European Convention, and Article 14 of the European Convention in conjunction with Article 2 of Protocol No. 1 to the European Convention.

47. The Constitutional Court will first present a general view on language, *i.e.* why the right to the language name is a constitutional issue in the specific case. In examining the

request, the Constitutional Court will deal solely with the constitutional aspects of the right to the language. The Constitutional Court will not deal with the issues that are to be dealt by professionals and possible (professional) dilemmas in respect of the languages in the official use in Bosnia and Hercegovina (*e.g.* whether it concerns a single language or three languages, to what extent those languages are similar or different, *etc.*), as those are the questions to be resolved by professionals (linguists) and not by the Constitutional Court.

48. As there exist different languages and different peoples/nations (*narodi/nacije*), who speak those languages, the idea of a language as a constituent element of nationality/ethnicity (narodnosti/nacionalnosti) is naturally imposed. Language and alphabet are one of the key characteristics of a constituent people and part of its identity. As a language is, *inter alia*, (i) an expression of the freedom of expression of one's nationality and culture, the freedom to use its own language and the equality of the language of each people are the rights that are guaranteed. This freedom, for both peoples and national minorities, implies the right to use their own language also in a private speech, in a letter addressed to state authorities, in the press and in other forms of the public use of the language. Therefore, any issue related to this area evidently represents vital national interests of each constituent people.

49. In its Decision on Admissibility and Merits No. *10/05* (see, Constitutional Court, Decision No. *U 10/05* of 22 July 2005, published in the *Official Gazette of BiH,* 64/05), the Constitutional Court took the position on the notion 'vital national interests of the constituent peoples'. Thus, the Constitutional Court mentioned several factors shaping the understanding of the aforementioned notion. First, the notion 'vital interest' is functional and it cannot be separated from the notion of the constituent status of the constituent peoples whose vital interests are served and protected by Article IV(3)(e) and (f) of the Constitution of Bosnia and Herzegovina. In addition, the Constitutional Court pointed out in the mentioned Decision that *the last line of the Preamble to the Constitution defines Bosniacs, Serbs and Croats as „constituent peoples (along with Others), and citizens of Bosnia and Herzegovina". In its Third Partial Decision U 5/98 (Decision of 7 January 2000, Official Gazette of Bosnia and Herzegovina, 23/00, paragraph 52), the Constitutional Court concluded that „however vague the language of the Preamble of the Constitution of BiH may be due to this lack of definition of the status of Bosniacs, Croats, and Serbs as constituent peoples, it clearly designates all of them as constituent peoples, i.e. as peoples"*. As further stated, the notion of constituent status of peoples is not an abstract notion but it incorporates certain principles without which a society with differences between peoples protected under its constitution could not function efficiently (Decision of the Constitutional Court No. *U 2/04*, paragraph 33).

50. In its further analysis of the notion 'vital interests', the Constitutional Court pointed out in the quoted Decision that the meaning of 'vital interests' is partly shaped by Article I(2) of the Constitution of Bosnia and Herzegovina, which provides that Bosnia and Herzegovina shall be a democratic state, *i.e.* „that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society" (line 3 of the Preamble). To this end, the interest of the constituent peoples in fully participating in the system of government and the operation of public authorities can be seen as a vital interest. Furthermore, the Constitutional Court underlined as follows: *the vital interests of the constituent peoples include upholding various rights and freedoms which significantly help to ensure that the constituent peoples can effectively advance their interests in collective equality and participation in the state. As well as being constitutional rights (see Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles I(4), II(3) (m) and II(5) of the Constitution of Bosnia and Herzegovina, the European Charter for Regional or Minority Languages and the Fourth Partial Decision of the Constitutional Court No. U 5/98 of 18 and 19 August 2000, Official Gazette of Bosnia and Herzegovina, 36/00, paragraph 34), the freedom to use one's own language when participating, and to have access to education, information and ideas in that language, are among these vital interests (*see Decision of the Constitutional Court, *U 8/04,* paragraphs 38 through 41).

51. The Constitutional Court also recalls its position taken in the quoted Decision No. *U 5/98*, pointing out the following: *As any provision of an Entity's constitution must be consistent with the Constitution of BiH, including its Preamble, the provisions of the Preamble are thus a legal basis for reviewing all normative acts lower in rank in relation to the Constitution of BiH for as long as the aforesaid Preamble contains constitutional principles delineating – in the words of the Canadian Supreme Court – spheres of jurisdiction, the scope of rights or obligations, or the role of the political institutions. The provisions of the preamble are therefore not merely descriptive, but are also invested with a powerful normative force thereby serving as a sound standard of judicial review for the Constitutional Court* (paragraph 26).

52. In the context of the aforesaid, the Constitutional Court will first analyse how is the issue of language regulated within the constitutional and legal system of Bosnia and Herzegovina.

53. In this regard, the Constitutional Court first and foremost highlights that the Constitution of Bosnia and Herzegovina does not explicitly regulate the issue of languages in the official use in Bosnia and Herzegovina. However, the Preamble of the Constitution of Bosnia and Herzegovina provides for the principle of constituent status of the peoples, which comprises a number of specific collective rights of the constituent

peoples (along with Others) and citizens of Bosnia and Herzegovina). As mentioned in the preceding paragraphs of the present Decision, language is one of the key characteristics of a constituent people and part of its identity. This constitutional right arises under the principle of respect for human dignity referred to in the first line of the Preamble of the Constitution of Bosnia and Herzegovina. To speak about respect for human dignity referred to in the first line of the Preamble of the Constitution of Bosnia and Herzegovina would become illusory, if the will of the constituent peoples and Others freely to use their language were not respected.

54. The Constitutional Court points out that the issue of languages in the official use in the Federation of Bosnia and Herzegovina is regulated by Article 6 of the Constitution of the Federation of Bosnia and Herzegovina, so that paragraph 1 of the mentioned Article stipulates as follows: *The official languages of the Federation of Bosnia and Herzegovina shall be the Bosnian language, the Croatian language and the Serbian language,* while paragraph 2 stipulates as follows: *Other languages may be used as a means of communication and instruction.* According to the original provisions of the Constitution of the Federation of Bosnia and Herzegovina, the official languages were Bosnian and Croatian; however, through the enforcement of the Decision on the constituent status of the three peoples in the Federation of Bosnia and Herzegovina, it was stipulated by Amendment XXIX that the Serbian language would be in official use in the Federation of Bosnia and Herzegovina as well.

55. The Constitutional Court also points out that in the Rules of the Constitutional Court (see, *the Official Gazette of Bosnia and Herzegovina*, 94/14), adopted in accordance with Article VI(2) of the Constitution of Bosnia and Herzegovina, the issue related to the use of languages and scripts is regulated so that Article 6 prescribes the following: (1) *Equal use of the languages and scripts in the official use in Bosnia and Herzegovina shall be provided in the work of the Constitutional Court*, and (2) *When the judges appointed by the President of the European Court of Human Rights participate in the work of the Constitutional Court the use of a foreign language and script shall be provided in an appropriate fashion*. Article 17(1) of the mentioned Rules stipulates that *the official languages and scripts referred to in Article 6 of these Rules shall be used in the proceedings before the Constitutional Court. At the request of party/parties to the proceedings, member/members of other peoples, the Constitutional Court may grant leave for the use of another language*, and paragraph 2 of that Article prescribes that *the Constitutional Court shall provide conditions for everyone to exercise the right referred to in paragraph 1 of this Article*. In addition, the Constitutional Court underlines that a form for an appeal to the Constitutional Court is an integral part of the mentioned Rules. Item 10 of the form to be

filled in by an appellant specifies Bosnian, Croatian and Serbian as official languages that appellants can use in their communication with the Constitutional Court.

56. The issue of languages in the official use in the Republika Srpska is governed by Article 7(1) of the RS Constitution, which prescribes as follows: *The official languages in the Republika Srpska shall be the language of the Serb people, the language of the Bosniac people and the language of the Croat people*. Paragraph 2 of the mentioned Article stipulates as follows: *In the regions populated by other national communities, their languages and alphabets shall also be in official use, as determined by law*.

57. The Constitutional Court will first point out that the challenged provision of Article 7(1) of the RS Constitution was adopted on 19 April 2002, when the High Representative, for the purpose of enforcing four partial decisions of the Constitutional Court No. *U 5/98* (decision on the constituent status of the constituent peoples), passed a decision to amend the RS Constitution (Amendment LXXI). In the reasons for the decision, the High Representative stated as follows: … *the Constitutional Court ruled in its third partial decision in case No. U 5/98 of 30 June and 1 July 2000, the Constitutional Court ruled that exclusion of one or other constituent people from the enjoyment not only of citizens' but also of peoples' rights throughout Bosnia and Herzegovina was in clear contradiction with the non-discrimination rules contained in the said Annex 4, which rules are designed to re-establish a multi-ethnic society based on equal rights of Bosniacs, Croats and Serbs as constituent peoples and of all citizens; and bearing in mind that the Entities of Bosnia and Herzegovina have hitherto failed to take any steps to implement the said four partial Decisions of the Constitutional Court of Bosnia and Herzegovina in case no. U 5/98;…* and the High Representative pointed out *the fact that changes are required to the text of certain of the amendments to the Republika Srpska Constitution which have been communicated to the High Representative.*

58. The Constitutional Court notes that „the Serbian language of Ekavian and Iekavian pronunciation" had been in official use in Republika Srpska until the adoption of the mentioned amendment. Thus, the reason for enacting the mentioned amendment to the Constitution of the Republika Srpska was the harmonization of the Entity's Constitution with the Constitution of BiH following the adoption of the Decision of the Constitutional Court in case no. *U 5/98*. In the mentioned Decision the Constitutional Court concluded as follows: *Even if the constituent peoples are, in actual fact, in a majority or minority position in the Entities, the express recognition of Bosniacs, Croats, and Serbs as constituent peoples by the Constitution of BiH can only mean that none of them is constitutionally recognized as a majority or, in other words, that they enjoy equality as groups. It must therefore be concluded, in the same way that the Swiss Supreme Court*

derived from the recognition of the national languages an obligation of the Cantons not to suppress these language groups, that the recognition of the constituent peoples and its underlying constitutional principle of collective equality poses an obligation on the Entities not to discriminate in particular against these constituent peoples which are, in actual fact, in a minority position in the respective Entity. Hence, there is not only a clear constitutional obligation not to violate individual rights in a discriminatory manner which obviously follows from Article II(3) and 4 of the Constitution of BiH, but also a constitutional obligation of non-discrimination in terms of a group right if, for instance, one or two of the constituent peoples are given special preferential treatment through the legal system of the Entities (see Third Partial Decision of the Constitutional Court, No. *U 5/98* of 1 July 2000, para 59 published in the *Official Gazette of BiH*, 23/00 of 14 September 2000).

59. The Constitutional Court must answer the question whether the definition of official language as referred to in Article 7(1) of the Constitution of the Republika Srpska imposes the language name on the Bosniac people and thus deprives it of the right to give a specified name to its language and how (as alleged by the applicant) the principle of constituent status of the Bosniac people would be violated with regards to the right to name its own language.

60. The Constitutional Court notes that the definition of official languages in Republika Srpska is given in Article 7(1) of the Constitution of the Republika Srpska prescribing as follows: „…the language of the Serb people, the language of the Bosniac people and the language of the Croat people". The Constitutional Court notes that a neutral descriptive definition of official languages used in Republika Srpska is provided in that manner, and that the names of the languages of the constituent peoples are not provided. In particular, as it follows from the definition „the language of the Bosniac people", it is determined in the descriptive manner that this is the language spoken by Bosniacs (without constitutional designation of that language). Thus, unlike the Constitution of the Federation of Bosnia and Herzegovina and the Constitutional Court's Rules prescribing explicitly the names of the languages in the official use in the Federation, including the communication with the Constitutional Court, the Constitution of Republika Srpska does not name the language but it associates the language with the constituent people by stipulating that „the language of the Bosniac people" is, *inter alia*, in use in Republika Srpska. The name of the language in not imposed on the Bosniac people in that way but it is concluded that the Bosniac people is entitled to use its own language as an official language. Thus, it is concluded that the language „of the Bosniac people" is in official use in addition to „the language of the Serb people" and „the language of the Croat people".

61. The Constitutional Court notes that the Venice Commission, in its Opinion on the Implementation of Decision *U 5/98* of the Constitutional Court by the Amendments to the Constitution of the Republika Srpska (adopted at the 52nd Plenary Session held on 18 and 19 October 2002), noted, *inter alia*: „The delicate question of official languages is dealt with by the new Article 7. The official languages of the RS are the language of the Serb people, the language of the Bosniac people and the language of the Croat people. This roundabout wording is designed to avoid any unnecessary disputes over the exact names of the languages."

62. The Constitutional Court is of the opinion that such an approach, which implies that all constituent peoples, including the constituent Bosniac people, are entitled to determine the name of its own language, is compatible with the principle of constituent status of peoples. Thus, the challenged provision does not name the official languages (it does not give names) so that it does not contain the name of the language, which would be contrary to the name of the language spoken by Bosniacs in Republika Srpska. The challenged provision, when analysed in the abstract sense, thus, without specific cases, i.e. the conduct of the public authority of the Republika Srpska, does not prevent Bosniacs from naming the language they speak as they wish. The Constitutional Court concludes that the first sentence of Article 7(1) of the Constitution of the Republika Srpska, in the part related to „the language of the Bosniac people", as a neutral provision which does not name the language, is compatible with the principle of the constituent status of peoples.

63. However, the Constitutional Court emphasizes that (unlike the majority of the allegations referred to in the response to the request) the language is the property of the people that speaks that language so that its name must reflect the wishes of as many people as possible speaking that language. The constitutional principle of freedom to use its own language and freedom to name its own language follows from the principle of human dignity referred to in the first sentence of the Preamble of the Constitution of Bosnia and Herzegovina and constitutes the expression of affiliation to a people, particularly the expression of ethnic culture.

64. The Constitution of Bosnia and Herzegovina stipulates in no way that the names of the languages spoken by the constituent peoples must be associated with the names of the constituent peoples. The Constitution of Bosnia and Herzegovina gives the right to the constituent peoples and Others to name the language they speak as they wish. The provision as such does entitle the authorities of the Republika Srpska to determine the name of the language spoken by Bosniacs contrary to their constitutional right to name the language they speak as they wish. The name of the language cannot depend upon linguistic rules because the constitutional right to the name of the language is independent

from the content of the language, standards of the language etc. The contested provision does not prevent Bosniacs, nor does it prevent anyone else, from naming the language they speak as they wish. Thus, such a concept of the contested provision is in accordance with the position that the Constitution of Bosnia and Herzegovina gives the right to all constituent peoples, including Bosniacs and Others to name the language they speak as they wish.

65. Furthermore, the Constitutional Court is to answer the question whether the contested provision violates the right to education (schooling) in the native language of Bosniacs and those Others that consider Bosnian language as their native language and whether the principle of prohibition of discrimination against citizens from among the group of „Others" that are belonging to the Bosnian linguistic community has been violated with regards to the right to education in the native language.

66. The right to education guaranteed by the first sentence of Article 2 of Protocol No. 1 to the European Convention requires by its nature the regulation by the State, although the very substance of that right must not be violated, nor, must it be contrary to other rights provided for in the European Convention and it Protocols (see, ECtHR, *Belgian linguistic case*, judgment of 23 July 1968, p. 32, para 5). As to its second sentence, the European Court, in its judgment *Campbell, Cosans v. the United Kingdom*, described the term „philosophical convictions" within the meaning of the second sentence of Article 2, arguing that in its ordinary meaning the word „convictions", taken on its own, is not synonymous with the words „opinions" and „ideas", such as are utilised in Article 10 of the Convention, which guarantees freedom of expression; it is more akin to the term „beliefs" (in the French text: „convictions") appearing in Article 9 - which guarantees freedom of thought, conscience and religion - and denotes views that attain a certain level of cogency, seriousness, cohesion and importance (see, ECtHR, *Campbell, Cosans v. the United Kingdom*, judgment of 25 February 1982, Series A, No. 48, p. 16, para 36).

67. As regards the adjective „philosophical", it is not capable of exhaustive definition and little assistance as to its precise significance is to be gleaned from the *travaux préparatoires*. Having regard to the Convention as a whole, including Article 17, the expression „philosophical convictions" in the present context denotes, in the Court's opinion, such convictions as are worthy of respect in a „democratic society" (see, most recently, the *Young, James and Webster* judgment of 13 August 1981, Series A no. 44, p. 25, par. 63) and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right of the child to education, the whole of Article 2 being dominated by its first sentence. Furthermore, according to the case-law of the European Court, Article 2 encompasses all State functions related to education and teaching, and it does not allow

difference to be made between religious instruction and other subjects. It provides that the State must respect the parents' convictions, both religious and philosophical in the entire program of the State education (see, ECtHR, *Campbell, Cosans v. the United Kingdom*, judgment of 25 February 1982, Series A, No. 48, p. 16, para 36).

68. Furthermore, under the case-law of the European Court, Article 2 includes all functions of the state that concern education and teaching and does not allow distinction between religious teaching and other subjects. It stipulates that the state must comply with the convictions of the parents, both religious and philosophical, in the entire state education program.

69. The Constitutional Court recalls the position expressed in Decision no. *U 26/13*, which was adopted in the procedure for the review of constitutionality of the Law on Primary Education and Upbringing of the Republika Srpska, the Law on Secondary Education of the Republika Srpska and the laws on primary education and laws on secondary education of all ten Cantons in the Federation of Bosnia and Herzegovina. In the mentioned decision, the Constitutional Court pointed out *that all the principles and standards stipulated by the European Convention as to the discrimination and the right to education are supported by the Constitutional Court as well. Furthermore, the Constitutional Court considers that in the complex state such as Bosnia and Herzegovina there should be the system of education which will not be in contradiction to the aforementioned principles. Namely, it is necessary that the education system offers parents and their children the right to access to education that will be conformity with their own religious and philosophical convictions that are worthy of respect in a „democratic society" without discrimination at any ground. Only that kind of education is in democratic spirit Bosnia and Herzegovina strives for while all other types of education would be illusory* (see, Constitutional Court, Decision on Admissibility and Merits no. *U 26/13* of 26 March 2015, published in the *Official Gazette of BiH*, 33/15, paragraph 39).

70. The cited decision further points out that the provisions of the challenged laws on the primary and secondary educations of the Republika Srpska entity prescribing the curricula and syllabi are adopted in the competent ministry of education in cooperation with the pedagogic institutes, are not discriminatory *per se* if the goal could be reached that the challenged laws, which are full of the provisions on prohibition of discrimination on any grounds whatsoever, would be implemented in an appropriate manner in the spirit of the challenged laws. In the opinion of the Constitutional Court, it is precisely the above laws that contain the general principles of international law to which the applicant refers in terms of Articles II(1) and III(3)(b) of the Constitution of Bosnia and Herzegovina, since they are stipulating and guaranteeing a considerably high level of human rights and

fundamental freedoms protection without any discrimination in the area of education. This indeed was the obligation of the Republika Srpska Entity under the Framework law which set out the general principles and goals of the education system of Bosnia and Herzegovina. However, the manner of implementation of the law in practice within the competent ministries entrusted with the adoption of the by-laws and the enforcement of those acts cannot be an issue the Constitutional Court should deal with when reviewing the constitutionality of the challenged laws in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina (paragraph 57).

71. The Constitutional Court again refers to the case-law referred to in Decision no. *U 10/05*, adopted on the basis of Article IV(3)(f) of the Constitution of Bosnia and Herzegovina in which the Constitutional Court stressed that it would not deal with the implementation of the law. Namely, in that Decision, the Constitutional Court noted that the claims that the existing television stations of the Federation of Bosnia and Herzegovina and of the Republika Srpska were *de facto* television stations in the Bosnian and Serbian languages and satisfied the needs of only the Bosniac and Serb people could not be used as arguments that the Draft Law was destructive to the vital national interests of the Croat people in Bosnia and Herzegovina.

72. Given the aforesaid, the Constitutional Court holds that the contested provision cannot serve as a justification for the competent authorities in the Republika Srpska to prohibit Bosniacs or Others to name the mother tongue they are learning in school as Bosnian language. However, only because the challenged provision does not contain the name „Bosnian language" it does not infringe upon the right to education in one's mother tongue of the Bosniacs and „Others". If the challenged provision is interpreted in accordance with the Constitution of Bosnia and Herzegovina, it affords to Bosniac and Others the right to education in Bosnian language. The competent public authorities in the Republika Srpska are obliged to apply the particular provision in this manner in the education system, as stated in the above part of reasoning, when evaluating the constitutionality of the disputable provision in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina .

73. The next issue which the Constitutional Court should answer is whether the challenged provision results in the situation that the members of „Others" belonging to the „Bosnian linguistic community" cannot automatically identify themselves with any of the official languages in the Republika Srpska (in terms of identity) which, as the applicant states, violates their right to private and family life under Article 8 of the European Convention, i.e. whether those belonging to the group of Others, who are considering Bosnian language as their mother tongue, are deprived of their identity in terms of Article 8 of the European Convention.

74. The Constitutional Court, first of all, recalls that the right of „Others" to be equal in the enjoyment of their rights and freedoms, both individual and group, has been determined by the judgements of the European Court of Human Rights in cases *Sejdić and Finci v. Bosnia and Herzegovina* of 22 December 2009 and *Zornić v. Bosnia and Herzegovina* of *15* July 2014*, (*available at *www.mhrr.gov.ba).* In both of the above judgements, the conclusion that „Others" have to be equal in the enjoyment of constitutional rights and freedoms and that the collective equality of the constituent peoples cannot be effectuated at the expense of the members of „Others" has been clearly identified. In the context of the above and the conclusion of the Constitutional Court that the first sentence of Article 7(1) of the Constitution of Republika Srpska in the part stating „the language of Bosniac peoples" is in compliance with the principle of constituent status of Bosniac peoples in respect of the right to language set forth in the Preamble of the Constitution of Bosnia and Herzegovina, the Constitutional Court holds that such approach does not differentiate between the constituent peoples and „Others", i.e. no one is in a privileged or inferior position as regards the use of language, including „Others". The challenged provision, as emphasized in the previous paragraphs of the present decision, does not give the right to public authorities to name the language, as that is the exclusive right of the constituent peoples and „Others". The challenged provision does not prohibit the members of Others (or Bosniacs) to name the language they speak as „Bosnian" and the competent authorities in the Republika Srpska are obliged to enable them in doing so. The public authorities in the Republika Srpska can neither interpret the challenged provision in an unconstitutional manner nor can they determine the name of the language by evading the will of the peoples who use it. The fact is that the challenged provision stipulates only the languages of the constituent peoples as official languages. However, the applicant does not dispute the provision of Article 7 of the Constitution of Republika Srpska because it has not prescribed the language spoken by „Others" as an official language but deems the unconstitutionality in the fact that the challenged provision does not contain the name Bosnian language which, in itself, does not represent a reason for it being unconstitutional.

75. The Constitutional Court further needs to respond to the applicant's question whether the public authorities in the Republika Srpska *de facto* discriminate against the Bosniac people in relation to the Serb people, since, in practice, it calls „the language of Serb people" „Serbian language" and does not apply the same principle to Bosniacs, as it does not call „the language of Bosniac people" „Bosnian language".

76. The Constitutional Court notes that within the context of the above said the applicant presented an example where the grades are entered for the „Serbian language" in the students' grade reports and not for „the language of the Serb people". The applicant also

presented the example of the Primary School „Petar Kočić" in Kravice (Konjević Polje) and the Primary School in Kozarac where, by the decisions of the Republika Srpska Institute of Pedagogy, the language of Bosniac people is introduced in the education process although the children of Bosniac origin have been learning „Bosnian language" for years. In addition, as an example the applicant also states that the official page of the Supreme Court of Republika Srpska uses „Serbian language" and the official page of the Republika Srpska Institute of Pedagogy clearly indicates that Serbian language is learned in the Republika Srpska while Bosnian language is not mentioned at all", etc.

77. In this respect, the Constitutional Court points out that in the previous paragraphs of the present decision it evaluated the challenged provision *in abstracto* and that it concluded that the existing provision follows the position that the Constitution of Bosnia and Herzegovina gives right to all constituent peoples as well as Others who are not declaring themselves as such to name the language they speak as they wish. The Constitutional Court cannot evaluate all the cases in which the public authorities in the Republika Srpska interpret the challenged provision and apply it in the practice. Each individual case may be the subject of separate proceedings and even the proceedings initiated on the basis of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina. The Constitutional Court reiterates that the constitutional right of the constituent peoples as well as Others who are not declaring themselves as such to name the language they speak as they wish and any different conduct in practice would lead to the violation of the Constitution of Bosnia and Herzegovina or the Constitution of Republika Srpska. The constitutional right to name language in accordance with the wishes of people speaking that language cannot be conditioned by linguistic rules as the constitutional right to name the language has priority over the linguistic rules. The challenged provision does not provide the public authorities in the Republika Srpska with the right in the specific cases to determine the name of language, in particular the language spoken by Bosniacs, contrary to their constitutional right to name the language they speak as they wish. When acting in such cases, all competent institutions (courts and administrative bodies) should bear in mind the position of the Constitutional Court that all the constituent peoples as well as Others not declaring themselves so have the constitutional right to name the language they speak as they wish and that only such interpretation and application in practice is in conformity with the Constitution of Bosnia and Herzegovina.

78. The Constitutional Court concludes that the first sentence of Article 7(1) of the Constitution of Republika Srpska, in the part reading „the language of Bosniac peoples", as a neutral provision which does not name the language, is not incompatible with the principle of constituent status of Bosniac peoples and Others in relation to the right

to language set out in the Preamble of the Constitution of Bosnia and Herzegovina. Furthermore, the Constitutional Court concludes that the first sentence of Article 7(1) of the Constitution of Republika Srpska, in the part stating „the language of Bosniac peoples" is not incompatible with the provision of Article 2 of Protocol No. 1 to the European Convention or with Article 14 of the European Convention in conjunction with Article 2 of Protocol No. 1 of the European Convention, Article 8 of the European Convention, Article 27 of the International Covenant on Civil and Political Rights, Article 30 of the Convention on the Rights of the Child, the European Charter for Regional or Minority Languages as well as the Framework Convention for the Protection of National Minorities.

VII. Conclusion

79. The Constitutional Court concludes that the first sentence of Article 7(1) of the Constitution of Republika Srpska, in the part reading „the language of Bosniac peoples, is a neutral provision which does not determine the name of language but contains the right of Bosniac constituent peoples as well as other constituent peoples and Others who are not declaring themselves as such to name the language they speak by the name of their choice, which is in compliance with the Constitution of Bosnia and Herzegovina, and any contrary conduct in practice would lead to the violation of the Constitution of Bosnia and Herzegovina but also of the Constitution of the Republika Srpska.

80. Having regard to Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina and Article 61(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this Decision.

81. Pursuant to Article 43 of the Rules of the Constitutional Court, Separate Dissenting Opinion of President Mirsad Ćeman joined by Judge Seada Palavrić, is attached to this Decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

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

(Article 43 of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of BiH*, 94/14)).

It is not difficult at first sight to agree with the Constitutional Court's majority opinion expressed in the reasons for the decision reading „the challenged provision (the first sentence of Article 7(1) of the Constitution of the Republika Srpska, in the part reading „the language of the Bosniac people"), when analysed in the abstract sense, does not prevent Bosniacs from naming the language they speak as they wish", and as such is a neutral provision which does not determine the name of language but contains the right of Bosniac constituent people as well as other constituent peoples and Others who are not declaring themselves as such to name the language they speak by the name of their choice, which is, as explicitly concluded by the Constitutional Court, in compliance with the Constitution of Bosnia and Herzegovina, and any contrary conduct in practice would lead to the violation of the Constitution of Bosnia and Herzegovina but also of the Constitution of the Republika Srpska" (para 79 of the Decision).

It is not difficult to agree notably with the Constitutional Court's approach in this case, namely, it „(…) will deal solely with the constitutional aspects of the right to the language (…) will not deal with the issues that are to be dealt by professionals and possible (professional) dilemmas in respect of the languages in the official use in Bosnia and Hercegovina (*e.g.* whether it concerns a single language or three languages, to what extent those languages are similar or different, *etc.*), as those are the questions to be resolved by professionals (linguists) and not by the Constitutional Court" (para 47).

However, an in-depth analysis of the allegations expressed in the National Assembly's response to the request for review of the constitutionality of the challenged provision of the Entity's Constitution (paras 21-35 of the Decision) and particularly unconstitutional practice of the public authorities (educational and other) in the Entity of the Republika Srpska, which had been previously established and which has been renewed and has become worse, indicate that in the present case the Constitutional Court could have considered the challenged provision in a broader context which the theory of constitutionalism, in a way, encourages, since the constitution consists, in terms of the supranational, of the norm itself and, in addition to it, general and special social relationships, objectives and values which the Constitution promotes as an achieved state, but also a prospective as an aim to be achieved legitimately – moral, ideological and program objectives. In particular, not only that the rules or the methodology of interpretation of a legal norm are acquainted with such an approach (evolutionary to a reasonable extent) but it is also a developed practice

all over democratic world which actually aims at affirming the constitutionalism and role of the constitutional courts and effective protection of human rights and freedoms through elimination of all forms of discrimination.

Moreover, the European Court of Human Rights interprets and applies the European Convention for the Protection of Human Rights and Fundamental Freedoms in its decisions, the provisions of which are seldom generalized (and the Convention forms integral part of the Constitution of Bosnia and Herzegovina - Article II(2)), and it does so by resolving the raised issues in the so-called operative part (enacting clause) through specifically expressed views and messages which, as a rule, do not need additional interpretation.

Thus, if a constitutional norm or mechanism is understood, interpreted or applied contrary to its real (?!) meaning for any reason whatsoever or if there is a dilemma as to their real meaning, then the author of the constitution must intervene or remove the reasons leading to such a situation or, as in the case here, when the legislator of the Constitution/ the National Assembly is the one that affords a disputable meaning to the norm, this must be removed in another constitutional way. Given the current constitutional order of Bosnia and Herzegovina, this would mean by means of a clearly and unambiguously reasoned decision of the Constitutional Court of Bosnia and Herzegovina.

However, in case no. *U 7/15*, the Constitutional Court proceeded with the review of the constitutionality of the challenged provision by abstracting the real context from which the constitutional dispute actually arose and the possibilities at its disposal within the limits of a broadly accepted modern understanding of constitutionalism, according to which the Constitutional Court is the last resort for not only formal but also substantive interpretation of the meaning of the constitutional norm.

As a rule, the definition of the abstract review of constitutionality is a very complex one, and decisions are often manifold and require a lot of skills and knowledge of constitutional law (and, notably, the sincere will) in the procedure for their implementation, which is the additional reason for and obligation of taking clear and specific decisions as a whole. I am quite certain that viewed as a whole, this was not such a decision.

In particular, in my opinion, the reasons for and operative part of the decision in case no. *U 7/15* are not compatible, which renders this decision weak, which, just like the disputable constitutional provision, may likely be subject of different interpretations. Only at first sight one may say that this is a „neutral provision" which could be actually characterized as such in some other social context and more developed legal and political culture. However, the National Assembly's arguments *a contrario* clearly indicate that there is not any „neutral" social context in the present case, nor is there tolerant legal or political culture or intention. The Constitutional Court of Bosnia and Herzegovina had the responsibility to recognize it and to respond to it adequately.

Therefore, such obvious reluctance and precaution (although in most cases they do not have to be disputable in themselves) which the Constitutional Court manifested in the present case, being, I would say, almost convinced that this decision, as conceived, would produce the expected legal effects and constitutional and practical consequences, were, in my opinion, erroneous, and they reflect in a few important weak characteristics of this decision, which would be most likely manifested to a real extent only in the procedure for its implementation (although not only for that reason):

1. From the formal aspect, the decision is unclear and contradictory (regardless of the fact that the term „decision" implies all the parts thereof), since the operative part and reasons are incompatible and it does not sufficiently comply with the standard of „reasoned decision", which the Constitutional Court applies when it deals with the decisions of the ordinary courts in the appellate proceedings. I am convinced at the same time that any decision with such a discrepancy between the operative part and reasons would be contested and classified as such by any appellate court which applies the standard of „reasoned decision" in the ordinary proceeding.

2. In substance, the Constitutional Court must resolve the constitutional issue and take a view and decision to clarify the disputable norm from the formal aspect (for example, possible linguistic meaning or meanings) and, at the same time, to remove the possibility for it to be interpreted differently and to prevent the dispute from being continued, failing which the Court devalues not only the constitutional provision related to the binding nature of its decisions (Article VI(5) of the Constitution) but also the purposefulness of the procedure for review of constitutionality, which should contribute to the harmonization of the case-law with the Constitution through a decision and acknowledgement of that decision.

3. Although the implementation of decisions of any authority, including the decisions of the Constitutional Court, is a separate issue, it could not be separated from the issue of the quality of decision. If a decision as such leaves room for voluntarism, then this is neither good decision nor quality decision. In the present case, voluntarism could not be excluded as the Constitutional Court left the door ajar for such a thing if not by the formal incompatibility between the operative part and reasons for the decision then by the substantive incompatibility.

Thus, regardless of the fact that one of the important questions which had to be answered included the question „whether the public authority in the Republika Srpska *de facto* discriminate against the Bosniac people in relation to the Serb people, since, in practice, it calls „the language of Serb people", „Serbian language" and does not apply the same principle to Bosniacs, as it does not call „the language of Bosniac people" „Bosnian language" (para 75 of the Decision), the Constitutional Court was not fully guided by

gravity of the findings and constitutional-legal consequences of the affirmative response but it rather confined its consideration, as it noted by the Constitutional Court itself, to the „abstract" review despite the fact that it found that discrimination *de facto* occurred. To all appearances, it is hard to believe that this would contribute to the real removal of unconstitutional situation in the present case, irrespective of the fact that the decision as such (if it is interpreted so) is nevertheless is binding in this sense.

On the other hand, the reference to the 2002 opinion of the Venice Commission (para 61 of the Decision) in this context is an inconsistent point, wherein the issue of official languages in Republika Srpska is actually classified as a „sensitive issue" dealt with by „new Article 7 of the Constitution" of this Entity and wherein it is concluded that this roundabout wording is designed to avoid any unnecessary disputes over the exact names of the languages". The Constitutional Court disregards the fact that meanwhile this issue (more than 13 years elapsed) did not remain, nor did it arise, at the level of the mere linguistic dispute and academic „bickering" (to call it so), but it has been rather manifested, all the time and obviously contrary to what was expected, primarily as a legal-constitutional practical issue related to human rights and fundamental freedoms, individual and group. In particular, these were exactly the Venice Commission and European Court of Human Rights that insisted in a number of their decisions and opinions not only on the formal content and meaning of the norm but also on their implementation in practice as a relevant criterion. This is the reason why in the present case the Constitutional Court could have referred or, actually, should have referred to its cases other than case no. *U 10/05*, para 49 of the Decision, and also to the case-law of the European Court of Human Rights, according to which it is irrelevant whether there is a difference of treatment or whether difference is expressly permitted by legislation (see, ECtHR, *Ireland v. the Great Britain*, judgment of 18 January 1978, Series A no. 25, para 226). This is a standard which is not created by this Constitutional Court but it is rather a heritage of a consistent understating of the European Convention within the framework of the modern constitutionalism (notably, as I have already noted, because the European Convention forms integral part of the Constitution of BiH, which is extremely important given our situation). Finally, I am quite certain that the Venice Commission did not mean, by „neutral/undetermined" wording of the contested norm of the Entity's Constitution, the right to deprive any of the constituent peoples (the Bosniac people in this case) to call its language as it wishes, instead of imposing it on it by unjustified excuses and reasons only supported by the scientific or quasi-scientific views of the linguists „in their favour" without taking into account other different opinions equally relevant.

For these reasons, although I am supportive of the views and interpretation (i.e. the decision) in the part of the reasons wherein the Constitutional Court explicitly concludes

that the contested provision of Article 7(1) of the Constitution of the Republika Srpska „provides for the constitutional right of the Bosniac people and any other constituent peoples as well as Others who are not declaring themselves as such to name the language they speak as they wish (…)", I could not agree with the operative part of this Decision as there was no convincing argument in support of such a view, given the social and constitutional context existing in Bosnia and Herzegovina, which should have been taken into account. At least not sufficiently convincing. On the contrary!

In my opinion, the Constitutional Court should have explicitly indicated the views expressed in the reasons for the decision in the operative part, which means it should have harmonized the operative part and the reasons in the following manner:

- by establishing that the challenged provision is not a „neutral" provision, and
- by granting the request for review of constitutionality and by establishing that the first sentence of Article 7(1) of the Constitution of the Republika Srpska, in the part reading „the language of the Bosniac people", is not compatible with the Constitution of Bosnia and Herzegovina".

Only a decision worded in such a manner and with such arguments could have, at least from the formal aspect, more chance to remain within the scope of *ius nudus*.

Although the parts of the National Assembly's response to the request for review of constitutionality are indicated as expert argumentation in paragraphs 34 and 35 of the Decision, which the Constitutional Court did not specifically elaborated, I will not particularly deal with them as they are primarily of political nature. Nevertheless, these are unfounded thesis ad claims which could be clearly denied through an analysis of the legislation and practice related to such issues.

It follows in essence that regretfully and with all due respect to my colleagues and their opinion, I disagree partially with the majority opinion on this issue in the present case.

Given the context, it seems to me that finally, it is noteworthy to remind that, for example, in case no. *U 9/09*, the Constitutional Court (paragraph 70 of the mentioned Decision) noted that „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 is [*even* – added by M.Ć.] the European Court (...)".

The majority of the Constitutional Court „forgets" sometimes their own standards, which were developed by the Constitutional Court at an earlier point. It is obvious that Decision *No. 7/05* is such an example.

Case No. U 23/14

DECISION ON ADMISSIBILITY AND MERITS

Request of Dr Božo Ljubić, the Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of submission of request for review of the constitutionality of Articles 10.10, 10.12, 10.15 and 10.16 of the Subchapter B of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16) and provisions of Article 20.16A under Chapter 20 – Transitional and Final Provisions of the Election Law

Decision of 1 December 2016

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59 (1),(2) and (3) and Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 94/14), in plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Having deliberated on the request of **Dr Božo Ljubić, the Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of submission of the request** in case no. **U 23/14**, at its session held on 1 December 2016, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of Dr Božo Ljubić, the Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of submission of the request is partially granted.

It is established that the provision of Sub-chapter B, Article 10.12 (2), in the part stating that *each of the constituent peoples shall be allocated one seat in every canton* and the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A (2), items a-j of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07,

33/08, 37/08, 32/10, 18/13, 7/14 and 31/16) are not in conformity with Article I(2) of the Constitution of Bosnia and Herzegovina.

The Parliamentary Assembly of Bosnia and Herzegovina is ordered to harmonise, in accordance with Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, not later than six months from the day of delivery of this decision, the provision of Sub-chapter B, Article 10.12 (2), in the part stating that *each of the constituent peoples shall be allocated one seat in every canton*, and the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A(2) items a-j of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16), with Article I(2) of the Constitution of Bosnia and Herzegovina.

The request of Dr Božo Ljubić, the Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of submission of the request for review of constitutionality of the remaining part of the provisions of Sub-chapter B, Articles 10.10 and 10.12, and Articles 10.15 and 10.16 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16) is dismissed as ill-founded.

It is established that the remaining part of the provisions of Subchapter B - Articles 10.10 and 10.12, and Articles 10.15 and 10.16 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16) are in conformity with Article I(2) of the Constitution of Bosnia and Herzegovina.

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

Reasoning

I. Introduction

1. On 20 September 2014, Dr Božo Ljubić, the Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of submission of request („the applicant"), filed with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") a request for review of the constitutionality of Articles 10.10, 10.12, 10.15 and 10.16 of the Subchapter B of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16, hereinafter: „the Election Law") and provisions of Article 20.16A under Chapter 20 – Transitional and Final Provisions of the Election Law.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, the Parliamentary Assembly of Bosnia and Herzegovina, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina were requested on 2 October 2014 to submit their respective replies to the request.

3. On 5 March 2015, the Commission on Constitutional and Legal Affairs of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina submitted its reply to the request. The House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina failed to submit the reply to the request.

4. At the plenary session held on 26 May 2016, the Constitutional Court, pursuant to Article 46 of the Rules of the Constitutional Court, decided to hold a public hearing in this case.

5. Pursuant to Article 16(3) of the Rules of the Constitutional Court, the Constitutional Court requested the European Commission for Democracy through Law (the Venice Commission) on 10 June 2016 to submit its opinion in writing on the request in question.

6. On 17 October 2016, the Venice Commission submitted the *Amicus Curiae* Brief for the Constitutional Court of Bosnia and Herzegovina on the Mode of Election of Delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, adopted by the Venice Commission at its 108th Plenary Session held on 14-15 October 2016.

7. The public hearing was held on 29 September 2016.

III. Request

a) Allegations from the request

8. The applicant alleges that the challenged provisions of the Election Law are not in conformity with Articles I (2), II(1) and II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention for Protection of Human Rights and Fundamental Freedoms („the European Convention"), Article 25 of the International Covenant on Civil and Political Rights (1966) („the International Covenant") and Optional Protocols (1996 and 1989) in conjunction with Article 3 of Protocol No. 1 and Protocol No. 12 to the European Convention and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, which make an integral part of the Constitution of Bosnia and Herzegovina (Annex I to the Constitution of Bosnia and Herzegovina). The applicant points out that the provisions of the Election Law, Sub-chapter B, and Articles from 10.10 through 10.18 regulate the matter of election of delegates to the House of Peoples of the Parliamentary Assembly of the Federation of BiH („the House of Peoples"), while the allocation of seats by constituent people to each canton has been determined in accordance with Article 20.16A.

9. The applicant quotes Article I.2 of the Constitution of BiH: *Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.* The applicant also notes that this constitutional norm foresees that there is a law regulating certain field and it also provides that the said law is consistent with the highest standards of the fundamental human rights and freedoms in a democratically organised society. Therefore, that law must be in compliance with the Constitution of Bosnia and Herzegovina and also in accordance with the Entity Constitutions because of the complex organisation of Bosnia and Herzegovina. Furthermore, the applicant points out that this norm particularly requires that the elections are free and democratic, which implies that there must be no limitations to the expression of will of the voters and that that process should be organised in a democratic manner and the outcome of that process should express the will of the voters and not the *imposition of the previously regulated will*. The system proclaimed by the Constitution of Bosnia and Herzegovina and Entity Constitutions implies that there should be the proportionality with regards to the will of voters, in which case there are certain rules that must be complied with when it comes to the total representation in the House of Peoples, which implies that the composition of that House of Peoples corresponds to the basic democratic principle and that it expresses the will of the peoples. As the composition of the House of Representatives expresses the will of voters, it follows that the composition of the House of Peoples must express the will of the constituent peoples.

10. The applicant also quotes Article II(1) and Article II(4) of the Constitution of Bosnia and Herzegovina and Chapter IV.A.2 of the Constitution of the Federation of Bosnia and Herzegovina, whereby the number of delegates in the House of Peoples is clearly determined stipulating: *Delegates to the House of Peoples shall be elected by the Cantonal Assemblies from among their representatives in proportion to the ethnic structure of the population*. The applicant is of the opinion that the constitutional amendments imposed by the High Representative in 2002, when the number of 30 delegates per caucus was reduced so that currently that number is 17, amounted to discrimination with regards to the method of election of delegates to the House of Peoples, and deviation from the principle of proportionality. The applicant wonders whether the provision of the Election Law stipulating that *there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body*, although the number of the members of the respective people in that canton is very small, is used for the purpose of electoral manipulation and violation of the provision implying the proportional representation.

11. The applicant further alleges that Article 8 paragraph 1 of Section IV(A)(2) of the Constitution of Federation of BiH is in direct contravention with paragraph 3 of the mentioned Article and that the application thereof flagrantly violates the principle of proportionality and is in contravention of Article 3 of Protocol No. 1 to the European Convention, which is again in contravention with the provisions of the Constitution of Bosnia and Herzegovina – Article I(2), Article II(1) and Article II(4) of the Constitution of Bosnia and Herzegovina. The principle of proportionality, as alleged by the applicant, should be applied in a manner in which there would be no derogation from the basic meaning of proportionality and which, in a multinational and complex Bosnia and Herzegovina, constitutes one of the key elements of stability and equality of citizens and constituent peoples. The applicant also alleges that the application of the principle of proportionality should serve its purpose through technical elements of application and it must not be a declarative provision of the Constitution and Election Law. The applicant notes that the mentioned Article 8 paragraph 2 item 2 of the Constitution of Federation BiH stipulates that *the number, structure and manner of election of delegates shall be regulated by law* and concludes that the provisions of the Election Law regulating this field are Article 10.12 and Article 20.16A, which are also in violation of the provisions of the Constitution of the Federation of Bosnia and Herzegovina („the Constitution of the Federation"), the Constitution of Bosnia and Herzegovina, Protocol No. 1, Protocol No.12 to the European Convention and International Covenant. The applicant finds confirmation of his allegation in the document that was adopted by the Central Election Commission titled Instruction for Application of Chapter 10, Subchapter B – House of Peoples of the Parliament of the

Federation of BiH – of the Election Law of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina,* 48/02). Article 2 of the Instruction stipulates that allocation of posts 17 B/17 H/17 S/7O, which has been determined in the amended Constitution of the Federation, is not proportional to the ethnic structure of the population in the Federation of BiH as per 1991 census (32B/13H/11S/10), and nor is it proportional to the ethnic structure of the population in the cantons from which the delegates to the caucuses are selected. The applicant alleges that a distinction should be made between the parity of the total representation of the constituent peoples in the House of Peoples, which is regulated in a manner in which each caucus of the constituent peoples has 17 delegates, and a clear constitutional provision which implies that there is a proportional representation in each of the caucuses in accordance with the national structure of the populations in each of the respective cantons.

12. The applicant further notes that Article 10.12 of the Election Law, which he entirely quoted, additionally gives arguments on violation of the constitutional provision on proportionality. In particular, the method of application of the so-called quotients (division of digits by 1, 3, 5, 7…) clearly indicates that there is a deviation from the principle of proportionality. The applicant considers that the application of this approach is not adequate when it comes to the issue of the proportional national representation of the constituent peoples in the cantons as regards the filling the caucuses in the House of Peoples as the House of Peoples has a specific constitutional task in realization of the equality of the constituent peoples and the method of calculation applied for the representative bodies could not be used in this case.

13. In further analysis of Article 10.12 of the Election Law, the applicant points to „another absurd situation as regards the violation of the constitutional provision on the proportional representation which is in conformity with the national structure of the population per cantons", and concludes that the mentioned article provides, inter alia: „Each of the constituent peoples shall be allocated one seat in every canton". However, as the applicant alleges, the provisions of the Constitution of BiH and Constitution of the Federation „do not determine that each of the constituent peoples shall be allocated one seat in every canton", but Article 8(3) of the Constitution of Federation stipulates as follows: „In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body", which means that it involves a conditional option and not an absolute provision as stated in Article 20.16A of the Election Law and as applied in the method of determination of mandates. The proof for this method of determining the number of the delegates in the House of Peoples is reflected in the following provision of Article 10.12 of the Election Law: „The highest

quotient for each constituent people in each canton shall be deleted from that constituent peoples' list of quotients. The remaining seats shall be allocated to constituent peoples and to the Others one by one in descending order according to the remaining quotients on their respective list".

14. The applicant quotes Article 8 of the Constitution of the Federation, which regulates the matter of election of delegates to the House of Peoples and points out that it follows from the mentioned provisions of the Constitution of the Federation that „fulfilling the requirements under paragraph 3 directly violates paragraph 1 – i.e. the requirement of proportional representation of delegates in the respective cantons, which, according to theses constitutional provisions, is taken over and regulated by the Election Law. Consequently, it has become the arms with which the Constitution of BiH and international conventions are being violated.

15. Mathematical analysis, as alleged by the applicant, confirms the previous allegations. He submitted a tabular presentation of the manner in which the House of Peoples is filled, including the election of delegates from the cantonal assemblies and he also explained that each delegate of each of the caucuses of the constituent peoples bears the percentage - 5, 88% - of the constituent people from certain canton from which he/she is elected (17x5.88=100).

Cantons	Bosniacs	Croats	Serbs	Others	Total
1. Sarajevo	3	1	5	2	11
2. Tuzla	3	1	2	2	8
3. Zenica-Doboj	3	2	2	1	8
4. Una-Sana	2	1	2		5
5. Bosnian Podrinje	1	1	1		3
6. Central Bosnia	1	3	1	1	6
7. Herzegovina-Neretva	1	3	1	1	6
8. Western- Herzegovina	1	2	1		4
9. Posavina	1	1	1		3
10. Canton 10	1	2	1		4
	17	**17**	**17**	**7**	**58**

16. The applicant also offered a diagram presentation of the national composition of the Federation in the cantons in numbers and percentages in accordance with the data of the Federation Institute for Statistics from 1991 and concludes that the consistent application of the provisions of the Constitution of the Federation should ensure appropriate proportional

representation of the delegates in the caucuses of the House of Peoples, which corresponds to the ethnic structure of the cantons the delegates come from. However, as alleged by the applicant, this allocation, in reality, is far away from any sort of proportionality when it comes to all three constituent peoples by the application of the mentioned elements set forth in the Election Law.

17. The applicant submitted a tabular presentation of the manner in which the number of the delegates in the cantons is determined in accordance with Article 20.16.A He considers that the mentioned allocation of mandates in the cantons is not well-founded as in each canton one mandate is allocated in advance for each constituents people, although the Constitution of the Federation clearly states that *there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body.* Furthermore, he alleges that the rule related the allocation of one mandate to each constituent people in each canton could not be applied until the results of elections for the cantonal assemblies became known as only then the mentioned constitutional provision could be applied: *there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body.* It is quite realistic, as considered by the applicant, that there are no representatives from some constituent people in some cantons. In the applicant's opinion, the prejudging in Article 20.16.A of the Election Law and assigning one delegate from each constituent people to each canton prior to knowing the outcome of the elections to the cantonal assemblies and „the counting of other delegates by cantons on the basis of that wrong premise" prove a violation of the Constitution of Bosnia and Herzegovina.

18. Furthermore, the applicant submitted a tabular presentation of „the real percentage of Bosniacs, Croats and Serbs in the cantons, the number of allocated mandates and percentage per mandate", and he points out that there are huge discrepancies between the elected composition of the caucuses of the constituent peoples and proportional participation of population in the cantons from which they were elected. The applicant refers to the Posavina Canton where, for example, one delegate from the Bosniac people should be elected from the Posavina Canton, which represents 5.88% of the participation in the Bosniac caucus, while the real participation of the Bosniac people in that canton is 0,55%, which represents 10 times deviation. Another example is the Western Herzegovina Canton, wherein one mandate has been provided for the delegate coming from the Bosniac people and that also represents 5.88% of the participation in the Bosniac caucus, while the real participation of the Bosniac people in that canton is 0.11%, which represents 53 times deviation or 5300%. The applicant also alleges that there was 25.12% of Bosniacs living in the Tuzla Canton according to the 1991 census. Pursuant to the provisions of the

Election Law, that canton allocates 3 delegates to the Bosniac caucus, which is 17.46% of the caucus of that constituent people, which means that it represents 7. 48% deviation at the detriment of that canton. The applicant also alleges that when it comes to the delegates from amongst the Croat people, there is even a more drastic deviation when compared to the real situation. Thus, in the Bosnian Podrinje Canton, the real percentage of the representation of the Croat people, as per 1991 census, is 0.01%, while the planned election of one delegate is 5.88% in the Croat Caucus in the House of Peoples, which represents the difference of 588 times when compared to the real situation. As regards the election of the Serb delegates, the most drastic situation, as alleged by the applicant, is in the Western Herzegovina Canton where, according to the 1991 census, 0.05 % Serbs lived and the Election Law provides for the election of one delegate which represents 5.88% of the Serb Caucus and that is almost 118 times deviation.

19. The applicant alleges that without questioning the right of an individual to declare him/herself as a member of „one of the constituent peoples", it is evident that the mentioned right is abused in a manner in which „the members of another people/s ensure the election of the delegates from the peoples who do not live in adequate number in the area of some cantons".

20. As to the election of the delegates from amongst the Croat people, the applicant alleges that it is clear that more Croat delegates are elected from the cantons with Bosniac people majority than from the cantons with the Croat people majority, which proves once again the absurdity of the election system, which should, according to the Constitution of BiH, ensure the highest level of free and democratic elections under the condition that both Entities ensure the highest level of internationally recognized human rights and fundamental freedoms.

Cantons:	**Bosniacs**	**Croats**	**Serbs**	**Other**	**Total**
Cantons with Bosniac majority	12	6	12	5	35
Cantons with Croat majority	3	5	3	-	11
Mixed cantons	2	6	2	2	12
	17	**17**	**17**	**7**	**58**

21. Finally, the applicant underlines that this discriminatory approach escalated after the imposition of the amendments to the Constitution of the Federation by the High Representative in BiH in 2002. Until then, the caucuses of the constituent peoples in the House of Peoples had 30 delegates so that each delegate represented 3.33% of participation

in the caucus, which, in sum, represented a more realistic possibility of election of the delegates in proportion to the composition of population within the respective cantons. The applicant considers that the challenged provisions of the Election Law relating to the election of delegates to the House of Peoples are unconstitutional and seeks that the Constitutional Court of BiH declare the disputable provisions unconstitutional and undertake all necessary legal steps in order to harmonise the mentioned norms with the Constitution of Bosnia and Herzegovina and international conventions.

b) Reply to the request

22. In its reply to the request, the Commission on Constitutional and Legal Affairs alleged that it had considered the request during its session held on 4 March 2015 when it had concluded that the Parliamentary Assembly of Bosnia and Herzegovina had passed the Election Law, that on 22 September 2014 the Constitutional Court of Bosnia and Herzegovina had received the applicant's request and that, following the discussion, the Commission had unanimously decided to inform the Constitutional Court of Bosnia and Herzegovina about the mentioned facts and that that court would decide whether the mentioned law was in conformity with the Constitution of Bosnia and Herzegovina.

c) *Amicus curiae* brief of the Venice Commission

23. In an exhaustive analysis of the present case, the Venice Commission first notes that the principle of equal voting power is guaranteed by Article 25 of the International Covenant as well as by Article 3 Protocol No. 1 to the European Convention and that inequalities of representation between constituencies are, in principle, forbidden even if there is a margin of appreciation. This leads to the question of whether or not the European Covenant and the European Convention allow for a distinction to be made between first and second chambers from the point of view of the scope of the principle of equal suffrage, to exclude, as regards second chambers, the aspect of equal voting power. Seventeen countries in Europe, including BiH, practice bicameralism. The method of selecting a second chamber is context dependent, the purpose of the second chamber and the historical traditions of the country in question are key contextual determinants. It is not inherently undemocratic to have a second chamber that is not proportionally representative of the population. In particular, bicameralism is often practised in federal states to equally represent the sub-national authorities at a national level; where this is the purpose of the second chamber, it is entirely appropriate that the members are selected by those sub-national authorities. A corollary of representing a sub-national authority in this manner is the seemingly, disproportionate representation of the different populations.

24. In the case of the Federation's House of Peoples, the primary purpose is to ensure proper representation of the constituent peoples and others. The calculation for the allocation of seats in this House can be seen from two different perspectives: (1) from the perspective of an individual canton of the Federation or of an individual citizen – either could arguably see it as disproportionate and lacking in equality; or (2) from the perspective of the Federation and the State of BiH – which can arguably see it as not arbitrary. In any case, it is designed to provide for a disproportionate reflection of mandates as across the 10 cantons. As a whole, the relevant provisions of the Election Law (i.e. Articles 10.10, 10.12, 10.15, 10.16 and 20.16A) create a system of indirect election that could be described as so circumscribed as to constitute a form of selection, respectively allocating seats to constituent peoples and cantons. The overall result is already dictated by the Constitution of the Federation as amended to comply with the Constitutional Court decision of 2002 on constituent peoples.

25. The Venice Commission further notes that the method of electing the delegates to the House of Peoples uses the cantons and their delegates, and the primary purpose of the House of Peoples is not to represent cantons, but rather to represent constituent peoples and others, and it embodies another type of equality i.e. the „collective equality" of the three constituent peoples plus a fixed representation of others. In addition, it has an important role to play in the vital interest procedure and could be seen as a „veto" chamber of the Federation's Legislature. Therefore, as further stated, the democratic legitimacy of the method of election should not be evaluated by reference to the comparative ballot value of voters or imbalance within or between cantons. The concepts of equal-voting power and proportionality do not apply to the special parts of the BiH legislature, which are designed to represent constituent peoples – and hence are designed to meet the unique specificities of BiH.

26. Finally, in response to the question: „Is the mode of election of delegates to the House of Peoples, having regard to the particularities of the constitutional situation and the decision of the Constitutional Court on constituent peoples, compatible with the principle underlying Europe's electoral heritage?", the Venice Commission notes that the Constitutional Court might consider that the composition of the House of Peoples of the Federation is not merely designed to reflect the participation of its 10 cantons in the legislative process; that, it aims instead to ensure the representation of the constituent peoples on a parity basis, ensuring that each constituent people has the same number of representatives and basically acts like a „veto" chamber of the Federation's Legislature.

27. The Venice Commission considers that although this distortion of proportionality in the electoral system might not be consistent with principles of European electoral heritage

if the election was for a directly elected part of the legislature, it can be justified that the concept of equal voting should not apply to the special parts of the BiH legislature, which are designed to ensure representation of constituent peoples and others. The Venice Commission notes that the Election Law of BiH intends to render operational the relevant provisions of the Constitution of the Federation on the allocation of seats to the House of Peoples of the Federation through the holding of two rounds of elections. The first round, under Article 10.12, is to allocate one seat per constituent peoples or others per canton and the second round, under Article 10.16, is to reallocate those seats that could not be filled to those cantons that have the necessary number of constituent peoples or others to fill the remaining seat(s). Finally, the European Commission concludes that the system under the Constitution of the Federation „seems to be in line with European and other international standards in the field of elections and since the Election Law intends to render operational the relevant provisions of the Constitution of the Federation, it also seems to be in line with these standards". In the Venice Commission's view, the Election Law seems to depart slightly from what is „proportionality", as mandated by the Constitution of the Federation in the allocation of seats to the House of Peoples of the Federation. However, a solution might be envisaged by which the provision of the Election Law („Each constituent people shall be allocated one seat in every canton") would be interpreted as worded in the Constitution of the Federation („In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body").

IV. Public hearing

28. At the plenary session held on 26 May 2016, the Constitutional Court decided, in accordance with Article 46 of the Rules of the Constitutional Court, to hold a public hearing with regards to this case. Pursuant to Article 47 of the Rules of the Constitutional Court, the decision was made to invite the following persons to the public hearing: the applicant, the representatives of the Parliamentary Assembly of BiH (House of Peoples and House of Representatives), the representative of the OSCE Mission to BiH, the representative of the Central Election Commission of Bosnia and Herzegovina - CEC, the representative of the Office of the High Representative for BiH – OHR, Prof Dr Goran Marković, Law Faculty of the University in Istočno Sarajevo, Prof Dr Zlatan Begić, Law Faculty of the University of Tuzla, Prof Dr Zvonko Miljko, Law Faculty of the University in Mostar.

29. The public hearing was held on 29 September 2016 and was attended by the representatives of the applicant, the representatives of the House of Peoples of the Parliament of the Federation of BiH, the representatives of the CEC, the representatives of

the OSCE Mission to BiH and Prof Dr Zlatan Begić - the Faculty of Law of the University in Tuzla and Prof Dr Zvonko Miljko – the Faculty of Law of the University in Mostar.

30. The representatives of the OHR did not attend the public hearing. However, on 27 September 2016, the OHR delivered the written opinion which was considered by the Constitutional Court.

31. At the public hearing, the applicant remained supportive of his request for review and pointed out that the basic principle of democracy was that the power came from the people and belonged to the people. Therefore, the Election Law must follow the logic of legitimate representation of the constituent peoples, in particular when it comes to the houses of peoples, i.e. that body of power which is intended to protect and articulate specific interests and needs of each constituent people. The consistent application of the provisions of the Constitution of the Federation should ensure that there is the appropriate and proportional representation of the delegates in the caucuses of the House of Peoples matching the national structure of the canton the delegates come from. However, by application of the challenged provisions of that law this distribution, in reality, is far away from any kind of proportionality with regards to all three constituent peoples. Furthermore, the applicant alleges that Bosnia and Herzegovina is a complex state, in which not only Serbs, Croats and Bosniacs are the constituent peoples, but the citizens, as people – demos, are also constituent. Therefore, there is a two-fold constituent status a) three constituent peoples and b) all citizens as members of people – „demos". In the opinion of the applicant, two-fold constituent status is expressed through bicameral system in Bosnia and Herzegovina, i.e. through the parliament and house of constituent peoples. The Parliament reflects the equality of citizens and principle of proportionality applies therein, and House of Peoples should ensure that there is equality of three constituent peoples and that equality is expressed through the caucuses of the constituent peoples and within the House of Peoples. Furthermore, the applicant notes that not only that the Election Law, in its Article 10.12, violates the principle of democratic representation but it absolutely denies that principle, i.e. the principle of legitimate democratic representation as the power does not originate from people, but from the legal norm.

32. The representatives of the CEC did not present the position of the CEC at the public hearing but they only presented personal viewpoints about the request in question.

33. In his presentation the representative of the House of Peoples pointed out that he supported the request and he also recalled the shortcomings in the manner in which the House of Peoples functions.

34. Prof Zvonko Miljko - the Faculty of Law of the University in Mostar, in his presentation, stressed, *inter alia*, the role of legitimacy or the legitimate representatives of the one representing himself, so many say in theory that it is the basic category of constitutional law that should be acknowledged as generally accepted value in which this principle appears as the higher ranking requirement. Furthermore, he stated that out of 17 Croat delegates in the House of Peoples more than a half are elected from the cantons in which the majority is some other ethnic group and concluded that the challenged provisions of the Election Law, while referring here primarily to the principle of constituent status of the peoples, which is supported in the number of decisions by this Court as well, and from which the corresponding principles of equality, constitutionality and multinational character of the state derived, are in contravention with those norms which, as an Annex, form integral part of the Constitution of Bosnia and Herzegovina.

V. Relevant Law

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

Preamble

(...)

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

Article I
Bosnia and Herzegovina

(...)

2. Democratic Principles

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

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

IV. STRUCTURE OF THE FEDERATION GOVERNMENT

A. The Legislature

a) The legislative authority in the Federation of Bosnia and Herzegovina shall be exercised by the House of Representatives and the House of Peoples.

FEDERATION PARLIAMENT

1. The House of Representatives

[...]

2. The House of Peoples

Article 6
Composition of the House of Peoples and Selection of Members

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

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

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

(Changed by Amendment XXXIII)

Article 8

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

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

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

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

(Changed by Amendment XXXIV)

37. The **Election Law of Bosnia and Herzegovina** (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10. 18/13 and 7/14 (the unofficial revised version published on www.izbori.ba was used for the purpose of this decision) as relevant reads:

a) SUBCHAPTER B

b) HOUSE OF PEOPLES OF THE PARLIAMENT OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

Article 10.10

The Cantonal Legislature shall elect fifty eight (58) delegates to the House of Peoples, seventeen (17) from among Bosniacs, seventeen (17) from among Serbs, seventeen (17) from among Croats and seven (7) delegates from the rank of Others.

Article 10.12

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

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

Article 10.15

The results of vote shall be communicated to the Election Commission of Bosnia and Herzegovina for the final allocation of seats. Mandates shall be distributed, one by one, to the lists or candidate with the highest quotients resulting from the proportional allocation formula referred to in Article 9.6 of this Law. When a list wins a mandate, the mandate shall be allocated from the top of the list.

Article 10.16

(1) If the required number of delegates to the House of Peoples from among each constituent people or from the group of Others in a given cantonal legislature are not elected then the remaining number of Bosniac, Croat, Serb or Other delegates shall be

elected from the other canton until the required number of delegates from among each constituent people is elected.

(2) The Election Commission of BiH shall re-allocate, immediately after completion of the first round of election of the delegates to the House of Peoples in all cantons, the seats that cannot be filled from one canton. The Election Commission of BiH shall re-allocate that seat to the non-elected candidate who has the highest quotient on all lists running for the appropriate constituent people or for the Others in all cantons.

CHAPTER 20
TRANSITIONAL AND FINAL PROVISIONS

Article 20.16A

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

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

a) from the Legislature of Canton number 1, Una-Sanai Canton, five (5) delegates, including two (2) Bosniacs, one (1) Croat and two (2) Serbs shall be elected.

b) from the Legislature of Canton number 2, Posavina Canton, three (3) delegates, including one (1) Bosniac, one (1) Croat and one (1) Serb shall be elected.

c) from the Legislature of Canton number 3, Tuzla Canton, eight (8) delegates, including three (3) Bosniacs, one (1) Croat, two (2) Serbs and two (2) Others shall be elected.

d) from the Legislature of Canton number 4, Zenica-Doboj Canton, eight (8) delegates, including three (3) Bosniacs, two (2) Croats, two (2) Serbs and one (1) Other shall be elected.

e) from the Legislature of Canton number 5, Bosnian-podrnije Canton – Gorazde, three (3) delegates, including one (1) Bosniac, one (1) Croat and one (1) Serb shall be elected.

f) from the Legislature of Canton number 6, Central Bosnia Canton, six (6) delegates, including one (1) Bosniac, three (3) Croats, one (1) Serb and one (1) Other shall be elected.

g) from the Legislature of Canton number 7, Herzegovina-Neretva Canton, six (6) delegates, including one (1) Bosniac, three (3) Croats, one (1) Serb and one (1) Other shall be elected.

h) from the Legislature of Canton number 8, West Herzegovina Canton, four (4) delegates, including one (1) Bosniac, two (2) Croats and one (1) Serb shall be elected.

i) from the Legislature of Canton number 9, Canton Sarajevo, eleven (11) delegates, including three (3) Bosniacs, one (1) Croat, five (5) Serbs and two (2) Others shall be elected.

j) from the Legislature of Canton number 10, Canton 10, four (4) delegates, including one (1) Bosniac, two (2) Croats and one (1) Serb shall be elected.

VI. Admissibility and Merits

38. First of all, the Constitutional Court notes that due to the complexity of the request and issues raised it will consider both the admissibility and the merits of the case.

39. The Constitutional Court observes that, bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the request was submitted by an authorized person (the Chairman of the House of Representative of the Parliamentary Assembly of Bosnia and Herzegovina at the time of submitting the request).

40. The applicant challenges the constitutionality of the provisions of the Election Law with respect to the relevant provisions of the Constitution of the Federation and Constitution of Bosnia and Herzegovina. Bearing in mind the aforementioned, the Constitutionals Court points out that it is indisputable that the Election Law constitutes „the decision of the institutions of Bosnia and Herzegovina" within the meaning of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina. However, pursuant to Article VI(3) of the Constitution of Bosnia and Herzegovina, its primary task is to uphold this Constitution and, according to Article VI(3)(a)(2) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall have jurisdiction to decide whether any provision of the constitution or law of an Entity is in accordance with this Constitution. Pursuant to Article I(2) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections. So, taking into consideration the mentioned principle of the rule of law, all constitutions, laws and other regulations must be harmonised with constitutional principles. The Constitutional Court is competent and obliged to act as a guardian of the Constitution of Bosnia and Herzegovina (Article VI(3)) on every occasion and that is defined under one of its basic principles - the rule of law referred to in the mentioned constitutional provision. Therefore, the Constitutional Court considers that it has jurisdiction to examine whether the relationship between the Election Law and Constitution of the Federation is

in conformity with the constitutional principles in adherence with which the provisions are to be passed. In other words, the Constitutional Court is to examine whether mutual relationship between the Election Law and Constitution of the Federation is in violation of the principles under the Constitution of Bosnia and Herzegovina, i.e. its relevant provisions the applicant refers to.

41. Specifically, the appellant considers that Article I(2) of the Constitution of Bosnia and Herzegovina provides that there is a law that has to be in conformity with the Constitution of Bosnia and Herzegovina but it has to be also in conformity with the Entity constitutions given the complex organisation of Bosnia and Herzegovina. Taking into consideration that the composition of the House of Peoples reflects the will of citizens, it also follows that the House of Peoples reflects the will of the constituent peoples, as concluded by the applicant. The principle of proportionality must be applied in a manner in which the basic meaning of proportionality is not derogated from, since it constitutes one of the key elements of stability and equality of citizens and constituent peoples in the multinational and complex State of Bosnia and Herzegovina.

a) As to Subchapter B, Article 10.12, paragraph 2, in the part reading as follows: Each constituent people shall be allocated one seat in every canton, and Chapter 20, Article 20.16A, paragraph 2, items a-j of the Election Law

42. Therefore, the task of the Constitutional Court is to establish whether the mutual relationship between the Constitution of the Federation and Election Law is in violation of the principles under the Constitution of Bosnia and Herzegovina, i.e. whether the aforesaid is in contravention of Article I(2) of the Constitution of Bosnia and Herzegovina.

43. The Constitutional Court finds that the provisions of Article 8, paragraphs 1 and 2 of the Constitution of the Federation provide that the delegates to the House of Peoples shall be selected by the Cantonal Assemblies from among their representatives in proportion to the ethnic structure of the population and the number of delegates to the House of Peoples to be elected in each Canton shall be proportional to the population of the Canton, given that the number, structure and manner of election of delegates shall be regulated by law. It follows that the framer of the constitution established the principle of proportionality with regards to the selection of the delegates to the House of Peoples, whereby it has been provided that the number of delegates of one constituent people to the House of Peoples from certain canton is proportional to the participation of that constituent people in the number of the population of the relevant canton. The selection of the legislative body within the context of selection of delegates to the House of Peoples must imply that the number of delegates of certain constituent people matches the percentage of participation

of that constituent people in respective canton of the Federation. The consequence of the principle of proportionality is that certain canton give more and other canton give less of the delegates to the House of Peoples and that is in accordance with the national structure of the respective canton. It follows that the established principle of proportionality is in the service of as complete representation of each of the constituent peoples in the Federation as it is possible. Furthermore, in Article 8 paragraph 3, the Constitution of the Federation provides for the obligation of filling the delegates' seats in all cantons by at least one member from each constituent people under the condition that the members of that constituent people are present in the respective legislative body, which means that the Constitution of the Federation does not „require" that the House of Peoples is filled by members from the canton which has no members of certain constituent peoples within the respective legislative body of that canton. The Constitutional Court notes that the aforementioned means that it is about a conditional option and not about absolute determinant. Furthermore, in Article 8, paragraph 4 of the Constitution of the Federation the author of the constitution exclusively determined that the representatives of the constituent peoples in the legislative bodies may be elected by the representatives of the respective constituent people.

44. Furthermore, the Constitutional Court finds that the Election Law, Article 1.1 regulates the election of the members and the delegates of the Parliamentary Assembly of BiH and of the members of the Presidency of BiH and shall stipulate the principles governing the elections at all levels of authority in BiH. So, the Election Law regulates the election with regards to the State institutions, while as regards the institutions of the Entities, i.e. the House of Peoples, the principles that apply to the elections are determined. The Constitutional Court notes that regardless of the fact that the Constitution of the Federation established the principle when it comes to filling the seats in the House of Peoples and entrusted the legislator with exclusive power to legally determine the number, structure, method of election of delegates and election of delegates from amongst Others, the legislator also provided, under the mentioned provision, that the Election Law determines the principles that apply to the elections at all levels of power in Bosnia and Herzegovina. The Constitutional Court finds that the legislator, under the provisions of Article 10.12 of the Election Law, determined that the number of delegates from each constituent people and group of Others is proportionate to the population of the canton as reflected in the last census. Furthermore, for each canton the legislator provided mathematic formula with regards to the selection of the number of delegates and that formula is based on the number of population of each constituent people in all cantons, but the legislator also provided that *each constituent people shall be allocated one seat in every canton*. Furthermore, the provisions of Article 20.16 A of the Election Law, which

are transitional provisions of temporary nature, precisely stipulate that until Annex 7 of the General Framework Agreement for Peace has been fully implemented, the allocation of seats by constituent people shall be done in accordance with that Article and until a new census is organized, the 1991 census shall serve as a basis for determination of number of delegates from amongst each constituent people and Others. Exact number of delegates from each constituent people and from amongst Others that are selected from the cantonal assemblies is defined by the mentioned Article, in which case it will be determined that minimum one delegate will be selected from each constituent people. It follows that the legislator, in Article 10.12, paragraph 2 of the Election Law reading *each constituent people shall be allocated one seat in every canton* and, in Article 20.16 A of the Election Law, essentially „gave up" the principle of proportionality. Namely, under the mentioned provisions the legislator provided that as regards the cantons with negligible (but not small) participation of the members of one of the constituent peoples in the total number of the members of that constituent people, a delegate is selected to the House of Peoples from amongst that people. That means that the mentioned provisions provide that instead of the principle of proportionality another principle is applied, according to which the ratio between the number of population and number of delegates from one constituent people is much bigger when compared with the ratio of the number of population and the number of delegates from some other canton. So, according to these provisions, the respective caucuses of the constituent people will be filled with the required number of ten delegates coming from each of the ten cantons out of the total number of 17 delegates, regardless of the number of members of the constituent people living in some of the cantons (in theory, it is possible that only one member of the respective constituent people lives in that canton). The aforementioned indicates that the matter is about an absolute determinant and not about conditional option. The Constitutional Court observes that the aforementioned is entirely in contravention of the principles established in the Constitution of the Federation.

45. As to the aforementioned task, the Constitutional Court has to answer whether it amounts to a violation of the Constitution of Bosnia and Herzegovina.

46. The Constitutional Court recalls the text of Article I(2) of the Constitution of Bosnia and Herzegovina, which reads as follows: „Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections", from which there ensues the principle of the rule of law according to which all constitutions, laws and other regulations must be in conformity with the constitutional principles.

47. The Constitutional Court recalls that states enjoy a wide margin of appreciation in establishing and regulating the electoral system to be applied. There are different ways

of organising and administering elections and this variety is conditioned *inter alia* by the political development of a country. Therefore, the legislation regulating elections must be viewed in light of the political development of the country concerned. In addition, the Constitutional Court recalls that according to the general principle of democracy, the right to participate in democratic decision-making is exercised through legitimate political representation, which has to be based on the democratic choice by those represented and whose interests are represented. In this regard, the connection between those who are represented and their political representatives at all administrative-political levels is actually the one that gives the legitimacy to community representatives. Therefore, only the legitimacy of representation creates a basis for actual participation and decision-making.

48. The Constitutional Court recalls the text of sub-paragraph 9 of the Preamble of the Constitution of Bosnia and Herzegovina: „(...) Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina". In addition, the Constitutional Court recalls the text of Article IV(1) of the Constitution of Bosnia and Herzegovina, which reads follows: „The House of Peoples shall comprise 15 delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs). a) The designated Croat and Bosniac Delegates from the Federation shall be selected, respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska. b) Nine members of the House of Peoples shall comprise a quorum, provided that at least three Bosniac, three Croat, and three Serb Delegates are present." Furthermore, the Constitutional Court recalls the part of the text of Article V(4)(b) of the Constitution of Bosnia and Herzegovina reading as follows: „(…) the Chair shall also nominate Deputy Ministers (who shall not be of the same constituent people as their Ministers)", and the part of the text of Article VII(2) of the Constitution of Bosnia and Herzegovina reading as follows: „The first Governing Board of the Central Bank shall consist of a Governor appointed by the International Monetary Fund, after consultation with the Presidency, and three members appointed by the Presidency, two from the Federation (one Bosniac, one Croat, who shall share one vote) and one from the Republika Srpska (…)."

49. The Constitutional Court recalls once again the general principle of democracy that state power originates from the people and belongs to the people. It follows from the Constitution of Bosnia and Herzegovina that the Constitution of Bosnia and Herzegovina designated, as the people, the constituent peoples who together with Others and the citizens of Bosnia and Herzegovina form a community of citizens, which exercises power

equally through its representatives, and the right to participate in democratic decision-making is exercised through legitimate political representation, which has to be based on the democratic choice by those represented and whose interests are represented. However, it follows from the mentioned sub-paragraph of the Preamble of the Constitution of Bosnia and Herzegovina that the framers of the Constitution designated the constituent peoples (Bosniacs, Serbs and Croats) as specific collectivities and awarded them equal rights, *i.e.* „underlined" the *specific and equal status* of Bosniacs, Serbs and Croats as constituent peoples. In this regard, the Constitutional Court recalls its Decision No. *U 5/98* (Decision on the Constituent Status of Peoples), wherein the Constitutional Court pointed out the following: „Again this designation in the Preamble must thus be viewed as an overarching principle of the Constitution of Bosnia and Herzegovina which the Entities, according to Article II (3)(b) of the Constitution of BiH, must fully comply with." In addition, it follows from the aforementioned provisions that the framers of the Constitution provide for the proportional representation of Bosniacs, Serbs and Croats, as constituent peoples, in the institutions of Bosnia and Herzegovina.

50. In the present case, the subject-matter of the request relates to the election of delegates to the House of Peoples of the Federation. According to the Constitution of Bosnia and Herzegovina, delegates to the House of Peoples of the State of BiH are selected from amongst delegates to the House of Peoples. However, the Constitution of Bosnia and Herzegovina does not specify the House of Peoples' function, *i.e.* it does not specify the institutions that exercise power in the Entities, meaning that the aforementioned is specified in the Constitutions of the Entities. Thus, the Constitution of the Federation stipulates that the House of Representatives and the House of Peoples will exercise the legislative powers in the Federation. Members to the House of Representatives are elected democratically by eligible voters in a direct, Federation-wide elections. Each voter is eligible to cast a single, secret ballot for any registered party. Therefore, the House of Representatives represents the interests of all citizens residing in the Federation of BiH, and the right to participate in democratic decision-making *is exercised through legitimate political representation, which has to be based on the democratic choice by all citizens residing in the Federation of BiH, as it represents their interests.* On the other hand, the Constitution of the Federation prescribes that the House of Peoples will be composed on a parity basis so that each constituent people will have the same number of delegates and it defines, as a fundamental issue of vital interest, the exercise of the rights of constituent peoples to be adequately represented in legislative, executive and judicial authorities. In addition to the aforementioned issues specified in the Constitution of the Federation of Bosnia and Herzegovina, other issues could be treated as vital national interest if

so claimed by 2/3rd of one of the caucuses of the constituent peoples in the House of Peoples. Therefore, it undisputedly follows from the aforementioned that the House of Peoples performs the key task of protecting the constituent status of peoples. Furthermore, according to the Constitution of the Federation, the Federation consists of federal units (cantons). However, regardless of the aforementioned, the House of Peoples is not the house of federal units but the house of constituent peoples. Moreover, the Constitutional Court recalls that, as a result of the implementation of the Decision of the Constitutional Court No. *U 5/98*, amendments to the Constitution of the Federation were passed (Article 8 of the Constitution of the Federation of Bosnia and Herzegovina) to harmonise the Constitution of the Federation with the Constitution of Bosnia and Herzegovina. As a result, the number of delegates was reduced and Serb delegates were included in the House of Peoples, so that each constituent people has an equal number of delegates to the House of Peoples (seventeen delegates each). In addition, the Constitutional Court points out that the Constitution of the Federation stipulates that amendments to the Constitution will be passed by the House of Peoples by simple majority, including the majority of Bosniac delegates, Croat delegates and Serb delegates (nine delegates each).

51. The above analysis shows that the right to participate in democratic decision-making, which is exercised through legitimate political representation, has to be based on the democratic election of the delegates to the House of Peoples of the Federation by the constituent people represented and whose interests are represented. Bringing into connection the aforementioned role of the House of Peoples within the constitutional system of the Federation with the principle of the constituent status of peoples in the Federation, it undisputedly follows that the principle of the constituent status of peoples in the Federation, in the context of House of Peoples, may be realised only if a seat in the House of Peoples is filled based on precise criteria that should ensure full representation of each constituent people in the Federation. Otherwise, an inadequate political representation of those represented and whose interests are represented amounts to a violation of the principle of the constituent status of peoples, i.e. leads to inequality between any of the constituent peoples, thereby violating Article I(2) the Constitution of Bosnia and Herzegovina.

52. The Constitutional Court finds that the election of delegates to the House of Peoples is the combination of direct and indirect elections. In particular, the cantonal assemblies directly select delegates to the House of Peoples from among delegates selected by secret vote at the general direct elections held on the entire territory of the Federation when each voter is entitled to vote for any candidate from the electoral list. The Constitutional Court notes that Article 10.12 (2) of the Election Law stipulates that each constituent people shall

be allocated one seat in every canton and Article 20.16 A of the Election Law (selection of one delegate from each constituent peoples for each canton) makes it possible for a member of a constituent people to be selected to the House of Peoples even in the case that such a person is the only member of one of the constituent peoples in one of the cantons, provided that he/she was selected to the legislative body of that canton. Thus, that delegate was elected by the members of another constituent people at the direct elections and the members of another constituent people elected him/her to that legislative body as well. The Constitutional Court notes that according to its hitherto case-law the implementation of certain law arrangements is not a constitutional issue if such arrangements are in themselves in accordance with the Constitution. In such situations, there are other appropriate protection in case of erroneous implementation of law provisions. However, the present case does not relate to such a situation but the situation where the mentioned provisions, when implemented, are in themselves contrary to the Constitution of Bosnia and Herzegovina. In particular, if one takes into account the fact that these provisions make it possible for a member of a constituent people to be selected to the House of Peoples even in the case that such a person is the only member of one of the constituent peoples in one of the cantons, provided that he/she was elected to the legislative body of that canton at the direct elections, and that members of that constituent people do not select him/her subsequently to the House of Peoples, then it is more than obvious that the mentioned provisions make it possible for the representatives of one constituent people to afford legitimacy to the representatives of another constituent people in the cantonal legislative body. In other words, one such a delegate has the same „capacity" in the House of Peoples as any other delegate selected by the members, i.e. representatives of that constituent people. Thus, it is obvious that the mentioned provisions imply that the right to democratic decision-making through legitimate political representation will not be based on the democratic election of delegates to the House of Peoples of the Federation from amongst the constituent people that is represented and whose interest are represented by those delegates. Furthermore, the mentioned provisions violate the Constitution of Bosnia and Herzegovina even in the case that the cantonal legislative body has more delegates from a constituent people, since the members of another constituent people may afford legitimacy to them at the direct elections. Accordingly, the Constitutional Court finds that not only that the provisions of Article 10.12(2), in the part reading that *each constituent people shall be allocated one seat in every canton*, and the provision of Article 20.16 A of the Election Law are not based on the precisely clear criteria but they also imply that right to democratic decision-making through legitimate political representation will not be based on the democratic election of delegates to the House of Peoples of the Federation from amongst the constituent people that is represented and whose interest are represented

by those delegates. The Constitutional Court finds that the mentioned is contrary to the principle of constituent status of the peoples, i.e. equality of constituent peoples, thus contrary to the Constitution of Bosnia and Herzegovina, more specifically Article I(2) of the Constitution of Bosnia and Herzegovina.

53. The Constitutional Court concludes that the provision of Subsection B, Article 10.12(2) in the part reading *each constituent people shall be allocated one seat in every canton* and the provision of Section 20, Article 20.16 (2) (a) through (j) of the Election Law are not in conformity with Article I (2) of the Constitution of Bosnia and Herzegovina.

b) As to the provisions of Subsection B Article 10.10, the remainder of Article 10.12, 10.15 and 10.16 of the Election Law

54. As to the provisions of Article 10.10 of the Election Law, the Constitutional Court holds that the total number of delegates to the House of Peoples from a constituent people may raise the issue whether each constituent peoples is represented with more or less credibility in that body following the elections. However, in the present case, such an arrangement is not contrary to the Constitution as the relevant provisions of the Constitution of the Federation and the Election Law determine the same number of delegates from all the three constituent peoples in the House of Peoples so that it is obvious that it enables equal representation of all constituent peoples in the House of Peoples. The Constitutional Court reiterates that, as a result of the implementation of the Decision of the Constitutional Court No. *U 5/98*, amendments to the Constitution of the Federation of Bosnia and Herzegovina were passed to harmonise the Constitution of the Federation with the Constitution of Bosnia and Herzegovina. As a result, the number of delegates was reduced and Serb delegates were included to the House of Peoples, so that each constituent people has an equal number of delegates to the House of Peoples (seventeen delegates each). Whether a greater number of delegates would enable better, i.e. more credible representation of constituent peoples and Others is the issue falling within the scope of competence of certain legislative authorities who enjoy a „wide margin of appreciation", and, thus, is not the issue of constitutionality so that it does not fall within the scope of jurisdiction of the Constitutional Court.

55. As to the provisions of the reminder of Article 10.12 of the Election Law, the Constitutional Court has noted above that the legislator has determined that the number of delegates from each constituent people and from Others is proportional to the number of inhabitants according to the last census. Furthermore, the legislator provided a mathematical formula for allocation of seats in respect of each canton, which is based on the number of

inhabitants of each constituent people in all cantons. The Constitutional Court reiterates that the proportional representation system is one of the standard models of the electoral system. Indeed, the majority of the states of the European Union accepts the proportional representation system selecting different mathematical methods for calculating the results of the vote in determining the mandates. In this connection, the Constitutional Court reiterates that the election rules are subject to normative regulation by the legislator which enjoys a wide margin of appreciation when regulating it. Furthermore, such an arrangement does not disclose a departure from the principles set forth in the Constitution of the Federation, i.e. it does not make it possible in itself for the right to democratic decision-making not to be based on the democratic election of delegates to the House of Peoples of the Federation from amongst the constituent people that is represented and whose interest are represented by those delegates.

56. As to the provision of Article 10.15 of the Election Law, the Constitutional Court finds that the aforementioned provisions provide for the procedure for submitting the election results to the CEC. It follows that the mentioned provisions do not regulate the matter contested by the request in question.

57. As to the provisions of Article 10.16 of the Election Law prescribing the procedure for filling the delegates seats in the House of Peoples in case that the necessary number of delegates is not selected, the Constitutional Court finds that the mentioned provisions pursue the conditional option of filling vacant delegates seats under the Constitution the Federation. It follows that the mentioned provisions do not regulate the matter which is essentially contested by the request in question.

58. Taking into account all the aforesaid, the Constitutional Court holds that the provisions of Subsection B Article 10.10, the remaining part of 10.12, provisions of Article 10.15 and provisions of Article 10.16 of the Election Law are not contrary to Article I(2) of the Constitution of Bosnia and Herzegovina.

Other allegations

59. Given the conclusions with regards to Article I(2) of the Constitution of Bosnia and Herzegovina, the Constitutional Court holds that there is no need to examine the applicant's allegations on the violation of Article II(1), II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention, Article 25 of the International Covenant with regards to Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 to the European Convention, and Article 1 of the International Convention on Elimination of All Forms of Racial Discrimination.

VII. Conclusion

60. The Constitutional Court finds that the part of Subchapter B, Article 10.12 (2) reading: *each of the constituent peoples shall be allocated one seat in every canton* and the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A paragraph 2 items a-j of the Election Law are not in conformity with Article I(2)of the Constitution of Bosnia and Herzegovina as the mentioned provisions manifestly imply that the right to participate in democratic decision-making exercised through legitimate political representation will not be based on democratic election of delegates to the House of Peoples of the Federation of Bosnia and Hercegovina by the constituent people that is represented and whose interests are represented by those delegates. Therefore, the aforesaid is in contravention of the principle of constituent status of peoples, i.e. the principle of equality of all constituent peoples.

61. The Constitutional Court holds that the remaining part of the provisions of the Subchapter B, Articles 10.10 and 10.12, and Articles 10.15 and 10.16 of the Election Law are consistent with Article I(2) of the Constitution of Bosnia and Herzegovina.

62. Pursuant to Article 59(1) and (2) and (3) and Article 61 (4) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

63. Under Article 43(1) of the Rules of the Constitutional Court, Judge Seada Palavrić gave a statement of dissent.

64. Under Article 43(1) of the Rules of the Constitutional Court, annex to this Decision makes a Separate Partially Dissenting Opinion of the President Mirsad Ceman.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Separate Partially Dissenting Opinion of President Mirsad Ćeman

With all due respect for the majority opinion of my colleagues, I do not agree with it, which was the reason why I voted against as I could not support a part of the decision. Therefore, pursuant to Article 43 of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of BiH,* 94/14), I hereby state the following partially dissenting opinion on Decision *U 23/14* of 1 December 2016 for the following reasons:

I agree with the majority opinion that „the provisions of Subchapter B Article 10.10, the remaining part of 10.12, the provisions of Article 10.15 and provisions of Article 10.16 of the Election Law are not contrary to Article I(2) of the Constitution of Bosnia and Herzegovina" – as stated in paragraphs 4 and 5 of the enacting clause of the Decision and in respect of which the appropriate reasons were given in paragraphs 54-58.

However, ***I could not agree*** with the view that the provision of Subchapter B, Article 10.12(2), in the part reading *each constituent people shall be allocated one seat in every canton,* and the provision of Section 20, Article 20.16 (2) (a) through (j) of the Election Law *are not in conformity with Article I(2) of the Constitution of Bosnia and Herzegovina as the mentioned provisions manifestly imply that the right to participate in democratic decision-making exercised through legitimate political representation will not be based* on democratic election of delegates to the House of Peoples of the Federation of Bosnia and Hercegovina by the constituent people that is represented and whose interests are represented by those delegates, which *is in contravention of the principle of constituent status of peoples, i.e. the principle of equality of all constituent peoples.*

In particular, ***the key notion*** of the majority opinion, which is the starting point of the granting part of the majority decision and the basis thereof, is that „(…) according to the Constitution of the Federation, the Federation consists of federal units (cantons). However, regardless of the aforementioned, the House of Peoples, *deriving from the cantonal assemblies, is not the house of federal units but exclusively (remark by M. Ć.) the house of constituent peoples (...)" (*paragraph 50 of the reasoning*)*. Furthermore, although the majority opinion (just like the applicant) invokes the principle of „constituent status of peoples", the view and decision of the majority are obviously based on the *reductionist understanding and extensive „terrritorialization" of the category of „constituent people".* Consequently, this finally results in the reduction of the legitimacy of the political representation of the constituent people (any people) to mostly one or possibly several political options within a people that are close to each other in terms of ideology,

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but above all to the election of representatives/delegates from the areas/cantons with the constituent people constituting majority or dominant majority. Without questioning anyone's right to feel so and/or to define himself/herself so (although it does not follow from the concept of the current electoral system, democratic principles or pluralism in Bosnia and Herzegovina), I believe nevertheless that the mentioned starting points cannot be the basis, the manner or the model for resolving this constitutional issue.

In particular, given the special role of the House of Peoples (which is, *inter alia*, the protection of vital national interests of all the three constitutional peoples of the Federation of BiH, *although it is not, I should stress, its only role – see its responsibilities defined in the Constitution*), the aim of the framer of the Constitution and the legislator was obviously to have the representatives of the constituent peoples from the whole territory of the Federation of BiH in the House of Peoples, ***since only then the category of „constituent peoples", along with the application of the principle of „positive discrimination" („at least one such a representative"), if necessary***, could be exercised and could be reflected on all members of that people (any constituent people), and not only on the areas where that people constitutes majority. In fact, it appears that the majority opinion reduces the function of the House of Peoples exclusively to the protection of vital national interest of the constituent peoples in the Federation of BiH, whereas it disregards the fact that the House of Peoples is *de iure* a „***parallel legislator***" (i.e. one of the houses of the legislature - the Parliament of the Federation of BiH), as none of the laws/regulations adopted by the House of Representatives can become effective until adopted, with the same wording, by the House of Peoples and *vice versa*. Thus, the legislative capacity of the House of Peoples is the same as that of the House of Representatives whose members are elected from entire territory of the Federation. Thus, the caucuses of the constituent peoples (i) in the House of Peoples should be filled from the whole territory of the Federation of BiH, since it has the same legislative responsibility as that of the House of Representatives. Such a manner of filling the seats was prescribed by the provisions of the Election Law, which were declared unconstitutional by the majority opinion in Decision No. *U 23/14*?!

Nevertheless, let us put first things first:

As to this very complex issue seen as a whole, the relation between the provisions of Article 10.12 of the Election Law (including other challenged provisions) and the relevant provision of Article 6 and Article 8 of the Constitution of the Federation should be analysed first in terms of the question whether they are essentially identical provisions or the relevant provisions of the Election Law differently regulate the election of delegates to the House of Peoples of the Parliament of the Federation of BiH in comparison to the mentioned provision of the Constitution of the Federation. I will not deal in this part with

possible mutual „confrontation" between certain paragraphs of Article 8 of the Constitution of the Federation (which will be dealt with below), but I shall rather analyse the part related to the procedure for the election of delegates to the House of Peoples by taking into account the relevant provisions of Article 8 of the Constitution of the Federation and provision of Article 10.12 of the Election Law.

Thus, Articles 6 and 8 of the Constitution of the Federation determine the composition and election of delegates to the House of Peoples, whereas Articles 10.10 through 10.16 of the Election Law – Subchapter B - the House of Peoples - regulate the composition and manner of selection of delegates to the House of Peoples. In this connection, it is necessary to answer the question whether the relevant provisions of the Election Law that relate to the composition and the manner of selection of delegates to the House of Peoples are identical to the provisions of the Constitution of the Federation that regulate the same issue. ***Article 6 of the Constitution of the Federation and Article 10.10 of the Election Law prescribe in an identical manner the number and composition of delegates of the House of Peoples.*** The House of Peoples shall be composed of 58 delegates, out of which 17 delegates from among each constituent people and 7 delegates from among Others. Furthermore, Article 8(2) of the Constitution of the Federation and Article 10.12 of the Election Law stipulate the procedure for the election of delegates to the House of Peoples. In particular, Article 8(2) of the Constitution of the Federation stipulates that *the number of delegates to the House of Peoples to be elected in each Canton shall be proportional to the population of the Canton, given that the number, structure and manner of election of delegates shall be regulated by law. Thus, the Constitution of the Federation refers exactly to the Election Law which determines the principles applicable to the election of delegates to the House of Peoples and Article 10.12 which prescribes the number, structure and manner of election of delegates*. **Article 10.12 paragraph 1 of the Election Law** stipulates that the *number of delegates from each constituent people and group of Others to be elected to the House of Peoples from the legislature of each canton shall be proportionate to the population of the canton as reflected in the last census,* and *the Election Commission will determine, after each new census, the number of delegates elected from each constituent people and from the group of Others that will be elected from each canton legislature.* Thus, the Constitution of the Federation and the Election Law regulate in an identical manner the number of delegates elected to the House of Peoples, and this in the manner that this number is proportionate to the number of inhabitants of cantons, where the *Election Law regulates this field more broadly and prescribes that this number shall be proportionate to the population of the canton as reflected in the last census and that the Election Commission will determine, after each new census, the number of delegates elected from each constituent people and from the group of Others*

that will be elected from each canton legislature. Furthermore, the provision of Article 8(1) of the Constitution of the Federation, which stipulates that *Delegates to the House of Peoples shall be elected by the Cantonal Assemblies from among their representatives in proportion to the ethnic structure of the population,* is implemented in the Election Law in two manners. In the first manner, which is still applicable, it is implemented through the provisions of Article 20.16A of the Election Law as the relevant paragraphs of that Article stipulates the number of delegates from each constituent people as reflected in the 1991 census. In my opinion, the aforementioned is not contrary to the provision of Article 8(1) of the Constitution of the Federation, since that provision does not specify the issue whether „in proportion to the ethnic structure of the population" was meant by the legislator the ethnic structure existing in 1991 or the current ethnic structure, i.e. the last relevant one. As that provision of the Constitution of the Federation (Article 8(1)) does not determine it, Article 20.16A of the Election Law regulates that issue, all the more so since paragraph 1 of that Article stipulates that that provision is of limited temporal validity, i.e. until Annex 7 of the GFAP has been fully implemented in Bosnia and Herzegovina. In my opinion, the same provision of the Constitution of the Federation (Article 8(1)) will apply in the manner prescribed by the second sentence of paragraph 1 of Article 10.12 of the Election Law when (even if) it is no longer necessary to apply the provisions of Article 20.16 of the Election Law. In particular, that provision (a part of paragraph 1 of Article 10.12 of the Election Law) stipulates that *the Election Commission will determine, after each new census, the number of delegates elected from each constituent people and from the group of Others that will be elected from each canton legislature.* In my opinion, this is in compliance with the principle set forth in Article 8(1) of the Constitution of the Federation, as the number of delegates to the House of Peoples shall be determined in proportion to the ethnic structure of the population as reflected in the last valid census to be conducted.

Furthermore, **Article 8(3) of the Constitution of the Federation** stipulates that *in the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body*, while the Election Law stipulates that (…) *each constituent people shall be allocated one seat in every canton* (paragraph 2 of Article 10.12). If one compares the mentioned provisions of the Election Law and Constitution of the Federation, it follows that essentially they are the same ones, although formulated in a different manner. In particular, paragraph 2 of Article 10.12 of the Election Law prescribes the method for calculation of allocation of seats and, within the framework of such a calculation, it prescribes that *each constituent people shall be allocated one seat in every canton,* while the Constitution of the Federation prescribes „a conditional option", namely that *in the House of Peoples there shall be at least one*

Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body. Thus, if there are no delegates from a constituent people (any of the constituent peoples) in a legislature of a canton, that constituent people from the respective canton will not have a representative in the House of Peoples. However, Article 10.16 of the Election Law regulates the situation where the required number of delegates to the House of Peoples from among each constituent people or from the group of Others in a given cantonal legislature are not elected, as the remaining number of delegates shall be elected from the other canton until the required number of delegates from among each constituent people is elected. *Thus, representation of a constituent people shall finally be ensured in a quota as prescribed by the Constitution and law.*

Furthermore, the question to be answered is whether the provision of Article 20.16.A of Chapter 20 – Transitional and Final Provisions - is identical with the provisions of the Constitution of the Federation that regulate the election of delegates to the House of Peoples. As previously noted, the Constitution of the Federation, in the provision of Article 8 paragraph 2, „left" to the legislator to regulate all other issues related to the election of delegates in the Election Law so that the provision of Article 20.16.A of the Election Law, which is a transitional provision and of temporary character, stipulates that until Annex 7 of the GFAP has been fully implemented, the allocation of seats by constituent people shall be done in accordance with that Article and that until a new census is organized, the 1991 census shall serve as a basis to calculate the number of delegates from each constituent people and Others that shall be elected by the Cantonal Assemblies. The exact number of delegates from each constituent people and Others elected by the cantonal assembles is determined in the mentioned Article, which is, in my opinion, in compliance with the principle set forth in Article 8(2) of the Constitution of the Federation, as the mentioned Article (as noted above) does not specify these issues.

It is also necessary to examine the relation between the principle of proportionality (… *delegates shall be elected by the Cantonal Assemblies in proportion to the ethnic structure of the population*) in electing delegates to the House of Peoples under Article 8(1) of the Constitution of Federation and provisions of paragraph 3 of the same Article of the Constitution of the Federation, which stipulates that *in the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body.* In fact, the question arises whether the principle of proportionality referred to in Article 8(1) of the Constitution of the Federation was brought into question by the provision of paragraph 3 of the same Article of the Constitution of the Federation that prescribes that *in the House of Peoples there shall be at least one member from each constituent people which has at least one such delegate in its legislative body.*

In this connection, it is first necessary to note that the provisions of Articles 6 and 8 of the Constitution of the Federation were passed on 19 April 2002 when the High Representative for BiH (OHR) took a Decision Amending the Constitution of the Federation (Amendment XXXIII and Amendment XXXIV) in order to enforce four partial decisions in Case No. *U 5/98* (so-called Decisions on the Constituent Status of Peoples). In giving the reasons for taking the mentioned decision, the High Representative noted that „the Constitutional Court ruled in its third partial decision in Case No. *U 5/98* of 30 June and 1 July 2000 (*Official Gazette of BiH*, 23/00 of 14 September 2000) that exclusion of one or other constituent people from the enjoyment not only of citizens' but also of peoples' rights throughout Bosnia and Herzegovina was in clear contradiction with the non-discrimination rules contained in the said Annex 4, which are designed to re-establish a multi-ethnic society based on equal rights of Bosniacs, Croats and Serbs as constituent peoples and of all citizens; and bearing in mind that the Entities of Bosnia and Herzegovina have hitherto [until then - remark by M.Ć] failed to take any steps to implement the said four partial decisions of the Constitutional Court of Bosnia and Herzegovina in case no. *U 5/98*."

„**The OHR's Amendments to the Constitution of the Federation** resulted in most radical changes in the composition and manner of election of delegates to the House of Peoples. At an earlier point, that house was composed of „30 Bosniac and 30 Croat delegates as well as Other Delegates, whose number shall be in the same ratio to 60 as the number of cantonal legislators not identified as Bosniac or Croat is in relation to the number of legislators who are so identified" (Article IV.A.6. of the former Constitution of the Federation). There were 79 delegates in that house until the constitutional amendments. However, Article IV.A.2.6. of the Constitution of the Federation was amended by Amendment XXXIII and a new structure of the House of Peoples was established so that that House comprises 17 delegates from among each of the constituent peoples and 7 delegates from among the Others. The total number of delegates of the House of People was thus reduced from 79 to 58 delegates.

Furthermore, former Article IV.A.2.8 of the Constitution of the Federation, regulating the procedure for election of delegate to the House of Peoples, was modified in Amendment XXXIV to the Constitution of the Federation. According to that amended Article of the Constitution of the Federation, paragraph 1 thereof remained the same (*the number of Delegates to be allocated to each Canton shall be proportional to the population of the Canton*), whereas the former para 3 (which read *In the House of Peoples there shall be at least one Bosniac, one Croat, and one Other Delegate from each Canton that has at least one such member in its Legislature, and the total number of Bosniac, Croat, and Other Delegates shall be in accordance with Article IV.A.6*) was amended

reading as follows *In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body.* That modification thus follows and reflects the principles set forth in Decision No. *U 5/98*, wherein the Constitutional Court concluded that „in the context of a multi-ethnic state such as BiH, the accommodation of cultures and ethnic groups prohibits not only their assimilation but also their segregation. Thus, segregation is, in principle, an illegitimate aim in a democratic society" (*op.cit. U 5/98 III*, paragraph 57).

I also hold that the principle of proportionality was not brought into question in electing delegates to the House of Peoples if one analyzes the provisions of Article 8, paragraphs 1 and 3, of the Constitution of the Federation. In particular, according to paragraph 1 of the said Article, *the number of delegates to be elected in each canton (constituency) shall be proportional to the population.* However, due to unequal dispersion of population (the number of members of certain peoples living in different parts of the Federation is not the same) Article 8 paragraph 3 of the Constitution of the Federation supplements paragraph 1 and gives „equal opportunity" to the constituent peoples constituting minority peoples in certain cantons to have their representative to the House of Peoples and to protect their interests. Along with the legitimate right to protect cultural and other particularities of ethnic groups (in the instant case, the members of the constituent peoples), which implies the prohibition of their assimilation and segregation, this is in fact the best way of affirmation of the principle of the constituent status of peoples.

The answer to the question whether the proportionality referred to in Article 8(1) of the Constitution of the Federation was brought into question by the wording „at least one", as provided for in paragraph 3 of the same Article of the Constitution of the Federation, depends on the position regarding the implementation of the „decision on the constituent status", i.e. the answer to the question whether it was necessary to amend the former paragraph 3 of Article 8 of the Constitution of the Federation in the manner as it stands now. I remind that the part of the provision reading „at least one" existed even before the implementation of the Decision on the Constituent Status of Peoples, but it was limited to Bosniacs and Croats, which indicates that from the outset the aim of the Entity Constitution was to have a minimum number of certain constituent peoples represented in the House of Peoples. Taking into account all what the „Decision on the Constituent Status" speaks of, it was certainly not possible to keep the provision of the former paragraph 3 of Article 8 of the Constitution of the Federation, which meant only Bosniac and Croats by „at least one". However, whether the part of the provision that reads „at least one" should exist at all in paragraph 3 of Article 8 of the Constitution of the Federation, given the principle of proportionality referred to in paragraph 1 of the same Article of the Constitution of the Federation, is a question at the discretion of

the assessment of the competent author of the Constitution, so that the Constitutional Court of BiH should not deal further with this matter. *In particular, that provision (such as it stands) has its objective and logical justification which has been mentioned above („unequal dispersion of population", „the same number of members of certain constituent peoples does not live in all parts of the Federation of BiH", „gives „equal opportunity" to the constituent peoples constituting minority peoples in certain cantons to have their representative to the House of Peoples and to protect their interests") and as such, that provision, in my opinion, does not question the fundamental human rights.*

It should be noted and accordingly determined that the applicant stressed that the caucuses of constituent peoples at the House of Peoples comprised 30 delegates from each constituent peoples before „the imposition of the Amendments to the Constitution of the Federation" so that each delegate represented 3.33% share in the caucus, which was, in total, a more realistic possibility of election of delegates in proportion to the structure of population in individual cantons. In this connection, I reiterate that according to the former provision of the Constitution of the Federation, the House of Peoples comprised 30 Bosniac and 30 Croat Delegates as well as an appropriate percentage of Other Delegates. However, in order to ensure equality, i.e. the constituent status of all the three peoples in the field of exercise of legislative power, the relevant provision of the Constitution of the Federation was amended so that all the three peoples (Bosniacs, Croats and Serbs) obtained 17 seats each in the House of Peoples. Certainly, the total number of delegates in the House of Peoples from a constituent people may raise the issue whether a constituent people is represented more or less credibly in that body following the elections. However, in the instant case, such a solution, in my opinion, is not contrary to the Constitution as the relevant provisions of the Constitution of the Federation and the Election Law as well determine the same number of delegates to the House of Peoples in the Federation as a whole. Would a higher number of delegates render better, i.e. more credible representation of constituent peoples and Others is also a question falling within the scope of competence of appropriate legislative authorities and constitutes a „wide margin of appreciation", and is not a question of constitutionality.

A very important and sensitive question is whether the hitherto manner of election of delegates to the House of Peoples of the Federation respects the will of voters? In other words, does that manner enable abuse, i.e. allows for the representatives of one constituent people to elect the representatives of another constituent people to the cantonal legislature at the direct elections, since their number is disproportional in some cantons, which affects further procedure and results of the election of delegates to the House of Peoples and respect for the principle of constituent status. I believe that it does not affect. In particular, if such a logic was accepted, then this would be a drastic departure from the concept and *model*

of electoral system in BiH, which nevertheless incorporates „compromises" and a kind of passable, although necessary, balance between civic and ethnic model. The election of delegates to the House of Peoples, I should reiterate, is essentially a combination of direct and indirect elections. In particular, delegates of the House of Peoples shall be elected by the Cantonal Assemblies from among their representatives selected at the direct-general elections by secret ballot (by canton on the whole territory of the Federation of BiH) in proportion to the ethnic structure when every voter, regardless of ethnic affiliation and regardless of the constituent people he/she is affiliated to, has the right to vote for any candidate on the electoral list of the political subject or independent candidate.

Furthermore, the applicant submitted a mathematical analysis and diagram presentation of, as he alleged, „deviation from the elected composition of the constituent peoples at the House of Peoples and proportional representation of population in the cantons from which they are elected". As an example he alleged the Posavina Canton where one delegate from the Bosniac people should be elected from the Posavina Canton and that represents 5.88% of the participation in the Bosniac caucus, while the real participation of the Bosniac people in that canton is 0,55%, which represents 10 times deviation. Another example is the Bosnian Podrinje Canton where the real percentage of the representation of the Croat people, as per 1991 census, is 0.01%, while the planned election of one delegate is 5.88% in the Croat Caucus in the House of Peoples, which represents the difference of 588 times when compared to the real situation. As regards the election of the Serb delegate, the most drastic situation, as alleged by the applicant, is in the Western Herzegovina Canton where, according to the 1991 census, 0.05 % Serbs lived and the Election Law provides for the election of one delegate which represents 5.88% of the Serb Caucus and that is almost 118 times deviation. It is not hard to notice that the applicant's allegations are reduced to the mathematical presentation of proportionality, where he indicates the examples of „deviation from the elected composition of the caucuses of constituent peoples and proportional share of population in the cantons from which they are elected. The manner in which the applicant expressed his understanding of the principle of proportionality related to the election of delegates to the House of Peoples does not mean that the law arrangement is unconstitutional or that the mentioned manner of election of delegates to the House of Peoples does not reflect the will of voters. Moreover, it cannot be seen from the aforementioned whether the representatives of a constituent people are elected by another constituent people, since the electoral lists are nor made to show the ethnic affiliation of the one that votes. Thus, it is not possible, at least in formal terms, to claim exactly that the delegates of a constituent people were elected at the direct elections by the members of another constituent people.

However, in my opinion, the crucial moment in this regard is that the election of delegates to the House of Peoples is the combination of direct and indirect elections. Equal number of members of certain constituent peoples does not live in all parts of the Federation so that the mentioned law arrangement, in constituting the cantonal assemblies and then, directly, in electing the delegates to the House of Peoples, gives a real opportunity to the constituent peoples constituting minority peoples in certain cantons to have their representatives in the House of Peoples that will protect their interest - both within the canton and in the Federation of BiH as a whole. Indeed, in this manner, the constituent peoples which do not constitute majority in a canton do not have exclusive right to elect delegates to the House of Peoples from the respective constituent peoples. One of the basic principles of the election right is guaranteed in that manner – equality of the weight of a vote, since the value of individual vote must not be affected by the factors of segregation, class or electoral geometry. This is the reason why it is appropriate here to mention the view expressed in Decision *No. U 5/98*: „(…) in the context of a multi-ethnic state such as BiH, the accommodation of cultures and ethnic groups prohibits not only their assimilation but also their segregation. Thus, segregation is, in principle, an illegitimate aim in a democratic society. There is no question therefore that ethnic separation through territorial delimitation does not meet the standards of a democratic state and pluralist society as established by Article I(2) of the Constitution of BiH taken in conjunction with paragraph 3 of the Preamble. *Territorial delimitation thus must not serve as an instrument of ethnic segregation, but – quite to the contrary – must provide for ethnic accommodation through preserving linguistic pluralism and peace in order to contribute to the integration of state and society as such*".

Also, with regards to the views of the European Court, namely**,** that states enjoy a wide margin of appreciation in establishing and regulating the electoral system to be applied, I would like to note that the model of electoral system which applies in the instant case to the principles and procedure for electing delegates to the House of Peoples (allocation of seats by cantons, election of delegates to the House of People that are elected by the Cantonal Assemblies and the rule of filling in) is the exact result of the free margin of appreciation of the legislator and discretionary right of the state to select and organize its electoral system. The question to know whether a different law arrangement and an electoral system differently designed would make it possible for the constituent peoples to be represented in the House of Peoples in a more credible manner is the question falling within the scope of the relevant legislative authorities and is not the issue of constitutionality. Therefore, in my opinion, taking as a starting point the fact that the House of Peoples of the Parliament of the Federation is not exclusively **the house of the constituent peoples** but it is also the house of federal units/cantons and that the

principle of „constituent status of peoples" should be understood more broadly than it was understood by the majority, with due respect for the majority opinion of my colleagues, I could not support a part of the decision.

Finally, I must note and add that the majority opinion did not give any reasons, or they are almost negligible, in respect of two very important issues for adopting such a significant decision.

The first one, the reasons are obviously and exclusively related to the provisions of Sub-chapter B, Article 10.12 (2), in the part reading *each of the constituent peoples shall be allocated one seat in every canton*, although Transitional and Final Provisions of Article 10.16.A para 2 of the Election Law, which were declared unconstitutional in the relevant part, apply as the key provisions. However, it does not follow in itself that these provisions are unconstitutional as well, and so for the same reasons as those for which, in the opinion of the majority, the provisions of Sub-chapter B, Article 10.12, in the relevant part, are unconstitutional, since these are absolutely different provisions. The majority opinion actually disregards the fact that the elections for the House for Peoples are carried out on the basis of Transitional and Final Provisions, Article 20.16.A, paragraph 2, item a) through j) (until Annex 7 of the GFAP has been fully implemented*)*. Next, the question as to why the provisions which are at any rate of temporary character are quashed (order for harmonization) remains without answer.

Moreover, I also point to the lack of reasons related to the opinion of the Venice Commission which explicitly noted (upon prior request of the Constitutional Court for giving an opinion on this case) that the principles underlying Europe's electoral heritage do not apply to the elections for the upper house as the elections for such houses are not conducted at the direct election as their function is to meet certain special requirements of Member States. The Council of Europe has 17 states of this kind, the legislative authority of which is composed of two houses. This, perhaps, questions the admissibility of the request for review of constitutionality (although this was not a disputable issue), since, in the Venice Commission's opinion, as I conceive it, the standards of „Europe's electoral heritage", which the applicant refers to in his request, cannot apply to the election of delegates to the House of Peoples. The majority opinion simply ignores that opinion, since it does not fit into the granting part of the decision.

CONTENTS

Case No. U 10/16

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Bakir Izetbegović, the Member of the Presidency of Bosnia and Herzegovina, Mr. Šefik Džaferović, First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, Mr. Safet Softić, Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, four members of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, 25 members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, 35 members of the House of Representative of the Parliament of the Federation of Bosnia and Herzegovina and 16 members of the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina for resolution of a constitutional dispute with the Entity of Republika Srpska" with regards to the Decision to Call a Republic Referendum, No. 02/1-021-894/16 of 15 July 2016 (*Official Gazette of the Republika Srpska*, 68/16)

Decision of 1 December 2016

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

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Having deliberated on the request of **Mr. Bakir Izetbegović**, **the Chairman of the Presidency of Bosnia and Herzegovina and Others** in case no. **U 10/16**, at its session held on 1 December 2016 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The requests of Mr. Bakir Izetbegović, a Member of the Presidency of Bosnia and Herzegovina, Mr. Šefik Džaferović, First Deputy Chair of the House of Representative of the Parliamentary Assembly of Bosnia and Herzegovina, Mr. Safet Softić, Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, four members of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, 25 members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, 35 members of the House of Representative of the Parliament of the Federation of Bosnia and Herzegovina and 16 members of the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina are hereby granted.

It is hereby established that the Decision to Call a Republic Referendum, No. 02/1-021-894/16 of 15 July 2016 (*Official Gazette of the Republika Srpska*, 68/16) is not compatible with Article I(2) and Article VI(5) of the Constitution of Bosnia and Herzegovina.

The results of the referendum held on 25 September 2016 are hereby annulled as the referendum was held based on the Decision to Call a Republic Referendum no. 02/1-021-894/16 of 15 July 2016 2016 (*Official Gazette of the Republika Srpska*, 68/16) which was established, in paragraph 2 of the enacting clause of this Decision, as not compatible with the Constitution of Bosnia and Herzegovina and contrary to the order of the Constitutional Court referred to in the Decision on Interim Measure no. *U 10/16* of 17 September 2016 (*Official Gazette of BiH*, 74/16).

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

Reasoning

I. Introduction

1. On 24, 29 and 31 August and 3 September 2016, Mr. Bakir Izetbegović, the Member of the Presidency of Bosnia and Herzegovina, Mr. Šefik Džaferović, First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, Mr. Safet Softić, Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, four members of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, 25 members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, 35 members of the House of Representative of the Parliament of the Federation of Bosnia and Herzegovina and 16 members of the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina („the applicants") filed individually with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") requests for resolution of a constitutional dispute with the Entity of Republika Srpska" with regards to the Decision to Call a Republic Referendum, No. 02/1-021-894/16 of 15 July 2016 (*Official Gazette of the Republika Srpska*, 68/16, „the Decision on Referendum"). The requests were registered under nos. *U 10/16*, *U*

11/16, *U 12/16*, *U 13/16*, *U 14/16*, *U 15/16* and *U 16/16*. The applicants also filed requests for interim measure wherein the Constitutional Court would suspend the application of the Decision on Referendum pending a final decision of the Constitutional Court.

2. As several requests related to the same factual and legal issue were filed with the Constitutional Court, the Constitutional Court, pursuant to Article 32(1) of the Rules of the Constitutional Court, took a decision on the joinder of requests in which the Constitutional Court would conduct one set of proceedings and take one decision under no. *U 10/16*.

3. In Decision on Interim Measure, No. *U 10/16* of 17 September 2016, the Constitutional Court suspended the application of the Decision on Referendum and decided that that decision would come into force immediately and produce legal effects pending a final decision on requests by the Constitutional Court of Bosnia and Herzegovina.

II. Proceedings before the Constitutional Court

4. Pursuant to Article 23(2) of the Rules of the Constitutional Court, the Constitutional Court forwarded the requests in cases *U 10/16* through *U 12/16* to the National Assembly of the Republika Srpska („the RS National Assembly") for response. As the text of the requests in cases *U 13/06* through *U 16/06* is the same as the text of the requests in cases *U 10/06* through *U 12/06*, the Constitutional Court did not forward those requests for response.

5. On 7 September 2016, the RS National Assembly submitted a response to the requests.

III. Request

a) Allegations from the request

6. The applicants are of the opinion that the Decision on Referendum is not compatible with Article I(2) and Article VI(5) of the Constitution of Bosnia and Herzegovina. In support of their claims, the applicants allege that the „dispute" in the present case relates to the issue of constitutional obligation of the Republika Srpska to respect the Constitution of Bosnia and Herzegovina, division of responsibilities between the State and the Entities and, in the present case, the obligation of the Republika Srpska to respect binding and enforceable decisions of the Constitutional Court, as prescribed by Article VI(5) of the Constitutional Court. In the applicants' opinion, the respect of responsibilities of the state institutions and constitutional institutions and their decisions are constitutional issues which, in the present case, fall under the scope of jurisdiction of the Constitutional Court.

Furthermore, the applicants allege that „an open, pro-active and aggressive violation of a constitutional provision may be given harsher qualifications in form of a violation of the principle of the rule of law and democratic order within the meaning of Article I(2) of the Constitution of Bosnia and Herzegovina".

7. The applicants further allege that the Constitutional Court established in its Decision on Admissibility and Merits, no. *U 3/13* of 26 November 2015 (*Official Gazette of BiH*, 100/15) that Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, 43/07) was not in conformity with Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1(1) and Article 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Based on the aforementioned, the Constitutional Court ordered that Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, 43/07) is harmonised with the Constitution of Bosnia and Herzegovina within a time limit of six months from the date of delivery of that Decision. That decision, as alleged by the applicants, entered into force on the date on which it was delivered to the National Assembly of the Republika Srpska and not later than on the date when it was published in the official gazettes. However, although Article VI(5) of the Constitution of Bosnia and Herzegovina prescribes that decisions of the Constitutional Court shall be final and binding, the mentioned decision has not been enforced because of an „obstructive passivity of the accountable [National Assembly] of the Republika Srpska". Furthermore, the National Assembly of the Republika Srpska „has failed to submit a reply in respect of the activities taken to enforce the Decision, meaning that it has completely ignored the highest judicial authority of Bosnia and Herzegovina".

8. Furthermore, the applicants allege that on 15 July 2016, the RS National Assembly passed a Decision on Referendum, wherein it was decided to hold a referendum based on the Law on Referendum and Civil Initiative of the Republika Srpska (the *Official Gazette of the Republika Srpska*, 42/10; „the Law on Referendum"). The referendum is scheduled for 25 September 2016. The referendum question will be: „Do you support that January 9th is observed and celebrated as the Republic Day?" Furthermore, the relevant authorities of the Republika Srpska, as alleged by the applicants, have taken a number of activities aimed at preparing and holding the republic referendum. In this connection, the applicants specify all their activities taken „for the purpose of indicating to the competent authorities in the Entity of the Republika Srpska that the challenged decision to call the referendum is unconstitutional". However, as further alleged, the RS National Assembly

disregarded their requests for rendering the decision on Referendum ineffective and for complying with the decision of the Constitutional Court No. *U 3/13*. This is the reason why the applicants hold that „the procedure to resolve this constitutional dispute has been unsuccessful". Furthermore, the applicants allege that the Council for Protection of Vital Interest at the Republika Srpska Constitutional Court („the RS Constitutional Court"), in its Decision no. UV-7/16 of 11 August 2016, established that the Decision on Referendum was not in violation of the national interest of the Bosniak people. The applicants allege that „it is clear that the present dispute may be resolve only before the Constitutional Court of Bosnia and Herzegovina".

9. Furthermore, the applicants have offered detailed reasons for considering in the present case that the Decision on Referendum is a legislative act („an individual act of the legislative authority"), by which a concretisation of the Law on Referendum … is carried out … which in no way can be construed as a formal or substantive „law" in terms of the abstract constitutional review under Article VI(3)(a) of the Constitution of BiH, but it constitutes an example *par excellence* of the so called federal dispute between the State and one Entity. However, for precautionary reasons, in case that the Constitutional Court of Bosnia and Herzegovina takes a different position, the applicants propose that „the present request be considered as a request for review of constitutionality".

Allegations related to Article VI(5) of the Constitution of Bosnia and Herzegovina

10. As to the alleged unconstitutionality of the Decision on Referendum with regards to Article VI(5) of the Constitution of Bosnia and Herzegovina, the applicants allege, *inter alia*, that the Entity of Republika Srpska has a constitutional and legal right to call a referendum based on Article 70 of the RS Constitution and Law on Referendum. However, as further alleged, Republika Srpska „must not abuse that democratic mechanism of the direct involvement of citizens in decision making in the manner that the referendum questions posed are in contravention of the final and binding nature of decisions of the Constitutional Court of Bosnia and Herzegovina and that they derogate the constitutional and legal obligations from the final and binding decisions of the Constitutional Court of BiH. Taking into account that in the specific case the Constitutional Court of BiH has decided that January 9th, as a date, is unconstitutional, than the referendum question: *Do you support that January 9th is observed and celebrated as the Republic Day?*, cannot be posed by the referendum". In this connection, the applicants allege that a referendum, as a direct democracy mechanism, is the manner in which binding decisions are made and is not a „public opinion examination". This is why, as they allege, one who wants to call a referendum must have not only a constitutional and legal basis to do so but it also has to

formulate a question in the manner that is not in contravention of a law and, in particularly, the highest law in the country, *i.e.* the Constitution of BiH. In support of their allegations, the applicants indicate, *inter alia*, the relevant case-law of the Constitutional Court of the Republic of Croatia, and notably the Decision of the Brčko District Supervisor, dated 19 August 2016, who decided not to give his consent to the holding of the RS referendum in the territory of the Brčko District as „such a referendum is in contravention of the Decision of the Constitutional Court of BiH No. *U 3/13*".

Allegations related to Article I(2) of the Constitution of Bosnia and Herzegovina

11. As to the alleged unconstitutionality of the Decision on Referendum with regards to Article I(2) of the Constitution of Bosnia and Herzegovina, the applicants refer to the relevant case-law of the European Court of Human Rights („the European Court") and Constitutional Court, according to which the enforcement of final and binding decisions is „an integral part of the decision-making process of the judicial authorities and is of decisive importance for the exercise of the rights". Given the aforesaid, the applicants argue that the Constitutional Court, in its Decision no. *U 3/13*, established the right of Bosniaks, Croats and Others not to be discriminated against, as the Constitutional Court concluded in that decision that they were discriminated against by Article 3(b) of the Law on Holidays of the Republika Srpska on the grounds of religion and ethnic origin. The enforcement of that decision, as they further allege, „is an integral part of decision-making on the collective rights of non-ethnic Serb population in the Entity of Republika Srpska". In this connection, the applicants allege that „despite the evidence on activities related to the conduct of referendum (…) the highest public officials in the Entity of Republika Srpska have been making statements in a clear, open, definite and very categorical manner that they will hold the referendum in the Entity of Republika Srpska regardless of a Decision of the Constitutional Court of BiH and/or a Decision of the High Representative for Bosnia and Herzegovina". In support of their allegations, the applicants present in detail the statements of certain official of the Republika Srpska. The applicants are of the opinion that this manifestly shows that the „representatives of the legislative, executive and judicial branches of government of Republika Srpska will not enforce the final and binding Decision of the Constitutional Court of Bosnia and Herzegovina".

12. According to the applicants, „it is evident that such a conduct has assumed a much stronger qualification that goes against the principles on the basis of which a democratic state functions in accordance with the rule of law; as a result, there is a strong tension throughout the State of BiH, including, but not limited to, the creation of unrest among citizens, the deterioration of political relationships among public authority representatives,

the challenges and offences for international community and the undermining of Bosnia and Herzegovina's European Integration process". Thus, in the applicants' view, Article I(2) of the Constitution of Bosnia and Herzegovina has been violated.

13. In view of the above, the applicants proposed that the Constitutional Court 1) grant the requests; 2) establish that the Decision on Referendum is unconstitutional in respect of Article I(2) and Article VI(5) of the Constitution of Bosnia and Herzegovina, 3) render the Decision on Referendum ineffective; 4) obligate the National Assembly of Republika Srpska to take all actions for annulment of all subsidiary decisions and activities based on the Decision on Referendum, and 5) order the National Assembly of Republika Srpska to inform the Constitutional Court of Bosnia and Herzegovina within three months on the measures taken.

14. The Constitutional Court notes that despite the Decision on Interim Measure, No. *U 10/16* of 17 September 2016, the Referendum was held in Republika Srpska on 25 September 2016, when the question determined in the Decision on Referendum was answered.

15. Furthermore, the Constitutional Court recalls that it established in Ruling No. *U 3/13* of 30 September 2016 that the National Assembly failed to enforce the Decision of the Constitutional Court of Bosnia and Herzegovina, No. *U 3/13* of 26 November 2015. The Court also established in the same Ruling that the provision of Article 3(b) of the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, 43/07) would be rendered ineffective on the first day following the date of publication of that ruling in the *Official Gazette of Bosnia and Herzegovina*.

b) Response to the requests

16. In its response to the requests, the RS National Assembly alleges, *inter alia*, that „a request for review of the constitutionality of the Decision of the Constitutional Court was submitted in case No. *U 3/13*, „which has not yet been considered by the Constitutional Court and no decision about the request has been passed." Therefore, as further stated, „the applicants' assertion is unacceptable that because of an obstructive passivity of the RS National Assembly, the quoted Decision of the Constitutional Court of BiH has not been enforced." This further means, as stated, that the RS National Assembly „has neither ignored decisions of the Constitutional Court nor has it offended a reputation of the Constitutional Court."

17. As to the essence of the requests filed, the RS National Assembly first gives detailed reasons for its position that the requests are inadmissible. In response, among other things,

it is stated that the Decision on Referendum is not a legislative act by its nature and, therefore, „the request seeking an interim measure before the Constitutional Court's consideration of the [RS National Assembly'] request for review [of Decision No. *U 3/13*] is ill-founded." In addition, the RS National Assembly also states that the Constitutional Court has no jurisdiction in the present case, as „it does not concern a dispute between the Republika Srpska and BiH and, particularly, it does not concern a dispute that has constitutional elements determined by the Constitution of BiH in order for the Constitutional Court to consider it". In order for a dispute to fall within the jurisdiction of the Constitutional Court, „it is necessary that there is a disagreement between the Republika Srpska and an institution of Bosnia and Herzegovina over a constitutional issue, right or legal facts." However, as stated, „an issue arises as regards which authority or institution of Bosnia and Herzegovina [the RS National Assembly], as an author of the Decision in question, has a dispute with over jurisdiction." In this regard, the RS National Assembly points out that there is no state authority at the level of Bosnia and Herzegovina „that has explicit jurisdiction conferred by the Constitution of Bosnia and Herzegovina to call and hold a referendum at the level of an Entity." Even the Parliamentary Assembly of BiH does not have such a jurisdiction, as further stated and specified, as to the issues that fall under its jurisdiction and, in particular, the issues that fall under the jurisdiction of the Entities. On the other hand, as pointed out, Article 77 of the RS Constitution stipulates that the RS National Assembly may decide „that certain issues within its competence are decided upon after the citizens have expressed their opinion in a referendum." Hence, the adoption of the Decision on Referendum „is to be considered exclusively as a concrete activity [of the RS National Assembly] in the process of consideration of modalities for enacting a normative act based on which the decision [No. *U 3/13]* would be enforced. Such a conclusion, as stated, follows from the legal nature of the Republic referendum, which […] has a consulting *i.e.* advisory nature". Only if the Constitution of the Republika Srpska authorised the RS National Assembly „to call mandatory referendums, then it would be possible to start from the assumption that the final and binding nature of the Decision *U 3/13* was called into question by the challenged decision." In view of the above, the RS National Assembly holds that the applicants' allegations are ill-founded that the Decision on Referendum decides the issue that does not fall within the jurisdiction of the Entity and calls into question the final and binding nature of the Decision of the Constitutional Court. As further stated, the relevant case does not concern a dispute within the meaning of the Constitution of BiH and; therefore, „dealing with the merits of the matter by the Constitutional Court of BiH would confirm the acceptance of legally unsustainable arguments given in the request and would prejudge the results of the Referendum".

18. The National Assembly further examines in detail why the jurisdiction of the Constitutional Court cannot be established also in respect of an abstract normative control of the Decision on Referendum. It is particularly underlined that this Decision is not a legislative act „based on which a concretisation of the Law on Referendum is carried out", as claimed by the applicants, but it is an individual act that cannot be the subject-matter of review of constitutionality before the Constitutional Court. Also, the RS National Assembly states that the applicants' allegations are ill-founded where they state that „the Republika Srpska has failed to take any action related to a friendly settlement of the dispute", because it has not been taken into account that „certain actions have actually been taken, primarily the filing of the request for review of the Decision [No. *U 3/13*]."

19. The response further offers details about the referendum mechanism and it particularly points out that the Law on Referendum was examined in detail by the European Commission for Democracy through Law (i.e. Venice Commission), which has a positive opinion on the matter. In addition, the RS National Assembly states that the referendum question relates to the public holiday in the Republika Srpska and that „the Day of the Republic has a great importance for peoples and citizens of the Republika Srpska." Furthermore, as stated, the Decision on Referendum was passed in the context of the relationship towards the application of the Constitutional Court's Decision [No. *U 3/13*] and „citizens of the Republika Srpska have a legitimate interest to express their political position and opinion in the Republic referendum, in a democratic and free manner, on the fact when and how the 9th January should be observed as a significant historical and political event." The RS National Assembly also states that although „the Republika Srpska expresses its dissatisfaction with the Decision of the Constitutional Court as regards its essential issues, the Republic referendum, as a democratic mechanism, serves the purpose of the enforcement of the Decision concerned. In this regard, the RS National Assembly points out that „there is only one explicit order in the mentioned Decision according to which the [RS National Assembly] is to „harmonise" Article 3(b) of the Law on Holidays of the Republika Srpska with the Constitution of Bosnia and Herzegovina, while „it is not stated that there is an obligation of [the RS National Assembly] to abolish the marking of January 9th as the Day of the Republic, nor is it concretised in some other way what is to be done in respect of that harmonisation." Therefore, as concluded by the RS National Assembly, the Decision of the Constitutional Court „cannot mean that the Republika Srpska is forbidden to mark the date, *i.e.* the day of its establishment."

20. It is also stated in the response that the Republic referendum will not endanger the sovereignty and integrity of Bosnia and Herzegovina and that the holding of the referendum is not in violation of either international treaties or the Dayton Peace Agreement or „the

highest legal act of Bosnia and Herzegovina." In addition, it is stated that the allegations are ill-founded that Article I(2) of the Constitution of Bosnia and Herzegovina is violated, and that it is „unfoundedly reiterated that the previous proceedings in the mentioned case were initiated with the aim to protect Bosniaks, Croats and the other citizens of the Republika Srpska from discrimination, as the Constitutional Court of Bosnia and Herzegovina could not decide that non-ethnic Serb population was discriminated against by Article 3(b) of the Law on Holidays of the Republika Srpska." Moreover, the RS National Assembly states that the reasoning of [the Decision on Referendum] is justified where it asserts that [the Decision in case No. *U 3/13*] is „disputable in several aspects, in particular it is disputable in legal aspect and also in aspect relating to the legitimacy of the authority rendering the decision", and that „all the decisions of the Constitutional Court are of disputable legal legitimacy, as the Constitutional Court of Bosnia and Herzegovina operates without the Law on the Constitutional Court of Bosnia and Herzegovina".

21. In response to the request, a reference is made to the 1992 Declaration Proclaiming the Republic of the Serb people of Bosnia and Herzegovina and to the continuity of the Republika Srpska, and the detailed arguments are given in support of the determination of January 9th as the Day of the Republic as well as an assessment of the Constitutional Court's Decision in case No. *U 3/13*. However, those allegations are irrelevant for decision-making in the present case and, therefore, the Constitutional Court will not interpret them separately.

22. As to the request for interim measure, the RS National Assembly alleges that it is unacceptable to order an interim measure, „which is primarily based on the applicants' statements that are founded on the present internal, legal, political and international crisis and interest, which would arise as a result of holding the referendum". The RS National Assembly holds that it is a sort of political pressure of the holders of the highest state offices on the Constitutional Court of BiH and a derogation from the democratic and constitutional principle of separation of powers and „negation of democratic institutions of direct democracy and prevention of introduction of good practice of direct participation of citizens in making decisions on vital and cumulative issues of the state and society".

23. Based on the response as a whole, the RS National Assembly suggests that the Constitutional Court establish that the requests are inadmissible, *i.e*. that the Constitutional Court pass the decision 1) rejecting the request to resolve a constitutional dispute because of the Decision on Referendum, or 2) if it decides to deal with the merits of the case, the Constitutional Court should dismiss the requests as Bosnia and Herzegovina „has no constitutional jurisdiction to regulate the legal matter related to the Republic referendum".

IV. Relevant Law

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

Article I
Bosnia and Herzegovina

(...)

2. Democratic principles

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

Article VI(3)(a)

The Constitutional Court shall uphold this Constitution.

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

- Whether an Entity's decision to establish a special parallel relationship with a 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.

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

Article VI(5)

Decisions of the Constitutional Court shall be final and binding.

25. The **Constitution of the Republika Srpska** (*Official Gazette of the Republika Srpska*, 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 31/02, 31/03, 98/03 and 115/05), in its relevant part reads:

Article 70

The National Assembly shall:

(...)

5. call for the republic referendum;

Article 77

The National Assembly may decide that certain issues within its competence shall be decided upon after the citizens have expressed their opinion in a referendum.

26. The **Law on Referendum and Civil Initiative of the Republika Srpska** (*Official Gazette of the Republika Srpska,* 31/11), in its relevant part, reads:

Article 2

(1) A referendum in the Republika Srpska („the Republic referendum") may be called, in accordance with the Constitution, to obtain the preliminary views of citizens.

(...)

Article 36

If citizens already stated their position on a certain issue by the referendum, the competent institution shall issue an appropriate act no later than six months after the date the referendum was held in accordance with the Constitution and Law.

27. The **Decision to Call a Republic Referendum** (*Official Gazette of the Republika Srpska*, 68/16) reads as follows:

I

The Republic Referendum will be conducted throughout the territory of the Republika Srpska.

II

The Referendum Question to be answered by the citizens of the Republika Srpska will be:

DO YOU SUPPORT THAT 9 JANUARY IS OBSERVED AND CELEBRATED AS THE REPUBLIC DAY?

III

The referendum will be held on 25 September 2016.

IV

The Government of the Republika Srpska is tasked with providing financial and technical support for conducting the referendum.

V

This Decision shall come into force the day after the day the decision is published in the Official Gazette of the Republika Srpska

V. Admissibility and Merits

28. The Constitutional Court will deal with the admissibility and merits of the requests together, as the requests and issues raised in them are complex.

29. The Constitutional Court notes that given the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the requests have been filed by the authorized persons.

30. As the requests in question challenge a decision of the lower legal force than a law, the Constitutional Court notes that in its hitherto case-law related to the situations where the issue of compatibility of a general act which has not been explicitly specified in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina was raised, it evaluated circumstances of each individual case in relation to the competence afforded to it on the basis of the mentioned Article, (see, *mutatis mutandis,* Constitutional Court, Decision on Admissibility and Merits *No. U 10/14* of 4 July 2014, published in the *Official Gazette of Bosnia and Herzegovina,* 6/14, paragraph 72 with further references, available at www.ustavnisud.ba).

31. Turning to the present case, all filed requests state that the Decision on Referendum containing the question „Do you support that 9 January is observed and celebrated as the Republic Day?" is incompatible with the Constitution of Bosnia and Herzegovina as the Constitutional Court, in Decision *U 3/13*, analyzed in detail that issue and established that such a provision of the Law on Referendum was incompatible with the Constitution of Bosnia and Herzegovina and international documents prohibiting discrimination.

32. The issue before the Constitutional Court is whether the challenged Decision on Referendum that was taken by the National Assembly raises an issue of constitutional dispute between the Entity of the Republika Srpska and institutions of Bosnia and Herzegovina, i.e. the Constitutional Court whose decisions are final and binding. In this connection, the Constitutional Court reminds that under Article VI(3)(a) of the Constitution

of Bosnia and Herzegovina, the Constitutional Court has exclusive jurisdiction to decide any dispute arising under this Constitution between Bosnia and Herzegovina and one of its Entities. According to the Constitutional Court's case-law related to constitutional disputes, „acts and activities of one of the Entities might rise issue of dispute between the given Entity and Bosnia and Herzegovina on some issue under the Constitution of Bosnia and Herzegovina on which only the Constitutional Court is competent to decide" (*mutatis mutandis*, *op. cit*, *U 10/14*, paragraph 75, with further references).

33. Furthermore, according to the case-law of the Constitutional Court, the issue of the conflict of competencies between different levels of authorities in Bosnia and Herzegovina in relation to the constitutional responsibilities (responsibility under the Constitution of Bosnia and Herzegovina) for the issuance of certain legal acts may result in the initiation of the constitutional dispute under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. Namely, in view of the text of second line of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina it is apparent that the Constitutional Court has jurisdiction to decide a dispute in which it is claimed that *certain law* is inconsistent with this Constitution. However, taking into account the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and the hitherto case-law on the issue of existence of constitutional dispute, the Constitutional Court notes that it follows from the relevant constitutional provisions that the question what constitutes a dispute under the Constitution of Bosnia and Herzegovina has not been exhausted through the lines 1 and 2 of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. It is precisely the last part of the sentence of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reading *including but not limited to,* which entitles the Constitutional Court to decide in each individual case, outside the scope of what is explicitly regulated by lines 1 and 2 of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, what is dispute in terms of the said Article of the Constitution of Bosnia and Herzegovina. Given the foregoing, the Constitutional Court, in the mentioned Decision *U 10/14*, established that there was a constitutional dispute in the case where the Government of the Republika Srpska took a Decision on the Verification on the Accuracy and Authenticity of Data during the Registration of the Permanent Residence on the Territory of the Republika Srpska, and, based on that, it examined conformity of that act with the Constitution of Bosnia and Herzegovina (*op. cit.*, *U 10/14*, paragraphs 77-79 with further references).

34. By bringing all the foregoing into connection with the context of the requests in question, the Constitutional Court notes that it found in its Decision No. *U 3/13* of 26 November 2015 that Article 3(b) of the Law on Holidays of the Republika Srpska was not compatible with the Constitution of Bosnia and Herzegovina and international

documents as specified in the operative part of the mentioned decision. Accordingly, the Constitutional Court obliged the RS National Assembly to harmonize Article 3(b) of the Law on Holidays within a time limit of six months from delivery of the decision and to inform the Constitutional Court within the same time limit of the measures taken for the same purpose.

35. Furthermore, on 15 July 2016 the National Assembly took the Decision on Referendum containing the referendum question „Do you support that 9 January is observed and celebrated as the Republic Day?". The basis for the decision of the National Assembly were the provisions of the Constitution of the Republika Srpska, according to which the National Assembly may decide that certain issues „within its competence shall be decided upon after the citizens have expressed their opinion in a referendum". This competence of the Republika Srpska is not challenged by the applicants either. However, the applicants are of the opinion that the referendum question asked in such a manner constitutes the basis for referral of a constitutional dispute, since, as they claimed, there is a decision on the same issue, which was taken by the Constitutional Court as an institution of Bosnia and Herzegovina, which is final and binding according to Article VI(5) of the Constitution of Bosnia and Herzegovina. However, in its response to the requests the National Assembly insisted on the claim that the conduct of the referendum with such a referendum question was „democratic means in the function of its implementation".

36. In its Ruling No. *U 3/13* of 30 September 2016, the Constitutional Court considered the same allegations of the National Assembly as those presented in Information on the Measures Taken with the Aim of Enforcing the Decision of the Constitutional Court No. *U 3/13*. It established in that Ruling that the mentioned decision was not enforced. The Constitutional Court noted *inter alia* in the reasons for that Ruling that in order to understand and enforce the order of the Constitutional Court referred to in decision No. *U 3/13* „it is not sufficient to read and interpret only paragraph 2 of the enacting clause of this decision that contains that order but one also must consider paragraph 1 of the enacting clause and the entire reasoning of that decision in which the Constitutional Court presented its legal understanding on which such an enacting clause is founded. Indeed, the order referred to in paragraph 2 is determined after the Constitutional Court concluded that Article 3(b) of the Law on Holidays is not in conformity with the Constitution of Bosnia and Herzegovina (paragraph 1 of the enacting clause of the Decision"). Furthermore, the Constitutional Court emphasized that „a [referendum] question posed in this manner disregards the decision of the Constitutional Court No. *U 3/13* and its position on the fact that January 9 as the holiday of the Entity „must represent all citizens of Republika Srpska who have equal rights according to the very Constitution of the Republika Srpska" and

that this date as the holiday of Republika Srpska „is not compatible with the constitutional obligation on non-discrimination in terms of rights of groups as it privileges one people only, Serb people" (*op. cit.* Ruling *U 3/13*, paragraph 13).

37. In dealing with the merits of the request in question, the Constitutional Court does not see any reason for taking a different position. The referendum question which was determined in the Decision on Referendum is the same issue which the Constitutional Court decided in its Decision No. *U 3/13*. This further means that the National Assembly, by calling the referendum with the same question on which the Constitutional Court took a final and binding decision, caused a constitutional dispute which can be decided only by the Constitutional Court. This dispute certainly does not relate to the issue whether the National Assembly can call a referendum or not, nor does it relate to the question whether a State authority or institution has competence for that issue, which was alleged in the response to the requests. This dispute indeed relates to what was unfoundedly alleged by the National Assembly, namely, that there is a „disagreement between the Republika Srpska and some of the institutions of Bosnia and Herzegovina regarding a constitutional issue of law or legal facts". In particular, the adoption of the Decision in Case No. *U 3/13* entailed the obligation for the Republika Srpska to enforce the Decision of the Constitutional Court. Disagreement with that decision neither reduce nor derogate the constitutional obligation to comply with the final and binding decision of the Constitutional Court as an institution of Bosnia and Herzegovina, about which the National Assembly gave its opinion in detail in the response to the requests. The constitutional nature of the decisions of the Constitutional Court means that none of the authorities, legislative, executive or judicial, has competence for issuing different acts on the issues which were decided in such a decision or for reviewing such a decision in any manner whatsoever, including the referendum, which is the case here. Quite the contrary, the constitutional provision related to the final and binding nature of the decisions of the Constitutional Court can only mean: all authorities are obliged to enforce such decisions. This is also required by Article I(2) of the Constitution of Bosnia and Herzegovina, which stipulates the principle of the rule of law, the integral part of which is the enforcement of court decisions.

38. Moreover, although the Constitutional Court will not analyse in detail the legal nature of the provisions on referendum, it notes that contrary to the National Assembly's allegations that the referendum has only „a consultative or advisory nature", Article 36 of the Law on Referendum stipulates that after citizens have stated their position on a certain issue," the competent institution shall issue an appropriate act not later than six months after the date the referendum was held. The provision formulated in such a way stipulates the obligation for the competent authority to implement the will which the

citizens expressed at the referendum, which further means that the question which was already decided by a final and binding decision of the Constitutional Court, wherein the obligation of the Republika Srpska was determined with regards to the specific issue, cannot be asked as a referendum issue.

39. It should be noted that the National Assembly still has the competence to call a referendum in respect of the issue regarding the specific date on which the Day of the Republika Srpska will be celebrated. However, in exercising that competence, the National Assembly must take account of the binding decisions of the Constitutional Court as an institution of Bosnia and Herzegovina. Therefore, the date in respect of which a referendum could possibly be called under the jurisdiction of the National Assembly cannot be 9 January, as it is contrary to Decision No. *U 3/13*. In particular, the Constitutional Court explicitly noted that that date, „in the opinion of the Constitutional Court and according to the position of the Venice Commission… can hardly be seen as compatible with the basic values declared in the Constitution of the Republika Srpska, namely with respect for human dignity, freedom and equality, national equality, with democratic institutions, rule of law, social justice, pluralistic society, guarantees for and protection of human freedoms and rights as well as the rights of minority groups in line with the international standards, prohibition of discrimination" (*op. cit, U 3/13*, paragraph 79). Given the foregoing, the allegations of the Republika Srpska that the referendum in the present case is „in the function of implementation" of the decision of the Constitutional Court cannot be accepted.

40. In view of the foregoing, the Constitutional Court holds that the Decision on Referendum is inconsistent with Article I(2) and Article VI(5) of the Constitution of Bosnia and Herzegovina.

41. The Constitutional Court holds that given the circumstances it is not necessary to decide that the Decision on Referendum is quashed and rendered ineffective as the essence of that decision is exhausted, since the referendum was held so that it does not produce legal effects any longer.

42. However, having in mind that referendum was held in Republika Srpska on 25 September 2016 despite the order of the Constitutional Court referred to in the Decision on Interim Measure no. *U 10/16* of 17 September 2016 and based on the Decision to Call a Referendum which was established to be incompatible with the Constitution of Bosnia and Herzegovina and with an obligation referred to in the final and binding decision of the Constitutional Court no. *U 3/13*, the Constitutional Court finds it necessary to annul the results of the referendum held in such a manner.

VI. Conclusion

43. The Constitutional Court concludes that the Decision on Referendum, No. 02/1-02-894/16 of 15 July 2016, is not compatible with Article I(2) and Article VI(5) of the Constitution of Bosnia and Herzegovina, since that decision determined the referendum issue on which there is a final and binding decision of the Constitutional Court of Bosnia and Herzegovina as institution of Bosnia and Herzegovina, and such decision must be respected by all public authorities and institutions. Considering this, the Constitutional Court concludes that the results of the referendum held based on the Decision to Call a Referendum which is inconsistent with the Constitution of Bosnia and Herzegovina and held contrary to the Decision on Interim Measure no. *U 10/16* of 17 September 2016, must be annulled.

44. Pursuant to Article 64(4) of the Rules of the Constitutional Court, the Decision on Interim Measure, No. *U 10/16* of 17 September 2016, does not produce legal effects any longer.

45. Under Article 43 of the Rules of the Constitutional Court, Vice-President Zlatko M. Knežević and Judge Miodrag Simović gave their statement of dissent.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 5/16

DECISION ON ADMISSIBILITY AND MERITS

Request of Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives at the time of filing the request for the review of constitutionality of the provisions of Article 84 (2), (3), (4) and (5), Article 109 (1) and (2), Article 117(d), Article 118 (3), Article 119 (1), Article 216 (2), Article 225 (2) and Article 226 (1) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13; „the Code") with the provisions of Article I(2), II(3) (b), (e) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3, 6, 8 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

Decision of 1 June 2017

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1), (2) and (3) and Article 60 and Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Mato Tadić, Vice-President,

Mr. Zlatko M. Knežević, Vice-President,

Ms. Margarita Tsatsa-Nikolovska, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Mr. Giovanni Grasso

Having deliberated on the request filed by **Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives at the time of filing the request**, in the case no. **U 5/16**, at its session held on 1 June 2017 adopted the following

PARTIAL DECISION ON ADMISSIBILITY AND MERITS

The request filed by Ms. Borjana Krišto, the Second Deputy Chair of the House of Representatives at the time of filing the request, is partly granted.

It is hereby established that the provisions of Article 84 (2), (3) and (4) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 117 (d) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07,

32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) in connection with Article II(3) (f) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 118 (3) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH***, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) in connection with Article II(3) (f) of the Constitution of Bosnia and Herzegovina.**

It is hereby established that the provisions of Article 225 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) in connection with Article II(3) (f) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 226 (1) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina.

The Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered, in accordance with Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, not later than six months from the date of communicating the present decision, to harmonize the provisions of:

Article 84 (2), (3) and (4) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina,

Article 117 (d) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09,

93/09 and 72/13) with the provisions of Article I(2) in connection with Article II(3) (f) of the Constitution of Bosnia and Herzegovina,

Article 118 (3) and Article 225 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the provisions of Article I(2) in connection with Article II(3)(f) of the Constitution of Bosnia and Herzegovina,

Article 225 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the provisions of Article I(2) in connection with Article II(3)(f) of the Constitution of Bosnia and Herzegovina,

and Article 226 (1) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina.

The Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered, in accordance with Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina to inform the Constitutional Court, within six months from the date of communicating this decision, on the measures taken to enforce the present decision.

The request filed by Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives at the time of filing the request, for the review of constitutionality of the provisions of Article 84 (5), Article 119 (1) and Article 216 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) is hereby dismissed as ill-founded.

It is hereby established that the provisions of 84 (5) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are in conformity with the provisions of Articles I(2) and II(3) (e) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 119 (1) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are in conformity with the provisions of Article I(2) and II(3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

It is hereby established that the provisions of Article 216 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are in conformity with the provisions of II(3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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

Reasoning

I. Introduction

1. On 27 June 2016, Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives at the time of filing the request („the applicant") filed a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for the review of constitutionality of the provisions of Article 84 (2), (3), (4) and (5), Article 109 (1) and (2), Article 117(d), Article 118 (3), Article 119 (1), Article 216 (2), Article 225 (2) and Article 226 (1) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13; „the Code") with the provisions of Article I(2), II(3) (b), (e) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3, 6, 8 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention").

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, the Parliamentary Assembly of Bosnia and Herzegovina, the House of Representatives and the House of Peoples respectively were requested on 1 July 2016 to submit their respective replies to the request.

3. The House of Representatives and the House of Peoples submitted their replies to the request on 1 August and 28 July 2016 respectively.

4. In accordance with Article 90(1) (b) of the Rules of the Constitutional Court, at the session held on 30 and 31 March 2017 the Constitutional Court adopted a decision disqualifying the President of the Constitutional Court Mr. Mirsad Ćeman and the Judge Ms. Seada Palavrić from working and deciding on the respective request, as they had taken part, as members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, in the enactment of the Law, which provisions were challenged.

5. Pursuant to Article 60 of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court reached a conclusion to adopt a partial decision and to postpone the adoption of the decision regarding the part relating to the establishment of the conformity of Article 109 (1) and (2) of the Code with the provisions of Article II(3) (b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3 and 8 of the European Convention.

III. Request

a) Allegations stated in the request

1. Right of the Witness to Refuse to Respond, Article 84 (2), (3), (4) and (5) of the Code

6. The applicant indicated that the provisions of Article 84 (2), (3), (4) and (5) of the Code are contrary to Article II(3)(e) in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention.

7. In reasoning these allegations, the applicant has stated that the mentioned provisions are unspecified and imprecise, because they do not prescribe the limits, or the manner in which the Chief Prosecutor treats a witness who is being granted immunity, *i.e.* the Chief Prosecutor may decide not to undertake criminal prosecution for even the most serious criminal offenses, so that the victim and the damaged person lose the right to satisfaction in a criminal procedure. The legislator failed to set a clear and precise limit considering

the nature and gravity of criminal offenses, which may justify the failure to undertake criminal prosecution on account of protecting the public interest in a democratic society, which is based on the rule of law and the respect for human rights.

8. In adittion, a „prosecutor's pardon" entirely excludes the court and its role in a criminal procedure, and the witness becomes an evidentiary instrument in the hands of the prosecution, which leads to the violation of the principle of the equality of citizens before the law and the principle of legality, thus it becomes questionable as to what happens with the property gain effected through the criminal offense. Prosecutor's pardon entirely excludes the court and its role in a criminal procedure, and the witness becomes an evidentiary instrument in the hands of the prosecution.

2. Physical Examination and Other Procedures, Article 109 (1) and (2) of the Code

9. The applicant indicated that the provisions of Article 109 (1) and (2) of the Code are in contravention of Article II(3)(b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3 and 8 of the European Convention.

10. In reasoning these allegations, the applicant indicated that the mentioned provisions prescribe the taking of blood samples and other medical procedures, essentially speak about medical treatments and criteria according to which, against the will and without the consent of the accused and other persons, they may be subjected to such medical treatments, which may raise the issue of inhuman and degrading treatment under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention. The applicant pointed to the case-law of the European Court of Human Rights according to which the right to private life was narrowly connected to the term of personal integrity, and any interference with the physical integrity must be prescribed by law and must be proportionate to the legitimate purpose for which it is exercised and for which the consent of the given person is required. Within the meaning of the case-law of the European Court of Human Rights (the applicant specified the judgments of the European Court of Human Rights) any performance of coercive medical procedure with the aim of collecting evidence must be convincingly justified by the facts of the present case, whereby it is necessary to be mindful of the gravity of the criminal offense concerned, and it must also be shown that the alternative methods of extracting evidence were considered. Besides, the procedure must not be followed by any risk of permanent damage to the suspect's health. The provisions of Article 109 (1) and (2), from the aspect of Article 3 of the European Convention, do not specify the degree to which coercive medical procedure was necessary for obtaining evidence, the risk to the suspect's health, the manner in which the procedure was performed and the physical pain and mental suffering the procedure

inflicted, the degree of physician's (medical) supervision made available and the effects on the suspect's health.

3. Criminal Offenses as to Which Special Investigative Measures May Be Ordered, Article 117 point d) of the Code

11. The applicant indicated that the provisions of Article 117 point d) of the Code are contrary to Article II(3)(f) of the Constitution of Bosnia and Herzegovina in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina.

12. In reasoning these allegations, the applicant indicated that the prescribing in this manner made it possible for the exception to be turned into a rule, that is to say that elements of disproportion, excessiveness and covert arbitrariness are introduced into the criminal legislation. Irrespective of the legitimate goal, the said provision opens up a possibility to undertake investigative actions for almost all criminal offenses enumerated in the Criminal Code.

4. Competence to Order the Measures and the Duration of the Measures, Article 118 paragraph (3) of the Code

13. The applicant indicated that the provisions of Article 118 paragraph (3) of the Code are contrary to Article II(3)(f) of the Constitution of Bosnia and Herzegovina in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina.

14. In reasoning these allegations, the applicant indicated that, according to these provisions, investigative actions may last up to one month at the longest, and may, for particularly important reasons, and upon the reasoned motion of the Prosecutor, be prolonged for a term of another month, with measures referred to in points a) and c) of Article 116 of the Code lasting up to six months in total at the longest. Such a long period of the duration of measures can in no way be considered a proportionate time limit in relation to the nature and need to restrict constitutional rights. The portion of the provision reading „particularly important reasons" violates the principle of the rule of law and of the right to a fair trial, because the law is not clear and transparent and leaves a possibility for arbitrary interpretation and procedures on the part of a body before which a procedure is conducted. Besides, that part of the provision is at the same time a presumption and a standard, on which a preliminary proceeding judge relies when applying this provision. Namely, it is an undisputed fact that a prolonged duration of special investigative actions will be necessary when it comes to criminal offenses of terrorism, severe forms of corruption, *i.e.* organized crime, trafficking in persons, in narcotic drugs and in arms. However, the disputed provision did not make a necessary distinction between such offenses and those

that do not have such elements, and to which the extension of time limits should not apply. Due to the aforementioned, the disputed provision causes legal unforeseeability and legal uncertainty. The applicant indicated that the restrictions on citizens' constitutional rights to privacy are within the judicial discretion of a Prosecutor and a preliminary proceeding judge, based on unspecified presumptions for the extension of the enforcement of special investigative actions.

5. Materials Received through the Measures and Notification of the Measures Undertaken, Article 119 paragraph (1) of the Code

15. The applicant indicated that the provisions of Article 119 paragraph (1) of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

16. In reasoning these allegations, the applicant indicated that the regulation of special investigative actions is not in conformity with the Constitution of Bosnia and Herzegovina for the reason that there is no mechanism securing a judicial control. Namely, the Court decides on the commencement of the undertaking of special investigative actions, however the mentioned provision prescribes that upon the completion of actions a police body prepares a report for the Prosecutor's Office, and a Prosecutor does so for a preliminary proceeding judge and only then a preliminary proceeding judge obtains a complete information on the results of the special investigative actions. A preliminary proceeding judge, after determining the commencement of the application is unable to oversee whether there still exists a need for the conduct of such actions, since the Code does not impose on a preliminary proceeding judge an obligation to demand daily or periodical reports from the police, neither does it impose an obligation on the police to submit such reports of its own initiative to a preliminary proceeding judge, or to a Prosecutor for that matter. The applicant indicated that the European Court of Human Rights holds that the control over the secret oversight measures should be, desirably, entrusted to a court, as the judicial control affords the best guarantees for independence, impartiality and compliance with procedures. In the case of *Rotaru v. Romania* the European Court of Human Rights indicated that although intelligence services may exist legitimately in a democratic society, the powers of secret oversight of citizens may be tolerated solely to an extent that is strictly necessary for the protection of democratic institutions. Within the meaning of Article 8 of the European Convention, oversight procedures must follow the values of a democratic society, particularly the rule of law, which implies that the interference of executive authorities with the rights of individuals must be subjected to effective oversight, which should be carried out by a court. The disputed provision did not envisage such a possibility, instead it prescribed the submission of the relevant

data, which makes it possible to reach a conclusion on whether the reasons for which actions were ordered had ceased and whether actions must be stopped. It is certain that the obligations of the police stipulating that „upon the completion of the application of the measures referred to in Article 116 of this Code, all information, data and objects obtained through the application of the measures, as well as a report, must be submitted by police authorities to the Prosecutor" are not sufficient for the realization of that goal. A preliminary proceeding judge must have a legal power at all times throughout the conduct of special investigative actions and request from a Prosecutor to submit a report on the justification of their further continuation, or when he/she finds so necessary, for the purpose of evaluating the justification of further continuation of actions, request from the police to submit daily reports and documentation to the extent and measure he/she is authorized to determine on one's own.

6. Order for Conducting an Investigation, Article 216 paragraph (2) of the Code

17. The applicant indicated that the provisions of Article 216 paragraph (2) of the Code are contrary to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention in connection with Article 13 of the European Convention.

18. In reasoning these allegations, the applicant indicated that the order to conduct an investigation is the first act placing a certain person under a criminal procedure, which, in its essence, constitutes a sort of restriction on fundamental rights and freedoms, as it does not secure the right to appeal or other legal protection against the initiation of criminal prosecution. The order to conduct an investigation contains the data on a perpetrator of the criminal offense if known, the description of the act pointing out the legal elements which make it a crime, the legal name of the criminal offense, *etc*. The legislator is, therefore, obliged to prescribe an obligation that a person must be informed immediately *ex officio* that he/she is a suspect and to constitute at the same time an effective legal instrument of protection against unlawful prosecution. The right to an appeal may be exceptionally ruled out in cases stipulated by law, if other legal protection is ensured. The right to a legal remedy is a universal constitutional and legal right of a human and a citizen. The order to conduct an investigation does not contain the instruction on the legal remedy, and citizens do not have the secured right to appeal against. Not a single law provides for other legal protection against the mentioned order to conduct an investigation. A Prosecutor has issued an order to conduct an investigation, and the person against whom the investigation is conducted has no knowledge whatsoever about it and has not been informed of his/her rights. That could be justified for the most serious criminal offenses, if found in a particular case that there is a risk to life or body or property of greater extent, which the legislator should specify precisely in the law.

7. Completion of Investigation, Article 225 paragraph (2) of the Code

19. The applicant indicated that the provisions of Article 225 paragraph (2) of the Code are contrary to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention in connection with Article 13 of the European Convention.

20. In reasoning these allegations, the applicant indicated that the mentioned provisions regulate the situation where the investigation is not completed within six months, that the Collegium of the Prosecutor's Office shall undertake necessary measures, without prescribing the final time limit. That is contrary to the right to a trial within a reasonable time, and a suspect and damaged person are not afforded the right to complain over the delay of a procedure and other irregularities in the course of investigation, so a possibility is left for investigation to be conducted for several years. The case-law of the European Court of Human Rights shows that non-effectiveness of investigative procedures, if established that it existed, always leads to a violation of the rights referred to in the Convention. Criminal prosecution must be independent and impartial and investigation must be effective (comprehensive, thorough, quick, diligent, attentive and meaningful).

8. Issuance of the Indictment, Article 226 paragraph (1) of the Code

21. The applicant indicated that the provisions of Article 226 of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina and Article 13 of the European Convention.

22. In reasoning these allegations, the applicant indicated that the mentioned provision is incomprehensive from the aspect of a trial within a reasonable time, which stipulates that „If during the course of an investigation, the Prosecutor finds that there is enough evidence for grounded suspicion that the suspect has committed a criminal offense". Upon the completion of an investigation a Prosecutor has at his/her disposal the information, on which basis he/she could either suspend a procedure or issue an indictment. The legislator is obliged to prescribe a time limit for the issuance of an indictment, as well as the extension thereof when it comes to the complex or particularly complex cases. In addition, the mentioned provisions do not envisage a legal instrument against the delay of the proceedings and other irregularities in the investigation procedure, which is contrary to the principle of the rule of law, legal certainty and legal consistency.

b) Reply to the request

23. The House of Representatives, Constitutional-Legal Committee, indicated that it considered the respective request, and that it adopted a conclusion with six votes in favor,

one against and one abstention as follows: „The Constitutional-Legal Committee of the House of Representatives of the Parliamentary Assembly of BiH considered the request of the Constitutional Court of BiH[…] and adopted a conclusion that the Parliamentary Assembly of BiH adopted the Criminal Procedure Code of Bosnia and Herzegovina".

24. The House of Peoples, Constitutional-Legal Committee, indicated that it considered the respective request, and that the Constitutional Court, in accordance with its competence, should decide on the consistency between the Code with the Constitution of Bosnia and Herzegovina.

IV. Relevant Law

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

Article 84
Right of the Witness to Refuse to Respond

(1) The witness shall be entitled to refuse to answer such questions with respect to which a truthful reply would result in the danger of bringing prosecution upon himself.

(2) The witnesses exercising the right referred to in to Paragraph 1 of this Article shall answer the same questions provided that immunity is granted to such witnesses.

(3) Immunity shall be granted by the decision of the Chief Prosecutor of BiH.

(4) The witness who has been granted immunity and who has testified shall not be prosecuted except in case of false testimony.

(5) A lawyer as the advisor may be assigned by the Court's decision to the witness during the hearing if it is obvious that the witness himself is not able to exercise his rights during the hearing and if his interests cannot be protected in some other manner.

Article 116 paras 1 and 2
Types of Special Investigative Actions and Conditions of Their Application

(1) If evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties, special investigative measures may be ordered against a person against whom there are grounds for suspicion that he has committed or has along with other persons taken part in committing or is participating in the commission of an offense referred to in Article 117 of this Code.

(2) Measures referred to in Paragraph 1 of this Article are as follows:

a) surveillance and technical recording of telecommunications;
b) access to the computer systems and computerized data processing;
c) surveillance and technical recording of premises;
d) covert following and technical recording of individuals, means of transport and objects related to them;
e) undercover investigators and informants;
f) simulated and controlled purchase of certain objects and simulated bribery;
g) supervised transport and delivery of objects of criminal offense.

Article 117
Criminal Offenses as to Which Special Investigative Measures May Be Ordered

Measures referred to in Article 116(2) of this Code may be ordered for following criminal offenses:

a) criminal offenses against the integrity of Bosnia and Herzegovina;
b) criminal offenses against humanity and values protected under international law;
c) criminal offenses of terrorism;
d) criminal offenses for which, pursuant to the law, a prison sentence of three (3) years or more may be pronounced.

Article 118 paras 1, 3, 5 and 6
Competence to Order the Measures and the Duration of the Measures

(1) Measures referred to in Article 116(2) of this Code shall be ordered by the preliminary proceedings judge in an order upon the properly reasoned motion of the Prosecutor containing: the data on the person against which the measure is to be applied, the grounds for suspicion referred to in Article 116(1) and (3) of this Code, the reasons for its undertaking and other important circumstances necessitating the application of the measures, the reference to the type of required measure and the method of its implementation and the extent and duration of the measure. The order shall contain the same data as those featured in the Prosecutor's motion as well as ascertainment of the duration of the ordered measure.

(3) Measures referred to in Subparagraphs a) through d) and g) Article 116(2) of this Code may last up to one (1) month, while on account of particularly important reasons the duration of such measures may upon the properly reasoned motion of the Prosecutor be prolonged for a term of another month, provided that the measures referred

to in Subparagraphs a), b) and c) last up to six (6) months in total, while the measures referred to in Subparagraphs d) and g) last up to three (3) months in total. The motion as to the measure referred to in Article 116(2)(f) may refer only to a single act, whereas the motion as to each subsequent measure against the same person must contain a statement of reasons justifying its application.

(5) By way of a written order the preliminary proceedings judge must suspend forthwith the execution of the undertaken measures if the reasons for previously ordering the measures have ceased to exist.

(6) The orders referred to in Paragraph 1 of this Article shall be executed by the police authorities. The companies performing the transmission of information shall be bound to enable the Prosecutor and police authorities to enforce the measures referred to in Article 116(2)(a) of this Code.

Article 119 paras 1 and 3
Materials Received through the Measures and Notification of the Measures Undertaken

(1) Upon the completion of the application of the measures referred to in Article 116 of this Code, all information, data and objects obtained through the application of the measures as well as a report must be submitted by police authorities to the Prosecutor. The Prosecutor shall be bound to provide the preliminary proceedings judge with a written report on the measures undertaken. On the basis of the submitted report the preliminary proceedings judge shall evaluate the compliance with his order.

(3) The preliminary proceedings judge shall forthwith and following the undertaking of the measures referred to under Article 116 of this Code inform the person against whom the measures were undertaken. That person may request from the Court a review of legality of the order and of the method by which the order was enforced.

Article 216 paras 1 and 2
Order for Conducting an Investigation

(1) The Prosecutor shall order the conduct of an investigation if grounds for suspicion that a criminal offense has been committed exist.

(2) The order to conduct the investigation shall contain: data on perpetrator if known, descriptions of the act pointing out the legal elements which make it a crime, legal name of the criminal offense, circumstances that confirm the grounds for suspicion for conducting an investigation and existing evidence. The Prosecutor shall list in the order which circumstances need to be investigated and which investigative measures need to be undertaken.

Article 225 paras 1 and 2
Completion of Investigation

(1) The Prosecutor shall order a completion of investigation after he concludes that the status is sufficiently clarified to allow for the bringing of charges. Completion of the investigation shall be noted in the file.

(2) If the investigation has not been completed within six (6) months after the order on its conducting has been issued, the Collegium of the Prosecutor's Office shall undertake necessary measures in order to complete the investigation.

Article 226 paragraph 1
Issuance of the indictment

(1) If during the course of an investigation, the Prosecutor finds that there is enough evidence for grounded suspicion that the suspect has committed a criminal offense, the Prosecutor shall prepare and refer the indictment to the preliminary hearing judge.

V. Admissibility

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

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

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

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

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

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

28. The remainder of the respective request was filed by the Second Deputy Chair of the House of Representatives of the Parliamentary Assembly. Bearing in mind the

aforementioned, within the meaning of the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court has established that the remainder of the respective request is admissible, because it was filed by an authorized entity, and that there is not a single formal reason under Article 19 of the Rules of the Constitutional Court rendering the request inadmissible.

VI. Merits

29. The applicant claims that the provisions of Article 84 (2), (3), (4) and (5), Article 117(d), Article 118 (3), Article 119 (1), Article 216 (2), Article 225 (2) and Article 226 (1) of the Code are not in conformity with the provisions of Article I(2), II(3) (e) and (f) of the Constitution of Bosnia and Herzegovina and the provisions of Articles 6, 8 and 13 of the European Convention.

VI. 1. Right of the Witness to Refuse to Respond, Article 84 (2), (3), (4) and (5) of the Code

30. The applicant indicated that the provisions of Article 84 (2), (3), (4) and (5) of the Code are contrary to Article II(3)(e) in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention. The applicant claims that the mentioned provisions are not in conformity with the Constitution of Bosnia and Herzegovina, because they are unspecified and imprecise, since they do not have a clear limit considering the nature and gravity of criminal offenses, which may justify the failure to undertake criminal prosecution on account of protecting the public interest in a democratic society, which is based on the rule of law and the respect for human rights. The Chief Prosecutor may decide not to undertake criminal prosecution for even the most serious criminal offenses.

31. The Constitutional Court finds, first and foremost, that the provisions of Article 84 paragraph 1 of the Code prescribe that „the witness shall be entitled to refuse to answer such questions with respect to which a truthful reply would result in the danger of bringing prosecution upon himself". In that respect the Constitutional Court recalls that the European Court of Human Rights in the case of *Saunders v. The United Kingdom* (see, the European Court of Human Rights, judgment of 17 December 1996) noted that „although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case

against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention". The Constitutional Court finds that the mentioned provision „incorporated" into the Code the mechanism of privileges against self-incrimination as one of the fundamental rights, which makes a part of the principle of a fair procedure and is narrowly linked to the presumption of innocence.

32. The Constitutional Court finds that the challenged provisions of Article 84 of the Code prescribe that *the witnesses exercising the right referred to in to Paragraph 1 of this Article shall answer the same questions provided that immunity is granted to such witnesses. Immunity shall be granted by the decision of the Chief Prosecutor of BiH. The witness who has been granted immunity and who has testified shall not be prosecuted except in case of false testimony. A lawyer as the advisor may be assigned by the Court's decision to the witness during the hearing if it is obvious that the witness himself is not able to exercise his rights during the hearing and if his interests cannot be protected in some other manner.*

33. Thus, the challenged provisions, as a form of protection against self-incrimination, the legislator prescribed that a witness may answer those questions provided that he/she has been granted immunity against criminal prosecution, the competence for granting immunity, failure to undertake criminal prosecution against a witness being granted immunity, and an obligation to appoint a counsel under certain conditions to a witness who has been granted immunity. The Constitutional Court observes, first and foremost, that the present case is about a witness, *i.e.* a person for whom no evidence exist that he/she had committed a criminal offense, *i.e.* who will incriminate oneself by answering the questions as a witness in a procedure against another person, and those will be the first evidence against him/her. In terms of the mentioned provisions the prosecutor may abandon criminal prosecution of such a witness for the purpose of obtaining his/her answers in a procedure against another person. Such answers become evidence for the prosecution against that other person. It follows that this is an agreement between a prosecutor and a witness. The Chief Prosecutor shall decide on the granting of immunity.

34. The Constitutional Court recalls that the entry into force of the Code (2003) in Bosnia and Herzegovina brought about essential changes to the rules of a criminal procedure. First and foremost, a criminal procedure was regulated as a sort of a criminal litigation with strong emphasis on the adversariness of each stage of a criminal procedure, where a prosecutor is one of the parties to the proceedings, with the powers and obligation to prosecute the perpetrators of criminal offenses. The Code gives the competence and

responsibility to a prosecutor for the entire procedure of uncovering and resolving criminal offenses, by entrusting an investigative procedure in its entirety to a prosecutor. Thus, within the meaning of the Code, a prosecutor has the obligation to undertake criminal prosecution if there is evidence that a criminal offence was committed, unless prescribed differently by this code. The principle of legality follows from the aforementioned, suggesting that everyone for whom evidence exist that he/she had committed a criminal offense should be prosecuted and punished in accordance with law. On the other hand, the Constitutional Court recalls that one of the ways used by contemporary states and the international community for a more successful fight against the perpetrators of severe criminal offenses is the creation of legal mechanisms that allow for a prosecutor to depart, under certain conditions, from the principle of legality of criminal prosecution, and they are special cases, when a greater public interest requires so. The Constitutional Court finds that the mechanism of granting immunity is „incorporated" in the Code with a view to opposing serious threats to the security of citizens, which appear in the form of terrorist organizations and affiliated criminal associations, *i.e.* with a view to bringing the perpetrators of such offenses to justice, as well as the organizers thereof in particular. It is indisputable that the aforesaid constitutes a justified exception to the principle of legality.

35. According to the applicant's allegations the mentioned provisions do not meet the requirements of being specified and precise, because they do not have a clear boundary *vis-à-vis* the nature and seriousness of criminal offenses that might justify the failure to undertake criminal prosecution on account of the protection of the public interest in a democratic society.

36. The Constitutional Court recalls the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina, according to which Bosnia and Herzegovina has been determined as „a democratic state, which shall operate under the rule of law and with free and democratic elections". The mentioned provision gives rise to the principle of the rule of law, which represents the system of political authority based on the respect for the Constitution, laws and other regulations, by citizens and the holders of public offices alike. All laws, other regulations, as well as conduct on the part of public office holders must be based on law, or on a regulation based on law. Further, the concept of the rule of law is not limited solely to the formal respect for the principle of constitutionality and legality, but it requires that the constitution and laws have certain content, appropriate for a democratic system, so that they may serve the protection of human rights and freedoms in relations between citizens and public authority bodies, as part of a democratic political system. Besides, the European Convention particularly proclaims the rule of law, and its special significance is reflected in the area of procedural law.

37. The Constitutional Court further recalls that the Code determines rules ensuring that no innocent person is convicted in a legally conducted procedure before a competent court, and that a perpetrator of a criminal offense is sentenced or another measure ordered against him/her under conditions envisaged by Criminal Code. Within the meaning of the Constitution of Bosnia and Herzegovina the regulation of criminal legislation lies within the exclusive competence of a legislator. From a constitutional and legal point of view, it is a sole obligation of a legislator to consider, while regulating certain mechanisms of that procedure, the requirements set before it by the Constitution of Bosnia and Herzegovina, particularly those arising from the principle of the rule of law. More precisely, the regulation thereof must be, at all times such, so as to ensure the accomplishment of legitimate goals of a criminal procedure, and a procedural equality of the parties. It is the task of the Constitutional Court to ensure that such requirements are complied with.

38. The Constitutional Court recalls that the requirements of the legal certainty and the rule of law imply that a legal norm is accessible to persons it applies to and is foreseeable for them, that is to say that it is sufficiently precise so that they can actually and specifically know their rights and obligations, up to a degree that is reasonable in given circumstances, so that they can conduct themselves in keeping with such legal norms. When such a requirement is not complied with, undetermined and imprecise legal norms leave room for arbitrary decision-making by competent bodies.

39. The Constitutional Court recalls primarily that different forms of immunity were developed in the international criminal law practice, so that a prosecutor may, depending on the circumstances of the specific case, opt for one of the two basic types of procedural immunity: the total (blanket) immunity granting a witness the full protection from criminal prosecution for any previously committed criminal offenses, to be uncovered during his/her testimony and the limited (use) immunity, guaranteeing a witness that his/her testimony, or other evidence stemming from his/her testimony, will not be used against him/her. However, if a prosecutor collects other evidence, separately and independently from a witness's testimony, a prosecutor may, based on such evidence, prosecute/accuse a witness for a specific criminal offense. Therefore, granting immunity during a criminal procedure aims at ensuring internationally recognized standards of a fair procedure, and they are the right to remain silent, *i.e.* a privilege against self-incrimination. By linking the aforementioned to the provision prescribing that „The witness who has been granted immunity and who has testified shall not be prosecuted except in case of false testimony", the Constitutional Court primarily holds that the challenged provisions are not precise regarding the scope of immunity that may be granted to a certain witness. Namely, based on the cited provision it does not follow whether a decision on immunity relates to the

actions the witness mentioned in his/her testimony, or it relates to the actions from the overall criminal event in connection with which the witness deposits a testimony, that is to say whether it relates to the actions that might be uncovered during his/her testimony. Thus, it follows from the cited provision that a legislator failed to make a clear distinction between the right of a witness to remain silent and not to respond to certain questions if a truthful answer would expose him/her to criminal prosecution in relation to the obligation of a witness to answer the questions asked, which is particularly relevant from the aspect of equality of parties to the proceedings. In adittion, there is no prescribed mechanism that will ensure for a witness who has been granted immunity, and who has not testified, to be prosecuted for a criminal offense concerning which he/she has been granted immunity. Such a witness may be prosecuted solely if he/she deposited a false testimony. When interpreting the portion of the provision „The witness who has been granted immunity and who has testified shall not be prosecuted..." it could be deduced that criminal prosecution of such a witness is permissible when he/she did not testify. However, the aforementioned indicates that this is an imprecise provision, *i.e.* that the legislator failed to prescribe precisely when, under what circumstances and in what manner such prosecution might be undertaken, for instance what to do in a situation where a witness has not refused to testify, but has changed the testimony. It follows from the aforementioned that witnesses who would offer testimonies in exchange for abandonment of criminal prosecution do not know specifically and actually to which extent and under which conditions they may realize that, that is to say they do not know when and whether they will be prosecuted. In that respect, the Constitutional Court finds that the legislator did not satisfy the standards of precision and clarity. In view of the aforementioned, the challenged provisions themselves leave room for arbitrary decision-making by a prosecutor, *i.e.* the Chief Prosecutor when granting the immunity.

40. The Constitutional Court further recalls that legal certainty does not mean that decision-makers shall not be entrusted with discretionary powers or a certain freedom to act, provided that there are legal means and legal procedures to prevent the abuse thereof. Laws must always set the framework of discretionary powers and regulate the manner of the implementation thereof with sufficient clarity, which ensures to an individual an adequate protection against arbitrariness. Arbitrary exercise of powers enables unfair or unreasonable decisions contrary to the principle of the rule of law. The Constitutional Court observes that the protection of the rights of the damaged person in a criminal procedure is ensured under the Law (notifying the damaged person of the following: that during a criminal procedure he/she may file a property claim, on the failure to conduct an investigation, on the suspension of the investigation as well as on the reasons for the suspension of the investigation, on the withdrawal of the indictment, on the adoption of

a decision acquitting the accused of charges or dismissing the charges or suspending a criminal procedure by a decision, on the results of negotiating the guilt with the accused). Further, the Constitutional Court recalls that the principle of legality is a guarantee to citizens that the prosecutor would institute a criminal procedure whenever statutory conditions have been met (if there is evidence that a criminal offense was committed) and that he/she would treat everyone equally. The person damaged by a criminal offense will then be able to exercise such rights as guaranteed under the Law. On the other hand, the Constitutional Court reiterates that a legislator „incorporated" in the Law the possibility not to undertake criminal prosecution with a view to countering serious threats to the security of citizens appearing in the form of terrorist organizations or other organized and associated criminal associations, that is to say with a view for perpetrators of such offenses, particularly the organizers thereof, to be brought to justice. In that case, the person damaged by a criminal offence in the perpetration of which a person who was granted the immunity from criminal prosecution for such crime had taken part in the perpetration, will not be able to exercise such rights as guaranteed under the Law, which he/she would possibly be able to exercise in a criminal procedure if no immunity was granted. The Constitutional Court previously noted that a grant of immunity constitutes indisputably a justified exception from the principle of legality. However, the Constitutional Court finds that it follows from the mentioned provisions that the legislator failed to set any statutory conditions or limitations regarding the granting of immunity to a witness, thus it follows that the immunity may be granted to a witness for whom the information exist that he had just participated in the perpetration of criminal offenses as part of a criminal or terrorist organization, with a view to proving criminal offenses, for example the forgery of an official identification card. Thus, the legislator failed to set a limitation for the immunity to be granted to a witness concerning whom there is information to have just participated in the perpetration of these offences, that is to say the challenged provisions do not contain any determinant or indication of the criminal offences being investigated, in order for a prosecutor to suspend the criminal prosecution of a witness with a view to proving those offences. Therefore, the Constitutional Court holds that due to the existence of different interests *i.e.* the endangerment of the rights of an individual to equality before the law and the rights of the persons damaged by a grave criminal offense committed by a person being granted immunity, prescribing the immunity without any limitations rules out the absolutely discretionary nature of the power conferred by the legislator on a prosecutor, or Chief Prosecutor for that matter. The manner in which the legislator will regulate the mechanism of granting immunity is not within the jurisdiction of the Constitutional Court, however the legislator must prescribe the offences for which immunity may be granted to the witness and the criminal offences to be investigated, in order for a prosecutor to suspend criminal prosecution of a witness with a view to proving those offences. For

the sake of comparison, the Constitutional Court observes that the legislator foresaw in the Law a possibility to enter into a Guilty Plea Agreement. That gave a possibility to the prosecutor to negotiate with a suspect or accused on the conditions of confessing to the criminal offense he/she was charged with, in exchange for a certain sanction, which, by its type and severity, may be below the minimum punishment of imprisonment determined by law for that criminal offense. However, the Constitutional Court observes that the legislator in that case engaged in a detailed regulation of that mechanism, by prescribing exactly the conditions under which a guilty plea agreement may be accepted, and concerning the verification of meeting those conditions the legislator prescribed a judicial control during decision-making on accepting the agreement. Bearing in mind that a prosecutor, or a Chief Prosecutor in the legal system of Bosnia and Herzegovina has a role of a party to the proceedings, which fact does not offer sufficient guarantees regarding his/her independence and impartiality, in addition to prescribing conditions, or limitations (concerning which offences a witness may be granted immunity, and which offences are to be investigated in order for a prosecutor to suspend criminal prosecution of a witness with a view to proving those offences), the legislator is obliged to prescribe judicial control of the fulfillment of these conditions; it is also necessary that the legislator rules out the absolutely discretionary nature of the power conferred by the legislator on a prosecutor or Chief Prosecutor for that matter.

41. Therefore, the Constitutional Court holds that because of imprecision and vagueness of the challenged provisions, these provisions are contrary to the principle of the rule of law. In particular, it is necessary to determine: a) for which crimes the immunity could be granted; b) in which proceedings this kind of immunity could be used. Furthermore, it is necessary to underline that the respect of the conditions foreseen should be verified by an independent and impartial tribunal.

42. The Constitutional Court concludes that the provisions of Article 84 paras 2, 3 and 4 of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina.

43. In view of the mentioned conclusion, the Constitutional Court will not consider whether the provisions of Article 84 paras 2, 3 and 4 of the Code are contrary to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention.

44. The applicant indicated that the provisions of Article 84 (5) of the Code are contrary to Articles I(2) and II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention. The Constitutional Court finds that the mentioned provisions read as follows „A lawyer as the advisor shall be assigned by the Court's

decision to the witness during the hearing if it is obvious that the witness himself is not able to exercise his rights during the hearing and if his interests cannot be protected in some other manner". The Constitutional Court observes that the applicant failed to provide a single allegation reasoning why she held that these challenged provisions are contrary to the mentioned articles of the Constitution of Bosnia and Herzegovina and the European Convention.

45. In view of the aforementioned the Constitutional Court finds these allegations stated in the request ill-founded, *i.e.* it concludes that the provisions of Article 84(5) of the Code are in conformity with Articles I(2) and II(3)(e) of the Constitution of Bosnia and Herzegovina.

VI. 2. Criminal Offenses as to Which Special Investigative Measures May Be Ordered, Article 117 (d) of the Code

46. The applicant indicated that the provisions of Article 117 (d) of the Code are contrary to Article II(3)(f) of the Constitution of Bosnia and Herzegovina in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina. The applicant indicated that the mentioned provisions made it possible to turn an exception into a rule, that is to say that elements of disproportion, excessiveness and covert arbitrariness were introduced into the criminal law legislation. Irrespective of the legitimate goal, the mentioned provision opens up a possibility to undertake special investigative actions for almost all criminal offenses enumerated in the Criminal Code.

47. The Constitutional Court recalls that it is indisputable that by ordering or applying special investigative measures the state interferes with the exercise of the rights of an individual referred to in Article 8 of the European Convention. Such interference is justified within the meaning of Article 8(2) only if „in accordance with the law", and pursuing one or more legitimate goals adduced in paragraph 2, and is „necessary in a democratic society" in order to achieve that goal or goals (see, *Kvasnica v. Slovakia*, no. 72094/01, paragraph 77, 9 June 2009). Furthermore, „in accordance with the law" pursuant to Article 8(2) requires in principle, firstly, for the disputable measure to have a certain foundation in the domestic regulation; it also applies to the quality of the respective regulation, which should be in accordance with the rule of law and available to the person concerned who must, additionally, be able to anticipate the circumstances for oneself, and that the measure must be in accordance with the rule of law (see, e.g., *Kruslin v. France*, 24 April 1990, paragraph 27, Series A no. 176-A). The Constitutional Court also indicates that according to the case-law of the European Court of Human Rights (see also *Kruslin v. France*) wiretapping and other forms of surveillance of telephone conversations constitute

serious interference with private life and correspondence and, therefore, must be based on „law" that is particularly precise. The most fundamental thing is to have clear and detailed rules, first and foremost the law must define the categories of persons who can be subject to measures of wiretapping on the basis of a court order and the nature of criminal offenses rendering reasons for such an order. Further, the Constitutional Court recalls that the interference will be considered necessary in a democratic society for a legitimate goal if it responds to an urgent social need and, particularly, if proportionate to a legitimate goal sought to be achieved (see *Coster v. The United Kingdom* no. 24876/94, paragraph 104, 18 January 2001).

48. The Constitutional Court recalls that the provisions of the Code prescribe that if evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties, special investigative measures may be ordered against a person against whom there are grounds for suspicion that he/she has committed or has along with other persons taken part in committing or is participating in the commission of a criminal offense referred to in Article 117 of this Code: a) against the integrity of Bosnia and Herzegovina; b) against humanity and values protected under international law; c) terrorism; and d) for which, pursuant to the law, a prison sentence of three (3) years or more may be pronounced. It follows that the Code specified the categories of persons against whom special investigative measures may be imposed and the nature of criminal offenses.

49. Furthermore, the Constitutional Court finds that the challenged provision of Article 117 (d) of the Code prescribes as follows: „Measures referred to in Article 116(2) of this Code may be ordered for following criminal offenses: criminal offenses for which, pursuant to the law, a prison sentence of three years or more may be pronounced." The applicant claims that the mentioned provision made it possible for an exception to be turned into a rule, that is to say that elements of disproportion, excessiveness and coveted arbitrariness are introduced into a criminal legislation.

50. First and foremost, the Constitutional Court recalls that the criminal legislation in Bosnia and Herzegovina is made up of the Criminal Code of BH, Criminal Code of the Federation of BiH, Criminal Code of the Republika Srpska and Criminal Code of the Brčko District. The Constitutional Court further recalls that the reason for enacting the Criminal Code at the state level was the need to introduce the criminal law standards of the international law into the criminal legislation of BiH and thus to secure legal certainty and the protection of human rights throughout BiH, and the advancement of the fight against crime. When inspecting the Criminal Code of BiH, the Constitutional Court observes that for a great majority of criminal offenses (*i.e.* a qualified form) the

legislator prescribed a possibility to impose an imprisonment in duration of three years, so that it follows that special investigative measures may be imposed for all those offenses. Furthermore, as part of those criminal offenses the Constitutional Court finds that the Criminal Code of BiH, among other things, prescribed the following as criminal offenses: Attack on the Constitutional Order, Endangering Territorial Integrity, Genocide, Inciting National, Racial and Religious Hatred, Discord or Hostility, Money Laundering, Organized Crime. It follows from the aforementioned that these are extremely important objects of criminal law protection, *i.e.* that these are serious criminal offenses manifested through violence and attack on the fundamental values of a human and the society as a whole. However, as part of those criminal offenses the Criminal Code of BiH, among other things, prescribed as criminal offenses the following: Violating the Free Decision-Making of Voters, Misuse of International Emblems, Counterfeiting of Instruments of Value, False Information about Criminal Offence, Illegal Use of Radio Broadcasting Rights. It follows from the aforementioned that the Criminal Code of BiH also provided criminal offenses that have no elements of serious criminal offenses. The Constitutional Court finds that the legislator prescribed by the Code that special investigative measures would be employed exclusively if there was no other way to achieve the goal, so that the legislator undoubtedly had in mind the restriction on the rights of an individual referred to in Article 8 of the European Convention. However, the Constitutional Court reiterates that the Criminal Code of BiH stipulates that special investigative measures may be ordered for a great majority of criminal offenses (basic or qualified form), including serious criminal offenses and criminal offenses not carrying such elements. The Constitutional Court finds that the legitimate goal of the application of special investigative measures is to counter the severest forms of crime. By prescribing that special investigative measures may be ordered for a great majority of criminal offenses prescribed by the Criminal Code, including offenses not carrying elements of serious criminal offenses, the legislator failed to ensure that the interference with the right referred to in Article 8 would be to such an extent that is necessary for the preservation of democratic institutions, *i.e.* it failed to secure the proportion between the severity of the interference with the right to privacy and the legitimate goal sought to be achieved through the application of that special measure. It is not within the competence of the Constitutional Court how the legislator will regulate this issue, whether it will raise the general limit of the punishment for which special investigative measures may be determined in combination with certain criminal offenses, or groups of criminal offenses, which, due to their specificity, irrespective of the prescribed punishment, require to be covered by a legal provision of criminal offenses for which special investigative measures may be ordered. However, when determining criminal offenses for which special investigative measures may be ordered, the legislator must restrict itself solely to that which is necessary in a democratic society, *i.e.* make

possible the proportion between the right to privacy and the legitimate goal sought to be achieved through the application of that special investigative measure.

51. The Constitutional Court concludes that the provision of Article 117(d) of the Code is contrary to Article I(2) in connection with Article II(3)(f) of the Constitution of Bosnia and Herzegovina.

VI. 3. Competence to Order the Measures and the Duration of the Investigative Measures, Article 118(3) of the Code

52. The applicant indicated that the provisions of Article 118(3) of the Code are contrary to Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article I(2) of the Constitution of Bosnia and Herzegovina. The applicant indicated in the reasons for the said allegations that under these provisions investigative measure may last up to one month at the longest, and may, for particularly important reasons, and upon the reasoned motion of the Prosecutor, be prolonged for a term of another month, provided that the measures referred to in Article 116 (a) and (c) of the Code may last no longer than six months in total. Such a lengthy period may not be considered a proportionate time limit in relation to the nature and need to restrict constitutional rights. The part of the provision reading „particularly important reasons" violates the principle of the rule of law and of the right to a fair trial, because the law is not clear and transparent and leaves a possibility for arbitrary interpretation and procedures on the part of a body before which a procedure is conducted. In addition, the challenged provision did not make a necessary distinction between those bodies and the ones which do not have such features and to which the extension of time limits need not apply.

53. The Constitutional Court reiterates that it is indisputable that by applying special investigative measures the state interferes with the exercise of the rights of an individual referred to in Article 8 of the European Convention. The Constitutional Court recalls the decision of the European Court of Human Rights in the case of *Dragojević v. Croatia* (Application no. 68955/11, judgment of 15 January 2015, paras 79-82) wherein the European Court of Human Rights indicated, such interference is justified within the meaning of Article 8(2) only if „in accordance with the law", and it pursues one or more legitimate goals adduced in paragraph 2, and is „necessary in a democratic society" in order to achieve that goal or goals (see, in a series of judgments *Kvasnica v. Slovakia*, no. 72094/01, paragraph 77, 9 June 2009). The term „in accordance with the law" pursuant to Article 8(2) requires in principle, firstly, for the disputable measure to have a certain foundation in the domestic regulation; it also applies to the quality of the respective regulation, which should be in accordance with the rule of law and available to a person

concerned who must, additionally, be able to anticipate the circumstances for oneself, and that the measure must be in accordance with the rule of law (see, *e.g.*, *Kruslin v. France*, 24 April 1990, paragraph 27, Series A no. 176-A). Particularly in the context of secret measures of surveillance, such as the interception of communications, the requirement of legal „foreseeability" cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, where a power of the executive is exercised in secret, the risks of arbitrariness are evident. Therefore, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see, for instance, *Malone*, cited above, § 67; *Huvig v. France*, judgment of 24 April 1990, Series A no.176-B, § 29; *Valenzuela Contreras v. Spain*, judgment of 30 July 1998, § 46, Reports on Judgments and Decisions1998-V; *Weber and Saravia v. Germany* (Decision), no. 54934/00, § 93, ECHR 2006 XI; and *Bykov v. Russia* [GC], no. 4378/02, § 76, 10 March 2009). In that respect the Court also reiterated the need for safeguards (see, *Kvasnica*, cited above, § 79). Specifically, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive – or to a judge – to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see *Bykov*, cited above, § 78, and *Blaj*, cited above, § 128).

54. Also, in its case-law the European Court of Human Rights developed the following minimum safeguards that should be set out in the statute in order to avoid abuses of power: the nature of the offences which may give rise to such an order; the categories of people liable to have their telephones tapped by judicial order; a limit on the duration of telephone tapping, the procedure for questioning, use and storage of the data obtained; the precautions to be taken when communicating data to other parties and the circumstances in which recordings may or must be erased or the tapes destroyed (see, European Court of Human Rights, *Huvig*, cited above, § 34; *Valenzuela Contreras*, cited above, § 46; and *Prado Bugallo* v. Spain, no. 58496/00, § 30, 18 February 2003).

55. Thus, according to the standards of the European Court of Human Rights, the domestic law must be sufficiently clear and particularly precise in order to point to an individual the circumstances in which and conditions under which the public authorities may order special investigative measures. Since these are secret measures not subject to

scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive – or to a judge – to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference.

56. The Constitutional Court finds that the provision of Article 118(3) of the Code reads: *Investigative measures referred to in Article 116(2) Subparagraphs a) through d) and g) of this Code may last up to one month at the longest, while on account of particularly important reasons the duration of such measures may upon the properly reasoned motion of the Prosecutor be prolonged for a term of another month, provided that the measures referred to in Subparagraphs a), b) and c) last up to six months in total, while the measures referred to in Subparagraphs d) and g) last up to three months in total. The motion as to the measure referred to in Article 116(2)(f) of this Code may refer only to a single act, whereas the motion as to each subsequent measure against the same person must contain a statement of reasons justifying its application.* Based on the mentioned provisions it follows that the total period during which special investigative measures may last is six months, or three months respectively. During this period the duration of these measures was restricted to one month and each new extension requires the statement of reasons by a prosecutor. Thus, the legislator opted for graduality in the establishment and extension thereof. The Constitutional Court finds that any extension of special investigative measures must be approved by a preliminary proceeding judge, who has a possibility not to approve the extension of investigative measures, if the prosecutor's motion contains no reason to continue with the enforcement thereof, *i.e.* that the extension is necessary to serve the purpose for which they were approved. The Constitutional Court finds that the legislator prescribed by the Code that special investigative measures are applied exclusively if there is no other way to achieve the same goal, and that there must be the grounds for suspicion that a person alone has committed or has along with other persons taken part in committing or is participating in the commission of a criminal offense. The legislator prescribed precisely in the provision of Article 118(3) the duration, or the longest duration of special investigative measures (up to one month, the total of three or six months respectively). Furthermore, the Constitutional Court observes that the legislator opted for graduality in the extension of special investigative measures (for additional term of one month). Also, the legislator prescribed that the extension of special investigative measures may be approved for particularly important reasons.

57. The applicant's allegations are based on the claim that the legislator, in the part of the provision reading „particularly important reasons" left a possibility for arbitrary

interpretation and procedures on the part of a body before which a procedure is conducted. In addition, the challenged provision did not make a necessary distinction between those bodies and the ones which do not have such features in relation to the offenses to which the extension of time limits need not apply. Therefore, the Constitutional Court ought to examine in the present case whether the challenged provisions, regarding the extension of special investigative measures, sufficiently clearly allege the scope and manner of exercising discretion conferred upon the public authorities, and whether the period of the extension of special investigative measures was proportionate to the nature of criminal offenses concerning which special investigative measures may be extended.

58. By linking the previously presented case-law of the European Court of Human Rights to the relevant provisions of the Code, the Constitutional Court finds that by prescribing for special investigative measures to last no longer than one month the legislator indisputably took into account the restrictions of the rights of an individual under Article 8 of the European Convention, *i.e.* that the duration of special investigative measures must be brought down to the shortest possible time. However, the challenged provisions prescribe that special investigative measures may be extended two more times, or five more times in duration of one month each for particularly important reasons. In that respect, the Constitutional Court primarily observes that the legislator, as a requirement for the extension of special investigative measures, used a syntagm „particularly important reasons", which constitutes an undetermined term not used in any other provision of the Code. Namely, it does not follow from the cited provision what particularly important reasons refer to, *i.e.* whether they refer to impossibility to obtain evidence due to the failure of special investigative measures to generate expected results, or they refer to the very nature and circumstances of the perpetration of a criminal offense, and whether and to what extent the results of the information collected up to that moment, through the employment of special investigative measures, must be known to the preliminary proceedings judge. Thus, it follows that the preliminary proceedings judge does not have precise benchmarks in the law according to which he/she could consider the motion of the prosecutor for the extension of special investigative measures and, accordingly, dismiss the motion, or grant it and order the extension thereof. Therefore, whether the reasons of the prosecutor proposing the extension of special investigative measures will be sufficient in terms of „particularly important reasons" depends exclusively on the margin of appreciation of the preliminary proceedings judge. In that respect, the Constitutional Court reiterates that under the standards of the European Court of Human Rights, since these are secret measures not subject to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive – or to a judge – to be expressed in terms of an unfettered power. Consequently,

the law must indicate sufficiently clearly the scope of any such discretion conferred on the competent authorities and the manner of its exercise to give the individual adequate protection against arbitrary interference. In this part the Constitutional Court recalls that inappropriate implementation of certain statutory solutions is not a matter of constitutionality, if such solutions are in themselves in accordance with the constitution. In such situations, in the event of abuse in the implementation of legal provisions there are other appropriate safeguard mechanisms. However, the present case is not about such a situation, but a situation where the challenged provisions are themselves, in the implementation, contrary to the Constitution of Bosnia and Herzegovina, as the challenged provisions did not sufficiently clearly prescribe the scope of discretion conferred upon the preliminary proceedings judge, since his/her discretion is manifested in the form of unlimited powers when interpreting those undetermined legal notions *i.e.* a presumption „for particularly important reasons" so that they do not guarantee to an individual an adequate protection against arbitrary interference. Therefore, the Constitutional Court finds that the legislator, by prescribing that, for particularly important reasons, which is an undetermined presumption, special investigative measures may be extended, did not appreciate that the law must sufficiently clearly prescribe the scope of discretion conferred upon the competent bodies.

59. Also, the Constitutional Court reiterates that according to the case-law of the European Court of Human Rights, the minimum guarantees that should be prescribed in the law in order to avoid the abuse of the conferred powers are, *inter alia*, the nature of the offenses concerning which a measure of eavesdropping may be ordered and the limitation time-wise of the duration of the eavesdropping measure. The Constitutional Court observes that the legislator prescribed in the provisions of Article 116 of the Code that special investigative measures may be ordered for the following criminal offenses: a) against the integrity of Bosnia and Herzegovina, b) against humanity and values protected under international law, c) terrorism, and d) criminal offenses for which, pursuant to the law, a prison sentence of three (3) years or more may be pronounced. Although it did prescribe the types of criminal offenses for which it is possible to order special investigative measures, the Constitutional Court observes that the legislator prescribed in the same manner and within the same time limits the extension of special investigative measures irrespective of criminal offenses concerned. In that respect, the Constitutional Court reiterates that the interference with human rights and fundamental freedoms, in the present case the right to private life, is justified if in conformity with law and pursuing one or more legitimate goals referred to in Article 8(2) of the European Convention, and is „necessary in a democratic society" in order to achieve a specific goal. The Constitutional Court also recalls that the legitimate goal of special investigative measures constitutes

the opposition to the gravest forms of crime. In that sense, it is indisputable that lengthier duration of special investigative measures is necessary if concerning the proving of criminal offenses of terrorism, corruption, organized crime, trafficking in humans and arms since the perpetration of these offenses may last over a prolonged period of time. However, considering the legitimate goal of implementing special investigative measures, the Constitutional Court holds that, although ordering special investigative measures in duration of one month may be justified for all criminal offenses for which a prison sentence of three years or more may be pronounced, it is unclear why the nature and seriousness of criminal offenses for which, for instance, a maximum prison sentence of up to three years or up to five years is prescribed, objectively justifies the possibility of ordering such measures in the longest duration as equally as criminal offenses with a prescribed prison sentence of up to twenty years or a long-term prison sentence. Therefore, the Constitutional Court finds that the legislator, when prescribing the length of special investigative measures failed to take into account the proportion between the restriction on human rights and the seriousness of criminal offenses, that is to say it failed to harmonize the issue of duration of special investigative measures with the nature of certain criminal offenses, which the extension should not apply to objectively.

60. Bearing in mind that the legislator failed to make any distinction whatsoever between criminal offenses, which the extensions of special investigative measures should not apply to, and that the presumption „for particularly important reasons" was determined imprecisely and may not serve as a benchmark for that distinction, the Constitutional Court finds that the challenged provisions of Article 118(3) of the Code, in the part relating to the extension of special investigative measures, are not in conformity with Article II(3) (f) of the Constitution of Bosnia and Herzegovina and Article I(2) of the Constitution of Bosnia and Herzegovina.

VI. 4. Materials Received through the Measures and Notification of the Measures Undertaken, Article 119(1) of the Code

61. The applicant indicated that the provisions of Article 119(1) of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, as there is no mechanism securing a judicial control. The applicant stated that a preliminary proceeding judge must have a legal power at all times during the conduct of special investigative actions and request that a prosecutor submits a report on the justification for their further continuation, or when he/she finds so necessary, for the purpose of evaluating the justification for further continuation of measures, request from the police

to submit daily reports and documentation to the extent and measure he/she is authorized to determine on one's own.

62. In connection with those allegations, the Constitutional Court recalls the case-law of the European Court of Human Rights that the control over the secret oversight measures should be, desirably, entrusted to a court, as the judicial control affords the best guarantees for independence, impartiality and compliance with procedures. The Constitutional Court recalls the case of *Rotaru v. Romania* (Judgment, Grand Chamber, of 4 May 2000, Application no. 28341/95), which reads: „In order for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain safeguards established by law which apply to the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, *inter alia*, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure… In the instant case the Court notes that the Romanian system for gathering and archiving information does not provide such safeguards, no supervision procedure being provided by Law no. 14/1992, whether while the measure ordered is in force or afterwards. That being so, the Court considers that domestic law does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities… There has consequently been a violation of Article 8."

63. The Constitutional Court finds that the challenged provision stipulates as follows: „Upon the completion of the application of the measures referred to in Article 116 of this Code, all information, data and objects obtained through the application of the measures as well as a report must be submitted by police authorities to the Prosecutor. The Prosecutor shall be bound to provide the preliminary proceedings judge with a written report on the measures undertaken. On the basis of the submitted report the preliminary proceedings judge shall evaluate the compliance with his order." It follows that police authorities, upon the completion of special investigative actions, are obliged to submit to the Prosecutor all materials resulting from the conduct of special investigative actions and a report on the measures taken, while the Prosecutor is bound to provide a preliminary proceedings judge with a written report on the measures taken, so that the preliminary proceedings judge becomes acquainted with the conduct of actions, *i.e.* so that he/she can check whether his/her order has been complied with. The Constitutional Court notes that this is a form of supervision, *i.e.* the protection of persons against unlawful interference with their rights and freedoms.

64. The Constitutional Court recalls that, according to the Law, the authority to order special investigative actions is expressly conferred on a preliminary proceeding judge and such actions may last up to one month and be extended for a term of another month, and they may last up to six months in total, *i.e.* three months in total. In addition, the provisions of the Law stipulate that a preliminary proceeding judge is bound to issue, without delay, a written order ceasing the enforcement of the actions taken, if the reasons for which actions are ordered have ceased. Furthermore, a prolonged duration of special investigative actions must be approved by a preliminary proceeding judge. Therefore, a preliminary proceeding judge has the possibility not to approve the extension of special investigative actions in the event that he/she considers that other circumstances have been created, allowing the application of other methods of obtaining evidence without interference or with a lesser degree of interference with fundamental human rights. The Constitutional Court finds that the aforementioned is a form of supervision *i.e.* the protection of persons against unlawful interference with their rights and freedoms.

65. Furthermore, the provisions of the Law prescribe a preliminary proceeding judge's obligation to notify, without delay, a person against whom an action has been taken and that person can ask the court to examine the legality of the order and the manner in which the action has been enforced. The Constitutional Court finds that the legislator has thus secured that the person, who considers that his/her rights and freedoms were violated by the application of special investigative actions, can ask the court to examine the legality thereof, the manner in which they were applied as well as the judicial order constituting the basis of the application thereof. The Constitutional Court finds that the aforementioned is a form of supervision *i.e.* the protection of persons against unlawful interference with their rights and freedoms.

66. In view of the above, the Constitutional Court holds that the legislator has secured that interference with an individual's right is subject to effective supervision.

67. The Constitutional Court concludes that the provisions of Article 199(1) of the Law are consistent with Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

VI.5. Order for Conducting an Investigation, Article 216(2) of the Code

68. According to the applicant, the provisions of Article 216(2) of the Law are not in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 in conjunction with Article 13 of the European Convention. The applicant points out in the

reasons for the aforementioned allegations that the order to conduct an investigation does not contain an instruction on legal remedy and that the citizens' right to appeal is not secured.

69. The Constitutional Court notes that according to the case-law of the European Court of Human Rights, the specific rights guaranteed by Article 6 may be relevant before a case is sent for trial, *e.g.* the right to pre-trial proceedings within a reasonable time or the right to defend oneself, as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the provisions of Article 6 (the case of *Kuralić v. Croatia*, Judgment of 15 October 2009, Application no. 50700/07).

70. Moreover, as to the application of the guarantees of Article 6 of the European Convention on pre-trial proceedings or the stages thereof, the European Court of Human Rights first determines whether there is a „criminal charge" for the purposes of Article 6 of the European Convention. The Constitutional Court recalls the case of *Foti and Others v. Italy* (Judgment of 10 December 1982, Applications nos. 7604/76, 7719/76, 7781/77 and 7913/77), according to which *...one must begin by ascertaining from which moment the person was „charged"; this may have occurred on a date prior to the case coming before the trial court... such as the date of the arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened ... Whilst „charge", for the purposes of Article 6(1), may in general be defined as „the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect.*

71. In the present case the Constitutional Court recalls that the provision of Article 216(1) of the Law stipulates that the Prosecutor will order the conduct of an investigation if grounds for suspicion that a criminal offense has been committed exist. In addition, the Constitutional Court finds that the challenged provision reads: „The order on conducting the investigation shall contain: data on perpetrator if known, descriptions of the act pointing out the legal elements which make it a crime, legal name of the criminal offense, circumstances that confirm the grounds for suspicion for conducting an investigation and existing evidence. The Prosecutor shall list in the order which circumstances need to be investigated and which investigative measures need to be undertaken." In view of the above, it follows that the legislator „gives" a Prosecutor express authority to conduct an investigation and that an order on conducting the investigation is a Prosecutor's decision on the existence of grounds for suspicion that a specific perpetrator (if known) has committed a criminal offense and that it is a plan for conducting the investigation and that it includes the description of investigative actions. In addition, the Constitutional Court notes that the

Law does not stipulate an obligation to submit an order on conducting the investigation nor does it stipulate sanctions for a Prosecutor's failure to issue an order on conducting the investigation. It follows from the above analysis that an order on conducting the investigation is an internal and preparatory act by a Prosecutor. Furthermore, the Law determines that when it is stipulated that the institution of criminal proceedings entails restrictions on the exercise of certain rights, such restrictions, unless otherwise specified, commence upon confirmation of an indictment and, as regards the criminal offenses for which the principal penalty prescribed is a fine or imprisonment up to five years, those consequences commence as of the day the verdict of guilty is rendered, regardless of whether or not the verdict has become legally binding. The Constitutional Court notes that the issuance of an order on conducting the investigation, *per se*, has no consequence that entails restrictions on the exercise of certain rights by a suspect. The Constitutional Court reiterates that the guarantees under Article 6 of the European Convention apply upon the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, *i.e.* upon other measures or actions which carry the implication that he has committed a criminal offence and which likewise substantially affect the situation of the suspect. The Constitutional Court also recalls that, in the course of an investigation, certain rights of a suspect may be subject to restrictions (measures securing the presence of the suspect, special investigative actions), however, in such a case, a basis for restrictions on the exercise of rights is a judicial decision and not an order on conducting the investigation, as an internal and preparatory act. Taking into account the preceding position that an order on conducting the investigation is an internal and preparatory act by a Prosecutor and that the legislator has not stipulated an obligation that an order on conducting the investigation has to be submitted to a suspect and that an order on conducting the investigation, *per se*, has no consequence, in terms of the Law, that entails restrictions on the exercise of certain rights by a suspect, the Constitutional Court assesses that the applicant's allegations are ill-founded that the challenged provisions are not in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 in conjunction with Article 13 of the European Convention.

72. The Constitutional Court concludes that the provisions of Article 216(2) are not in contravention of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 and Article 13 of the European Convention.

VI. 6. Completion of Investigation, Article 225(2) of the Code

73. The applicant pointed out that the provisions of Article 225(2) of the Law are contrary to the standards of a trial within a reasonable time guaranteed by Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention in

conjunction with Article 13 of the European Convention. In the reasons for those allegations, the applicant stated that this provision regulates the situation where the investigation is not completed within six months, *i.e.* it stipulates that the Collegium of the Prosecutor's Office shall undertake necessary measures in order to complete the investigation, without prescribing the final time limit for the completion of investigation. That is contrary to the right to a trial within a reasonable time, and a suspect and damaged person are not afforded the right to complain over the delay of a procedure or other irregularities in the course of investigation, thus the possibility is left for investigation to be conducted for several years.

74. The Constitutional Court finds that the applicant's allegations are essentially based on the allegation that the challenged provision does not foresee the lodging of a complaint, thus leaving a possibility for an investigation to be conducted for a number of years. In that respect, the Constitutional Court observes that the applicant held that the challenged provisions do not meet the principles of the rule of law, *i.e.* that they do not guarantee a fair investigative procedure.

75. The Constitutional Court recalls that the principles of the rule of law require that a law must be clear and precise in accordance with the special nature of the matter it regulates normatively, thereby preventing any arbitrariness in the interpretation and application of laws, *i.e.* the removal of uncertainty concerning the addressee of the legal norm regarding the ultimate effect of the legal provisions directly applicable to them.

76. The Constitutional Court further recalls that the goal of a criminal procedure is to establish the truth, *i.e.* to establish whether a suspect or an accused had committed a criminal offense or not. The Constitutional Court previously noted that an order to carry out an investigation is an internal and preparatory act on the part of a prosecutor, that the legislator failed to prescribe an obligation to communicate the order to the suspect, and that it follows that the suspect needs not have any knowledge that an investigation is being conducted against him/her. In this connection, the Constitutional Court finds that the suspect in that case is not in a state of uncertainty nor does he/she have an interest in the conclusion of the investigative procedure. However, as of the day on which he/she learns about the investigation against him/her, that is to say when his/her rights are restricted during the investigation, the interest and right of the suspect to conclude the investigation are undeniable. Further, the Constitutional Court finds that a criminal procedure is conducted with a view to protect fundamental rights and freedoms of a human and citizen, who, in the event of the enforcement of a punishment, get the status of the damaged persons if any of those rights and freedoms were violated or threatened. Therefore, it is necessary to bear in mind during the investigative procedure the damaged persons as a

person whose rights and freedoms were violated or threatened by a criminal offense. In that respect, the damaged person is a person who has exceptional interest in the conclusion of an investigative or criminal procedure. It follows from the aforementioned that the provisions of the rules of procedure must meet the principles of the rule of law, which will guarantee the respect for the rights of a suspect and a due care for the protection of the rights of the damaged persons, that is to say the fairness of an investigative procedure.

77. The Constitutional Court observes that the challenged provision of Article 225(2) of the Code reads: „If the investigation has not been completed within six (6) months after the order on its conducting has been issued, the Collegium of the Prosecutor's Office shall undertake necessary measures in order to complete the investigation". Thus, it follows that the mentioned legal provision does not state explicitly that the investigation must be completed within six months, neither does it state the lengthiest time limit within which the investigation must be completed. Thus, undertaking necessary measures for the purpose of completing the investigation exclusively depends on the margin of appreciation of the Collegium of the Prosecutor's Office. This is to say that bearing in mind the role of a prosecutor in the Code, who is also a party to the criminal proceedings, the Constitutional Court finds that prescribing the obligation on the Collegium of the Prosecutor's Office to undertake necessary measures in order to conclude the investigation, the legislator failed to provide an appropriate insurance that the investigation would be completed indeed. Also, it follows that no possibility was prescribed for a suspect to lodge a complaint for the excessively lengthy duration of the investigative procedure, so that the challenged provisions make it possible for an individual charged with a criminal offense to be in a state of uncertainty and lack of information about own destiny for unlimited duration of time. Besides, it follows that the legislator failed to prescribe a possibility for a person damaged by the criminal offense to lodge a complaint over the excessive length of the investigative procedure, so that the person damaged by the criminal offense is in a state of uncertainty as to whether the suspect had committed or not that criminal offense for unlimited duration of time. The Constitutional Court observes that the legislator, in certain cases, prescribed in the Code a possibility to oversee the legality of actions taken during the investigation. For instance that was done in the event of a temporary seizure of objects and documentation, in the event of issuing the order to a bank or other legal person to temporarily suspend the execution of a financial transaction, against an administrative ruling ordering the measures of prohibition, against an administrative ruling ordering the detention and such like. In view of the aforementioned, the Constitutional Court concludes the legislator was not consistent in terms of law when it regulated a possibility for unlimited duration of investigation, in essence, without prescribing a mechanism for the protection of the rights of suspects and damaged persons. Therefore, the Constitutional Court holds

that if the legislator opted for a possibility of unlimited duration of investigation, it had to ensure in the Code simultaneously a direct protection of the rights of those whose rights might be violated.

78. In view of the aforementioned, the Constitutional Court finds that the challenged provision does not meet the principles of the rule of law, that is to say the legislator failed to be mindful of the rights of suspects and the protection of the rights of the damaged persons, thereby jeopardizing fairness in an investigative procedure from the aspect of the reasonable time-limit.

79. In view of the aforementioned, the Constitutional Court concludes that the provisions of Article 225(2) of the Code are contrary to Article I(2) in connection with Article II(3) (e) of the Constitution of Bosnia and Herzegovina.

VI. 7. Issuance of indictment, Article 226 paragraph 1 of the Code

80. The applicant emphasized that the provisions of Article 226 of the Law are inconsistent with Article I(2) of the Constitution of Bosnia and Herzegovina and Article 13 of the European Convention. In the reasoning of these allegations the applicant emphasized that this provisions is incomprehensible from the aspect of a trial within a reasonable time, since when the investigation is completed the prosecutor disposes with the information based on which he could either suspend the proceedings or issue an indictment. The legislator is obliged to stipulate a general time limit for the issuance of an indictment, as well as extension of that limit when it comes to the complex or particularly complex cases. In addition, these provisions do not provide for legal remedy against protraction or irregularities in the investigation proceedings, which is inconsistent with the principle of the rule of law, legal security and legal consistency.

81. The Constitutional Court finds that the challenged provision provides as follows: „If during the course of an investigation, the Prosecutor finds that there is enough evidence for grounded suspicion that the suspect has committed a criminal offense, the Prosecutor shall prepare and refer the indictment to the preliminary hearing judge." The Constitutional Court finds, first and foremost, that the Code prescribes that a criminal procedure may be instituted and conducted only upon the request of a Prosecutor. It follows from the mentioned provision that the institution and conduct of a criminal procedure require a prosecutor's request. A criminal proceeding may be conducted solely against such a person and for such an offense that the prosecutor has specified in his/her request. In accordance with the aforementioned, following the completion of an investigation a criminal procedure may be conducted solely following an indictment issued by a competent prosecutor and

solely against a person specified in the indictment and solely for an offense which is the subject-matter of the indictment. The Constitutional Court further finds that, according to the Code, the Prosecutor shall complete investigation when it finds that the state of affairs is sufficiently clarified in order to file an indictment, and completion of the investigation will be recorded in the case-file. Thus, the legislator obliged the Prosecutor to complete investigation when the state of affairs is sufficiently clarified so that an indictment may be issued, which means that the legislator obliged the prosecutor to prepare and refer the indictment to the preliminary hearing judge if during the course of an investigation the prosecutor finds that there is enough evidence for a grounded suspicion that the suspect has committed a criminal offense. So, the challenged provision does not provide for a time-limit within which the prosecutor is obliged to prepare an indictment, neither is that time-limit prescribed under the provision regulating the matter of completion of an investigation.

82. The applicant challenges the ruling of the legislator who failed to prescribe the time-limit for issuing an indictment. In this connection, the Constitutional Court reiterates that according to the principle of the rule of law, the law must be clear and precise and in conformity with specific nature of the matter subject to normative regulation, thereby preventing any arbitrariness in interpretation and application of law, *i.e.* removal of uncertainty of the addresses of the legal norm with regards to the final effect of law provisions that are directly applied to them. In the legal system which was founded on the rule of law, laws must be general and equal for all and legal consequences should be certain for those to whom the laws will apply. In the case at hand, the legislator determined that the prosecutor shall prepare the indictment if during the course of an investigation he/she finds that there is sufficient evidence to do so. The legislator decided not to specify the time-limit within which a prosecutor is obligated to issue an indictment, while at the same time it failed to ensure in the Code a direct protection of the rights of those whose rights might be violated. The establishment of unconstitutionality of the provision of Article 225(2) of the Code due to the lack of a mechanism protecting the rights of suspects and damaged persons during the investigation would not lead to genuine protection of their rights, if such protection would not apply at the same time to the stage from the completion of investigation to the issuance of indictment. From the aspect of the rule of law, it is not relevant which stages in the conduct of investigation were prescribed as necessary by the legislator, but the final result is relevant, for only the adoption of a decision by a Prosecutor's Office removes the uncertainty of persons in question. Therefore, it is necessary to ensure in the present case the continuity of the protection of the rights of suspects and damaged persons.

83. In view of the aforementioned, the Constitutional Court concludes that the provisions of Article 226(1) of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina.

84. In view of the aforementioned conclusion, the Constitutional Court will not consider whether the challenged provisions of Article 225(2) of the Code are contrary to Article 13 of the European Convention.

VII. Conclusion

85. The Constitutional Court concludes that the provisions of Article 84, paragraphs 2, 3 and 4 of the Code are in contravention of Article I(2) of the Constitution of Bosnia and Herzegovina, due to the non-existence of clear distinction between granting immunity and absolute discretionary power to grant immunity, namely, because of imprecision and vagueness the challenged provisions themselves are contrary to the principle of the rule of law.

86. The Constitutional Court concludes that the provision of Article 117(d) of the Code is contrary to Article I(2) of the Constitution of Bosnia and Herzegovina because the legislator failed to ensure that the interference with this right would take place to such an extent that is strictly necessary for the preservation of democratic institutions, *i.e.* it failed to ensure the proportion between the severity of interference with the right to privacy and the legitimate goal sought to be achieved through the application of that special measure.

87. Bearing in mind that the legislator failed to make any distinction whatsoever between criminal offenses to which the extension of special investigative measures should not apply, and that the presumption for particularly important reasons is imprecisely set and may not serve as a benchmark for that distinction, the Constitutional Court finds that the challenged provisions of Article 118(3) of the Code in the part relating to the extension of special investigative measures are not in conformity with Article of the Constitution of Bosnia and Herzegovina in connection with Article II(3)(f) of the Constitution of Bosnia and Herzegovina.

88. The Constitutional Court concludes that the provisions of Article 225(2) of the Code are in contravention of Articles I(2) and II(3)(e) of the Constitution of Bosnia and Herzegovina, because they do not meet the principles of the rule of law, *i.e.* the legislator failed to be mindful of the rights of suspects and the protection of the rights of damaged persons, thereby jeopardizing the fairness in an investigative procedure.

89. The Constitutional Court concludes that the provisions of Article 226(1) of the Code are in contravention of Article I(2) of the Constitution, as the establishment of unconstitutionality of the provision of Article 225(2) of the Code due to the lack of a mechanism protecting the rights of suspects and damaged persons during the investigation would not lead to genuine protection of their rights, if such protection would not apply at the same time to the stage from the completion of investigation to the issuance of indictment.

90. The Constitutional Court concludes that the provisions of Article 84(5) of the Code are not contrary to Articles I(2) and II(3)(e) of the Constitution of Bosnia and Herzegovina, where the applicant fails to provide a single allegation to reason why she held that these challenged provisions are unconstitutional.

91. The Constitutional Court concludes that the provisions of Article 119(1) of the Code are consistent with Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, as the legislator ensured that the interference with an individual's right would be subjected to an effective supervision.

92. The Constitutional Court concludes that the provisions of Article 216(2) of the Code are not in contravention of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 and Article 13 of the European Convention, as the legislator „described" the order on conduct of an investigation as an internal and preparatory act of the prosecutor and the very order on conduct of an investigation, within the meaning of the Code, has no effects on a suspect when it comes to making restrictions on some of his/her rights.

93. Pursuant to Article 59(1), (2) and (3), Article 60 and Article 61(4) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

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

Mato Tadić
Vice-President
Constitutional Court of Bosnia and Herzegovina

Case No. U 21/16

DECISION ON ADMISSIBILITY AND MERITS

Request of Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives at the time of lodging the request, for review of conformity of the provisions of Article 78(3), (4) and (5) of the Law on the Intelligence-Security Agency of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 12/04, 20/04, 56/06, 32/07, 50/08 and 12/09) („the Law") with the provisions of Articles I(2) and II(3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

Decision of 1 June 2017

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Mr. Giovanni Grasso,

Having deliberated on the request filed by **Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives, at the time of filing the request**, in case no. **U 21/16**, at its session held on 1 June 2017, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives at the time of lodging the request, is hereby granted.

It is hereby established that the provisions of Article 78(3), (4) and (5) of the Law on the Intelligence-Security Agency of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 12/04, 20/04, 56/06, 32/07, 50/08 and 12/09) are not in conformity with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina in conjunction 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 Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered, in accordance with Article 61(4) of the Rules of the Constitutional

Court, not later than six months from the date of communication of this decision, to harmonize the provisions of Article 78(3), (4) and (5) of the Law on the Intelligence-Security Agency of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 12/04, 20/04, 56/06, 32/07, 50/08 and 12/09) with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina in conjunction 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 Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered, in accordance with Article 72(5) of the Rules of the Constitutional Court, not later than six months from the date of communication of this decision, to inform the Constitutional Court 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 7 December 2016, Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives 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 conformity of the provisions of Article 78(3), (4) and (5) of the Law on the Intelligence-Security Agency of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 12/04, 20/04, 56/06, 32/07, 50/08 and 12/09) („the Law") with the provisions of Articles I(2) and II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention").

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, on 20 December 2016, the Parliamentary Assembly of Bosnia and Herzegovina, the House of Representatives and the House of Peoples were requested to submit their respective response to the request.

3. On 19 January 2017, the House of Representatives and the House of Peoples submitted their replies to the request.

4. Pursuant to Article 90(1) item b) of the Rules of the Constitutional Court, the Constitutional Court rendered the decision on exemption of the President of the Constitutional Court Mirsad Ćeman and Judge Seada Paravlić from the work and deliberation on the Request since, in their capacity as representatives in the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, they took part in the procedure of passing the Law the provisions of which have been challenged.

a) Allegations Stated in the Request

5. The applicant stated that the provisions of Article 78(3), (4) and (5) of the Law are not in conformity with the provisions of Articles I(2) and II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. While reasoning her allegations, the applicant pointed out that the challenged provisions are imprecise, inexplicit, and unclear and they give too much discretionary power to the state bodies. Therefore, they are evidently subject to arbitrary interpretation and to any other abuse, and, at the same time, they are inconsistent with the Constitution of Bosnia and Herzegovina. In this law provision, the legislator mentions the concept of „justified cases" and „30 days periods if he is satisfied that a warrant continues to be required" which are undefined legal terms, i.e. these are, at the same time, the presumption and standard, and are different by their nature. The fact is that a prolonged duration of the measure of secret information gathering will be necessary when it comes to investigation of terrorism, including international terrorism given that the commission of those acts may, sometimes, last for a long period of time. However, the necessary distinction between those acts and the acts that do not have those elements and to which the prolongation of time-limits should not objectively apply was not made in the Law.

6. The applicant pointed out that the challenged provisions do not precisely prescribe total duration of application of the prescribed measure of secret information gathering, although the mentioned extensions may be only exceptional and may be enforced solely if evidence cannot be obtained in any other way, which is more lenient to citizens, i.e. which interferes to a lesser degree with the constitutional rights of citizens. The principle of the rule of law does not only require the compliance of authorities with the Constitution and law, but it places the requirements concerning the quality of law before the legislative authorities. In order for a general act to be considered the law, not only in formal but also in substantive terms, that law must be sufficiently precise, clear and foreseeable, so that an individual may adjust his behaviour to it without fear that he will be denied, because of

unclear and imprecise norms, the exercise of his rights or that because of that he will bear negative consequences. Furthermore, the principle of the rule of law places obligation on the legislative authorities to prescribe clear and detailed rules in the law, including the time duration of application of the measure of secret information gathering. The law provision „30 days periods" provides for application of the measure of secret information gathering for years.

7. The applicant stated that the challenged provisions regulate the special case of derogation from the principle of inviolability of the right to secrecy of letters and other means of communication, when required in an emergency, and when the measure is not imposed based on the decision of the court, but based on the authorisation of the Agency's Director-General with the agreement of the Chair. It remains unclear whether an expression „with agreement of the Chair" should imply only „the agreement of the Chair" or the agreement of the Chair in writing. In addition, the interference by executive authorities with individual rights safeguarded under the Constitution must be subjected to effective control, which should, as a rule, be carried out by judiciary since the judicial control affords the best guarantees for independence, impartiality and correctness of procedure. Surveillance measures relevant to the confidentiality of correspondence and other means of communication afford the possibility for different kinds of misuse in collecting and processing the data about both citizens and legal persons. These measures may include a wide range of persons, given that not only the persons against whom the measures are undertaken may be affected but also all other persons who had communication with them through different kinds of communication. For all stated above, the applicant claims that a necessary condition for application of measures whereby the right of secrecy of correspondence and other means of communication is limited is issuing of a reasoned court decision in written form. Under to the challenged provisions the judge shall take appropriate action to confirm the authorization or to terminate the information-gathering, pursuant to the Law. Undefined legal term „shall take appropriate action" cannot serve as a criterion. The criterion should be clearly and precisely indicated in the Law itself.

b) Response to the Request

8. The Constitutional Commission of the House of Representatives pointed out that it considered the claim, and that, with four votes *IN FAVOR*, three votes *AGAINST* and no *ABSTENTIONS*, it concluded that it does not have uniformed position as regards the issue of the conformity of the Law with the Constitution of Bosnia and Herzegovina.

9. The Constitutional Commission of the House of Peoples stated that it considered the relevant request and that the Constitutional Court, in accordance with its jurisdiction,

should decide on the compatibility of the challenged Law with the Constitution of Bosnia and Herzegovina.

III. Relevant Law

10. In the **Law on the Intelligence-Security Agency of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 12/04, 20/04, 56/06, 32/07, 50/08-Z.O. and 12/09 – for the purposes of this decision an unofficial, revised text published on www.parlament.ba was used as well) relevant provisions read:

Article 1(1)

This Law establishes the Intelligence and Security Agency of Bosnia and Herzegovina („the Agency"), which shall be responsible for gathering, analysing and disseminating intelligence in order to protect the security, including the sovereignty, territorial integrity and constitutional order, of Bosnia and Herzegovina.

Article 5

The Agency shall be responsible for gathering intelligence both within and outside Bosnia and Herzegovina regarding threats to the security of Bosnia and Herzegovina, analysing such intelligence, and disseminating such intelligence to the officials and bodies listed in Article 6, paragraph 5 of this Law, as well as gathering, analysing and disseminating intelligence for the purpose of providing assistance to authorized officials as defined in criminal procedure codes in Bosnia and Herzegovina and other competent bodies in Bosnia and Herzegovina, where necessary to prevent threats to the security of Bosnia and Herzegovina.

For the purpose of this Law, „threats to the security of Bosnia and Herzegovina" shall be understood to mean threats to the sovereignty, territorial integrity, constitutional order, and fundamental economic stability of Bosnia and Herzegovina, as well as threats to global security which are detrimental to Bosnia and Herzegovina, including:

a) terrorism, including international terrorism;
b) espionage directed against Bosnia and Herzegovina or otherwise detrimental to the security of Bosnia and Herzegovina;
c) sabotage directed against the vital national infrastructure of Bosnia and Herzegovina or otherwise directed against Bosnia and Herzegovina;
d) organized crime directed against Bosnia and Herzegovina or otherwise detrimental to the security of Bosnia and Herzegovina;
e) drug, arms and human trafficking directed against Bosnia and Herzegovina or otherwise detrimental to the security of Bosnia and Herzegovina;

f) illegal international proliferation of weapons of mass destruction, or the components thereof, as well as materials and tools required for their production;

g) illegal trafficking of internationally controlled products and technologies;

h) acts punishable under international humanitarian law; and

i) organized acts of violence or intimidation against ethnic or religious groups within Bosnia and Herzegovina

[...].

VIII – COLLECTION OF INFORMATION

(a) General Authorisations

Article 72

The Agency is authorized to collect, analyse, keep and disseminate to competent bodies within Bosnia and Herzegovina intelligence information in a manner consistent with the Constitution of Bosnia and Herzegovina, this law and other relevant State legislation.

Article 74

In the course of activities authorized by the Director-General of the Agency, the Agency is entitled to collect information:

a) from all publicly available sources;

b) from other bodies and institutions in Bosnia and Herzegovina, which shall be obliged to answer requests for information made by the Agency unless expressly forbidden to do so by law;

[...].

(b) Secret Information Gathering Subject to Authorization by the Director-General

Article 76

When the Director-General deems necessary for the purpose of fulfilling the responsibilities of the Agency under this Law, the Agency may:

a) gather information concealing the reasons for their gathering due to the security nature thereof;

b) establish clandestine contacts with private individuals;

[...].

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(c) Secret Information Gathering Subject to Judicial Authorization

Article 77

Surveillance in non-public places, the surveillance of telecommunication, and other forms of electronic surveillance, as well as the search of property without consent of the owner or temporary occupant, may only be used in cases where there has been advance authorization by the President of the Court of Bosnia and Herzegovina or a Judge of the Court of Bosnia and Herzegovina designated by the President of the Court of Bosnia and Herzegovina.

The Director-General shall make a written application to the judge where s/he believes on reasonable grounds that surveillance or search under this section is required to enable the Agency to investigate a threat to the security of Bosnia and Herzegovina.

All such applications must contain the following information:

1. *The type of communication proposed to be intercepted, the type of information, records, documents or things proposed to be obtained, and the means to be exercised for that purpose;*
2. *The name(s) of the person(s) proposed as subject to surveillance or search;*
3. *A general description of the place or places where the surveillance or search is proposed to be executed, if a general description of that place can be given;*
4. *The information to justify that the surveillance or search is required, on reasonable grounds, to enable the Agency to investigate a threat to the security of Bosnia and Herzegovina;*
5. *A declaration that the required information cannot be obtained in any other manner within the necessary time;*
6. *The period, not exceeding 60 days, for which the warrant is requested to be in force; and*
7. *Information on any previous application made in relation to the person or place subject to the surveillance or search, the date on which such application was made, the name of the judge to whom such application was made; and the decision of the judge thereon.*

The judge shall make a decision within 48 hours of the submission of the application. No appeal is possible against this decision.

[...].

Article 78

The warrant must contain:

a. The type of communication intended to be intercepted, the type of information, records, documents or things that have to be obtained and the powers to be exercised for that purpose;

b. The name(s) of person(s) for whose surveillance the warrant is issued;

c. A general description of the place or places where the warrant is to be executed, if such description can be given; and

d. The period for which the warrant is in force.

Where s/he deems appropriate, the judge may also prescribe certain conditions for execution of the warrant.

The warrant may not be authorized for longer than 60 days. In justified cases, the judge may extend the warrant for additional 30 days periods if s/he is satisfied that a warrant continues to be required.

Notwithstanding the provisions contained in Article 77 of this Law and the previous paragraph of this Article, the use of these measures may be authorized by the Director-General with the agreement of the Chair when delay would cause irreparable harm to the security of Bosnia and Herzegovina.

Upon authorizing such measures, the Director-General must immediately inform the judge, who shall take appropriate action to confirm the authorization or to terminate the information-gathering, pursuant to this Law.

V. Admissibility

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

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

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

- Whether 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.

13. The request was lodged by the Second Deputy Chair of the House of Representatives of the Parliamentary Assembly. Bearing in mind the aforesaid and for the purpose of provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court established that the request in question is admissible as it was lodged by an authorized subject and that there are no other formal reasons under Article 19 of the Rules of the Constitutional Court that should render the request inadmissible.

VI. Merits

14. The applicant holds that the challenged provisions of Article 78 (3) (4) (5) of the Law are in contravention of Article I (2) and II (3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

15. First of all, the Constitutional Court reminds that the Agency has been established under the Law with the aim of collection of intelligence in connection with threats against security of BiH. The Law defines those threats as threats against sovereignty, territorial integrity, the constitutional order, the fundaments of economic stability of Bosnia and Herzegovina, including threats against global security which are detrimental to Bosnia and Herzegovina, particularly including the following: terrorism, including international terrorism; espionage directed against Bosnia and Herzegovina or otherwise detrimental to the security of Bosnia and Herzegovina in any other way; sabotage directed against the vital national infrastructure of Bosnia and Herzegovina or otherwise directed against Bosnia and Herzegovina; organized crime directed against Bosnia and Herzegovina or otherwise detrimental to the security of Bosnia and Herzegovina in any other way; illegal drugs, arms and human trafficking directed against Bosnia and Herzegovina or otherwise detrimental to the security Bosnia and Herzegovina in any other way; illegal international proliferation of weapons of mass destruction, and the components thereof, as well as materials and tolls required for its production; illegal trafficking of internationally controlled products and technologies; acts punishable under international humanitarian law; organized acts of violence or intimidation against national or religious groups in Bosnia and Herzegovina. Further, the Constitutional Court notes that the legislator prescribed general powers of the Agency in gathering information and that it gave detailed information for which the approval of the Director General is required and it also prescribed

the measures of secret gathering of information for which the Court's authorization is required. The following are the measures of secret gathering of information for which the Court's authorization prescribed by Law is required: surveillance in non-public places, surveillance of telecommunication and other forms of electronic surveillance, as well as search of property without consent of the owner or temporary occupant. The legislator determined that these measures may only be used in cases where there has been previous authorization by the President of the Court of Bosnia and Herzegovina or a Judge of the Court of Bosnia and Herzegovina designated by the President of the Court of Bosnia and Herzegovina. The Law defined the content of the application for obtaining written approval for the measures of surveillance and search, including the content of the warrant.

16. The Constitutional Court finds that the challenged provisions of Article 78, paragraphs 3, 4, and 5 of the Law read as follows:

The warrant may not be authorized for longer than 60 days. In justified cases, the judge may extend the warrant for additional 30 days periods if s/he is satisfied that a warrant continues to be required.

Notwithstanding the provisions contained in Article 77 of this Law and the previous paragraph of this Article, the use of these measures may be authorized by the Director-General with the agreement of the Chair when delay would cause irreparable harm to the security of Bosnia and Herzegovina.

Upon authorizing such measures, the Director-General must immediately inform the judge, who shall take appropriate action to confirm the authorization or to terminate the information-gathering, pursuant to this Law.

17. The Constitutional Court observes that there are two substantive complaints of the applicant. As to the first complaint, the applicant claims that, when it comes to extension of authorization under this Article, the legislator stated „in justified cases" and „for additional 30 days periods if s/he is satisfied that a warrant continues to be required", which indisputably indicates that the challenged provisions are vague and imprecise, and the State bodies are given excessive discretionary powers. Therefore, those provisions are obviously subjected to arbitrary interpretation or any other misuse. Moreover, the challenged provisions do not give precise information about total duration of application of measures of secret information gathering.

18. In her second complaint, the applicant indicates that interference with the guaranteed rights of an individual by executive body must be subjected to effective control. Pursuant to the challenged provisions the judge „shall undertake appropriate actions" in order to

confirm the authorization or terminate the action of information gathering. Also, there has been no deadline nor written decision of the court prescribed in the challenged provisions.

19. The Constitutional Court notes that within the meaning of the provisions of Article I (2) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina is defined as „a democratic state, which shall operate under the rule of law and with free and democratic elections". The principle of the rule of law arises from the mentioned provision and it signifies the system of political power based on the compliance with the Constitution. The principle of the rule of law requires that all constitutions, laws and other regulations that are passed must be harmonized with the constitutional principles. Furthermore, the concept of the rule of law is not limited only to formal compliance with the principle of constitutionality and lawfulness, but it requires that the constitution and laws have specific content appropriate in a democratic society, so that it serves the principle of protection of human rights and freedoms with regards to the relations between citizens and bodies of public authority within the frame of democratic and political system. In view of the aforesaid, the law must be sufficiently precise, clear and foreseeable so that an individual may adjust his/her behaviour to that Law without fear that because of unclear and imprecise norms he/she would be deprived of the guaranteed rights or bear the relevant consequences. In view of the aforesaid, the legislator, when regulating the field of protection of national security, must take into account the demands of the Constitution of Bosnia and Herzegovina, particularly those arising from the rule of law principle.

20. Thus, the Law provides that in order to perform its tasks the Agency may determine the measures of surveillance in non-public places, the surveillance of telecommunication, and other forms of electronic surveillance, as well as the search of property without consent of the owner or temporary occupant.

21. The Constitutional Court finds that the decision to determine these measures results in interference with individual right under Article 8 of the European Convention. Furthermore, the Constitutional Court recalls the relevant opinions presented in the case-law of the European Court of Human Rights: „such interference is justified within the meaning of Article 8, paragraph 2 only if it is „in accordance with law", pursues one or more legitimate aims stated in Article 8(2) and it is „necessary in a democratic society" in order to achieve that goal or goals…the law must fulfil the requirements of quality: must be accessible to a person it relates to and be foreseeable with regards to its effects… Foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, especially where a power vested in the executive is exercised in

secret, the risks of arbitrariness are evident… Moreover, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the discretion granted to the executive or to a judge to be expressed in terms of an unfettered power". Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference. Furthermore, the Constitutional Court reminds that in the judgment of *Roman Zakharov vs. Russia* (see, judgment *Roman Zakharov vs. Russia,* Application No. 47143/06, judgment of 4 December 2015), the European Court of Human Rights noted as follows: „ In view of the risk that a system of secret surveillance set up to protect national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there are adequate and effective guarantees against abuse… The Court has held that it is not unreasonable to leave the overall duration of interception to the discretion of the relevant domestic authorities which have competence to issue and renew interception warrants, provided that adequate safeguards exist, such as a clear indication in the domestic law of the period after which an interception warrant will expire, the conditions under which a warrant can be renewed and the circumstances in which it must be cancelled… The Court will take into account a number of factors in assessing whether the authorisation procedures are capable of ensuring that secret surveillance is not ordered haphazardly, irregularly or without due and proper consideration. These factors include, in particular, the authority competent to authorise the surveillance, its scope of review and the content of the interception authorisation. As regards the authority competent to authorise the surveillance, authorising of telephone tapping by a non-judicial authority may be compatible with the Convention… provided that that authority is sufficiently independent from the executive".

22. As to the case at hand, the legislator determined that in case the Agency's Director General has justified reasons to consider that the measures of surveillance and search are required by the Agency in order for it to be able to conduct investigation into threats against security of Bosnia and Herzegovina, he/she shall send written request to the respective Judge for obtaining approval for such surveillance and search. The Constitutional Court observes that the legislator determined that such warrant cannot be approved for a period longer than 60 days and in justified cases the Judge may extend the warrant for additional 30 days if he/she is convinced that the warrant is still required. The Constitutional Court finds that in the challenged provision the justified cases have been not specified, which means that it is not precisely stated in which cases the judge will approve extension of warrant. Moreover, the provision also contains a vague term: *if s/he is satisfied that a warrant continues to be required*. So, it follows that the preliminary proceedings judge

has no precise criteria stated in the law in accordance with which he/she could extend the warrant. Furthermore, the Law does not provide for the obligation of the Agency Director to submit any additional information or reasons based on which the judge would extend the warrant. The Constitutional Court finds that the legislator clearly indicated the period after which the warrant would expire. However, the legislator failed to determine how many times the warrant may be extended or renewed, which means that the legislator failed to prescribe maximum length of duration of these measures. Thus, how long these measures will last depends solely on the discretionary decision of the President of the Court of BiH or the judge authorised by him. The Constitutional Court reiterates that according to the standards of the European Court of Human Rights, and given that it concerns undisclosed measures which are not subject to examination by the persons they are related to or by public at large, it would be in contravention of the rule of law that legal discretion granted to executive branch or a judge is expressed in a form of unlimited power. So, the law must sufficiently clearly define the scope of such discretion granted to the relevant bodies and it also must stipulate the manner in which that discretion is exercised in order to guarantee to an individual the appropriate protection from arbitrary interference. As to the case at hand, the challenged provisions, based on which the warrant is extended, have failed to clearly stipulate the scope of discretion granted to the President of the Court of BiH or a judge designated by him/her since his/her discretion is reflected in a form of unlimited power when interpreting those vague terms „in justified cases" and „if s/he is satisfied that a warrant continues to be required" and when maximal duration of these measures depends solely on the discretionary decision of the President of the Court of BiH or the judge designated by him/her. Therefore, these measures do not guarantee for an individual appropriate protection from arbitrary interference.

23. Furthermore, the Constitutional Court reiterates that according to the case-law of the European Court of Human Rights, the European Court takes into account several factors when assessing whether making an assessment as to whether the procedures of granting approval may ensure that secret surveillance is not ordered haphazardly, irregularly or without due and proper consideration. Those factors particularly include the body in charge of approving the surveillance, its scope of consideration and content of the approval for interception. As regards the authority competent to authorise the surveillance, authorising telephone tapping by a non-judicial authority may be compatible with the Convention provided that that authority is sufficiently independent from the executive branch of power. In general, the Constitutional Court reminds that measures of secret gathering of information afford the possibility for any kind of misuse in gathering and processing the information. For instance, telephone tapping and recording of conversations and use of data on established communications may affect a large number of persons. It does not

mean that only persons against whom those measures are ordered would be affected by the measures of secret gathering of information, but all other persons who communicated with them. For the mentioned reasons, the legislator stipulated that the measures of surveillance and search may be carried out only after the warrant from the Court of BiH or the judge authorised by him/her is obtained and that the warrant must be in a written form and have the prescribed content.

24. Therefore in the opinion of the Constitutional Court, the measures of secret gathering of information should be approved by the court or non-judicial authority which is sufficiently independent from the executive authority. This position of the Constitutional Court follows the case-law of the European Court of Human Rights. In the judgment of the European Court of Human Rights, *Szabo and Vissy vs. Hungary* of 12 January 2016, the following positions were taken:

75. A central issue common to both the stage of authorisation of surveillance measures and the one of their application is the absence of judicial supervision. The measures are authorised by the Minister in charge of justice upon a proposal from the executives of the relevant security services, that is, of the TEK which, for its part, is a dedicated tactical department within the police force, subordinated to the Ministry of Home Affairs, with extensive prerogatives to apply force in combating terrorism. For the Court, this supervision, eminently political (...) but carried out by the Minister of Justice who appears to be formally independent of both the TEK and of the Minister of Home Affairs – is inherently incapable of ensuring the requisite assessment of strict necessity with regard to the aims and the means at stake. (...).

77. (...) However, the political nature of the authorisation and supervision increases the risk of abusive measures. The Court recalls that the rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control (...).

78. The governments' more and more widespread practice of transferring and sharing amongst themselves intelligence retrieved by virtue of secret surveillance – a practice, whose usefulness in combating international terrorism is, once again, not open to question and which concerns both exchanges between Member States of the Council of Europe and with other jurisdictions – is yet another factor in requiring particular attention when it comes to external supervision and remedial measures.

79. It is in this context that the external, preferably judicial, a posteriori control of secret surveillance activities, both in individual cases and as general supervision, gains its true importance (see also Klass and Others, cited above, §§ 56, 70 and 71; Dumitru Popescu, cited above, § 77; and Kennedy, cited above, §§ 184-191), by reinforcing citizens' trust that guarantees of the rule of law are at work even in this sensitive field and by providing

redress for any abuse sustained. The significance of this control cannot be overestimated in view of the magnitude of the pool of information retrievable by the authorities applying highly efficient methods and processing masses of data, potentially about each person, should he be, one way or another, connected to suspected subjects or objects of planned terrorist attacks. The Court notes the lack of such a control mechanism in Hungary.

85. In any event, the Court recalls that in Klass and Others a combination of oversight mechanisms, short of formal judicial control, was found acceptable in particular because of „an initial control effected by an official qualified for judicial office". However, the Hungarian scheme of authorisation does not involve any such official. The Hungarian Commissioner for Fundamental Rights has not been demonstrated to be a person who necessarily holds or has held a judicial office. (...)

25. However, pursuant to the challenged provisions, the use of these measures may be approved by the Director General with consent of the Chair of the Council of Ministers if postponement would amount to irreparable damage to the security of Bosnia and Herzegovina. So, application of these measures commences upon obtaining the consent from the Chair of the Council of Ministers. The Constitutional Court observes that this exception exclusively relates to the situation where an additional and „more serious" threat exists against the security of Bosnia and Herzegovina. So, the absence of urgent action and postponement of application for 48 hours during which the judge is obliged to decide the request, could cause irreparable damage to the security of Bosnia and Herzegovina and its citizens. As regards introduction of measures of secret gathering of information, i.e. the measures of surveillance and search, the legislator did not foresee the requirement of obtaining previous consent from the Chair of the Council of Ministers of BiH. The Constitutional Court reiterates that effective control by non-judicial body may be in accordance with the Convention provided that such body is sufficiently independent of the executive power. In the case at hand, the Chair of the Council of Ministers of BiH is the holder of the executive power. Furthermore, the legislator provided that after the use of those measures is approved, the Director General must immediately inform the judge, in accordance with this law. The Constitutional Court finds that it could be interpreted that appropriate actions referred to under the challenged provision are the same ones as those undertaken by the judge when he/she approves the warrant (when he/she checks out whether the requirements prescribed by the Law have been fulfilled). However, the legislator did not provide that the Director General should send a written request (with legally prescribed content) to the respective judge, neither did it prescribe the time-limit within which the judge must either approve or terminate application of these measures. Given that there is no deadline, the measures of surveillance and search will last without appropriate consideration of justification until the time the judge „undertakes appropriate actions" in order to

acknowledge the warrant or terminate the action of information gathering. The challenged provisions according to which application of measures of surveillance and search may be approved by the Director General after obtaining the consent from the Chair of the Council of Ministers in cases where additional and „more serious" threat against security of Bosnia and Herzegovina exists, and, according to which, the Director General must inform the judge who undertakes „appropriate actions" in order to confirm the approval or terminate the action of information gathering, have failed to ensure that the measures of surveillance and search are not ordered without due and proper consideration.

25. The Constitutional Court concludes that the provisions of Article 78 (3)(4)(5) of the Law are in contravention of the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

VII. Conclusion

27. The Constitutional Court concludes that the provisions of Article 78 (3)(4)(5) of the Law are not in compliance with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the reason that as regards the extension of the warrant, the scope of discretion granted to the President of the Court of BiH or the judge authorised by him is not clearly prescribed since his/her discretion implies unlimited power when he/she interprets vague terms such as „in justified cases" and „if s/he is satisfied that a warrant continues to be required", and where maximal duration of these measures exclusively depends on the discretionary decision of the Court of BiH or the judge authorised by him. Therefore, it follows that those provisions do not guarantee appropriate protection from arbitrary interference with individual constitutional rights. Also, the challenged provisions do not ensure that the measures of surveillance and search are not ordered haphazardly, irregularly or without due and proper consideration.

28. Having regard to Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as set out in the enacting clause of the present decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

CONTENTS

Case No. U 18/16

DECISION ON ADMISSIBILITY AND MERITS

Request of thirty delegates of the National Assembly of the Republika Srpska for the review of the constitutionality of the Law Declaring March 1 as the Independence Day of the Republic of Bosnia and Herzegovina (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95)

Decision of 6 July 2017

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

Mr. Mirsad Ćeman, President,

Mr. Mato Tadić, Vice-President,

Mr. Zlatko M. Knežević, Vice-President,

Ms. Margarita Tsatsa-Nikolovska, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Mr. Giovanni Grasso

Having deliberated on the request filed by **30 delegates of the National Assembly of the Republika Srpska**, in the Case no. **U 18/16**, at its session held on 6 July 2017 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by 30 delegates of the National Assembly of the Republika Srpska for the review of the constitutionality of the Law Declaring March 1 as the Independence Day of the Republic of Bosnia and Herzegovina (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95) is hereby dismissed as ill-founded.

It is hereby established that the Law Declaring March 1 as the Independence Day of the Republic of Bosnia and Herzegovina (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95) is consistent with the part of the Preamble of the Constitution of Bosnia and Herzegovina reading: *Bosniacs, Croats and Serbs, as constituent peoples (along with Others), and*

***citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina*, Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina, 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 1.1 and Article 2(a), (b), (c), (d) and (e) of the International Convention on the Elimination of All Forms of Racial Discrimination.**

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 2016, thirty delegates of the National Assembly of the Republika Srpska („the applicants") filed a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for the review of the constitutionality of the Law Declaring March 1 as the Independence Day of the Republic of Bosnia and Herzegovina (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95; „the Law").

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court of Bosnia and Herzegovina, the House of Representatives and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the House of Representatives and the House of Peoples of the BiH Parliamentary Assembly") were requested on 19 October 2016 to submit their replies to the request.

3. The House of Representatives and the House of Peoples submitted their replies on 19 January 2017 and on 18 November 2016 respectively.

4. Upon the proposal of the President Mirsad Ćeman, and pursuant to Article 90(1) (b) of the Rules of the Constitutional Court, it was decided that he would not take part in the work and decision-making in this case, as he had taken part in the passing of the law, which review of compatibility was sought.

III. Request

a) Allegations stated in the Request

5. The applicants hold that the Law is in contravention of the Constitution of Bosnia and Herzegovina and, in particular, in contravention of the tenth paragraph of its Preamble, reading: *Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina*, and Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina. In addition, the applicants state that the Law is in contravention of 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 1.1 and Article 2(1) (a), (b), (c), (d) and (e) of the International Convention on the Elimination of All Forms of Racial Discrimination („the International Convention").

6. It was indicated that the decision of the Constitutional Court in the case no. *U 5/98*, based on the cited paragraph of the Preamble of the Constitution of Bosnia and Herzegovina, established the constituent status of Serbs, Bosniacs and Croats throughout the territory of Bosnia and Herzegovina, namely in both of its Entities, as well as the obligation of the Entities to create conditions in order for that status to be exercised in full capacity.

7. In addition, the applicants underlined that the aim of the General Framework Agreement for Peace in Bosnia and Herzegovina, as well as that of the Constitution of Bosnia and Herzegovina, is to prohibit discrimination. In this connection, the applicants stated that the application of the rights and freedoms referred to in Annex I to the Constitution of Bosnia and Herzegovina, as stated in Article II(4) of the Constitution of Bosnia and Herzegovina, should be secured to all persons without discrimination. The aforementioned provisions, as indicated by the applicants, are the expression of the circumstances in which the General Framework Agreement for Peace in Bosnia and Herzegovina came about, namely, and the intention to additionally secure and protect a wide scope of rights of all persons on the territory of Bosnia and Herzegovina. As further indicated, such a constitutional solution is unique in the world as the international instruments listed in Annex I to the Constitution of Bosnia and Herzegovina make an integral part of the Constitution of Bosnia and Herzegovina and, thus, have priority over all other law, meaning that these constitutional provisions have priority over law of the State and Entities, including all the laws.

8. The applicants pointed out that in addition to the obligation to respect the constitutional norms on the constituent status of Serbs, Bosniacs and Croats in the entire territory of Bosnia and Herzegovina, i.e. in both of its Entities, and the obligation of the Entities

to create conditions in order for the constituent status to be exercised in full capacity, and the constitutional principle of prohibition of discrimination, Bosnia and Herzegovina established March 1 as the Independence Day of Bosnia and Herzegovina. It was also stated that it is a well-known fact that the Independence Day of Bosnia and Herzegovina is marked on March 1 every year, the date when Bosnia and Herzegovina declared independence from the Socialist Federal Republic of Yugoslavia, which, according to the applicants, was a classic form of secession. The applicants stated that it is a well-known fact that the referendum for the independence of Bosnia and Herzegovina was held on 29 February and 1 March 1992, when the independence, as alleged, was supported mainly by Bosniacs and Croats, and boycotted by Serbs. Moreover, it was indicated that a Decree to Proclaim the Law Declaring March 1 as the Independence Day of Bosnia and Herzegovina and the national holiday was signed by the President of the Presidency of the Republic of Bosnia and Herzegovina, Alija Izetbegović, on 6 March 1995, during the tragic conflict in Bosnia and Herzegovina. Previously, as stated, the Assembly of the Republic of Bosnia and Herzegovina had passed the Law on 28 February 1995. It was further mentioned that based on that act, nowadays the Independence Day is celebrated only in one part of the territory of Bosnia and Herzegovina, namely the Federation of Bosnia and Herzegovina. In the opinion of the applicants, it clearly follows from the aforesaid that the intention behind the establishment of March 1 as the Independence Day of Bosnia and Herzegovina was to exclude absolutely one constituent people, *i.e.* the Serb people. As further indicated, the prescription of a holiday of the Entities symbolizing only one constituent people, or two of the three constituent peoples in Bosnia and Herzegovina, in the applicants' opinion constitutes the measures directed at distinction, exclusion, restriction or giving preference based on national or ethnic origin. It was also stated that the prescription of the mentioned holiday was aimed at disrupting or compromising the recognition, enjoyment or exercise, under equal conditions, of human rights and fundamental freedoms in all areas of life.

9. Despite the obligations arising from Article II(1) and II(6) of the Constitution of Bosnia and Herzegovina for all the participants in public life and all public authorities, irrespective of the level of the government, to refrain from, not to encourage, not to defend or support discrimination, to take efficient measures at the national or local level to amend, rescind or nullify any laws and regulations containing discriminatory provisions, to prohibit any discriminatory actions, in the applicants' opinion, the competent authorities of Bosnia and Herzegovina did not take adequate measures to fulfil the obligations committed to under Article II(1), II(4) and II(6) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1, Article 2(1) (a), (b), (c), (d) and (e) of the International Convention referred to in Annex I to the Constitution of Bosnia and Herzegovina, as well as the European Convention.

10. The applicants concluded that it is quite clear that March 1 is celebrated as a date related exclusively to two peoples, namely the Bosniac people and Croat people, which places the Serb people in a subordinated and discriminatory position. Regarding the Constitutional Court of Bosnia and Herzegovina as a guardian of the Constitution and upholder of the principle of the constituent status of all three peoples throughout the territory of Bosnia and Herzegovina, protecting equally the interests of all peoples, including Serbs, the applicants requested that the Constitutional Court established that the Law was in contravention of the cited provisions of the Constitution of BiH, the European Convention and the International Convention.

b) Reply to the request

11. In their reply the Constitutional and Legal Commission of the House of Peoples stated that at its session held on 17 November 2016 it considered the request of the Constitutional Court for opinion on the mentioned request for the review of constitutionality. On that occasion, the Constitutional and Legal Commission noted that the Law had been passed on 28 February 1995 by the Assembly of the Republic of Bosnia and Herzegovina and that the Decree to Proclaim the Law had been signed by the President of the Presidency of the Republic of Bosnia and Herzegovina, Alija Izetbegović, on 6 March 1995, precisely three years after the verification of the results of the referendum determining the status of Bosnia and Herzegovina by the Republic Election Commission of the Socialist Republic of Bosnia and Herzegovina. It was also noted that the Law had been published in the *Official Gazette of the Republic of Bosnia and Herzegovina*, no. 9/95. It was further noted that the provision of Annex II(2) of the Constitution of BiH prescribed that *all laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in force to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina*. It was stated that the Constitutional and Legal Commission of the House of Peoples, following the discussion, decided unanimously to inform the Constitutional Court of the aforementioned facts, which would decide, in accordance with its jurisdiction, on the compatibility of the Law with the Constitution of BiH.

12. In their reply the Constitutional and Legal Commission of the House of Representatives stated that the Commission had considered the relevant request for the review of constitutionality at the session held on 17 January 2017 and, following the discussion, concluded with four votes „in favour" and three votes „against" and without abstention, that it was unable to reach a consensus, or to take a unanimous position on the request for the review of the constitutionality of the Law, and that the Constitutional Court would make a final decision in accordance with the Constitution of BiH and its Rules.

IV. Relevant Law

13. The **Law Declaring March 1 as the Independence Day of the Republic of Bosnia and Herzegovina** (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95 of 30 March 1995), as relevant, reads:

Article 1

It is hereby declared that March 1 shall be Independence Day of the Republic of Bosnia and Herzegovina.

Article 2

Independence Day of the Republic of Bosnia and Herzegovina shall be a national holiday.

Article 3

State authorities, companies and other legal persons shall not work on Independence Day.

State authorities, companies and other legal entities that are obliged to work on Independence Day as well as the scope of their work shall be determined by the Government of the Republic of Bosnia and Herzegovina.

Article 4

This Law shall enter into force on the date of its publication in the Official Gazette of the Republic of Bosnia and Herzegovina.

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

Preamble

[...]

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

Article 1
Bosnia and Herzegovina

1. Continuation

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

and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations.

2. Democratic Principles

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

Article II
Human Rights and Fundamental Freedoms

1. Human Rights

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

2. International Standards

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

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 VI(3)
Jurisdiction

The Constitutional Court shall uphold this Constitution.

Annex II
Transitional Arrangements

2. Continuation of Laws

All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect

to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina.

15. **Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,** 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.

16. **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, 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.

17. The **International Convention on the Elimination of All Forms of Racial Discrimination** (adopted by the United Nations General Assembly at its plenary session held on 21 December 1965), as relevant, reads:

Article 1.1

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

Article 2(1) (a), (b), (c), (d) and (e)

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

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

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

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

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

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

V. Admissibility

18. 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.

19. The Constitutional Court observes that the applicants requested the Constitutional Court to take a decision on the constitutionality of the Law. Taking into account that the National Assembly of the Republika Srpska consists of 83 delegates and that the respective request was filed by 30 delegates, the Constitutional Court concludes that the request was filed by an authorised subject referred to in Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

20. In view of the above and in accordance with the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Constitutional Court's Rules, the Constitutional Court established that the request in question is admissible, as it was filed by an authorised subject, and that there is no any formal reason under Article 19 of the Rules of the Constitutional Court rendering the request inadmissible.

VI. Merits

21. The applicants held that the challenged Law is incompatible with the Constitution of Bosnia and Herzegovina and, notably, with the part of the Preamble reading as follows: *Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina*, and Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention, Article 1 of Protocol No. 12 to the European Convention and Article 1.1. and Article 2(1)(a), (b), (c), (d) and (e) of the International Convention.

22. The reason for the foregoing being the fact that the referendum on the independence of Bosnia and Herzegovina, which had been held on 29 February and 1 March 1992, was supported mainly by Bosniacs and Croats, while Serbs boycotted the referendum. Taking into account that 1 March as the Independence Day is celebrated only in one part of the territory of Bosnia and Herzegovina, *i.e.* the Federation of Bosnia and Herzegovina and that 1 March is celebrated as a day related exclusively to two peoples, the Bosniac and Croat people, in the opinion of the applicants, the declaration of March 1 as the Independence Day placed the Serb people in a subordinated and discriminatory position compared to two other constituent peoples.

23. Furthermore, the applicants alleged that the prescription of holidays of the State and Entities symbolizing only one, or two of the three constituent peoples in Bosnia and Herzegovina constitutes measures directed at distinction, exclusion, restriction or giving preference based on national or ethnic origin. In their opinion, the competent authorities of Bosnia and Herzegovina failed to take adequate measures to amend, rescind or annul the challenged Law, which is in contravention of the mentioned provisions of the Constitution of BiH, European Convention and International Convention.

Introductory Remarks (overview of the events, which preceded the referendum and the international recognition of the Republic of Bosnia and Herzegovina)

24. The Constitutional Court notes that Bosnia and Herzegovina had been a federal unit of the Socialist Federal Republic of Yugoslavia (SFRY) before it became an independent

internationally recognized State under the name of the Republic of Bosnia and Herzegovina (RBiH or Republic of BiH).

25. The fundamental principles referred to in the 1974 SFRY Constitution determined as follows: „the Peoples of Yugoslavia, proceeding of from the right of every people to self-determination, including the right to secession, (…) have united into a federal republic of free and equal nations and nationalities and have created a socialist federative community of working people – the SFRY (…).” Under the 1974 Constitution of the Socialist Republic of BiH (SRBiH) and Amendment LXVII thereto, the citizens of BiH exercised their powers through the Assembly or referendum.

26. At the beginning of the process of the dissolution of SFRY, the aim of which was a peaceful resolution of the Yugoslav crisis and the consideration of that problem from the legal point of view, two documents were adopted at the Summit of the (then) European Community, which was held in Brussels on 17 December 1991. The first document being the Declaration on the Guidelines on the Recognition of New States in the Eastern Europe and in the Soviet Union, wherein it was stated that „new States will be recognized subject to the normal standards of international practice and the political realities in each case”. The second document being the Declaration on Yugoslavia, wherein the European Community expressed its readiness to recognize, as of 15 January 1992, all Yugoslav republics complying with and respecting international documents, such as e.g. the UN Charters *et al*. In this connection, the European Community formed a special Arbitration Commission (known as the Badinter Arbitration Commission named after its President, Robert Badinter). During its work, the Arbitration Commission adopted a number of opinions on the dissolution of the SFRY.

27. In its Opinion No. 1 of 29 November 1991, the Arbitration Commission of the Peace Conference on Yugoslavia of the European Community indicated that „although the SFRY has until now retained its international personality, notably inside international organizations, the Republics have expressed their desire for independence; in Slovenia, by a referendum in December 1990, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991; in Croatia, by a referendum held in May 1991, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991; in Macedonia, by a referendum held in September 1991 in favour of a sovereign and independent Macedonia within an association of Yugoslav States; in Bosnia and Herzegovina, by a sovereignty resolution (memorandum of independence) adopted by the SRBiH Assembly on 14 October 1991, whose validity has been contested by the Serbian community of the Republic of Bosnia and Hercegovina”. Based on the aforementioned, the Arbitration Commission found

that „the Socialist Federal Republic of Yugoslavia is in the process of dissolution; that it is incumbent upon the Republics to settle such problems of State succession as may arise from this process in keeping with the principles and rules of international law, with particular regard for human rights and the rights of peoples and minorities".

28. In the Arbitration Commission's Opinion No. 4 of 11 January 1992, which was related to an application of the Minister of Foreign Affairs of the SRBiH for recognition of the SRBiH by the member States of the European Community, the Arbitration Commission established that „in the eyes of the Presidency of the SRBiH and Government of the SRBiH, the legal basis for the application for recognition is Amendment LX added to the Constitution of the SRBiH on 31 July 1990". That Amendment states that Bosnia and Herzegovina is a „sovereign democratic State of equal citizens, comprising the peoples of Bosnia and Herzegovina - Muslims, Serbs and Croats - and members of other peoples and other nationalities living on its territory". The Arbitration Commission held that the quoted provision was essentially the same as Article 1 of the 1974 SRBiH Constitution and made no significant change in the previous law. The Arbitration Commission also established that on the other hand, „outside the institutional framework of SRBiH, on 10 November 1991 'the Serbian people of Bosnia and Herzegovina' voted in a plebiscite for a 'common Yugoslav State'. On 21 December 1991 an 'Assembly of the Serbian people of Bosnia and Herzegovina' passed a resolution calling for the formation of a „Serbian Republic of Bosnia and Herzegovina" in a federal Yugoslav State if the Muslim and Croat communities of Bosnia and Herzegovina decided to 'change their attitude towards Yugoslavia'. On 9 January 1992 this Assembly proclaimed the independence of a 'Serbian Republic of Bosnia and Herzegovina'". Taking into account the given circumstances, the Arbitration Commission was of the opinion that „the will of the peoples of Bosnia and Herzegovina to constitute the SRBiH as a sovereign and independent State cannot be held to have been fully established but that this assessment could be reviewed if appropriate guarantees were provided by the republic applying for recognition, possibly by means of a referendum of all the citizens of Bosnia and Herzegovina without distinction carried out under international supervision".

29. Pursuant to Article 152 of the Constitution of the SRBiH and Amendment LXXI, item 5, line 9 to the Constitution of the SRBiH, in conjunction with Articles 3 and 26 of the Law on Referendum, at the joint session of the Council held on 24 and 25 January 1992, the Assembly of the SRBiH took a decision to call a republic referendum to determine the status of BiH. The Decision was published in the *Official Gazette of the SRBiH*, 2/92. The Decision determined the date of the referendum in which citizens of SRBiH were asked to vote on the following question: „Are you for a sovereign and independent Bosnia and Herzegovina, a state of equal citizens, peoples of Bosnia and Herzegovina – Muslims,

Serbs, Croats and members of other people living in it?" It was established that the referendum would be carried out by the Republic Election Commission and Municipal Election Commission.

30. Pursuant to Article 28, item 6 of the Law on Referendum (*Official Gazette of the SRBiH*, 29/77 and 24/91), at the session held on 6 March 1992, the Republic Election Commission established the results of the republic referendum to determine the status of Bosnia and Herzegovina, which was held on 29 February and 1 March 1992. They were published in the *Official Gazette of the RBiH*, 7/92 of 27 March 1992. The Republic Election Commission established that out of the total number of voters - 3,253,847, 2,073,567 of citizens with the suffrage right or 64.31% appeared and voted at the republic referendum for determining the status of Bosnia and Herzegovina. The number of valid ballots was 2,067,969 or 64.16%. Out of the total number of valid ballots, 2,061,932 were „for", or 99.44%, and 6,037 were „against" or 0.29%. There were 5,227 invalid ballots or 0.25%. Thus, out of the total number (2,073,568) of citizens who voted at the republic referendum on 29 February and 1 March 1992 to determine the status of Bosnia and Herzegovina, „2,061,932 citizens or 99.44% voted for a sovereign and independent Bosnia and Herzegovina, a State of equal citizens, peoples of Bosnia and Herzegovina – Muslims, Serbs, Croats and members of other people living in it".

31. The European Community and member States, at the session held in Luxembourg on 6 April 1992, recognized the legal personality of Bosnia and Herzegovina and its territorial integrity and political independence.

32. On 22 May 1992, the United Nations General Assembly adopted the Resolution No. A/RES/46/237 to admit the Republic of Bosnia and Herzegovina to membership of the United Nations.

33. In its Opinion No. 8 of 4 July 1992, the Arbitration Commission established that „the process of dissolution of the SFRY referred to in Opinion No. 1 of 29 November 1991 is now complete and that the SFRY no longer exists". The Arbitration Commission was of the opinion that „the existence of a federal state, which is made up of a number of separate entities, is serious compromised when a majority of these entities, embracing a greater part of the territory and population, constitute themselves as sovereign state with the result that federal authority may no longer be effectively exercised. By the same token, while recognition of a state by other state has only declarative value, such recognition, along with membership of international organizations, bears witness to these states' conviction that the political entity so recognized is a reality and confer on it certain rights and obligations under international law". It also stated that „the referendum proposed in Opinion No. 4 was held in Bosnia and Herzegovina on 29 February and 1 March 1992; a

large majority of the population voted in favour of the Republic's independence". It also noted that „Bosnia and Herzegovina, Croatia and Slovenia have been recognized by all the Members States of the European Community and by numerous other States, and were admitted to membership of the United Nations on 22 May 1992".

34. The Assembly of the RBiH, at the session held on 28 February 1995, adopted the challenged Law, which was promulgated by a Decree of the President of the Presidency of the RBiH on 6 March 1995.

As to the review of constitutionality of the challenged Law

35. The Constitutional Court notes that the challenged Law (which entered into force in RBiH on 30 March 1995) continued its legal existence in the present BiH in accordance with the principle of the continuation of laws under Annex II(2) of the Constitution of BiH, which stipulates that all laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina.

36. Furthermore, the Constitutional Court observes that the republic referendum to determine the status of BiH was held after the beginning of the process of dissolution of the SFRY and after two other republics, namely Slovenia and Croatia, following the referendums, declared their independence on 25 June 1991. Furthermore, the Constitutional Court notes that the referendum „of all the citizens of the RBiH without distinction carried out under international supervision „ was proposed as a solution to determine the status of BiH by the Arbitration Commission. In this connection, the Constitutional Court outlines that the referendum to determine the status of BiH was carried out throughout Bosnia and Herzegovina, that all eligible citizens of BiH were called, without distinction, that more than 64% of citizens voted of which percentage 99.44% voted for a sovereign and independent Bosnia and Herzegovina, a State of equal citizens, peoples of Bosnia and Herzegovina – Muslims, Serbs, Croats and members of other people living in it. In the opinion of the international observers, the referendum was carried out in compliance with international democratic principles.

37. The Constitutional Court further notes that after the results of the referendum had been declared, the State was internationally recognized as the Republic of Bosnia and Herzegovina based on the referendum held on 1 March 1992. Article I(1) of the Constitution of BiH prescribes that *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. (...). As it follows from the foregoing, the results of the mentioned referendum are incorporated in the Constitution of BiH, which in no way whatsoever problematizes the existence of the Republic of BiH (which was internationally recognized based on the results of the referendum held on 1 March 1992) nor does it disregard it, but it rather emphasizes its legal continuation. Given the mentioned facts, which, in a way, form a part of the Constitution of BiH, the Constitutional Court further notes that the Constitutional Court of BiH, under Article VI(3) of the Constitution of BiH, has the jurisdiction which is defined so that the Constitutional Court *shall uphold this Constitution.* Regardless of different historical views and perspectives related to independence and international recognition of Bosnia and Herzegovina, the Constitutional Court holds that the genesis of the present Bosnia and Herzegovina is related, *inter alia*, to (i) international recognition thereof and, in that connection, (ii) referendum on independence held on 1 March 1992. Therefore, the referendum on independence of Bosnia and Herzegovina can be seen in no other way but as a part of legal continuation, which resulted in the international recognition of Bosnia and Herzegovina and the proclamation of this Constitution, which is upheld and protected by the Constitutional Court.

38. Furthermore, the Constitutional Court finds it necessary to explain the notion of constituent status (*konstitutivnost* in the B/H/S languages), notably in the context (such as this one) where the protection of the constituent status is requested in a procedure before the Constitutional Court. Constituent status implies the constituent power of the constituent peoples. The relevant part of the Preamble of the Constitution clearly prescribes that *constituent peoples (along with Others and citizens of Bosnia and Herzegovina) hereby determine that the Constitution of Bosnia and Herzegovina is as follows.* However, that right is limited by this Constitution. The Constitutional Court may examine the issue whether the constituent status of a people is violated or not only based on the provisions of the present Constitution, since this is precisely the Constitution which constitutes the expression of the joint will of the constituent peoples. Constituent status may not be understood so widely as to exceed what is determined by the Constitution. This means that the constituent peoples (through authorized representatives) cannot successfully refer to a violation of constituent status based on the something that could be described as their views or wishes or disagreements on certain issues (political, legal, cultural, historical, economic etc.). Constituent status may be violated exclusively if a right or a provision of this Constitution is jeopardized. Turning to the present case, the fact is that the present Constitution prescribes the continuation of the Republic of Bosnia and Herzegovina, and the previous paragraphs clearly explain that the international recognition of the Republic

of Bosnia and Herzegovina came after the referendum held on 29 February and 1 March 1992. On the other hand, the fact is that all constituent peoples, naturally including the Serbs, *determined that the Constitution of Bosnia and Herzegovina is as follows,* including the provisions on the continuation of the Republic of Bosnia and Herzegovina. For these reasons, the Constitutional Court holds that the constituent status of the Serb people is not jeopardized.

39. With regards to the applicant' allegations that the challenged Law placed Serbs as the constituent people in a subordinated and discriminatory position compared to Bosniac and Croats as two other constituent peoples, the Constitutional Court notes that, according to the case-law of the Constitutional Court based on the case-law of the European Court, discrimination occurs if a person or a group of persons who are in an analogous situation are treated differently without providing an objective and reasonable justification for such a treatment. Furthermore, it is irrelevant whether discrimination is the consequence of difference permitted by legal treatment or application of the mere law (see ECtHR, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, paragraph 226). According to the case-law of the European Court of Human Rights, an act or a regulation is discriminatory if it differentiates between individuals or groups in similar situations without objective and reasonable justification, i.e. if there was no reasonable proportionality between the means used and the aim sought to be achieved (see, Constitutional Court, First Partial Decision *No. U 4/04* of 31 March 2006, paragraph 109, available on the website of the Constitutional Court www.ustavnisud.ba).

40. In the case No. *U 3/13*, having referred to its own case-law, the Constitutional Court concluded that the holidays cannot be regulated so as to give preference to any of the constituent peoples i.e. that this will be the case if regulated so as to reflect history, tradition, customs, religion and other values of only one people (see Constitutional Court, Decision *No. U 3/13* of 26 November 2015, paragraph 90, available on the website of the Constitutional Court www.ustavnisud.ba). In the mentioned case, the Constitutional Court concluded that the contested Article 3(b) of the Law on Holidays of the Republika Srpska, by designating the Day of Republic to be observed on 9 January, places the members of the Serb people in the privileged position when compared to Bosniacs and Croats, Others and citizens of the Republika Srpska, for the fact that this date represents a part of the historical heritage of only Serb people. For that reasons, the Constitutional Court found that the contested Article was incompatible with Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1. and Article 2 (a) and (c) of the International Convention and Article 1 of Protocol No. 12 to the European Convention (*op. cit. U 3/13,* paras 97 and 101).

41. Taking into account the aforesaid, and starting from the facts that all citizens of Bosnia and Herzegovina, without distinction on the ground of national or ethnic affiliation, were called to vote at the referendum, that they answered the question whether they were for a sovereign and independent Bosnia and Herzegovina, a State of equal citizens, peoples of Bosnia and Herzegovina – Muslims, Serbs, Croats and members of other people living in it and that the Republic of Bosnia and Herzegovina continued its legal existence as the State of Bosnia and Herzegovina where Bosniacs, Croats and Serbs are equal constituent peoples, the Constitutional Court cannot conclude that the challenged Law, wherein 1 March (as the date when the referendum was held) is determined as a holiday marking the Independence Day of BiH, discriminates against Serbs when compared to two other constituent peoples. In particular, the Constitutional Court holds that the challenged Law does not put any of the constituent peoples in a different position, including the Serb people when compared to two other constituent peoples. Therefore, the Constitutional Court does not hold that the challenged Law, which is related to 1 March as the Independence Day, places Serbs in a subordinated and discriminatory position when compared to Croats and Bosniacs as two other constituent peoples.

42. Therefore, the Constitutional Court concludes that the challenged Law is not in violation of the part of the Preamble of the Constitution reading as follows: *Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina*, Article I(2) and Article II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention, Article 1 of Protocol No. 12 to the European Convention and Article 1.1. and Article 2 (1) (a), (b), (c), (d) and (e) of the International Convention.

VII. Conclusion

43. The Constitutional Court concludes the challenged Law is compatible with the tenth line of the Preamble reading *Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina*, Article I(2) and Article II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention, Article 1 of Protocol No. 12 to the European Convention and Article 1.1. and Article 2 (1) (a), (b), (c), (d) and (e) of the International Convention.

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

45. Pursuant to Article 43 of the Rules of the Constitutional Court, a separate dissenting opinion of the Vice-President Zlatko M. Knežević makes an annex to 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.

Zlatko Knežević
Vice-President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of Vice-President Zlatko M. Knežević, joined by Judge Miodrag Simović

I note with regret that I disagree with the opinion of the majority in this case following the request of a group of delegates of the National Assembly of the Republika Srpska for the review of the constitutionality of the provisions of the Law Declaring March 1 as the Independence Day for the following reasons:

The first group of reasons is related to the procedural aspect, which is equally important for the equal treatment of the applicants. Namely, the Constitution of Bosnia and Herzegovina, unlike the majority of contemporary, and some historical constitutions, substantially narrows the circle of authorized applicants for the review of constitutionality. Obviously the author of the constitution, in addition to other reasons that are less relevant for this opinion, wished to treat the request for the review of constitutionality as the most serious act by means of which a part of the state system expresses doubt about the constitutionality of a provision and/or the law that is important for the functioning of the entire system. At the same time, that implies an equal treatment of all the authorized applicants addressing the Constitutional Court with a request for review.

There is no possibility to discuss or decide this case without making comparisons with the recent case of the Constitutional Court no. *U 3/13* wherein the Constitutional Court decided on the request for the review of constitutionality of the provision of the Law Declaring January 9 the Day of the Republika Srpska.

Right away, in this procedural part, I point to obvious unfairness – I would almost say unfairness of procedure, to refer to the standard referred to in the Preamble of the Constitution – the standpoint of the majority in the Constitutional Court when it comes to these two requests. In one (*U 3/13*) the procedure was respected in the part relating to the public hearing as a form of democratic inclusion of not only applicants and other party but also of the public at large in the discussion on the issue of national equality; also, a respectable number of public workers was engaged to, if they wished so, give their respective opinion; the relevant international elements in Bosnia and Herzegovina were invited to state their opinion as *amicus curiae* and, eventually, not as the least important though, the opinion of the Venice Commission was sought. This afforded the significance to the case it merits as the issue being decided, as well as to the applicant.

In this case, unfortunately, everything is different.

Requests were denied to seek the opinion from the Venice Commission, to schedule a public hearing, no *amicus curiae* were invited, and that „indecent speed", to use an

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expression of a poet, indicates that the majority either did not want to allow an equal treatment, or had a serious fear to answer the questions asked in the request.

Regretful lack of knowledge about the Bosnia-Herzegovina's society, historical mentalities and inappropriate comparison of individual appeals with requests for the review of constitutionality are indicative of unpreparedness of a part of „compact majority", that always expresses its opinion in the same way, to venture into consideration and decision-making at the level required when working at the Constitutional Court. However, that is the problem of this society, which tolerates such existence and two different approaches in the entrusted trust to decide in the name of the society, one with the full competence and responsibility that all domestic judges meet irrespective of differing opinions or positions and different approach!, which changes are not in the hands of the Constitutional Court.

Both these cases concern an almost identical request – the review of constitutionality of a date declared a holiday and whether that disrupts the status/perception that one constituent people has in a sense that it was discriminated against. And the approach is, as I have already mentioned it, contrary to „the fair procedure"!, which brings us to the second reason.

Deeply dreading the effects of the decisions of the Constitutional Court I had to state this in the introduction, as unfair procedure in identical requests is not a matter of a changed case-law, but of a direct caving-in of the authority of the Constitutional Court. Unfortunately, we are gliding towards the social refusal of the implementation of our decisions and, irrespectively of a substantially minor number of decisions not implemented – only a few, their significance is substantial for the society as a whole and key political and human rights (to address only the fate of the case „Mostar") and that practice is not only the burden of the ones failing to implement it but also of the Constitutional Court itself which MUST take an equal approach in every case thereby dismissing any objection whatsoever of unfairness. The decision always constitutes the position of the majority and it may be in keeping with or against the request and is final as such and MUST be implemented, however if the society or a part of the society has a perception that the Constitutional Court approaches differently equal or similar requests, then the implementation of decisions comes down to the discussion on the fairness of procedure, and not on the merits of the request.

To point out right away: in the Case no. *U 3/13* I pointed out the danger for the Constitutional Court to address the assessment of perceptions, I pointed out the danger of introducing the Constitutional Court into the assessment of historical facts, I pointed out the danger of putting emphasis of differences as problems, and not as the riches of this society, I pointed out the danger of caving in the authority of the Constitutional Court when speaking about the mentioned historical facts from the constitutional/legal/social

and political level (social and political in terms of creating the social system, and not primitive supporters-like discussion in favour or against political parties). I am by no means happy that my fears are materialising, or that I am seeing it and, for the peace of my conscience, I am saying that the authority of the Constitutional Court is still, unfortunately, being caved in. As a citizen of this society whom the society has bestowed the right and obligation to do this job, I am obliged to speak irrespective of whether I am the majority or minority. That, in my deep conviction, is the purpose of the constitutional obligation to uphold this Constitution.

When we speak about the merits itself, the reasons for the decision were obviously written for some other request. Namely, the reasons for the decision, to bring it down to the basic categories with a danger to oversimplify it, discuss the independence of Bosnia and Herzegovina.

The independence of Bosnia and Herzegovina, namely the autonomous state existence as an internationally recognised state within the existing boundaries and with the internal structure defined by the Constitution (to rephrase the provisions of the Constitution of Bosnia and Herzegovina), is an indisputable fact that has been indisputable at least since the entry into force of the Constitution, for more than twenty years now that is. The filed request for the review of constitutionality does not problematize the independence of the *state* of Bosnia and Herzegovina and the switch of thesis in the reasons for the decision is either a professional failure or an attempt to obscure the different decision-making in similar or identical requests.

Let me go back to the Case no. *U 3/13*. In that case the Constitutional Court decided that the enactment of the Law on the Day of the Republika Srpska was in a legal procedure before the National Assembly of the Republika Srpska; that no discriminatory treatment occurred in the procedure of enactment, as it was mentioned when the law was enacted, its amendments, the implementation of the earlier decisions of the Constitutional Court in this matter and everything that was necessary for the history of decision-making.

In this case everything is different.

The Decree Promulgating the Law had been adopted in 1995 and, without any euphemisms, amidst tragedy and war. Is it necessary now for me to explain who waged war against whom, and there was no legality, at least when it comes to one people at a minimum, to take decisions in their name during that period. The Decision on the Referendum on the Independence was adopted and implemented with the refusal of one people to take part in the referendum.

Now I only wish to refer to the positon in the Decision no. *U 3/13*, which I convey here:

Therefore, the Constitutional Court holds that the selection of 9 January as the day observing the Day of the Republic does not symbolize collective, shared remembrance contributing to strengthening the collective identity as values of particular significance in a multi-ethnic society based on the respect for diversity as the basic values of a modern democratic society. In this connection, the selection of 9 January to mark the Day of the Republic as one of the holidays of the Entity which constitutes a constitutional category and, as such must represent all citizens of the Republika Srpska, who have equal rights according to the Constitution of the Republika Srpska, is not compatible with the constitutional obligation on non-discrimination in terms of the rights of groups as it privileges one people only, namely the Serb people, whose representatives have adopted on 9 January 1992, without participation of Bosniacs, Croats and Others, the Declaration Proclaiming the Republic of the Serb people of Bosnia and Herzegovina, that represents a unilateral act.

Therefore, the questions that the Constitutional Court was supposed to answer in this case are rather simple, by following its case-law in the Case no. *U 3/13*, which I was against at the time, by the way, due to the fear of everything we are talking about today.

Namely: *Does the choice of March 1 as the date for marking a holiday has the symbolism of collective shared remembrance that may contribute to the strengthening of collective identity as the values of special significance in a multi-ethnic society based on the consideration and respect for differences as the basic values of a modern democratic society?*

Next, *does the choice of March 1 as one of the holidays of the Entity, which is a constitutional category and, as such, have to represent the citizens of that Entity?*

Next, *is the legal provision about the choice of March 1 as a holiday in conformity with the constitutional obligation of non-discrimination in terms of the right of groups and whether it establishes a privileged position of only one or two constituent peoples, for it is indisputable that on the relevant day the members of two people, without the participation of the Serb people, adopted a decision on independence, which is a unilateral act in relation to the members of the Serb people?*

Next, *was the enactment and promulgation of the law in a procedure of accommodating and considering interests other than those of the issuer of the Decree of Promulgation*?

And, finally: *In terms of historical evaluation (which the reasoning in the Decision no. U 3/13 deals with in detail) can we speak in terms of the choice of the date (as March 1, and not the expression of the independence of Bosnia and Herzegovina) in a constituent people (Serbs) as being indicative of tragic events ensuing after that day, including the*

event taking place on that very day, and how it led to the perception of that people about discrimination?

Here, we have come to an end of the comparison of two decisions on identical causes – the days chosen to mark historical events, which were accepted negatively in the perception of *etnos*.

As much as I have held, for the reasons already mentioned, which were elaborated on here, and much more so in the Decision no. *U 3/13*, that the assessment of the *perception* was not in the hands of the Constitutional Court, we are in a different situation now. The majority that adopted the Decision no. *U 3/13* faces the most important legal postulate – the issue of legal certainty. Legal certainty, which is oftentimes referred to as the rule of law (not as the rule of the laws, for the laws may be enacted also in an unconstitutional procedure, or contrary to constitutional provisions), imposes as *conditio sine qua non* for identical requests to be decided identically. And if a different decision is made, that change of position must be deeply based on new needs or interpretations of the norm in the broadest Kelsenian sense as the pure norm or pure law. The philosophy of law does not answer the questions of an individual request or interpretation, but it surely does answer all the questions of the essence of social existence and prevents unfairness or inequality. The constitutional law does not amount to copying the decisions of ordinary courts and the obscurity of the responsibilities of this Constitutional Court to decide the violations of individual rights guaranteed under the Constitution does not rule out – on the contrary – it orders the consideration in key social processes and guarantees of the essence of social behaviour with possibilities to enhance or to aggravate social development. That is the task of the Constitutional Court, not participating in the role of a Supreme Court, not justice in terms of ordinary courts, but creating interpretations of the Constitution that is neither a check, nor an obstacle, but a text affording sufficient room for fairness and equity. If fairness and equity are wanted.

And, finally, to whom it may concern:

The decision in this case failed to answer positively the already asked questions, neither did it discuss these questions at all, thus introducing an additional problem in the functioning of our society, for there is no more important concern than that of the rule of law as a condition for the social system in the broadest sense, particularly so the constitutional system.

Therefore, I was against the position of the majority in this case.

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Case No. U 22/16

DECISION ON ADMISSIBILITY AND MERITS

Request of 30 delegates to the National Assembly of Peoples of the Republika Srpska for review of the constitutionality of Articles 1, 2 and 3 of the Law Declaring November 25 as Statehood Day of the Republic of Bosnia and Herzegovina (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95)

Decision of 6 July 2017

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

Mr. Zlatko M. Knežević, Vice-President,

Mr. Mato Tadić, Vice-President,

Ms. Margarita Tsatsa-Nikolovska, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Mr. Giovanni Grasso

Having deliberated on the request filed by **30 delegates of the National Assembly of the Republika Srpska**, in the case no. **U 22/16**, at its session held on 6 July 2017 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by 30 delegates of the National Assembly of the Republika Srpska for review of the constitutionality of Articles 1, 2 and 3 of the Law Declaring November 25 as Statehood Day of the Republic of Bosnia and Herzegovina (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95) is hereby dismissed.

It is hereby established that Articles 1, 2 and 3 of the Law Declaring November 25 as Statehood Day of the Republic of Bosnia and Herzegovina (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95) are not inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and Article 2(a), (b), (c), (d), (e) of the International Convention on the Elimination of All Forms of Racial

Discrimination and Article 1 of Protocol No. 12 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 7 December 2016, 30 delegates to the National Assembly of Peoples of the Republika Srpska („the applicants") filed a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of Articles 1, 2 and 3 of the Law Declaring November 25 as Statehood Day of the Republic of Bosnia and Herzegovina (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95; the „challenged law").

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2)(a) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the House of Representatives and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the House of Representatives and the House of Peoples of the BiH Parliamentary Assembly") were requested on 6 February 2017 to submit their replies to the request.

3. On 7 March 2017, the House of Representatives of the BiH Parliamentary Assembly submitted the reply to the request, while the House of Peoples of the BiH Parliamentary Assembly did so on 7 April 2017.

III. Request

a) Allegations stated in the Request

4. The applicants contest the constitutionality of the provisions of Articles 1, 2 and 3 of the challenged law with reference to the tenth paragraph of the Preamble of the Constitution of Bosnia and Herzegovina, Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention for the Protection of

Human Rights and Fundamental Freedoms („the European Convention"), Article 1 of Protocol No. 12 to the European Convention and Article 1.1. and Article 2(a), (b), (c), (d), (e) of the International Convention on the Elimination of All Forms of Racial Discrimination. In the reasons for their request, the applicants point out firstly that the Constitutional Court of Bosnia and Herzegovina, in its Decision *U 5/98*, based on the tenth paragraph of the Preamble of the Constitution, established the constituent status of Serbs, Bosniacs and Croats throughout the territory of Bosnia and Herzegovina and the obligation of the Entities to create conditions in order for that status to be exercised in its full capacity. In addition, the applicants underline that *the aim of the General Framework Agreement for Peace in Bosnia and Herzegovina, including the Constitution of Bosnia and Herzegovina, is the prohibition of discrimination*. The provision of Article II(4) is *included in the Constitution of Bosnia and Herzegovina despite the fact that there is a similar provision provided for in the European Convention (Article 14 thereof)*. Annex I to the Constitution of Bosnia and Herzegovina contains a list of international documents protecting the human rights and freedoms, while Article II(4) of the Constitution of Bosnia and Herzegovina prescribes that the application of those rights and freedoms shall be secured to all persons without discrimination. In the applicants' opinion, the intention additionally to secure and to protect a wide range of rights of all persons in the territory of Bosnia and Herzegovina is thus expressed. The applicants hold that such a constitutional solution *is unique in the world*, as the international instruments provided for in Annex I to the Constitution of Bosnia and Herzegovina form an integral part of the Constitution of Bosnia and Herzegovina *and, thus, have priority over all other law*. In the case at hand, according to the applicants, this means that these constitutional provisions have priority over law of the State and Entities, including all the laws.

5. Furthermore, the applicants state that Bosnia and Herzegovina, despite the obligation to respect the constitutional norm related to the constituent status of Serbs, Bosniacs and Croats throughout the territory of Bosnia and Herzegovina, determined November 25 as Statehood Day of Bosnia and Herzegovina. The applicants allege that a Decree to Proclaim the Law wherein November 25 was declared as Statehood Day of Bosnia and Herzegovina and National Holiday was signed by *the President of the Presidency of the so-called Republic of Bosnia and Herzegovina, Alija Izetbegović, on 6 March 1995, at the time of tragic conflict in Bosnia and Herzegovina*. Based on that act, nowadays the Statehood Day has been *celebrated only in one part of the territory of Bosnia and Herzegovina, i.e. Federation of Bosnia and Herzegovina*. In the applicants' view, it clearly follows that *the intention behind the determination of November 25 as Statehood Day of Bosnia and Herzegovina was to exclude one constituent people, i.e.*

the Serb people. Namely, in the applicants' opinion, any prescription of a holiday of the Entities symbolizing only one constituent people or two constituent peoples in Bosnia and Herzegovina constitutes the measure directed at distinction, exclusion, restriction or giving preference based on national or ethnic origin, the aim of which is to jeopardize or impair the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms under equal conditions in all fields of life. The applicants point out that despite the obligations *for all participants in public life and public authorities at any level whatsoever to refrain from, not to encourage, not to defend or not to support discrimination*, and to take efficient measures at the national or local levels to amend, rescind or nullify any laws and regulations which provide for discriminatory provisions, to prohibit any discriminatory actions, the competent authorities of Bosnia and Herzegovina failed to take adequate measures to that end. The applicants hold that November 25 is celebrated *as a holiday related only to two peoples, namely the Bosniac people and Croat people, which places the Serb people in a subordinated and discriminatory position*.

6. In view of the above, the applicants requested that the Constitutional Court establish that the provisions of Articles 1, 2 and 3 of the challenged law are inconsistent with Article 1 of Protocol No. 12 to the European Convention and Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and Article 2(a), (b), (c), (d), (e) of the International Convention on the Elimination of All Forms of Racial Discrimination.

b) Reply to the request

7. In the reply to the request, the House of Representatives of the BiH Parliamentary Assembly stated that the Constitutional and Legal Commission discussed the request and *failed to take a unanimous position on the issue*.

8. In the reply to the request, the House of Peoples of the BiH Parliamentary Assembly mentioned the date when the challenged law had been passed, and the signatory party to the Decree to Proclaim the Law and the time when it had been signed. In addition, it is stated that the provision of Article II(2) (interim provisions) prescribes that *all laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina*. Furthermore, they stated that, following the discussion, the Constitutional and Legal Commission of the House of Peoples of the BiH Parliamentary Assembly decided *to inform the Constitutional Court of BiH about the mentioned facts and that the Constitutional Court, within its jurisdiction, ought to decide whether or not the challenged law is inconsistent with the Constitution of BiH*.

IV. Relevant Law

9. The **Law Declaring November 25 as Statehood Day of the Republic of Bosnia and Herzegovina** (*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95), as relevant, reads:

Article 1

It is hereby declared that November 25 shall be a Statehood Day of the Republic of Bosnia and Herzegovina.

Article 2

The Statehood Day of the Republic of Bosnia and Herzegovina shall be a national holiday.

Article 3

State authorities, companies and other legal persons shall not work on the Statehood Day.

State authorities, companies and other legal entities that are obliged to work on the Statehood Day as well as the scope of their work shall be determined by the Government of the Republic of Bosnia and Herzegovina.

[...]

V. Admissibility

10. 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.

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

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

[...]

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

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary

Assembly; by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

12. Having regard to the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Constitutional Court's Rules, the Constitutional Court established that the request for review of the constitutionality of Articles 1, 2 and 3 of the challenged law is admissible, as it was filed by an authorised person, and that there is no any formal reason under Article 19 of the Rules of the Constitutional Court rendering the request inadmissible.

VI. Merits

13. The applicants hold that Articles 1, 2 and 3 of the challenged law are not in conformity with the provisions of Article I(2) and II(4) of the Constitution of Bosnia and Herzegovina, Article 14 of the European Convention, Article 1 of Protocol No. 12 to the European Convention and Article 1.1 and Article 2(a), (b), (c), (d), (e) of the International Convention on the Elimination of All Forms of Racial Discrimination, for *the Serb people in Bosnia and Herzegovina is discriminated against*, contrary to the constituent status proclaimed under the Preamble of the Constitution of Bosnia and Herzegovina.

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

Preamble

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

Article 1
Bosnia and Herzegovina

1. Continuation

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

2. Democratic Principles

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

Article 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.

15. **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, 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.

16. The **International Convention on the Elimination of All Forms of Racial Discrimination** (adopted by the General Assembly at its plenary meeting held on 21 December 1965), as relevant, reads:

Article 1.1

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

Article 2

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

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

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

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

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

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

17. The Constitutional Court first notes that Article 14 of the European Convention, referred to by the applicants, is not applicable to the present case, as the right guaranteed under Article 14 of the European Convention is an accessory right. This means that Article 14 of the European Convention does not provide for an independent right to non-discrimination but it may be referred to only having regard to „the enjoyment of the rights and freedoms set forth in the European Convention." Given that the applicants failed to make a connection between their allegations on discrimination and a right safeguarded by the European Convention in respect of which they claim a violation, the Constitutional Court cannot examine the applicants' allegations on discrimination under Article 14 of the European Convention in the present case.

18. However, the applicants also referred to the prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and Article 2(a), (b), (c), (d), (e) of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 1 of Protocol no. 12 to the Euroepan Convention. As to the applicability of the aforementioned provisions, the Constitutional Court notes that in the First Partial Decision no. *U 4/04* of 31 March 2006 (published in the *Official Gazette of BiH*, 47/06) and in the Second Partial Decision no. *U 4/04* of 18 November 2006 (published in the *Official Gazette of BiH*, 24/07), while examining the constitutionality of the then legal solutions on the flag, coat of arms and anthem, and the stipulation of holidays, it took a position that the International Convention on the Elimination of All Forms of Racial Discrimination was applicable. This conclusion was based on the fact that the International Convention on the Elimination of All Forms of Racial Discrimination was listed in Annex I to the Constitution of BiH, as one of the additional agreements which are applied in Bosnia and Herzegovina, and that the

obligations under the international agreements, listed in Annex I to the Constitution of Bosnia and Herzegovina, in accordance with Article II(1) and Article II(6) of the Constitution of Bosnia and Herzegovina also refer to the Entities. In addition, in the aforementioned Decision the Constitutional Court concluded that the stipulation of holidays and days of their observance falls under „the right explicitly guaranteed under the domestic law" within the meaning of Article 1 of Protocol No. 12 to the European Convention, regarding which the public authorities have committed themselves not to discriminate against anyone (*idem*, *U 3/03*, paragraphs 65-68).

19. In the present case, the assertions that Articles 1, 2 and 3 of the challenged law discriminate against the Serb people, meaning that other two peoples are given preference over the Serb people, contrary to the principle of equality of the constituent peoples, are based on the following facts: 1) the Decree to proclaim the challenged law was signed, as stated by the applicants, by *the President of the Presidency of the so-called Republic of Bosnia and Herzegovina, Alija Izetbegović […], at the time of tragic conflict in Bosnia and Herzegovina*; and 2) November 25 as Statehood Day of the Republic of Bosnia and Herzegovina has been observed only in the Federation of Bosnia and Herzegovina, which means that *the intention behind the determination of November 25 as Statehood Day of Bosnia and Herzegovina is absolutely to exclude one constituent people, i.e. the Serb people*.

20. According to the case-law of the Constitutional Court based on the case-law of the European Court of Human Rights, discrimination occurs if a person or a group of persons who are in analogous situations are treated differently, without an objective and reasonable justification for such treatment. In addition, it is irrelevant whether 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). Therefore, the first issue to be examined by the Constitutional Court is whether there is differential treatment, as alleged by the applicants.

21. As to the first argument that the challenged law is discriminatory because the Decree proclaiming the challenged law was signed by *the President of the Presidency of the so-called Republic of Bosnia and Herzegovina, Alija Izetbegović, on 6 March 1995, at the time of tragic conflict in Bosnia and Herzegovina*, the Constitutional Court notes that the challenged law was passed by the Presidency of the then Republic of Bosnia and Herzegovina, which, at the time, was an internationally recognized State and a Member State of the United Nations. The aforementioned also ensues from the Constitution of Bosnia and Herzegovina, which, in Article I(1), prescribes continuity between the former

Republic of Bosnia and Herzegovina and present day Bosnia and Herzegovina, which *shall continue its legal existence under international law as a state.*

22. As to the applicants' assertion that there was a clear *intention behind the determination of November 25 as Statehood Day of Bosnia and Herzegovina is absolutely to exclude one constituent people,* the Constitutional Court first recalls that in the First Partial Decision no. *U 4/04*, while examining the constitutionality of the Entities' laws on the flag, coat of arms and anthem, the Constitutional Court pointed out the following: (see paragraph 131): […] *As to the symbols of the Republika Srpska, the Constitutional Court points to the fact that the symbols in question are the official symbols of a territorial unit which has the status of „Entity", that they constitute a constitutional category and as such must represent all citizens of the Republika Srpska, who have equal rights according to the Constitution of the Republika Srpska. These symbols appear on all features of the public institutions of the Republika Srpska, that is the National Assembly of the Republika Srpska, public institutions etc. They are not the local symbols of one people, which are to reflect the traditional and historical heritage of that people but the official symbols of the multinational Entity. As such they must reflect the character of the Entity*. In the cited Decision, the Constitutional Court concluded that the challenged Laws were not in conformity with Article II (4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2. a) and c) of the International Convention for Elimination of All Forms of Racial Discrimination.

23. In addition, in the Second Partial Decision no. *U 4/04*, wherein the Constitutional Court examined the constitutionality of the provisions of Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays, designating as the holidays of the Republika Srpska: Christmas, Day of Republic, New Year (January 14th), Twelfth-day, St. Sava, First Serb Uprising, Easter, Whitsuntide, May Day – Labour Day and St. Vitus's Day, the Constitutional Court concluded that the challenged provisions (see, paragraph 70) were not in conformity with the constitutional principle of equality of the constituent peoples, citizens and Others, had a discriminating character and were not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 (a) and (c) of the International Convention for Elimination of All Forms of Racial Discrimination, because they included the holidays which only reflect and exalt the Serb history, tradition, customs and religious and national identity.

24. Furthermore, in its Decision no. *U 3/13*, the Constitutional Court concluded that the contested Article 3(b) of the Law on Holidays, by designating the Day of Republic to be observed on January 9, places members of the Serb people in the privileged position when compared to Bosniacs and Croats, Others and citizens of the Republika Srpska, for

the fact that this date represents a part of the historical heritage of only Serb people, and on account of the observance of the Saint Patron's Day of the Republika Srpska being connected to the tradition and customs of only Serb people. In view of the above, the Constitutional Court concluded that the contested Article 3(b) of the Law on Holidays was inconsistent with Article I (2) of the Constitution of Bosnia and Herzegovina, Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and Article 2 a) and c) of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 1 of Protocol No. 12 to the European Convention (*op. cit*. *U 3/13*, paragraphs 97-98).

25. Therefore, in the present case, the Constitutional Court will consider the historical context and symbolism of November 25 in order to establish whether the relevant date represents a part of the historical heritage which excludes the Serb people. In this regard, the Constitutional Court notes that, historically, the date of November 25 is based on the date of the 1943 First State Anti-Fascist Council of the People's Liberation of Bosnia and Herzegovina meeting („ZAVNOBIH"), held in Mrkonjić Grad on 25 and 26 November 1943. In the former Socialist Republic of Bosnia and Herzegovina, this date used to be observed as national holiday based on the Law Declaring November 25 as national holiday of the Socialist Republic of Bosnia and Herzegovina (*Official Gazette of SR BiH,* 5/69), which ceased to exist after the adoption of the challenged law. According to historical sources, this date is important because a Decision on Constituting Bosnia and Herzegovina as equal federal unit within the Yugoslav Federation was passed. The ZAVNOBIH Presidency was formed so that it reflected the equality of all the peoples in Bosnia and Herzegovina (Dr. Vojo Kecmanović was appointed President and Avdo Humo, Đuro Pucar Stari, Aleksandar Preha, Vice-Presidents and Hasan Brkić, Secretary). At this meeting, ZAVNOBIH adopted a resolution, wherein the following was pointed out: „for the first time in the history of Bosnia and Herzegovina, representatives of the Serb, Croat and Muslim peoples, feeling strong ties of fraternity in the uprising, are met with the aim of making political decisions allowing our peoples to organise our county in accordance with our will and interests, based on the results of armed struggle of the peoples of Yugoslavia and Bosnia and Herzegovina". In addition, the ZABNOBIH Resolution states: „the peoples of Bosnia and Herzegovina, mixed with each other, have been living together for centuries and have been sharing common interests and desire that their country, which is neither Serb, nor Croat nor Muslim, but Serb as well as Croat and Muslim, is free and fraternizes Bosnia and Herzegovina, guaranteeing equal rights to all Serbs, Muslims and Croats" (texts of the Minutes of the First ZAVNOBIH Meeting and Resolution available at: http://www.znaci.net/00001/145_3.pdf).

26. In view of the above, the Constitutional Court holds that it can be concluded that the date of November 25 is historically associated with the Serb people equally as with the Croat and Bosniac peoples, meaning that this date is not associated with any event which has excluded the Serb people in any way. On the contrary, it can be concluded that this date represents a symbol of the common anti-fascist struggle of all the peoples in Bosnia and Herzegovina in World War II and their aspirations for Bosnia and Herzegovina as equal federal unit within former Yugoslavia and that all the peoples living there are equal.

27. Furthermore, the Constitutional Court holds that the fact itself that the challenged law was passed during the war in Bosnia and Herzegovina and that the Decree to Proclaim the Law was signed by the then President of the internationally recognised Republic of Bosnia and Herzegovina does not call into question the indisputable historical connection of the peoples in Bosnia and Herzegovina with the events November 25 symbolises, as already stated. In view of the above, the Constitutional Court holds that November 25, as the date observed as national holiday in Bosnia and Herzegovina, based on the challenged law and after the dissolution of the former Yugoslavia, is a symbol of collective, shared remembrance contributing to strengthening the collective identity, as values of particular significance in a multi-ethnic society that is based on the respect for diversity as the fundamental values of a modern democratic society.

28. The second argument on discrimination, as stated by the applicants, is that the mentioned holiday has been *celebrated only in one part of the territory of Bosnia and Herzegovina, i.e. Federation of Bosnia and Herzegovina.* In connection with this issue, in its Decision no. *U 3/13* the Constitutional Court noted *that the holiday is manifested in the public life of a community through activities undertaken by the public authority for the purpose of reminding the public of the values of significance for the community as a whole and through representation of the community towards others, from outside of the community itself. Therefore, the manner of observance of the holidays assumes a character of exercising the public authority although, as such, it is not regulated by legal or any other norm* (*op. cit*. *U 3/13*, paragraph 82), and that *the manifestation of a holiday in a private life of an individual is connected to free time and does not obligate or impose any public or private participation in the very observation of the holiday. Thus, the practice of the observation of a holiday in principle could not result in discrimination in exercising one's individual rights and obligations. However, non-discrimination of individuals is not the same as the equality of groups (see, Constitutional Court, Third Partial Decision, No. U 5/98, paragraph 70). Therefore, the principle of collective equality of constituent peoples imposes an obligation on the entities not to discriminate, primarily, against those constituent peoples who are, in reality, a minority in that particular entity* (*idem*, paragraph 87).

29. Moreover, the Constitutional Court stated in the mentioned Decision that *the Venice Commission, in support of the reasons for which the selection of January 9 as the day of observance of the Day of the Republic may be problematic, among other things, indicated that, although no obligation has been imposed on persons to participate in the formal celebration of the Day of the Republic, the very fact that that law imposes the celebration on all the inhabitants by introducing it as a day off, namely for them to refrain from work on that day, under a threat of sanction of a relatively high fine, may be problematic, and the application thereof may result in disproportionate impact on individuals/members of certain ethnic communities living in the Republika Srpska, and the communities concerned* (*idem*, paragraph 95).

30. In the present case, the Constitutional Court notes that Article 3 of the challenged law prescribes that *state authorities, companies and other legal entities shall not work on the Statehood Day*. Accordingly, the Constitutional Court notes that it is common practice that the Ministry of Labour and Social Policy of the Federation of BiH sends a notification that the relevant day is a non-working day in the Federation of Bosnia and Herzegovina. However, the Constitutional Court notes that neither the challenged law nor any regulation prescribe any sanction in case that any legal person works on the Statehood Day. Furthermore, the applicants failed to refer to any practice or anything that would lead to the conclusion that the manner of observance of November 25, there where the date is celebrated as Statehood Day, established a difference in respect of the Serb people, when compared to the Bosniac people and Croat people.

31. In view of the above, the Constitutional Court holds that the applicants, by their allegations, failed to prove, to make it probable that, by proclaiming and/or observing November 25 as the Statehood Day of Bosnia and Herzegovina, the Serb people in Bosnia and Herzegovina is treated differently from the Bosniac people and Croat people. As it cannot be concluded that there is a differential treatment, the Constitutional Court concludes that the allegations on discrimination are ill-founded, meaning that the allegations are ill-founded that Articles 1, 2 and 3 of the challenged law are inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and Article 2 a), b), c), d) and e) of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 1 of Protocol No. 12 to the European Convention.

VII. Conclusion

32. The Constitutional Court concludes that the provisions of Articles 1, 2 and 3 of the Law Declaring November 25 as Statehood Day of the Republic of Bosnia and Herzegovina

(*Official Gazette of the Republic of Bosnia and Herzegovina*, 9/95) are not inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and Article 2 a), b), c), d) and e) of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 1 of Protocol No. 12 to the European Convention.

33. Having regard to Article 59(1) and (3) of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause.

34. Having regard to Article 43 of the Rules of the Constitutional Court, Vice-President Zlatko M. Knežević and Judge Miodrag Simović gave their statement of dissent to the majority 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.

Zlatko Knežević
Vice-President
Constitutional Court of Bosnia and Herzegovina

Case No. U 6/17

DECISION ON ADMISSIBILITY AND MERITS

Request of twenty six representatives to the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina for the review of constitutionality of Article 3.15 of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16)

Decision of 28 September 2017

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

Mr. Mato Tadić, Vice-President,

Mr. Zlatko M. Knežević, Vice-President,

Ms. Margarita Tsatsa-Nikolovska, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Mr. Giovanni Grasso

Having deliberated on the request filed by **twenty six representatives to the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina**, in the case no. **U 6/17**, at its session held on 28 September 2017 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by twenty six representatives to the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina for the review of the constitutionality of Article 3.15 of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16) is hereby dismissed.

It is hereby established that Article 3.15 of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16) is in conformity with Articles I(2), II(1), II(2), II(3), II(4) and II(5) of the Constitution of Bosnia and Herzegovina, Articles

14 and 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 25 and 26 of International Covenant on Civil and Political Rights, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.

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

Reasoning

I. Introduction

1. On 20 June 2017, twenty six representatives to the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina („the applicant") lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for the review of constitutionality of Article 3.15 of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16; „the Election Law").

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the Parliamentary Assembly of Bosnia and Herzegovina, the House of Representatives and the House of Peoples respectively were requested on 22 June 2017 to submit their respective replies to the request.

3. The House of Peoples submitted its reply on 19 July 2017. The House of Representatives failed to submit its reply to the request, within the given deadline of 30 days.

4. Upon the proposal of the President, Mirsad Ćeman, the Constitutional Court took a decision that the President will not participate in the work and decision-making upon the request for the existence of the reasons referred to in Article 90(1)(b) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

III. Request

a) Allegations stated in the request

5. The applicant claimed that the challenged Article 3.15 of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16) is not in conformity with Articles I(2), II(1), II(2), II(3), II(4) and II(5) of the Constitution of Bosnia and Herzegovina („the Constitution of BiH"), Articles 14 and 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 25 and 26 of International Covenant on Civil and Political Rights, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.

6. The applicant indicated that Article I(2) of the Constitution of BiH establishes that Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections. The applicant held that the mentioned provision envisages that there is a law that regulates a certain area, as well as that the mentioned law is on accordance with the highest standards of fundamental human rights and freedoms in a democratic society. Therefore, cited provision requires that the elections are free and democratic, i.e. that there must be no restrictions, or additional obligations with regards to registration and expression of the will of voters and that that process must be organized in a democratic manner and the outcome thereof will reflect the will of voters, and not restriction or differential treatment of citizens of BiH. In the applicant's opinion, imposing additional obligations on the citizens of BiH based on the place of residence constitutes a differential treatment of voters.

7. To support the allegations the applicant referred to the document – Query of 23 June 2016, which the Social Democratic Party („SDP") addressed to the Central Election Commission of BiH („CEC"). In the cited document the SDP requested the CEC to submit its reasoning, by stating the specific legal regulation, on the basis of which the CEC, in its notification of 13 May 2016, requested from the citizens of BiH who are temporarily residing abroad or hold the status of a refugee from BiH to register themselves by a given deadline for the Local Elections in BiH to be held on 2 October 2016, i.e. to state the specific legal basis for seeking, as alleged, reregistration of the citizens of BiH from abroad, who have already been registered in the Central Voters Register and who have used their suffrage previously.

8. Based on the presented document that was cited in the request, it follows that references were made to Article 25 of the International Covenant on Civil and Political Rights in Article IV of Annex 3 of the Framework Agreement for Peace in BiH, and „the Document from the second session of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (CSCE), which is integrated in the Framework Agreement for Peace as an attachment to Annex 3". Furthermore, the opinion was voiced that the determination of additional requirements for participation of the citizens of Bosnia and Herzegovina residing abroad in elections, by evading the legally prescribed election procedures, may be considered discrimination against this population and the violation of the provisions of the Constitution of BiH, including the Election Law.

9. Furthermore, it was indicated that the Election Law, in Article 1.5 paragraphs 2 and 3, stipulates that a citizen of BiH temporarily residing abroad and having the right to vote, shall have the right to vote in person (by arriving at an appropriate polling station in BiH or at a diplomatic and consular representation offices of BiH abroad) or by mail, and that the CEC shall regulate, by means of a special regulation, the entire procedure of voting in a diplomatic and consular representation office of BiH. Article 2.9 of the Election Law stipulates that the CEC shall be responsible for the accuracy, updating and overall integrity of the Central Voters Register for the territory of BiH, without making any distinction whatsoever between the voters abroad and those who permanently reside in BiH. Article 3.5 of the Election Law stipulates that the CEC shall keep the Central Voters Register for the territory of BiH on the basis of the records of a competent state authority that keeps the records of citizens of BiH, where the competent authority keeping the records of citizens of BiH receives the data from: a) the competent Registry Office on death of all citizens over eighteen (18) years of age; and b) the competent Ministry of BiH on the removal from BiH citizenship. It was indicated that it was not possible to identify in the statutory provisions the obligations of the citizens of BiH residing abroad to „update" their status in the Central Voters Register during each election cycle. Finally, it was indicated that Article 3.2 paragraph 2 of the Election Law defines that the citizens of BiH shall be registered in the Central Voters Register „who have voting rights in accordance with Article 20.8 paragraph 6 of this Law, which regulates that a citizen of BiH who has a refugee status and has the right to vote under this article, shall register in the Central Voters Register for the municipality where he or she had a permanent place of residence according to the last Census conducted by the State of BiH, except in the case where he or she can produce a proof of a change of his or her permanent residence in accordance with the law, in the period from the last Census to the moment the person concerned acquired a refugee status".

10. Accordingly, it was concluded that it clearly follows that every citizen of BiH residing abroad has equal right to be registered in the Central Voter Register, and that

those registered in accordance with the law have permanent right to participate in election processes in BiH under the same conditions as other citizens of BiH.

11. The applicant further stated that the CEC pointed out, in its reply no. 06-1-07-2-719-2/16 of 13 July 2016, the following: „Article 3.15 of the Election Law stipulates that a citizen of BiH who is temporarily residing abroad, as well as a citizen of BiH who has a refugee status in order to be included in the excerpt from the Central Voters Register for voting outside of BiH, is obliged to submit an application to the Central Election Commission of BiH for every elections. A proof of identity of the applicant, as prescribed by this Law, and accurate details of the address abroad shall be attached to the application, signed by the applicant. Furthermore, the provision of Article 22 of the Rulebook on the keeping and use of the Central Voters Register (*Official Gazette of BiH*, 37/14) provides that the CEC BiH, upon calling the elections, submits form PRP-2 to all voters who were, during previous elections, listed on the excerpt of the Central Voters Register for voting outside of BiH. The entire procedure of conducting elections in the diplomatic and consular representation offices of BiH is prescribed by the Rulebook on the manner of conducting elections in the DCRO of BiH, in which the citizens who reside outside of BiH have been given a chance, when submitting an application for voting outside of BiH, to opt to vote by mail or to vote in the DCRO of BiH. Based on the selected voting option, the CEC BiH prepares voting lists for voters who opted for voting in the DCRO BiH and for those opting to vote by mail. Voting in the DCRO BiH is done in person by arrival of voters to the polling station. The CEC BiH complies with the legal regulations regulating this area and it is not authorized to amend them".

12. Accordingly the applicant deems that the challenged Article 3.15 of the Election Law is not in conformity with the principles of the Constitution of BiH and the principles set forth in the recognized international conventions. In the applicant's opinion the CEC is forced to act in accordance with the challenged Article 3.15 of the Election Law, which results in discrimination regarding the manner of voting and in departure from the principles of equality and non-discrimination. The application of the challenged article, according to the applicant, results in flagrant violation of the principle of non-discrimination and violates the rights of refugees and displaced persons, thus the challenged article is in contravention of Article 3 of Protocol No. 1 to the European Convention, which is also in contravention of the provisions of Articles I(2), II(1), II(2), II(3), II(4) and II(5) of the Constitution of BiH.

13. The applicant pointed out that the constitutional principles must be applied so as not to derogate the basic meaning of elections, including the equality and non-discrimination

of all citizens of BiH who represent the key elements of stability and equality in a multinational and complex state of BiH. The application of the principle of equality and non-discrimination and international standards and human rights, particularly the rights of refugees and displaced persons, in the applicant's opinion, must, through technical elements of application, fulfil its purpose and must not be only a declarative provision in the Constitution and in the Election Law. The challenged Article 3.15 of the Election Law is in violation of the provisions of the Constitution of BiH, Article 3 of Protocol No. 1, Protocol No. 12 and the International Covenant on Civil and Political Rights, particularly Articles 25 and 26 that prescribe that every citizen shall have the right and the opportunity, without any distinctions whatsoever and without unreasonable restrictions: to vote and to be elected at fairly conducted periodic elections, with universal and equal suffrage and secret ballot, ensuring the free expression of the will of the voters; to have access, on general terms of equality, to public services in their country. All persons are equal before the law and are entitled without any discrimination to equal protection under the law. The law should 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 and other opinion, national and social origin, property, birth or other circumstance.

14. Finally, the applicant indicated that the challenged Article 3.15 of the Election Law, which the CEC referred to in acting as a state body in charge of conducting the elections, while treating the citizens of BiH in the diaspora and in the country in a different manner, does not provide equal rights for all citizens, without any differences whatsoever, to vote and to be elected, does not provide universal and equal suffrage, and it does not provide access, on general terms of equality, to public services in their country, and neither does it make possible for all persons to be equal before the law. Therefore, the challenged article does not ensure the free expression of the will of voters and is in contravention of the aforementioned provisions of the Constitution and the highest international and legal standards on the protection of human rights as established in the documents of UN and Council of Europe.

b) Reply to the request

15. The House of Peoples, the Constitutional and Legal Commission, indicated in the reply to the request that it reached a unanimous conclusion after the discussion that the Constitutional Court should, in accordance with its responsibilities, render a decision on the conformity of the respective law with the Constitution of BiH.

IV. Relevant Law

16. The **Election Law of Bosnia and Herzegovina** (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16) reads in its relevant part as follows:

Article 1.4

(1) Each citizen of Bosnia and Herzegovina who has attained eighteen (18) years of age shall have the right to vote and to be elected (hereinafter: right to vote) pursuant to provisions of this law.

(2) To exercise his or her right to vote, a citizen must be recorded in the Central Voters Register, pursuant to this law.

Article 1.5

(1) All citizens of BiH who have the right to vote, pursuant to this law, shall have the right to vote in person in the municipality of their permanent residence.

(2) A citizen of BiH who is temporarily residing abroad and has the right to vote, shall be entitled to vote in person (by appearing at an appropriate polling station in BiH or at a diplomatic and consular representation office of BiH abroad) or by mail (by sending the voting ballot by mail) for the municipality where the person had the permanent place of residence prior to his or her departure abroad, provided that he or she is registered as a permanent resident in that municipality at the moment of submitting his or her application for out-of-country vote.

(...)

Article 3.1

(1) The Central Voters Register constitutes the records of citizens of BiH who have the right to vote in accordance with this Law and shall be established, maintained and used for the following purposes: to organize and conduct elections in accordance with law, to conduct referendums, to conduct recalls of elected officials and to elect bodies of the Local Self-governance in accordance with law.

Article 3.2

(1) The Central Voters Register is unique, permanent and shall be regularly updated.

(2) The following citizens of BiH shall be recorded in the Central Voter Register:

a) those of age (18) or older;

b) those who will become eighteen (18) years of age on the Election Day;

c) those who have the right to vote in accordance with this Law, but are temporarily residing abroad; and

d) those who have the right to vote as provided by Article 20.8, Paragraph 6 of this Law.

(...)

Article 3.3

The Central Voters Register shall be made and maintained on the basis of data from official records on permanent and temporary residence of citizens of BiH maintained by a competent State authority, from other public identification documents and official records on citizens of BiH maintained by the Central Election Commission of BIH and other competent authorities and on the basis of public documents and data received directly from citizens.

Article 3.5

(1) The Central Voters Register shall be maintained ex-officio.

(2) The Central Election Commission of BiH shall maintain the Central Voters Register for the territory of BiH on the basis of records of a competent State authority that maintains the records of citizens of BiH in accordance with the Law on Central Registers and Data Exchange, unless otherwise prescribed by this Law.

(3) The competent State authority referred to in Paragraph 2 of this Article shall maintain and shall be responsible for the overall technical processing of all data of relevance for the records of the Central Voters Register (hereinafter: the authority in charge of technical maintenance of the Central Voters Register records).

(4) The competent authority that maintains the records on citizens of BiH pursuant to Law on Citizens' Single Identification Number, Law on Permanent and Temporary Residence of the Citizens of BiH and the Law on Identification Card of BiH Citizens, shall receive the data from:

a) Competent Registry Office on death of all citizens over eighteen (18) years of age; and

b) Competent Ministry of BiH: on deregistration of BiH citizenship.

(6) The competent authority in charge of technical maintenance of the Central Voter Register records shall receive data from the following parties:

a) Municipal Election Commissions on Polling Stations; and

b) Central Election Commission of BIH and Municipal Election Commissions on changes of voting options.

(7) The competent authority in charge of maintaining the official records concerning such data shall be responsible for accuracy and update of data necessary to produce the Central Voters Register.

(8) The competent Registry Offices shall provide to the authority competent for maintaining the official records concerning the Citizens' Single Identification Number, Permanent and Temporary Residence of the Citizens of BiH with the data on all changes that affect the accuracy of the Central Voters Register, in writing, not later than within seven (7) days from the date the change has occurred.

(9) The authority competent for maintaining the official records concerning the Citizens' Single Identification Number, Permanent and Temporary Residence of the Citizens of BiH is responsible for keeping the data updated and accurate and is obliged to keep the files with documents, public identification documents and requests of citizens, on the basis of which the Central Voters Register is maintained and updated, and make the access to these files possible and the files available at the request of the Central Election Commission.

Article 3.6

(1) The Central Election Commission of BIH is responsible for accuracy, correctness and general integrity of the Central Voter Register.

(2) In terms of maintaining the Central Voters Register, Central Election Commission of BIH shall:

(...)

b) draw up the excerpts from the Central Voters Register for displaced persons of BiH;

c) draw up the excerpts from the Central Voters Register for voters who participate in an out-of-country voting;

(...)

e) complete and verify the final excerpts from the Central Voters Register to be used for the elections.

(3) The excerpts from the Central Voters Register for voters referred to in Paragraph 2, sub-paragraph b) of this Article shall be drawn up on the basis of data received from the competent State authorities and citizens in accordance with this Law.

(4) The excerpts from the Central Voters Register for the voters referred to in Paragraph 2, sub-paragraph c) of this Article shall be drawn up on the basis of data possessed by the Central Election Commission of BIH and data delivered by the citizens who participate in the out-of-country voting.

(...)

(6) The Central Election Commission of BIH shall issue its regulations guiding the following:

a) deadlines for completion and verification of the final Central Voters Register and

b) deadlines for delivery of data on the changes in the records of displaced persons and records of citizens who participate in the out-of-country voting.

Article 3.9

(1) A citizen of BiH who has the right to vote shall be recorded in the Central Voters Register for the basic electoral unit where he is registered as a permanent resident in BiH, unless otherwise specified by this Law.

(2) A citizen of BiH who has the right to vote under this Law and who is temporarily residing abroad shall be recorded in the Central Voters Register for the basic electoral unit in which he was registered as a permanent resident in BiH before the departure abroad.

(3) A citizen of BiH who has the right to vote under this Law and who has the status of a refugee from BiH shall be recoded in the Central Voters Register for the basic electoral unit where he used to have permanent residence in accordance with the provisions of Article 20.8 of this Law.

(4) A citizen of BiH who has the right to vote under this Law and who has a status of a displaced person shall be recoded in the Central Voters Register for the basic electoral unit on the basis of the expressed voting option, in accordance with the provisions of Article 20.8 of this Law.

(5) An application for determination or a change in the voting option, in accordance with Paragraph 4 of this Article, shall be submitted by applicants in person, in due time and in the form as prescribed by the Central Election Commission of BiH.

(6) If a citizen of BiH fails to submit an application for determination or a change in the voting option pursuant to Paragraph 5 of this Article, he shall be recorded in the Central Voters Register for the basic electoral unit where he was recorded in the last elections, and if he was not recorded in the Central Voters Register at all, he shall be recorded in the Central Voters Register for the basic electoral unit in which he had a permanent residence according to the last Census conducted by BiH.

Article 3.10

(1) Records of the Central Voters Register shall contain the following information on citizens of BiH who have the right to vote:

a) Last and first name and name of one of parents,
b) Date of birth,
c) National Identification number,
d) Gender,
e) Name of the Municipality where this person has a permanent or temporary residence,
f) Address of the permanent/temporary residence (street, street number and town),
g) Name of the Municipality and/or electoral unit for which this person is eligible to vote,
h) Voting option,
i) Polling Station,
j) Date of registration of the permanent or temporary residence,
k) Field with the heading: „Notes".

(...)

Article 3.12

(1) Permanent residence is the municipality in which a citizen has settled down with the intention to permanently reside there and where the permanent residence is registered pursuant to the Law on Permanent and Temporary Residence of Citizens of BiH.

(2) Permanent residence of a citizen of BiH who has the status of a displaced person or a refugee is his municipality of permanent residence in accordance with the last Census conducted by BiH.

Article 3.15

(1) A citizen of BiH who has the right to vote under this Law and is temporarily residing abroad and is recorded in the Central Voters Register, in order to be included in the excerpt from the Central Voters Register for out-of-country voting, is obliged to submit an application to the Central Election Commission of BiH for every elections. Proof of identity of the applicant as prescribed by this law and accurate details of the address abroad, as well as a declaration concerning the voting option: in a diplomatic and consular representation office (DCR) or by mail, shall be attached to the application, signed by the applicant.

(2) A citizen of BiH who has the status of a refugee from BIH and has the right to vote under this Law, and is recorded in the Central Voter Register, in order to be included in the excerpt from the Central Voters Register for out-of-country voting, is obliged to submit an application to the Central Election Commission of BIH for every elections. The application must be received before the deadline set by the Central Election Commission of BIH in

the period after the elections are announced and contain the declaration concerning the voting option: in a diplomatic and consular representation office (DCR) or by mail. The applicant should attach to the signed application, the following proofs:

a) proof of identity of the applicant as prescribed by this Law;

b) accurate details of the address abroad and

c) proof of the permanent residence in BiH in accordance with Article 20.8 of this Law, if he wants a change of the data recorded in the Central Voters Register for the basic electoral unit that he has the right to vote for.

(3) A refugee from BiH who is not recorded in the Central Voters Register, in order to be recorded in the Central Voters Register and to exercise thereby his right to vote under this Law, must submit an application to the Central Election Commission of BiH. The application must be received before the deadline set by the Central Election Commission of BiH in the period after the elections are announced. The applicant should attach to the signed application, the following proofs:

a) proof of identity of the applicant,

b) proof of the citizenship of BiH,

c) proof of change of the permanent residence in BiH, in accordance with Article 20.8 of this Law and

d) accurate details of the address abroad.

(4) The following documents shall be admissible as valid proof on identity of the applicant, pursuant to Item a) of Paragraph 3 of this Article:

a) Passport

b) Driving license

c) Valid personal identity card issued by the host country and

d) Refugee card issued by the Government of the host country or another international organization.

(5) The applicant may send the completed and signed application and the required documents by fax and electronically. The procedure and method of sending, receiving, processing, filing (archiving) and protection of electronic applications and documents shall be established by the Central Election Commission of BiH under a separate regulation.

(6) If the requirements of Paragraphs 1, 2 and 3 of this Article are met, the applicant shall be recorded in the excerpt from the Central Voters Register for out-of-country voting.

(7) The applicant referred to in Paragraphs 1, 2 and 3 of this Article shall be held responsible for authenticity of data attached to the application.

(8) The Central Election Commission of BIH shall prescribe the layout of the application form referred to in Paragraphs 1, 2 and 3 of this Article, the manner and procedure to verify the accuracy of data in the documents submitted by refugees from BIH who request to be recorded in the Central Voters Register, to verify the proofs of identity and permanent residence of the refugees and shall issue relevant instructions regarding the procedure for recording voters in the excerpts of the Central Voters Register for out-of -country voting.

(9) Registration into the Central Voters Register of the citizens of BiH who have the status as refugees from BiH, and who have their voting rights as provided by this Law, shall be a continuing process conducted during the entire year, with the documentation attached as provided by paragraph (3) of this Article.

Article 3.16

(1) A citizen of BiH referred to in Paragraphs 1, 2 and 3 of Article 3.15 of this Law shall be obliged to provide all changes affecting the data that he previously submitted to the Central Election Commission of BiH and based of which he is recorded in the excerpt from the Central Voters Register for out-of-country voting. The changes of the data must be submitted not later than the deadline established for the submission of applications for out-of-country voting in the next elections.

(2) If a citizen of BiH referred to in Paragraph 1 of Article 3.15 of this Law fails to submit an application before the deadline established for out-of-country voting in the next elections, he shall be recorded in the excerpt from the Central Voters Register for voting in the appropriate Polling Station in the basic electoral unit of his permanent residence.

(3) If a citizen of BiH referred to in Paragraph 2 of Article 3.15 of this Law, fails to submit proof of his permanent residence in BIH in accordance with Article 20.8 of this Law, he shall be recorded in the excerpt from the Central Voters Register for voting out-of-country with the right to vote for the basic electoral unit of his permanent residence according to the information available to the authority which performs technical maintenance of the records of the Central Voters Register.

(4) If a citizen of BiH, who is recorded in the excerpt from the Central Voters Register for out-of-country voting has returned to BiH before the deadline established for submission of applications for out-of-country voting in the next elections, he is obliged to submit a request to change his voting option to the competent Voters Register Center.

(5) Voters Register Center shall receive through the Municipal Election Commission and process all requests referred to in Paragraph 4 of this Article in accordance with the

regulations of the Central Election Commission of BIH and shall deliver these data to the Central Election Commission of BIH in order to record changes in excerpt from the Central Voters Register for out-of-country voting.

(6) If a citizen of BiH who is recorded in the excerpt of the Central Voters Register for out-of-country voting has returned to BiH after the expiry of the deadline established for submission of applications for out-of-country voting in the next elections, he shall be allowed to vote with the tender-ballot/enveloped ballot in the Polling Station in the basic electoral unit he has right to vote for.

Article 3.17

(1) A citizen of BiH who has the right to vote and is not found in the completed excerpt from the Central Voters Register may vote if he presents a valid identification document referred to in Article 5.12 of this Law and a confirmation on permanent residence.

(2) A voter referred to in Paragraph 1 of this Article shall vote in a Polling Station according to his permanent residence.

Article 20.8

(...)

(5) Until otherwise decided by the High Representative or the Parliamentary of BiH pursuant to paragraph seven of this article, a citizen of BiH who is a refugee and who has the right to vote shall have the right to register and to vote in person or by mail for the municipality in which the person had his or her permanent place of residence according to the last Census conducted by the State of BiH, except in the case where the person can provide proof of a change of his or her permanent residence in accordance with the law, in the period from the last Census conducted by the State of BiH until that person acquired refugee status.

(6) A citizen of BiH who has refugee status and has the right to vote under this article, shall register for the municipality where he or she had a permanent place of residence according to the last Census conducted by the State of BiH, except in the case where he or she can provide proof of a change of his or her permanent residence in accordance with the law, in the period from the last Census conducted by the State of BiH until that person acquired refugee status.

(7) The special rights to register and to vote provided to displaced persons and refugees in this article shall expire on a day determined by the High Representative. If the High Representative does not so decide before his or her mandate terminates, then the special rights to displaced and refugee voters shall continue until so decided by the Parliamentary Assembly 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 and Article 19 of the Rules of the Constitutional Court.

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

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

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

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

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

18. The request for the review of constitutionality was lodged by twenty six representatives to the House of Representatives of the Parliament of the FBiH, which means that the request was filed by an authorized entity within the meaning of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

VI. Merits

19. The applicant claimed that the challenged Article 3.15 of the Election Law is not in conformity with Articles I(2), II(1), II(2), II(3), II(4) and II(5) of the Constitution of BiH, in conjunction with Articles 14 and 17 of the European Convention, Articles 25 and 26 of the International Covenant on Civil and Political Rights, Article 3 of Protocol No. 1 and Protocol No. 12 to the European Convention and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.

20. Based on the applicant's allegations it follows that the challenged provision does not bring into question the right of the citizens of BiH abroad to vote, and of the persons with the status of refugees from BiH. However, the conditions under which these persons

exercise their right to vote, i.e. the obligation, as the applicant stated, to „reregister" themselves and to „update" before every election process, although they have already been registered in the voters register and have already exercised that right, brings these categories into an unequal position in comparison to the citizens of BiH living in BiH who do not have the same obligation before every election process. In that respect the applicant indicated that maintaining and brining up-to-date the Central Voters Register is within the competence of state authorities, and that there is the obligation of the competent state authorities to submit and exchange the necessary data on the citizens of BiH. The applicant deems that this brings about a differential treatment of citizens of BiH according to the place of residence. In the applicant's opinion, the challenged Article 3.15 of the Election Law does not afford the equal right to all citizens, without differences, to vote and to be elected, it does not afford the universal and equal suffrage, it does not afford access to public services of their country with general conditions of equality, neither does it make possible for all persons to be equal before the law, and does not ensure free expression of the will of voters.

21. The applicant referred to Article 3 of Protocol No. 1 to the European Convention, and Article 25 of the International Covenant on Civil and Political Rights.

22. Article 3 of Protocol No. 1 to the European Convention reads as follows:

Article 3
Right to free elections

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.

23. Article 25 of the International Covenant on Civil and Political Rights reads as follows:

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

(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;

(c) To have access, on general terms of equality, to public service in his country.

24. The Constitutional Court recalls that the right to vote and to be elected are not absolute rights and the state is granted a wide margin of appreciation regarding the manner in which to regulate this issue, as well as the issue of organizing and conducting the election process.

25. The Constitutional Court observes that the European Court, in the case of *Sitaropoulos and Giakoumopoulos v. Greece* (see, ECHR, judgment of 15 March 2012, paragraph 70), considered the question as to whether Article 3 of Protocol No. 1 places States under an obligation to introduce a system enabling expatriate citizens to exercise their voting rights from abroad. The European Court pointed out the following:

71. In general terms, Article 3 of Protocol No. 1 does not provide for the implementation by Contracting States of measures to allow expatriates to exercise their right to vote from their place of residence. Nevertheless, since the presumption in a democratic State must be in favour of inclusion (see Hirst, cited above, § 59), such measures are consonant with that provision. The question is, however, whether Article 3 of Protocol No. 1 goes so far as to require them to be taken. In answering that question, Article 3 should be interpreted with reference to the relevant international and comparative law (see Yumak and Sadak, cited above, §127, and Demir and Baykara v. Turkey [GC], no. 34503/97, §§ 76 and 85, ECHR 2008) and to the domestic law of the country concerned.

73. Firstly, with regard to international law, the Court notes that neither the relevant international and regional treaties – such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights – nor their interpretation by the competent international bodies provide a basis for concluding that voting rights for persons temporarily or permanently absent from the State of which they are nationals extend so far as to require the State concerned to make arrangements for their exercise abroad (see paragraphs 26-31 above).

74. It is true that, in order to give greater effect to the right to vote in parliamentary elections, the institutions of the Council of Europe have, inter alia, invited member States to enable their citizens living abroad to participate to the fullest extent possible in the electoral process. (...) The Venice Commission, for its part, observed that since the 1980s the recognition of external voting rights had gained ground in Europe. While it also recommended that member States facilitate the exercise of expatriates' voting rights, it did not consider that they were obliged to do so. Rather, it viewed such a move as a possibility to be considered by the legislature in each country, which had to balance the principle

of universal suffrage on the one hand against the need for security of the ballot and considerations of a practical nature on the other (see, in particular, paragraph 25 above).

75. Furthermore, a comparative survey of the legislation of Council of Europe member States in this sphere shows that, while the great majority of them allow their nationals to vote from abroad, some do not (see paragraph 38 above). However, as regards those States which do allow voting from abroad, closer examination reveals that the arrangements for the exercise of expatriates' voting rights are not uniform, but take a variety of forms. (...) Lastly, in the majority of member States which allow voting from abroad, persons wishing to avail themselves of this facility must register by a certain deadline on the electoral roll with the authorities in their country of origin or the diplomatic or consular authorities abroad (see paragraphs 39-45 above).

76. In short, none of the legal instruments examined above forms a basis for concluding that, as the law currently stands, States are under an obligation to enable citizens living abroad to exercise the right to vote. As to the arrangements for exercising that right put in place by those Council of Europe member States that allow voting from abroad, there is currently a wide variety of approaches.

26. According to the cited position of the European Court, it follows that neither Article 3 of Protocol No. 1 to the European Convention nor, accordingly, Article 25 of the International Covenant on Civil and Political Rights, which the applicant referred to, impose the basis for a conclusion that states are under an obligation to enable citizens living abroad to exercise the right to vote where they live. Also, the mentioned provisions do not impose a certain mechanism for the exercise of the right to vote where recognized to expatriates. In that sense the establishment of a mechanism under which the exercise of the right to vote abroad, i.e. in the place where a voter resides abroad, is conditioned, *inter alia,* upon the registration within a certain deadline in the voters register of the authority of one's own country of origin or at its diplomatic or consular authorities abroad, which, according to the cited paragraph is precisely the case with the majority of the countries allowing their citizens living abroad to vote, is not contrary to the right referred to in Article 3 of Protocol No. 1 to the European Convention, or in Article 25 of the International Covenant on Civil and Political Rights.

27. Furthermore, when it comes to domestic law, the Constitutional Court recalls that Article 3 of the Law on Citizenship stipulates that all citizens of BiH shall enjoy the same human rights and fundamental freedoms, as stipulated under the Constitution of BiH and shall enjoy the protection of these rights throughout the territory of BiH, under the same conditions. In accordance with Article 1.4 of the Election Law all citizens shall be

guaranteed the right to vote (to vote and to be elected) in accordance with the provisions of this law, under the conditions applicable to all the citizens of BiH: to have turned 18 years of age and to be registered in the Central Voters Register in accordance with the provisions of this law.

28. According to the aforementioned provisions it follows undisputedly that the right to vote is recognized to all the citizens of BiH, irrespective of whether they live abroad or in BiH or whether they are the refugees from BiH. The Constitutional Court recalls that in its hitherto case-law it took a position that it was the right guaranteed under the law in respect of which the public authorities must not discriminate against anyone (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 14/12* of 26 March 2015, paragraph 62, available at www.ustavnisud.ba).

29. In the present case the applicant claimed that the conditions prescribed under the challenged Article 3.15 of the Election Law under which the citizens of BiH abroad and refugees from BiH exercise this right in a discriminatory manner and, as such, in contravention of Article II(4) of the Constitution of BiH, Article 14 of the European Convention, Protocol No. 12 to the European Convention and Article 26 of the International Covenant on Civil and Political Rights.

30. Article II(4) of the Constitution of BiH reads as follows:

Non-Discrimination

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

31. Article 14 of the European Convention reads as follows:

Article 14
Prohibition of discrimination

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.

32. Protocol No. 12 to the European Convention reads as follows:

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.

33. Article 26 of the International Covenant on Civil and Political Rights reads as follows:

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.

34. The Constitutional Court recalls that, regarding the interpretation of the term discrimination in its hitherto case-law (see, *inter alia*, the afore-cited Decision on Admissibility and Merits no. *U 14/12*, paragraph 63), it followed the position of the European Court according to which: „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 (as regards the case-law of the UN Human Rights Committee on Article 26 of the International Covenant on Civil and Political Rights, the provision similar, although not identical – to Article 1 of Protocol No. 12 to the Convention, see *Nowak*, CCPR Commentary, N.P. Engel Publishers, 2005, pp. 597-634)".

35. In view of the above, the Constitutional Court must answer the question as to whether the challenged Article 3.15 of the Election Law, concerning the citizens of BiH abroad

and refugees from BiH, by prescribing the obligation for them to submit an application for each election process, which obligation has not been prescribed for the citizens of BiH who reside in BiH, establishes a differential treatment between the mentioned categories, without an objective and reasonable justification.

36. The challenged Article 3.15 of the Election Law reads as follows:

Article 3.15

(1) A citizen of BiH who has the right to vote under this Law and is temporarily residing abroad and is recorded in the Central Voters Register, in order to be included in the excerpt from the Central Voters Register for out-of-country voting, is obliged to submit an application to the Central Election Commission of BiH for every elections. Proof of identity of the applicant as prescribed by this law and accurate details of the address abroad, as well as a declaration concerning the voting option: in a diplomatic and consular representation office (DCR) or by mail, shall be attached to the application, signed by the applicant.

(2) A citizen of BiH who has the status of a refugee from BIH and has the right to vote under this Law, and is recorded in the Central Voter Register, in order to be included in the excerpt from the Central Voters Register for out-of-country voting, is obliged to submit an application to the Central Election Commission of BIH for every elections. The application must be received before the deadline set by the Central Election Commission of BIH in the period after the elections are announced and contain the declaration concerning the voting option: in a diplomatic and consular representation office (DCR) or by mail. The applicant should attach to the signed application, the following proofs:

a) proof of identity of the applicant as prescribed by this Law;

b) accurate details of the address abroad and

c) proof of the permanent residence in BiH in accordance with Article 20.8 of this Law, if he wants a change of the data recorded in the Central Voters Register for the basic electoral unit that he has the right to vote for.

(3) A refugee from BiH who is not recorded in the Central Voters Register, in order to be recorded in the Central Voters Register and to exercise thereby his right to vote under this Law, must submit an application to the Central Election Commission of BiH. The application must be received before the deadline set by the Central Election Commission of BiH in the period after the elections are announced. The applicant should attach to the signed application, the following proofs:

a) proof of identity of the applicant,

b) proof of the citizenship of BiH,

c) proof of change of the permanent residence in BiH, in accordance with Article 20.8 of this Law and

d) accurate details of the address abroad.

(4) The following documents shall be admissible as valid proof on identity of the applicant, pursuant to Item a) of Paragraph 3 of this Article:

a) Passport

b) Driving license

c) Valid personal identity card issued by the host country and

d) Refugee card issued by the Government of the host country or another international organization.

(5) The applicant may send the completed and signed application and the required documents by fax and electronically. The procedure and method of sending, receiving, processing, filing (archiving) and protection of electronic applications and documents shall be established by the Central Election Commission of BiH under a separate regulation.

(6) If the requirements of Paragraphs 1, 2 and 3 of this Article are met, the applicant shall be recorded in the excerpt from the Central Voters Register for out-of-country voting.

(7) The applicant referred to in Paragraphs 1, 2 and 3 of this Article shall be held responsible for authenticity of data attached to the application.

(8) The Central Election Commission of BIH shall prescribe the layout of the application form referred to in Paragraphs 1, 2 and 3 of this Article, the manner and procedure to verify the accuracy of data in the documents submitted by refugees from BIH who request to be recorded in the Central Voters Register, to verify the proofs of identity and permanent residence of the refugees and shall issue relevant instructions regarding the procedure for recording voters in the excerpts of the Central Voters Register for out-of-country voting.

(9) Registration into the Central Voters Register of the citizens of BiH who have the status as refugees from BiH, and who have their voting rights as provided by this Law, shall be a continuing process conducted during the entire year, with the documentation attached as provided by paragraph (3) of this Article.

37. The Constitutional Court recalls that Article 1.5 of the Election Law stipulates that the citizens of BiH who have the right to vote, pursuant to this law, shall have the right to

vote in person in the municipality of their permanent residence. It is a general provision equally applied to all the citizens of BiH irrespective of whether they are in BiH or outside of BiH. This indisputable follows from paragraph 2 of the mentioned Article, under which a citizen of BiH who is temporarily residing abroad and has the right to vote, shall be entitled to vote in person (by appearing at an appropriate polling station in BiH or at a diplomatic and consular representation office of BiH abroad) („DCR") or by mail (by sending the voting ballot by mail) for the municipality where the person had the permanent place of residence prior to his or her departure abroad, provided that he or she is registered as a permanent resident in that municipality at the moment of submitting his or her application for out-of-country vote.

38. It follows from this legal solution that, unlike the citizens of BiH in the country who have the right to vote in person in the municipality where they reside permanently, the citizens of BiH outside BiH, in addition to this right, also have the right, by submitting an application for out-of-country vote, to vote in person at the DCR or by sending the voting ballot by mail.

39. The Constitutional Court recalls that in the Decision on Admissibility and Merits no. *AP 4144/16* of 10 November 2016 (available at www.ustavnisud.ba), in relation to the right of citizens of BiH outside BiH to choose the right to vote within the meaning of Article 1.5 of the Election Law, indicated the following (see, paragraph 55): „This solution is obviously in the spirit of historical context and wartime developments in BiH, which resulted in a significant number of citizens of BiH leaving their pre-war places of permanent residence and now living abroad, i.e. it aims to redress „factual inequality" between the citizens of BiH who have the right to vote and live in BiH who can vote in person on the elections day at a polling station in their place of permanent residence and the citizens of BiH who have the right to vote and live abroad, who in order to exercise this right are conditioned to appear and vote at the polling station of their place of residence which would make the exercise of such right difficult to say the least. In that respect, Article 5.21 of the Election Law explicitly regulated that a citizen of BiH who has the right to vote and is abroad shall have the right to vote by mail. The Central Election Commission of BiH shall regulate the manner and procedure of voting by citizens by mail".

40. The Constitutional Court observes that based on the challenged Article 3.15 of the Election Law it follows (paragraph 7) that in order to submit an application and meet conditions prescribed in Paragraphs 1, 2 and 3 the applicant should be on the excerpt from the Central Voters Register for out-of-country voting. In that sense, the challenged Article

3.15 of the Election Law is in the service of the exercise of the rights of voters from BiH who are abroad to vote at DCR or by mail. Given that the citizens of BiH living in BiH do not have this right, only prescribing the conditions for the exercise thereof in terms of submitting an application for each election process does not put the citizens of BiH outside BiH in an unequal position when compared to the citizens of BiH living in BiH.

41. Furthermore, the Constitutional Court observes that it follows from the allegations of the applicant that the claims of differential treatment between the citizens of BiH outside BiH and the citizens of BiH living in BiH is based on the fact that the citizens of BiH outside the country must submit the required data for each election process, although they changed nothing regarding the data previously submitted, and that the citizens of BiH living in BiH are not required to submit data about possible changes irrespective of whether there were any. In support of these allegations the applicant invoked the relevant provisions of the Election Law which regulate the following: that the Central Election Commission of BiH shall be responsible for accuracy, update and overall integrity of the Central Voters Register without any distinctions between the voters citizens of BiH in and outside the country; the Central Election Commission of BiH shall maintain the Central Voters Register on the basis of records of a competent State authority that maintains the records of citizens of BiH; that the necessary data for citizens of BiH are submitted by competent state authorities: Registry Offices on death of all citizens over 18 years of age; and competent Ministry of BiH: on deregistration of BiH citizenship.

42. As already noted in this decision the challenged Article 3.15 of the Election Law is in the service of the exercise of the rights of citizens of BiH living outside of BiH and refugees from BiH to vote at DCR or by mail, which is the right that voters the citizens of BiH living in the country do not have. Further, the very choice between these two options were in no way conditioned or limited by the Election Law. Namely, there is no provision prescribing that a once chosen option is obligatory or that it may be changed solely under certain conditions. Accordingly, a voter may select one option in one election process and another in the next process without any restrictions or conditioning whatsoever. Therefore, neither the Election Law, nor bylaws enacted on the basis of this law, prescribe the obligation of the public authority to observe once chosen manner of voting (at DCR or by mail), or that they must ensure it for so long as the voter, citizen of BiH, has decided to change it.

43. Furthermore, it is possible to conclude that by prescribing obligation for the voters, citizens of BiH out-of-country of submitting an application before any election procedure, the challenged Article 3.15 of the BiH Election Law serves to achieve the legitimate aim, i.e. to enable their citizens living abroad to participate to the fullest extent possible in the

electoral process. The legitimate aim determined in such a manner is in accordance with the primary obligation in the field of the right to vote, which is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to „hold" democratic elections (see, ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, para 50).

44. In view of the aforementioned, it is necessary to answer the question whether the challenged legal solution strikes a fair balance between the principle of universal suffrage granted to all citizens of BiH regardless of where they live, one the one hand, against the need for security of the ballot and considerations of a practical nature on the other (see, *mutatis mutandis*, *Sitaropoulos and Giakoumopoulos v. Greece*, paragraph 73).

45. In accordance with the challenged Article 3.15 of the BiH Election Law, the citizens of BiH are obliged to submit an application before every election process, wherein they should indicate the voting option (through DCRO or by mail). The application must be duly signed by the applicant and the proof of identity must be attached to it (copy of passport, identity card, driving license, valid personal identity card issued by the host country and refugee card issued by the Government of the host country or another international organization), and the accurate details of home address abroad must be indicated therein.

46. The Constitutional Court notes that Rulebook on the Manner of Conducting Elections in the Diplomatic-Consular Representative Offices of BiH regulates conducting of elections in the DCRO. According to Article 2 of that Rulebook, the Central Election Commission shall take a decision no later than 65 days before the Election Day in order to designate the polling stations in the DCRO of BiH, where the voters, registered in the excerpt from the Central Voters Register for out-of-country voting, may vote. The same Article stipulates that the Central Election Commission determines the polling stations in the DCROs on the basis of the number of voters registered in the excerpt from the Central Voters Register for out-of-country voting in the DCR, and that there must be at least 50 voters, although a decision to vote in the DCROs with smaller number of voters may be taken if there are justified reasons for it. If the mentioned requirement is not fulfilled, the voters registered to vote in DCROs will be allowed to vote by mail. In addition to the mentioned requirements, the organisational and technical requirements must be fulfilled to organize voting in a DCRO.

47. Furthermore, in accordance with Article 31 of the Rulebook on the Procedure of Conducting Elections in Bosnia and Herzegovina, the BiH Central Election Commission shall make a mail delivery of polling package to all those voters who choose to vote by mail and to voters in the case that the requirements to vote in a DCRO are not fulfilled. The

package shall contain: voter's personal information form: name and last name, personal identification number, date of birth, present address outside BiH (street and number, city, zip code, state), combination number for the ballot papers; appropriate specially protected ballot papers that are issued for the basic constituency for which the voter casts his/her vote; return envelope with imprinted (return) address of the BiH Central Election Commission and an envelope for ballot papers to ensure confidentiality of the vote. It follows from the aforementioned that the polling package contains personal information, the protection of which, according to the relevant laws of BiH, must be secured, and that it contains the ballot paper which, if used, forms integral part of the election results at the specific elections.

48. It follows from the cited provisions of the mentioned Rulebooks that the purpose of the submission of application before any election process is the security of the ballots and considerations of a practical nature related to the exercise of the rights of voters, citizens of BiH out-of-country, to vote in the DCROs or by mail.

49. In particular, the BiH Central Election Commission takes a decision to determine the DCROs where voting will be organized before each electoral process, and the requirement to organize the elections in a DCRO is the number of applied voters who decided to avail themselves of the right to vote by mail in a specific electoral process. In that sense, the submission of application in respect before electoral process for the purposes of the challenged Article 3.15 of the BiH Election Law aims at creating the conditions making it possible for the greatest possible number of voters, citizens of BiH, to vote in the DCROs and as such it does not exceed the limits of positive measures to hold democratic elections, which the state takes for the purpose of making it possible for the right to vote to be exercised.

50. Furthermore, as to the exercise of the right to vote by mail and, in this connection, the submission of application in each electoral process, it follows from the cited provisions of the mentioned Rulebooks that the accurate address to be obtained from voters abroad, to which the pooling package will be delivered, given the content of the pooling package, is an important factor for the purpose of protection of personal information and protection against possible abuse of ballot papers. In particular, the voters from BiH are not obliged to submit information about the residence address abroad to the relevant authorities which gather and process data and maintain registers on the citizens of BiH. Those records are the basis for creating, maintaining and updating of Central Voter's Register, i.e. the national authorities neither create nor maintain such records. In this connection, the requirement to submit an application for each electoral process, wherein it must be indicated, in addition

to the voting option by mail, the accurate address abroad, does not exceed the limits of positive measures to hold democratic elections, which the State takes for the purpose of making it possible for the right to vote by mail to be exercised.

51. Finally, the Constitutional Court notes that Article 3.16 paragraph 2 of the BiH Election Law imposes the obligation on all voters out of BiH to provide all changes affecting the data that they previously submitted to the BiH Central Election Commission and based of which they are recorded in the excerpt from the Central Voters Register for out-of-country voting. However, the BiH Election Law does not impose any sanction whatsoever in case of failure to do so.

52. In particular, according to Article 3.16 para 2 of the Election Law, if a citizen of Bosnia and Herzegovina living abroad fails to submit an application for the purposes of Article 3.15 of the Election Law, he/she shall be recorded in the excerpt from the Central Voters Register for voting in the appropriate polling station in the basic electoral unit of his permanent residence, just like the citizens of BiH living in BiH, and he/she may vote in the pooling station of his/her permanent residence, i.e. in accordance with the rule which applies to all citizens of BiH regardless of where they live.

53. Furthermore, as to the citizens of BiH who are refugees from BiH, Article 20.8 of the Election Law prescribes special rights of that category. According to paragraph 5 of that Article, such persons shall have the right to register and to vote in person (at the polling station in the country or in the DCRO) or by mail for the municipality in which the person had his/her permanent place of residence according to the last Census conducted by the State of Bosnia and Herzegovina, except in the case where the person can provide proof of a change of his or her permanent residence in accordance with the law, in the period from the last Census conducted by the State of Bosnia and Herzegovina until that person acquired refugee status. Furthermore, according to paragraph 9 of the challenged Article 3.15, registration into the Central Voters Register of the citizens of BiH who have the status as refugees from BiH, and who have their voting rights as provided by this Law, shall be a continuing process conducted during the entire year. According to Article 3.16 paragraph 3 of the BiH Election Law, if such persons fails to submit proof of their permanent residence in BIH in accordance with Article 20.8 of this Law, they shall be recorded in the excerpt from the Central Voters Register for voting out-of-country with the right to vote for the basic electoral unit of his permanent residence according to the information available to the authority which performs technical maintenance of the records of the Central Voters Register, i.e. where the person had his/her permanent place of residence according to the last Census conducted by the State of BiH.

54. Taking into account the aforementioned, the Constitutional Court holds that the balance between the universal suffrage granted to all citizens of BiH regardless of where they live, one the one hand, against the need for security of the ballot and considerations of a practical nature on the other is not called into question by the challenged Article 3.15 of the Election Law.

55. The Constitutional Court concludes that the challenged Article 3.15 of the Election Law is not contrary to Articles I(2), II(1), II(2), II(3), II(4) and II(5) of the Constitution of Bosnia and Herzegovina, Articles 14 and 17 of the European Convention, Articles 25 and 26 of the International Covenant on Civil and Political Rights, Article 3 of Protocol No.1 and Article 1 of Protocol No. 12 to the European Convention and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.

VII. Conclusion

56. The Constitutional Court concludes that the challenged Article 3.15 of the Election Law (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/10, 18/13, 7/14 and 31/16) is compatible with Articles I(2), II(1), II(2), II(3), II(4) and II(5) of the Constitution of Bosnia and Herzegovina, Articles 14 and 17 of the European Convention, Articles 25 and 26 of the International Covenant on Civil and Political Rights, Article 3 of Protocol No.1 and Article 1 of Protocol No. 12 to the European Convention, and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.

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

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

Mato Tadić
Vice-President
Constitutional Court of Bosnia and Herzegovina

Case No. U 8/17

DECISION ON ADMISSIBILITY AND MERITS

Request of Mr. Safet Softić, the Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for review of the constitutionality of Article 1(1) (7) of the Rulebook Amending the Rulebook on Wearing Uniforms in part reading „when in uniform, police officers are not allowed to have a beard", which was passed by the Director of the Border Police of Bosnia and Herzegovina, no. 17-07-02-1161-7/06 of 30 January 2017

Decision of 30 November 2017

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

Mr. Mirsad Ćeman, President,

Mr. Mato Tadić, Vice-President,

Mr. Zlatko M. Knežević, Vice-President,

Ms. Margarita Tsatsa-Nikolovska, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Mr. Giovanni Grasso,

Having deliberated on the request filed by Mr. **Safet Softić, Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina**, in case no. **U 8/17**, at its session held on 30 November 2017, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by Mr. Safet Softić, the Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, is hereby granted.

It is hereby established that Article 1(1)(7) of the Rulebook Amending the Rulebook on Wearing Uniforms in the part reading „when in uniform, police officers are not allowed to have a beard", which was passed by the Director of the Border Police of Bosnia and Herzegovina, no. 17-07-02-1161-7/06 of 30 January 2017, is incompatible with Article II(3)(f) and (g) of the Constitution of Bosnia and Herzegovina and Articles 8 and 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 1(1)(7) of the Rulebook Amending the Rulebook on Wearing Uniforms, in the part reading „when in uniform, police officers are not allowed to have a beard", passed by the Director of the Border Police of Bosnia and Herzegovina, no. 17-07-02-1161-7/06 of 30 January 2017, is hereby repealed pursuant to Article 61(2) of the Rules of the Constitutional Court.

The repealed Article 1(1)(7) of the Rulebook Amending the Rulebook on Wearing Uniforms, in the part reading „when in uniform, police officers are not allowed to have a beard", passed by the Director of the Border Police of Bosnia and Herzegovina, no. 17-07-02-1161-7/06 of 30 January 2017, is rendered ineffective the first day following the date of publication of the present Decision in the *Official Gazette of Bosnia and Herzegovina*, pursuant to Article 61(3) of the Rules of the Constitutional Court.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, 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 October 2017, Mr. Safet Softić, the Deputy Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina („the applicant") lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of Article 1(1)(7) of the Rulebook Amending the Rulebook on Wearing Uniforms („the Rulebook") in part reading „when in uniform, police officers are not allowed to have a beard", which was passed by the Director of the Border Police of Bosnia and Herzegovina, no. 17-07-02-1161-7/06 of 30 January 2017.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the Director of the Border Police of Bosnia and Herzegovina was requested on 16 October 2017 to submit his response to the request.

3. The Director of the Border Police of Bosnia and Herzegovina submitted his response on 14 November 2017.

III. Request

a) Allegations stated in the request

4. The applicant points out that the disputed provision of Article 1(1)(7) of the Rulebook Amending the Rulebook on Wearing Uniforms, as relevant, reads „when in uniform, police officers are not allowed to have a beard". The cited provision, in the applicant's opinion, is incompatible with Article II(1), II(3)(g) and II(4) of the Constitution of Bosnia and Herzegovina, and Articles 9(1) and 14 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 and Articles 2(1), 18(1) and 26 of the International Covenant on Civil and Political Rights („the ICCPR"). In the applicant's opinion, the request concerns constitutional issues and, primarily, it relates to the human rights of religious believers safeguarded by the Constitution of Bosnia and Herzegovina and international law. It is further stated that after amendments to the Rulebook on Wearing Uniforms of 30 January 2017, police officers have been banned from wearing a beard when in uniform.

5. As to the background of this case, the applicant states that, after the challenged provision of the Rulebook had been amended, in the period between 3 February and 25 May 2017 the police officers of the Border Police of Bosnia and Herzegovina (F.A. and A.H., employees of the JGP Sarajevo Airport) addressed the Union of the Border Police of Bosnia and Herzegovina, the Office for Professional Standards, the Director of Border Police of Bosnia and Herzegovina, the BiH Parliamentary Joint Committee on Human Rights and the Ombudsman of Bosnia and Herzegovina, as they were unable to exercise their religious and human rights in the Institutions of Bosnia and Herzegovina, and they requested protection and aid in exercising their religious rights or possible change of work position that does not require wearing their uniform. However, their requests were not complied with.

6. As to a violation of Article 9 of the European Convention, it is pointed out that religious appearance, the wearing of a beard in the present case, falls within the scope of religious rights and the rights safeguarded by Article 9 of the European Convention. Thus, as pointed out, the prohibition of wearing a beard in the particular case amounts to an interference with the religious rights. It is further stated that, in accordance with the provisions of the European Convention and the case-law of the European Court of

Human Rights, the state may interfere with the freedom to manifest one's religion if the requirements set forth in Article 9(2) are cumulatively met. The applicant holds that the challenged provision of the Rulebook is in violation of the right to freedom of religion, as this norm is not prescribed by law, there is no legitimate aim, nor is it necessary in a democratic society. In relation to the first requirement that the measure limiting the right to freedom of religion is a measure prescribed by law, it is pointed out that in the particular case it is the Rulebook in question which does not have a legal status or legal significance, as it was passed by the Director of the Border Police of Bosnia and Herzegovina and not by a legislative or any other electoral body. As regards the existence of a legitimate aim referred to in Article 9(2) of the European Convention it is stated that a legitimate aim does not exist in the present case. It is further pointed out that the document of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina no. Ž-SA-04-113/17 of 19 June quotes the position of the Border Police of Bosnia and Herzegovina that the disputable measure was issued *for the purpose of a neat and uniformed appearance of the police officers when they are in uniform of the Border Police of Bosnia and Herzegovina…* In the applicant's opinion, the aforementioned does not represent any of the legitimate aims laid down in Article 9(2) of the European Convention. Even if a legitimate aim exists, a measure restricting the freedom of religion must be proportionate to that aim, which is not the case in the particular situation. In addition, as the applicant alleges, the question might be raised given that the wearing of moustaches is allowed, is it possible that moustaches can be well-kept and beards cannot and how is it possible to achieve that employees of the Border Police of Bosnia and Herzegovina are uniform in their appearance if some of them have moustaches and some do not. With regard to the requirement that any interference or restriction must be „necessary in a democratic society, this requirement has not been complied with as it is not proven anywhere and in any possible manner that the challenged measure is necessary in the society of Bosnia and Herzegovina. Moreover, in the period between 28 April 2006, when the first Rulebook had been passed, and 30 January 2017, when the Rulebook in question was passed, the then applicable provision allowed the wearing of a beard and there were no difficulties in work activities or any objections related to the appearance of employees of the Border Police of Bosnia and Herzegovina. Furthermore, the applicant points out that there was no analysis whether the impugned measure was justified and necessary in the society of Bosnia and Herzegovina. In view of the aforesaid, the applicant concludes that the Rulebook is not in conformity with the relevant provisions of the Constitution of Bosnia and Herzegovina.

7. As to a violation of the right not to be discriminated against, it is pointed out that the impugned measure, *i.e.* the Rulebook, discriminates against the Border Police's employees who are followers of Islam, as only in the Islamic tradition the wearing of beards is

considered a recommendation and an act to please God. In other words, as highlighted, although the impugned measure is general and relates to all employees irrespective of their religious affiliation, the implementation of that measure affects only Muslims, *i.e.* followers of Islam (indirect discrimination).

8. The applicant further points out that the European Commission for Democracy through Law („the Venice Commission"), in its Guidelines for Legislative Reviews of Laws Affecting Religion or Belief, adopted on 18 and 19 June 2004, regarding several issues that arise related to public institutions, including prisons, the military and state-operated hospitals, concluded that *limitations should be made only after a proper „limitations analysis," with the understanding of the reasonable possibility of heightened state security interests.* In the opinion of the applicant, it follows from the aforementioned that a limitation of the freedom of religion in the army may be justified only if a proper „limitations analysis" is made in pursuit of one of the legitimate aims, and that is the protection of „public safety". When the disputed Rulebook was passed no analysis was made and there was nothing to prove that the limitation of the freedom of religion, by prohibiting the wearing of a beard, could in any way affect „public safety". In addition, it is stated that in the aforementioned Guidelines, the Venice Commission, as regards the *external freedom (forum externum) points out that it is important to remember that it is both the manifestations of an individual's beliefs and those of a community that are protected. Thus, the manifestation of an individual's beliefs may be protected even if the individual's beliefs are stricter than those of other members of the community to which he or she belongs, and finally, that manifestations of religion or belief, in contrast to internal freedom, may be limited, but only under strictly limited circumstances set forth in the applicable limitations clauses.* The applicant underlines that the European Convention and the ICCPR safeguard the public manifestations of religion by an individual even if these manifestations are stricter than those of other members of the community to which s/he belongs. In the particular case, as pointed out, that means that the right to wear a beard for religious reasons is protected even if some members of the Islamic Community do not wear a beard or even if they do not consider that wearing a beard is mandatory. It is sufficient that an individual considers that this is a religious norm he/she desires to follow. In the cited paragraph of the Guidelines, the Venice Commission points out that the limitation of the freedom of religion may be imposed only as defined by Articles related to the limitations, *i.e.* Article 9(2) of the European Convention and Article 18(2) of the ICCPR.

9. It is proposed that the Constitutional Court declare the Rulebook unconstitutional and order the Director of the Border Police of Bosnia and Herzegovina to annul the relevant Rulebook immediately or no later than one month after this Decision is published in the *Official Gazette of Bosnia and Herzegovina*.

b) Reply to the Request

10. In the reply to the request, the Director – Chief General Inspector of the Border Police stated, *inter alia*, that the reason for amending the Rulebook and passing the impugned provision was the need that the police officers, while in uniform of the BiH Border Police, are neat and uniform in their appearance, respecting their racial, national and ethnic origin, religious and other beliefs or orientations. Every police officer of the Border Police is subject to the relevant amendments to regulations, notwithstanding their racial, religious or other affiliation. The amendments to the regulations were „imposed by a vital need, meaning that it was established that the norm as a whole was imperfect and deficient, including the possibility of the abuse thereof". In addition, „having a beard may affect or affects to the largest possible extent a person's appearance, which is also important in the fight against corruption that occurs in connection with the performance of duty by police officers of the Border Police and as regards difficulties in identifying and recognizing such police officers wearing a beard and the need that the police officers, when in uniform of the BiH Border Police, are neat and uniform in their appearance." It is also stated that „when entering Bosnia and Herzegovina, a foreign visitor first encounters a police officer of the Border Police and, based on his/her look, behaviour and physical appearance, the foreigner gets an impression of the State represented by the police officer".

IV. Relevant Law

11. The **Law on Police Officials of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, 27/04, 63/04, 5/06, 33/06, 58/06, 15/08, 50/08, 63/08, 35/09 and 7/12), as relevant, reads:

Article 1
Scope of the Law

This Law regulates police powers and the working legal status (labour relations, including: obligations and rights, recruitment, education and in-service training, deployment, ranks, performance evaluation and promotion, remuneration, working conditions, disciplinary responsibility, responsibility for damage and termination of employment) of police officials of Bosnia and Herzegovina („BiH").

Article 2(1)
Police Officials

(1) This law applies to police officials employed within the State Investigation and Protection Agency (SIPA) and the Border Police of Bosnia and Herzegovina (BPBiH)

and the Directorate for Coordination of Police Bodies of Bosnia and Herzegovina („the Directorate").

Article 3
Basis of the Work

(1) The work of police officials shall be based on the Constitution of Bosnia and Herzegovina, the law and other regulations in force in BiH.

(2) In performing his/her duties, a police official shall act in an impartial and legal manner, guided by the public interest to serve and assist the public, promoting the development and preservation of democratic practices consistent with the protection of human rights and fundamental freedoms.

Article 4
National Balance

The structure of police officials within the police body shall generally reflect the ethnic structure of the population of BiH in accordance with the 1991 census.

Article 5(2) and (3)
Police Insignia

(2) A police official wears a police uniform pursuant to the rulebook of a police body and relevant regulations.

(3) The Council of Ministers of Bosnia and Herzegovina („the Council of Ministers") prescribes the form of the police identification card and the police badge, the latter of which must be clearly recognizable to the public as a police insignia, and issues regulations on design of a police uniform.

Article 36(3)

(3) A police official shall always refrain from publicly manifesting his/her political beliefs, and from publicly manifesting religious beliefs while on duty;

Article 131
Regulations by the Head

Within three months upon the entry into force of this Law, the Head shall pass the regulations on the following:

- *On wearing of the police uniform (Article 5, Paragraph 2);*

[...]

12. The **Law on Border Police of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina,* 50/04, 27/07 and 59/09), as relevant, reads:

Article 15(2)
Duties and Responsibilities of the Director

(2) In addition to the duties and responsibilities referred to in paragraph 1 of this Article, the Director shall also perform other tasks, such as:

a) issuance of Rulebooks with the Council of Ministers' approval, as well as the adoption of other regulations envisaged by law which are necessary to perform tasks within the competence of the BPBiH.

13. The **Rulebook on Design of a Police Uniform** (*Official Gazette of Bosnia and Herzegovina,* 90/05), as relevant, reads:

Article 1

(1) This Rulebook determines the design and type of police uniforms in the State Investigation and Protection Agency, State Border Service („the police bodies"), parts thereof, colour, shelf life and special police insignia.

14. The **Rulebook on Wearing Uniforms**, no. 18-06-02-1161/06 of 28 April 2006, in relevant part reads as follows:

VI

Police officers are obliged to comply with the following general rules on wearing and maintenance of uniforms:

1. All officers on duty or at the same border crossing and on other official task must be uniformly dressed and have uniformed footwear.

2. A police officer on all occasions, while on duty or in public place, should be properly dressed and should behave in the spirit of the police code of conduct protecting their reputation and the dignity of service.

[...]

5. Wearing other insignia, badges or pins on a uniform is prohibited.

6. In public places and while on duty, carrying umbrellas, nylon bags or other goods is prohibited with the exception of smaller bags or suitcases, totes or similar.

7. when in uniform, police officers should have their hair neatly cut and their beards shaven. Having a well-kept beard and moustache is allowed.

[...]

CONTENTS

15. The **Rulebook Amending the Rulebook on Wearing Uniforms** no. 17-07-02-1161-7/06 of 30 January 2017, as relevant, reads:

Article 1

The Rulebook on Wearing Uniforms (no. 18-06-02-1161/06 of 28 April 2006 and no. 17-07-02-1161/06 of 6 November 2014) in Item VI under no. 6, the sentence: „when in uniform, police officers should have their hair neatly cut and their beards shaven. Having a well-kept beard and moustache is allowed." is amended and reads:

„7. When in uniform, police officers should have their hair neatly cut and they are allowed to have a moustache, which should be neat and clean and of length not exceeding face volume. When in uniform, police officers are not allowed to have a beard."

V. Admissibility and Merits

16. The Constitutional Court first notes that, given the specific nature of the particular request and issues raised therein, it will examine the admissibility and merits of the request together.

17. The Constitutional Court observes that, in view of the provisions of Article VI(3) (a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the request in question was filed by an authorised person.

As to the Constitutional Court's Competence

18. As the relevant request challenges the act of a lower rank than the law, the Constitutional Court will make reference to its case-law in such cases. In this respect, the Constitutional Court notes that according to its hitherto case-law, in the situations where the issue of compatibility of a general act not expressly referred to in the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina has been raised, the Constitutional Court has assessed the circumstances of the relevant case on a case-by-case basis commensurate with the competences which are conferred upon it by the mentioned Article and, accordingly, has expressed its positions as to whether or not the requests for review of such acts were admissible. In addition, the Constitutional Court points out that it is the master of the characterization to be given in law to the facts of the case, and that it is not bound by the characterization given by parties to the proceedings (see, Constitutional Court, Decision on Admissibility and Merits no. *U 6/06* of 29 March 2006, paragraph 21, *the Official Gazette of BiH*, 40/08), and that the Constitutional Court is the ultimate judicial authority on the interpretation and application of the Constitution of Bosnia and Herzegovina (see, Constitutional Court, Decision on Admissibility and Merits no. *U 9/09* of 26 November 2010, paragraph 70, *the Official Gazette of BiH*, 48/11).

19. In view of the case-law of the Constitutional Court in cases nos. *U 4/05* and *U 7/05* (Decisions on Admissibility and Merits available at the website of the Constitutional Court, www.ustavnisud.ba) as well as in the cases nos. *U 1/09* and *U 7/10* (Decisions on Admissibility available at the website of the Constitutional Court, www.ustavnisud.ba), the Constitutional Court points out that it clearly follows from the quoted case-law that the Constitutional Court, as an institution which upholds the Constitution, is competent to review the constitutionality of acts of lower rank than laws if such acts raise an issue concerning the protection of human rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention. 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 human rights violations (*op.cit. U 4/05*, paragraph 16).

20. In the present case, the applicant holds that the challenged provision of the Rulebook is in violation of the right to freedom of religion, as guaranteed by Article II(3)(g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention, and Articles 2(1), 18(1) and 26 of the ICCPR, as well as the right not to be discriminated against, as guaranteed by Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention and Article 1 of Protocol 12 to the European Convention in respect of the members of the Border Police of Bosnia and Herzegovina who manifest their religious beliefs by growing a beard.

21. In connection with the above, the Constitutional Court will establish, by reference to its own case-law and the case-law of the European Court of Human Rights, whether the challenged provision raises an issue of human rights safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention.

22. According to its hitherto case-law related to the allegations about a violation of the right to freedom of religion because of the wearing of a scarf-hijab by a member of the Armed Forces of Bosnia and Herzegovina and the wearing of a hat in the courtroom of the Court of Bosnia and Herzegovina for the purpose of manifesting their religion, the Constitutional Court took the position that the allegations stated in the appeals raised the issue of guarantees under Article 9 of the European Convention and, as such, were falling within the scope of application of Article 9 of the European Convention (see, the Constitutional Court, Decision on Admissibility and Merits no. *AP 2190/13* of 9 July 2015 and *AP 3947/12* of 9 July 2015, available at the website of the Constitutional Court, www.ustavnisud.ba).

23. In addition, the Constitutional Court notes that Article 9 of the European Convention does not engage *numerus clausus* in respect of the forms which manifestation of one's

religion or beliefs may take. On the contrary, each individual is free to choose a form of manifestation of religion or beliefs. In particular, the manner in which an individual manifests his/her religion may differ and take the form of 'custom' including, for instance, wearing a beard, hair, special diet and the like (*mutatis mutandis*, European Court of Human Rights, *Leyla Sahin vs. Turkey*, Judgement of 10 October 2005). As regards the issue of having a beard, in the case of *Biržietis v. Lithuania* the European Court of Human Rights established a violation of Article 8 of the European Convention in the situation where the applicant, who was serving a prison sentence, was prohibited from growing a beard by the internal rules of the correctional institution in which he was placed. The Court stated in the cited case that personal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his/her personality and thus fall within the notion of private life and held that, in the circumstances of the relevant case, the choice to grow a beard constituted a part of the applicant's personality and individual identity and fell within the scope of private life, and Article 8 of the European Convention is therefore applicable (see, the European Court of Human Rights, *Biržietis v. Lithuania*, Judgement of 14 June 2016).

24. Upholding its own jurisprudence in the aforementioned cases as well as the cited case-law of the European Court of Human Rights, the Constitutional Court concludes that the applicant's allegations that the prohibition on the members of the Border Police of Bosnia and Herzegovina to wear a beard for the purpose of manifesting their religious beliefs raises the issue of human rights under Article 9 of the European Convention.

25. However, the Constitutional Court holds it necessary to underline that wearing a beard is an aspect of private life safeguarded by Article 8 of the European Convention. This follows from the above cited case-law of the European Court of Human Rights, notwithstanding the fact that the cited case concerned the specific circumstance of wearing a beard in prison and the particular case before the Constitutional Court relates to the case of wearing a beard while performing public duties, as it is a „personal choice as to an individual's desired appearance, whether in public or in private places". Although this aspect related to the challenged Rulebook is not explicitly stated in the request, the Constitutional Court points out that it implicitly follows from the request itself. Namely, it is also stated in the response to the request that „all police officers of the Border Police are subject to the relevant amendments to the regulations notwithstanding their racial, religious or other affiliation". Hence, prohibiting the police officers to wear a beard while in uniform affects all of them notwithstanding their racial, religious or other affiliation, including those who wear a beard only as their „personal choice as to an individual's desired appearance". Therefore, the Constitutional Court holds that this issue cannot be

considered only as the issue of manifesting one's religious beliefs but also as a matter of privacy and concludes that this request raises an issue of qualified rights, in particular, the right to respect for private life and the right to freedom of religion safeguarded by Articles 8 and 9 of the European Convention.

26. The Constitutional Court further notes that an absolute ban on beards for police officers in uniform was imposed by the challenged provision. Taking into account that „a well-kept beard and moustaches" were allowed by the provision applicable before the impugned amendment thereto have been passed, the provision of the Rulebook imposing the absolute ban on beards for police officers in uniform, according to the assessment of the Constitutional Court, interfered with the right to private life and the right to freedom to manifest one's religion. Given that the interference with the relevant qualified rights occurred on the basis of the Rulebook in question, as a buy-law, the Constitutional Court more readily considers that it has the jurisdiction to examine its constitutionality. Supporting its own position that it is competent to review the constitutionality of acts lower rank than laws, if such acts raise an issue of human rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention, the Constitutional Court concludes that, in the particular case, the request for review of constitutionality is admissible in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court.

27. After concluding that the particular request is admissible, the Constitutional Court will consider the merits of the request, *i.e.* whether the interference with the right to private life and freedom of religion has been justified under paragraph 2 of Articles 8 and 9 of the European Convention.

Right to Private Life

28. Article II(3)(f) of the Constitution of Bosnia and Herzegovina reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

f) The right to private and family life, home, and correspondence.

29. Article 8 of the European Convention reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in

the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

30. Under the case-law of the Constitutional Court, the primary purpose of Article 8 of the European Convention is to protect individuals against arbitrary interferences by the public authorities with their rights guaranteed by Article 8 of the European Convention. Article 8(2) of the European Convention allows the public authorities, in certain cases, the interference with the rights of individuals safeguarded by Article 8 of the European Convention. To be justified, the interference of public authorities must be 'in accordance with the law'. This requirement of legality, in accordance with the meaning of terms of the European Convention consists of several elements: a) interference must be based on the national or international law, b) the law concerned must be sufficiently accessible so that an individual is instructed on the circumstances of the law that must be applied to a given case, and c) the law must be formulated with appropriate accuracy and clarity so that an individual is enabled to adjust his/her actions to it. If it is established that the interference by the public authorities was in accordance with the law, it must be established whether such interference was 'necessary in a democratic society' and whether the interference related to the one of aims specified in Article 8(2) of the European Convention. In that context, it should be considered whether the decision of the public authorities had a legitimate aim and whether it represented a measure which was necessary in a democratic society.

Freedom of Thought, Conscience and Religion

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

g) freedom of thought, conscience and religion

32. Article 9 of the European Convention reads as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

33. The Constitutional Court considers that freedoms enshrined in Article 9 of the European Convention represent one of the foundations of a 'democratic society'. In their religious dimension, these freedoms are one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practice or not to practice a religion (see, European Court of Human Rights, *Kokkinakis v. Greece* of 25 May 1993, Series A no. 260-A, p. 17, paragraph 3; *Buscarini and Others vs. San Marino [GC]*, no. 24645/94, paragraph 34, ECHR 1999-I).

34. In assessing the role of religion in a democratic society, the European Court pointed out that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (*op.cit, Kokkinakis v. Greece*).

35. The Constitutional Court points out that Article 9 of the European Convention is so structured that the first paragraph defines the freedoms that are protected and the second paragraph contains the so-called restrictive clause, which means that it provides for the circumstances under which the public authorities may restrict the enjoyment of the protected freedoms. Namely, Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance (see, European Court of Human Rights, *Kalaç vs. Turkey*, Judgment of 1 July 1997, Decisions and Reports 1997-IV, paragraph 27).

36. Bringing the said principles into connection with the facts of the instant case, the Constitutional Court recalls that the limitation prescribed by Article 9(2) of the European Convention affords to the states the possibility to decide only on the scope of enjoyment of these rights and freedoms, and only when such intervention of the state is prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Consequently, the state is permitted to place limitations on the enjoyment of these rights only in the general public interest but it is not allowed to suspend them.

37. The freedom of religion and beliefs, unlike the freedom of thought and conscience (*forum internum*), has its external component (*forum externum*). Namely, Article 9 of the European Convention guarantees the right to external manifestation of religion and belief. However, this right is not absolute and is subject to limitations set out in Article 9(2) of the European Convention. In this respect, the Constitutional Court observes that it is established by the Guidelines for Legislative Reviews of Laws Affecting Religion or Beliefs, passed by the Venice Commission on 18 and 19 June 2004, that manifestations of religion or beliefs, in contrast to internal freedom, may be restricted, but only under strictly limited circumstances set forth in the applicable limitations clauses.

Justification for restricting the right to respect for private life and freedom of religion under Article 8(2) and Article 9(2) of the European Convention

38. The Constitutional Court points out that Article 8(2) and Article 9(2) of the European Convention include identical reasons justifying the restrictions on the rights guaranteed in the preceding paragraph of the mentioned Articles. Namely, in order to impose restrictions on the exercise of the rights listed in Article 8(2) and Article 9(2) of the European Convention, there must be a legal basis to do so and such measures must be necessary in a democratic society and prescribed in the interests of general (broader) objectives, referred to in Article 8(2) and Article 9(2) of the European Convention.

39. In view of the above, the Constitutional Court will examine whether the interference with the right to respect for private life and the right to freedom of religion is justified under Article 8(2) and Article 9(2) of the European Convention, taken together.

40. Taking the applicant's objection as a starting point that the impugned provision is not prescribed by law, the Constitutional Court notes that the impugned provision is included in the Rulebook on Wearing Uniforms, which was passed by the Director of the Border Police based on Articles 5(2) and 131(2) of the Law on Police Officials of Bosnia and Herzegovina and Article 15(2) of the Law on State Border Service of BiH. Therefore, the impugned provision is not prescribed by law in the formal sense but by the Rulebook, a bylaw. The Constitutional Court notes that the mentioned legal provisions stipulate the authority of the Director to pass regulations on the appearance and manner of wearing a uniform. In addition, the Constitutional Court notes that, according to the request, it is undisputed that the members of the Border Police, whom the impugned provision relates to, are familiar with the impugned provision and that the provision is clear. Taking into account that, in case no. *AP 3947/12*, the Constitutional Court concluded that restricting the right to freedom of religion for wearing a cap in the courtroom of the Court of BiH

was lawful in terms of Article 9(2) of the European Convention, given the internal act of the Court of BiH and other judicial institutions *(op.cit. AP 3947/12* paragraph 44), and taking into account the position taken by the European Court of Human Rights in the case of *Biržietis v. Lithuania* that the notion „law" encompasses not only written laws enacted by Parliament, but also statutes and regulatory measures of a lower order passed by professional regulatory bodies under independent rule – making powers delegated to them by Parliament (*op. cit. Biržietis v. Lithuania*), the Constitutional Court concludes that the restrictions on the right to respect for private life and the right to freedom of religion in the present case are prescribed by „law", within the meaning of Article 8(2) and Article 9(2) of the European Convention.

41. In addition, as regards the issue whether the impugned measure was necessary in a democratic society and whether it pursued one of the legitimate aims under Article 8(2) and Article 9(2) of the European Convention, the Constitutional Court notes that it is necessary first to determine whether the impugned measure was passed in the interest of legitimate aims under Article 8(2) and Article 9(2) of the European Convention, which are to be interpreted strictly, and if so, whether the impugned measure, as such, is proportionate to that aim and necessary in a democratic society. In this connection, the Constitutional Court points out that the Rulebook on Wearing Uniforms, prior to the amendments thereto, had prescribed as follows: *A well-kept beard and moustache shall be permitted.* Furthermore, the Constitutional Court notes that the provision of Article 36(3) of the Law on Police Officials of Bosnia and Herzegovina prescribes as follows: *A police official shall always refrain from publicly manifesting his/her political beliefs, and from publicly manifesting religious beliefs while on duty.* The Constitutional Court notes that the applicant failed to define the appearance of a beard, as a form of expression of one's religious belief, but he highlighted that the cited provision, applicable before the impugned amendment thereto was passed (*A well-kept beard and moustache shall be permitted*), had caused no problem. In addition, the Constitutional Court has already pointed out that a beard, as part of the body and physical appearance of a person, is a form of expression of one's religion only where the beard is worn for religious reasons but it is also an aspect of one's private life, as it is not associated only with religious symbols.

42. The Constitutional Court recalls that according to the consistent case-law of the European Court of Human Rights, the Contracting States have a certain margin of appreciation in assessing the existence and extent of the need for interference with citizen's rights, but this margin is subject to European supervision, embracing both the law and the decisions applying it, even those given by independent courts (see, European Court of Human Rights, *Dahlab v. Switzerland*, 16 February 2001, Application no. 42393/98). In

addition, according to the consistent case-law of the European Court of Human Rights, the Court's task is to determine whether the measures taken at national level are justified in principle – that is, whether the reasons adduced to justify them appear „relevant and sufficient" and are proportionate to the legitimate aim pursued (see, European Court of Human Rights, *The Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, Series A no. 30).

43. In order to answer the question whether the impugned provision was passed for the purpose of achieving the legitimate aim referred to in Article 8(2) and Article 9(2) of the European Convention, the Constitutional Court will determine whether the absolute ban on beards for police officers in uniform was issued in the interest of general objectives, such as national security, public safety, health or morals, or the rights and freedoms of others, *etc*. According to the response of the Director of the Border Police of 14 November 2017, the reason for amending the Rulebook and passing the impugned provision was the need that the police officers, while in uniform of the BiH Border Police, are neat and uniform in their appearance, and the fight against corruption that occurs in connection with the performance of duty by police officers and difficulties in identifying a person wearing a beard. In the opinion of the Constitutional Court, the stated the objectives of a general nature as reasons for passing the impugned provision, given that it is completely logical that any uniformed police should be „neat and uniform in the appearance", but Director of the Border Police failed to explain why, otherwise (for example, if a neat and well-kept beard would have been allowed, as previously prescribed by the law), this general objective would be imperilled. Does it mean that, before the impugned provision was passed, the police officers had been untidy and non-uniform in their appearance? Therefore, it seems that the Director of the Border Police, in the manner mentioned above, expressed his personal views on how police officers should look like in order to be „neat and uniform in their appearance"; however, given that the impugned provision amounted to an interference with fundamental human rights, such as the right to respect for private life and the right to freedom of religion, no reasonable and logical explanation about the necessity of this measure was offered. Does it really mean that a police officer, who would wear a well-kept beard, would violate grooming and personal appearance standards to such an extent that it required an intervention to his fundamental constitutional right to respect for private life and the right to freedom of religion? As to the second reason offered in the response, the fight against corruption, the Constitutional Court holds that it concerns an arbitrary assertion that can reasonably be countered by the opposite assertion that it is easier to identify a person wearing a beard (well-kept beard), because, as stated in the response, „the beard may affect and affects the person's facial physiognomy."

Therefore, these reasons do not satisfy the requirement of necessity in a democratic society for the protection of the general values mentioned in Article 8(2) and Article 9(2) of the European Convention. In the absence of any other relevant justification by the enactor of the impugned provision, the Constitutional Court highlights that it does not find that there exists a special reason justifying the „necessity" for the interference with the aforementioned constitutional rights in the manner it was done by the impugned provision. Once again, the Constitutional Court points out that it does not find a reason that would in itself be an obstacle for the police to perform its duty in the interest of public safety or for the protection of public order, if some police officers wear a well-kept beard. The Constitutional Court may reiterate all the aforementioned also with regard the fulfilment of other standards set forth in the second paragraph of the right to respect for private life and the right to freedom of religion (*the protection of health or morals, the protection of the rights and freedoms of others*). That would mean that the impugned measure, which was prescribed by the impugned provision, could not be justified even in terms of the remaining standards referred to in Article 8(2) and Article 9(2) of the European Convention.

44. Therefore, the Constitutional Court considers that, in the present case, no relevant and sufficient reasons were offered based on which the Constitutional Court could conclude that the relevant measure of restriction was prescribed in the interest of the legitimate aims referred to in Article 8(2) and Article 9(2) of the European Convention. In addition, the Constitutional Court notes that the impugned provision prescribes an absolute prohibition against the wearing of beard without any possible guidelines on its aesthetic appearance or any other characteristics or exceptions. Therefore, taking into account that the specific restriction on the fundamental human rights does not pursue the interest of general objectives referred to in Article 8(2) and Article 9(2) of the European Convention, the Constitutional Court concludes that the impugned provision is in violation of the right to respect for private life and the right to freedom of religion under Article 8 and Article 9 of the European Convention.

45. The Constitutional Court concludes that the impugned provision of the Rulebook is in violation of Article II(3)(f) and (g) of the Constitution of BiH and Articles 8 and 9 of the European Convention.

Other allegations

46. As to the applicant's allegations that the impugned provision is discriminatory against the Border Police employees who are the followers of Islam, the Constitutional Court

notes that the impugned provision is of a general nature and that it applies equally to other denominations, which require that their followers wear a beard. Having regard to the conclusion of the Constitutional Court that there is a violation of Article 9 of the European Convention, the Constitutional Court holds that it is not necessary to examine separately the allegations about a violation of the rights under Article II(4) of the Constitution of BiH and Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention. Also, taking into account the aforementioned conclusion on a violation of Article 9 of the European Convention, the Constitutional Court considers that it is not necessary to examine separately the allegations about a violation of Article 2(1), Article 18(1) and Article 26 of the International Covenant on Civil and Political Rights.

VI. Conclusion

47. The Constitutional Court concludes that an absolute prohibition on the BiH Border Police' police officers to wear a beard while wearing their police uniform is in violation of the right to respect for private life and the right to freedom of religion safeguarded by Article II(3)(f) and (g) of the Constitution of BiH and Articles 8 and 9 of the European Convention, as the impugned measure does not purse the general objectives set forth in Article 8(2) and Article 9(2) of the European Convention.

48. Pursuant to Article 43(1) of the Rules of the Constitutional Court, a Separate Concurring Opinion of Judge Tudor Pantiru is annexed to the present Decision. Vice-Presidents Mato Tadić and Zlatko M. Knežević and Judges Valerija Galić and Miodrag Simović have given their dissenting statement, expressing their disagreement with the majority decision.

49. Having regard to Article 59(1) and (1) and Article 61(2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Separate Concurring Opinion of Judge Tudor Pantiru

In its decision of 30 November 2017, the Constitutional Court of BiH, in case no. *U 8/17*, granted the request for review of the constitutionality of Article 1(1)(7) of the Rulebook Amending the Rulebook on Wearing Uniforms no. 17-07-02-1161-7/06 of 30 January 2017 („the Rulebook"), which had been adopted by the Director of the Border Police of Bosnia and Herzegovina.

In the enacting clause of the Decision it is established that Article 1(1)(7) of the Rulebook, in the part reading **when wearing uniform, a police officer's beard must be shaven**, is incompatible with Article II(3)(f) and (g) of the Constitution of Bosnia and Herzegovina and Articles 8 and 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Although I agree with the decision of the majority as regards the unconstitutionality of the provisions of Article 1(1)(7) of the Rulebook, with all due respect I think that the Decision of the Constitutional Court is incomplete and that it should not have been limited to the aforementioned for the following reasons.

It is true that the Rulebook was passed on the basis of provisions of the Law on Police Officials of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 27/04, 63/04, 5/06, 33/06, 58/06, 15/08, 50/08, 63/08, 35/09 and 7/12, „the Law on Police Officials"). It follows directly from the provisions of Article 5(2) if the aforementioned Law, which read: „A police official wears a police uniform pursuant to the rulebook of a police body and relevant regulations." In the present case it has been disregarded that the Law on Police Officials includes also the provisions of Article 36(3), which read: **A police official shall always refrain from publicly manifesting his/her political beliefs, and from publicly manifesting religious beliefs while on duty**. Therefore, the aforementioned provision, in its relevant part, stipulates that: **A police official shall always refrain from publicly manifesting his/her political beliefs while on duty**. This means that the Law stipulates an absolute prohibition against the public manifestation of all religious beliefs by police officials while on duty. It is my deep conviction that the aforementioned, as a whole, means that the impugned provision of the Rulebook, imposing an absolute ban on wearing a beard (as a form of manifesting religious beliefs) while on duty, is derived from the cited provision of the Law on Police Officials. Likewise, the aforementioned means that the Director of the Border Police of Bosnia and Herzegovina prescribed the aforementioned prohibition against the public manifestation of religious beliefs on the basis of the provisions of Article 36(3) of the Law on Police Officials, which, as already

stated, prescribes an absolute prohibition against the public manifestation of all religious beliefs by police officials while on duty.

The question then arises what is the purpose of the decision of the Constitutional Court in the present case, if the provisions of Article 36(3) of the Law on Police Officials, in addition to the impugned provision of the Rulebook, were not examined. In my opinion, in this case the said provision of the Law on Police Officials is implicitly referred to in this case, as the Rulebook cannot be viewed separately from the said Law, taking into account the undisputed fact that the Rulebook was passed based on the Law on Police Officials. Therefore, the provisions of Article 36(3) of the Law on Police Officials engage Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, given that those provisions stipulate an absolute prohibition against the public manifestation of all religious beliefs by police officials while on duty. Taking into account the manner in which it was done, the Director of the Border Police of Bosnia and Herzegovina has been put in a very difficult situation, as he adopted the impugned provision of the Rulebook based on Article 36(3) of the Law on Police Officials.

In view of the above, I hold that the Constitutional Court should have examined whether the absolute prohibition against the public manifestation of all religious beliefs by police officials while on duty, prescribed by Article 36(3) of the Law on Police Officials, is consistent with the limitations on the freedom to manifest one's religion or beliefs that are permitted under Article 9(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That is the main reason why I wrote the separate opinion in the present case, concurring in the Decision of the Constitutional Court no. *U 8/17* of 30 November 2017.

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

CONTENTS

Case No. U 4/15

DECISION ON ADMISSIBILITY AND MERITS

Request of the Cantonal Court in Mostar (Judge Zuhra Hodžić-Seknić) for review of the compatibility of Article 17(4) of the Law on Enforcement Procedure (*Official Gazette of the Federation of BiH*, 52/03, 33/06, 39/09 and 35/12) with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms

Decision of 30 September 2015

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

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Mr. Constance Grewe,

Ms. Seada Palavrić

Having deliberated on the request of the **Cantonal Court in Mostar (Judge Zuhra Hodžić-Seknić)**, in case no. **U 4/15**, at its session held on 30 September 2015, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by the Cantonal Court in Mostar (Judge Zuhra Hodžić-Seknić) for review of the constitutionality of Article 17(4) of the Law on Enforcement Procedure of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, 32/03, 52/03, 33/06, 39/09 and 35/12) in respect 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 dismissed.

It is hereby established that Article 17(4) of the Law on Enforcement Procedure of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, 32/03, 52/03, 33/06, 39/09 and 35/12) is 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.

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 June 2015, the Cantonal Court in Mostar (Judge Zuhra Hodžić-Seknić) lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the compatibility of Article 17(4) of the Law on Enforcement Procedure (*Official Gazette of the Federation of BiH*, 52/03, 33/06, 39/09 and 35/12) with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention").

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, on 2 July 2015 the House of Representatives and the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina (the F BiH Parliament) were requested to submit their respective replies to the request.

III. Request

a) Allegations from the Request

3. The applicant seeks a review of compatibility of Article 17(4) of the Law on Enforcement Procedure (*Official Gazette of the Federation of BiH*, 52/03, 33/06, 39/09 and 35/12) with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

4. It is stated in the request that the Municipal Court in Mostar forwarded its case no. 58 0 Rs 119939 14 I to the Cantonal Court in Mostar for, *inter alia*, the purpose of decision-making on an appeal lodged by a judgment creditor against the decision of the Municipal Court in Mostar no. 58 0 Rs 119939 14 I of 22 December 2014. In the said decision, the

Municipal Court in Mostar rejected, as premature, the judgment creditor's motions to impose fines, dated 10 and 19 December 2014. It was noted that the first instance court passed the challenged decision by applying the provisions of Article 8(3) of the Law on Enforcement Procedure, which read: *If the enforceable decision on enforcement cannot be applied against a certain enforcement object or a means, the judgment creditor, in order to effectuate the same claim, may propose other enforcement object or means, and the court shall take a decision to that end*.

5. The applicant notes that the present case relates to the enforcement of the decision reinstating an employee. It points to the provision of Article 216 of the Law on Enforcement Procedure stipulating that the enforcement based on the enforcement document, ordering the debtor to reinstate the judgment creditor, will be effectuated by applying the appropriate provisions of Article 17 and Chapter XIX of this Law on Enforcement in order to meet the obligation relating to the action that can be taken only by the judgment debtor.

6. The applicant notes that pursuant to Article 209(1) of the said Law, in case that only the judgment debtor can take the action, the court will pass the enforcement decision determining an appropriate deadline for meeting the obligation. Paragraph 2 stipulates that the court, in the enforcement document, will warn the judgment debtor and also the responsible persons within a legal person, that it shall impose fines in certain amount if they fail to fulfil the obligation within the prescribed period of time, in accordance with Article 17 of the said Law. According to paragraph 3, if the debtor fails to meet the obligation within the relevant time period, the court, upon a proposal by the judgment creditor, will act in accordance with the provisions of Article 17 of the said Law.

7. The applicant highlights that the judgment creditor proposed that the enforcement be allowed by obliging the judgment debtor to return the judgment creditor to work within 8 days under threat of fines to the amount of BAM 10 000 to be imposed on the judgment debtor and BAM 2 000 to be imposed on the responsible person within the judgment debtor's legal person.

8. The applicant states that the first instance court allowed the enforcement by its decision of 3 October 2014. However, although the judgment creditor, on several occasions during the proceedings (the submissions of 12 November, 10 December and 19 December of 2014), demanded that the court impose the fines, the first instance court, by its decision of 22 December 2014 and by applying the provisions of Article 8(3) of the Law on Enforcement Procedure, rejected the judgment creditor's proposals as premature and the first instance court, by its decision of 29 December 2014, imposed the fine on the judgement debtor.

9. The applicant states that while acting in accordance with the provision of Article 17(4) of the Law on Enforcement Procedure, the „court" summoned the judgement debtor to make a statement about the failure to act in accordance with the enforcement document. The applicant notes that in the appellate proceedings this Court upheld the decision rejecting the judgment creditor's motions of 10 and 19 December 2014 as premature, taking into account the length of the entire proceedings (the action had been submitted on 8 November 2012, the case had been sent to this Court on 9 February 2015 and assigned to the judge in May 2015). In this regard, assessing that the case was about a labour dispute – reinstatement of the employee after the annulment of the decision to dismiss the director from the position, for being unlawful, and taking into account the need to act in an expedient manner, this Court assessed that the annulment of the decision of 22 December 2014 would not serve the purpose and would cause further delays in the proceedings. Therefore, the said decision was upheld by the ruling of the Cantonal Court in Mostar of 13 May 2015.

10. In the applicant's opinion, given that it is about the enforcement of the final judgment ordering the reinstatement of the employee and that in such cases fines are imposed on judgement debtors, as a means of coercive enforcement (the provisions of Article 17 of the Law on Enforcement Procedure), the subsequent summons to the judgement debtor to make the statement about the failure to act in accordance with the enforcement document is unnecessary and in contravention of the efficiency principle and the urgency of enforcement procedure (Article 5 of the Law on Enforcement Procedure), and of Article 6 of the European Convention, which guarantees the right to a fair trial within a reasonable time, as an element of the said right.

b) Reply to the Request

11. No reply to the request was submitted.

IV. Relevant Law

12. **Law on Enforcement Procedure of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH,* 32/03, 52/03, 33/06, 39/09 and 35/12) reads as relevant:

Article 8
Limitations of Methods and Objects of Enforcement

(1) The Court shall issue a decision ordering an enforcement over the objects listed in a motion for enforcement.

(2) If more than one method or more than one object of enforcement or security were requested, the Court may, on a motion of a judgment debtor or security opponent, limit the enforcement to some of those methods or objects necessary to satisfy or secure the claim.

(3) If an enforceable decision cannot be executed on a certain object or by a particular method, the judgment creditor may, for the purpose of satisfying the claim, propose a new method or object for enforcement about which the Court shall decide by issuance of a ruling.

Article 17
Fines and coercive measures in enforcement procedure

(1) A fine on a natural person in the amount from 100 BAM to 5,000.00 BAM, and on a legal person in the amount from 1 000 BAM to 100 000. BAM may be imposed where this Law foresees the imposition of fines as a means of enforcement.

(2) In the case referred to in paragraph 1 of this Article, a fine on a responsible person in the legal person in the amount from 500 BAM to 5 000 BAM may be imposed.

(3) The fine referred to in paragraphs 2 and 3 of this Article may be reimposed if the judgement debtor fails to act in accordance with a repeated order of the court or continues to act contrary to prohibitions.

(4) Prior to imposing the fine, the court shall give the judgement debtor an opportunity to make a statement and, if needed, the court shall hold a hearing for presentation and evaluation of evidence.

(5) A fine shall be imposed based on the decision by a judge, who, in meting out the amount of the fine, shall take into account economic power of judgement debtor, the meaning of the action judgment debtor was obligated to perform, as well as other conditions of the case. In its decision on enforcement, the Court shall also set a deadline for payment.

(6) The person on whom the fine has been imposed may, within 8 days from the date of service of the decision, file an objection against the decision.

(7) The person on whom the fine has been imposed in accordance with this Article shall bear all the expenses incurred by the imposition and enforcement of the fine.

(8) After the decision on enforcement has become enforceable, the Court shall ex officio collect the fine in favour of the budget for funding the court responsible for enforcement. Court budget funds are burdened by enforcement expenses and collection of those expenses determined in a conclusion by the court shall be carried out in the procedure for coercive collection of the fine.

(9) The provisions of this Article shall not apply in case that the judgment debtor is either Bosnia and Herzegovina or its entities, the Brčko District of BiH, cantons, towns, municipalities or administrative organisations, or the bodies of those legal persons, but the provisions on imposing fines on responsible persons shall accordingly apply, unless otherwise provided by law.

(10) According to the provisions of this Article, the fine may be imposed on and enforced against judgment debtor and other natural and legal persons, including responsible persons in the legal person and, in case that they refuse to provide information about the assets of the judgment debtor and where they, through their actions and activities and contrary to the court order or prohibitions, hide, damage or destroy the assets of the judgment debtor or disturb the court in carrying out the enforcement actions.

(11) The fine imposed under the provisions 1 through 10 of this Article cannot be replaced by imprisonment.

Article 209
Enforcement to Fulfil an Obligation to Perform an Act which can only Be Performed by the Judgment debtor

(1) If only the judgment debtor may perform an act, the Court shall, in a decision on Enforcement, set a reasonable period of time for the judgment debtor to fulfil the obligation.

(2) In the decision on enforcement the Court shall warn the judgment debtor and also the responsible persons within a legal person, that it shall impose fines, in accordance with Article 17, in certain amount if they fail to fulfil the obligation within the prescribed period of time.

(3) If the judgment debtor fails to fulfil the obligation within the prescribed period of time, the Court shall, on the motion of the judgment creditor, act in in accordance with Article 17 of the Law.

(4) Judgment debtor who fulfilled his/he r obligation within deadline set by the Court, is obligated to inform the Court about it without delay and present credible evidences on that (written statement of the judgment creditor that act was performed, record of the Court referee on the performance of the act, finding and opinion of the Court expert that act was performed, delivery of the piece that was made by such act into Court deposit), otherwise it shall be deemed that act has not been performed.

(5) If an act that may only be performed by the judgment debtor is of the type that does not depend exclusively on his/her willingness (for example, the creation of a certain work of art, etc.), the judgment creditor shall not have the right to request enforcement under Paragraph 1 of this Article, but only compensation for his/her damages.

Article 216
Method of enforcement

Enforcement on the basis of an enforceable document ordering the judgment debtor to permit the judgment creditor to return to work or to his/her service shall be enforced by applying the appropriate provisions of Article 17 and provisions of Chapter XIX of this law on enforcement for the purpose of fulfilling the obligation which can be fulfilled by the judgment debtor only.

V. Admissibility

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

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.

14. The request for review of constitutionality was filed by the Cantonal Court in Mostar (Judge Zuhra Hodžić-Seknić), 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*, 37/11). Bearing in mind the provision of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 16(c) of the Constitutional Court's Rules, the Constitutional Court considers that the request is admissible as it was submitted by an authorized person and that there is no formal reason under Article 19 of the Rules of the Constitutional Court for which the request would be considered inadmissible.

VI. Merits

15. The applicant seeks that the Constitutional Court decide whether Article 17(4) of the Law on Enforcement Procedure is in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention. In essence, the applicant is of the opinion that requesting the judgment debtor to state, within the meaning

of the provision of Article 17 (4) of the Law on Enforcement Procedure, why he did not act in accordance with the enforcement document is unnecessary and is in contravention of the principle of efficiency and urgency of the enforcement procedure. Also, in the applicant's opinion, the challenged provision is also in contravention of the principle of taking a decision within reasonable time as a segment of the right to a fair trial.

16. Bearing in mind the aforesaid, the Constitutional Court observes that the request raises the issue of procedural guarantees of the judgment debtor on the one hand and the principle of urgency of the enforcement procedure on the other hand so as to enforcing the legally binding judgment at the request of the party seeking enforcement as soon as possible.

17. In this connection, the Constitutional Court reminds that it was pointing to the case-law of the European Court of Human Rights (see the European Court of Human Rights, *Hornsby vs. Greece*, judgment of 19 March 1997, para 40), according to which Article 6 (1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or a tribunal. That right embodies the „right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see the European Court of Human Rights, *Philis vs. Greece*, judgment of 27 August 1991, Series A-209, page 20, para 59). However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party to the proceeding. It would be unacceptable that Article 6 of the European Convention should, in detail, to prescribe procedural guarantees given to the parties to the proceedings – a proceeding that is fair, public and expeditious – without protection through enforcement of the court decision. Where Article 6 of the European Convention is to be understood as concerning exclusively the conduct of an action would, definitely, lead to a situation incompatible with the principles of the rule of law, which the Contracting States took over on the occasion of ratifying the European Convention (see the European Court of Human Rights, *Golder vs. United Kingdom*. Judgment of 7 May 1974, Series A-18, pp. 16-18, paras 34-36). Therefore, enforcement of a judgment rendered by any court must be viewed as an integral part of the proceeding within the meaning of Article 6 of the European Convention (see the Constitutional Court, Decision on Admissibility and Merits No. *AP 861/10* of 13 March 2013, available at web-page of the Constitutional Court: www.ustavnisud.ba).

18. However, the Constitutional Court notes that the request raises (i) an issue of a legal position of the judgment debtor in enforcement proceedings, looking from the aspect of procedural guarantees he/she enjoys in that proceeding and to which he/she is also entitled based on Article 6 (1) of the European Convention. Pursuant to Article 17 (4) of the Law

on Enforcement Procedure, a fine may be imposed if judgement debtor fails to act in accordance with the decision on enforcement. In this connection, the Constitutional Court recalls the case-law of the former Commission for Human Rights according to which the decisions rendered by the court during the enforcement of a legally binding judgment do not necessarily pertain to a new and special determination of civil rights when compared with the previous proceeding and the decision arising from that proceeding (see the decision of the former European Commission for Human Rights, *Anton Dornbach vs. Federal Republic of Germany*, No. 11258/84 OI 46). The Constitutional Court, in its decision No. *AP 1996/06* of 6 March 2007, which was rendered in an almost identical legal situation, upheld the case-law of the former European Commission for Human Rights with regards to the fact that the decision of the courts pertaining to enforcement of judgments fall within the scope of Article 6 of the European Convention, except for the cases where new civil rights are to be determined and are related to the appellant (see the decision of the former European Commission for Human Rights, *K. vs. Sweden*, No. 13800/88 OI 94).

19. The Constitutional Court notes that the basic principle of enforcement procedure is the principle of urgency prescribed under Article 5 of the Law on Enforcement Procedure. As regards the enforcement procedure, the mentioned principle is reflected in the stipulation of short deadlines for undertaking certain enforcement-related actions either by parties to the proceeding or court. In essence, the issue is about the demands reflected in the principles of cost-effectiveness and efficiency of the enforcement procedure and timeliness of providing legal protection to the party seeking enforcement. Additionally, so far it has been pointed out that the urgency of action is primarily in the interest of the party seeking enforcement and, indirectly, it is in the interest of the judgment debtor as the costs are reduced and uncertainty in the legal position of subjects is promptly removed.

20. The Constitutional Court referred to the mentioned principle in its decision, in which it noted that in the course of the enforcement procedure, due to its nature, should take a prompt action as stipulated under Article 5 of the Law on Enforcement Procedure (see the Constitutional Court, *AP 5668/14* of 14 May 2015, paragraph 26; *AP 5401/14* of 24 April 2015, paragraph 24; *AP 5156/14* of 17 March 2015, paragraph 23, available at the web-page of the Constitutional Court www.ustavnisud.ba). As to the mentioned cases, the Constitutional Court found violations of the right to a fair trial under 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 given that the enforcement procedure was not completed within the reasonable period of time.

21. However, despite the mentioned principle of urgency which is sacrosanct when it comes to the enforcement procedure, the Constitutional Court faces an issue of procedural

guarantees for the judgment debtor within the meaning of Article 17(4) of the Law on Enforcement Procedure (its statement given prior to imposition of fine) from the criminal-legal aspect of the right to a fair trial, as it follows from the challenged provision that the judgment debtor was punished (sanctioned) in a manner in which the fine was imposed on him due to his failure to fulfil its obligation. Furthermore, the Constitutional Court notes that the mentioned penalty cannot be replaced with the prison sentence but that the penalty, in a larger sense, may be brought into connection with the concept of „criminal charge" within the meaning of the European Convention given its nature, severity and purpose of punishment in accordance with „the Engel criteria" (see the European Court of Human Rights, *Engel and Others v. the Netherlands*, 8 April 1976, Series A, No. 22). Namely, considering Article 17 of the Law on Enforcement Procedure as a whole, the Constitutional Court observes that it stipulates and regulates the modalities of imposing financial penalties against the judgment debtor, whereas maximum penalties are imposed both against physical and legal persons, which points to the severity of this penalty whose purpose is punishment and forcing the judgment debtor to fulfil his obligation and deterring him from continuing with his illegal behaviour during that proceeding.

22. In the opinion of the Constitutional Court, in a larger context and given the aspect of procedural guaranties, even the legislator recognised the situation where the judgment debtor is faced with criminal charges and, for that reason, it incorporated appropriate guarantees for the judgment debtor into the challenged provision (entering a plea prior to pronouncement of a sentence). Namely, the mentioned provision (Article 17 (4) of the Law on Enforcement Procedure) provides for an obligation of a court, prior to imposing a sentence, to make it possible for a judgment debtor to enter a plea and, if a need be, for a hearing to be held for the purpose of presentation of evidence. Thus, the challenged provision grants the judgment debtor appropriate guarantees of the right to a fair trial prior to being imposed a fine. On the other hand, the Constitutional Court considers that the purpose of the mentioned provision is to consider possible objective obstacles faced by the judgment debtor if any. So, if there are no obstacles the purpose of this provision is to make it possible for an appropriate fine to be imposed on him as a form of enforcement.

23. Bearing in mind the aforesaid, the Constitutional Court is faced with a question whether the principle of urgency and cost-effectiveness in the enforcement procedure should prevail over the fundamental rights the parties to the proceedings enjoy during the proceeding before the court according to the standards of the European Convention (the right to a fair trial, equality of arms, principle of reasonable time-limit, *etc.*). Namely, the Constitutional Court notes that by the provision of Article 17(4) of the Enforcement Procedure, prior to imposing the fine, the court shall give the judgement debtor an

opportunity to make a statement and, if needed, the court shall hold a hearing for presentation and evaluation of evidence. Imposing a fine in enforcement procedure is aimed at making enforcement procedure more efficient in a manner in which the possibility for imposing a fine is extended, including other measures for achieving the goal of enforcement. A fine is imposed against judgment debtor after his failure to act upon the ruling on enforcement. Fine may be imposed if the judgment debtor fails to act upon the repeated order of the court. However, the provision under paragraph 4 stipulates that the obligation of the court, prior to imposing a fine, is to give the judgement debtor an opportunity to make a statement and, if needed, the court shall hold a hearing for presentation and evaluation of evidence. So, the challenged provision indisputably provides for the punishment of the judgment debtor because of his failure to fulfil his obligations such as reinstatement of an employee as determined by the legally binding judgment. Therefore, a fine is a form of coercive measure in order to force a judgment debtor to fulfil his obligation. Therefore, according to the Constitutional Court, the purpose of this provision is to make enforcement procedure more efficient and not, as alleged by the applicant, to procrastinate it leading to a violation of the principle of „taking a decision within reasonable time".

24. The Constitutional Court observes that entering a plea by the judgment debtor and scheduling a hearing are additional actions which the enforcement court has to undertake. As it is about a form of punishing a judgment debtor, it would be necessary, prior to imposing a fine, to make it possible for a judgment debtor to enter a plea and thus the adversarial principle would be complied with as one of the segments of the right to a fair trial. Therefore, although the principle of urgency is particularly relevant in the enforcement procedure, this principle could not be interpreted so as to go beyond the essence of the right to a fair trial within the meaning of the basic procedural guarantees of the parties to the proceeding before the courts.

25. Furthermore, the Constitutional Court considers that the challenged law provision, in itself, must not have effect in any way, in practice, on the efficiency and urgency of the conduct of the enforcement procedure. To the contrary, the courts should determine how and in which way the mentioned provision is to be applied in order for it not to disturb the urgency of the enforcement procedure and the courts should also make it possible, on the other hand, for the adversarial proceeding to be conducted. According to the Constitutional Court, the mentioned principles must not mutually exclude each other but, to the contrary, they should supplement each other. A violation of any of the mentioned principles of the enforcement procedure (urgency, efficiency, access to court, adversarial principle, equality of arms, and principle of a reasonable time-limit…) would amount to a violation of the essence of the right to a fair trial.

26. Therefore, the Constitutional Court finds that the challenged provision, by itself, does not amount to 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. It is being so as the challenged provision is aimed at making it possible for the efficient proceeding to be conducted and that means that its goal is to force the judgment debtor to fulfil his obligation. However, the standards of the European Convention, within the scope of the right to a fair trial, do not allow for imposing a penalty, in this case a fine, without previously giving a chance to the party to the proceeding to enter a plea. In its decision, the Constitutional Court will not give its opinion how ordinary courts should implement the mentioned provision. As it has been already noted, that is the task of ordinary courts which, in the course of the conduct of enforcement procedure, should keep in mind the nature of the mentioned proceeding and fundamental principles and demands of the European Convention considering things from the angel of the right to a fair trial.

27. In view of the aforesaid, the Constitutional Court holds that the challenged provision is compatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

VII. Conclusion

28. The Constitutional Court concludes that Article 17(4) of the Law on Enforcement Procedure (*Official Gazette of the Federation of BiH,* 32/03, 52/03, 33/06, 39/09 and 35/12) is in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, as the mentioned provision is not aimed at procrastination of the enforcement procedure. To the contrary, it is aimed at forcing the judgment debtor to fulfil his obligation as soon as possible.

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

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

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Case No. U 20/16

DECISION ON ADMISSIBILITY AND MERITS

Request of the Municipal Court of Bihać (Judge Dino Muslić) for review of constitutionality of Article 1 of the Law on Amendments to the Law on the Enforcement Procedures of the Federation of BiH (*Official Gazette of the Federation of BiH*, 46/16)

Decision of 31 March 2017

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59 (1) and (2) and Article 61 (2), (3) and (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 94/14), in plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Paravlić,

Mr. Giovanni Grasso,

Having deliberated on the request of the **Municipal Court of Bihać (judge of the Municipal Court of Bihać, Mr. Dino Muslić**), in case no. **U 20/16**, at its session held on 30 March 2017, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request of the Municipal Court of Bihać (Judge of the Municipal Court of Bihać, Dino Muslić) is granted.

It is established that the provision of Article 1 of the Law on Amendments to the Law on the Enforcement Procedures of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, 46/16) in not compatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Right and Fundamental Freedoms.

Pursuant to Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and

Herzegovina is ordered to harmonize the provision of Article 1 of the Law on Amendments to the Law on the Enforcement Procedures of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, 46/16) 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 Right and Fundamental Freedoms within a time limit not exceeding six months following the publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*.

Pursuant to Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina within a time limit referred to in the previous paragraph of the measures undertaken with the aim of 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 2 December 2016, the Municipal Court of Bihać (Judge Dino Muslić, hereinafter referred to as „the applicant") filed with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") a request for review of constitutionality of Article 1 of the Law on Amendments to the Law on the Enforcement Procedures of the Federation of BiH (*Official Gazette of the Federation of BiH*, 46/16, hereinafter referred to as „the Law on Amendments to the Law on Enforcement Procedures"). The applicant submitted a supplement to the request on 26 December 2016.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, the House of Representatives and the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina were requested on 17 January 2017 to submit their respective replies to the request within a time limit of 30 days.

III. Request

b) Allegations from the request

3. The applicant alleges that Article 1 of the Law on Amendments to the Law on Enforcement Procedures (*Official Gazette of the Federation of BiH*, 46/16) prescribes that Article 89(5) of the Law on Enforcement Procedures shall be amended to read as follows: „If the real property is not sold at the second foreclosure hearing, the court shall schedule a third foreclosure hearing within a period of at least 15 days and up to 30 days. The real property may be sold at that foreclosure hearing without lower price limits compared to the appraised price upon prior consent given by the Tax Administration of the Federation of Bosnia and Herzegovina („the Tax Administration"). If the Tax Administration denies the consent to the proposed price being lower than the determined price, it shall offer the court a realistic appraisal of the value at which the real property may be sold at that foreclosure hearing within a time limit of 15 days from the day of receipt of the request for giving a consent to the selling price."

4. The applicant further alleges that Article 3 of the Law on the Courts in the Federation of Bosnia and Herzegovina (*Official Gazette*, 38/05, 22/06, 63/10, 72/10, 7/13 and 52/14) prescribes that the courts shall be autonomous and independent of legislative and executive authority and that no one shall influence the independence and impartiality of a judge during the decision-making on cases he/she is assigned to work on. He also cited Article 5 of the mentioned Law, which stipulates that „the courts shall protect the rights and freedoms guaranteed by the Constitutions of Bosnia and Herzegovina, of the Federation of BiH and of the Cantons," and outlines that courts shall conduct themselves in their work in an impartial, timely and efficient fashion. As further alleged by the applicant, Article 1 of the Law on Amendments to the Law on Enforcement Procedures precisely raises a doubt as to whether a body of the Ministry of Finance of the Government of the Federation of BiH, namely the Tax Administration, may set the price or the manner in which courts conduct themselves during the decision-making on cases. Finally, he alleges that it is not clear what the legislator was guided by while amending to the Law on Enforcement Procedures, particularly in the case where the Tax Administration fails to propose a realistic price at which the real property may be sold so that the question arises as to whether the Tax Administration may limit the court during the procedure and decision-making. This is manner, as alleged by the applicant, in which „one directly interferes with impartiality of the court and right of access to court as they are restricted by the opinion of the administrative authorities".

b) Facts of the case in respect of which the request was filed

5. The applicant alleges that the enforcement proceedings between the enforcement creditor, namely Raiffeissen bank d.d. BiH, Main Branch Office Bihać, and the enforcement debtor, namely E.K. and Others are pending for the purpose of collection of pecuniary claims (the value of the subject of the dispute is BAM 21 352.67). He further alleges that the applicant issued the ruling on enforcement no. 17 0 P 038720 14 I on 8 October 2014, wherein the enforcement of collection of pecuniary claims consisting of the main debt, interests and costs of the enforcement procedure was allowed. According to the ruling, the settlement of claims of the enforcement creditor was ordered by way of seizure, appraisal and sale of movable property of the enforcement debtor. According to the applicant's conclusion of 9 December 2015, the enforcement creditor was informed that it was impossible to enforce the ruling on enforcement by way of seizure of movable property of the enforcement debtor due to the lack of movably property of the enforcement debtor.

6. In a submission dated 11 January 2016, the enforcement creditor proposed that the enforcement be determined by way of registration, appraisal and sale of immovable property of enforcement debtor A.K. and that the debt be settled against the amount obtained by sale, since the enforcement could not be carried out against the previously proposed item.

7. In ruling no. 17 0 P 038720 16 I 2 of 20 January 2016, the applicant determined the enforcement by way of registration, appraisal and sale of immovable property of enforcement debtor A.K., which was specified in para I of the enacting clause of the ruling. As to the movable property of enforcement debtor A.K., the enforcement was suspended, whereas the remaining part of the ruling on enforcement, no. 17 0 P 038720 14 I of 8 October 2014, remained unmodified.

8. In Conclusion on Sale no. 17 0 P 038720 16 I 2 of 5 September 2016, the applicant scheduled the first foreclosure hearing for sale of real property by way of an oral and public competitive auction scheduled for 11 October 2016. According to para II of the mentioned Conclusion, the determined value of the real property was BAM 20 240 as apprised by the court expert in architecture, Mr. Adnan Pozderac. According to paragraph VII of the mentioned Conclusion, the selling price of the real property could not be less than ½ of the appraised value, i.e. BAM 10 120 within the meaning of Article 89(2) of the Law on Enforcement Procedure. According to the applicant's Conclusion no. 17 0 P 038720 16 I 2 of 11 October 2016, the first foreclosure hearing for sale of the real property being the subject of enforcement was declared unsuccessful.

9. In Conclusion no. 17 0 P 038720 16 I 2 of 11 October 2016, the applicant scheduled the second foreclosure hearing for sale of real property by way of an oral and public competitive auction for 28 November 2016. According to para VII of the mentioned conclusion, the selling price of the real property could not be less than 1/3 of the appraised value, i.e. BAM 6 746.66.

10. According to the applicant's Conclusion no. 17 0 P 038720 16 I 2 of 28 November 2016, the second foreclosure hearing for sale of the real property being the subject of enforcement was declared unsuccessful.

11. In a submission dated 29 November 2016, the applicant requested the Tax Administration – Cantonal Office of Bihać - to give a response as to the price at which the real property could be sold at the third foreclosure hearing within the meaning of the provision of Article 89(5) of the Law on Enforcement Procedures.

12. In a submission dated 13 December 2016, the Tax Administration informed the applicant that at the third foreclosure hearing the real property could be sold at the price which was not less than 1/3 of the market value of that real property apprised by the court expert.

IV. Relevant Law

13. The **Constitution of Bosnia and Herzegovina,** so far as relevant, 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 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.

14. The **Law on Amendments to the Law on Enforcement Procedures** (*Official Gazette of the Federation of BiH*, 46/16), so far as relevant, reads:

Article 1

In the Law on Enforcement Procedures (Official Gazette of the Federation of BiH, 32/03, 52/03, 33/06, 39/06 and 35/12), paragraph 5 of Article 89 shall be amended to read as follows:

(5) If the real property is not sold at the second foreclosure hearing, the court shall schedule a third foreclosure hearing within a period of at least 15 days and up to 30 days. The real property may be sold at that foreclosure hearing without lower price limits compared to the appraised price upon prior consent given by the Tax Administration of the Federation of Bosnia and Herzegovina. If the Tax Administration of the Federation of Bosnia and Herzegovina denies the consent to the proposed price being lower than the determined price, it shall offer the court the realistic appraisal of the value at which the real property may be sold at that foreclosure hearing within a time limit of 15 days from the day of receipt of the request for giving a consent to the selling price.

15. The **Law on Enforcement Procedures** (*Official Gazette of the Federation of BiH*, 32/03, 52/03, 33/06, 39/06, 39/09 and 35/12), so far as relevant reads:

Article 80
Manner of Appraisal

(1) The Court shall determine the manner of appraising the value of real property by issuing a conclusion immediately after it issues a decision on enforcement. If necessary, the court shall hold a hearing with the parties before issuing the conclusion.

(2) The appraisal of real property shall commence after the decision on enforcement becomes enforceable, and may commence before that time on the motion of the judgment creditor if s/he provides security for the appraisal in advance and agrees to bear the costs of the appraisal and in the case that the enforcement is suspended.

(3) Real property shall be appraised based on an expert's evaluation and other factors to determine its market value on the date of the appraisal. In appraising the real property, any encumbrances that will remain on the property after the sale shall be taken into account and may result in a lesser value being assigned to the property.

(4) In lieu of the appraisal stipulated in paragraph 3 of this Article, the court may request a competent body of the tax administration to provide their appraisal of the property.

(5) In the procedure for the enforcement against co-ownership portion referred to in Article 69 of this Law, the appraisal will contain determined values of the real property as a whole and co-ownership portion thereof, and the value of the co-ownership portion which would be obtained in the case the entire real property is sold in accordance with Article 69(4) of this Law.

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(6) The provisions referred to in paragraphs 1 through 4 of this Article shall not apply if the persons that have a claim right reach an agreement on the value of the real property.

Article 89
Sale Price

(1) The real property cannot be sold at auction at the price which does not cover even partially the amount of pecuniary claim of the judgment creditor without consent given by the persons whose claims are to be settled in order of priority before the creditor seeking the enforcement.

(2) At the first foreclosure hearing, real property may not be sold for less than one-half of the appraised value. Initial offers amounting to less than one-half of the appraised value shall not be considered at the first foreclosure hearing.

(3) If the real property is not sold at the first foreclosure hearing, the court shall schedule a second foreclosure hearing within a time limit of 30 days. The court shall schedule a foreclosure hearing within the same time limit in the case that three persons who proposed the highest offers at the first foreclosure hearing did not pay the selling price in accordance with the provisions of Article 92(3) of this Law.

(4) At the second foreclosure hearing, the real property may not be sold for less than one third of the value determined in the conclusion on sale. The initial offer at the second foreclosure may not be less than one third of the determined value.

(5) If the real property is not sold at the second foreclosure hearing, the court shall schedule a third foreclosure hearing within a time limit of at least 15 days and up to 30 days, at which the real property may be sold without lower price limits compared to the appraised value.

(...)

16. The **Law on the Courts in the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH*, 38/05, 22/06, 63/10, 72/10 – Correction 7/13, 52/14), so far as relevant reads:

Article 3
Independence

The courts shall be autonomous and independent of legislative and executive authority.

No one shall influence the independence and impartiality of a judge during the decision-making on cases he/she is assigned to work on.

Article 5
Protection of Rights

The courts shall protect the rights and freedoms guaranteed by the Constitutions of Bosnia and Herzegovina, of the Federation of BiH and of the Cantons, and secure constitutionality and legality.

The courts shall conduct themselves in their work in an impartial, timely and efficient fashion.

Article 15
Cooperation and legal assistance

The courts shall cooperate with each other and with the governing authorities and foreign courts.

The court shall provide legal assistance to other courts in Bosnia and Herzegovina in accordance with the law in the cases falling within the scope of their jurisdiction.

The governing authorities and legal persons exercising public powers shall, upon request of the courts, submit case-files, documents and other information to the courts, which are necessary for the conduct of the court proceedings.

The courts shall provide international legal assistance in accordance with international documents or on the basis of the principle of reciprocity.

V. Admissibility

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

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

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

18. The request for review of constitutionality was filed by the Municipal Court of Bihać (judge Dino Muslić), which means that the request was filed by an authorized person under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (see Constitutional Court, Decision on Admissibility and Merits, *No. U 5/10* of 26 November 2010, paragraphs 7-14,

published in the *Official Gazette of Bosnia and Herzegovina*, 37/11). Taking into account the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the Constitutional Court holds that this request is admissible as it was filed by an authorized person, and there are no other formal reasons under Article 19(1) which would render it inadmissible.

VI. Merits

19. The applicant seeks that the Constitutional Court decide whether Article 1 of the Law on Amendments to the Law on Enforcement Procedures is in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, which, i*nter alia*, guarantee the right of access to court and right to an independent and impartial tribunal, and those make an integral part of the right to a fair trial.

20. 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.

21. The applicant is of the opinion that the challenged Article 1 of the Law on Amendments to the Law on Enforcement Procedures is in violation of the principle of independence given that the real property may be sold at the third foreclosure hearing without the lowest price limits compared to the determined value, as alleged by the applicant, „solely with previously obtained consent to be given by the Tax Administration as a body of the Ministry of Finance of the Government of the Federation of BiH".

22. The European Court of Human Rights („the European Court") and Constitutional Court, in their respective jurisprudences, have consistently indicated that the right to a fair trial under Article 6(1) of the European Convention guarantees, *inter alia*, the possibility for everyone to present his/her case relating to civil rights and obligations before a court or „tribunal". The existence of independent and impartial tribunals is at the heart of a judicial system that guarantees human rights in full conformity with international human rights law. The constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. 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.

Individual independence implies the ability of judges to decide the cases in absence of any political or other external pressure. In its judgement *Campbell and Fell v. the United Kingdom* (see ECtHR, judgement of 28 June 1984, paragraphs 78-80), the European Court stated certain criteria and pointed out the following: „In determining whether a body can be considered to be „independent" - notably of the executive and of the parties to the case, the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence". Also, the European Court established that „impossibility of executive authority to remove judges must be viewed as a consequence of its independence". Moreover, the judicial body is deprived of the key characteristic of an independent court due to mere possibility for the executive authorities to change judicial decision or terminate its enforcement (see, ECtHR, *Van de Hurk v. the Netherlands*, paragraphs 45-55, judgment of 19 April 1994, Application no. 16034790). Individual independence implies the ability of individual judges to decide cases in absence of any political or other external pressure (see, ECtHR, *Incal v. Turkey* and *Findlay v. the United Kingdom*). For instance, the independence of a judge is usually interfered with when an executive authority interferes with the work on certain case in other to exert influence on the outcome of the proceeding (see, ECtHR, *Sovtransavto Holding v. Ukraine*, paragraph 80, judgment of 25 July 2002, Application No. 48553/99).

23. Furthermore, the Constitutional Court notes that principle of independence of judiciary follows from the basic principle of the rule of law or principle of separation of powers. Separation of powers to executive, legislative and judicial power implies, in itself, clearly divided and defined functions and role of each of them, including the prohibition of mutual interference. Therefore, it follows that the court, *inter alia*, must function independently of the executive power and it must base its decision on its free opinion, facts and proper legal basis.

24. Turning to the instant case, Article 89(5) of the Law on Enforcement Procedures was amended by the challenged provision of Article 1 of the Law on Amendments to the Law on Enforcement Procedures in a way that it is prescribes that if a real property is not sold at a second foreclosure hearing, the court will schedule a third foreclosure hearing within 15 days at the earliest and not later than 30 days. At that foreclosure hearing the real property may be sold without the lowest price limits in comparison to the determined value, exclusively with the consent obtained beforehand from the Tax Administration. If the Tax Administration does not grant its consent to the proposed lower price as compared to the established value, it shall be obliged to propose to the court the realistic value at which the real property may be sold at that foreclosure hearing.

25. Thus, the challenged provision provides for the following conditions under which a real property may be sold at the third foreclosure hearing: the consent given by the Tax Administration for the proposed price lower than the determined value or proposal for the realistic price at which a real property may be sold. First of all, the Constitutional Court notes that the Tax Administration is a federal administration which is an integral part of the Federation Ministry of Finance. The Tax Administration, in its capacity as an executive body, is in charge of applying the Law on Tax Administration of the Federation of BiH and other tax-related laws and by-laws. In addition to the accounting, control and collection of public incomes, the Tax Administration performs other administrative and expert tasks such as registration of tax payers, receipt, and control and processing of tax returns, including giving opinions about tax-related issues, etc. The Tax Administration is in charge of conducting activities in the field of all forms of federal, cantonal, city and municipal taxes and contributions, other taxes, special fees, subscription fees, etc.

26. Turning to the instant case, the Constitutional Court indicates that the enforcement against the real properties according to the Law on Enforcement Procedures is conducted by way of registration of enforcement in the land register, by determination of the value of real property, by sale of the real property and by settlement of the claim of the enforcement creditor (Article 68 of the Law on Enforcement Procedures). Article 80 of the Law on Enforcement Procedures regulates the manner in which the value of real property subject to enforcement is determined. So, paragraph (3) provides that „*the value of the real property shall be appraised based on an expert's evaluation and other factors determining its market value on the date of the appraisal* „, while paragraph (4) provides that *in lieu of the appraisal stipulated in paragraph 3 of this Article, the court may request a competent body of the tax administration to provide their appraisal of the property.* Thus, on the occasion of determination of the value of real property the court may request the relevant body of the Tax Administration to submit data on the value of the real property. Furthermore, the Constitutional Court indicates that upon giving the price, the court issues a ruling awarding the real property to the buyer (the ruling on award) and it is under obligation to deliver the legally binding ruling on award to the relevant tax administration within a time-limit of 15 days from the day when it becomes legally binding since after the ruling on award becomes legally binding the tax related obligation for a buyer occurs (payment of taxes related to the turnover of real properties).

27. The Constitutional Court notes that the real property turnover tax and rights in the area of the canton have been defined by the cantonal regulations. Thus, it is regulated that on the occasion of turnover of real properties (sale, exchange and other transfer of ownership over real properties), the payer of sales tax on turnover of real property shall file tax return with the tax administration because without proof on payment of tax (or

proof on tax exemption) on turnover of real property one cannot register the ownership over the real property and rights in cadastre, register or other public books. This kind of payment of tax is made through the relevant tax administration.

28. The Constitutional Court notes that before the challenged Article 1 of the Law on Amendments to the Law on Enforcement Procedures was passed the wording of Article 89(5) of the Law on Enforcement Procedures had read as follows: „If a real property is not sold at a second foreclosure hearing, the court will schedule a third foreclosure hearing within 15 days at the earliest and not later than 30 days. At that foreclosure hearing the real property may be sold without limitations as to the lowest price in comparison to the determined value". In order for the real property to be sold without limitations as to the lowest price in comparison to the determined value, the consent of the Tax Administration is required according to the amended Article 89(5) of the Law on Enforcement Procedures. If the Tax Administration of the Federation of Bosnia and Herzegovina does not grant its consent to the proposed lower price as compared to the determined value, it shall be obliged to propose to the court the realistic value at which the real property may be sold at the third foreclosure.

29. The legislator found the *ratio legis* for the mentioned amendment in „the consistent case-law relating to differential treatment in the course of the enforcement procedures conducted by the courts in the Federation of BiH and in the continuously frequent cases of misuse since the real properties in the area of the Federation of BiH, through the enforcement procedure at the court, used to be sold at prices which were very low, i.e. lower than the real or market prices, which means that the real properties used to be bartered away by which the budget of the Federation of BiH sustained damage (see the proposal of the Law on Amendments to the Law on Enforcement Procedures, May 2016, available at www. parlamentfbih.gov.ba).

30. Bearing in mind the aforementioned, the Constitutional Court considers that it is necessary to make reference to the judgment of the European Court in the case of *Ljaskaj v. Croatia* of 20 December 2016, wherein the violation of the applicant's (debtor's) right to property was established as in in the enforcement procedure his property was sold at the price which was less than 1/3 of its estimated value. The applicant contested the sale of the pledged property, and the previous Law on Enforcement Procedures of the Republic of Croatia did not provide for the lowest price limits at the third foreclosure hearing when it comes to the sale of real properties. In case *Ljaskaj v. Croatia,* the European Court noted:

> *(...) 64. However, the Court also notes that in a number of cases the Croatian Constitutional Court and the Supreme Court have expressed the view that applying*

the said provision mechanically and selling debtors' immovable property for a symbolic price (ranging from HRK 1 to HRK 15,650) not sufficient to settle the creditors' claims was contrary to the Constitution and the law (see paragraphs 33-40 above). What is more, in its decision no. Rev 701/14-2 of 4 November 2014 the Supreme Court even went so far as to conclude that the provision in question was „by its very nature contrary to public morals and as such socially unacceptable" and that, regardless of the fact that it had been in force, „it was an essentially immoral legal institution, which is why a sale based on such an immoral institution results in nullity" (see paragraph 40 above). Lastly, in the explanatory report on the bill which resulted in the enactment of legislation that abolished that provision, the Government of Croatia stated that it was „unjust and unreasonable", opened the door to „various abuses", and was contrary to the constitutionally-guaranteed right of ownership (see paragraph 41 above).

(...)

69. The foregoing considerations are sufficient to enable the Court to conclude that, because the legislation applicable at the material time lacked the requisite protection against arbitrary interferences by the public authorities (see paragraphs 65-66 above), the domestic courts' decision to sell the applicant's house for less than one-third of the value established by the court-appointed expert was not lawful in the given circumstances. There has, accordingly, been a violation of Article 1 of Protocol No. 1 to the Convention (...).

31. In the context of the mentioned case-law of the European Court, the Constitutional Court will invoke its own case-law (see, the Constitutional Court, *mutatis mutandis*, Decision on Admissibility and Merits No. *U 3/16* of 1 December 2016 and *AP 4380/13* of 22 December 2016, available at www.ccbih.ba). In case no. *U 3/16* of 1 December 2016, the Constitutional Court dealt with the case based on the responsibility under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and replied to the request of the judge of the Basic Court of Derventa, in which the constitutionality of the provisions of the Law on Enforcement Procedures of the Republika Srpska was referred to and, in the opinion of that judge, those provisions imposed the obligation on the court to conclude that the claimed amount of the enforcement creditor was settled and that was the amount he paid when he became the owner of the pledged property, which he bought during the third auction as the only buyer. The essence of the quoted Decision No. *U 3/16* is reflected in the position of the Constitutional Court according to which none of the provisions of the Law on Enforcement Procedures of the Republika Srpska prevent ordinary courts from finding, in each individual case, that the claim of the enforcement creditor is completely

settled if he, as the only buyer, has become the owner of the pledged real property with which his claim was secured, and the value of the estimated real property was higher than the amount of his claim in respect of the enforcement debtor, and that any interpretation, which would mean that the claim of the enforcement creditor is settled only to reflect the amount he paid at the auction, would led to violation of the enforcement debtor's right to property given that those amounts are usually symbolic and are not even approximately comparable to the estimated amounts of the pledged real property.

32. In Case no. *AP 4380/13* of 22 December 2016, the Constitutional Court concluded 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 was violated by the challenged rulings of the Municipal Court of Kiseljak and Cantonal Court of Novi Travnik due to arbitrary application of Article 98 of the Law on Enforcement Procedures because the mentioned courts (contrary to the real meaning and sense of the mentioned law provision) considered that the enforcement creditor was entitled to continue with the enforcement procedure against the appellant, including the guarantor, although the enforcement debtor became, in the course of the enforcement procedure, the owner of the real property pledged by the appellant for the purpose of securing the debt towards the enforcement creditor, while the estimated amount of the value of the real property was several times higher than the amount the enforcement creditor claimed from the appellant. The Constitutional Court noted the following in the quoted decision: „The enforcement creditor (the party seeking enforcement) cannot be allowed to become the owner of the real property for bagatelle and then claim that it has no effect on the appellant's debt towards the party seeking the enforcement. The enforcement creditor is even allowed to continue with enforcement procedure against the property of the appellant and his guarantors. Exactly at this point, in the opinion of the Constitutional Court, the role of ordinary courts becomes of crucial importance given that the courts conduct the enforcement proceeding and issue decisions on settlement in a way that they must ask themselves and give valid reply to the question what the purpose of the procedure they conduct at the proposal of the party seeking the enforcement is. If, in the course of the enforcement procedure, it was shown that the estimated amount of value of the pledged real property was BAM 195 109 and the claim of the party seeking enforcement was BAM 72 198.41, what the purpose of selling the pledged real property at the price of BAM 1 000 was in general terms, and should the court allow such sale regardless of the content of the provision under the Law on Enforcement Procedures, i.e. bearing in mind the content of the provision under the Law on Enforcement Procedures that was referred to. In the mentioned decision, the Constitutional Court also pointed out that „for the purpose of avoiding possible disputes in

the future in connection with this matter in each and next (i) specific case, it is necessary that the relevant ordinary courts, including the Tax Administration of the Federation of BiH, show maximum sensibility when applying the amended provisions if Article 89(5) of the Law on Enforcement Procedures, and that the sales price of the pledged real property at the third foreclosure hearing, reflects indeed '(…) the real value for which the real property can be sold (…)', as (i) prescribed by the mentioned provision of the Law on Enforcement Procedures of the Federation of BiH".

33. The Constitutional Court recalls that „the court applies the provisions of the Civil Procedure Code in the course of enforcement procedure in a proper manner, if not otherwise regulated" (Article 21 of the Law on Enforcement Procedures). Thus, Article 147 of the Law on Civil Procedure (*Official Gazette of the Federation of BiH,* 53/03, 73/05, 19/06, 98/15) provides that the court may, at a party's proposal, decide to hear experts, when professional knowledge, which the court does not have, is necessary for the establishment or clarification of certain facts. Also, the court may *entrust more complex expert evaluation to professional institutions* (…) (Article 149(4) of the Civil Procedure Code) and, within the menaing of Article 15 of the Law on Courts in the Federaiton of BiH, the governing authorities and legal persons exercising public powers shall, upon request of the courts, submit case-files, documents and other information necessary for the conduct of the court proceedings. Thus, the role of an expert or expert institution is to establish the circumstances with the use knowledge and then, based on the established circumstances, the court alone must conclude whether decisive facts exist or do not exist, and he/she has no influence on the application of the legal norm, neither can he/she base his/her opinion on the interpretation of legal norms.

34. Turning to the instant case, the challenged provision provides that the Tax Administration shall, upon summons of the court, submit the consent for the lowest price with regards to the value of the real property, which is subject to the sale in the course of the enforcement procedure or to propose to the court the realistic price at which the real property may be sold at the third foreclosure hearing within the time-limit of 15 days from the day of receipt of the request. The Tax Administration, as a professional institution, shall give its expert opinion about the realistic price commensurate to the value at which the real property may be sold at the third foreclosure hearing in the same way in which the court, when determining the value of the real property, may request, within the meaning of Article 80(4) of the Law on Enforcement Procedures, submission of data from the relevant tax administration, which is obligated, within the meaning of Article 15 of the Law on Courts in the Federation of BiH, to submit to the court the data necessary for the conduct of enforcement procedure.

35. The legislator found a *ratio legis* for the mentioned amendment „in the consistent case-law relating to differential treatment in the course of the enforcement procedures conducted by the courts in the Federation of BiH and in continuously frequent cases of misuse since the real properties in the area of the Federation of BiH used to be sold, through the enforcement procedure at the court, at the prices which were very low, i.e. lower than real and market prices". However, the Constitutional Court is of the opinion that in this way the Tax Administration, as a body of executive power (the Ministry of Finance), has a direct influence on the decision of the court as the real property may be sold without limits as to the lowest price in comparison to the determined value, exclusively with the consent obtained beforehand from the Tax Administration. Thus, the Tax Administration, as a professional body, does not give its opinion about the price at which the real property may be sold at the third foreclosure hearing, but it gives its consent for the proposed price, and if it denies the consent for the proposed price which is lower than the price determined for its value, it is obligated to suggest the realistic price at which the real property may be sold. It follows from the challenged provision that the decision on realistic price at which the real property may be sold at the third foreclosure hearing is not made by the court but by the executive body - the Tax Administration. The Constitutional Court reiterates that judicial independence implies that an individual judge is free from receiving instructions when performing his/her judicial duty. This issue is raised in cases where the executive and legislative bodies directly exert their influence on the outcome of the proceeding. For instance, the European Court concluded that Article 6(1) was violated because the Minister of Foreign Affairs was given an exclusive authorization to interpret international treaties (see, ECtHR, *Beaumatrin v. France,* paragraph 38, judgment of 24 November 1994, Application No. 15287/89). Also, the judges must have the power to give a binding decision which may not be altered by a non-judicial authority (see, ECtHR, *Van de Hurk v. the Netherlands*, paragraph 45, judgment of 19 April 1994, Application No. 16034/09). In the aforementioned judgment, the European Court concluded that the legally prescribed Government's authorization not to enforce judicial decision constituted a violation of Article 6, although the Government has never used that authorisation.

36. Therefore, the court must function independently of the executive and legislative power, and it must base its decision on its own free opinion about the facts and so on the legal basis. In the case at hand, the challenged provision of the Law on Amendments to the Law on Enforcement Procedures prevents the court from passing a decision without the consent given by the Tax Administration, i.e. to determine the realistic appraisal of the value at which the real property, which is the subject of sale in the enforcement procedure, may be sold bearing in mind and considering the principle of good faith and honesty and principle of prohibition of misuse of rights. The Constitutional Court reminds

that, within the meaning of Article 80(3) of the Law on Enforcement Procedures, the real property shall be appraised based on an expert's evaluation and other factors to determine its market value at the date of the appraisal. Therefore, it is unclear why the court, when determining the realistic price commensurate to the value at which the real property may be sold at the third foreclosure hearing, cannot request an opinion from the expert and then, based on his opinion and other facts, determine the sales price of the real property, without interference of the executive body - the Tax Administration. Thus, in this specific case it is about the influence on the court by non-judicial authority and that is definitely contrary to the principle of „independence of the court", which implies that the court must function independently of the executive or legislative authority.

37. Given the aforesaid and bearing in mind the principle of independence of the court and the fact that by the challenged provision it is stipulated that the real property may be sold at the third hearing without limits as to the lowest price in comparison to the determined value, exclusively with the consent obtained beforehand from the Tax Administration, i.e. if the Tax Administration denies the consent to the proposed price being lower than the determined price, it shall offer the court the realistic appraisal of the value at which the real property may be sold, the Constitutional Court concludes that the provision of Article 1 of the Law on Amendments to the Law on Enforcement Procedures is in contravention of the right to *an independent tribunal* as 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.

38. As regards the applicant's allegations that the challenged provision „directly interferes with independence of the court and the right of access to the court, the Constitutional Court considers that the content of the challenged provision can in no way have influence on the court to be partial in relation to any of the parties to the enforcement procedure, neither does it bring into question the finalization of the enforcement procedure. Therefore, the Constitutional Court concludes that the applicant's arguments do not raise the issue relating to the principle of *impartial tribunal* and the 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.

VII. Conclusion

39. The Constitutional Court concludes that Article 1 of the Law on Amendments to the Law on Enforcement Procedures 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 as it stipulates that the real property may be sold at the third hearing foreclosure

without limits as to the lowest price in comparison to the determined value, exclusively with the consent obtained beforehand from the executive body (Tax Administration) or, if the Tax Administration denies its consent, it shall offer the court the realistic appraisal of the value at which the real property may be sold at that foreclosure hearing and, in this way, the principle of *an independent tribunal* 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 is violated.

40. Pursuant to Article 59(1) and (2) and Article 61 (1) (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court has decided as set out in the enacting clause of this decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 2/17

DECISION ON ADMISSIBILITY AND MERITS

Request of County Court in Banja Luka (Judge Milan Blagojević) for review of the constitutionality of Article 93(4) of the Law on Enforcement Procedure of Republika Srpska (*Official Gazette of the Republika Srpska*, 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13 and 98/14)

Decision of 1 June 2017

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and Article 61(2), (3) and (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President,

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić.

Mr. Giovanni Grasso,

Having deliberated on the request filed by the **County Court in Banja Luka (Judge Milan Blagojević)**, in case no. **U 2/17**, at its session held on 1 June 2017, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by the County Court in Banja Luka (Judge Milan Blagojević) is hereby granted.

It is hereby established that Article 93(4) of the Law on Enforcement Procedure of Republika Srpska (*Official Gazette of the Republika Srpska*, 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13 and 98/14) is not compatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of the Republika Srpska is

ordered to harmonize Article 93(4) of the Law on Enforcement Procedure of Republika Srpska (*Official Gazette of the Republika Srpska*, 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13 and 98/14) 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 a time limit not exceeding six months from the date of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*.

Pursuant to Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of Republika Srpska is ordered to inform the Constitutional Court of Bosnia and Herzegovina about the measures taken in order 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 13 March 2017, the County Court in Banja Luka (Judge Milan Blagojević; „the applicant") lodged a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of Article 93(4) of the Law on Enforcement Procedure of Republika Srpska (*Official Gazette of the Republika Srpska*, 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13 and 98/14).

II. Proceedings before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 16 March 2016 the National Assembly of the Republika Srpska („the RS National Assembly") was requested to submit a reply to the request.

3. On 11 April 2017, the RS National Assembly submitted the reply to the request.

III. Request

a) The facts of the case in respect of which the request was filed

4. The applicant alleged that the enforcement proceedings were pending before the applicant as a second-instance court which was called on to decide an appeal filed against the ruling of the Basic Court in Gradiška („the Basic Court"), no. 72 0 I 019851 15 I 2 of 31 October 2016, whereby an appeal filed by enforcement debtor P.D. against the ruling on award of the Basic Court, no. 72 0 I 019851 11 I of 24 August 2016, had been rejected as untimely. In particular, according to the mentioned ruling on award, dated 24 August 2016, the real property of enforcement debtor P.D., as precisely described in the enacting clause of that ruling, had been awarded and handed over to the purchaser – the creditor, namely Bobar banka A.D. Bijeljina, which was undergoing the process of liquidation. According to the legal remedy clause, an appeal against that ruling was allowed within a time limit of eight days, where the time-limit for filing the appeal commenced running upon the expiry of the third day from the date of posting the ruling on award on the notice board of the court. The Basic Court, in a ruling dated 31 October 2016, rejected as untimely the appeal of enforcement debtor P.D. against the ruling on award.

5. The applicant alleged that it followed from the reasons for the ruling of 31 October 2016 that the mentioned ruling on award of real property had been delivered to all participants in the procedure by way of posting it on the notice board of the first instance court on 29 August 2016. The first-instance court therefore found that the time-limit for lodging the appeal had commenced running on 2 September 2016 and that it had expired after 9 September 2016. The reason for this is the fact that the mentioned provision of Article 93(4) of the Law on Enforcement Procedure of Republika Srpska stipulates that the ruling on award of real property shall be considered as delivered to all persons upon expiry of the third day from the date when it was posted on the notice board of the court, and the time-limit for lodging an appeal against that ruling commenced running since then, which is also stipulated by the same provision. In the present case, enforcement debtor P.D. lodged an appeal against the ruling on award on 25 October 2016, which was the reason why the first-instance court rejected it as untimely in a ruling issued on 31 October 2016. The enforcement debtor lodged an appeal against that ruling on rejection, which is to be decided by the applicant in the case registered under no. 72 0 I 019851 16 Gž 2.

b) Allegations from the request

6. The applicant is of the opinion that the provision of Article 93(4) of the Law on Enforcement Procedure of the Republika Srpska („the contested provision") is not

compatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 14(1) of the International Covenant on Civil and Political Rights („the ICCPR"). In particular, the applicant alleges that it is indisputable and, moreover, it is evident that the issue at hand is in direct connection with the right to a fair trial before the court and that right is guaranteed by the previously stated provisions of the Constitution of Bosnia and Herzegovina, European Convention and ICCPR. He further alleges that there is no fair trial if there is no access to court and that access must be of substantive significance and not of formal significance. He also notes that certain limitations on access to court exist in jurisprudence, for example, for the reason of statute of limitations or limitation on access to court imposed on juveniles and mentally ill persons. However, such limitations must not endanger or, let alone, violate the very essence of the right to a fair trial. The applicant concludes that the contested provision is in violation of the very essence of the right to a fair trial, in absence of which there is no fair trial in any court proceedings, including the enforcement proceedings. In his opinion, there is no fair trial where the legislator, like in the instant case, prescribes that the court decision (on award), whereby the former owner of the real property has lost his ownership right by way of that real property being awarded to another person, is not delivered to any of them in person but is posted on the notice board of the court. In such a situation, in the applicant's opinion, the law imposes not only disproportionate but also unjust and illegitimate request on those persons who have to watch the notice board all the time in order to be informed about such a court decision. If they do not do so they will lose, as alleged by the applicant, according to the valid law „arrangement", the right to appeal. Thus, in the opinion of the applicant, they will be deprived of the very essence of the right to trial in the unlawful and blatant manner and, consequently, of the right to a fair trial.

7. The applicant holds that the contested provision is incompatible with those hierarchically higher legal provisions, and it is also irrational given the previously presented arguments. Illegality and irrationality of the contested provision, as alleged by the applicant, cannot be made up by the fact that the conclusion on the sale of the real property has been previously delivered to the participants in these proceedings. Namely, the ruling on award of the real property is a court decision against which, unlike the conclusion (Article 12(6) of the Law on Enforcement Procedure of the Republika Srpska), an appeal is allowed in accordance with the law, and if so, it means that the prior delivery of that decision (the ruling on award of the real estate) to the parties to the proceedings is only inherent in the right to a fair trial, instead of establishing an unconstitutional fiction implying that it is enough just to post that decision on the notice board of the court to

consider, upon expiry of three days from that moment, that it has been delivered to all participants in the proceedings, including those whose property (civil) rights are decided upon in the ruling *(unconstitutional fiction)*.

8. In conclusion, the applicant notes that the only inherent in the right to a fair trial is to stipulate by the law that such court decisions shall be delivered to the parties to the proceedings, whose rights and legal interests are decided upon in such decisions and not to stipulate that the court decision shall be considered as delivered by posting it on the notice board of the court and that the time-limit for filing an appeal against such a decision commences running upon the expiry of certain number of days (three days in this case) from the day of posting it on the notice board. Any other interpretation, in the applicant's opinion, would amount to violation of the human and civil right to a fair trial, which cannot be justified by any public interest.

c) Reply to the request

9. In its reply to the request the RS National Assembly notes that the applicant's allegations that the contested provision is incompatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention are unfounded. It further alleges that the legislator has the full right and obligation to define the legal framework for the conduct of legal subjects in a specific case related to the enforcement procedure and that it did so by enacting the RS Law on Enforcement Procedure. The legislator defines such legal frameworks by being guided by the public interest and reasons related to suitability. The enforcement procedure, as further alleged, constitutes a comprehensive implementation of forcible collection of claims based on the credible enforcement documents. While observing the contested provision from the aspect of a particular procedure, the RS National Assembly holds that it is noticeable that the law arrangement in question meets the requirements of proportionality between the interests of individuals and public interest.

10. It further alleges that the rules related to the manner of delivery prescribed by the contested provision are also provided for in other regulations, notably the Law on Bankruptcy (*Official Gazette of RS*, 16/16), which regulates that in case of sale – converting real property into money – it is carried out in accordance with the rules of the RS Law on Enforcement Procedure. In this connection, as further alleged, Article 25(2) of the Law on Bankruptcy prescribes that delivery is considered completed by posting it on the notice board of the court, web site of the court and *Official Gazette of RS*, including the case in respect of which the law prescribes personal delivery. Paragraph 6 of the mentioned

Article stipulates that delivery is considered completed upon the expiry of five days from the date of publication. Furthermore, paragraph 7 of Article 156 of the Law on Bankruptcy, which regulates the procedure for converting real property into money, stipulates that if the assembly of creditors refuses to determine the terms and conditions of liquidation of the debtor's real property, the real property shall be liquidated in accordance with the rules related to the enforcement procedure if it is not contrary to the provisions of the mentioned law.

11. The RS National Assembly further alleges that the legislator took also into account the fact that the conclusion on sale of real property (Article 82 of the RS Law on Enforcement Procedure) shall be delivered to the parties, the persons who have priority right to have their claims settled or the persons who have the same priority right as the party seeking the enforcement, the persons who have the registered pre-emption right or legal pre-emption right and the relevant authority of the tax administration. Thus, the conclusion on sale is to be delivered to all interested persons so that Article 93(1) of the mentioned law stipulates that after the price has been deposited, the court issues a ruling to award the real property to the purchaser (the ruling on award). Such a ruling determines that the sold real property shall be delivered to the purchaser and orders the relevant property to register the ownership right under the purchaser's name. It outlines that the ruling on award is not an act wherein one's right to property is decided on the merits but rather an act to execute a decision taken by the relevant authority and to enable the sale in the enforcement procedure. An objection against the mentioned ruling is not allowed. However, an appeal against it is allowed. The ruling is considered as delivered to all participants by the expiry of the third day from the date of its publication on the notice board. The RS National Assembly considers that the contested provision has a practical significance as the completion of the enforcement procedure would be brought into question if it was impossible for the mentioned ruling to be delivered to all parties. It outlines that the RS Law on Enforcement Procedure offers favourable and appropriate solutions which are not incompatible with the Constitution of Bosnia and Herzegovina and European Convention. Taking into account the presented facts, the RS National Assembly proposed that the applicant's request for review of constitutionality of the contested provision be dismissed as it is not grounded on the Constitution of Bosnia and Herzegovina, European Convention and Article 14 of the ICCPR.

IV. Relevant Laws

12. The **Law on Enforcement Procedure** (*Official Gazette of the Republika Srpska*, 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13 and 98/14), as relevant, reads:

Article 1
Contents of the Law

(1) This Law shall govern the procedure pursuant to which the courts of Republika Srpska shall enforce claims based on enforcement and authentic documents (hereinafter „the enforcement procedure"), unless otherwise prescribed by a separate law.

(2) The provisions of this Law shall not be applied to the enforcement proceedings stipulated by separate law.

Article 5(1)
Immediacy and Sequence of Actions

In the enforcement procedure the Court shall act without delay.

Article 10(1)
Delivery

(1) The ruling upon motion for enforcement, ruling upon objection raised against the ruling on enforcement, ruling to impose a fine and conclusion referred to in Article 37 of this Law shall be delivered in accordance with the rules related to the delivery of the lawsuit referred to in the Civil Procedure Code.

Article 12(4)
Legal remedies

(4) An appeal against the ruling issued upon objection may be filed within a time limit of eight days from the date of delivery of the ruling. The second-instance court shall decide on the appeal.

Article 68
Enforcement Actions

The enforcement against immovable property shall be carried out through the registration of enforcement in land books, through the determination of the value of immovable property, through the sale of immovable property and through the settlement of claims of the party seeking the enforcement against the amount obtained through the sale.

Article 80(1)
The Manner of Appraisal

The Court shall determine the manner of appraising real property by issuing a conclusion immediately after it issues the decision on enforcement, and if necessary, the Court shall hold a hearing with the parties before issuing the conclusion.

Article 82(1), (3) and (6)
Conclusion on Sale

(1) After conducting a proceeding for determining the value of real property, the court shall issue a conclusion on sale of real property, wherein it determines the value of the property and the manner and conditions as well as the time and place of the sale if the sale is being carried out at a public auction.

(...)

(2) The conclusion on sale shall be posted on the Court's notice board and other appropriate ways as the court may decide.

(...)

(6) The conclusion on sale shall be delivered to the parties, to the persons that have the priority right to have their claims settled or the same priority right as the party seeking the enforcement, to the persons who have a registered or legal pre-emption right and to the relevant body of the tax administration.

Article 92 (1) and (8)
Depositing the Price

(1) The person with the highest offer at the hearing shall pay the total selling price reduced by the security deposit by depositing the price into the court within a time-limit which is determined by the court and which cannot exceed 30 days from the date of publication of the conclusion referred to in Article 90(6) of this court on the notice board.

(2) If the party seeking the enforcement is a purchaser and there are no other persons whose claims are to be settled against the selling price before him/her, he/she shall not be obliged to deposit the price into the court up to the amount of his/her claims.

Article 93
Handover of the Real Property to the Purchaser

(1) After the price is deposited into the court, the court shall issue a ruling to award the immovable property to the purchaser (the ruling on award).

(2) In its ruling referred to in paragraph 1 of this Article, the Court shall determine the handover of the real property to the purchaser and shall order the land registry court to register the change in the ownership right and to delete the rights of third persons whom the ruling concerns.

(3) An objection against the ruling is not allowed, but an appeal is available.

(4) The ruling referred to in paragraph 1 of this Article shall be published on the notice board. The ruling shall be considered as delivered to all the persons to whom the

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conclusion is to be delivered and to all participants to the auction upon the expiry of the third day from the date on which it was posted on the notice board.

Article 94
Protection of the Purchaser's Rights

Revocation or modification of a ruling on enforcement after the ruling on award of real property has been enforced has no effect on the purchaser's right to ownership acquired according to the provisions of Article 93 of this Law.

Article 96
Settlement of Claims of the Party Seeking the Enforcement
Commencement of Settlement

The Court shall commence paying the party seeking the enforcement immediately after the ruling on award has been issued.

V. Admissibility

13. 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.

14. The request for review of constitutionality was submitted by the County Court in Banja Luka (Judge Milan Blagojević), which means that the request was filed by an authorised person pursuant to Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (see Constitutional Court, Decision on the Admissibility and Merits no. *U 5/10* of 26 November 2010, paragraphs 7 through 14, published in the *Official Gazette of Bosnia and Herzegovina*, 37/11). Bearing in mind the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Constitutional Court's Rules, the Constitutional Court establishes that the present request is admissible as it was submitted by an authorised person and because there is no single reason under Article 19(1) of the Constitutional Court's Rules rendering this request inadmissible.

VI. Merits

15. The applicant requested the Constitutional Court to decide on the compatibility of the contested provision of the RS Law on Enforcement Procedure with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention and Article 14(1) of the ICCPR.

16. The contested provision of the RS Law on Enforcement Procedure reads as follows:

(4) The ruling referred to in paragraph 1 of this Article shall be published on the notice board. The ruling shall be considered as delivered to all the persons to whom the conclusion is to be delivered and to all participants to the auction upon the expiry of the third day from the date on which it was posted on the notice board.

Right to a fair trial

17. Article II(3)(e) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

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

18. Article 6(1) of the European Convention, as relevant, reads:

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

19. The Constitutional Court observes that the applicant challenges the contested provision as the ruling on award is not delivered to the parties to the proceedings in person nor is it delivered so to any other participant whose rights and duties have been decided on, and, moreover, that the mentioned ruling is considered as delivered to the persons to whom it is to be delivered in accordance with the law after the expiry of three days from the date when it was posted on the notice board and that the time-limit for filing an appeal commences to run on that date. The Constitutional Court further note that the ruling on award shall be delivered to *all the persons to whom the conclusion is to be delivered and to all participants to the auction.* Furthermore, according to Article 82(6) of the RS Law on Enforcement, *the conclusion on sale shall be delivered to the parties, to the persons that have the priority right to have their claims settled or the same priority right as the*

party seeking the enforcement, to the persons who have a registered or legal pre-emption right and to the relevant body of the tax administration, which means in the present case that the ruling on award is to be also delivered to the mentioned persons.

20. The Constitutional Court notes that the RS National Assembly, which enacted the contested provision, alleged in its reply that as a legislator it was guided by the public interest and reasons for purposefulness. In this connection, the Constitutional Court observes that the public interest is reflected in the need to complete the enforcement proceedings in the prompt, efficient and cost-effective manner, on the one hand, and without placing an excessive burden on the persons having the interest and right to file an appeal against a ruling on award, on the other hand.

21. The Constitutional Court notes that the request in question raises the issue of procedural guarantees of the parties in relation to the right to file an appeal, on the one hand, and the principle of promptness of the enforcement procedure, on the other hand, meaning that the forcible collection of claims upon request of the party seeking the enforcement is executed within the shortest possible time limit. However, although the principle of promptness is particularly noticeable in the enforcement procedure, the mentioned principle, in the opinion of the Constitutional Court, could not be interpreted as prevailing over the essence of the right to a fair trial within the meaning of the fundamental procedural guarantees of the parties to the court proceedings.

22. The provision of Article 5 of the RS Law on Enforcement Procedure prescribes that the basic principle of the enforcement procedure is *the principle of promptness*. The mentioned principle in the enforcement procedure is reflected in the prescription of shorter time-limits for undertaking certain enforcement actions either by the parties or by the court. Essentially, this relates to the requirement expressed in the principles of cost-effectiveness and efficiency of the enforcement procedure and timeliness of providing legal protection to the party seeking the enforcement. The hitherto theory has emphasized that the promptness in taking actions is first of all in the interest of the party seeking the enforcement and indirectly the enforcement debtor because of the decrease in costs and prompt removal of uncertainty of the legal position of the legal subject.

23. The Constitutional Court referred to the mentioned principle in its decisions wherein it emphasized that the enforcement procedure, due to its nature, requires prompt action as prescribed by Article 5 of the RS Law on Enforcement Procedure (see Constitutional Court, *AP 5668/14* of 14 May 2015, para 26, *AP 5401/14* of 24 April 2015, para 24, *AP 5156/14* of 17 March 2015, available at www.ustavnisud.ba). In the mentioned cases, the Constitutional Court found 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 as the enforcement proceedings were not concluded within the reasonable time-limit.

24. However, despite the mentioned principle of promptness, which is inviolable in the enforcement procedure, the question raised before the Constitutional Court relates to the procedural guarantees in respect of the right to appeal under Article 93(3) of the RS Law on Enforcement Procedure (*An objection against the ruling is not allowed but an appeal is available).* In this connection, the Constitutional Court notes that „the right to file an appeal with the court of higher instance is not defined nor does Article 6(1) of the European Convention imply it". However, if the appeal is available and if it was filed, and the court of that instance is called upon to established the facts, the first paragraph of Article 6 of the European Convention will be applicable (see ECtHR, *Delcourt v. Belgium,* judgment of 17 January 1970, Series A, no. 11, pp. 14-15). The Constitutional Court notes that although Article 6(1) of the European Convention does not imply the right to file appeal with a higher instance court, if that right is not prescribed by the law, the guarantees enabling its consistent application must be secured through clear and precise norms.

25. The European Court of Human Rights noted in the judgment of *Muscat v. Malta* that Article 6 of the Convention does not compel the Contracting States to set up courts of appeal. However, where such courts do exist, the requirements of Article 6 must be complied with, so as for instance to guarantee to litigants an effective right of access to court for the determination of their „civil rights and obligations". The „right to court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired (see ECtHR, *Muscat v. Malta,* judgment of 17 July 2012, para 42). The rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed at ensuring the proper administration of justice and compliance, in particular, with the principle of legal certainty. That being so, the rules in question, or the manner in which they are applied, should not prevent litigants from using an available remedy. However, those concerned must expect those rules to be applied. It is incumbent on the interested party to display special diligence in the defence of his interests (*op. cit. Muscat v. Malta*, para 44).

26. The Constitutional Court emphasizes that legal provisions regulating time-limits have to genuinely offer a possibility for a citizen to excercise his or her specific right, while the expiry thereof means the loss of the possibility to realize that right. Such a time-limit must

be realistic (see, Constitutional Court, *AP 1524/06* of 8 November 2007, para 33, available at www.ustavnisud.ba).

27. As to the contested provision, the Constitutional Court notes that the legislator prescribes in that provision that the ruling shall be considered as delivered to all the persons to whom the conclusion is to be delivered in accordance with the law and to all participants to the auction upon the expiry of the third day from the date on which it was posted on the notice board. Furthermore, Article 12(4) of the RS Law on Enforcement Procedure stipulates that an appeal against the ruling issued upon objection may be filed within a time limit of eight days from the delivery of the ruling. The second-instance court shall decide on the appeal. In this connection, the Constitutional Court notes that the legislator implies that all the persons who has the interest in filing an appeal against the ruling on award have the obligation to be aware of the date of expiry of the ruling on award posted on the notice board (although there are no time indications of when this would happen) in order to be informed when the time-limit for filing an appeal commences to run. Thus, posting of the ruling on award on the notice board is in fact an uncertain event in respect of which a precise date is not determined. Taking into account the fact that the ruling on award is to be issued after the price is deposited (Article 93(1) of the RS Law on Enforcement Procedure), that the prescribed time limit for depositing the price is to be determined by the court and that it cannot exceed 30 days from the date when the conclusion on sale is published (Article 92(1) of the RS Law on Enforcement Procedure), the Constitutional Court notes that in the mentioned period, which is uncertain, the interested parties are obliged to check, on a daily basis, whether the ruling is published on the notice board in order to be watchful of the time limit for filing an appeal. The Constitutional Court notes that an excessive burden was placed on all interested parties in relation to securing the procedural guarantees for filing the prescribed legal remedy due to the uncertainty of the time when the ruling on award will be posted on the notice board of the court. Taking as a starting point the fact that the contested provision prescribes that the ruling shall be considered as delivered to all the persons to whom the conclusion is to be delivered in accordance with the law and to all participants to the auction upon the expiry of the third day from the date on which it was posted on the notice board and that there are no other elements which would render the time of publication certain or that there is no prescription that it would be determined in another appropriate manner, the Constitutional Court holds that the contested provision is not compatible with Article 6(1) of the European Convention as it does not secure procedural guarantees for filing a legal remedy. The Constitutional Court holds that posting the ruling in question on the notice board of the court, which is prescribed by the contested provision, is not disputable. However, such a provision in itself, without any determination that would indicate certainty of the date when the ruling would be posted on the notice

board, and, consequently, the calculation of the time-limit within which an appeal could be filed, places an excessive burden on the parties and other participants in the proceedings that are interested in addressing an appeal.

28. Given the foregoing, the Constitutional Court holds that the contested provision is not compatible with the provision of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

Other allegations

29. As to the allegation on the violation of Article 14 of the ICCPR, the Constitutional Court notes that the mentioned provision provides, *inter alia*, that *in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled (...) by a competent (...) tribunal established by law.* Given the fact that the mentioned right essentially corresponds to the guarantees under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention and that these allegations of the applicant have already been considered in detail in this decision, the Constitutional Court holds that it is not necessary to separately examine them in relation to the mentioned provision of the ICCPR.

VII. Conclusion

30. The Constitutional Court of BiH concludes that Article 93(4) of the RS Law on Enforcement Procedure is contrary to the right to a fair trial under Article II(3)(e) and Article 6(1) of the European Convention as it provides that the ruling shall be considered as delivered to all the persons to whom it is to be delivered in accordance with the law upon the expiry of the third day from the date on which it was posted on the notice board, but it does not provide for other elements which would render the time of publication on the notice board certain in order to secure procedural guarantees to the parties interested in filing a legal remedy prescribed by the law.

31. Having regard to Article 59(1) and (2) and Article 61(2), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

CONTENTS

Case No. U 7/17

DECISION ON ADMISSIBILITY AND MERITS

Request of the County Court in Banja Luka (Judge Milan Blagojević) for review of the constitutionality of Article 109(6) of the Law on Enforcement Procedure of the Republika Srpska (*Official Gazette of the Republika Srpska*, 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13 and 98/14)

Decision of 30 November 2017

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (2) and Article 61(2), (3) and (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President,

Mr. Mato Tadić, Vice-President,

Mr. Zlatko M. Knežević, Vice-President,

Ms. Margarita Tsatsa-Nikolovska, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Mr. Giovanni Grasso

Having deliberated on the request filed by **the County Court in Banja Luka (Judge Milan Blagojević)**, in the Case no. **U 7/17**, at its session held on 30 November 2017 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by the County Court in Banja Luka (Judge Milan Blagojević) is hereby granted.

It is hereby established that Article 109(6) of the Law on Enforcement Procedure of the Republika Srpska (*Official Gazette of the Republika Srpska*, 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13 and 98/14) 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.

Pursuant to Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of the Republika Srpska is hereby ordered to harmonize Article 109(6) of the Law on Enforcement

Procedure of the Republika Srpska (*Official Gazette of the Republika Srpska*, 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13 and 98/14) 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 not later than six months after the date of publishing this Decision in the Official Gazette of Bosnia and Herzegovina.

Pursuant to Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of the Republika Srpska is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within the time limit specified in the foregoing paragraph, of 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 in the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

Reasoning

I. Introduction

1. On 22 September 2017, the County Court in Banja Luka (Judge Milan Blagojević; „the applicant") filed a request with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for review of the constitutionality of Article 109(6) of the Law on Enforcement Procedure of the Republika Srpska (*Official Gazette of the Republika Srpska,* 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13 and 98/14; „the RS Law on Enforcement Procedure").

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska („the RS National Assembly") was requested on 25 September 2017 to submit its reply to the request.

3. Upon a request by the National Assembly of RS, the Constitutional Court of BiH, by its letter of 30 October 2017, gave the National Assembly the additional 15-day time-limit for the reply to the request. The National Assembly of RS submitted its reply on 17 November 2017.

III. Request

a) Facts of the case in respect of which the request was filed

4. In the ruling on settlement no. 71 0 I 183687 14 I of 3 March 2017, the Basic Court in Banja Luka decided that the enforcement creditors would be settled (more than 20 enforcement creditors), pledgee and joint creditors, as specified in the enacting clause of the said ruling, out of the amount of BAM 717,767.00, received through the sale of a real property, owned by the enforcement debtor and mortgage debtor „DEL INVEST" d.o.o. Banja Luka, namely the real property registered in the land register folio no. 5313 Cadastral Municipality of SP Banja Luka, with full ownership by the enforcement debtor, as specified in the enacting clause of the ruling.

5. In the reasoning of the ruling it was stated that the mentioned ruling would be published on the bulletin board of the first-instance court in accordance with the provisions of Article 109 of the RS Law on Enforcement Procedure. It was indicated that, upon the expiration of three days after posting the ruling on the bulletin board, the court would deem the ruling to have been delivered to all the persons entitled to settlement out of the sale price.

6. One of the enforcement creditors lodged an appeal against the first-instance ruling and raised, *inter alia*, an issue of the delivery of the first-instance ruling to the enforcement creditors via a bulletin board within the meaning of Article 109(6) of the RS Law on Enforcement Procedure, where it relates to several enforcement creditors or third parties to enforcement proceedings.

7. The second-instance court (the applicant), filing the respective request, is ought to decide on the mentioned appeal.

b) Allegations stated in the request

8. The applicant holds that the provision of Article 109(6) of the RS Law on Enforcement Procedure („the impugned provision") is not compatible with the provision 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 („the European Convention"), the provision of Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention, as well as with the provision of Articles 14(1) and 26 of the International Covenant on Civil and Political Rights („the International Covenant").

9. In that respect the applicant indicates that the impugned provision prescribes that the ruling on the settlement out of the price obtained through the sale of the real properties that is the subject-matter of enforcement is not to be delivered to the parties-persons who are entitled to be settled out of the sale price, but the ruling is only posted on the bulletin board of the court without any indication as to the time when such a ruling would be posted in order to be able, at least based on such an indication, to establish the start of the time limit for appeal.

10. It is pointed out that on the basis of such a provision it further follows that, upon the expiration of three days after posting the ruling on the bulletin board, the court deems that the ruling has been delivered to all the persons who are entitled to settlement out of the sale price.

11. The applicant indicated the case in respect of which the request was filed and alleged that in the ruling of the Basic Court dated 3 March 2017, by referring to the impugned provision, the first-instance court determined that the first-instance ruling would be posted on the bulletin board of the court and that, upon the expiration of three days after posting the ruling on the bulletin board, the ruling would be deemed to have been delivered to all the persons entitled to be settled out of the sale price. Further, the applicant indicated that in that case one of the enforcement creditors lodged an appeal against the first-instance ruling, wherein he alleged, among other things, that the mentioned action of the first-instance court flagrantly denied the right of other enforcement creditors in the same case (more than 20 enforcement creditors) to be served on the ruling on settlement, which they could appeal against if they deemed that their rights were violated.

12. The applicant recalled the Decision of the Constitutional Court no. *U 2/17* and alleged that the respective issue raised in this request was directly linked to the right to a fair trial. According to the applicant, there is no fair trial if there is no access to a court, which must be essential and not only formal.

13. In the applicant's opinion, the impugned provision violates the very essence of the right to a fair trial and, in the absence of it, there can be no fair trial in any judicial proceedings, including the enforcement proceedings. In the applicant's opinion, such a legal arrangement imposes not only a disproportionate but also an unjustified and illegitimate requirement, so that, practically, those persons must keep a constant watch on the bulletin board, as that is the only way they can be informed about a court decision determining who will or will not be paid out of the sale price and to what amount. The applicant points out that if they failed to do so they would lose the right to appeal, under the applicable legal solution, thereby unlawfully depriving them of the very essence of

the right to a fair trial; as a result, there is a violation of the Constitution and international general acts that are applied directly in Bosnia and Herzegovina.

14. The applicant alleges that the facts of this specific issue greatly correspond to the facts referred to in the Decision of the Constitutional Court no. *U 2/17*, as that case concerned also a provision of the law, prescribing the posting of a court decision on a bulletin board of the court concerned, so that upon the expiration of three days after posting the ruling on the bulletin board, the court would deem the ruling to have been delivered to all parties to the proceedings. Therefore, the applicant presented the views of the Constitutional Court referred to in the mentioned decision (paragraph 27 of the decision), which, in his opinion, are applicable to the present case.

15. In addition to the aforementioned, the applicant indicates that the mentioned provision leads to unequal treatment of enforcement creditors, since it prescribes that the ruling on settlement is to be published on a bulletin board of the court unless the RS Law on Enforcement Procedure prescribes an obligation to conduct a hearing for the division of a sale price. Furthermore, the applicant states that such a hearing, under Article 108, paragraph 1 of the RS Law on Enforcement Procedure, must be held if there is more than one enforcement creditor or third persons entitled to settlement. Otherwise, there is no legal obligation to conduct such a hearing if there is only one enforcement creditor or one third person who is entitled to settlement out of the sale price.

16. Accordingly, in the applicant's view, it is obvious that persons who are in the same legal situation are not equal before the law regarding the delivery of the ruling on settlement, which, in the applicant's opinion, amounts to discrimination.

17. Finally, the applicant indicates that an inherent requirement of the right to a fair trial is to prescribe by law that such legal decisions are to be delivered to the parties whose rights and legal interests were decided by the respective decision and not to prescribe that a court decision is considered delivered solely by posting it on a court's bulletin board. Everything else, in the applicant's opinion, leads to a violation of the right to a fair trial and discrimination and a violation of the right to equality before the law, which cannot be justified by any public interest whatsoever.

c) Reply to the request

18. In its reply to the request, the National Assembly of RS stated that the Government of Republika Srpska at its 139th session, held on 24 August 2017, determined Draft Amendments to the Law on Enforcement Procedure and that it made amendments to the provisions of Article 93 of the Law on Enforcement Procedure that initiated a procedure

of harmonization of this provision with the decision of the Constitutional Court no. *U 2/17*, by introducing the provision of Article 2 of that Draft. It is emphasized that this Draft made an „appropriate intervention" in the provision of Article 109 paragraph 6 of the Law on Enforcement Procedure, which was contested by the request in question. It is emphasized that this draft will be forwarded to the Assembly for procedure and that following the adoption of the above-referenced amendments to the Law on Enforcement Procedure by the National Assembly of RS and its publication in the *Official Gazette of RS*, the decision of the Constitutional Court in case no. *U 2/17* will be fully implemented.

IV. Relevant Law

19. The **RS Law on Enforcement Procedure** (*Official Gazette of the Republika Srpska*, 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13 and 98/14), reads in its relevant part as follows:

Article 1

(1) This Law shall govern the procedure pursuant to which the courts in the Republika Srpska shall enforce claims based on enforceable and authentic documents (hereinafter: enforcement procedure), unless otherwise provided by a separate law.

(2) The provisions of this Law shall not be applied to enforcement procedures stipulated by separate law.

Article 5 paragraph 1

(1) In the enforcement procedure the Court shall act without delay.

Article 10 paragraph 1

(1) Under the rules on the delivery of a lawsuit referred to in the Civil Procedure Code to be delivered are: the ruling on the motion for enforcement, the ruling on the objection to the ruling on enforcement, the ruling on the fine and the conclusion referred to I Article 37 of this Law.

Article 12 paragraph 4

(4) An appeal against the ruling issued upon objection may be filed within a time limit of eight days from the date of delivery of the ruling. The second-instance court shall decide on the appeal.

Article 21

(1) The provisions of the Civil Procedure Code shall be also accordingly applied in the enforcement procedure, unless this or other law stipulate otherwise.

(2) A disqualification of a judge may be requested not later than the adoption of a decision on objection, and that of an official person not later than the first action has been taken in an enforcement procedure.

(3) Provisions of the law regulating property rights or the law of obligations are accordingly applied to the substantive and legal prerequisites and consequences of the enforcement procedure.

Article 93

(1) After the price is deposited into the court, the court shall issue a ruling to award the immovable property to the purchaser (the ruling on award).

(2) In its ruling referred to in paragraph 1 of this Article, the Court shall determine the handover of the real property to the purchaser and shall order the land registry court to register the change in the ownership right and to delete the rights of third persons whom the ruling concerns.

(3) An objection against the ruling is not allowed, but an appeal is available.

(4) The ruling referred to in paragraph 1 of this Article shall be published on the notice board. The ruling shall be considered as delivered to all the persons to whom the conclusion is to be delivered and to all participants to the auction upon the expiry of the third day from the date on which it was posted on the notice board.

Article 96

The Court shall commence paying the party seeking the enforcement immediately after the ruling on award has been issued.

Article 108

(1) After the conditions referred to in Article 96 of this Law have been met, the court shall schedule a hearing for the division of the price (the amount received through sale) if there is more than one enforcement creditor or third persons who are entitled to settlement.

(2) Besides the parties, persons who, according to the case file and data from the land registry, are entitled to settlement from the respective amount, shall be summoned to the hearing.

(3) Those persons shall be notified in the summons that if they fail to appear at the hearing, their claims shall be considered according to the status in the land registry and the case file, and that they may contest any other person's claim, its amount and the order of settlement no later than at the hearing for distribution.

(4) The settlement of enforcement creditors and of other persons filing a claim for settlement shall be discussed at the hearing.

(5) The court will inform the persons in attendance at the hearing of the date of passing the ruling on settlement, following which accordingly the general provisions about the delivery will be applied, including the prerequisites and consequences of failing to receive the ruling.

Article 109

(1) After holding a hearing, the judge shall rule without delay, by issuing a ruling, on the settlement of the enforcement creditor and other persons who are entitled to settlement, having regard to the data from the case file and the land registry, as well as the status established at the hearing.

(2) In issuing the ruling referred to in paragraph 1 of this Article only such claims for which the ruling on enforcement has become enforceable not later than the date of the distribution hearing shall be taken into account.

(3) If there are claims with respect to which ruling on enforcement has not become enforceable not later than the date of the distribution hearing, those claims shall be settled out of the remaining proceeds of the sale, if any, after the ruling on enforcement has become enforceable, and the remainder shall be refunded to the enforcement debtor.

(4) The provisions of paragraphs 2 and 3 of this Article shall not apply to the claims secured by a lien or a debt in land.

(5) No objection may be raised to the ruling on settlement, however, an appeal may be lodged.

(6) If this Law has not prescribed a necessity to hold a hearing on distribution, the court shall publish the ruling on settlement on a bulletin board. After three days have elapsed following the posting on the bulletin board, the ruling shall be deemed to have been delivered to all the persons who are entitled to settlement out of the sale price.

(7) The enforcement of the ruling on settlement shall commence following the expiry of the deadline for appeal by authorized persons.

(8) If an appeal against the ruling on settlement is lodged within the given time limit, it will be communicated to the parties and other participants in the proceedings, and the ruling will be enforced if the enforcement creditor fails to file a motion, within three days from receiving the appeal, for the postponement of enforcement pending the decision of the second-instance court on appeal.

20. The **Law on Civil Procedure** (*Official Gazette of the RS*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13), reads in its relevant part as follows:

Article 185

Following the conclusion of the main hearing, the court shall inform the present parties of the date when the judgement shall be rendered. If one party was absent from the hearing, the court shall inform him/her in writing about the day when the judgement shall be rendered.

The parties themselves, or their representatives or agents, shall be obliged to take over the judgement in the court building and therefore, the court shall not serve the judgement pursuant to the provisions of this Law on service.

If the parties were duly informed of the date when the judgement was rendered, the time limit for the appeal against the judgement shall start to run from the next day after the judgement was rendered.

V. Admissibility

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

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

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

22. The request for review of constitutionality was filed by the County Court in Banja Luka (Judge Milan Blagojević), which means that the request was filed by an authorized person under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (see the Constitutional Court, Decision on Admissibility and Merits no. *U 5/10* of 26 November 2010, paras 7-14, published in *the Official Gazette of Bosnia and Herzegovina*, 37/11). Bearing in mind the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the Constitutional Court holds that the respective request is admissible, as it was lodged by an authorized entity, and because there is not a single formal reason under Article 19(1) of the Rules of the Constitutional Court rendering this request inadmissible.

VI. Merits

23. The applicant requested the Constitutional Court to decide on the compatibility of the impugned provision of the RS Law on Enforcement Procedure with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention as well as Articles 14(1) and 26 of the International Covenant.

24. The impugned provision of the RS Law on Enforcement Procedure reads as follows:

Article 109, paragraph 6

(6) If this Law has not prescribed a necessity to hold a hearing on distribution, the court shall publish the ruling on settlement on a bulletin board. After three days have elapsed following the posting on the bulletin board, the ruling shall be deemed to have been delivered to all the persons who are entitled to settlement out of the sale price.

Right to a fair trial

25. 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.

26. Article 6(1) of the European Convention, as relevant, reads:

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

27. The Constitutional Court observes that the applicant questions the impugned provision of the RS Law on Enforcement Procedure for the reason that the impugned provision does not clearly specify the time when a ruling on settlement will be posted on a bulletin board of a court, since that is the moment from which the three-day time limit for lodging an appeal starts to run. The applicant considers that the aforementioned calls into question the very essence of the right to a fair trial.

28. Therefore, the respective request raises the issue of procedural guarantees of the parties in relation to the right to lodge an appeal against a ruling on settlement in enforcement proceedings, which is urgent in terms of coercive satisfaction of the enforcement creditor's claim as quickly as possible.

29. In that respect, the Constitutional Court indicates that the basic principle of enforcement procedure is *the principle of urgency* prescribed by the provision of Article 5 of the Law on Enforcement Procedure. The mentioned principle in enforcement procedure is reflected in the prescription of short time limits for undertaking certain enforcement actions either by the parties or by the court. Essentially this is a request expressed through the principles of cost-efficiency and efficiency of an enforcement procedure, and timelines in rendering legal protection to the enforcement creditor, and it was indicated that the urgency in proceedings was primarily in the interest of the enforcement creditor, as well as indirectly of the enforcement debtor, as it reduces the costs and quickly removes uncertainty in a legal position of entities (see the Constitutional Court, Decision on Admissibility and Merits no. *U 4/15* of 30 September 2015, available on the website of the Constitutional Court: www.ccbh.ba, paragraph 19).

30. The Constitutional Court referred to the mentioned principle in its decisions wherein it emphasized that it was necessary to act urgently in an enforcement procedure, due to its very nature, as prescribed by the provision of Article 5 of the Law on Enforcement Procedure (see the Constitutional Court, *AP 5668/14* of 14 May 2015, paragraph 26, *AP 5401/14* of 24 April 2015, paragraph 24, *AP 5156/14* of 17 March 2015, paragraph 23, available on the website of the Constitutional Court: www.ccbh.ba). In the mentioned cases the Constitutional Court established violations 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 on the ground that the enforcement procedure had not been completed within a reasonable time.

31. However, although the principle of urgency is particularly pronounced in an enforcement procedure, according to the Constitutional Court, the mentioned principle cannot be construed so as to prevail over the very essence of the right to a fair trial, in terms of the basic procedural guarantees of the parties to the proceedings before courts (*ibid U 4/15*, paragraph 24).

32. The Constitutional Court observes that the applicant referred to the decision of the Constitutional Court no. *U 2/17* wherein also a question was asked as to the procedural guarantees of the parties in relation to the right to lodge appeals against the rulings on award, which is published on a court's bulletin board under the provision of Article 93(4)

of the RS Law on Enforcement Procedure (which was challenged in that case), whereby after the three days have elapsed from the day of posting it on the bulletin board the ruling will be deemed to have been delivered to all the persons who are to be served the ruling under the law. In that case the Constitutional Court indicated that, having regard to the impugned provision (Article 93(4) of the RS Law on Enforcement Procedure) as well as the provision of Article 12(4) of the RS Law on Enforcement Procedure, it follows that the legislator presumes an obligation for all persons who have the interest to lodge an appeal against the ruling on settlement to follow the date of the posting of a ruling on a bulletin board in order to establish the start of the time limit for an appeal. Therefore, the Constitutional Court emphasized that posting a ruling on a bulletin board is actually an uncertain event, for which no precise date is specified as to when it will occur. Due to that uncertainty as to when a ruling on award would be posted on the court's bulletin board, in the opinion of the Constitutional Court, an excessive burden was placed on the interested persons in securing procedural guarantees for lodging a prescribed legal remedy. Therefore, as it was undisputedly established that the impugned provision carried no elements making the posting time certain or prescribing that it would be determined in another appropriate manner, the Constitutional Court concluded in the cited decision that the impugned provision was not in conformity with Article 6(1) of the European Convention in terms of securing procedural guarantees for lodging a legal remedy. In so doing the Constitutional Court emphasized that posting the respective ruling on the bulletin board prescribed by the impugned provision was undisputed. However, such a provision, in itself, without any determination that would indicate certainty of the date when the ruling would be posted on the notice board and, consequently, the calculation of the time-limit within which an appeal could be filed, places an excessive burden on the parties and other participants in the proceedings that are interested in filing an appeal (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 2/17* of 1 June 2017, available on the website of the Constitutional Court: www.ustavnisud.ba, paragraph 27).

33. In addition to the aforementioned, in the cited decision the Constitutional Court referred to the decision of the European Court of Human Rights in the case of *Muscat v. Malta*, which states that the Court reiterates that Article 6 of the Convention does not compel the Contracting States to set up courts of appeal. However, where such courts do exist, the requirements of Article 6 must be complied with, so as for instance to guarantee to litigants an effective right of access to a court for the determination of their „civil rights and obligations". The „right to court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard.

However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired (see, European Court of Human Rights, *Muscat v. Malta*, judgment of 17 July 2012, paragraph 42). The rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed at ensuring the proper administration of justice and compliance, in particular, with the principle of legal certainty. That being so, the rules in question, or the manner in which they are applied, should not prevent litigants from using an available remedy. However, those concerned must expect those rules to be applied. It is incumbent on the interested party to display special diligence in the defense of his interests (*ibid Muscat v. Malta*, paragraph 44).

34. By linking the stances from the cited decision to the respective request the Constitutional Court observes that the impugned provision, in paragraph 5, prescribes that no objection may be raised to the ruling on settlement, however, an appeal may be lodged. Furthermore, the legislator prescribed in the impugned provision, paragraph 6, that the ruling on settlement shall be published on a bulletin board, and that after three days have elapsed following the posting on the bulletin board, the ruling shall be deemed to have been delivered to all the persons who are entitled to settlement out of the sale price. Thus, unlike the cited case wherein the impugned provision was related to the publishing on a court's bulletin board of a ruling on award and, in that regard, to the exercise of the right to lodge an appeal, the present case concerns the publishing on a bulletin board of a ruling on settlement and, in that regard, the exercise of the right to lodge an appeal. Further, the Constitutional Court observes that the impugned provision in the present case, as well as the impugned provision in the Case no. *U 2/17*, also carries no clear indication as to the time when the ruling on settlement will be posted on the court's bulletin board, which is the reason why the interested persons were obligated to check on a daily basis in order to preserve the time limit for appeal. Therefore, it follows that the impugned provision carries no elements making the posting time certain or prescribing that it will be determined in another appropriate manner, in terms of securing procedural guarantees for lodging a prescribed legal remedy (appeal). Therefore, in the opinion of the Constitutional Court, the impugned provision places an excessive burden on the interested persons in securing procedural guarantees for lodging a prescribed legal remedy, which is contrary to the guarantees referred to in Article 6(1) of the European Convention.

35. Accordingly the Constitutional Court deems that the respective request raises an identical constitutional issue as was the case in the Case no. *U 2/17*, and that the mentioned case-law from the cited case may be entirely applied to the present request. In doing so, the Constitutional Court deems that the prescription by the legislator for

the ruling on settlement to be published on a court's bulletin board is not disputed in the present case, rather that it must be made certain when that will occur, *i.e.* when the ruling on settlement will be published on the court's bulletin board since the time limit for the interested persons to lodge an appeal starts running from that date. Therefore, in the opinion of the Constitutional Court, that must not be an uncertain event, since the exercise of procedural rights of the parties depends on it, in terms of lodging an appeal against the ruling on settlement. What is more, the impugned provision without any specification indicative of the certainty of the date of posting a ruling on the bulletin board, and, in that regard, of calculating the time limit for an appeal, constitutes an excessive burden for the interested persons implicated in this provision. Therefore, it follows that the impugned provision is not in conformity with Article 6(1) of the European Convention in terms of securing procedural guarantees for lodging a legal remedy.

36. The Constitutional Court emphasizes that, within the meaning of its jurisdiction under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, it considered the impugned provision *in abstracto* without addressing its specific application by ordinary courts. In that regard, the Constitutional Court observes that the first-instance court, in the case concerning which the respective request was filed, delivered the ruling on settlement to the enforcement creditors (more than 20 enforcement creditors) within the meaning of the impugned provision, and that one of the enforcement creditors, among other things, on the ground of the manner of such delivery, lodged an appeal against the ruling on settlement, which is yet to be decided by the second-instance court (the applicant). Thus, the second-instance court is yet to render a decision concerning the appeal lodged. However, having regard to its jurisdiction within the meaning of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, the Constitutional Court will not issue instructions to the applicant as to the decision on the appeal in the present case, since that is the task of the ordinary courts and not of this court.

37. In view of the aforementioned, the Constitutional Court deems that the impugned provision is not in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and the provision of Article 6(1) of the European Convention.

Other allegations

38. Having regard to the conclusion of the Constitutional Court about the violation of the right to a fair trial, the Constitutional Court deems that it is not necessary to consider the allegations of the applicant about the violations of the right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European

Convention, as well as the right under Article 14(1) and Article 26 of the International Covenant.

VII. Conclusion

39. The Constitutional Court concludes that that the provision of Article 109(6) of the RS Law on Enforcement Procedure is contrary to the guarantees of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, since it prescribes that upon expiration of the three days after the posting on the bulletin board, the ruling on settlement shall be deemed to have been delivered to all the persons who are entitled to settlement out of the sale price, without carrying the elements making the time for posting on a bulletin board certain in order to secure procedural guarantees to the interested persons for lodging a legal remedy prescribed by law.

40. Pursuant to Article 59(1) and (2) and Article 61(2), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

41. In view of Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

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

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Case No. AP 4606/13

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Željko Ivanović against the Verdict of the Court of Bosnia and Herzegovina – the Appellate Division, no. S1 K 003442 12 Kžk of 17 June 2013

Decision of 28 March 2014

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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 (*Official Gazette of Bosnia and Herzegovina*, 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 Paravlić, 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. Željko Ivanović**, in the case no. **AP 4606/13**, at its session held on 28 March 2014, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. Željko Ivanović is partly granted.

The violation of Article II (2) of the Constitution of Bosnia and Herzegovina and Article 7(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. S 1 1 K 003442 12 Kžk of 17 June 2013 is 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 line with Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in relation to the sentencing.

The Court of Bosnia and Herzegovina is ordered, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to inform the Constitutional Court of Bosnia and Herzegovina, within 90 days as from the date of delivery of this Decision, of the measures taken to execute this Decision.

The appeal of Željko Ivanović lodegd against the Verdict of the Court of Bosnia and Herzegovina no. S 1 1 K 003442 12 Kžk of 17 June 2013 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 is hereby dismissed as ill-founded.

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

Reasoning

I. Introduction

1. On 11 November 2013 Mr. Željko Ivanović („the appellant") from Pale, represented by Mr. Petko Pavlović, a lawyer practicing in Zvornik 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 Appellate Division („the Court of BiH – the Appellate Division"), no. S1 K 003442 12 K**žk** of 17 June 2013.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Appellate Division and Prosecutor's Office of Bosnia and Herzegovina were requested on 12 December 2013 to submit their respective replies to the appeal.

3. The Appellate Division and the Prosecutor's Office of BiH submitted their respective replies on 26 December 2013.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were submitted to the appellant on 27 December 2013.

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. The Court of BiH – the War Crime Division I, in its Verdict no. S1 1 K 003442 09 Kri (X-KR-07/180-3) of 6 July 2012, found the appellant guilty of having committed, by undertaking actions during the period from 10 July to 19 July 1995, as described in more detail in the enacting clause of the verdict, the criminal offence of crime against humanity in violation of Article 172 paragraph 1 item a) of the Criminal Code of BiH from 2003 („the 2003 Criminal Code") in conjunction with Article 29 of the aforestated law, and sentenced him to 13 years prison term.

7. The Court of BiH - the Appellate Division, in its Decision no. S1 1 K 003442 12 Krž 8 of 16 November 2012, granted the appeals of the Prosecutor's Office of BiH and the appellant and quashed the first-instance verdict for serious violations of the provisions of the criminal procedure and ordered the main hearing before the said Division.

8. The Court of BiH – the Appellate Division, in its Verdict no. S1 1 K 003442 09 Kžk of 17 June 2013, found the appellant guilty for having committed, by undertaking actions during the period from 10 July to 19 July 1995, as described in detail in the enacting clause of the verdict, the criminal offence of genocide in violation of Article 171 item a) in conjunction with Article 31 of the 2003 Criminal Code of BiH, and then sentenced him to long-term imprisonment of 24 years.

9. The reasons for the verdict read that following the completion of the proceedings, by way of assessing all the presented evidence both separately and in conjunction with other evidence, it was established that the appellant, in the manner described in more detail in the enacting clause, had participated in capturing, securing the conduct of and detaining the captured Bosniaks in the warehouse of the Farming Cooperative „Kravica", and that by guarding the prisoners at the rear of the mentioned facility, he had contributed to the extermination of the protected group of the Bosniak people of the Srebrenica Municipality, and thereby he helped in the realization of the intention of complete destruction of Bosniaks from the Srebrenica Enclave, and also to the partial extermination of the Bosniak people in eastern Bosnia. Furthermore, it was pointed out that the appellant had acted with premeditation in respect of the killing of the persons captured in the Farming Cooperative „Kravica" and, although not personally possessing an intention to exterminate Bosniaks as a national, ethnic or religious group, he had been aware of such a goal and of the genocidal intention of the main perpetrators.

10. According to the Appellate Division's assessment, the Prosecutor's Office of BiH proved beyond a reasonable doubt that the appellant, on 12 and 13 July 1995, as a member of the 2nd Detachment of the Special Police in Šekovići, had been deployed on the road Bratunac-Konjević polje, with a task to secure that the road was passable, which had been used at the time to displace the inhabitants of Srebrenica, mostly women, children and old persons. It was also established that the task of the appellant and other members of that Detachment as armed guards on the mentioned road communication had been to ensure the successful relaizaiton of surrender of Bosniak men and to take them to the meadow on the designated locality where other members of the 2nd Detachment had guarded them, based on which it was concluded that the appellant had contributed to the capture of Bosniaks. Taking into account the general context of the events occurring in the Area of Srebrenica and the fact that the members of the Detachment which the appellant belonged to, as a unit, which da been in the particular military action under the subordination of the Army of Republika Srpska, had been engaged in order to contribute to a successful realization of capturing Bosniak men and their subsequent execution, as well as to securing convoys transporting civilian population, with the purpose of the realization of the plan of forcible relocation from the territory of the UN safe zone of Srebrenica, with the aim of their extermination, it was concluded that the appellant, as one of the policemen who was in that area, indisputably possessed the knowledge and awareness of the background of those events. For that reason, according to the assessment of the court, his role cannot be assessed as negligible in the capturing of those persons, although he neither invited the men to surrender nor participated in their search and even did not stand in the circle around them in the meadow at the mentioned location. Next, it was established that the appellant, together with other members of the 2nd Detachment, had participated in the escort of the captured persons to the Farming Cooperative „Kravica", and he was in the circle of the mentioned facility when the prisoners were brought in. The Appellate Division concluded that the appellant's role was to stand guard at the rear of the warehouse in order to prevent prisoners from fleeing the hangar of the Farming Cooperative „Kravica" where they were held captive. According to the court's assessment, although it was not proven that he had shot a single bullet (and no such charges were made in the indictment) at the captives held at the Farming Cooperative „Kravica", such appellant's role contributed to the killing of the men held captive at the hangar, namely over 1,000 of them, as established in the verdicts of that court and the ICTY. It was also indicated that, based on the testimonies of the heard witnesses and the assessment of the whole surface area of the Farming Cooperative „Kravica", it was established in those proceedings that the number of the executed persons exceeded 1,000. In this respect, it was noted that the windows at the rear of the warehouse, which had been guarded, among others, also by the appellant, represented a single possible way out for prisoners to flee, and the very fact that the appellant had agreed along with others and had done nothing to avoid such a task, and in so doing being aware of

all of the aforementioned circumstances, suggested that the appellant and other members of the 2nd Detachment shared premeditation in killing the captured persons.

11. In the reasoning of the verdict it was indicated, among other things, that the key pieces of evidence on the basis of which the appellant's liability was established are the statements of the interrogated witnesses, including the protected witness I-3 and the testimonies of witnesses P.M. and M.S. they deposited in the course of investigation conducted against them regarding the same event. The Appellate Division evaluated as unfounded the appellant's allegations that the witness I-3 was not a reliable witness and did not possess a credibility to act as a witness. It was pointed out in this respect that the different testimonies, which the witness I-3 deposited in different proceedings as well as in this one, were assessed and it was concluded that they were in conformity with crucial facts relating to the existence of a criminal act and the appellant's criminal liability, as well as that they were corroborated by other presented evidence, testimonies of the heard witnesses and by material evidence. Moreover, it was pointed out that the existence of a criminal act and criminal liability of the appellant was not exclusively based on the testimony of this witness, as he was an accomplice who concluded the plea agreement with the Prosecutor's Office of of BiH, and therefore his testimony was regarded rather as evidence corroborating other evidence presented in the present proceedings. The appellant's allegations were assessed as unfounded as well in that they read that testimonies made during the investigation of the witnesses P.M. and M.S. constituted unlawful evidence. It was stated in this respect that these witnesses deposited their respective testimonies in 2005 in the presence of their defence councels and that they were advised of their rights in accordance with the then applicable Article 78 of the Criminal Procedure Code of BiH. Amendments to this article, which the appellant referred to, intend to protect a suspect/accused when he defends himself by silence and, in the particular case P.M. and M.S. were heard as witnesses and thus, their testimonies deposited during the investigation conducted against them were treated as an integral part of their testimonies in their capacity as witnesses in this case. Finally, it was indicated that the testimonies of other witnesses were assessed who testified about the circumstances as to the general context of the events in the area of Srebrenica in the incriminating period and about the very capture of men, activities of the Special Police Detachment, which the appellant was a member, in respect of securing the road and escorting the column of the captives to the Farming Cooperative „Kravica", and the very liquidation of the prisoners. It was indicated that the testimonies of these witnesses, although they did not identify the appellant as a participant in the respective events, because they either did not him or viewed the event from a certain distance territory-wise, were linked to the testimonies of the three key witnesses and had the character of substantiating evidence.

12. According to the Appellate Division, the appellant acted with the intent with respect to the killing of captured male Bosniaks in the warehouse of Kravica and, although he personally did not have an intention to exterminate Bosniaks as a national, ethnic and religious group he, under the circumstances described thoroughly in the judgment, had been aware of such a goal and genocidal intention of principal perpetrators. Also, a conclusion was drawn that the appellant had been aware of the fact that the massacre in Kravica was a part of genocide in the area of the municipality of Srebrenica. Therefore, his actions, i.e. the securing of the rear part of the warehouse of Kravica that had the windows were characterized as aiding within the meaning of Article 31 of the 2003 Criminal Code of BiH. Finally, it was pointed out that the appellant consented to serving as a means that contributed to the extermination of the protected group of the Bosniak people of the municipality of Srebrenica and, by his actions of aiding in killings, he had actually helped in the realization of the intention to completely destroy the Bosniaks from the enclave of Srebrenica and thus, partially, in the realization of the extermination of the Bosniak people of the eastern Bosnia. In view of the aforesaid, the conclusion was drawn that the appellant's actions had the elements of the criminal offence of genocide under Article 171 paragraph 1 item a) in connection with Article 31 of the 2003 Criminal Code of BiH.

13. Next, the Court of BiH – the Appellate Division, in the procedure of reaching a verdict, considered also the issue of the application of the substantive law to the present case. In doing so, the Appellate Division took as a starting point the principle of legality prescribed by Article 3, and the principle of time constraints regarding the applicability of the criminal code prescribed by Article 4 of the 2003 Criminal Code of BiH, corresponding to the principle contained in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), which, pursuant to Article II(2) of the Constitution of BiH, has priority over all other law. Next, the criminal offence of genocide is prescribed by Article 171 of the the 2003 Criminal Code of BiH, but it is also undisputed that, at the time of the perpetration thereof, it was also prescribed as a criminal offence of genocide in Article 141 of the Criminal Code of the SFRY („the CC SFRY of 1976"), which was in force and applicable in the relevant period. Moreover, it was indicated that aiding is prescribed in the same manner in Article 31 of the 2003 Criminal Code of BiH as well as in Article 24 of the CC SFRY of 1976 as a form of responsibility in the perpetration of a criminal act. Accordingly, it was indicated that the CC SFRY of 1976 and the 2003 Criminal Code of BiH prescribe identically, more precisely they contain identical elements of the criminal offence of genocide, and regulate in an identical manner the aiding as a form of co-perpetration and a form of responsibility. Therefore, in the opinion of the Appellate Division, it was necessary to compare the prescribed punishments with regards to the criminal offence in question while assessing which law was more lenient to the perpetrator.

14. In this respect, it was indicated first and foremost, when it comes to the criminal offence of genocide, that the 2003 Criminal Code of BiH prescribed the punishment of a minimum of 10 years in prison or long-term imprisonment, and the CC SFRY of 1976 prescribed the punishment of a minimum of five years in prison or a death penalty.

15. The Court of BiH – the Appellate Division found that appellant's position was ill-founded, or a unilateral approach not applicable in the present case, in that it read that the special minimum punishment prescribed should be taken as a starting point in assessing which law was more lenient.

16. It is pointed out in this respect that the criminal offence of genocide is the gravest criminal offence – the crime of crimes, punishable both under domestic and international law. Next, it is indicated that the appellant participated in killing of over 1,000 Bosniak civilians in Srebrenica in one day, held captive on the premises of the Farming Cooperative of „Kravica", thus contributing to the killings, and as an aider to genocide, was found guilty as he himself did not have the genocidal intent, but he was aware of the genocidal intent of others, which is sufficient for establishing that form of responsibility. Therefore, the factual description of the criminal offence, the gravity of the committed crime in which the appellant directly participated is such that, taking into account the criminal policy existing under the former code (*the CC SFRY of 1976*) it would justify the sentencing to death, which was prescribed as an alternative. By prescribing such a punishment, the legislator had an obvious intention to give a possibility of imposing a death penalty for the gravest forms of serious criminal offences, which the criminal offence that the appellant was charged with and consequently found guilty of indubitably is.

17. Next, it is indicated that, although the death penalty was abolished in the meantime (upon the entry into force of the Constitution of Bosnia and Herzegovina), its existence cannot be fully disregarded, and neither could the intention of the legislator be disregarded when it comes to the criminal offences to which it is to be applied. In that respect, it is indicated that the present case concerns an extremely grave criminal offence with immeasurably serious consequences, so that it is justified to ask a question which criminal offence, if not the criminal offence in question, would justify the sentencing to the gravest penalty, i.e. the death penalty.

18. The Court of BiH – the Appellate Division further stated that, unlike the CC SFRY of 1976, which prescribed the death penalty as the gravest punishment, the 2003 Criminal Code of BiH prescribed the punishment of 45 years of long-term imprisonment as the maximum punishment for the criminal offence of genocide. The punishment of long-term imprisonment, which provides for gradation and adjustment of punishment depending on the concrete degree of guilt of the perpetrator so that it can be imposed for a term spanning

between 21 and 45 years in prison, is indubitably more lenient than the death penalty prescribed by the former law.

19. Taking into account the aforesaid, particularly the fact that the nature and gravity of the criminal offence in question is such as to justify the death penalty as the severest punishment under the former code, in the opinion of the Appellate Panel, in the present case, the 2003 Criminal Code of BiH appears to be a more lenient code, as the punishment of long-term imprisonment, regardless of its duration, is in any case more lenient than the death penalty.

IV. Appeal

a) Allegations stated in the Appeal

20. The appellant holds that his right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, as well as the right under Article 7 of the European Convention have been violated by the challenged verdict.

21. The appellant's extensive allegations relating to a violation of his right to a fair trial essentially come down to the assertions that the principle of equality of the parties to the proceedings and the related guarantees of an adversarial procedure were breached; that the facts were established in an erroneous manner as the court incorrectly assessed the evidence, in particular, the testimony of the witness I-3; and that the facts of the case were based on unlawful evidence, the testimonies deposited by the witnesses P.M. and M.S. during the investigation carried out against them in connection with the same event, and that they conducted their defence by remaining silent, and on the facts established by the ICTY, which he opposed during the proceedings; and that the reasoning of the challenged verdict did not satisfy the standards of the right to a fair trial; that the substantive law was misapplied; and, finally, that his right to defence was violated.

22. The appellant claims that his right under Article 7 of the European Convention has been violated. In this respect the appellant referred to the judgment of the European Court in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina*, pointing, *inter alia*, to the position of that Court that Article 7(1) contains a general rule on the prohibition of retroactive application of law, and that the Constitutional Court accepted this position in its decisions following a series of appeals in similar cases. At the same time, the appellant points out that the Constitutional Court in these cases, *inter alia*, took a position that there was neither theoretical nor practical possibility to impose a death penalty at the time of the issuance of the challenged decisions. The appellant indicates that all cases of war crimes, in one way or another, resulted in the loss of lives, and that the Court of BiH applied

the CC SFRY of 1976 in some of them. The appellant specifically refers to the case of *Slavko Perić* who was, as the appellant himself, convicted as an aider in genocide, under the CC SFRY of 1976 though. Corroborating the claim that his right under Article 7 has been violated, the appellant points out that the rule prohibiting retroactive application of penalty has been violated as well. In this respect, the appellant indicated that the penalty of long-term imprisonment was a novelty in the criminal legislation and could not be applied as such to the relations preceding the entry into force of the law prescribing that penalty. Finally, the appellant pointed out that he could not be affected by a more severe law or a more severe penalty because the legislative bodies had failed to react in a timely fashion and amend the nomenclature of penalties, which they did only in 2003.

b) Reply to the Appeal

23. In its reply to the appeal, the Court of BiH offered the thorough reasons for its position that the appellant's allegations were ill-founded insofar as he claimed that his right to a fair trial was violated.

24. As to the appellant's allegations regarding the violation of Article 7 of the European Convention, it was primarily pointed out that the appellant's action had a character of a decisive contribution to the killing of over 1,000 Bosniak men, held captive at the Farming Cooperative of „Kravica". Given the gravity of the criminal offence committed, under the law applicable at the time of its perpetration, i.e. in 1995, the death penalty could have been imposed, alternatively along with the prescribed sentence of 5 to 15 years in prison. Consequently, it was concluded that the 2003 Criminal Code of BiH, which prescribes the punishment of a 10 years prison term, or a long-term imprisonment, is more lenient for the appellant as it does not prescribe a death penalty. Next, it is indicated that a death penalty had not been definitely abolished by the signing of the Dayton Peace Agreement when Protocol No. 6 entered into force, which, *inter alia*, allowed the states to provide for a death penalty in their legislation for criminal offences committed during the war or immediate threat of war, as the circumstances of the present case were, and, finally, that the death penalty was definitely abolished by Protocol No. 13, which into force on 28 May 2003 in Bosnia and Herzegovina entered, i.e. at the time when the 2003 Criminal Code of BiH has already been in force and which, as a punishment framework for the gravest criminal offences, including genocide, provided for the punishment of 10 years in prison or long-term imprisonment. Consequently, it is pointed out that the death penalty could not be neglected, which existed as a prescribed punishment at the time of the perpetration of the criminal offence, for which reason, in the compliance with the principle of a more lenient law, the 2003 Criminal Code of BiH was applied in the appellant's case. Finally, it is indicated that, in doing so, the Court was governed by the position taken in the Decision of the Constitutional Court in the case of *Maktouf* (*AP 1785/06* of 30 March 2007).

25. The Prosecutor's Office of BiH pointed out in its reply to the appeal that the appellant's allegations in the major part were related to the conclusions on facts and, as they held, that was the reason for which an appeal could not be lodged with the Constitutional Court.

26. Next, as to the appellant's allegations relating to a violation of Article 7 of the European Convention, it is indicated that it was undisputed that the criminal code was changed after the perpetration of the criminal offence and that the CC SFRY of 1976, as the law that was inherited, was in force in the Federation of BiH until 1998 and in the Republika Srpska until 2000, and that the Criminal Code of BiH has been applied since 2003 and, therefore, it was necessary to assess, in accordance with the principle of time constraints regarding the applicability of the criminal code, which law was more lenient to the perpetrator. In the opinion of the Office of the Prosecutor of BiH, in evaluating which law is more lenient it is not possible to apply a one-sided approach upon which the appellant insists, i.e. that in evaluating which law is more lenient one should start from the minimum sentence prescribed. In that regard, the Office of the Prosecutor of BiH has pointed out that the criminal offence of genocide is the most severe of criminal offences, under the domestic and international laws alike. In the present case, the appellant participated in the killing of over 1,000 Bosniak civilians from Srebrenica in one day captured at the Farming Cooperative „Kravica", giving his contribution as an aider in genocide. In the opinion of the Office of the Prosecutor of BiH, the gravity of the committed criminal offence in which the appellant directly participated is such that, taking into account the penal policy under the Criminal Code of SFRY from 1976, it would have justified the sentencing to death penalty, which had been the intention of the legislator prescribed for the gravest forms of criminal offences, which beyond doubt is the crime of which the appellant was found guilty. Moreover, although the death penalty had been abolished in the meantime (upon the entry into force of the Constitution of Bosnia and Herzegovina) its existence cannot be neglected and neither can the legislator's intention in respect of the criminal offences to which it should be applied. Given the circumstances of the present case, i.e. that it involves an extremely grave criminal offence, the consequences of which have been immeasurably grave, so that a question arises as to which criminal offence, in the opinion of the Office of the Prosecutor of BiH, if not the criminal offence in question, would justify the imposition of the gravest punishment. In view of the fact that the Criminal Code of SFRY from 1976 prescribed a death penalty for the criminal offence of genocide, while the 2003 Criminal Code of BiH prescribes as a maximum sentence imprisonment in duration of 45 years, which may be adjusted to the circumstances of the present case in the prescribed range of punishment between 21 and 45 years, the Office of the Prosecutor of BiH holds that the 2003 Criminal Code of BiH is in any case a more lenient for the appellant.

27. The Office of the Prosecutor of BiH highlighted that the Constitutional Court, by invoking the positions of the European Court in the *Maktouf and Damjanović* case, had already issued decisions in respect of the appeals of persons sentenced for genocide, taking the position that the Criminal Code of SFRY from 1976 was the more lenient law. However, in the opinion of the Office of the Prosecutor of BiH, the positions of the European Court in the aforementioned decision may not be applied in the present case. Namely, the Office of the Prosecutor of BiH holds that the European Court, in the case of *Maktouf and Damjanović,* did not in any way consider the application of a more lenient law in the cases involving severe consequences, as is the appellant's case, where the appellant had been found guilty of taking part in the killing of over 1,000 captured Bosniak male civilians. It was also pointed out that the Committee of Ministers of the Council of Europe at its session no. 1186 of 5 December 2013 had stressed „that the European Court did not review *in abstracto* whether the retroactive application of the 2003 Code in war crimes cases is, *per se*, incompatible with Article 7 of the Convention" and „that it is the task of domestic courts to assess on a case-by-case basis, taking into consideration the specific circumstances of each case, including those relating to the gravity of individual criminal offences, which law is more lenient for the perpetrator". Accordingly, in the opinion of the Office of the Prosecutor of BiH, in the present case when assessing which law is more lenient the first question to be answered is whether the appellant, at the time when the offence had been committed, could have received a death penalty, thereby bearing in mind that, although the sanction is currently not applicable, it may not be unilaterally removed as though it had never existed.

28. Finally, the Office of the Prosecutor of BiH proposed, in case the Constitutional Court did not accept their arguments and granted the appeal in the present case, i.e. established the violation of Article 7 of the European Convention, that the Court of BiH be ordered to modify the second-instance verdict, not to repel it though.

V. Relevant Law

29. The **Criminal Code of Bosnia and Herzegovina (***Official Gazette of BiH*, 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07 and 8/10) as relevant reads:

Principle of Legality

Article 3

(1) Criminal offences and criminal sanctions shall be prescribed only by law.

(2) No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.

Time Constraints Regarding Applicability

Article 4

(1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.

(2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

Trial or punishment for criminal offences under the general principles of international law

Article 4(a)

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.

Accessory

Article 31

(1) Whoever intentionally helps another to perpetrate a criminal offence shall be punished as if he himself perpetrated such offence, but the punishment may be reduced.

(...)

Imprisonment

Article 42

(1) Imprisonment may be imposed only as principal punishment.

(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.

(...)

Reduction of Punishment

Article 49

The court may set the punishment below the limit prescribed by the law, or impose a milder type of punishment:

a) When law provides the possibility of reducing the punishment;

b) When the court determines the existence of highly extenuating circumstances, which indicate that the purpose of punishment can be attained by a lesser punishment.

Limitations in Reduction of Punishments

Article 50

(1) When the conditions for the reduction of punishment referred to in Article 49 (Reduction of Punishment) of this Code exist, the punishment shall be reduced within the following limits:

a) If a punishment of imprisonment of ten or more years is prescribed as the lowest punishment for the criminal offence, it may be reduced to five years of imprisonment;

(...)

(2) When deciding on the extent of reducing punishments in accordance with the rules set forth in paragraph 1 of this Article, the court shall take into special consider action the smallest and the largest punishment prescribed for the particular criminal offence.

Genocide

Article 171

Whoever, with an aim to destroy, in whole or in part, a national, ethnical, racial or religious group, orders perpetration or perpetrates any of the following acts:

a) Killing members of the group;

b) Causing serious bodily or mental harm to members of the group;

c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

d) Imposing measures intended to prevent births within the group;

e) Forcibly transferring children of the group to another group, shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

30. The **Criminal Code of SFRY** (*Official Gazette of SFRY*, 44/76, 36/77, 34/84, 74/87, 57/89, 3/90, 38/90 and 45/90) as relevant reads:

Aiding

Article 24

(1) Anybody who intentionally aids another in the commission of a criminal act shall be punished as if he himself had committed it, but his punishment may also be reduced.

Capital punishment

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.

(...)

(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.

Imprisonment

Article 38

(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.

(...)

Reduction of punishment

Article 42

The court may set the punishment below the limit prescribed by statute, or impose a milder type of punishment;

1) when provided by statute that the offender's punishment may be reduced;

2) when it finds that such extenuating circumstances exist which indicate that the aims of punishment can be attained by a lesser punishment.

Mode of reducing punishments

Article 43

(1) When there are conditions for the reduction of punishment referred to in Article 42 of this law, the court shall reduce the punishment within the following limits:

1) if a period of three years' imprisonment is prescribed as the lowest limit for the punishment for a criminal act, it may be reduced for a period not exceeding one year of imprisonment;

(...)

In deciding on the extent of the reduction of punishment under the rules set forth in paragraph 1 of this article, the court shall take into special consideration the smallest and the biggest punishment prescribed for the particular criminal act.

Genocide

Article 141

Whoever, with the intention of destroying a national, ethnic, racial or religious group in whole or in part, orders the commission of killings or the inflicting of serious bodily injuries or serious disturbance of physical or mental health of the group members, or a forcible dislocation of the population, or that the group be inflicted conditions of life calculated to bring about its physical destruction in whole or in part, or that measures be imposed intended to prevent births within the group, or that children of the group be forcibly transferred to another group, or whoever with the same intent commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

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

Article 10
Legally Invalid Evidence

(1) It shall be forbidden to extort a confession or any other statement from the suspect, the accused or any other participant in the proceedings.

(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 12
Instruction on Rights

The Court, Prosecutor and other bodies participating in the proceeding shall instruct a suspect or the accused or any other participants in the criminal proceedings, who could, out of ignorance, fail to carry out a certain action in the proceeding or fail to exercise his rights, on his rights under this Code and the consequences of such failure to act.

Article 14
Equality of Arms

(1) The Court shall treat equally the parties and the defence attorney and provide each party an equal opportunity with regards to the access to evidence and the presentation thereof at the main trial.

(2) 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 47
The Right of a Defence Attorney to Inspect Files and Documentation

(1) During an investigation, the defence attorney has a right to inspect the files and obtained items that are in favour of the suspect. This right can be denied to the defence attorney if the disclosure of the files and items in question would endanger the purpose of the investigation.

(...)

(3) After the indictment is issued the defence attorney of the suspect or accused has a right to inspect all files and evidence.

(4) Upon obtaining any new piece of evidence or any information or facts that can serve as evidence at a trial, the preliminary proceedings judge, the judge or the Panel, as well as the Prosecutor, shall be bound to submit them for inspection to the defence attorney.

Article 226
Issuance of the indictment

(...)

(2) After the issuance of the indictment, the suspect or the accused and the defence attorney have a right to examine all the files and evidence.

(...)

Article 290
The Contents of the Verdict

(...)

(6) In the opinion of the verdict, the Court shall present the reasons for each count of the verdict.

(7) The Court shall specifically and completely state which facts and on what grounds the Court finds to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence, the reasons why the Court did not sustain the various motions of the parties, the reasons why the Court decided not to directly examine the witness or expert whose testimony was read, and the reasons guiding the Court in ruling on legal matters and especially in ascertaining whether the criminal offense was committed and whether the accused was criminally responsible and in applying specific provisions of the Criminal Code to the accused and to his act.

(...)

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 challenged by the appeal is the Verdict of the Court of BiH no. S1 1 K 003442 12 Kžk of 17 June 2013, against which there are no other effective remedies available under the law. Furthermore, the appellant received the challenged judgment on 13 September 2013 and the appeal was filed on 11 November 2013, *i.e.* within the 60-day time-limit 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 rendering the appeal inadmissible.

35. Having regard to 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 establishes that the appeal meets the admissibility requirements.

VII. Merits

36. The appellant challenges the aforementioned verdict claiming that his rights under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention and Article 7 of the European Convention have been violated.

Right to a fair trial

37. Article II(3) of the Constitution of BiH, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

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

38. Article 6(1) of the European Convention, as relevant, reads:

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

39. The appellant's allegations relating to a violation of his right to a fair trial essentially come down to the assertions that the principle of equality of the parties to the proceedings and the related guarantees of adversarial procedure were breached; that the facts were established in an erroneous manner as the court incorrectly assessed the evidence, in particular, the testimony of the witness I-3; and that the statement of facts was based on unlawful evidence, and the facts established by the ICTY, which he opposed during the

proceedings; that the reasoning of the challenged verdict did not satisfy fair trial standards; that the substantive law was misapplied; and, finally, that his defence rights were violated.

40. The Constitutional Court recalls that, when it comes to the criminal procedure, the universal guarantee of „a fair trial" referred to in Article 6(1) of the European Convention has elements which amend the specific guarantees set forth in Article 6(2) and (3) (see, European Court of Human Rights, *Artico v. Italy*, A 37 (1980)). When it comes to the case which falls under some of the specific guarantees set forth by Article 6(2) and (3) it can be considered within the scope of those guarantees (see, European Court of Human Rights, *Luedicke v. FRG,* A 29 (1978); 2 EHRR 149*)* or in conjunction with Article 6(1) (see, European Court of Human Rights, *Benham v. The United Kingdom*, 1996-III; 22 EHRR 293 GC). However, if the application essentially relates to the assertion that the procedure as a whole, including the appellate procedure, was unfair, the allegations are to be examined within the meaning of Article 6(1) (see, European Court of Human Rights, *Edwards v. The United Kingdom*, A 247-B (1992); 15 EHRR 417, paras 33-34).

41. In the specific case, the appellant raises the issues in relation to guarantees set forth by Article 6(1), (2) and (3) which, in essence, relate to the assertion that the procedure, as a whole, was not fair, thus the Constitutional Court will examine his allegations in that sense.

42. The appellant primarily asserts that the principle of equality of arms between the parties to the proceedings was violated in connection with the guarantees of an adversarial procedure. In support of this assertion the appellant indicates that the court favoured the evidence presented by the Prosecutor's Office of BiH in a way that it gave them full credence when they were to the detriment of the appellant, that it was made impossible for the appellant to cross-examine the witness I-3 as the witness for the Prosecutor's Office of BiH, which was the reason why he had to summon him as his witness, thus the burden of proof was transferred on the appellant, that the court neglected the appellant's procedural objections regarding other mentioned witnesses, and finally, that the Prosecutor's Office of BiH failed to make available all the materials that it had at its disposal.

43. The Constitutional Court recalls that, according to the stance of the European Court of Human Rights („the European Court"), the principle of equality of arms requires that each party be given a reasonable possibility to present their case under the conditions which do not put them in a substantially more unfavourable position when compared to the opponent party (see, European Court of Human Rights, amongst others, *G.B. v. France,* Application no. 44069/98, paragraph 58, ECHR 2001-X). Next, the principle of equality of arms is but one feature of the right to a fair trial, as a wider concept, which

also includes the fundamental right that the criminal procedure ought to be an adversarial procedure. The right to an adversarial procedure in a criminal procedure means that both the prosecutor and the accused must be given a possibility to get to know each other and to comment on the observations and evidence of the opponent party (see, European Court of Human Rights, *Brandstetter v. Austria*, Judgment of 28 August 1991, paras 66 and 67, Series A, no. 211). Next, Article 6(1) requires the Prosecutor to disclose all material evidence he/she possesses in favor or against the accused (see, *mutatis mutandis*, *Rowe and Davis*, Judgment of 16 February 2000, paragraph 60). Finally, the right of the accused to cross-examine the witness against him is the crucial element of the right contained in Article 6(3)(d) of the European Convention and the right to an adversarial procedure within the meaning of Article 6(1) of the European Convention.

44. In support of the assertion that the principles of equality of arms and the adversarial procedure were violated, the appellant first and foremost indicated that the ordinary court favoured the evidence of the Prosecutor's Office of BiH whenever they were to the appellant's detriment and it gave credence to them. In that respect the Constitutional Court observes that the appellant did not claim that he was denied a possibility to confront his evidence to the evidence of the Prosecutor's Office and to challenge at the main trial the evidence presented by the Prosecutor's Office of BiH. In that sense it is not possible to accept the appellant's unreasoned allegations as to the procedural objections in relation to the examination of certain witnesses of the Prosecutor's Office of BiH, because the appellant did not reason as to what they comprised or how they put him in a less favourable position in comparison to the opponent party. Finally, the Constitutional Court observes that the reasoning of the challenged judgments did not omit thorough reasons and reasoning as to which evidence were given credence, and that the conclusions were based on careful and conscientious assessment of evidence individually and in connection with other presented evidence. Further, the appellant stated that he was denied a possibility to cross-examine the witness I-3 as the witness of the Prosecutor's Office of BiH, so he had to summon him as his witness, but even then he had to limit his examination only to the testimonies of the said witness in which he had mentioned the appellant. Due to the aforementioned the appellant held that the burden of proof was transferred on him. The Constitutional Court recalls that the right of the accused to cross-examine the witness is not an absolute right and that it may be subject to limitations, but that these limitations cannot be such as to bring into question the equality of the parties to the proceedings. In the specific case, the appellant did not claim that he was denied the right to cross-examine this witness regarding the circumstances concerning the existence of the criminal offence and of the appellant's criminal responsibility. In doing so, the Constitutional Court observes that the testimonies of this witness, which he had given in other proceedings before the Court of BiH regarding

the same event, in the proceeding before the Appellate Panel, were different and were included upon the appellant's proposal in the evidentiary material, and the court assessed them individually and in connection with other evidence. Finally, it was made possible for the appellant himself to summon the mentioned witness to examine him in order to refute his testimonies before the court deciding in the appellant's case. Accordingly, it follows that the appellant's allegations were ill-founded in this part too. Finally, the appellant claims that the Prosecutor's Office of BiH denied him the access to materials available to the Prosecutor's Office, i.e. that he did not have access to the statements of the witnesses testifying in other cases before the Court of BiH regarding the same event, the testimonies of persons heard by the Prosecutor's Office of BiH regarding the same event but who were not proposed as witnesses and that he had no access to „other relevant materials". As to this part of the appellant's allegations, the Constitutional Court notes, as also stated by the appellant, that it relates to the evidence collected in other cases, i.e. criminal proceedings to establish the criminal liability of the persons against whom they were conducted. In this regard, the mere fact that the criminal proceedings, as claimed by the appellant, pertained to the same event cannot suffice to assess that the evidence collected in that way had relevance to the appellant's case. In addition, the appellant does not assert that any piece of the evidence was used in the course of the proceedings, i.e. that the challenged verdict was based on such evidence or, in case that any piece of the evidence was used, that he was denied the right to comment on the evidence or to dispute them. Finally, the appellant does not state, and it is also not possible to conclude from the reasoning of the challenged verdict, that he made this objection at the main trial before the Appellate Division, so that it failed to comment it or it dismissed the objection as ill-founded. All the more so because at the main trial the Appellate Division, as already noted in the present decision, accepted and presented the evidence proposed by the appellant, which had been rejected by the first instance panel. Therefore, the Constitutional Court cannot accept as well-founded the appellant's allegations in this part.

45. Next, the appellant claimed that the facts of the case were erroneously established. However, the essence of the appellant's allegations in this part, actually, refers to the assertion that the court was unable to give credence to the testimony of the witness I-3 because, as he claimed, it was challenged by numerous testimonies of witnesses for both the prosecution and the defence, as well as that it concerned the witness who, in the appellant's opinion, cannot be a credible witness, among other things due to the fact that he had entered a Guilty Plea Agreement. Finally, in this part the appellant indicated that the testimonies of witnesses M.S. and P.M, which they had given in the investigation conducted against them, were used, which, in his opinion, constitute unlawful evidence.

46. As to this portion of the allegations stated in the appeal the Constitutional Court recalls that it is outside its jurisdiction to appraise the quality of the courts' conclusions with respect to the assessment of evidence if this assessment does not appear to be manifestly arbitrary. Likewise, the Constitutional Court will not interfere with the manner in which the ordinary courts had accepted evidence as evidentiary material. The Constitutional Court will neither interfere with the situation where the ordinary courts give credence to evidence of one party to the proceeding on the basis of the court's assessment. It is solely the role of ordinary courts, even when the statements given by witnesses in open court and on oath are in conflict (see, European Court of Human Rights, *Doorson v. The Netherlands*, Judgment of 6 March 1996, published in Reports no. 1996-II, paragraph 78). The Constitutional Court emphasized that, in doing so, the ordinary court was not bound or limited by special formal evidentiary rules, but that the margin of appreciation in assessing evidence requires the reasoning of each piece of evidence separately as well as of all evidence together, and the linking of all the presented evidence mutually and logically. Further, according to the position of the European Court of Human Rights it is necessary to establish whether the person concerned was offered a possibility to challenge the validity of evidence and to confront them; the quality of evidence must be assessed including the fact whether they were taken in the circumstances casting doubt on their reliability and authenticity (see, European Court of Human Rights, among others, *Sevinç et al. v. Turkey* (dec.), Application no. 8074/02 of 8 January 2008; *Bykov v. Russia* [GC], Application no. 4378/02, paragraph 90, of 10 March 2009). In this context the task of the Constitutional Court is to examine whether evidence in favor or against the person concerned were presented in a way so as to ensure a fair proceeding (see, *mutatis mutandis*, European Court of Human Rights, *Barım v. Turkey* (dec.), Application no. 34536/97 of 12 January 1999). Further, the Constitutional Court pointed to the case-law of the European Court of Human Rights that the acceptance of unlawfully obtained evidence not only constitutes by itself a violation of Article 6 of the European Convention, but that this fact can have a bearing on the fairness of the proceedings as a whole, depending on the circumstances of the specific case (see, European Court of Human Rights, *Schenk v. Switzerland*, Judgment of 12 July 1988, Application no. 1086/84, Series A-140, paragraph 49).

47. The Constitutional Court observes that the appellant, first and foremost, presented the claims that the court could not have given credence to the testimony of the witness I-3. In that respect he stated that this witness had changed his testimony several times, as well as that his testimony had been challenged by the testimonies of the witnesses for the prosecution and for the defence, and lastly that the conclusion of the ordinary court was wrong reading that the differences in the testimonies of this witness arose from the fact that this witness was not asked about the appellant in the testimonies in which there was no

mention of the appellant. In relation to this part of the allegations the Constitutional Court, first and foremost, points out that the reasoning of the challenged judgment reads that this witness's testimony was one of the crucial pieces of evidence against the appellant, and that that was the reason why special attention was paid to it. Further, it was indicated that even as such, the testimony of this witness had the character of a corroborating piece of evidence as it concerned a person who had been an accomplice in the perpetration of the same criminal offence and who previously entered into a Guilty Plea Agreement. Moreover, at the trial held before the Appellate Department the appellant was allowed to present different testimonies of this witness which he had given about the same event both in the proceeding conducted against him and in the proceedings against other persons conducted regarding the same event, as well as the statements of this witness given subsequently in which he denied all his previous testimonies. Assessing these testimonies individually and in connection with other presented evidence, the Appellate Department concluded that they were matching regarding the crucial facts i.e. the appellant's presence and participation in the incriminated actions he was charged with. The fact that in certain testimonies this witness failed to mention the appellant, according to the court, concerned solely the circumstances regarding which the witness I-3 gave a testimony, which did not apply to the appellant. Namely, as indicated in the reasoning of the challenged judgment, this witness had testified in a number of proceedings that had been conducted against different persons regarding the same event, which is the reason why his testimonies were focused on specific proceedings and specific persons. Also, the Appellate Department provided in the reasoning of the challenged judgment thorough reasons as to why the credibility of this witness was not brought into question by the fact that he had entered a Guilty Plea Agreement, which was made conditional upon his appearing as a witness in other proceedings against other persons regarding the same event. In that respect the testimonies of the witness I-3 were pointed to in which he was explicit that there were some of the persons against whom also criminal procedure was conducted regarding the same event, as well as that in relation to the appellant he changed his testimony in which he claimed that the appellant too had shot at prisoners, for which he apologized to him.

48. Further, regarding the appellant's assertion that the relevant facts had been established on the basis of unlawful evidence, the Constitutional Court observes that the reasoning of the challenged judgment did not miss to mention thorough reasons and reasoning regarding this allegation. Namely, it was indicated that the testimonies of witnesses M.S. and P.M. from the investigation were accepted as evidence, which they had given in accordance with Article 78 of the Criminal Procedure Code of BiH (2005) which was applicable at the time, i.e. in the presence of their respective defence counsels and having been informed in advance of their rights. At the time the cited legal provision did not regulate that the

suspect must be informed of the fact that his/her testimony from the investigation might be used as evidence at the main trial and without his/her consent, as regulated by amendments to the Law of 2008, on which the appellant based the claims of unlawfulness of these two testimonies, as well as on the fact that these two witnesses in the proceeding against them had exercised silence as their defence. In that respect it was indicated that the testimonies of these two witnesses from the investigation were assessed as an integral part of their testimonies that they had given as witnesses in the proceeding against the appellant, and that as such they were linked to the rest of the presented evidence. In view of the aforementioned, the conclusion of the Appellate Department that this does not concern unlawful evidence, and that these persons in the proceeding against the appellant had the capacity of witnesses and not of suspects, which is the reason why the possible violation of the right to silence was not brought into question, contrary to the appellant's assertions, does not point to a conclusion that these pieces of evidence could not be accepted as evidentiary material.

49. In view of the aforementioned, the Constitutional Court could not accept as well-founded the appellant's allegations that the facts of the case were erroneously established, as it was based on the testimony of the witness I-3 and, as he claimed, on unlawful evidence, the testimonies of witnesses M.S. and P.M. from the investigation.

50. Finally, in relation to the erroneously established facts of the case the appellant noted that the decision on the existence of a criminal offence and his guilt was based on the facts that had been established in the decisions of the ICTY, which he opposed during the proceeding. The Constitutional Court observes that the reasoning of the challenged judgment indicated that all the facts established in the ICTY Judgment in the case of *Blagojević and Jokić*, which had been accepted by the first-instance chamber, and that upon the appellant's proposal the facts from this case were also accepted as proven, as well as the facts from the case of *Vujadin Popović*, and the case of *Krstić*. Further, the Constitutional Court recalls that, in accordance with Article 4 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Courts in BiH, regulates that a court may, after hearing the parties, decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY. However, these facts do not have the quality of absolute facts, and may be challenged during a criminal procedure if there is a valid reason or justified basis for doing so. In the present case the appellant had availed himself of this legal possibility and proposed in support of his defence, which was accepted, that the facts in the ICTY cases, which he had referred to, be accepted as proven. In doing so, the Constitutional Court observes that the appellant did not claim that,

regarding the facts that were accepted as established upon the proposal of the Prosecutor's Office of BiH, he was denied a possibility to challenge them during the proceeding. Lastly, on the basis of the reasoning of the challenged judgments it is not possible to conclude that these facts had been crucial in establishing the appellant's criminal responsibility and his participation in the incriminated event. In view of the aforementioned, the Constitutional Court could not accept as well-founded the appellant's allegations in this part.

51. Further, the appellant claims that the challenged judgment does not meet the standard of a reasoned decision within the meaning of the right to a fair trial. The appellant claims that the court had presented evidence but that it failed to link them mutually and that they were not linked to the allegations stated in the indictment and the elements of a criminal act, which is the reason why he deems that the reasons were missing on the basis of which it was concluded that he had committed the criminal offence and that he carries criminal responsibility.

52. In relation to this portion of the allegations the Constitutional Court recalls that, according to the case-law of the European Court of Human Rights, domestic courts have the responsibility to reason their judgments whereby they do not need to give detailed replies to each and every allegation made by the parties. Furthermore, the European Court of Human Rights and the Constitutional Court have indicated in numerous decisions that domestic courts have a certain margin of appreciation as to the arguments and evidence which they are to accept in a given case, however, at the same time, they have the obligation to reason their respective decisions by providing clear and reasonable reasons on which they based that decision (see, European Court of Human Rights, *Suominen v. 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). The purpose of the obligation to have a reasoned decision is also to show that it was made possible for the parties to the proceedings to be heard on an equal footing and in a fair manner in a proceeding before the court (see, European Court of Human Rights, *Kuznetsov et al. v. Russia,* Judgment of 11 January 2007, Application no. 184/02).

53. The Constitutional Court observes that the indictment charged the appellant with the crime of genocide referred to in the Criminal Code of BiH from 2003 prescribed in Article 172(1)(a) – killing members of the group of people, and item (b) – causing serious bodily or mental harm to members of the group. On the basis of the presented evidence the Appellate Department concluded that the Prosecutor's Office of BiH failed to prove that the appellant had committed the acts described in Article 172(1)(b) of the Criminal Code of BiH from 2003, and found him guilty solely for the acts referred to in item (a) of the

mentioned article. The Appellate Department based this conclusion on evidence that were presented during the proceeding, which it assessed individually and together, on the basis of which it concluded that the appellant had been in the territory of Srebrenica during the relevant period; that as a police officer, a special unit member, he had contributed to the imprisonment of men members of the Bosniak people who had surrendered themselves; that he had taken part in escorting these persons to the „Kravica" Farming Cooperative where the mentioned group of people had been imprisoned in inhumane conditions, and finally that he had been securing the rear of the facility of the „Kravica" Farming Cooperative in order to prevent the flight of the prisoners when killings had started, that is to say that he had committed acts that the indictment charged him with in the part he was found guilty of. The reasoning of the challenged judgment enumerated in detail the evidence that were presented regarding these circumstances, each piece of evidence had been assessed individually and in connection with other evidence, on the basis of which the appellant's participation and role in the mentioned acts was established. Further, given that the appellant was found guilty of a criminal offence of genocide, which he had committed as an accomplice, the reasoning of the challenged judgment analyzed in detail the circumstances and reasons, and the appellant's capacity, on which basis it was concluded that the appellant did not have a genocidal intent, i.e. the extermination of Bosniaks as a national, ethnic and religious group, as part of the plan of total extermination of the Bosniak population of Srebrenica. However, it was concluded that the appellant had acted with intent in relation to the killing of the imprisoned Bosniak men in the „Kravica" Farming Cooperative, because, for the reasons enumerated and reasoned in detail in the challenged judgment, he was aware of the mentioned objective and the genocidal intent of the chief perpetrators. In view of the aforementioned, the Constitutional Court could not accept as well-founded the appellant's allegations in this part.

54. Furthermore, the appellant indicated that his right to defence was violated, but failed to elaborate specifically on this allegation. In view of the aforementioned, bearing in mind that the rest of the appellant's allegations concerning the right to a fair trial were examined in detail and that it was concluded that they were ill-founded, and that, on the basis of the presented documents, it was not possible to establish the existence of anything whatsoever indicative of a violation of this right of the appellant, the Constitutional Court will not engage in separate examination of the appellant's allegation.

55. Finally, the appellant's allegations relating to a violation of his right to a fair trial based on an erroneous application of the substantive law in the challenged verdicts will be considered together with the appellant's allegations relating to a violation of Article 7 of the European Convention.

56. The Constitutional Court holds that the appellant's allegations are ill-founded where he claims the violation of the principle of equality of arms between the parties to the proceedings relating to the adversarial procedure, the evidence presented and assessed and, accordingly, the statement of facts established, as well as the reasons offered in the challenged verdict, i.e. that the circumstances of the specific case do not disclose anything leading to the conclusion that the criminal proceedings conducted against the appellant, as a whole, were unfair.

57. The Constitutional Court concludes that the appellant's allegations as to the violation of the right to a fair trial referred to in Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention are ill-founded.

No punishment without law

58. The appellant claims that the challenged verdict has violated his right under Article 7 of the European Convention.

59. Article II(2) of the Constitution of Bosnia and Herzegovina 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.

60. Article 7 of the European Convention reads:

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

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

61. In essence, the appellant's allegations in this part can be reduced to the claim that in his case there ought to have been applied the 1976 Criminal Code of SFRY as the law applicable at the time of the perpetration of the criminal offence of which he had been found guilty and which was more lenient for him, and not the 2003 Criminal Code of BiH, and that the long-term imprisonment sentence could not be imposed upon him because that penalty is new in domestic law and may not be applied to events which preceded time-wise the entry into force of the law which prescribed it for the first time. In support

of these allegations the appellant indicated the judgment of the European Court in the case of *Maktouf and Damjanović v. BiH*, the decisions of the Constitutional Court in cases for which he claimed to be similar to his, as well as the case law of the Court of BiH, particularly singling out the case of *Slavko Perić*, who had been found guilty by a first instance verdict of aiding in the criminal offence of genocide under the 2003 Criminal Code of BiH, whereas, pursuant to the second instance verdict, he was found guilty of the same criminal offence under the 1976 Criminal Code of SFRY though.

62. In that respect, the Constitutional Court primarily indicates that the case involves a criminal offence which is prescribed in the provisions of the Criminal Code of BiH, its Article 171, Chapter XVII - Crimes against Humanity and the Values Protected by International Law, i.e. which was prescribed in the provisions of the Criminal Code of SFRY in Article 141, Chapter XVI – Crimes against Humanity and International Law. This is a criminal offence from the group of the so-called war crimes. This is to say that these concern a crime falling in the group of the so-called war crimes. Therefore, the Constitutional Court will examine the challenged decisions in respect of the compatibility thereof with Article 7 of the European Convention.

63. The Constitutional Court indicates that the European Court in the case of *Scoppola v. Italy* (see the European Court, *Scoppola v. Italy,* no. 10249/03, of 17 September 2009) took a position that it was necessary to depart from the case-law established by the Commission in the case of *X v. Germany* and established that Article 7(1) of the European Convention did not guarantee only the principle of prohibition of retroactive application of the more severe criminal code but also, implicitly, it guaranteed the principle of retroactive application of the more lenient criminal code. This principle is enunciated in the rule reading that in the event of a difference between the criminal code in force at the time of the perpetration of a criminal offence and criminal codes enacted and entered into force subsequently and prior to the adoption of a final judgment, courts must apply the law which provisions are most favourable to the accused.

64. The Constitutional Court recalls that the European Court of Human Rights („the European Court") had already considered in its hitherto case-law applications raising similar legal issues in respect of the possible violation of Article 7 of the European Convention, in two cases (in which the Court of BiH had adopted decisions) namely the case of the applicant Boban Šimšić (see, European Court of Human Rights, *Boban Šimšić v. Bosnia and Herzegovina*, Decision on Admissibility of 10 April 2012, Application no. 51552/10; „the Šimšić Case"), and in the case of the applicants Abduladhim Maktouf and Goran Damjanović (see, European Court of Human Rights, *Maktouf and Damjanović*

v. Bosnia and Herzegovina, Judgment of 18 July 2013, Applications nos. 2312/08 and 34179/08; „the Maktouf and Damjanović Case").

65. In this respect, the Constitutional Court observes that the European Court dismissed in the Šimšić Case as manifestly ill-founded the application in which the applicant pointed to the violation of Article 7 of the European Convention, on account of the fact that the criminal offence of crimes against humanity, which he was found guilty of and punished for, had not constituted a crime under domestic law during the time of war from 1992 to 1995. The European Court stated in the mentioned decision, among other things, that the offences, which the applicant was sentenced for, had not constituted a crime against humanity under domestic law until the entry into force of the 2003 Criminal Code of BiH, but that it is evident that the impugned acts constituted, at the time when they were committed, a crime against humanity under the international law (paragraph 23 of the Judgment), which implies that the European Court considered this case under Article 7(2) of the European Convention. Finally, the European Court concluded in the present case that the applicant's acts, at the time when they were committed, constituted an offence defined with sufficient accessibility and foreseeability by international law. Thus it dismissed the allegations related to Article 7 of the European Convention as manifestly ill-founded (paragraph 25 of the Judgment).

66. Further, the Constitutional Court observes that, on the other hand, the European Court found a violation of Article 7 of the European Convention in the *Maktouf and Damjanović* Case. In the mentioned judgment, first and foremost, the European Court noted that some crimes, notably crimes against humanity, were introduced into the national law only in 2003, so the courts therefore have no other option but to apply the 2003 Criminal Code of BiH in such cases. However, it was indicated that the respective applications raise entirely different questions to 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 they were committed (paragraph 55).

67. In that regard, the Constitutional Court points out that in its most recent case-law (see, *inter alia*, Decision on Admissibility and Merits no. *AP 325/08* of 27 September 2013, „the Damjanović Case", and Decision on Admissibility and Merits no. *AP 5161/10* of 23 January 2014, „the Đukić case", available at www.ustavnisud.ba), which follows the case-law of the European Court developed in the case of *Maktouf and Damjanović*, who were also, as the appellants in the quoted cases of the Constitutional Court, found guilty of committing the war crimes against the civilian population under Article 173 of the Criminal Code of BiH, it established that a violation of Article 7(1) of the European Convention

occurred, because there was a realistic possibility that the retroactive application of the Criminal Code of BiH, in a situation where the respective criminal offence had existed as such in the provision of Article 142 of the Criminal Code of SFRY, was to the detriment of the applicants/appellants in respect of the sentencing, which is in contravention of Article 7(1) of the European Convention.

68. The Constitutional Court highlights that the decisions cited above noted that it was not the task of the European Court [neither is it the task of the Constitutional Court] to review *in abstracto* whether the retroactive application of the 2003 Criminal Code of BiH in war crimes cases is, *per se*, incompatible with Article 7 of the European Convention, but that this matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts have applied the law which provisions are most favourable to the defendant (paragraph 65).

69. The cited decisions further highlighted that the definition of war crimes the applicants were found guilty of is the same in both the Criminal Code of SFRY and the Criminal Code of BiH, which was applied retroactively in the present case. However, it was indicated that these two laws offered a different range of sentences for war crimes. Further, it was noted that the European Court did not accept the arguments stating that the Criminal Code of BiH was more lenient for the applicants than the Criminal Code of SFRY, as it did not prescribe death penalty. Having examined the length of sentences imposed on the applicants and the sentences that the applicants could possibly receive depending on the law that would be applied in their cases, the European Court concluded that the Criminal Code of SFRY was more lenient as it provided the possibility of imposing shorter prison sentences. In the mentioned decision, the European Court also stated that the sentences imposed on the applicants were within the latitude of both the Criminal Code of SFRY and the Criminal Code of BiH and, therefore, it could not be said with any certainty that either applicant would have received lower sentences had the Criminal Code of SFRY been applied. Nevertheless, the European Court pointed out the following: *What is crucial, however, is that the applicants could have received lower sentences had that Code (note: CC SFRY) been applied in their cases* (paragraph 70).

70. The Constitutional Court holds that a general (abstract) position cannot be taken as to which of the two criminal codes (the CC SFRY and the CC BiH) provides a „more lenient" or „heavier" penalty for the criminal offence concerned and, in this regard, an abstract conclusion cannot be reached as to which of the two criminal codes should be applied (in the cases where both laws prescribe specific criminal offences relating to war crimes charges contained in the indictment) for the reason that that law stipulates „a more lenient

penalty". It will be possible to reach such a conclusion only on a case-by-case basis and it is highly likely that the mentioned codes (the CC SFRY and the CC BiH) will be applied differently given that, as already stated, one and the same law, depending on concrete circumstances of each particular case, may prove to be more lenient in one situation or, in another, it may be more stringent in respect of the penalty that is to be imposed. In the view of the Constitutional Court it may be concluded that in cases where the respective criminal offence was incriminated in both codes (in the code applicable at the time of the perpetration of an offence and in the subsequently enacted code), it is mandatory to examine, in accordance with the second sentence of Article 7(1) of the European Convention, which of the two or more codes adopted successively foresees a more lenient penalty and then to apply that code, *i.e.* the code prescribing a more lenient penalty (the *favor rei* principle). In so doing it is necessary to be mindful of the relevant issues as are the minimum and maximum prescribed penalty, conditions for mitigating the penalty and other things.

71. The Constitutional Court points out that the appellant, by the challenged verdict, was found guilty of and sentenced for committing the criminal offence of genocide referred to in Article 171 of the Criminal Code of BiH. The Constitutional Court notes that the definition of the criminal offence of genocide in Article 141 of the Criminal Code of SFRY, applicable at the time of the perpetration of the criminal offence concerned (in 1995), is identical to that in Article 171 of the Criminal Code of BiH, which was applied retroactively in the specific case. In view of the above, it follows that the appellant was found guilty of the criminal offence which, as such, *had constituted a criminal offence at the time the criminal offence was committed* (within the meaning of the first sentence of Article 7(1) of the European Convention), and this fact, within the meaning of the guarantees specified in the second sentence of Article 7(1) of the European Convention, implies an obligation of the Constitutional Court to examine that *the sanction to be imposed is not heavier than the one applicable at the time the criminal offence was committed*. In view of the above, the Constitutional Court points out that the appellant, by the application of the provisions of the Criminal Code of BiH, was ultimately imposed the sentence of long-term imprisonment for a term of 24 years.

72. In this connection, the Constitutional Court notes that the CC SFRY and the CC BiH provide the different scope of sanctions prescribed for the criminal offence of genocide that the appellant was found guilty of. Namely, under the CC SFRY, the criminal offence concerned was punishable by imprisonment for a term of 5-15 years or, for the most serious cases, the death penalty, instead of which a 20-year prison term could be imposed. Under the CC BiH, the criminal offence concerned was punishable by imprisonment

for a term of 10 years or a long-term imprisonment. First, as to the minimum sentence prescribed, it is evident that the CC SFRY prescribes a lower minimum sentence. In addition, the appellant was found guilty of committing the criminal offence of genocide as an aider. In this connection, the Constitutional Court notes that the CC BiH and the CC SFRY prescribe that aiders of criminal offences are to be punished as if they themselves had committed the crimes, but their punishment could be reduced. In addition, under the CC SFRY, the punishment could be reduced to one year prison term, whereas under the CC BiH, the punishment could be reduced to five year prison term. However, the Constitutional Court points out that there was a possibility in the specific case that, given the criminal acts the appellant was charged with, the manner of perpetration of the criminal offence and its consequences, that is, given that it related to the gravest form of war crimes, the appellant as an aider could receive the severest punishment prescribed by law only for the gravest forms of war crimes. Therefore, there was a possibility to impose the severest punishment on the appellant in the specific case.

73. The Constitutional Court observes that the Court of BiH – the Appellate Division imposed on the appellant the sentence of long-term imprisonment for a term of 24 years. In this connection and in the context of the maximum (the most severe) penalty prescribed by law that can be pronounced for this criminal offence, the Constitutional Court notes that the provisions of Article 37(1) of the CC SFRY stipulate *that the death penalty may not be imposed as the only principal punishment for a certain criminal act*, and that the provisions of Article 38(2) also stipulate that *the court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty*. In addition, the Constitutional Court points out that according to the aforementioned provisions it follows that the death penalty, therefore, was not the only maximum penalty prescribed for the criminal act committed by the appellant but, as an alternative to the death penalty, a punishment of imprisonment for a term of 20 years could be imposed in certain cases. Therefore, the Constitutional Court notes that a punishment of imprisonment for a term of 5 to 15 years or a punishment of imprisonment for a term of 20 years or the death penalty were stipulated for the criminal offence of genocide under the CC SFRY.

74. In that context, the Constitutional Court indicates that, beyond any dispute, the death penalty, prescribed by the CC SFRY as the maximum penalty for the criminal offence in question, is more severe than the penalty of long-term imprisonment, prescribed as the maximum penalty by the CC BiH. However, the Constitutional Court recalls that Article II(2) of the Constitution of Bosnia and Herzegovina prescribes that the rights and freedoms as provided for in the European Convention and Protocols thereto are directly applicable in Bosnia and Herzegovina, and that these acts have priority over all other

law. In this respect, the Constitutional Court indicates that upon the entry into force of the Constitution of Bosnia and Herzegovina (on 14 December 1995) also Protocol No. 6 to the European Convention entered into force, prescribing that the death penalty is to be abolished (Article 1), and that a state may in its legislation stipulate the death penalty for the offences committed in the time of war or imminent threat of war (Article 2). Moreover, the Constitutional Court indicates that subsequently, on 3 May 2002, at the level of the Council of Europe, Protocol No. 13 to the European Convention was adopted prescribing the abolishment of the death penalty in all circumstances, which Bosnia and Herzegovina ratified on 28 May 2003. Having in mind the foregoing, the Constitutional Court indicates that it clearly follows from the abovementioned that at the time of the issuance of the challenged decisions on 17 June 2013 there was neither a theoretical nor practical possibility for the death penalty to be imposed on the appellant for the criminal offence in question.

75. The Constitutional Court recalls that the issue of the status of death penalty had been already previously considered in the Decision of the Human Rights Chamber for BiH in the case of *Sretko Damjanović v. BiH no. CH/96/30* of 5 September 1997. In this decision it was stated, *inter alia*: „In considering whether the threatened execution of the applicant would be provided for in the domestic law and in accordance with the provisions for the purpose of Article 2 of Protocol No. 6 to the Convention, the Chamber must take into account the relevant provisions of the Constitution set out in Annex 4 to the General Framework Agreement. In this respect the Chamber notes that under Article 2 of Annex II to the Constitution, dealing with transitional arrangements, it is provided that laws in effect on the date of entry into force of the Constitution shall remain in effect to the extent not inconsistent with the Constitution." The application of the death penalty could therefore only be considered to be provided by the domestic law in the form of Article 141 or 142 of the Criminal Code in so far as the provisions of those Articles were not themselves „inconsistent with the Constitution" (paragraph 34). Furthermore, „where one of the human rights agreements imposes a clear, precise and absolute prohibition on a particular course of action, the only way in which the obligation to secure the right in question to all persons without discrimination can be carried out is by giving effect to the prohibition. Laws which run counter to such a prohibition cannot, therefore, be considered consistent with the Constitution and cannot therefore be regarded as a proper basis in domestic law for any action which, under the European Convention, must be lawful in domestic law. The Chamber, therefore, considers that Articles 141 and 142 of the Criminal Code, in so far as they authorize the application of the death penalty in peacetime, are not consistent with the Constitution and that the threatened execution of the applicant would not therefore be provided for by the domestic law for the purpose of Protocol No. 6 to

the European Convention. It would, therefore, breach Article 2 of Protocol No. 6 for this reason also" (paragraph 37).

76. Therefore, given the fact that it was not possible to impose the death penalty on the appellant, the question arises as to what was the maximum penalty which could be imposed on the appellant under the CC SFRY. In this respect, the Constitutional Court notes that the provisions of Article 38(2) of the CC SFRY prescribe that „the court may impose a prison term of 20 years for criminal acts eligible for the death penalty". The Constitutional Court holds that it clearly follows from the quoted provision that the maximum penalty for the criminal offence in question, in a situation where it is no longer possible to impose the death penalty, is the 20-year prison sentence. When comparing the 20-year prison sentence (as a maximum penalty for the criminal offence in question referred to in the CC SFRY) to the long-term sentence of 45 years in prison (as a maximum sentence for the criminal offence in question according to the CC BiH), the Constitutional Court holds that it is beyond any doubt that the CC SFRY is more lenient law to the appellant in the instant case. Therefore, given the fact that it was possible to impose the maximum penalty of 20 years in prison on the appellant according to the CC SFRY, whereas the long-term sentence of 24 years in prison was imposed on him in accordance with the CC BiH, the Constitutional Court holds that the CC BiH was applied retroactively to the detriment of the appellant insofar as the penalty imposed was concerned, which was contrary to Article 7 of the European Convention.

77. Taking into account the aforementioned, the Constitutional Court concludes that the challenged Verdict of the Court of BiH – Appellate Division is in violation of the appellant's constitutional right under Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention.

78. With the aim of protecting the appellant's constitutional rights, the Constitutional Court finds it sufficient to quash the challenged Verdict of the Court of BiH - Appellate Division no. S1 1 K 003442 12 Kžk of 17 June 2013 and to refer the case back to that court, which is to pass a new decision in accordance with Article 7(1) of the European Convention with respect to sentencing.

79. The Constitutional Court notes that the appellant was first pronounced guilty and sentenced to imprisonment by the Verdict of the Court of BiH - the Section I for War Crimes no. S1 1 K 003442 09 Kri (X-KR-07/180-3) of 6 July 2012. Deciding on the appellant's appeal and the appeal of the Prosecutor's Office of BiH, the Appellate Division, in its Decision no. S1 1 K 003442 12 Krž 8 of 16 November 2012, quashed the first instance verdict and scheduled the main trial before that court. It follows that

the Appellate Division passed the Verdict no. S1 1 K 003442 12 Kžk of 17 June 2013, which was the subject-matter of review in the proceedings before the Constitutional Court and based on which the appellant has been serving the prison sentence at the time of the adoption of a decision by the Constitutional Court.

80. The Constitutional Court points out that the appellant's allegations are ill-founded in respect of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, as there is nothing in the specific case that may lead to the conclusion that the proceedings as a whole, in respect of the challenged verdict, were unfair. The Constitutional Court holds that the appellant's allegations are well-founded in respect of Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention and, consequently, it quashed the challenged verdict and ordered the Court of BiH to take a new decision to remove the established violation.

81. The Constitutional Court points out that in the present case and in its recent case-law where it established the violation of Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention and quashed the verdicts of the Court of BiH and ordered that a new decision be taken in order to remove the violation established, the Constitutional Court did not deal with the termination of the prison term and the release of the appellant, nor did the Constitutional Court deal with the procedure of the Court of BiH in passing the new decision. Given that the first instance verdict was quashed in the present case and that the appellant was deprived of liberty and sent to serve his prison sentence on the bases of the challenged verdict, being presently quashed by the present decision of the Constitutional Court only in respect of Article 7 of the European Convention, the Prosecutor's Office of BiH and the Court of BiH will decide on the deprivation of liberty of the appellant, in accordance with their authorities and the relevant provisions of the CPC of BiH.

VIII. Conclusion

82. The Constitutional Court concludes that there is a violation of the appellant's right under Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention, as the retroactive application of the Criminal Code of BiH was to the appellant's detriment as concerns the sentencing.

83. The Constitutional Court concludes 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 as the specific circumstances of the present case do not disclose anything to conclude that the principle of equality of arms between the

parties to the proceedings was called into question, or that the court based its verdict on the evidence on which the verdict could not be based, or that the court failed to establish the facts upon a careful and conscientious assessment of the evidence and to offer the clear reasons for its decision. Therefore, the Constitutional Court concludes that the present case does not disclose anything to conclude that the proceedings as a whole were unfair.

84. 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.

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

86. 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

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

In the Decision no. *AP 4606/13* of 28 March 2014 the Constitutional Court, *inter alia,* partly granted the appeal; established a violation of Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; quashed the Verdict of the Court of Bosnia and Herzegovina no. S 1 1 K 003442 12 Kžk of 17 June 2013 and referred back the case to the Court of Bosnia and Herzegovina ordering that it passes a new decision in an urgent procedure in accordance with Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and to inform the Constitutional Court of the measures taken with the aim of enforcing this decision.

With due respect for the majority decision, I cannot agree with the reasoning and conclusion in the granting part of the decision of the Constitutional Court.

Instead of a special reasoning I refer to the separate opinion I presented in relation to the Decision of the Constitutional Court no. *AP 5161/10* of 23 January 2014, which reads as follows:

Separate Dissenting Opinion of Judge Seada Palavrić

In the Decision of the Constitutional Court no. *AP 5161/10* the Constitutional Court of Bosnia and Herzegovina:

Granted the appeal, found a violation of Article II(2) of the Constitutional Court of Bosnia and Herzegovina and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), quashed the second instance verdict of the Court of BiH and referred back the case to that court with an order to take a new decision in an expedited procedure in line with Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention.

With due respect for the majority decision, I cannot agree with the reasoning and the conclusion relating to the granting of the appeal no. *AP 5161/10*.

The reasoning of the Constitutional Court may be summarized as follows:

In the relevant part, the Constitutional Court referred to its respective Decision no. *AP 325/08* of 27 September 2013, which it adopted by following the case-law of the European Court developed in the *Maktouf and Damjanović* Case, wherein that court

established that a violation of Article 7(1) of the European Convention occurred, because there was a realistic possibility that the retroactive application of the CC BiH, where the applicants were found guilty of having committed a criminal offence of the war crime against civilians under Article 173 of the CC BiH in a situation where the respective criminal offence, as such, had existed in the provision of Article 142 of the CC SFRY, was to the detriment of the applicants/appellants in respect of the sentencing, which is in contravention of Article 7(1) of the European Convention.

Next, the Constitutional Court pointed out that *in the present case* the challenged verdicts found the appellant guilty of and sentenced him for committing the criminal offence of the War Crime against Civilians under Article 173 of the CC BiH. The Constitutional Court observed that a definition of the War Crime against Civilians is the same in Article 142 of the CC SFRY, which had been applicable at the time of the perpetration of the respective criminal offence (in 1995 that is to say) as in Article 173 of the CC BiH, which was applied retroactively in the particular case. It, therefore, followed from the aforementioned that the appellant was found guilty of the criminal offence which, as such, constituted a criminal offence at the time when it was committed (within the meaning of the first sentence of Article 7(1) of the European Convention) and that fact, in terms of guarantees referred to in the second sentence of Article 7(1) of the European Convention, implies the obligation of the Constitutional Court to examine that a heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. Within the context of the aforesaid, the Constitutional Court indicated that the appellant, through the application of the provisions of the CC BiH, in the end was sentenced to the long term imprisonment of 25 years.

While presenting the reasons on the basis of which it found a violation of Article 7 of the European Convention, the Constitutional Court, among other things, indicated that it clearly followed from the reasons adduced in the decision that at the time of the issuance of the challenged decisions, which were adopted during 2008 and 2009, there was neither a theoretical nor practical possibility for the death penalty to be imposed upon the appellant for the criminal offence in question.

Given the fact that, therefore, it was not possible to impose the death penalty on the appellant, the question arises as to what maximum penalty might have been imposed on the appellant under the CC SFRY. In this respect, the Constitutional Court noted that the provisions of Article 38(2) of the CC SFRY prescribed that „the court may impose a punishment of imprisonment for a term of twenty years for criminal acts eligible for the death penalty". According to the opinion of the Constitutional Court, it clearly followed from the quoted legal provision that the maximum penalty for the criminal offence in question, in a situation where it was no longer possible to impose the death penalty, was

the 20-year prison sentence. When comparing the 20-year prison sentence (as a maximum penalty for the criminal offence in question referred to in the CC SFRY) to the long-term sentence of 45 years in prison (as a maximum sentence for the criminal offence in question according to the CC BiH), the Constitutional Court held that it was beyond any doubt that the CC SFRY was more lenient law to the appellant in the instant case. Therefore, given the fact that it was possible to impose the maximum penalty of 20 years in prison on the appellant according to the CC SFRY, whereas the long-term sentence of 25 years in prison was imposed on him in accordance with the CC BiH, the Constitutional Court held that the CC BiH was retroactively applied to the detriment of the appellant insofar as the penalty imposed was concerned, which was contrary to Article 7 of the European Convention.

In my opinion,

The Constitutional Court did not follow in its decision the principles, which the European Court of Human Rights („the European Court") abided by in the Decision of *Maktouf and Damjanović v. BiH.*

My reasons for disagreeing with the reasoning and conclusions of the Constitutional Court in relation to the Decision no. *AP 5161/10* are as follows:

- First and foremost, I hold that the Constitutional Court, unlike the European Court, did not give importance to the fact **that the appellant, unlike the applicants Maktouf and Damjanović, was found guilty of taking lives, namely 71 life and around 200 wounded**, and, according to the criteria of the European Court, on that fact depended the assessment of the severity of the crime and, accordingly, the prescribed punishment at the time of the perpetration of the criminal offence. For, both, the case of *Maktouf and Damjanović* and the case at hand concern the same criminal offence. The difference is that the applicants in the case of *Maktouf and Damjanović* were not sentenced before the domestic courts for the most severe forms of the criminal offence of the War Crime against Civilians, for which the death penalty was prescribed, but for the milder form of that criminal offence and the imposed sentences, which were almost minimum, attested to it, whereas the long-term prison sentence of 25 years was imposed on the appellant, which is one of the most severe punishments prescribed in 2003, after it was no longer possible to impose a death penalty in Bosnia and Herzegovina, namely as a substitute for the death penalty.
- Next, the Constitutional Court arrived at a milder punishment by comparing the punishment of long-term imprisonment of 45 years, which is prescribed under the 2003 CC BiH, with the punishment of 20 years imprisonment under the 1976 CC

SFRY, which might have been imposed as a substitute sentence for the death penalty, instead of comparing it with the death penalty.

- I reckon, however, that Article 7 of the European Convention should neither be understood nor construed in such a way, nor that the European Court had interpreted or applied Article 7 in this manner. The mentioned article, undoubtedly, insists that the punishment to be imposed should not be more severe than the punishment that **was applicable** at the time the criminal offence was committed. Here there are no exceptions either when it comes to the perpetrators of the criminal offences of war crimes. However, I reckon that the Constitutional Court, by demanding a milder punishment for the appellant, could not have compared the long-term imprisonment sentence with the 20-years imprisonment sentence, but with the death penalty, which was applicable at the time of the perpetration of the war crime that the appellant was found to be liable for, irrespective of the fact that at the time of the trial the death penalty could no longer be imposed. Article 7 of the European Convention clearly insists that a perpetrator of a criminal offence cannot receive a more severe punishment in comparison to the punishment that was applicable at the time a criminal offence was committed, and not in comparison to the punishment that can no longer be imposed at the time of the trial.
- What is more, it seems that the Constitutional Court overlooked the fact that it was considering the present appeal wherein *the challenged decisions of the Court of BiH imposed on the appellant the sentence of long-term imprisonment of 25 years and not of 45 years, thus the imposed and not the prescribed maximum penalty should have been compared instead with the death penalty*. Also, I reckon that even the lifelong prison sentence (in case that it was prescribed by the 2003 CC BiH) is milder than the death penalty, which was prescribed and applicable at the time the criminal offence was committed, and, in particular, the long-term prison sentence of 25 years, which was imposed on the appellant in the present case, is milder.
- Since it was deciding the specific appeal, I reckon that the Constitutional Court must have taken into account the reasoning adduced for the challenged first instance verdict which, among other things, indicated that the application of the 2003 CC BiH is additionally justified by the fact that the punishment prescribed by the CC BiH is, in any case, milder than the death penalty, which was in force at the time the criminal offence was committed, which satisfied the criterion of time constraints regarding applicability of the criminal code, that is the application of the law that is more lenient for the perpetrator, as well as the reasoning adduced for the second instance verdict presented in paragraphs 142 and 143 of that verdict, where the Court

of BiH indicated that, while examining the decision on the punishment within the scope of the allegations made in the appeal by the Prosecutor's Office and within the meaning of the provision of Article 308 of the CC BiH, it found that the first instance panel correctly meted out the punishment bearing in mind all subjective and objective circumstances relating to the criminal offence and the perpetrator thereof, which make the imposed sentence adequate in terms of the degree of the appellant's criminal liability, the motives for perpetrating the offence, the degree of injury to the protected object, as well as the appellant's personal situation, and concluded that the imposed long-term prison sentence of 25 years was correctly meted out and that the imposed punishment will serve the purpose of punishment provided for in the provision of Article 39 of the CC BiH, which requires the following: to express the condemnation of a perpetrated criminal offence; to deter the perpetrator from perpetrating criminal offences in the future; to deter others from perpetrating criminal offences (individual and general prevention), and, in particular, to raise the awareness among citizens of the detrimental impact of criminal offences and of the fairness of punishing perpetrators; and that it is necessary to bear in mind that the protected objects of these criminal offences are the universal human values, objects that are a condition and a basis for co-existence and humane existence, which violation constitutes a serious violation of the international law norms, which seriousness and severity are attested to by the fact that these offences are not subject to the statute of limitations.

- In addition to the aforementioned, by proceeding in this manner, namely by comparing the long-term prison sentence with the prison sentence of 20 years and not with the death penalty, the Constitutional Court brought about the situation whereby the perpetrators of war crimes who were not found liable for the losses of human lives and for other „milder" war crimes and the perpetrators of war crimes who were found guilty of losses of over tens of human lives and of other most severe war crimes were subsumed under the same range of punishment, even received punishments for war crimes milder than the punishment for „an ordinary" murder.
- In the end, it appears illusory when the Constitutional Court states that it did not assess *in abstracto* the issue of a more lenient law, because it is a fact that it was *de facto* done in all the cases wherein the same criminal offence was prescribed by the 1976 CC SFRY and the 2003 CC BiH. It follows that in such cases the CC SFRY will be applied as the more lenient law for a perpetrator. Therefore, in my opinion, the crime constituting a violation of the international humanitarian law, which was always prescribed as not to be subject to the statute of limitations and to be subject to

the most severe punishment – for which, under the 1976 CC SFRY, a death penalty was prescribed, and, under the 2003 CC BiH, a long-term prison sentence – loses the purpose of punishment itself, that is to say that the purpose of punishment will be served solely against the war crimes perpetrators who were tried before the International Criminal Tribunal for the former Yugoslavia, or, on the other hand, the persons being tried before that court are in a significantly less favourable position than the persons tried for the same crimes before the Court of BiH.

It follows that I am absolutely in no position to agree with the conclusion adopted by the majority at the Constitutional Court in relation to this issue. With due respect, I use this opportunity to express my disagreement.

Case No. AP 1020/11

DECISION ON ADMISSIBILITY AND MERITS

Appeal of the Organization Q for promotion and protection of culture, identity and human rights of queer persons for failure of the public authorities to take necessary, reasonable and appropriate legal and practical measures for protection and preservation of the appellant's rights guaranteed by the Constitution of Bosnia and Herzegovina and European Convention for the Protection of Human Rights and Fundamental Freedoms

Decision of 25 September 2014

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18(2) and (3)(d)(h), Article 57(2)(b), Article 59(1) and (2) and Article 74 of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 22/14), 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 Knežević,

Having deliberated on the appeal of the **Organization Q for promotion and protection of culture, identity and human rights of queer persons**, in case no. **AP 1020/11**, at its session held on 25 September 2014, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by the Organization Q for promotion and protection of culture, identity and human rights of queer persons is partially granted.

A violation of the right 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 is hereby established.

The Government of the Federation of Bosnia and Herzegovina is ordered to pay the Organization Q for promotion and protection of culture, identity and human rights of queer persons the amount of BAM 3 000, within a time limit of three months from the date of delivery of this decision, for non-pecuniary damage caused by the violation of the constitutional right.

The Government of the Sarajevo Canton is ordered to pay the Organization Q for promotion and protection of culture, identity and human rights of queer persons the amount of BAM 3 000, within a time limit of three months from the date of delivery of this decision, for non-pecuniary damage caused by the violation of the constitutional right.

The Government of the Federation of Bosnia and Herzegovina and the Government of the Canton of Sarajevo are ordered, in accordance with Article 72(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 delivery of this decision, of the measures taken to execute this decision.

The appeal of the Organization Q for promotion and protection of culture, identity and human rights of queer persons filed for violation of the rights of its members and sympathisers under Article II(3)(b),(f) and (i) of the Constitution of Bosnia and Herzegovina and Articles 3, 8 and 11 taken alone and in conjunction with Articles 13 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby rejected as inadmissible as it was filed by an unauthorised person.

The appeal of the Organization Q for promotion and protection of culture, identity and human rights of queer persons filed for violation of the rights under Article II(3)(b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3 and 8 taken alone and in conjunction with Articles 13 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby rejected as being incompatible *ratione materiae* 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 2 March 2011 the Organization Q for promotion and protection of culture, identity and human rights of queer persons („the appellant"), represented by Association

VAŠA PRAVA through lawyer Emir Prcanović, Executive Manager and Zlatan Terzić, Lawyer of the Association VAŠA PRAVA, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") for failure of the public authorities to take necessary, reasonable and appropriate legal and practical measures for protection and preservation of the appellant's rights guaranteed by the Constitution of Bosnia and Herzegovina and 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) and (2) of the Rules of the Constitutional Court (*Official Gazette of Bosnia and Herzegovina*, 60/05, 64/08 and 51/09), which were in force at the time when the relevant actions were taken, the Ministry of Internal Affairs of the Canton of Sarajevo („the MoI"), was requested on 18 and 19 November 2013 to submit its reply to the appeal.

3. The MoI submitted its reply to the appeal on 6 December 2013.

4. Pursuant to Article 23 of the Rules of the Constitutional Court, the Cantonal Prosecutor's Office of Sarajevo („the CPO") was requested on 28 April 2014 to submit its reply to the appeal.

5. The CPO submitted its reply on 12 May 2014.

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 a non-governmental organization advocating promotion and protection of culture, identity and human rights and support to the LGBTIQ persons and removal of all forms of discrimination and inequality on the ground of sex, gender, sexual orientation, sexual identity, gender identity, gender expression and intersexual characteristics.

8. In the period from 24 to 28 August 2008 the appellant organised the first Sarajevo Queer Festival („the Festival") with the aim of presenting „life stories" of the LGBTIG persons and revising heteronormative and patriarchal values through cultural and artistic forms in the context of gender, sex and sexual orientation. The Program of the Festival planned tribunes, discussions, gatherings, exhibitions of young and unestablished artists from the region and film program and performances on precise locations used for such purposes.

9. At the beginning of 2008 the appellant worked intensively on preparations for holding the Festival. In March 2008, the end of September was determined as a date on which the Festival would be held. During July 2008 the appellant became aware of Ramadan and the fact that the Festival would fall within the last quarter of the fasting holiday of Ramadan. Despite the awareness that there might be wrong interpretations, the appellant considered that the month of Ramadan was supposed to be the most peaceful month in the year and that the overlapping of these two events would cause no problems. The appellant continued with preparations and an already commenced public campaign announcing the Festival.

10. On 22 August 2008, SAFF – a weekly newspaper, published an article on its cover page titled „Dangerous playing with religious feelings of Bosniaks – Festival of Homosexuals during Holy Ramadan." On 28 August, Dnevni Avaz – a daily paper published an article on its front page titled „The BH public against Queer Festival in Sarajevo – Provocative Gay Event during Ramadan".

11. On 2 September 2008 the appellant issued a public statement regarding the violence directed against the Festival and aforementioned newspapers' titles. During the same day posters „Death to Faggots" and „We Shall Not Allow Gay Festival" could be seen all over Sarajevo. On 4 September 2008 the appellant informed the Police Administration Centre and Police Administration of Novo Sarajevo about the posters.

12. The representative of the appellant S.Đ. addressed the Police Administration Centre on 4 September 2008 asking about the procedure for announcing the Festival.

13. On 8 September 2008 the appellant informed the Police Administration Centre about the holding of the Festival. In an official letter it was pointed out that, *inter alia*, the security agency was hired and that its personnel would be in all locations where the festival would be held, but that the support should be also offered by the members of MoI, particularly in places around the locations of the Festival due to possible „surprise attacks", media reactions contributing to discrimination and prejudices against the LGBTIQ population, the posters that could be seen in the town calling for violence against LGBTIQ persons, which had been already reported to Police Administration, the violence and discrimination announced through various Internet portals at which public calls for lynch were disseminated and hate speech was expressed. Furthermore, it was noted that the appellant and its members received numerous threats from unknown person that used the mentioned phone number. Finally, the appellant stated, *inter alia*, that around 300 visitors were expected to attend the Festival to last for five days.

14. During the period from 3 to 9 September the appellant addressed, among others, the Cabinet of the Chairman of the Council of Ministers of BiH, the Mayor of the City of

Sarajevo and the Agencies for Gender Equality, as well as the political personalities holding high official offices at that time. The appellant also addressed the Federation Ministry of Internal Affairs, the Cabinet of the Vice-President of the Federation of BiH, the Ministry of Justice of BiH, the Ministry for Human Rights and Refugees, and all members of the Presidency of BiH. In all letters an appeal was disseminated to all people to raise their voice and condemn hate speech, including the announced violence against LGBTIQ persons and Festival visitors. In support of this appeal it was noted that it was unacceptable for the posters to appear in Sarajevo having the following inscriptions: „Death to Faggots", and for the comments to be posted on Internet portals and forums: *They are insane, all of them will die 100%!!! Let them come out but then they should not complain after we break them. They are warned. Sarajevo, do not sleep. Wake up people, find the organisers of the event and break their legs. We should start buying hand grenades again…This time massacre will take place on Kovačići…Neither did Karadzic nor Mladić finish their job. We have to finish that job now. All of them should be slaughtered…We have to be careful, which means that we should allow gays to organise the parade and then beat them with baseball bat, pour gasoline on them and put on fire a prominent group of organisers, and certain number of gays and lesbians to be killed at the location of „internal flame" to be the warning to all future generations of gays…It is better to be fascist than gay. As to the question whether we can terrorize them, you can be sure about that after we, police and ambulance cars walk over them, and it will be just like it was in Belgrade*, etc.

15. On 10 September 2008, the appellant reported the same unknown person, who was sending threats from the previously mentioned telephone number, to the Police Administration Centre. The hate speech was reported, as well as the call for lynch and threats which were published on different forums on Internet. The printed versions of the contents from three web pages were submitted and among them there was a Facebook group with slogan: „Stop gay parade in Sarajevo during the month of Ramadan".

16. On 11 September 2008, the appellant reported to the Police Administration Centre threats sent to the e-mail of the appellant and the content and address from which the massage was sent were also reported. A.N. who posted an advertisement containing threats on the Facebook and threats on the forum of Radio Sarajevo was also reported to the police. In all these cases the messages were, essentially, that the holding of the Festival should be prevented by use of force and which was also accompanied with insulting and humiliating comments against the LGBTIQ population.

17. The reports filed by the appellant on 10 and 11 September 2008 were forwarded, together with official reports, to the CPO for further action.

18. At the meeting held in the premises of the Police Administration Centre on 17 September 2008 with the representatives of the appellant and the security agency hired by the appellant, it was determined that the activities of the Festival would take place in the area of Police Administration Centre and Police Administration Novo Sarajevo and the appellant was ordered to submit an official announcement note relating to the holding of the gathering to the MoI. It was agreed at the meeting that the Police Administration would be in charge of providing external security of the facility and that the appellant, as an organiser of the Festival, and the hired security agency would be in charge of maintaining the order in the facilitates in which the Festival would be held.

19. On 17 September 2008 Police Administration Centre developed an Operational Plan on conducting the measures for providing physical, operational and bomb squad security for the Festival. It follows from the plan, *inter alia*, that providing security to the area around the Academy of Fine Arts, as it was scheduled to open the Festival there, would be conducted with two rings. It was planned to deploy five police uniformed officials in the first ring, including two police officials from the Crime Police Department and ten police officers from the Support Unit, and there was a plan to deploy eight unformed police officials in the second ring, including six officials from the Crime Police Department and ten officials of the Support Unit in reserve. As regards both rings, the locations were determined at which the engaged police forces should be deployed.

20. On 17 September 2008, the Police Administration received a report from the security workers of the Academy of Fine Arts that they had received a message over the phone that the explosive was planted in that location. The Police Administration informed the CPO and upon their authorization the investigation was conducted on the spot and it was established that it was a bomb hoax and, after that, the report was submitted to the CPO.

21. On 18 September 2008 the appellant addressed in writing the MoI by announcing the Festival. Just like in communication addressed to the Police Administration of Centre with regards to the announcement of the Festival, the MoI was requested to provide support for the reasons mentioned in the communication addressed to the Police Administration.

22. On 18 September 2008, an employee of the „Radio station Zid" informed the Police Administration Centre that they had received a threatening letter with the signature „Wrath of War Veterans of Sarajevo" with regards to the Festival. The relevant CPO was informed of the received report, an inspection on the spot was carried out and report and gathered material were submitted to the CPO on 22 September 2008.

23. On 19 September 2008, the Police Administration Centre, the representatives of the appellant and security agency jointly inspected the locations where the Festival was

supposed to be held. The appellant was ordered to involve a service of security guards composed of 69 persons.

24. In an act of the Ministry of Human Rights and Refugees, dated 22 September 2008, the Police Administration Centre was informed of a threatening letter signed by the „War Veterans of Sarajevo", which was addressed to the student „FM Radio". This document was submitted to the relevant CPO.

25. In a supplement to the report dated 23 September 2008, the appellant informed the MoI that the invitation letters had been sent via e-mail and expressed fears that due to the unauthorised access to the appellant's web page some people who had the intention to cause problems during the opening ceremony of the Festival could appear. It was noted that the forms of invitation letters and accreditations were identical and they had a seal on the back of the page. On the same day the appellant reported unauthorised access to their web page, theft of e-mail addresses of the appellant's members. The web page with information on the person who gained access without authorization was submitted and information relating to taking responsibility for the aforesaid, theft of e-mail addresses, threats and insults, first name and family name of the person, e-mail address that person used and phone number.

26. During the night time between 23 and 24 September 2008, posters conveying messages presenting homosexuality as an illness and threat to healthy society and universal moral values, perversion, crime and members of that population as predetermined killers were posted all over the town.

27. From the beginning of announcement of the Festival to the opening day of the Festival, some of the most influential personalities of BiH, representatives of the State authorities, high-ranking religious officials, well-known persons, doctors etc., were expressing their views fully denying and humiliating the LGBTIQ population, describing them as sick people who needed medical assistance and expressing negative attitude towards the Festival and any public address and promotion of that population.

28. On 24 September 2008 the appellant informed the Police Administration Centre of the protests of the opponents of the Festival in Alija Izetbegović Square at 17.00hrs, including a walk to the Academy of Fine Arts as a place where the opening ceremony of the Festival was to take place, which were scheduled for the same date. Furthermore, it was reported that posting the posters which had been seen in town the night before conveying insulting and threatening contents addressed to the Festival and the LGBTIQ persons had been carried out by means of vehicles with the indicated registration plates and that messages with the same content had appeared on the aforementioned web address. Threats with arms

which had appeared on a portal were also reported. The Police Administration forwarded the received report, including official records, to the CPO on the same date.

29. The opening ceremony of the Festival was scheduled for 24 September 2008, 20.00 hrs in the premises of the Academy of Fine Arts. There were approximately 250 visitors during the opening ceremony. Immediately after the beginning of the opening ceremony, 50 to 70 citizens gathered in front of the building of the Academy of Fine Arts expressing disapprovals, protesting against the Festival and crying out and using abusive language against participants and visitors of the Festival, present journalists and police. In return, abusive language was directed at the opponents to the Festival so that conflict escalated. The police forces intervened on a limited scale and separated the opponents into smaller groups who ran away in neighbouring streets.

30. The Police Administration made a record of the incidents escalated during the Festival from 24 to 28 September, took statements and received reports with regards to the following: physical attack on journalists P.K. and E.I. on Čobanija Street, when E.F. was deprived of liberty, whereas two journalists, P.K. and E.I. were injured; physical attacks on the police officers protecting the building of the Academy of Fine Arts; physical attack on four persons on Skenderija parking, including Latvian citizen V.S.; physical attack on M.B., deprivation of liberty of the person potentially suspected of having committed the attack, deprivation of liberty of DJ.L. and A.T. for destruction of the vehicle of another party in front of the building of the Embassy of Greece; physical attack on Spanish citizen M.A.R.R; physical attack on the activists of the Festival, H.C., A.S. and S.D. and taxi driver in front of Pastry & Café Shop „Palma", when two persons sustained serious bodily injuries.

31. On 25 September 2008 the Police Administration submitted to the CPO the official report and minutes taken on the spot with regards to the criminal offence referred to in Articles 172 and 362 of the Criminal Code of the Federation of Bosnia and Herzegovina („CCFBiH"), which was committed against the activists of the Festival, H.C, A.S. and S.D.

32. At a meeting held in the premises of the Police Administration on 25 September 2008 with the representatives of the appellant and security agency, all participants agreed that there were certain failures on the part of the organiser of the Festival with regards to the estimated number of visitors and realization of previously agreed measures. In this regard, it was noted that the presence of a total number of 300 persons during 5 days of Festival was announced, whereas 300 persons were present during the first day of the Festival. A representative of the appellant noted that the problem regarding the invitation letters had occurred because of unauthorised gain of access to the web page of the appellant and that the Police Administration had been informed of it. On the same day,

the Police Administration made an Annex to the Police Operational Plan for the festival days scheduled for 27 and 28 September 2008.

33. On 26 September 2008 the appellant informed the Police Administration Centre that it cancelled the holding of the Festival scheduled 27 and 28 September 2008.

34. On 26 September the appellant informed the Police Administration Centre about the person who had been addressing threats for days and advocating hatred which assumed nationalist character. On the same day threatening messages from SMS to the phone of the appellant were reported to the Police Administration. Furthermore, S.DJ., member of the appellant filed a report in which she indicated the web page with insulting messages, a video-clip conveying threats addressed to her, beheading her, names, e-mail address and phone numbers from which threats and insulting messages were addressed, informing of her personal data, publishing the home address of her mother, incitement under the cover of Dnevni Avaz paper and his organisers, suspicion that the official phone in the premises of the appellant was eavesdropped, that the movement of the members of the appellant was under surveillance. Two another members /activists of the appellant reported threats and insulting messages and phones numbers from which such massages were sent on the same day. It was also reported that the official car of the appellant was followed; the type of the vehicle and registration plates were also reported.

35. On 2 October 2008 the Police Administration requested the CPO to order Telecom to confiscate phone listings in respect of the phone numbers from which threats had been sent on 27 September 2008, according to the reports of the members of the appellant.

36. On 2 October 2008 the Police Administration filed a request with the Municipal Court of Sarajevo („the Municipal Court") for institution of minor offence proceedings against S.S., A.J, A.A., A.T. for minor offences referred to in Article 8(5)(a) of the Law on Minor Offences against Public Order and Peace as on 24 September 2008 they had disturbed public order and peace by fighting during the festival.

37. On 3 October 2008, the appellant filed a report with the Police Administration Sarajevo, in which it alleged that it still received threats even after the cancellation of the Festival and indicated the last and first names of individuals and legal persons, e-mail addresses and landline and mobile telephone numbers from which threats were addressed.

38. On 10 October the Ministry of Internal Affairs of the Federation of BiH visited the appellant in order take the documentation necessary for investigating the threats addressed via Internet and e-mail.

39. On 29 October 2008 the Police Administration submitted the following documents to the CPO:

- Report with regards to the grounds for suspicion that E.DJ. committed the criminal offences referred to in Article 362 of the CCFBiH against journalists P.K. and E.I.; official record of the statement made by police officer B.V. with regards to the grounds for suspicion that a non-identified person committed a criminal offence referred to in Article 359(2) of the CCFBiH; official record of the statement and report made by Latvian citizen V.A. with regards to the grounds for suspicion that a non-identified person committed a criminal offence under Article 362 of the CCBiH; official records and oral report made by T.B. with regards to the grounds for suspicion that a non-identified person committed a criminal offence referred to in Article 362(1) of the CCFBiH; a report with attachments with regards to the grounds for suspicion that S.B. committed a criminal offence referred to in Article 362 of the CCBiH to the detriment of E.Z.; official records of oral statement made by E.T., member of the appellant/organiser of the Festival with regards to the grounds for suspicion that a criminal offence referred to in Article 182 of the CCFBiH (threatening messages received over the phone of the appellant and a video-clip displaying the beheading of S.DJ., member/organiser of the Festival) had been committed; official record of the oral statement made by the member/organiser of the Festival, A.S. for the grounds for suspicion that the criminal offence referred to in Article 182 of the CCFBiH was committed (for threatening messages received over the phone of the appellant, calls for lynch through the use of Internet forums Islam Bosna, Facebook, Radio Sarajevo, surveillance of an official vehicle of the appellant); official record of the statement made by the member/organiser of the Festival, M.D.H. with regards to the grounds for suspicion that the criminal offence referred to in Article 183 of the CCFBiH was committed by a non-identified person (that she was insulted on the ground of national affiliation via forum of Radio Sarajevo, that she does not feel safe); record and oral statement made by the member/organiser of the festival S.DJ. for the grounds for suspicion that a non-identified person committed the offence referred to in Article 183 of the CCFBiH (a video-clip displaying beheading, threats addressed via phone, e-mail messages addressed from the indicated address and information about the person who was the holder of the indicated address); record of the oral report and statement made by Spanish citizen M.A.R.R., according to which a non-identified person committed the criminal offence referred to in Article 362 of the CCFBiH; report with attachments that B.B., M.B., L.B., E.S.M and N.E., in September 2008, before the festival, during the opening ceremony thereof and after the cancellation of the festival committed the criminal offences referred to in Articles 183 and 362 of the CCFBiH by addressing serious threats to life an bodily integrity to the members of the appellant on forum of the web page of the appellant, insulting them and inviting other users of the forum to have recourse to violence against the organisers of the Festival.

40. On 31 October 2008 the MoI sent information to the appellant about the measures taken until that point. It was noted in information that an operational team had been formed with the cooperation of the CPO, which worked on the identification of the persons who had behaved violently at the time of opening ceremony of the Festival and before and after the Festival, the persons who had jeopardized safety of the organisers and members of the appellant. Furthermore, it was noted that the IP address from which a video-clip was posted and which displayed decapitation of one of the organisers of the Festival was located on the territory of another State. It was established that this was the address from which the web page of the appellant had been hacked and from which a number of threats had been addressed to the organisers of the Festival and members of the appellant. It was noted that a request for identification of the person or persons who had used that address had been filed with the police of the State on which the address was located via Interpol BiH and that they were waiting for results of checks. Furthermore, it was noted that seven persons who had behaved violently at the time of opening ceremony of the Festival were identified and that, upon consent of the CPO, reports in respect of each of them were made for the grounds for suspicion that they had committed the criminal offences of violent behaviour; they were forwarded to the CPO on 29 October 2008. Furthermore, it was noted that four persons who had insulted the members of the association via forum on the web page of the appellant were identified. Reports in respect of each of them were made upon order of the CPO on the grounds of suspicion that they had committed the criminal offence of endangerment of security. The reports were forwarded to the CPO on 29 October 2008. Furthermore, it was noted in Information that a meeting had been held with the representatives of the appellant on 29 October 2008 during which the results of the measures and actions taken during the preparations of the security measures for the festival, during the opening ceremony and after the decision on cancellation of the festival had been presented. The representatives of the Helsinki Committee of Human Rights were present at that meeting. Finally, it was noted that MoI did not have any information that the criminal offence of violation of confidentiality of letters and other mails or unauthorised eavesdropping had been committed and that the MoI remained open for any form of cooperation in order to obtain such information.

41. On 17 November 2011, the Police Administration submitted to the CPO a report with attachments for the existence of grounds for suspicion that M.H. and M.M. had committed the criminal offence referred to in Article 362 of the CCFBiH, as members of a group which had attempted to enter the building of the Academy of Fine Arts by having recourse to force but the police had prevented them from doing so.

42. On 17 November 2008, the Police Administration instituted disciplinary proceedings against four police officers for the existence of grounds for suspicion of a serious breach

of official duty: police office A.M. as he ordered retreat of a unit toward the building of the Academy of Fine Arts so that space around Skenderija remained unprotected and T.B., R.K., A.V. and a Latvian citizen were physically attacked; police officer N.F. as he as a part of security guards failed to took sufficient measures in front of the building of the Academy of Fine Arts in order to prevent attacks and identify the instigators of riots and take further procedural measures; police officers S.J. and T.T. as they failed to take timely measures and actions on Radiceva Street, where they were deployed in order to prevent the attack on Spanish citizen M.A.R.R.

43. In a ruling of 15 December 2008, the Disciplinary Commission found the aforementioned police officers guilty of serious breach of official duty and imposed the fines on them in the amount of 20% of their monthly salary for a period of four months.

44. In a ruling of 21 January 2009, the Police Board of the Sarajevo Canton granted appeals of the police officers and released them from accountability. It was noted in the reasons for the ruling that it followed from Information sent to the OHR of 8 October 2010 that the appellant, at a meeting held on 17 September 2008, requested that the access to the Academy of Fines Arts remain free on 24 September 2008 in the period from 20.00hrs to 22.00hrs, the persons approaching the building not to be subjected to the security checks, and that the appellant had not limited the circle of persons that could have access to the gathering as the checks had not been carried out at the points before the entrance of the building by the guards involved by the appellant.

IV. Appeal

a) Allegations from the appeal

45. The appellant claims that its rights under Article II(3)(b), (f) and (i) of the Constitution of Bosnia and Herzegovina and Articles 3, 8, 11, 13 and 14 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 have been violated as the authorities failed to take necessary, reasonable and appropriate legal and practical measures. The appellant claims that despite all the measures it took as an association, the public authorities were and remained inefficient both in preventing violence against the members and sympathisers of the Association and in conducting an effective investigation, identification and punishment of those who settled accounts with the members of the appellant by having recourse to hate speech and physical violence. Therefore, the „Association as appellant complains" about the violation of the aforementioned rights.

46. In support of its allegations on the violation of Article 3 of the European Convention, the appellant notes that there was no effective investigation into the threats addressed to the appellant and its members, nor was there an effective investigation into the persons who had threatened the members of the appellant before the Festival, who had hacked the web page of the appellant, who had attacked the members and sympathisers of the appellant during the Festival, and that they were not brought to court. Furthermore, the appellant alleges that the competent authorities failed to provide efficient security measures for the gathering, i.e. the festival, which was the reason why violence against the members of the appellant and its sympathisers occurred, they were injured and that they failed to conduct an efficient investigation in this respect. The appellant notes that nobody was held responsible for the criminal offence of abuse of official authority or powers referred to in Article 383, criminal offence of preventing or hindering a public gathering referred to in Article 190(1), criminal offence of violent behaviour referred to in Article 362 and criminal offence of damaging computer data or program referred to in Article 393(2) of the CCFBiH.

47. Furthermore, the appellant alleges that the guarantees of sexual life or sexual orientation, which are encompassed by Article 8 of the European Convention, relate also to the right of every person to be effectively protected against attacks against his/her chosen social identity both in substantive and procedural sense, which was completely lacking in this case.

48. The appellant alleges that its right to freedom of assembly and association under Article 11 of the European Convention has been violated as the appellant and its members and sympathisers were not protected in exercising their right to peaceful assembly, since the present police forces were neither adequate nor sufficient to prevent the occurred violence, which was the reason why the appellant's members and sympathisers were injured. Furthermore, the appellant alleges that violence continued through persecution of the organiser and participants of the Festival and that the police protection was reduced to the establishment of consequences. Moreover, the appellant alleges that there was no effective investigation, which should have been conducted *ex officio* and that no adequate measures have been taken to the present day in order to identify the organisers and perpetrators of the attacks on the participants of the Festival, nor has any indictment been brought for a criminal offence of preventing or hindering a public gathering referred to in Article 190(1) of the CCFBiH, although media published images and names of the attackers.

49. In support of the allegations on the violation of the right to an effective legal remedy under Article 13 of the European Convention, the appellant alleges that the Parliamentary Assembly of the Council of Europe took Resolution 1926 (2008), wherein it condemned

discrimination and violence against the organisers and participants of Sarajevo Queer Festival and invited the BiH authorities to urgently and comprehensively investigate the attacks and bring the responsible persons to justice. The appellant claims that the public authorities failed to do so and that it does not have any available legal remedy with regards to the rights under Articles 3, 8 and 11 of the European Convention.

50. With regards to the violation of the right to prohibition of discrimination under Article 14 of the European Convention, in conjunction with the rights under Articles 3, 8, 11 and 13 and rights under Article 1 of Protocol No. 12, the appellant alleges that the main reason for threatening the members of the appellant before the Festival and attacking them during and after the Festival was sexual orientation of the members of the appellant, sexual identity of the members of the LGBTIQ population and great public disproval of their public presentation. In this connection, the appellant pointed to public statements of the State officials and representatives of religious communities on homosexualism as an illness, as a „private matter" which should be „between four walls" and other statements full of prejudices and ignorance of the LGBTIQ population, public promotion of hate speech via Internet, which the appellant had been reporting on a regular basis and submitting evidence to the relevant authorities which failed to take any measure with regards to it. All the aforementioned led to further stigmatization of the members of the appellant and generally the LGBTIQ population, which is generally stigmatized and deprived of rights in the BiH society. In conclusion, the appellant alleges that the failure of authorities to prevent, identify and punish those who addressed threats, attacked and injured the members of the appellant, who are the members of the LGBTIQ population, solely on the ground of sexual orientation amounted to the violation of the aforementioned Articles of the Convention.

51. The appellant requested the court to order the relevant prosecutor's office to urgently take efficient measures in order to complete investigation into all filed reports, to bring charges against the persons responsible for criminal offences and to oblige the Government of the Federation of BiH to pay the appellant as representative of the members and affiliates of the LGBTIQ population the amount of KM 50,000 as a compensation for non-pecuniary damage caused by the violation of the aforementioned rights.

b) Response to the appeal

52. In response to the appeal, the Cantonal Prosecutor's Office alleged as follows:

- in case no. KT-2771/08 it brought an indictment against the accused E.DJ., in which the Municipal Court of Sarajevo imposed a one-year prison sentence for violent behaviour referred to in Article 362(1) and criminal offence of obstructing an official person in

execution of official duty referred to in Article 358(3) in conjunction with para 1 of the CCFBiH and determined that the sentence would not be enforced if he did not commit a new criminal offence within a time limit of 2 years;

- in case no. KT-3144/08, the Prosecutor's Office issued an order on non-conduct of investigation against H.M., V.A., M.A. and N.H., and the law enforcement authorities were instructed to initiate minor offence proceedings referred to in Article 8 para 2 of the Law on Minor Offences against Public Order and Peace and the Law on Communal Activities;

- in case no. KT-3144/08 against B.B., M.B., L.B., E.S.M. and N.E. an order on non-conduct of investigation was issued as it was established that the case related to a minor offence;

- in case no. KT-3142/08, the Prosecutor's Office issued an order on suspension of investigation against B.S., as there was no evidence that he had committed the criminal offence of violent behaviour referred to in Article 362(1) of the CCBiH but the minor offence referred to in the Article 8(2)(a) of the Law on Minor Offences against Public Order and Peace;

- in case no. KT-3367/08, the Prosecutor's Office brought charges against S.P. for criminal offence of violent behaviour referred to in Article 362(1) of the CCBiH and the Municipal Court rendered a judgment of acquittal on 26 January 2010, whereupon the Prosecutor's Office, on 27 January 2010, filed an appeal, which was dismissed by the Cantonal Court of Sarajevo on 30 May 2011;

- in case no. KT-3368/08 against H.M. and M.M., an order on non-conduct of investigation was issued on 26 June 2009 with the instruction for the MoI to initiate proceedings against the aforementioned persons for minor offences referred to in Article 8(2)(a) of the Law on Minor Offences against Public Order and Peace;

- in case no. KT-2758/08 an indictment was brought against A.T. for the criminal offence of violent behaviour referred to in Article 362(1) of the CCFBiH and the Municipal Court of Sarajevo, on 2 October 2009, imposed a 5-month suspended prison sentence with the probation period of 1 year;

- in case no. KTM-225/08 against DJ. L., on 26 May 2011, an order on non-conduct of investigation into criminal offence of damaging another person's property was issued;

- the Prosecutor's Office also dealt with cases KTA-2773/08, KTA-3094/08 and other cases marked as KTN.

53. The CPO concluded that it had taken actions with the aim of putting on trial the persons responsible for the incidents mentioned in the appeal and reports filed, just as MoI and Municipal Court did.

54. In response to the appeal the MoI presented the chronology of the incidents which occurred before, during and after the Festival and described in detail the measures and actions it had taken upon reports filed by the appellant, individual reports filed by its members and third persons. Furthermore, it noted that at the material time an exchange of operational and other information with other law enforcement agencies had been carried out with regards to the assessment of security situation before the festival and identification of perpetrators during and after the festival. In support of its allegations, individual acts relating to that period were submitted. It was noted that on the day of the opening ceremony of the Festival, incidents had occurred because of the appellant's failure to provide efficient protection of invitation letters for the participants which had been sent via Internet, as alleged in the report, and that the web page had been hacked. This was the reason why the control over the external security circle was not possible so that the organiser had imposed the control measures only at the entrance of the building. This allowed the coming of a group of 50 to 70 persons introducing themselves as attendees of the Festival. When it was established that they did not have accreditations, the police officers had blocked the building of the Academy of Fine Arts letting pass only those who had invitation letters and, thus, providing security measures in the building of the Academy and undisturbed opening ceremony.

55. Furthermore, the MoI indicated as follows:

- By carrying out operations out on the field it could not obtain information to identify the persons who had posted the posters which the member of the appellant, S.DJ., reported on 4 September 2008;

- On 30 June 2009, the CPO informed the Police Administration that it had issued an order on not conducting an investigation against B.B., M.B., L.B., E.S.M and N.E. for grounds for suspicion that they had committed the criminal offences referred to in Articles 363 and 183 of the CCFBiH to the detriment of the appellant's members as the actions of the aforementioned persons had the characteristics of minor offences. On 18 August 2009 the Police Administration initiated minor offence proceedings before the Municipal Court, which, in a ruling dated 15 December 2010, terminated the proceedings as they were barred by the statute of limitations;

- On 26 June 2009, the CPO informed the Police Administration that it had issued an order on not conducting an investigation against M.H. and M.M. for grounds for suspicion that they had committed criminal offence referred to in CCFBiH as the case related to a minor offence. On 18 August 2009 the Police Administration initiated minor offence proceedings, and on 16 December 2009, the Municipal Court issued a ruling wherein it found M.H. and M.M. responsible for the minor offence referred to in Article 8(2)(a) of the Law on Minor Offences against Public Order and Peace;

- On 1 July 2009 the CPO informed the Police Administration that it had issued an order on not conducting an investigation against M.H., V.A., M.A. and N.H. for a criminal offence referred to in Article 183 of the CCFBiH as the case related to a minor offence. The Police Administration initiated minor offence proceedings on 18 August 2009. In a ruling dated 24 December 2009, the Municipal Court terminated the proceedings as they were barred by the statute of limitations;

- On 17 November 2008, disciplinary proceedings were initiated against four police officers as there were grounds for suspicion that they had committed a serious breach of official duty. In a Decision of the Disciplinary Commission, they were found responsible and sanctions were imposed on them; upon appeal the Police Board granted their appeals and they were released from disciplinary accountability.

56. The MoI concluded that the appellant unfoundedly alleged that it had failed to take adequate measures with the aim of providing security measures for the festival and measures with the aim of identifying and punishing those who disturbed public order and peace during the Festival and police officer who committed serious breach of official duty.

V. Relevant Law

57. The **Criminal Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the FBiH*, 36/03, 37/03, 21/04, 69/04, 18/05), so far as relevant, reads:

Article 190
Preventing or Hindering a Public Gathering

(1) Whoever prevents or hinders the right of citizens to public assembly, shall be punished by a fine or imprisonment for a term not exceeding three years.

(2) An official person, who perpetrates the criminal offence referred to in paragraph 1 of this Article abusing his position or authority, shall be punished by imprisonment for a term between six months and five years.

58. The **Criminal Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the FBiH*, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 7/09, 12/10 and 8/13), so far as relevant, reads as follows:

Article 45
Rights and Duties

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

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

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

b) to conduct an investigation in accordance with this Code;

Article 233(3)
Prosecutor Supervising the Work of the Authorised Officials

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

59. The **Law on Public Assembly** (*Official Gazette of the Canton of Sarajevo*, 17/01) so far as relevant reads as follows:

Article 2(1)

Citizens shall have the right to a peaceful gatherings and public protests (hereinafter referred to as the public gathering) as prescribed by this law.

Article 9

The organiser of a public gathering shall determine a leader.

The organiser and leaders shall organise a security service and shall determine the guards to maintain order and peace in accordance with determined security measures.

If the security measures determined by the organiser are not sufficient, the police administration shall order the organiser to take additional security measures.

If the organiser does not act as ordered by the police administration, the police administration may prohibit the public gathering.

Article 16

A fine ranging from BAM 500 to BAM 5 000 shall be imposed on the organiser of the public gathering/legal person for minor offence:

(...)

5. if it acts contrary to the provisions of Article 9 of this Law.

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60. The **Law on Internal Affairs of the Canton of Sarajevo** (*Official Gazette of the Canton of Sarajevo,* 22/00, 15/02, 18/02 and 28/02) so far as relevant reads as follows:

Article 2

The internal affairs falling within the scope of the Canton are as follows:

(...)

6. Tasks and duties with regards to: maintenance of public gatherings (...)

Article 30

Police shall perform administrative, expert and other tasks and duties which notably relate to: protection of life and personal security of people, protection of property, prevention and detection of criminal offences, identifying and arresting the perpetrators of criminal offences and bringing them to the competent authorities in the cases where this does not fall within the competence of judicial police, maintenance of public order and peace, carrying out crime technician tasks, security, control and regulation of road traffic and protection of certain persons.

61. The **Law on Minor Offences of Public Order and Peace** (*Official Gazette of the Canton of Sarajevo*, 18/07 and 7/08) so far as relevant reads as follows:

Article 8

(Minor offences and fines in respect of natural persons)

(1) A fine in the amount of BAM 100.00 for minor offence shall be imposed on:

(a) The person who disturbs public order and peace by quarrel, yelling, impolite or insolent behaviour;

(...)

(2) A fine in the amount ranging from BAM 200.00 to BAM 600.00 for minor offence shall be imposed on;

(a) The person who disturbs public order and peace by particularly insolent behaviour, rude insults addressed to other persons or other ruthless behaviour endangers security of people provokes the feeling of physical endangerment, anxiety or disapprovals by people.

(...)

VI. Admissibility

62. 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.

63. Pursuant to Article 18(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

Unauthorised person

64. The appellant claims that the right not to be subjected to torture or to 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, right to private life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, right to freedom of peaceful assembly and association with others under Article II(3)(i) of the Constitution of Bosnia and Herzegovina and Article 11 of the European Convention, alone and in conjunction with the right to an effective legal remedy under Article 13 of the European Convention and prohibition of discrimination under Article 14 of the European Convention have been violated as the public authorities failed to provide security measures for the gathering and to conduct an effective investigation to identify and put on trial the organisers and initiators of the occurred violence against its members and sympathisers.

65. In examining the admissibility of this part of the appeal, the Constitutional Court invoked the provisions of Article VI(3)(b) and Article 18(3)(d) of the Rules of the Constitutional Court.

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

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

67. Article 18(3)(d) of the Rules of the Constitutional Court, so far as relevant, reads as follows:

(3) An appeal shall also be inadmissible in any of the following cases:

d) the appeal was lodged by an unauthorised person;

68. The Constitutional Court notes that the appellant is a legal person, a non-governmental organization, which, as alleged in the appeal, advocates promotion and protection of culture, identity, human rights, provides support to the LGBTIQ persons and removal of all forms of discrimination and inequality on the ground of sex, gender, sexual orientation, sexual identity, gender identity, gender expression, intersexual characteristics. Furthermore, the appellant alleges that despite all it undertook as an association, the public authority was and remained inefficient both in preventing of violence against it, its members and sympathisers and in conducting an effective investigation, identifying and punishing the persons who settled accounts with the members of the appellant by having recourse to hate speech and physical violence. Therefore, „the Association as appellant complains" of the violation of the aforementioned rights.

69. Furthermore, the European Court refuses to accept as applicants non-governmental organizations set up for the express purpose of protecting the rights of alleged victims (see, ECtHR, *Smits, Kleyn, Mettler Toledo B.V. al., Raymakers, Vereniging Landelijk Overleg Betuweroute and Van Helden v. the Netherlands* (dec.), Applications nos. 39032/97, 39343/98, 39651/98, 43147/98, 46664/99 and 61707/00, of 3 May 2001, in respect of the applicant *Vereniging Landelijk Overleg Betuweroute; Stichting Mothers of Srebrenica and Others v. the Netherlands,* Application no. 65542/12, of 11 June 2013, para 116), and non-governmental organizations the express purpose of which is the protection of human rights (see, ECtHR, *Van Melle and Others v. the Netherlands* (dec.), Application no. 19221/08, of 29 September 2009, in respect of the applicant *Liga voor de Rechten van de Mens*).

70. Furthermore, according to the position of the European Court, a legal person may complain about the violation of its own rights, but not the violation of its members as Article 35 of the Convention does not secure to individuals a kind of *actio popularis* for the interpretation of the Convention (see, ECtHR, *Ada Rossi and Others v. Italy* (dec.), Applications nos. 55185/08, 55483/08, 55516/08, 55519/08, 56010/08, 56278/08 and 58424/08, ECHR 2008-...).

71. Finally, in case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (see ECtHR, judgement of 17 July 2014, available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145577), the European Court noted as follows:

> *...Where applicants choose to be represented under Rule 36 § 1 of the Rules of Court, rather than lodging the application themselves, Rule 45 § 3 requires them to produce a written authority to act, duly signed. It is essential for representatives to demonstrate that they have received specific and explicit instructions from the alleged victim within the meaning of Article 34 on whose behalf they purport to act*

before the Court (see Post v. the Netherlands (dec.), no. 21727/08, 20 January 2009; as regards the validity of an authority to act, see Aliev v. Georgia, no. 522/04, §§ 44-49, 13 January 2009).

However, the Convention institutions have held that special considerations may arise in the case of victims of alleged breaches of Articles 2, 3 and 8 at the hands of the national authorities.

Applications lodged by individuals on behalf of the victim(s), even though no valid form of authority was presented, have thus been declared admissible. Particular consideration has been shown with regard to the victims' vulnerability on account of their age, sex or disability, which rendered them unable to lodge a complaint on the matter with the Court, due regard also being paid to the connections between the person lodging the application and the victim (see, mutatis mutandis, İlhan, cited above, § 55, where the complaints were brought by the applicant on behalf of his brother, who had been ill-treated; Y.F. v. Turkey, no. 24209/94, § 29, ECHR 2003–IX , where a husband complained that his wife had been compelled to undergo a gynecological examination; and S.P., D.P. and A.T. v. the United Kingdom, cited above, where a complaint was brought by a solicitor on behalf of children he had represented in domestic proceedings, in which he had been appointed by the guardian ad litem).

By contrast, in Nencheva and Others (cited above, § 93) the Court did not accept the victim status of the applicant association acting on behalf of the direct victims, noting that it had not pursued the case before the domestic courts and also that the facts complained of did not have any impact on its activities, since the association was able to continue working in pursuance of its goals. The Court, while recognising the standing of the relatives of some of the victims, nevertheless left open the question of the representation of victims who were unable to act on their own behalf before it, accepting that exceptional circumstances might require exceptional measures.

72. In particular, the aforementioned case concerned a particularly vulnerable person without close relatives, Mr. Câmpeanu, a young man of Roma Ethnicity, who was diagnosed as HIV-positive, who spent his whole life in the institutions under state surveillance and who finally died in the hospital for alleged negligence. Following his death, a non-governmental organization, namely *Centre for Legal Resources (*the „CLR"*)* filed an application with the European Convention for violation of Articles 2, 3, 5, 8, 13 and 14 of the European Convention, although it did not have any contacts with him during his life, nor did it have any authorization or instruction received from him or other authorised person.

73. The European Court accepted the *CLR* as *de facto* representative of Mr. Câmpeanu by noting as that Mr. Câmpeanu was the *direct victim*, within the meaning of Article 34 of the Convention, of the circumstances which ultimately led to his death and which are at the heart of the principal grievance brought before the Court in the present case, namely the complaint lodged under Article 2 of the Convention (para 106); that the CLR cannot be regarded as an indirect victim within the meaning of its case-law, since it has not demonstrated a sufficiently „close link" with the direct victim, nor has it argued that it has a „personal interest" in pursuing the complaints before the Court, regard being had to the definition of these concepts in the Court's case-law (para 107); that while alive, Mr. Câmpeanu did not initiate any proceedings before the domestic courts to complain about his medical and legal situation (para 108); that following the death of Mr. Câmpeanu, the CLR brought various sets of domestic proceedings aimed at elucidating the circumstances leading up to and surrounding his death. Finally, once the investigations had concluded that there had been no criminal wrongdoing in connection with Mr. Câmpeanu's death, the CLR lodged the present application with the Court (para 109); that neither the CLR's capacity to act for Mr. Câmpeanu nor their representations on his behalf before the domestic medical and judicial authorities were questioned or challenged in any way, although such initiatives would normally be the responsibility of a guardian or representative (para 110); that Mr. Câmpeanu had no known next-of-kin, and that no competent person or guardian had been appointed by the State to take care of his interests, whether legal or otherwise, despite the statutory requirement to do so, and that at domestic level the CLR became involved as a representative only shortly before his death – at a time when he was manifestly incapable of expressing any wishes or views regarding his own needs and interests, let alone on whether to pursue any remedies, and that the main complaint under the Convention concerns grievances under Article 2 (para 111); that in the exceptional circumstances of this case and bearing in mind the serious nature of the allegations, it should be open to the CLR to act as a representative of Mr. Câmpeanu, notwithstanding the fact that it had no power of attorney to act on his behalf and that he died before the application was lodged. To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention as a result of its own failure to appoint a legal representative to act on his behalf as it was required to do under national law (para 112); finally, granting standing to the CLR to act as the representative of Mr. Câmpeanu is in accordance with the approach consonant with that applying to the right to judicial review under Article 5(4) of the Convention in the case of „persons of unsound mind" (Article 5 1(e)) and securing access to a court to such persons either in person or, where necessary, through some form of representation (para 113).

74. The Constitutional Court holds that it may be guided by the aforementioned principles of the European Court in assessing the admissibility of this part of the appeal.

75. In this connection, the Constitutional Court notes that the appellant is a non-governmental organization, a legal person dealing with promotion and protection of human rights that complains about the violation of the enumerated right of its members. Furthermore, the appellant did not attach to the appeal a letter of attorney of any of its members or sympathisers to represent them, the rights of whom were allegedly violated, which was prescribed by Article 21(2) of the Rules of the Constitutional Court, nor did it make possible or probable that they could not do it, i.e. that the public authorities failed to appoint a guardian or representative for these persons. Furthermore, as it follows from the facts, the appellant's members and sympathisers, not the appellant, filed in person complaints with the competent authorities with regards to the offences, ill-treatments and physical attacks they sustained before, during and after the Festival, the competent authorities acted upon the complaints, which means that these two persons, not the appellant, initiated proceedings before the competent authorities, the efficiency of which in respect of the investigation and prosecution are the essence of the appellant's allegations in respect of the violation of the rights of its members. The appellant does not allege in the appeal nor does it make possible or probable in any way that these persons are prevented from addressing the competent authorities with regards to the filed complaints, all the more so given the fact that the rights under Articles 3 and 8 of the European Convention are non-transferable rights (see, the above-cited judgment *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*). Finally, it does not follow from the extensive documentation submitted to the Constitutional Court that the appellant ceased to work in accordance with its objectives being the reason for which it was founded due to the violation of the rights of its members and sympathisers, being the fact of which the appellant complains.

76. Bringing into connection the specific circumstances of the present case with the aforementioned principles of the European Court, the Constitutional Court holds that this part of the appeal is filed by an unauthorised person.

77. Taking into account all the aforesaid, the Constitutional Court concludes that the part of the appeal relating to the violation of the aforementioned rights of the appellant's members and sympathisers is inadmissible within the meaning of Article 18(3)(d) of the Rules of the Constitutional Court as it has been filed by an unauthorised person.

Ratione materiae

78. The appellant claims that the right not to be subjected to torture or to 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, right to private life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, alone and in conjunction with the right to an effective legal remedy under Article 13 of the European Convention and prohibition of discrimination under Article 14 of the European Convention have been violated as the public authorities failed to provide security measures for the gathering and to conduct an effective investigation to identify and put on trial the organisers and initiators of the occurred violence.

79. In examining the admissibility of this part of the appeal, the Constitutional Court invoked the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 18(3)(h) of the Rules of the Constitutional Court.

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

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

81. Article 18(3)(h) of the Rules of the Constitutional Court, so far as relevant, reads as follows:

(3) An appeal shall also be inadmissible in any of the following cases:

h) the appeal is ratione materiae incompatible with the Constitution;

a) As to Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention

82. In the present case, the appellant, a non-governmental organization, claims that its rights under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention have been violated.

83. The Constitutional Court recalls that according to the European Court, the term „victim" within the meaning of Article 34 of the Convention, must be interpreted autonomously and independently of domestic concepts such as those concerning the interest in taking proceedings or the capacity to do so. According to the European Court, in order for the applicant to be in the position to claim that he is a victim of violation of one or several rights and freedoms guaranteed by the Convention and Protocols hereto, there must be a sufficiently direct connection between the applicant and damage which he allegedly sustained as a result of the alleged violation (see, among other authorities, ECtHR, *Association des amis de Saint-Raphaël et de Fréjus v. France* (dec.), Application no. 45053/98, of 29 February 2000). Furthermore, as it has already been indicated in this

decision, according to the view of the European Court, a legal person can only invoke the violation of its own rights, not the violation of the rights if its members.

84. The Constitutional Court notes that the rights guaranteed under Article 3 relate to human beings, not other legal persons and that according to the view of the European Court, the rights under Article 3 of the European Convention are by their very nature not susceptible of being exercised by a legal person such as a private association (see, cited above, *Verein „Kontakt-Information-Therapie" (KIT) v. Austria*, Decision on Admissibility of 12 October 1988).

85. Taking into account the fact that the appellant is a non-governmental organization, a legal person, and that the essence of its allegations in this part relates to the violation of the rights of its members and sympathisers, and this did not amount to the cessation of the appellant's rights work aiming at achieving the objectives which were the reasons for its foundation, and finally, taking into account the fact that the guarantees provided for by Article 3 relating to human beings and not to legal persons, the Constitutional Court holds that the appellant as a legal person cannot enjoy the guarantees under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention.

b) As to the right under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention

86. Furthermore, the appellant complains about the violation of Article 8 of the European Convention.

87. The Constitutional Court recalls that Article 8 of the European Convention protects four values: family life, home, correspondence and privacy. As to the legal persons as victims of violations of the rights under this Article, the view of the European Court is that legal persons enjoy the protection of the right to „home" within the meaning of Article 8 of the European Convention (see, ECtHR, *Société Colas Est and Others v. France*, Application no. 37971/07, para 41, ECHR 2002-III; *Buck v. Germany*, Application no. 41604/98, para 31, of 28 April 2005 and *Kent Pharmaceuticals Limited and Others v. the United Kingdom* (dec.), Application no. 9355/03, of 11 October 2005). Furthermore, correspondence and other forms of communications of legal persons enjoy the guarantees of „correspondence" within the meaning of Article 8 of the European Convention (see, ECtHR, *Halford v. the United Kingdom*, judgment of 25 June 1997, p. 1016, para 44; *Aalmoes and Others v. The Netherlands* (dec.), Application no. 16269/02, of 25 November 2004). Finally, according to the view of the European Court, legal persons may be the victims of secrete surveillance see, ECtHR, *Mersch and Others v. Luxembourg*, Applications nos. 10439-41/83, 10452/83, 10512/83 and 10513/83, Decision of the Commission, of 10 May 1985, DR 43, p. 34,

paras. 113-114). According to the hitherto case-law, the European Court left open the question whether a legal person may have „private life" within the meaning of Article 8 of the European Convention (see, ECtHR, *Case of The Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, judgment of 28 June 2007, para 60).

88. The Constitutional Court notes that identification of sex, sexual orientation and sexual life fall under the ambit of private life safeguarded by Article 8 of the European Convention protecting the most intimate sphere of life of every human being (see, ECtHR, *Dudgeon v. The United Kingdom*, judgment of 22 October 1981, paras 41 and 52, Series A no. 45; *Laskey, Jaggard and Brown v. The United Kingdom*, judgment of 19 February 1997, para 36, DR 1997-I).

89. In the present case, the appellant claims that its right under Article 8 of the European Convention has been violated as the guarantee of protection of sexual life and sexual orientation, which is encompassed by this Article and relates to the right of any person to be effectively protected from the attacks against his/her selected social identity, was lacking according to the appellant.

90. The Constitutional Court notes that the appellant is a non-governmental organization advocating promotion and protection of culture, identity and human rights and support to the LGBTIQ persons and removal of all forms of discrimination and inequality on the ground of sex, gender, sexual orientation, sexual identity, gender identity, gender expression and intersexual characteristics, in which its social identity reflects. As it follows from the aforementioned view of the European Court, sexual life and sexual orientation are values inherent to human beings, physical persons so that in that sense they cannot form part of social identity of a legal person, even when it reflects in promotion and protection of specific group or removal of all forms of inequalities and discrimination in the field of sexual life and sexual orientation. Therefore, the Constitutional Court holds that despite the fact that the European Court left open the question whether a legal person may have „private life" within the meaning of Article 8 of the European Convention, sexual life or sexual orientation as values inherent to human beings cannot be values which are secured to a legal person in the sphere of private life under Article 8 of the European Convention, which is the essence of the appellant's allegations in this respect.

91. Taking into account the aforesaid, it follows that the appellant as legal person cannot enjoy the right to private life under Article 8 of the European Convention in part relating to the protection of sexual orientation and sexual life.

92. The Constitutional Court concludes that the part of the appeal relating to the violation of the aforementioned rights of the appellant is *ratione materiae* incompatible with the

Constitution of Bosnia and Herzegovina within the meaning of Article 18(3)(h) of the Rules of the Constitutional Court.

93. Taking into account the aforementioned and accessory nature of the right to an effective legal remedy under Article 13 and right to prohibition of discrimination under Article 14 of the European Convention, the appeal, in the part relating to the allegation of violation of the aforementioned rights, is *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina within the meaning of Article 18(3)(h) of the Rules of the Constitutional Court.

Admissibility as to Article II(3)(i) of the Constitution of Bosnia and Herzegovina and Article 11 of the European Convention alone and in conjunction with Articles 13 and 14 of the European Convention and Article 1 of Protocol No. 12

94. The appellant claims that its right to freedom of assembly has been violated as the police forces were neither sufficient nor adequate to ensure its safety and safety of its sympathisers, members and participants of the Festival and that the public authorities failed to conduct adequate investigation and punish the perpetrators of violence.

95. The Constitutional Court reminds that Article 11 of the European Convention guarantees the right to freedom of assembly to all those who have the intention to organise a peaceful assembly. Furthermore, according to the European Court, such guarantees cover both private meetings and meetings in public thoroughfares. Finally, the guarantees under this Article relate to the organiser of assembly, even when the organiser is an association (see, ECtHR, *Christians Against Racism and Fascism v. the United Kingdom*, Decision on Admissibility of 16 July 1980; *Rassemblement jurassien and Unité jurassienne v. Switzerland*, Decision on Admissibility of 10 October 1979, DR 17, p. 93 and 119)

96. Turning to the instant case, the appellant was the organiser of the Festival which, as peaceful assembly, was authorised by the public authorities, which is one of conditions prescribed by the law to permit it. Accordingly, the appellant may invoke the guarantees under Article 11 of the European Convention.

97. Furthermore, as the appellant enjoys the guarantees under Article 11 of European Convention, it enjoys the guarantees under Articles 13 and 14 of the European Convention with regards to an effective legal remedy for protection and exercise of this right of his and not to be discriminated against in enjoyment of this right.

98. Taking into account the fact that Article 18(2) of the Rules of the Constitutional Court provides that 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, this part of the appeal is admissible.

99. Taking into account the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 18(2), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that this part of the appeal fulfils the admissibility requirements.

VII. Merits

100. The appellant claims that his right under Article 11 of the European Convention has been violated as the public authorities failed to take necessary measures and actions and to secure safe holding of the Festival and that they failed to conduct an effective investigation and identify and punish the persons who caused violence.

Right to freedom of peaceful assembly and freedom of association

101. Article II(3) of the Constitution of Bosnia and Herzegovina so 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:

(i) Freedom of peaceful assembly and freedom of association with others.

102. Article 11 of the European Convention reads as follows:

1. 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.

2. 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.

103. Turning to the instant case, the appellant complains that freedom of assembly has been violated as the public authorities failed to secure the gathering adequately, i.e. that they failed to take necessary measures in this respect. Furthermore, the appellant claims

that the public authorities failed to conduct an effective investigation and put on trial the organisers and instigators of violence occurred.

104. The right to freedom of assembly is a fundamental right in a democratic society and, like the freedom of expressions, is one of the foundations of such a society (see, ECtHR, *G v. Germany*, Application no. 13079/87, Decision on Admissibility of 6 March 1989; *Rai and Others v. the United Kingdom*, Application no. 25522/94, Decision on Admissibility of 6 April 1995). The Constitutional Court notes that Article 11 of the European Convention imposes on the public authorities the obligation to refrain from arbitrary interference with the right to freedom of association and assembly. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Therefore, there may in addition be positive obligations to secure the effective enjoyment of the right to freedom of assembly (see, ECtHR, *Wilson, National Union of Journalists and Others v. The United Kingdom*, Applications nos. 30668/96, 30671/96 and 30678/96, para 41, ECHR-2002V), in relations between individuals (see, P*lattform „Ärzte für das Leben" v. Austria*, judgment of 21 June 1988, Series A no 139, p. 12, para 32). Accordingly, it is incumbent upon public authorities to guarantee the proper functioning of an association or political party, even when they annoy or give offence to persons opposed to the lawful ideas or claims that they are seeking to promote. Their members must be able to hold meetings without having to fear that they will be subjected to physical violence by their opponents. Such a fear would be liable to deter other associations or political parties from openly expressing their opinions on highly controversial issues affecting the community. Finally, in a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right of association (see, ECtHR, *Ouranio Toxo and Others v.* Greece, judgment of 20 October 2005, para 37 with further references).

105. The Constitutional Court notes that in response to the appellant's allegations that no adequate measures were taken to protect the gathering, the MoI and Police Administration alleged that violence had escalated on the day of opening ceremony of the Festival due to the failure of the appellant to take ordered measures, the fact that invitation letters had been distributed via e-mail, although the appellant's web page had already been hacked and wrong assessment on the part of the appellant with regards to the number of visitors, who had announced a total number of 300 persons during 5 days of the Festival, whereas around 250 persons had appeared on the first day of the Festival.

106. The Constitutional Court reminds that the public authorities have the obligation to take reasonable and adequate measures to allow authorised protests to take place

peacefully. However, they cannot guarantee it in an absolute manner and have large margin of appreciation of choosing the means to do so (see, *mutatis mutandis*, ECtHR, *Abdulaziz, Cabales, Balkandali*, of 28 May 1985, Series A, no. 94, pp. 33 and 34, *Rees,* of 17 October 1986, Series A no. 106, pp. 14 and 15, paras 34 through 37). In this domain, the obligation of the public authorities in accordance with Article 11 of the European Convention is the obligation with regards to the measures to be taken, not the results to be achieved. In this connection, the European Court does not have to assess the expediency or effectiveness of the tactics adopted by the police on these occasions but only to determine whether there is an arguable claim that the appropriate authorities failed to take the necessary measures (see, cited above, *Plattform „Ärzte für das Leben" v. Austria*, para 36).

107. The Constitutional Court notes that the appellant as organiser of the Festival addressed the relevant Police Administration, i.e. MoI in accordance with the Law on Public Assembly in order to obtain permit to hold the gathering, that it obtained it as it fulfilled that requirement, namely that the gathering would be peaceful, in addition to other requirements. It follows from the documents which the appellant and Police Administration submitted to the Constitutional Court that the organization of the Festival, insofar as the part relating to its safe holding is concerned, was carried out in cooperation and coordination between the Police Administration and the appellant. After the meeting held with the appellant, the Police Administration made an Operation Plan in which it was indicated, in addition to other issues, the number of police officers to be involved in the security actions on the location where the opening ceremony of the festival was supposed to be held and to be deployed in two circles, as stated in that Plan. In response to the appeal, the Police Administration did not indicate the number of visitors and participants that would be appropriate to the number of involved police officers. Furthermore, in accordance with its authorizations, the Police Administration ordered the appellant to take certain security measures. The Constitutional Court notes that it does not follow from the submitted documents that the appellant failed to fulfil this obligation as this would have amounted to the prohibition of gathering in accordance with Article 8 of the Law on Public Assembly, which is not the case here. Furthermore, the Police Administration had already been informed of the threats addressed to the appellant and announcements of violence against the appellant, Festival itself and certain persons who had publicly supported that public event. Furthermore, the general situation regarding the Festival, media interest and posters conveying the insulting messages and messages used to incite violence which had been posted all over the town and public invitation for organization of a manifestation opposing the festival on the day of opening ceremony of the Festival, about which the appellant informed the Police Administration, and whose participants were invited to appear in front of the building of Academy of Fine Arts and prevent the opening ceremony of the Festival,

were a sufficient signal for applying reinforced security measures in the present case. In this regard, the Constitutional Court holds that a possible failure of the appellant with regards to the delivery of invitation letters via e-mail in the situation when its web page had already been „hacked" was not of decisive significance to the incitement of violence occurred, since the Police Administration had already been informed of it. Furthermore, the Police Administration noted that violence had occurred as the appellant had failed to fully comply with the ordered measures but it did not indicate those measures, nor did it indicate how they would have prevented the violence occurred. Moreover, the Constitutional Court notes that the appellant was obliged to provide security measures inside the buildings where the events took place, as indicated by the Police Administration, whereas the police forces were obliged to do so outside and around the buildings. Furthermore, during the preparations of the Festival, the appellant hired a special security agency which was supposed to provide security services during the gathering, which was the obligation of the appellant as organiser of the gathering as prescribed by the law. The appellant attached to the appeal the Protection Plan for the Opening Ceremony of the Event, which was made by the aforementioned agency and which was delivered to the Police Administration together with the announcement of the gathering. Finally, the Constitutional Court notes that in the application for public gathering, the appellant indicated the reasons for considering that security measures of the police were necessary, wherein it stated that that this was particularly necessary at the points around the locations where the festival was to take place because of possible „surprise attacks". On the day of the opening ceremony of the Festival, seven persons, attendees/visitors of the Festival were attacked and sustained minor and major bodily injuries during such „surprise attacks" in addition to the incidents occurred between the supporters and opponents of the Festival in front of the building of the Academy of Fine Arts. In this connection, the Constitutional Court notes that the Police Administration conducted disciplinary proceedings against several police officers who were deployed to secure the points where the attacks occurred. Finally, it does not follow from the response of the MoI or CPO that the proceedings prescribed by the Law on Public Assembly were conducted against the persons designated as organisers of the Festival of the appellant or against security agency for possible failures.

108. The Constitutional Court notes that at the material time and with regards to the positive obligations of public authorities to protect peaceful demonstrations, the CCFBiH prescribed the criminal offence of preventing or hindering a public gathering (Article 190). However, taking into account the circumstances in the present case, it follows that the public authorities failed to take reasonable and appropriate measures in order to prevent the conflict between the supporters and opponents of the Festival and subsequent attacks on the participants of the Festival.

109. Furthermore, in the present case, the question arises whether the attitude of the public authorities towards the organization of the Festival contributed to the escalation of violence which occurred on the day of the opening ceremony of the Festival.

110. The Constitutional Court notes that the Festival was organised with the aim of presenting life stories of the LGBTIQ persons – their everyday life, love life, relationships, friendships, family activities, fears and other life issues with which they face in their everyday life, and that this was the first event of the kind in BiH. Displaying affiliation such as the affiliation to the LGBTQ population is and protection and development of its identity and values, could not be said to constitute a threat to a „democratic society", even if it could be the cause of tensions (see, *mutatis mutandis*, ECtHR, *Sidiropoulos and Others v. Greece*, judgment of 10 July 1988, Reports 1998-IV, pp. 1615, para 41). In particular, the creation of tension is one of the unavoidable consequences of pluralism when different ideas are freely discussed. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other (see, cited above, „*Ärzte für das Leben*", p. 12, para 32 and *Serif v. Greec*e, Application no. 38178/97, para 53, ECtHR 1999-IX). Moreover, it is of crucial importance for politicians to avoid intolerance in their public discourse (see, ECtHR, *Erbakan v. Turkey*, Application no. 59405/00 of 6 July 2006, para 64).

111. The Constitutional Court notes that the appellant attached to the appeal the written submissions addressed to a number of institutions at all levels of government in BiH and, at the material time, personalities and politicians holding important public office. In all those addresses, there were calls for public appearance to prevent and condemn announced violence and hate speech, which was illustrated in the letters by messages and threats addressed to the appellant. The outcome of those addresses were the communications by two institutions and the meetings with two officials, i.e. their representatives, in respect of which no public statement was released. Furthermore, it follows from the documents submitted to the Constitutional Court that some politicians publicly presented their views denying the LGBTIQ population, disproving the Festival and any form of public presentation of this population.

112. The Constitutional Court recalls that the role of State authorities is to defend and promote the values inherent in a democratic system, such as pluralism, tolerance and social cohesion. In the present case, it would have been more in keeping with those values for the local authorities to advocate a conciliatory stance, rather than to stir up confrontational attitudes, which was caused by the organization of such event (see, *mutatis mutandis*, cited above, *Ouranio Toxo*, para 42). Therefore, the Constitutional Court holds that the ignorant

attitude of public authorities, i.e. publicly expressed views by some officials manifestly contributed to the violence occurred on the day of the opening ceremony of the Festival.

113. Furthermore, the appellant claims that there was no effective investigation to identify and punish the organisers and persons initiating violence occurred, although media published the names of the persons and their photographs, i.e. to date nobody has been held responsible for the criminal offence of preventing or hindering a public gathering referred to in Article 190 of the CCFBiH. In response to this part of the appeal, the MoI and CPO alleged that in the present case concrete measures and actions had been taken to identify and punish the persons who had participated in violence occurred, i.e. criminal and minor offence proceedings had been conducted against some of those persons and they were punished.

114. The Constitutional Court recalls that the positive obligation of the State implies the actions to be taken with the aim of effective conduct of investigation and, if necessary, protection against unlawful acts, including violence. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, ECtHR, *Özgür Gündem v. Turkey*, judgment of 16 March 2000, paras 43 and 45).

115. The Constitutional Court notes that the appellant as organiser of the Festival was exposed to attacks, threats and open announcements of violence against it, its members and LGBTIQ population in general from the moment of announcement of the Festival. Furthermore, as it follows from the documents submitted to the Constitutional Court, all of this was not remained unknown to the relevant MoI and Police Administration with which the appellant had been filing reports from the moment of announcement of the Festival and period of preparations for opening ceremony, which were supported by available information which could have been used for the purpose of identifying and preventing the individuals and groups addressing threats and offences. All reports were also forwarded to the CPO. Furthermore, these facts could not remain unknown to the MoI and CPO given the campaign in media and the interest which was caused by the organization of such event and posters and leaflets conveying insulting messages and inciting violence, which were posted on visible and most popular places in town. Finally, it follows from the documents submitted to the Constitutional Court that the MoI and CPO were informed of the threats addressed to those who clearly expressed their support to the Festival. However, the Constitutional Court notes that up to the day of the opening ceremony of the Festival, i.e. 24 August 2008, neither the MoI nor CPO had taken any action to investigate or

eventually identify the individuals who were addressing threats, insults and were inciting violence. For that purpose, the investigation initiated after the incident took place and resulting in cancellation of the Festival, in the situation when the competent authorities, although aware of the threats, did nothing to investigate them and prevent the violence from occurring, cannot be accepted as meeting of the positive obligation of the public authorities to act preventively and to conduct effective investigation.

116. The Constitutional Court further observes, having in mind that the internet was used, in most cases, for announcement of the threats, insults as well as calling for violence, that from the presented it is not possible to conclude that any measures or actions were undertaken against web page owners where such content was published or against web page owners whose forums were used for posting the messages by visitors in order to stop and prevent further dissemination of such messages, all the more so since it appears that the access to such pages and their contents had been in no way restricted. Furthermore, until the day of opening of the Festival no action was taken in respect of the appellant's complaints about unauthorised access to its web-page, threatening and offending messages addressed to its e-mail address, abuse of those data, which occurred, as it follows from the documents submitted to the Constitutional Court, despite the appellant's efforts to protect it and prevent it. The extensive documentation attached to the appeal shows the content of the messages which it received, which were left on the forum of its web page, on the forums of the holders of other web pages and, finally, the content of the texts which the holders of certain web pages published, and that the appellant attached those documents to the complaints filed with the relevant Police Administration. It follows from the aforementioned documents that homosexuality is regarded as illness, a plague of modern society, an evil against which one should fight, as a culprit of AIDS and HIV, that it is tantamount to paedophilia, that it is contrary to social moral, that it destructs social moral etc. Furthermore, among those texts, numerous are those calling for violence, suggesting the most rude and cruel means to be used and measures to be taken against the organisers and participants of the Festival and LGBTIQ population in general.

117. The Constitutional Court notes that in a modern society the internet is a very special method of communication and one of its fundamental principles is the high level of anonymity, which it guarantees to its users. Owing to that, internet encourages free speech and expression of various ideas. On the other hand, because of the high level of anonymity the internet is a powerful tool for defaming or insulting people or violating the rights of others. Contrary to the traditional media, the victim cannot easily identify the defaming person or group due to the fact that it is possible to hide behind a pseudonym or even to use a false identity. This is the reason why the investigation and identification of the persons taking such actions or prevention or surveillance of such messages might be difficult or

even impossible despite available technical tools and measures and actions which the victim can take in order to prevent such messages from being received. Therefore, it is the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context (see, ECtHR, *K.U. v. Finland*, judgment of 2 December 2008, paras 34 and 49).

118. The Constitutional Court notes that at the material time, a Cyber Crime Department existed within the MoI. However, as it follows from the submitted documents that the aforementioned Department took actions to investigate and identify the persons who had addressed the threats and insults to the appellant and some of its members but only after the reports had been filed on 27 September 2008, thus after violence had occurred. The Constitutional Court notes that the MoI and CPO did not indicate in the response to the appeal the reason for which that Department had not been involved at an earlier point, taking into account the fact that the appellant had been filing reports on threats and insults sent via Internet as of 10 September, that they were supported by the documents indicating the content of the messages and, in a small number of cases, the names who sent them or at least information which could be useful in order to identify those persons. Finally, the MOI forwarded all reports to the CPO which is competent to issue orders to involve that Department. The Constitutional Court notes that the fact that this part of the investigation amounted to certain results and that some of the persons were identified, that minor offence proceedings were conducted against them leads to the conclusion that the actions taken in this sense could not be regarded as an excessive burden placed on the public authorities to investigate and prevent unlawful actions, including the violence occurred. However, the Constitutional Court notes that these actions were taken only after the violence had occurred so that they could not be regarded as fulfilment of the positive obligations of the public authorities to take preventive actions.

119. Furthermore, the Constitutional Court notes that according to the European Court, tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance provided that any „formalities", „conditions", „restrictions" or „penalties" imposed are proportionate to the legitimate aim pursued (see, ECtHR, *Erbakan v. Turkey*, judgment of 6 July 2006, para 56). Furthermore, according to the European Court, incitement to hatred does not have to include the act of violence or other criminal offences. However, the attacks themselves against persons, who were committed by insults, ridicules, defamation of a group or part of population could be sufficient for the authorities to favour the fight against racist hate in the form of freedom of expression when it is carried out in an adequate manner (see, ECtHR,

Féret v. Belgium, Application no. 15615/07, para 73, of 16 July 2009). Furthermore, the European Court particularly notes that discrimination on the ground of sex is as serious as discrimination on the ground of „race, origin and colour" (see, *inter alia*, ECtHR, *Smith and Grady v. The United Kingdom*, Application nos. 33985/96 and 33986/96, para 97, ECHR 1999-VI). Finally, the terms constituting the hate speech do not enjoy the protection of Article 10 of the European Convention (see, cited above, *Günduz*, para 41). The effective prevention of serious crimes, when important aspects and substance of guaranteed rights are brought into question, may require the public authorities to create efficient provisions of criminal law through effective investigation of criminal law, which would, through an effective investigation and criminal prosecution, deter against such acts (see, *mutatis mutandis*, cited above, *X. and Y*., 23-24 and 27; *August v. The United Kingdom* (dec.) Application no. 36505/02 of 21 January 2003 and *M.C. v. Bulgaria,* Application no. 39272/98, Application no. 39272/98, para 150, ECHR 2003-XII).

120. The Constitutional Court notes that at the material time (2008), Bosnia and Herzegovina had already ratified the Convention on Cyber Crime and Additional Protocol to Cyber Crime, Related to the Prosecution of Acts of Racist and Xenophobic Nature through Computer Systems (*Official Gazette of BiH* – International Treaties, 6/06). Additional Protocol encompasses prosecution of acts of racist and xenophobic nature through computer systems such as dissemination of racist material through computer systems, racist and xenophobic motivated threat, racist and xenophobic motivated insults. Furthermore, at the material time, the CCFBiH, Chapter XXXII, prescribed the criminal offences against electronic data processing system, which corresponds to the obligations undertaken under the Convention on Cyber Crime. However, the obligations undertaken under the Additional Protocol did not have effect on the contents of that Chapter, nor did they have effect on any other section of the CCFBiH. Furthermore, at the material time, the CCFBiH did not regulate the offence of hate crime, nor does it regulate it today as any other criminal offence committed on the ground of race, colour, religion, national or ethnic affiliation, disability, sex, sexual orientation or gender identity of a person. Moreover, there was no regulation in Bosnia and Herzegovina at the material time nor is there such regulation today prescribing the publishing on the Internet, which would protect the rights of citizens in respect of the contents published on web pages, web portals and social networks. The same applies to the Law on Communications, which, as a law at the State level, regulates, *inter alia*, the field of telecommunications. In particular, the Regulatory Agency for Telecommunications does not deal with the complaints of citizens relating to the contents published on web portals, social networks but it forwards them to the Press Council of BiH. The Press Council of BiH is a self-regulatory body established as an expression of willingness of media industry to apply the self-regulatory system to press

and online media. The Council acts in accordance with the Press Code and online media in BiH as its own regulation, the aim of which is to create the foundations of self-regulatory system to media to press and online media, being morally binding upon journalists, editors, owners and publishers of print and online media. Complaints for contents published on the web page of a media house could be filed with the Council, in case that, *inter alia*, such content may be classified as hate speech. However, decisions of the Council are of declaratory nature and do not amount to the punishment of breaches of the Code.

121. In the instant case, the insults, defamation and threats to the appellant and calling for violence were in the most part addressed through internet. All of this occurred in the period (2008) when it was a well-known fact that internet, due to a high degree of anonymity, encourages freedom of speech and expression and exchange of the most diverse ideas but that due to its anonymity also represents a powerful tool in offending, threatening and violating the rights of the others. In addition, in the relevant period, the Additional Protocol of the Convention on Cyber Crime was also ratified according to which all state signatories have undertaken an obligation to the criminalize acts of a racist and xenophobic nature committed through computer systems. Pursuant to this, it follows that there existed an obligation of the public authorities to provide for a legal framework in which it will reconcile the various claims which obviously compete for protection in this context. Namely, as already indicated in this decision, according to the position of the European Court, in certain democratic societies it can be considered necessary to sanction or even prevent all forms of expression that spread, incite, promote or justify hatred based on intolerance, if it is provided that „formalities", „conditions", „restrictions" or „penalties" are proportionate to the legitimate aim sought to be achieved. Expressions and comments: *Death to Faggots*! *They are insane, all of them will die 100%!!! Let them come out but then they should not complain after we break them. They are warned. Sarajevo, do not sleep. Wake up people, find the organisers of the event and break their legs. We should start buying hand grenades again… This time massacre will take place on Kovačići… Neither did Karadžić nor Mladić finish the job. We have to finish that job now. All of them should be slaughtered… We have to be careful, which means that we should allow gays to organise the parade and then beat them with baseball bat, pour gasoline on them and put on fire a prominent group of organisers, and certain number of gays and lesbians to be killed at the location of „internal flame" to be the warning to all future generations of gays… It is better to be fascist than gay. As to the question whether we can terrorize them, you can be sure about that after we, police and ambulance cars walk over them, and it will be just like it was in Belgrade*, etc. refer to the conclusion that they are motivated primarily

by the manner in which the LGBTIQ population expresses its sexuality and gender and sexual orientation. Considering the manner in which they are, for the most, announced i.e. through internet, having in mind its prevalence and accessibility, it is indubitably that they had a character of public expression. In those terms, they represents „hate speech" which in the broadest meaning, implies public expression or causing of hatred towards certain group or individual due to its certain preference, for the purpose of creating intolerance, discord, discrimination and violence and/or incitement of already present hatred, which is all the more developed, strengthened and deepened through public hate speech. However, in the relevant period as is the case today, the Criminal Code of FBiH failed to stipulate crime committed out of hate as any other criminal offence committed on the account of race, colour of skin, religion, national or ethnic origin, disability, gender, gender orientation or gender identity of other persons. Therefore, the failure of public authority to provide for a clear legal framework in which it will reconcile the various claims which obviously compete for protection in this context for the purpose of acting preventively and deterring from commission of the same or similar acts, which would prevent dissemination of insults, defamations and threats addressed to the appellant, its members and sympathisers because of organization of the festival dedicated to a legitimate issue, in appellant's case, amounted to a physical violence on the day of the opening ceremony of the Festival and caused the cancellation of the remaining part of the festival thus denying the appellant the effective enjoyment of the right to freedom of assembly.

122. The Constitutional Court concludes that given the circumstances of the instant case, the appellant's right under Article II(3)(i) of the Constitution of Bosnia and Herzegovina and Article 11 of the European Convention has been violated.

As to the compensation for non-pecuniary damage

123. The appellant requested the Court to order the Government of the Federation of BiH to pay it „as a representative of the members and affiliates of the LGBTIQ population" the amount of BAM 50 000 as compensation for non-pecuniary damage.

124. The Constitutional Court notes that pursuant to Article 74 of the Rules of the Constitutional Court, the Constitutional Court, in a decision granting an appeal, may award compensation for non-pecuniary damage. Paragraph 2 of that Article provides that if the Constitutional Court considers that compensation for pecuniary damage is necessary, it shall award it on equitable basis, taking into account the standards set forth in the jurisprudence of the Constitutional Court.

125. In the instant case, the Constitutional Court notes that the appellant as a „representative of the LGBTIQ population" requests to be awarded a compensation for damage caused by "the violation of all aforementioned rights". In this connection, the Constitutional Court notes that it has already concluded that the appeal is not admissible in the part in which the appellant invoked the violation of the rights of its members and sympathisers as it has been filed by an unauthorised person. Furthermore, the Constitutional Court concluded that the appeal, in the part wherein the appellant claims that its rights under Article II(3) (b) and (f) of the Constitution of BiH and Articles 3 and 8 of the European Convention have been violated, alone and in conjunction with Articles 13 and 14 of the European Convention, is incompatible *ratione materiae* with the Constitution of BiH.

126. In the instant case, the appeal is granted in the part in which the appellant complained about the violation of the right under Article II(3)(i) of the Constitution of BiH and Article 11 of the European Convention. The Constitutional Court has established that the public authorities failed to take positive measures and provide an effective protection of this right of the appellant. Given a complex constitutional structure of the FBiH, this failure is attributed to the authorities at the level of the Canton, i.e. MoI of the Sarajevo Canton which failed to adequately secure the gathering, i.e. the MoI of the Sarajevo Canton and CPO, which failed to conduct an effective investigation into the threats and announcements of violence, which finally occurred, and the authorities at the level of the FBiH, i.e. legislative authority which failed to provide for a legal framework for preventing dissemination of insults, defamations and threats against the appellant and its members and sympathisers and which would make it possible for such behaviour to be punished with the aim of acting preventively and deterring from commission of the same or similar acts.

127. Taking into account the fact that the violation of the appellant's right under Article II(3)(i) of the Constitution of BiH and Article 11 of the European Convention has been established, the Constitutional Court decides to award to the appellant the amount of BAM 6 000 as compensation for non-pecuniary damage. Out of that amount, the Government of the Federation of BiH is ordered to pay the appellant the amount of BAM 3 000 and the Government of the Sarajevo Canton the amount of BAM 3 000.

Other allegations

128. Taking into account the conclusion on the violation of the right under Article II(3)(i) of the Constitution of Bosnia and Herzegovina and Article 11 of the European Convention, the Constitutional Court does not find it necessary to separately examine

the appellant's allegations on the violation of the rights under Article 13 and 14 of the European Convention in conjunction with Article 11 of the European Convention and rights under Article 1 of Protocol No. 12 to the European Convention.

VIII. Conclusion

129. The Constitutional Court concludes that there has been a violation of the right to freedom of assembly under Article II(3)(i) of the Constitution of Bosnia and Herzegovina when the public authorities failed to fulfil its positive obligation, under this Article, to take necessary measures in order to secure peaceful assembly organised in accordance with the law, which amounted to violence between the confronting sides, when they failed to provide for a clear legal framework to punish the behaviour which amounted to violence for the purpose of preventing it and deterring from the commission of the same or similar acts.

130. Pursuant to Article 18(2) and (3)(d) and (h), Article 59(1) and (2) and Article 74 of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the operative part of this Decision.

131. Pursuant to Article 43 of the Rules of the Constitutional Court, Separate Partially Dissenting Opinions of Judges Mirsad Ćeman and Margarita Tsatsa-Nikolovska are attached to this Decision.

132. 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 Partially Dissenting Opinion of Judge Margarita Tsatsa-Nikolovska

Taking into account the conclusions enounced in the decision, there are several important elements which deserve to be elaborated with regards to the rejection of the appeal in the part where the appellant complains about a violation of the rights of its members and sympathisers under Article II(3)(b), (f) and (i) of the Constitution of Bosnia and Herzegovina and Articles 3, 8 and 11 alone and in conjunction with Articles 13 and 14 of the European Convention, as it was filed by an unauthorised person and the rejection of the appeal in the part where the appellant complains about a violation of the rights under Article II(3) (b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3, 8 alone and in conjunction with Articles 13 and 14 of the European Convention, as it was incompatible *ratione materiae* with the Constitution of Bosnia and Herzegovina. Although the appellant also refers to Article 1 of Protocol No. 12, there are no reasons for this allegation.

An important element of the taken decision is that the reason for which the organization (the appellant) was founded was the exclusive representation of the alleged victim of violation of human rights.

Under the heading „Facts of the case" of the decision, it was established that the appellant was a non-governmental organization having several objectives (paragraphs 7 and 8 of the decision) and that the Festival had been organised with the aim of presenting „life stories" of the LGBTIQ persons and revising heteronormative and patriarchal values through cultural and artistic forms in the context of gender, sex and sexual orientation. The program of the Festival was not the representation of the alleged victim of violations of human rights.

The element of existence of the organization (the appellant) or its possible closing down was not the subject of examination.

It was not established whether the appellant's Statute allowed it to represent its members nor was the scope of such representation established. Given the fact that this was not established, how was it possible to conclude that it did not have the power of attorney in respect of each member of that organization? In addition to all the aforesaid, the appellant was not requested to submit those possible powers of attorney to the court. To accept the fact that the powers of attorney should have been submitted together with the appeal would mean the application of excessive formalism, which is not in accordance with the principle and standards of the European Convention.

The issue of direct or indirect victim and their connection was not the subject of examination. The status of victim should be treated so as to take into account the sensibility and vulnerability of the LGBTIQ group, and the laws relating to them and their fear of being identified by stating their names because of those laws.

In clarifying the issue regarding the authorised person, the circumstance that a legal person may be subject to criminal liability in the majority of legal systems should be taken into account, which means that it may be punished by imposition of the measure of restriction, but it does not have the possibility of fighting for its rights, namely the right not to be subjected to inhuman, degrading treatment or punishment, the right to privacy or the right not to be discriminated as they do not relate to legal persons. Is it possible to restrict (Article 8, Article 11(2)) the rights and freedoms without securing the enjoyment, exercise and protection of those rights?

Article 1 of the European Convention obliges all contracting parties to secure to everyone under their jurisdiction the rights and freedoms defined in the European Convention.

Article 34 of the European Convention should certainly be taken into account in the present situation, which makes it possible for legal persons to file an application with the European Court on their behalf. In order for such case to be admissible, that legal person, as already said, must qualify as a victim. This means that the legal person must be directly affected by the act or omission, depending on the interference with a certain right (*Ernewein v. Germany*, Decision of 12 May 2009, Application no. 14840/08 and *NBTK and Swig Group Inc. v. Russia*, Decision of 23 March 2006, Application no. 307/02). In the present case, the festival organised by the appellant was not held, through no fault of his own (the interference with the given right was established under the heading „Facts of the case" of the decision).

In my opinion, the well-established case-law of the European Court should be indicated as relevant to this case, which is also the principle of interpretation, namely that the European Convention is a „living instrument" which must be interpreted in the light of the present conditions.

I would like to emphasize that the established facts are not disputable insofar as the objectives of the organization are concerned, where the mentioned case-law of the European Court is not quite relevant argument to the Decision. The organization did not have one objective nor was it established that it did not exist anymore in order to apply, *inter alia*, the mentioned case-law to the present case.

Taking into account the aforesaid, I do not agree with the Decision to reject that part of the appeal. Given such opinion, I could not accept either the opinion that the appeal should be rejected in respect of Article 13 of the European Convention, since the issue of accessory nature of Article 13 depends on the decision on the merits in the part which was rejected. Any other analysis would amount to speculations, which would certainly not lead to the appropriate application and interpretation of the European Convention.

Separate Partially Dissenting Opinion of Judge Mirsad Ćeman

The Constitutional Court partially granted the appeal and found a violation of the appellant's rights 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 by concluding (paragraph 129) that there had been a violation of the right to freedom of assembly and association under Article II(3)(i) of the Constitution of Bosnia and Herzegovina and Article 11 of the European Convention when the public authorities failed to fulfil its *positive obligation*, under this Article, to take necessary measures in order to *secure peaceful assembly* organised in accordance with the law, which amounted to violence between the confronting sides, and when they failed to *provide for a clear legal framework* to punish the behaviour which amounted to violence for the purpose of preventing it and deterring from the commission of the same or similar acts.

Thus, the Constitutional Court found that the public authorities:

- failed to take necessary measures („… reasonable and appropriate measures in order to prevent the conflict between the supporters and opponents of the Festival …" – paragraph 108) to secure peaceful assembly organised in accordance with the law, which amounted to violence between the confronting sides, which was primarily attributed to the Ministry of the Interior of the Sarajevo Canton;
- failed to provide for a clear legal framework for the purpose of preventing and deterring from the commission of the acts against peaceful gathering of citizens, for which the legislative authority of the Federation of BiH was held responsible.

However, in my opinion, the facts presented before the Constitutional Court do not indicate such conclusion. Especially not equally in both aspects.

In particular, it obviously follows from the presented facts (paras 7-44 and 54 and 55) that the public authorities, i.e. the competent police authorities and other authorities were not passive, which was alleged by the appellant and accepted by the majority of the Constitutional Court, nor did they fail to take necessary measures in order to secure the peaceful gathering organised in accordance with the law for the following reasons:

- the permission for the event as a peaceful public gathering organised by the appellant was issued in a timely fashion (the first Sarajevo Queer Festival) (para 107);
- all necessary measures to provide physical, operational and bomb squad security for peaceful holding of the event (the Operational Plan on conducting the measures for providing physical, operational and bomb squad security for the Festival etc.)

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(paras 18 and 19) were agreed in intensive collaboration with and participation of the appellant;

- it is indisputable that there were certain failures on the part of the organiser of the Festival with regards to the estimated number of visitors and realization of previously agreed measures (joint conclusion, para 32);
- the public authorities, taken as a whole, took a number of organizational, operational and security measures to provide peaceful holding of the event and conducted misdemeanour and offence proceedings with the aim of identifying and punishing the persons who had acted in the violent manner at the time of the opening of the Festival, during and after the Festival (para 40);
- disciplinary proceedings were conducted against a number of police officers (para 43 and 44);
- etc. …, as stated in the facts of the case.

It is not disputable, which the Constitutional Court has rightfully indicated, that the positive obligation of a State (i.e. the public authorities) implies the actions to be taken with the aim of effectively conducting the investigation and, if need be, securing protection against unlawful acts, including violence. However, the Constitutional Court has also concluded that they, i.e. the public authorities „…cannot guarantee it in an absolute manner and have large margin of appreciation of choosing the means to do so …" and that the obligation of the public authorities in accordance with Article 11 of the European Convention is the obligation with regards to the measures to be taken, not the results to be achieved. In this connection, the European Court does not have to assess the expediency or effectiveness of the tactics adopted by the police on these occasions but only to determine whether there is an arguable claim that the appropriate authorities failed to take the necessary measures (para 106).

Thus, although the taken measures were not an absolute guarantee for peaceful holding of the event, as the law and other regulations guarantee for all citizens, I have the impression that the Constitutional Court (i.e. the majority of the Court), by finding a violation of the appellant's rights, is sending an obviously necessary message although in an insufficiently substantiated manner that it is the guarantor of the rights of citizens to be exercised in accordance with the Constitution of BiH and European Convention. In particular, although the Constitutional Court, through its decisions, together with other authorities within the scope of their responsibilities, must not only encourage but also guarantee the effective application of wide range of constitutional freedoms and rights of all citizens of Bosnia and Herzegovina, *its concrete decisions must be based on an impartial assessment and application of constitutional norms and provisions of the*

European Convention, on the one hand, and facts on which those decisions are based, on the other hand. Whatever they are and whoever they concern. In the present case, the Constitutional Court, i.e. the majority of the Court, was nevertheless a „rigorous judge". Irrespective of the fact, it is also to be noted, that the conduct and acts of a number of the opponents of the Queer Festival (where the opposition to the „philosophy" of the LGBTIQ population is also a legitimate civil standpoint which, as any other standpoint, may and must be manifested without violence, offences and endangerment of security etc.) were, to a certain extent, contrary to the Law on Public Assembly and other regulations. *The facts show that the public authorities punished the violent conduct as such. Thus, the public authorities acted.*

Certainly it is not the task of the Constitutional Court, nor is it my intention to assess in the present case at which extent the date of the Queer Festival had influence on the reaction of not only the opponents but also the LGBTIQ population in general. However, it is to be noted that the appellant's conclusion (para 9) that „the month of Ramadan is supposed to be the most peaceful month in the year and that the overlapping of these two events would cause no problems", does not appear convincing. Regardless of the fact that in all likelihood the reaction would have been similar if another date had been chosen (the experience in the countries of the region and beyond confirm this). Therefore, when it is viewed *specifically and generally*, no matter how it is hard to understand and accept, the fact that new cultural and other elements (expressed through the applicable constitutional model of human rights and freedoms) are inserted in the traditional pattern of multicultural BiH society obliges *all those who „compete for protection" of their rights and freedoms to have more understanding and sensibility.* This is how the realistic „tensions" between the confronting cultural models and concepts (traditional and the new ones as well) and their promotion as an expression and reflection of legitimate right to diversity will be resolved in the peaceful manner, with tolerance and in accordance with the law. *From the aspect of modernity or traditionalism, giving preference may mean partiality. In cases such as this one, the Constitutional Court must be very cautious.*

Furthermore, the appellant alleged and the Constitutional Court established that the arguable claim was that the public authorities had failed to secure the clear legal framework for the purpose of preventing and deterring from committing the same or similar acts.

It is not difficult to agree with the view that there must be a consistent and a clear legal framework making it possible for the public authorities to act preventively and effectively not only in this matter but also in general in protection of guaranteed freedoms, rights and interests of all citizens by „conciliating" different interests which are competing in the present case. However, in my opinion, the quoted provisions of the relevant regulations

(paras 57 through 61) indicate that these two levels of the public authorities (Federation of BiH and the Sarajevo Canton), within the scope of their powers, secured sufficient legal framework making it possible for them to act operatively and to punish the offenders. Although there is a need even an obligation (Convention on Cybercrime and Additional Protocol to that Convention, which was ratified by BiH) to additionally regulate that specific category, i.e. the issue of cyber crime, the presented facts indicate that this in itself was not decisive for the level of guarantees and effective protection. This is suggested by the fact that the appellant reminded the Constitutional Court that nobody had been held responsible for, *inter alia*, the criminal offence of damaging computer data or program referred to in Article 393(2) of the Criminal Code of FBiH, which means that the existing legal framework, despite certain deficiencies, provides for a legal basis and framework for intervention. Even within the scope suggested by the appellant if this may be based on the relevant facts. *Therefore, it may be that the case comes to the understanding of facts and objective assessment of the measures taken by the public authorities with the aim of preventing at a significant extent obviously lawful forms of manifestation of different attitude towards the LGBTIQ population in general.*

As to this issue, i.e. whether there is a clear legal framework, one should take into account the competences of different levels of power in Bosnia and Herzegovina over the issue of regulating and punishing the cybercrime.

Finally, although I share the view of the majority of the Constitutional Court in respect of the issue of admissibility of the appeal (in the part in which the appeal was rejected as inadmissible for being filed by an unauthorised person and in the second part in which it was declared *ratione materiae* ill-founded), I could not support the Decision as a whole, since in my opinion, the part of the appeal which was declared admissible *should have been dismissed as ill-founded.*

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Case No. AP 2052/12

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Zdravko Marić against the ruling of the Cantonal Court in Sarajevo, no. 09 0 U 001407 08 of 3 April 2012, the decision of the Ministry of Housing Affairs of the Canton of Sarajevo no. 27/02-23-1315/08 of 29 February 2008 and the decision of the Administration for Housing Affairs of the Canton of Sarajevo no. 23/6-372-P-2653/99 of 1 February 2008

Decision of 27 November 2015

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57 (2) (b) and Article 59 (1) and (2) and Article 62(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*the Official Gazette of Bosnia and Herzegovina*, 94/14), in plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić

Having deliberated on the appeal of **Mr. Zdravko Marić** in case no. **AP 2052/12**, at its session held on 27 November 2015 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Zdravko Marić is granted.

A violation of the right under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Ruling of the Cantonal Court in Sarajevo no. 09 0 U 001407 08 of 3 April 2012 is quashed.

The case shall be referred back to the Cantonal Court in Sarajevo, which is obligated to take a new decision under expedited procedure 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 Cantonal Court in Sarajevo, pursuant to Article 72(5) of the Rules of the Constitutional Court, is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within a time limit of three months from the delivery of this Decision, of 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 30 May 2012 Mr. Zdravko Marić („the appellant") from Bratunac, 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 001407 08 of 3 April 2012, the decision of the Ministry of Housing Affairs of the Canton of Sarajevo („the Ministry") no. 27/02-23-1315/08 of 29 February 2008 and the decision of the Administration for Housing Affairs of the Canton of Sarajevo („the Administration") no. 23/6-372-P-2653/99 of 1 February 2008.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 12 August 2014, the Cantonal Court, the Ministry and Administration were requested to submit their respective replies to the appeal.

3. On 3 September 2014, the Cantonal Court submitted its reply to the appeal and the Ministry did so on 22 August 2014. Until the day of the rendering of this decision, the Administration has not submitted its reply to the appeal.

III. Facts of the Case

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

5. By the decision no. 23/6-372-P-2653/99 of 1 February 2008, the Administration dismissed the appellant's repossession claim regarding the apartment at the designated address („the apartment").

6. It follows from the reasons for the decision that the appellant submitted the apartment related repossession claim on 10 September 1999, that his claim was dismissed as ill-founded by the decision of the Administration and that, while deciding the appellant's complaint against this decision, the Ministry annulled it and remitted the case to the Administration for renewal of the proceeding. The Ministry ordered the Administration to make it possible, in the renewed proceeding, for the appellant to participate in the proceeding and to establish the following: whether the apartment constituted the appellant's home within the meaning of Article 8 of the European Convention, whether the appellant fulfilled all obligations of the occupancy right holder and whether the owner of the apartment challenged the usage of the apartment by the appellant by all available legal means.

7. In the course of the renewed proceeding, the Administration found it indisputable that the appellant was the occupancy right holder of the apartment in question (there is the Decision of the apartment owner on allocation of the apartment to the appellant and Contract on use of the apartment of 17 July 1973). Based on the registration of residence certificate of the Ministry of Interior of the Sarajevo Canton of 30 November 2006, it was established that the appellant has been registered at the address of the apartment in question since 2 August 2001. Based on the inspection of the Certificate of the Cantonal Housing Fund of 7 May 2007 on the members of the family household arising from the data obtained by scoring the apartment of 10 October 1987, it was established that the appellant was the member of the family household regarding the apartment in question and that there were no other members and that the Commission concluded, on the basis of the statements of the neighbours, that the appellant, the occupancy right holder of the apartment in question, was working abroad. Based on the Certificate of the Department for General and Local Community Affairs of the Municipality of Novi Grad of 27 February 2007 it was established that the appellant was not registered in the electoral list from 1992 at the address of the apartment in question. Based on the inspection of the letter of the Federation Institute for Statistics of 23 April 2007 it was established that the appellant was not on the census record (the census was conducted from 1 to 15 April 1991). Furthermore, it was pointed out that witness J.K. who has been living in the apartment opposite of the building in which the apartment in question was located stated that he knew all lodgers in that building and that all of them knew each other, but that he did not know the appellant, neither did he ever see him before. Therefore, it follows that the appellant was renting out the apartment and, as pointed out by this witness, „according to the statement of an old lady called Hajra, who has been living for a long time in that building, a person who was a teacher used to live in that apartment". According to the assessment made by the Administration, It follows from the statement of witness B.H, who lived in the building in which the apartment was located during the period from

1986 to 2006, that the appellant renting the apartment to the lodgers as this witness stated that a woman used to come out of the apartment together with children and that she used to know all the lodgers of the building, and that she did not have the contact with them and, finally, that she had never seen the appellant before and that she had heard from the neighbours that he was in Germany. In the letter of 1 August 2001, the appellant stated that he has lived in Germany since 1971, whereto he was sent by the Employment Bureau and that he used to use the apartment during his annual leave. Furthermore, it was established that it is indisputable that the apartment in question has never been declared abandoned and that the appellant used to pay all utility services related bills regarding the apartment in question and his name was on those bills. Finally, it was also established as indisputable fact that the apartment is owned by the municipality of Novo Sarajevo and that the relevant department informed the Administration by its letter of 17 July 2003 that no data exist that before the war the proceeding was instituted for the purpose of cancellation of contract on use of the apartment which was signed by the appellant.

8. It follows from the decision that the Administration, based on the presented evidence, concluded that it indisputably follows that on 30 April 1991 the apartment in question did not constitute the appellant's home within the meaning of Article 8 of the European Convention since the home implies the place where a person lives and performs its usual activities. Furthermore, it was pointed out that the appellant was not the person who had left the apartment in question during the period from 30 April 1991 and 4 April 1998 and that, pursuant to Articles 3,4,6,7 and 18b of the Law on Cessation of Application of the Law on Abandoned Apartments (*Official Gazette of FBiH*, 11/98, 38/98, 12/99, 18/99, 43/99, 56/01 and 29/03), he is not to be considered a refugee or displaced person according to Annex VII of the General Framework Agreement for Peace in BiH („Annex VII").

9. By its decision no. 27/02-23-1315/08 of 29 February the Ministry dismissed as ill-founded the appellant's complaint lodged against the first instance ruling. The Ministry concluded that the first instance body established the facts and that it correctly applied the substantive law to those established facts. In the opinion of the Ministry, the conclusion of the first instance body is correct that the apartment in question did not constitute the appellant's home within the meaning of Article 8 of the European Convention as the appellant did not live in it. Accordingly, the conclusion was made that the first instance body correctly concluded that the appellant does not fall within the scope of Article 3 paragraphs 1 and 2 of the Law on Cessation of Application of the Law on Abandoned Apartments and he failed to give valid reasons and explanations in this regard. The appellant's allegations that the first instance body unlawfully interpreted the provisions of the mentioned Convention are considered as ill-founded, as well as the allegation that the conclusion of the first instance body is wrong that the appellant failed to prove that

the apartment is his home. Finally, the conclusion was drawn that the first instance body correctly interpreted Article 1 of Annex VII when it concluded that the right to return to pre-war homes is granted to the occupancy right holders who abandoned their apartments during the period between 30 April 1991 and 4 April 1998 as they are considered to be the refugees and displaced persons according to this Annex.

10. By its judgment no. 09 0 U 001407 08 U of 3 April 2012 the Cantonal Court dismissed the appellant's administrative lawsuit as ill-founded.

11. In the reasons for the judgment, the Cantonal Court pointed to the evidence which were presented in the course of the first instance proceeding and also pointed to the following: that the appellant is the occupancy right holder of the apartment in question which was allocated to him by the designated decision of the apartment allocating authority on 17 July 1973, and that the appellant concluded the contract on use of the apartment with the Housing Company Sarajevo on the same day; that, based on the notification letter of the Ministry of Defence from 2007 - the Sarajevo Department, it was established that the appellant was registered in the list of military conscripts at the address of the previous apartment for which, this apartment was allocated to him as an alternative, and that was stated in the decision on allocation of the apartment; and that in the supplement to the appeal for repossession of the apartment from 2001, the appellant pointed out that in 1971, through the Employment Bureau, he went to work in Germany, that he used to use the apartment upon his arrival to BiH when he was on his annual leave, and that from the beginning of the war until August 2001 he did not visit the apartment, which is right now occupied by the family A.M.; and that it follows from the presented receipts on payment for the apartment in question (and those receipts have his name written on them), he made payments to Sarajevo stan for 1990, 1991, and 1992, he paid the electricity bills for 1990, 1991, and 1992 and he also paid the water supply bills to the Public Utilities Company Vodovod for 1991 and there is also one receipt from 1992. Therefore, given the aforesaid, it follows that the appellant was fulfilling his obligations as regards the apartment in question.

12. In view of the aforesaid, the Cantonal Court is of the opinion that the findings of the administrative bodies are correct that the appellant is not a person falling within the scope of Article 3 paragraphs 1 and 2 of the Law on Cessation of Application of the Law on Abandoned Apartments. In the opinion of the court, the appellant – the occupancy right holder of the apartment in question, did not abandon the apartment during the period between 30 April 1991 and 4 April 1998 because of the war activities and, therefore, he cannot be considered a refugee or displaced person who is entitled to return in accordance with Annex VII. In the Court's opinion, the apartment in question was not the appellant's

home on 30 April 1991 given that all legal disputes are dealt with regards to this date as a starting point, which has been incorporated into Article 3 of the Law on Cessation of Application of the Law on Abandoned Apartments. In support of this conclusion, the Cantonal Court referred to the decision of the Constitutional Court no. *U 14/04* of 4 May 2001. The Cantonal Court considers that the fact that the appellant registered his permanent residence on the address of the apartment in question only on 2 August 2001 leads to the conclusion that the facts were correctly established and that, even now, the address of his previous apartment was registered by the competent body for defence as his address, which means that is the address of the apartment in which he had lived before this apartment was allocated to him and „the apartment in question was allocated to him on 17 July 1993", and the appellant was not recorded in the General electoral list from 1992 at the address of the apartment in question and that, on the occasion of his apartment being scored in 1987 and during the conduct of census in April 1991, the appellant, in the court's opinion, was recorded only as a nominal occupancy right holder of the apartment in question and that is not an indication that he had used that apartment. Accordingly, it follows that he did not abandon the apartment in question during the period from 30 April 1991 until 4 April 1998 and that the apartment in question was not his home on 30 April 1991.

IV. Appeal

a) Allegations from the appeal

13. The appellant holds that the challenged decisions are in violation of his rights under Article II(3)(e), (f), (k) and (m) of the Constitution of Bosnia and Herzegovina and Article 6 (1) and Article 8 of the European Convention and Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4 to the European Convention. The appellant considers that the rights mentioned above were violated as, according to his statement, the administrative bodies and Cantonal Court established the facts in an arbitrary and erroneous manner, i.e. that the apartment in question was not his apartment, which means that they arbitrarily interpreted the relevant provisions of the Law on Cessation of Application of the Law on Abandoned Property when they concluded that he is not entitled to the repossession of the apartment in question.

b) Reply to the appeal

14. In its reply to the allegations from the appeal, the Cantonal Court referred to the reasons for its decision and concluded that the appellant's allegations about a violation of the rights he refers to in this appeal are ill-founded.

15. In its reply to the appeal the Ministry pointed out that it was established that the appellant is not a person falling within the scope of Article 3 paragraphs 1 and 2 of the Law on Cessation of Application of the Law on Abandoned Apartments and that, therefore, the legal conditions were not met for the apartment in question to be considered his home.

V. Relevant Law

16. The **Law on Cessation of Application of the Law on Abandoned Apartments** (*Official Gazette of the FBiH*, 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

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

Article 5

A claim for repossession of the apartment must be filed within fifteen months from the date of the entry into force of this Law.

Exceptionally, the deadline for submission of claims for repossession of apartments (...) Article 18b para 1 of this Law (...) shall be 4 October 1999.

If the occupancy right holder does not file a claim to the competent administrative authority, to a competent court, or to the Commission for Real Property Claims of Displaced Persons and Refugees, within the appropriate time limit referred to in this Article, the occupancy right is cancelled.

Article 18b

The provisions of this Law shall also apply to the apartments that have not been declared abandoned in terms of Article 1 of this Law, including damaged and destroyed apartments, provided that the occupancy right holder lost possession of the apartment in question before 4 April 1998. (...)

17. The **Instruction on Application of the Law on the Cessation of Application of the Law on Abandoned Apartments** *(Official Gazette of the FBiH, 43/99, 46/99 and 56/01)* as relevant reads:

Status as refugee or displaced person under Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina

1. A person who left his/her apartment between 30 April 1991 and 4 April 1998 shall be presumed to be a refugee or displaced person with a right to return to the apartment, irrespective of the circumstances in which s/he left the apartment.

(...)

Processing of claims for apartments which were not declared abandoned

42. In accordance with Article 18b of the Law, the responsible administrative authority shall be competent to receive claims for apartments which were not declared abandoned in accordance with the laws and regulations referred to in Article 1 of the Law, including damaged and destroyed apartments, where the occupancy right holder lost possession of the apartment before 4 April 1998.

18. The **Law on Housing Relations** (*Official Gazette of SRBiH*, 14/84, 12/87 and 36/89 and *Official Gazette of FBiH*, 11/98, 38/98, 12/99 and 19/99), as relevant, reads:

Article 11

The citizen acquires the occupancy-right on the day of legal occupation of the apartment.

Legal occupation of the apartment shall be considered to be the form of occupation when it is carried out in line with the contract on apartment usage signed in accordance with the appropriate enactment or other enactment specified by this law provided that the said enactment represents a valid legal ground for occupation of the apartment.

Article 44

The owner of the apartment or the housing community may cancel holder of the occupancy rights contract on usage of the apartment in case when:

6) the holder of the occupancy right rents a part of the apartment or the whole apartment to lodgers contrary to provisions of this Law or the municipality assembly regulation (Article 54);

(...)

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:

(...)

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 1 of 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.

Article 48

The holder of the occupancy right cannot have his contract on usage of the apartment canceled due to reason that he does not use the apartment longer that six months but not longer than five years, if he is going to work abroad temporarily or to some other place in the country as a worker in the associated labour or as an expert with approval from responsible organs of the social-political community or through self-management employment community for interest, and also in the cases when he is abroad due to schooling, specialization, staging of art shows and medical treatment.

In cases from the previous Paragraph, the holder of the occupancy right may give the whole apartment or a part of the apartment for usage to another person as the subtenant, but only if he offered the owner of the apartment to specify the subtenant and he hasn't done that within 30 days after the day the request was submitted.

Article 50

Notice of cancellation of the contract on use of all apartment shall be given to a holder of the occupancy right by a claim which shall be submitted to the responsible court.

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 18(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

21. In the present case, the subject matter of the appeal is the ruling of the Cantonal Court in Sarajevo, no. 09 0 U 001407 08 U of 3 April 2012, against which there are no other effective remedies available under the law. No slip proving that the challenged judgment was delivered to the appellant was presented to the Constitutional Court. However, given the date when the judgment was rendered – 3 April 2012 and the date when the appeal was filed – 30 May 2012, it is evident that the time-limit of 60 did not expire as provided for by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court because it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

22. Having regard to Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 18 (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that the appeal meets the admissibility requirements.

VII. Merits

23. The appellant holds that the challenged decisions are in violation of his rights under Article II(3)(e), (f), (k) and (m) of the Constitution of Bosnia and Herzegovina and Article 6 (1) and Article 8 of the European Convention and Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4 to the European Convention

Right to property

24. Article II(3) 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:

(...)

(k) right to property

25. Article 1 of Protocol No. 1 to the European Convention, so far as relevant, reads:

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

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

26. The appellant considers that in the challenged decisions, whereby his repossession claim was dismissed as regards the apartment in respect of which he was the occupancy right holder, his right to property was violated for the reasons that, according to him, the facts were erroneously established and the relevant substantive law was misapplied.

27. The Constitutional Court recalls that Article 1 of Protocol No. 1 to the European Convention contains three distinct rules. First rule, contained within the first sentence of the first paragraph, is of general nature specifying the principle of the peaceful enjoyment of possession. Second rule, contained within the second sentence of the same paragraph, relates to deprivation of possessions subjecting it to certain conditions. Third rule, contained within paragraph 2 of the same article, specifies the right of a State to, *inter alia*, control the use of property in accordance with the general interest. These three rules are not „different" in the sense of not being interconnected, the second and third rules relate to specific cases of interference by the state with the right to peaceful enjoyment of possession and should be interpreted within the general principle specified in the first rule (see the European Court, *Sporrong and Lönnorth vs. Sweden*, judgment of 23 September 1982, Series A, no. 52, paragraph 61).

28. The Constitutional Court recalls that the notion „possessions" includes a wide range of proprietary interests representing an economic value (see the Constitutional Court, Decision no. *U 14/00* of 4 April 2001, published in the *Official Gazette of Bosnia and Herzegovina*, 33/01). Furthermore, the occupancy right constitutes proprietary interests *sui generis* representing an economic value (see the Constitutional Court, Decision on Admissibility and Merits no. *AP 380/04* of 26 April 2005, paragraph 27 published in the *Official Gazette of Bosnia and Herzegovina*, 40/05). Finally, the Constitutional Court recalls that the occupancy right constitutes „possessions" within the meaning of Article 1 of Protocol No. 1, which is also recognised by the European Court of Human Rights (see, *Mago and others vs. Bosnia and Hercegovina*, judgment of 3 May 2012, paragraph 78).

29. As to the instant case, it was indisputable that the appellant has been the occupancy right holder of the apartment in question since 1971 and that he had that capacity at the time when the proceeding was taking place given the statement of the owner of the

apartment from 2003. In view of the aforesaid, it follows that the challenged decisions, whereby the appellant's repossession claim regarding the apartment in respect of which he had occupancy right was dismissed, constitutes the interference with his right to property.

30. The Constitutional Court reminds that according to the case-law of the European Court of Human Rights, the first and the most important requirement arising from Article 1 of Protocol No. 1 to the European Convention is the one which requires that the interference of public authorities with the right to property be lawful. The Constitutional Court notes that interference is lawful only if the law, which is the basis of the interference, is: (a) adequately accessible to the citizens; (b) precise so as to enable the citizen to regulate his conduct, (c) in accordance with the rule of law so that the legal discretion granted to the executive is not expressed in terms of an unfettered power, *i.e.* the law must give to the individual adequate protection against arbitrary interference (see, the European Court of Human Rights, the *Sunday Times judgment* of 26 April 1979, Series A No. 30, para 49; and *Malone vs. The United Kingdom judgment* of 2 August 1984, Series A no. 82, paragraphs 67-68).

31. In examining whether the interference with the property was lawful, the European Court of Human Rights starts from the viewpoint that the task of domestic authorities is, above all, to resolve the issue of interpretation of domestic law, and the role of the European Court of Human Rights is limited to establishing whether such interpretation is in accordance with the Convention. Therefore, although it has limited power to review compliance with domestic law, the Court may draw appropriate conclusions under the Convention where it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so to reach arbitrary conclusions (see the European Court of Human Rights, *Kushoglu vs. Bulgaria*, the judgment of 10 August 2007, paragraph 50, including the additional quoted case-law).

32. The Constitutional Court reminds that in its numerous decisions it had taken the position that the task of ordinary courts is primarily to establish the facts and apply the law, and that its role is limited to examining whether, while doing so, ordinary courts violated or neglected the constitutional rights or rights under the Convention.

33. As to the instant case, the appellant's claim of repossession of the apartment was dismissed as it was found that the appellant does not fall within the scope of Article 3(1)(2) of the Law on Cessation of Application of the Law on Abandoned Apartments. The Constitutional Court recalls that pursuant to Article 3(1)(2) of the Law, the occupancy right holder of an apartment declared abandoned shall have the right to return in accordance with Annex 7. Furthermore, pursuant to Article 3 paragraph 2 of the mentioned Law, paragraph 1 shall be applied only to those occupancy right holders who have the right to

return to their homes of origin under Article 1 of Annex 7 and that the 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.

34. The Constitutional Court observes that it follows from the reasons for the challenged judgments that it was indisputably established in the proceeding that the appellant was the occupancy right holder of the mentioned apartment on 30 April 1991 and that he had that capacity at the time when the proceeding of repossession of the apartment was instituted and conducted. Moreover, it was proved as indisputable in the proceeding that the apartment in question has never been declared abandoned and, bearing in mind Article 18b of the Law on Cessation of Application of the Law on Abandoned Apartments, that fact, in itself, was not an obstacle for exercising the right to repossession of the apartment given that the quoted provision determined that the provisions of this law apply to the apartments that have not been declared abandoned. Furthermore, it follows from the reasons for the challenged decisions that based on the presented evidence it was established that the appellant had not used the apartment for many years and that he was renting out the apartment. Therefore, the conclusion was drawn that he had left the apartment before 30 April 1991, which means that he cannot be considered a refugee or displaced person and that the apartment in question was not his home on the mentioned date.

35. The Constitutional Court notes that at the time of initiation and conduct of the proceeding for repossession of the apartment, the Law on Housing Relations was in force. Pursuant to the mentioned law, the apartment allocating authority may cancel the contract on use of the apartment signed by the holder of the occupancy right in case when, inter alia, the holder of the occupancy right rents out a part of the apartment or the whole apartment to lodgers contrary to provisions of this Law (Article 44 (1) (6)), and when he stops with personal usage of the apartment longer than six months continuously (Article 47 (1) of the Law on Housing Relations), or he does not use the apartment longer than five years due to his going to work abroad (Article 48 (1) of the Law on Housing Relations). Finally, notice of cancellation of the contract on use of all apartment shall be given to a holder of the occupancy right by a claim which shall be submitted to the responsible court (Article 50 of the Law on Housing Relations).

36. In the instant case, based on the statement of the apartment owner given in 2003, it was established that the proceeding of cancellation of the contract on use of the apartment before the competent court was not initiated on 30 April 1991. Thus, it follows from the reasons for the challenged decisions that the grounds on which the conclusion is based that the appellant had abandoned the apartment in question before 30 April 1991 were that the apartment in question was not used by him in person and that he was giving it on rent.

37. In view of the aforesaid, it follows that under the circumstances of the case at hand and given the irrefutable fact that the appellant was the occupancy right holder as at 30 April 1991 and that his repossession claim was filed in a timely fashion, the administrative bodies and Cantonal Court, while applying Article 3 (1)(2) of the Law on Cessation of Application of the Law on Abandoned Apartments, reached an arbitrary conclusion that the appellant is not entitled to the repossession of the apartment in question for the reasons that could be considered the ground for cancellation of the contract on use of the apartment in accordance with the Law on Housing Relations and that the matter could have been decided only upon the lawsuit of the owner of the apartment filed with the competent court. Given that according to the Law on Cessation of Application of the Law on Abandoned Apartments, the decision whereby the repossession claim was dismissed as ill-founded resulted in the loss of the occupancy right which constitutes the property within the meaning of Article 1 of Protocol No. 1 to the European Convention, it follows that in the appellant's case the challenged decisions amounted to a deprivation of property and, therefore, the standard of lawful interference was not satisfied.

38. Therefore, the Constitutional Court concludes that in the instant case 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.

Other allegations

39. Taking into account the conclusion of the Constitutional Court with regards to a violation of the right to property, the Constitutional Court considers that it is not necessary to separately examine the appellant's allegations about a violation of the rights to a fair trial under Article II(3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 to the European Convention, Article II(3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and Article II(3) (m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to 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 competent authorities and the court, in the circumstances of the case at hand and while interpreting the relevant provision of the substantive law, reached an arbitrary conclusion, which resulted in

depriving the appellant of his property in a manner in which the standard of lawful interference was not satisfied.

41. Having regard to Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court, the Constitutional Court has decided as set out in the enacting clause of the present decision.

42. Within the meaning of Article 43 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of Judge Seada Palavrić joined by President Mirsad Ćeman makes an annex to this decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

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

In the Decision of the Constitutional Court no. AP 2052/12 the Constitutional Court of Bosnia and Herzegovina decided as follows:

The Constitutional Court granted the appeal and found 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 and concluded that the interference with the appellant's property was not in conformity with the law. It also quashed the Judgement of the Cantonal Court of Sarajevo no. 09 0 U 001407 08 of 3 April 2012, and remitted the case ordering the court to adopt a new decision under expedited procedure in accordance with Article II(3) (k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention.

With due respect for the decision of the majority, I cannot agree with the presented decision, reasons and conclusions relating to the granting of the appeal no. *AP 2052/12*.

Namely, in the relevant part the Constitutional Court pointed out that the appellant's claim for repossession of the apartment was dismissed as the conclusion was drawn that the appellant does not fall within the scope of persons under Article 3, paragraphs 1 and 2 of the Law on Cessation of Application of the Law on Abandoned Apartments and recalled that Article 3 paragraph 1 of the mentioned Law provides that the occupancy right holder over the apartment which was declared abandoned is entitled to repossession of that apartment under Annex VII and that in Article paragraph 2 of the mentioned Law, it is stated that paragraph 1 applies only to holders of the occupancy right entitled to return to their pre-war homes according to Article 1 of Annex VII, and that persons who abandoned their apartments between 30 April 1991 and 4 April 1998 are considered refugees and displaced persons under Annex VII. In particular, the Constitutional Court emphasized that it was indisputable in the proceeding that the apartment the appellant claimed the repossession of has never been declared abandoned and „that fact, in itself, was not an obstacle for exercising the right to repossession of the apartment given that the quoted provision determined that the provisions of this law apply to the apartments that have not been declared abandoned". It was also noted that it follows from the reasons for the challenged decisions that based on the presented evidence it was established that the appellant had not used the apartment for many years and that he was renting it out. Therefore, the conclusion was drawn that he had left the apartment before 30 April 1991, which means that he cannot be considered a refugee or displaced person and that the apartment in question was not his home on the mentioned date.

Finally, the Constitutional Court pointed out that it appears that under the circumstances of the case at hand, and given an indisputable fact that on 30 April 1991 the appellant was the occupancy right holder over the apartment and that he filed the repossession claim in a timely fashion, the administrative bodies and Cantonal Court, while applying Article 3 paragraphs 1 and 2 of the Law on Cessation of Application of the Law on Abandoned Apartments, reached a wrong conclusion that the appellant is not entitled to repossess the apartment in question for the reasons that could be considered the ground for cancellation of the contract on use of the apartment in accordance with the Law on Housing Relations and that the matter could have been decided only upon the lawsuit of the owner of the apartment filed with the competent court. Given that according to the Law on Cessation of Application of the Law on Abandoned Apartments, the decision whereby the repossession claim was dismissed as ill-founded resulted in the loss of the occupancy right which constitutes the property within the meaning of Article 1 of Protocol No. 1 to the European Convention, it follows that in the appellant's case the challenged decisions amounted to a deprivation of property and, therefore, the standard of lawful interference was not satisfied.

The reasons for my disagreement with the decision of the Constitutional Court in the case at hand are the following:

First of all, I recall that the appellant initiated the proceeding by filing the repossession claim, whereby he sought that the Law on Cessation of Application of the Law on Abandoned Apartments be applied, i.e. that the court establish that the appellant acquired the status of a refugee or displaced person and that he is entitled to repossession of the apartment. In my opinion, it is indisputable that the administrative bodies and Cantonal Court acted within the scope of the appellant's claim and established that he does not fall within the scope of persons that are entitled, according to the aforementioned law, to repossess the apartments owned by them on 30 April 1991. Therefore, the appellant is not entitled to repossess the apartment in that proceeding. The administrative bodies and Cantonal Court were not deciding the appellant's occupancy right at all, except for the fact that they established that the appellant has been the occupancy right holder since 1973, but they were not deciding and have never decided that the appellant lost that right. Bearing in mind the facts, I do not find at all that that those bodies acted unlawfully within the meaning of Article 1 of Protocol No. 1 to the European Convention.

Namely, in its decision the Constitutional Court starts from the fact that, because he has been the nominal occupancy right holder since 1973, which includes 30 April 1991 as well, and regardless of the fact that the said apartment has never become his home because the appellant was continuously renting out that apartment and did not live in it

as he was in Germany for years, which means that he had left the apartment and that fact is not linked with the war conflict and he did so during the period which was irrelevant when it comes to acquiring the refugee status or displaced persons status, the appellant is entitled to repossess the apartment in question by application of the Law on Cessation of Application of the Law on Abandoned Apartments, arising from application of Annex VII of the General Framework Agreement for Peace in BiH. It follows that the basic question regarding the resolution of dispute in the appeal at hand is whether that appellant held the refugee status in order for him to be able to exercises the rights concerning the return of refugees to their pre-war homes.

Although the administrative bodies and Cantonal Court gave fully clear and relevant reasons for their decisions, and given this decision of the Constitutional Court, I am of the opinion that it is, nevertheless, necessary to recall the fact that under Article 1 of Annex VII, it is prescribed, *inter alia*, that all refugees and displaced persons are entitled to freely return to their homes and that they are entitled to repossession of property they were deprived of during the hostilities in 1991, and to the compensation for the property that cannot be repossessed. It was also guaranteed under Article II(5) of the Constitution of Bosnia and Herzegovina that all refugees and displaced persons have right to freely return to their homes in accordance with Annex VII, as well as the right to repossess the property they were deprived of during the hostilities in 1991, and to the compensation for the property that cannot be repossessed.

As regards the definition of a refugee, in my opinion, the Convention on the Status of Refugees from 1951 is, above all, relevant as it provides that a refugee is a person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. When it comes to Bosnia and Herzegovina, the Law on Refugees from BiH and Displaced Persons in BiH provides that a refugee from BiH, under this Law, is a citizen of BiH who is outside of BiH, and who has been expelled from his/her place of permanent residence or left his/her place of permanent residence in BiH and escaped abroad after 30 April 1991, due to a well-founded fear of being persecuted for reasons of race, religion, nationality, affiliation with a particular social group or his/her political opinion, and who is neither able to return in safety and with dignity to his/her former place of permanent residence nor has voluntarily decided to settle permanently outside of BiH. Article 5 of the Law provides that the status of a refugee from BH during his/her stay in a host country shall be determined

according to rules and regulations of that country. Although the administrative bodies and Cantonal Court indisputably established that the appellant has no refugee status and that he abandoned the apartment in question prior to 30 April 1991, which means before the date that is relevant for acquiring the status of a refugee, the appellant, although he claims that due to the war he could not return to the apartment, he actually does not claim that he had the status of a refugee in Germany, neither did he attach to the case/file the proof that Germany recognized his status of a refugee. Therefore, in my opinion, the Law on Cessation of Application of the Law on Abandoned Apartments cannot apply to him at all as this Law provides, in Article 3, that the occupancy right holder over the apartment that was declared abandoned or a member of his/her family household, as determined under Article 6 of the Law on Housing Relations, is entitled to return in accordance with Annex VII of the General Framework Agreement for Peace in BiH, where that right may be exercised by the occupancy right holders that are entitled to return to their homes according to Article 1 of Annex VII and that the persons who abandoned their apartments between 30 April 1991 and 4 April 1998 are considered refugees or displaced persons according to Annex VII.

It follows from the aforementioned that there is no ground at all on which the appellant would have the status of a refugees, where the key fact is that the apartment in question was abandoned before the war activities and, irrespective of those activities, and given that he was renting out the whole apartment continuously, contrary to the explicit provisions of the Law on Housing Relations, to the lodgers who were found in the apartment even at the time of war - the apartment in question was not declared abandoned (although, according to the law, declaring an apartment abandoned is irrelevant), and he, therefore, is not entitled to repossession of the apartment in the proceeding conducted upon his claim by application of the Law on Cessation of Application of the Law on Abandoned Apartments.

As regards the appellant's occupancy right about which the European Court of Human Rights expressed an opinion that it constitutes the property in Bosnia and Herzegovina, but that is not the case in the Republic of Croatia (as the relevant authorities in BiH, while referring to Article VI to the General Framework Agreement for BiH and Washington Agreement, when it comes to the Federation of BiH, had previously expressed their standpoint that the occupancy right is the property), I consider that in the course of the proceeding conducted by the administrative bodies and Cantonal bodies resulting in the challenged decision, the appellant's right to the status of the occupancy right holder is not violated at all as it is not to be decided by application of the Law on Cessation of Application of the Law on Abandoned Apartments. On the other hand, given that the appellant was only the nominal occupancy right holder and that he did not use the apartment

in his capacity as occupancy right holder, i.e. as the user of the apartment *de facto,* and that he, in essence, did not realise any connection with the apartment, particularly not at the level at which the apartment could be considered his home, it follows that neither was the appellant's right to home violated given that only the right that exists may be violated.

Anyway, the previous case-law of the Constitutional Court in such and similar cases, particularly regarding the standpoint that persons who claim the repossession of the apartment they had abandoned prior to the outbreak of war conflict in Bosnia and Herzegovina and irrespective of them, was that a person who abandoned the apartment for the reason not connected with the war conflict, or before the outbreak of the war conflict in Bosnia and Herzegovina has no right to repossess the apartment, and that case-law also includes Decision no. *AP 1328/06* of 28 September 2007 and Decision no. *AP 1468/07* of 11 November 2009. Thus, in Decision no. *AP 1468/07* of 11 November 2009, the Constitutional Court, in part which is similar to and relevant for the case at hand, interpreted the part of the judgment of the Supreme Court as follows: „The Supreme Court established that prerequisites for cancellation of the contract on use of the apartment existed until 30 April 1991 and that in the dispute at hand the period during which the apartment was not used is relevant until that date only because under the provisions of the Law on Housing Relations it was precisely stated that „the cancellation of the holder of the occupancy right's contract on usage of the apartment can be made when he stops with personal usage of the apartment longer than six months" under the conditions of this Law. As established by the lower instance courts, the conditions under Article 47 of the Law on Housing Relations were met for cancellation of contract on use of the apartment because it was not used for longer than six months. The Supreme Court concluded that the finding of the lower instance courts is correct that at the time of allocation of the disputed apartment to the second defendant (in August 1992) the conditions were met for cancellation of the contract on use of the apartment signed by the appellant and that the counter-claim filed by the allocating authority demanding cancellation of the contract on use of the apartment signed by the appellant was well-founded. Furthermore, the law provisions regulating the issue of repossession of property (the so-called „property laws") provide that the occupancy right holder over the abandoned apartment or a member of his/her family has 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 apply to all apartments left by their users between 30 April 1991 and 19 December 1998, regardless of whether the apartment was declared abandoned or not, i.e. regardless of whether the apartment was used for the business related-purposes or not after 30 April 1991. Given that the appellant ceased to use the apartment before this deadline and permanently moved to Belgrade, he cannot be considered a refugee or displaced person who abandoned the

apartment during the mentioned period of time. On the other hand, the prerequisites were fulfilled for application of Article 47 of the Law on Housing Relations on cancellation of contract on use of the apartment. The Supreme Court concluded that the appellant had not used the apartment for a longer period than the prescribed deadline and that he had no status of refugee or displaced person in order for the law provision on repossession of apartment to apply to him.

(…)

As to the instant case, the ordinary courts applied appropriate provisions of the Law on Housing Relations and Law on Cessation of Application of the Law on Abandoned Apartments. The Law on Housing Relations provide that the occupancy right may be cancelled to every person due to a reason that he/she does not use the apartment longer than six months under the conditions prescribed by law and that condition was fulfilled in the case at hand. The legal nature of that cancellation is not changed by the fact that only upon the counterclaim of the municipality of Bijeljina the contract on use of the apartment was cancelled. The court started from the fact that the appellant *de facto* had the occupancy right over the apartment in question but that right ceased to exist because he did not use the apartment longer than six months. In the course of the court proceeding it was indisputably established that the appellant and members of his family household ceased to use the apartment in 1988, that the appellant cancelled his residence in Bijeljina during that year and registered it in Belgrade, and that since then he used to visit the apartment from time to time until the second defendant P.M. moved in, and the County Court stated that Article 6 of the Law on Housing Relations requires that the housing needs are met by „permanent living in the apartment", and that condition was not fulfilled by the appellant. The ordinary courts concluded that Article 47 of the Law on Housing Relations is to be applied to the appellant's case and that article provides that cancellation of the contract on use of the apartment may be given when the occupancy right holder and members of his family household, who lived with him, cease to use the apartment continuously for the period longer than six months."

In the mentioned decision the following was highlighted: „The Constitutional Court is of the opinion that the appellant's referral to the constitutional provisions relating to the occupancy right in this case is, actually, referral to the right of refugees and displaced persons to return to their homes without impediments and the property which was taken from them due to the war conflict that started on 30 April 1991 to be returned to them. The right of refugees and displaced persons is a right based on Article II(5) of the Constitution of Bosnia and Herzegovina, which is explicitly applied to all forms of deprivation of property occurred prior to the Constitution of Bosnia and Herzegovina entering into force".

In the mentioned decision the Constitutional Court reminded of the following: „in its Decision No. *U 14/00*, the Constitutional Court took a position that the factual situation on 30 April 1991 should be a starting point for litigation arising from the measures undertaken by the authorities in both Entities and Bosnia and Herzegovina (within their respective responsibilities), with the aim of returning the properties to their pre-war owners. However, the courts found that the appellant's legal situation must be viewed within the context of the fact that he has no status of refugee or displaced person, and that he abandoned the apartment in 1988, which means that abandoning the apartment had no link with the war conflict and that his contract on use of the apartment was cancelled because of the fact that he did not use it longer than six months."

As to the instant case, the Constitutional Court concluded that the right to a fair trial was not violated, that the apartment in question does not constitute the appellant's home because the appellant did not use it and because he left it prior to the outbreak of war in Bosnia and Herzegovina. Therefore, since the allegations about violation of the appellant's right to property were based on the same arguments as those that the Constitutional Court had already considered and concluded that they were ill-founded, the Court did not consider it purposeful to deal with the allegations about violation of the right to property.

I find enormous similarity between these two cases and I am of the opinion that the position of the Constitutional Court presented in Decision No. *AP 1468/07* is fully applicable regarding the conclusion that there is no violation of the constitutional rights the appellant refers to, where the competent authorities established that the appellant ceased to use the apartment in question on his own prior to 30 April 1991, irrespective of the war conflict and that he has no status of refugee or displaced person and that, therefore, that apartment is not to be considered the appellant's home within the meaning of Article 8 of the European Convention.

In my opinion, given the aforesaid, it is evident that in the decision on the current appeal the Constitutional Court departed from its positions and case-law, and that the offered arguments in the decision with which I disagree do not support such change of the position of the Constitutional Court.

It follows that I am absolutely unable to agree with the conclusion adopted by the majority of judges of the Constitutional Court with regards to this issue. With due respect, on this occasion I express my disagreement.

Case No. AP 3312/12

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Mladen Milić against the verdicts of the Court of Bosnia and Herzegovina, no. S1 2 K 002735 12 Kržʒ of 23 April 2012 and S1 K 002735 11 Krl of 28 October 2011

Decision of 27 November 2015

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

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavric

Having deliberated on the appeal of **Mr. Mladen Milić**, in case no. **AP 3312/12**, at its session held on 27 November 2015, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Mladen Milić is partially 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 Rights is hereby established.

The verdict of the Court of Bosnia and Herzegovina, no. S1 2 K 002735 12 Krž3 of 23 April 2012 is hereby quashed in the part related to the application of substantive law with regards to the criminal offence of war crimes against civilians referred to in Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina.

The fact that the verdict of the Court of Bosnia and Herzegovina, no. S1 2 K 002735 12 Krž3 of 23 April 2012 is quashed in the part as referred to in the previous paragraph shall not have any impact on depriving the appellant of liberty, holding or detaining him, which falls under the exclusive jurisdiction of the Court of Bosnia and Herzegovina.

The case shall be referred back to the Court of Bosnia and Herzegovina, which is to follow an expedited procedure and take a new decision in accordance with the standards laid down in this Decision, and in accordance with Article II(3)(e) of the Constitution of Bosna and Herzegovina and Article 6(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 three months from the date of delivery of this Decision, about the measures taken in order to enforce this Decision, in accordance with Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal of Mr. Mladen Milić against the verdicts of the Court of Bosnia and Herzegovina, no. S1 2 k 002735 12 Krž3 of 23 April 2012 and S1 k 002735 111 Krl of 28 October 2011, in relation to other aspects 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 for the Protection of Human Rights and Fundamental Freedoms 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 September 2012, Mladen Milić („the appellant") from Banja Luka, represented by Mr. Simo Tošić, a lawyer practicing in Banja Luka, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the

verdicts of the Court of Bosnia and Herzegovina („the Court of BiH"), no. S1 2 K 002735 12 Kržʒ of 23 April 2012 and S1 K 002735 11 Krl of 28 October 2011. On 2 August 2013, the appellant filed a supplement to the appeal.

2. On 2 August 2013, the appellant filed a request for interim measure wherein the Constitutional Court would order a measure to discontinue serving the prison term imposed on the appellant pending a decision on the appeal.

II. Procedure before the Constitutional Court

3. Pursuant to Article 23 of the Rules of the Constitutional Court, the Court of BiH and the Office of the Prosecutor of Bosnia and Herzegovina („the BiH Prosecutor's Office") were requested on 24 February 2015 to submit their replies to the appeal.

4. The Court of BiH and the BiH Prosecutor's Office submitted their responses to the appeal on 4 March 2015.

III. Facts of the Case

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

6. By the verdict of the Court of Bosnia and Herzegovina, no. S1 K 002735 11 Krl of 28 October 2011, the appellant was found guilty of the criminal offence of war crimes against civilians referred to in Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina („CC BIH") in conjunction with Article 180(1) of the CC BiH in respect of his actions described in the enacting clause of the verdict and the first-instance court sentenced him to 10 years in prison. The time spent in detention from 8 September 2010 to 7 October 2010 and from 28 October 2011 onwards was credited against the sentence.

7. In the reasons for the first-instance verdict, it was noted that the court, at the main trial held on 14 September 2011, granted the BiH Prosecutor's Office's proposal for reading the statement made by the appellant in the investigation proceedings, which the BiH Prosecutor's Office attached to the case-file, in accordance with Article 78(2)(c) of the Criminal Procedure Code of Bosnia and Herzegovina („the CPC BiH"). The Court of BiH found that the statement made in the investigation proceedings had been drafted in accordance with the provisions of Article 78(2) of the CPC BiH and that the appellant had been instructed that if he decided to make a statement on what he was charged with in the presence of his defence counsel, such a statement was admissible as evidence at the main trial and it could be read without his consent and could be used at the main trial.

8. It was noted that the court, according to Article 15 of the CPC BiH, had the right to free assessment of evidence and, accordingly, it had carefully assessed all presented evidence and had presented the findings thereon in its verdict wherein it had given reasons with regards to the factual and legal examination of the charges brought against the appellant.

9. As for the issue of substantive law to be applied, the court, given the time when the criminal offence had been perpetrated, admitted the legal classification of the criminal offence which the appellant was charged with, and convicted the appellant of the criminal offence of war crimes against civilians referred to in Article 173(1)(c) of the CC BiH. The court noted that given the time of perpetration of the criminal offence and provisions of substantive law, which had been in force at the relevant time, the court found that two legal principles were relevant: the principle of lawfulness and principle of temporal validity of the criminal code. The Court of BiH also referred to the provision of Article 7(1) and (2) of the European Convention. It stressed that Article 7(2) of the European Convention gave possibility of derogation from the principle referred to in Articles 3 and 4 of the CC BiH and from the application of the criminal code which had been in force at the time of perpetration of the criminal offence. The court further noted that the criminal offence of which the appellant was found guilty constituted a criminal offence according to the customary international law and thus, fell under the „general principles of international law", as laid down in Article 4(a) of the Law Amending the CC BiH, and the „general principles of the law recognized by civilized nations", as prescribed by Article 7(1) of the European Convention so that the CC BiH could be applied in this case by virtue of that provision.

10. Next, the fact that the criminal actions enumerated in Article 173 of the CC BiH were also enumerated in the code which had been in force in the relevant period – at the time of perpetration of the criminal offence, more precisely in Article 142 of the Criminal Code of the Socialist Federative Republic of Yugoslavia („CC SFRY") meant that such criminal actions had been punishable according to the then applicable criminal code, which contributed to the court's conclusion on the principle of lawfulness. According to the Court of BiH, the application of the CC BiH was justified because the prescribed punishment was in any case more lenient than the death penalty which had been prescribed at the time of perpetration of the criminal offence so that the principle with regards to the time constraints of the criminal code had been met, *i.e.* the application of more lenient law to the perpetrator. The court also referred to the Decision of the Constitutional Court taken in case of *Maktouf*, no. *AP 1785/06*.

11. In addition, the court noted that at the time when the criminal offences had been committed, Bosnia and Herzegovina as the successor state was signatory party to all relevant international conventions on human rights and international humanitarian and criminal law. Furthermore, the customary status of criminal responsibility for war crimes against civilians and individual responsibility for war crimes committed in 1992 was confirmed by the UN Secretary General, Commission for International Law, case-law of the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda.

12. According to the first-instance court, the criminal offence of war crimes against civilians should be encompassed by the „general principles of international law" under Articles 3 and 4(a) of the CC BiH. This was the reason why it was indisputable that the war crimes against civilians, regardless of whether it is viewed from the aspect of customary international law, international law on treaties or „principles of international law" constituted criminal offences at the relevant time and the principle of lawfulness was met within the meaning of *nullum crimen sine lege* and *nulla poena sine lege*.

13. The court therefore concluded that in the case before it was necessary and justified to apply the CC BiH. Furthermore, the Court of BiH noted that the CC BiH should be applied to the severity of the penalty.

14. The court further noted that the first-instance court had assessed each piece of evidence individually and in conjunction with other evidence and, based on such an assessment, made conclusion as to whether a fact was proved or not. It was noted that pieces of evidences which the court did not mention in the reasons for the verdict were not, according to the court, legally relevant to establish the facts, which was the reason why the court had not assessed them individually.

15. As for the awareness of the appellant, the Court of BiH noted that it established beyond any doubt that the appellant had come to the place N.T. in Kotor Varoš on the relevant night, being aware that civilians were in the house, brothers Z.G., I.G., and V.G., who had been placed under house arrest after having been interrogated and held in the premises of the Public Safety Station of Kotor Varoš. The court established the aforementioned facts on the basis of the corroborative testimonies given by witnesses S-1 and V.G. as the witnesses for defence Z.M. and Z.P. and on the basis of the appellant's testimonies.

16. It followed from the testimonies of witnesses for prosecution, V.G., S1, M.S., E.Č., Ž.B. I E.B., that the Serb armed forces, military and police, had entered Kotor Varoš on 11

June 1992. Witness V.G. alleged that on that occasion the phone and telecommunications had been interrupted, that Croats and Muslims had been arrested and that he, together with his own brothers had been taken from his family house to the premises to the Police Station in Kotor Varoš where they had been interrogated, kept and ill-treated. The aforementioned witness alleged that the Serb armed forced (military and police forces) had had the territory of Kotor Varoš under their control, and that they had started to clean, murder and burn down villages where the members of Bosniak and Croat people had lived. At that point, Muslims and Croats had started to be organized and a bomb had been thrown on the settlement of Kotor, when a member of the Serb forces had been killed, another one had been wounded and, one day before the relevant event, more precisely on 5 July 1992, colonel S. M. from the Ministry of the Interior had been killed.

17. It was noted that the appellant, at the time of perpetration of the criminal offense, had been the member of the Serb armed forces and that accused LJ.V., alias „K", had been the member of the of Public Safety Centre of Banja Luka, and the appellant had been the member of VP (Military Post) 7551 Banja Luka, which had formed a part of the Second Infantry Brigade. The status of the appellant as the member of the Serb forces had not been disputed during the proceedings as he had alleged that at the relevant time he had been the member of the Serb armed forces. The aforesaid fact also followed from the concurrent statements of the witnesses for defence, namely D.G., Z.P., Z.M. and S.R. and witness for prosecution, namely D.K., who stated that at the relevant time the appellant had been the member of the military formation, *i.e.* the Second Light Infantry Brigade.

18. The court established indubitably that the appellant had been the member of armed forces of the Republika Srpska at the relevant time, that in that capacity he had stayed in Kotor Varoš and that his stay had exclusively been related to the armed conflict on that territory. It was noted that the incriminated actions committed by the appellant in relation to the injured persons, namely brothers G. had not been justified by military necessity. The appellant misused his position of member of armed forces and the position of injured persons, civilians, brothers G, which had been placed under house arrest, in order to commit the incriminated actions, which was the reason, according to the court, why there was a nexus between the war, *i.e.* armed conflict and the criminal offence committed.

19. Furthermore, according to the first-instance court, the appellant had been aware that he, as a member of the Serb armed forces, and the accused LJ.V., armed with automatic firearm and gun, and the appellant who had had a car which had been at the disposal of the armed forces, had taken brothers G. from house N.T. where they had been placed under house arrest, had taken them to the place of execution, while brothers G. had been without arms and had not put up any resistance. Accordingly, the court concluded that the armed

conflict had had an influence on the accused persons' capacity and decision to commit the criminal offence in question and on the manner in which the criminal offence had been committed.

20. The court noted that it had been indubitably established that accused LJ.V., wearing a blue camouflage uniform and being armed with an automatic firearm and a gun, and the appellant, wearing a black T-shirt and camouflage pants, together with another member of VP 7551 Banja Luka, wearing a camouflage pants and armed with an automatic forearm, on 6 July 1992 in Kotor Varoš, between 22h00 and 23h00, had come to house N.T., being aware that brothers, civilians, Z.G., I.G. and V.G had been placed under house arrest., and when witness S1 had opened the door of entrance, the accused LJ.V., alias „K", had ordered brothers G. to go with them for an interrogation, whereupon brothers G had been taken to the building of the Municipality of Kotor Varoš in a car „Ford Escort", which had been driven by the appellant and in which the co-driver had been the aforesaid member of the VP 7551 Banja Luka 7551, while the accused LJ.V. had been in the trunk, where brothers G. had been ordered to get out of the car and to keep moving towards the monument; they had complied with the order and while walking in column along the right curbside of the pavement in the direction of Teslić, while the appellant and the aforementioned member of the VP 7551 with the automatic firearm had been walking along their left side and while the accursed LJ.V. had been walking behind them, V.G. had asked the appellant where they were taking them, the appellant had withdrawn, whereupon the aforementioned member of the VP 7551 Banja Luka, with the aim to kill brothers G., reloaded the firearm and fired bursts of firearm towards brothers G., whereupon brothers Z.G. and I.G. had immediately died as a consequence of wounds caused by firearm bullets, while V.G., who had been hit in the hands and had manged to escape with heavy bodily injuries.

21. The first-instance court established that at the relevant night the appellant had worn a black T-shirt and camouflage pants. As for the arms, the BiH Prosecutor's Office did not state either in the confirmed or amended indictment that the appellant had been armed on that occasion, which was the reason why the court held that the appellant had not had the arms at the relevant time.

22. In his defence stated during the investigation, the appellant alleged that he had been asked to drive injured party V.G. and two other persons to a prison in the town, that he had done so and that he had stopped the car in front of the building of the prison, *i.e.* near the building, whereupon he had driven back to the police station.

23. In his defence, the accused LJ.V. confirmed the testimony given by witness G.V., namely that the appellant had taken part in taking brothers G. in the direction of the

monument and, due to the fact that brothers G. had been driven in the direction of a place where there was no prison according to the testimony given by witness V.G. and accused LJ.V., the question which injured party V.G. had asked the appellant, as the person whom he had known best from among them, „where are you taking us" was a quite logic one to the court. The court further admitted the testimony of witness V.G. as true and credible, namely that the appellant had started to withdraw following that question without giving him any answer, whereupon he had seen G.M. reloading the firearm with the aim of firing bursts of firearm towards him and his brothers. In the court's opinion, such a description of events in relation to appellant V.G., which had been given by witness V.G., was true and credible as the witness had not further mentioned the appellant and the accused LJ.V by sincerely stating that from that moment he had not seen where the accused persons were. The credibility of that testimony was corroborated by the defence of accused LJ.V, who also stated that he had seen G.M., alias „M", fired bursts of firearm in the direction of brothers G.

24. The court noted that the fact that brothers Z.G. and I.G. had died of wounds caused by the bursts of firearm in the place near the monument had been established on the basis of the testimony given by witness Z.B. He noted that as a commander of the platoon for improvement of sanitary conditions in the municipality of Kotor Varoš he had seen blood stains near the stairs in the morning, that the workers had removed the bodies in the neighbouring abandoned bakery shop and that he had seen when the bodies in the bags had been taken out of the bakery shop and driven on a tractor to the cemetery where they had been buried, although the graves had not been marked. Furthermore, he alleged that he had learned at that moment that these were brother I.G. and Z.G. and that the police had failed to carry out an on-site inspection.

25. Having analysed all presented evidence, individually and in their mutual conjunction, the first-instance court concluded beyond any doubt that the accused LJ.V. and the appellant had deliberately assisted G.M., alias „M", to perpetrate the criminal offence of war crimes against civilians, by killing in the manner described in the enacting clause of the verdict. The court noted that the accused LJ.V. and the appellant, together with G.M., had come to the house N.T. in which brothers G. had been placed under house arrest, whereupon the accused LJ.V., wearing a uniform and being armed with an automatic firearm had personally asked witness S1 and injured party V.G. to go together with all three brothers G. for an interrogation. The appellant and accused LJ.V., together with G.M., had been present when injured parties, brothers G., had got into car „Ford escort" upon order by the accused LJ.V., when the appellant had opened the door of the car, and that the appellant had taken the injured parties, driving that car to the building of the Municipality of Kotor Varoš.

26. It was noted that it was indisputable that the act of execution had taken place immediately after V.G. had asked the appellant „where are you taking us", that following that question the appellant had started to withdraw without answering. According to the defence of LJ.V, he and the appellant had been on the spot when G.M. had fired from the firearm on brothers G. with the intention to kill brothers G. In the present case, the main perpetrator had fired on three persons with the premeditation to kill, which caused death of two persons and heavy bodily injuries of one person. According to the court, the appellant and the accused LJ.V, by taking the aforesaid actions, had deliberately assisted G.M. to perpetrate the criminal offence of crime against civilians by killing them.

27. The court noted that at the relevant time the injured brothers G. had not put up any resistance nor had they had at their disposal any means to attack. At the time of armed conflict and perpetration of the crime, the appellant and the accused LJ.V. had been members of the Serb armed forces and G.M. had had the same capacity, whereas the injured parties had been civilians placed under home arrest, which was the reason why they had observed the order not to leave the house N.T., to get into car „Ford escort", to get out of the car and move towards the monument and downtown until the moment when G.M., with the intention to kill, fired bursts of automatic firearm on brothers G.

28. According to the court, the actions which the accused LJ.V. and the appellant were charged with had been obviously aimed at making it possible for another person to commit the criminal offence in question. By the aforesaid actions, the accused LJ.V. and the appellant had made it easier for him to commit the criminal offence of war crimes against civilians. In the present case, the appellant and the accused LJ.V. had not participated in the commission of criminal offence but they had participated in another person's act. Therefore, according to the court, the actions taken by the accused persons had contributed to the commission of criminal offence and had significant effects on the perpetration. The court indisputably established that the appellant and the accused LJ.V. had taken those actions of assistance with direct premeditation, as they had been aware that they assisted the perpetrator by taking those actions.

29. The first-instance court noted that it had established beyond any doubt that the appellant had deliberately assisted another person to commit, by killing, the criminal offence of war crimes against civilians referred to in Article 173(1)(c) of the CC BiH.

30. The BiH Prosecutor's Office and the appellant's defence counsel filed appeals against the first-instance verdict. The Court of BiH, Appellate Division, Section I for War Crimes, in verdict no. S1 1 K 002735 12 Kržʒ of 23 April 2012, dismissed as ill-founded the appeal of the BiH Prosecutor's Office and partially granted the appeal of the appellant's

defence counsel so that it granted the first-instance verdict in the part relating to the legal classification of the offence and decision on punishment by classifying the actions the appellant had committed as criminal offence against civilians referred to in Article 173(1) (c) of the CC BiH in conjunction with Article 180(1) of the CC BiH and in conjunction with Article 31 of the CC BiH and sentenced the appellant to eight years in prison; the time spent in custody from 8 September 2010 to 7 October 2010 and from 28 October 2011 onwards was credited against the sentence. The reminder of the first-instance verdict remained unmodified.

31. The court noted in the reasons for its verdict that the session of the second-instance court had been held on 23 April 2012 and that the session had been attended by the prosecutor of the Prosecutor's Office of BiH, the appellant and his defence counsel, namely Simo Tošić, Aleksandar Ristić and Vladmir Ilić.

32. The court noted that the appellant's attorney, Mr. Simo Tošić complained about the violation of the provisions of the criminal procedure code, criminal code and erroneously and incompletely established facts and he proposed that the appellant should be released from charges, that his detention should be terminated and the first-instance verdict should be quashed and that a trial before a panel of the Appellate Division should be scheduled. The appellant's attorney Simo Tošić presented the content of the appeal filed in writing, and the newly designated attorney of the appellant, namely Mr. Vladimir Ilić, additionally explained the appeal primarily from the aspect of serious violations of the provisions of the criminal procedure. The appellant fully agreed with his submission.

33. The Court noted that although the defence counsel of the appellant, lawyers Vladmimir Ilić and Aleksandar Ristić, had not filed appeals in writing, the second-instance court concluded that given the fact that the complaints of attorney Vladmimir Ilić, which had been presented orally at the public session of the second-instance court, could be encompassed by the reasons for the appeal filed by the main attorney of the appellant, these complaints would be considered by the court and the court would give a response to them in its verdict.

34. The court noted that pursuant to Article 306 of CPC BiH, the second-instance court reviewed the verdict within the scope of complaints, thus, the decision of the appellate panel was limited to the issues raised and explained by the parties. Furthermore, the obligation of the appellant was to present the legal grounds for challenging the verdict and the reason in support of the basis for the complaints for the purposes of Article 295(1)(b) and (c) of the CPC BiH.

35. In this connection, the court noted that arbitrary grounds for the appeal and alleged irregularities in the challenged verdict without specifying the reasons for the appeal under which such irregularities could fall could not be considered a valid legal basis for challenging the verdict, and the second-instance panel considered such complaints as ill-founded.

36. The second-instance court found that the complaints of the appellant's attorney about the discrepancies between the enacting clause of the verdict and reasons were ill-founded. It noted that the attorney did not allege in the appeal that the enacting clause of the verdict was contradictory to its reasons but rather that the presented evidence as explained in the verdict did not reflect the facts as contained in its enacting clause. Therefore, such a complaint might have only the character of the complaint about the erroneously and incompletely established facts. According to the court, unlike the allegations of the attorney, all relevant characteristics of the essence of the criminal offence of which the appellant was found guilty followed from the enacting clause of the first-instance verdict, including the place and time of perpetration of the criminal offence and all circumstances determining the action as a criminal offence and guilt of the accused persons both from the objective and subjective aspects.

37. As for the allegations of attorney Aleksandar Ilić, the second-instance court was of the opinion that the actions taken by the appellant clearly followed from the enacting clause of the challenged verdict, including the actions which objectively constituted assistance to the member of VP 7551 Banja Luka to commit the murder of two brothers G. and wounding the third one who had survived, V.G. According to the opinion of the court, the actions taken by the appellant were fully individualized and specified in the enacting clause of the verdict so that the second-instance court held that the complaint about the incomprehensibility of the enacting clause of the verdict was unfounded.

38. The second-instance panel considered as unfounded the complaint about erroneously established facts, the reason being that it was indisputable that the appellant, having arrived at the spot near the building of the municipality, had stopped the car. Although it was accepted that the appellant was not the person who had ordered brothers G. to get out of the car, unlike the complaint from the appeal, witness G. could not say with certainty who among the present persons had ordered him and his brothers to get out of the car so that he remained understated in respect of whether the first accused, LJ.V. was so or G.M., although he did not dispute the fact that one of these two persons had ordered them to get out of the car and to walk along the right curbside of the pavement in the direction of Teslić. Furthermore, the aforementioned witness described in detail that he and his brothers had walked in column, that the accused LJ.V. had been at a distance of 4-5 meters

behind them with an automatic firearm and that the appellant had walked on his left hand side and had not been armed, that G.M. had walked behind the appellant also armed with an automatic firearm.

39. It was noted that the fact that it was not stressed in the enacting clause of the verdict that the appellant had not been armed did not disclose incompletely established facts, which was indicated in the appeal of the defence counsel. It did not follow from the enacting clause of the verdict that the appellant had had any arms, while in the reasons for the verdict, it was explained through the assessment of the testimonies given by witnesses, that neither witness V.G. nor witness S-1, nor accused LJ.V. confirmed that the appellant had been armed. Accordingly, unlike the complaint of the defence counsel, the fact that the enacting clause did not state that the appellant had not been armed but only that he had been wearing a T-shirt and camouflage pants, did not imply that he had had arms and that the facts were erroneously established.

40. According to the panel, it followed from the evidence presented in the course of the first-instance proceedings that the first-instance panel's findings were correct and that the complaints of the attorney that the contested verdict was based on presumptions and that the facts were incorrectly established were unfounded.

41. It was indicated in the part of the appeal related to the violation of the criminal code that the appellant's defence counsel did not specify what that violation consisted of. Having analysed the appeal, the appellate panel concluded that the defence council held that the criminal code had been violated because the appellant's action could not be classified as assistance in the perpetration of the criminal offence which he was charged with.

42. According to the court, accused LJ.V. and the appellant had taken a series of actions which, contrary to the complaints of the defence counsel of the accused, aimed at enabling the perpetration of the criminal offence of another person, *i.e.* the actions which contributed to the perpetration of the criminal offence, although they were not decisive for it. It was noted that the second-instance court upheld the views of the first-instance panel which held that in order for a case to be related to an accessory, the Prosecution's Office does not have the obligation to prove that the criminal offence would not have been committed without assistance of an accessory.

43. According to the second-instance panel, the actions taken by the appellant had the characteristics of accessory, as also established by the first-instance penal. However, with the aim of having more precise and more complete legal assessment of the appellant's incriminated actions, and taking as a starting point Article 280(2) of the CPC BiH, which provides that the court is not bound by the prosecutor's proposals in respect of the legal

assessment of the offence, the second-instance court found it necessary to modify the verdict with regards to the legal classification of the offence by declaring the appellant guilty of the criminal offence of war crimes against civilians referred to in Article 173(1) (c) of the CC BiH in conjunction with Article 180(1) of the CC BiH, in conjunction with Article 31 of the CC BiH.

IV. Appeal

a) Allegations from the appeal

44. The appellant considers that the impugned verdicts 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) and (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") and the right to private and family life under Article II(3)(f) and Article 8 of the European Convention. The appellant is of the opinion that the ordinary courts adopted erroneous conclusions about the appellant's responsibility for the criminal offence as all presented evidence led to the same conclusion, namely that the Court of BiH should have released the appellant from criminal accountability. The appellant also refers to the appeal against the first-instance verdict and is of the opinion that the appeal should have been granted and the appellant should have been released from criminal responsibility as the appellant is not the perpetrator of the criminal offence. According to the appellant, he could not be responsible for the act committed by another person. He therefore refers to the violation of the principle *in dubio pro reo.*

45. In the supplement to the appeal, dated 2 August 2013, the appellant complained about the violation of Article 6(3)(c) of the European Convention and the right under Article 7(1) of the European Convention. He alleges that it was correct that the appellant's defence counsel did not complain about the applied legal classification of the act, *i.e.* the applicable criminal code. He also alleges that the defence counsel was appointed *ex officio* in the present case. However, it is an indisputable fact that his defence counsel did not invoke a serious violation of the principle of legality, *i.e.* a violation of Article 7 of the European Convention either in the written submission (objection to the indictment, appeal *etc*.) or in the course of the first-instance proceedings, or in the proceedings on appeal. He outlines that his attorney did not do it in the appeal so that he had to file a supplement to the appeal. The appellant alleges that as the work of his attorney was not efficient, he had to involve two other attorneys for the appellate proceedings, who dealt with the violation of the provision of the CPC and erroneously and incompletely established facts. In his opinion, the CC SFRY should have been applied, which was in force at the time

when the incriminated actions were taken. He further alleges that the 2003 CC BiH was neither more favourable nor more lenient for the appellant. He invokes the violation of the provisions related to the proceedings at two instances for the purposes of Article 7(2) of the European Convention. In his opinion, the aforementioned principle constitutes a form of judicial control over the work of judiciary and that in case of the Court of BiH there were no judicial authorities at several instances and that only an illusion of proceedings at several instances is created by the existing law arrangements prescribed by the Law on the Court of BiH. As for the complaint about the violation of Article 6(3)(c), the applicant alleges that his attorney who was designated *ex officio* did not invoke the violation of the provisions of Article 7 either in the first-instance proceedings or in the appellate proceedings. He alleges that he did not do so in the appeal, which was the reason why the appellant had to file a supplement to the appeal.

b) Reply to the appeal

46. In its reply to the appeal the Court of BiH alleges that nothing new was indicated in the appeal, anything which had not been the subject of examination and assessment in the first-instance proceedings. As to the reference to the appeal against the first-instance verdict, the Court of BiH alleges that the second-instance panel gave a response to all complaints and reasons therefor, and thus, it referred to the reasons for the second-instance verdict. As for the supplement to the appeal, in which the appellant invoked a violation of Article 7 of the European Convention, the Court of BiH alleges that the aforementioned supplement was untimely as it had been filed following the expiry of the time limit prescribed by the Rules of the Constitutional Court.

47. In its reply to the appeal the BiH Prosecutor's Office alleges that the appeal did not indicate the violation of the appellant's constitutional rights. However, the BiH Prosecutor's Office holds that the supplement to the appeal concerning the application of substantive law in respect of more lenient law was founded.

V. Relevant Law

48. The **Criminal Code of Bosnia and Herzegovina** *(Official Gazette of BiH,* 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07 and 8/10*),* so far as relevant, reads*:*

Principle of Legality

Article 3

Criminal offences and criminal sanctions shall be prescribed only by law.

No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.

Time Constraints Regarding Applicability

Article 4

(1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.

(2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

Trial and punishment for criminal offences pursuant to the general principles of international law

Article 4(a)

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.

Accessory

Article 31

Whoever intentionally helps another to perpetrate a criminal offence shall be punished as if he himself perpetrated such offence, but the punishment may be reduced.

The following, in particular, shall be considered as helping in the perpetration of a criminal offence: giving advice or instructions as to how to perpetrate a criminal offence, supplying the perpetrator with tools for perpetrating the criminal offence, removing obstacles to the perpetration of criminal offence, and promising, prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, the tools used for perpetrating the criminal offence, traces of the criminal offence, or goods acquired by perpetration of the criminal offence.

Imprisonment

Article 42

(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.

Crimes against Civilians

Article 173(1)(c)

(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.

Individual and Command Responsibility

Article 180

(1) A person who planned, instigated, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in Article 171 (Genocide), 172 (Crimes against Humanity), 173 (War Crimes against Civilians), 174 (War Crimes against the Wounded and Sick), 175 (War Crimes against Prisoners of War), 177 (Unlawful Killing or Wounding of the Enemy), 178 (Marauding the Killed and Wounded at the Battlefield) and 179 (Violating the Laws and Practices of Warfare) of this Code, shall be personally responsible for the criminal offence. The official position of any accused person, whether as Head of State or Government or as a responsible

Government official person, shall not relieve such person of criminal responsibility nor mitigate punishment.

Criminal Code of the SFRY (*Official Gazette of the SFRY*, 44/76, 36/77, 56/77, 34/84, 37/87, 74/87, 57789, 3/90, 38/90 and 45/90), so far as relevant reads:

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, and which were perpetrated under particularly aggravating circumstances or caused especially grave consequences, a punishment of imprisonment for a term of 20 years may be imposed when so provided.

Chapter XVI – Criminal acts against humanity and international law

(Remark: encompassed, inter alia, the following criminal acts: Article 141 - Genocide; Article 142 - War crimes against the civilian population; Article 143 - War crimes against the wounded and sick; Article 144 - war crimes 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 and Article 155 - Establishing slavery relations and transporting people in slavery relation

Article 142
War crimes against the civilian population

(1) Whoever in violation of rules of international law effective 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 by imprisonment for not less than five years or by the death penalty.

(2) Whoever, in violation of the rules of international law applicable in the time of war, armed conflict or occupation, issues the following orders: to attack the objects under international protection or life-threating objects and plants such as dams, embankments, nuclear power plants; to shoot without determined targets civilian objects under protection of international law, undefended places and demilitarized zones; to cause damage at large scale to environment, which may have harmful consequences for health and survival of population or who commits any of the aforementioned acts.

Whoever, in violation of the rules of international law applicable in the time of war, armed conflict or occupation, as occupant, order or replace part of civilian population to the occupied territory,

shall be punished by imprisonment for a term not less than five years.

Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09), 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 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 court shall treat the parties and defence counsel equally and shall give equal opportunities both in respect of access to evidence and the presentation thereof at the main trial.

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 281
Evidence on Which the Verdict is grounded

(1) The Court shall reach a verdict solely based on the facts and evidence presented at the main trial.

(2) The Court is obligated to conscientiously evaluate every piece of evidence and its correspondence with the rest of the evidence and, based on such evaluation, to conclude whether the fact(s) have been proved.

Article 306
Limits in Reviewing the Verdict

The Panel of the Appellate Division shall review the verdict only insofar as it is contested by the appeal.

Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of BiH* – no. 94/04), in its relevant part, read:

Article 31
(Scope of Decision-Making)

As a rule, during the decision-making procedure, the Constitutional Court shall examine the existence of only those violations that are stated in the request/appeal.

VI. Admissibility

49. 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.

50. Pursuant to Article 18(1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective legal remedies available under the law against a judgment/decision challenged by the appeal are exhausted and if the appeal 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.

51. In the instant case, the subject challenged by the appeal is the verdict of the Court of BiH no. S1 2 K 002735 12 Kržʒ of 23 April 2012, against which there are no other effective legal remedies available under the law. Furthermore, the appellant and his defence counsel received the challenged verdict on 13 July 2012, and the appeal was filed on 10 September 2012, *i.e.* within a time-limit of 60 days as laid down in Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court because it is not manifestly (*prima facie*) ill-founded, nor is there any other formal reason that would render the appeal inadmissible.

52. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 18(1), (3) and (4) of the Constitutional Court's Rules, the Constitutional Court concludes that the present appeal meets the admissibility requirements.

VII. Merits

53. The appellant complains that the challenged verdicts 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) and (2) of the European Convention and the right to private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

Right to a fair trial

Article II(3)(e) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

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

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. [...]

54. The present case concerns the determination of a criminal charge against the appellant so that Article 6 of the European Convention is applicable in this case.

55. The Constitutional Court notes that in the present case it cannot consider the supplement to the appeal dated 2 August 2013, since the requirements under Article 22(3) of the Rules of the Constitutional Court have not been met. Therefore, the supplement to the appeal was filed after the expiry of the time limit under Article 18(1) of the Rules of the Constitutional Court. Therefore, the Constitutional Court will focus on the examination of the allegations from the appeal dated 10 September 2012.

56. The Constitutional Court notes that the appellant, in his appeal dated 10 September 2012, failed to allege explicitly that he considered that the relevant law had been applied arbitrarily in respect of the principle of compulsory application of more lenient law, *i.e.* the law prescribing more lenient penalty and that therefore his right to a fair trial under Article 6(1) of the European Convention had been violated. According to Article 31 of the Rules of the Constitutional Court, as a rule, during the decision-making procedure, the Constitutional Court shall examine the existence of only those violations that are stated in the request/appeal. However, the Constitutional Court is aware of its consistent case-law related to the application of more lenient law (in the present case, the CC SFRY compared to the CC BiH) just like it is aware of the fact that in the impugned verdicts the Court of BiH expressed significantly different views about this issue compared to the case-law of the Constitutional Court. According to the Constitutional Court, such views expressed in the impugned verdicts disclose a violation of the appellant's right to a fair trial. Taking into account the aforesaid, the question arises as to whether the Constitutional

Court, despite the limitations under Article 31 of the Rules of the Constitutional Court, may examine whether the relevant law was arbitrarily applied to the detriment of the appellant's fundamental rights in respect of the principle of mandatory application of the law prescribing more lenient penalty.

57. With regards to the aforementioned issue, the Constitutional Court refers to the opinion of the European Commission for Democracy through Law („the Venice Commission") no. 804/2015 of 29 June 2015, requested by the Constitutional Court of Georgia with regards to the rule *non ultra petita* in criminal matters. In the aforesaid opinion, the Venice Commission gave its opinion with regards to the following questions:

- What are the international or national human rights standards with regard to the scope of review by a higher court? In which circumstances may courts be entitled to go beyond the appeal in question and decide on the issues that are not indicated in the complaint?
- What are the international or national standards of application of the principles of protection against double jeopardy (right not to be tried or punished twice), *in dubio pro reo* (defendant may not be convicted by the court when doubts about his or her guilt remain), *nullum crimen sine lege* (there exists no crime and no punishment without a pre-existing penal law) and *lex mitior* (the application of the more lenient criminal law)? Do these principles authorise or even oblige a court of law, in case of no formal demand by an appellant or an accused, to uphold those principles on its own behalf (*sua sponte*)?

58. Having analysed the aforementioned issue in the context of law arrangements and case-law of a number of countries of all continents and case-law of international courts dealing with the protection of human rights, the Venice Commission adopted the following conclusions:

60. The non ultra petita rule sets out that a court is only competent to review a case within the limits of the questions of law or fact which have been raised by the parties to a dispute. It also aims to ensure the efficiency of justice, by reducing unnecessary loss of time and costs for the litigants and the judicial system. Such procedural requirements do not, per se, offend human rights protection.

61. The non ultra petita rule is a common feature in European legal systems and beyond. In the criminal law field, this rule is also found in states that otherwise follow the inquisitorial principle with respect to the scope of the jurisdiction for appellate courts to review judgments on appeal or cassation.

62. States that provide for the non ultra petita rule in their criminal procedure codes or rules often also provide for specific exceptions to this rule in the same code or rules. These exceptions refer to cases where the higher interests of justice should prevail. If such exceptions are not explicitly referred to by the law, they may be introduced through case law in order to protect fundamental rights enshrined in constitutions and international human rights law.

63. Based on the exceptions to the non ultra petita rule and the examples of state practice on the matter provided to the Venice Commission, it seems clear that for most states, a court of law is allowed to uphold, sua sponte, the fundamental principles raised in this amicus curiae brief and, for some states, it is even an obligation for courts to do so. It is, however, also clear that such an intervention must be exercised sparingly and in very specific circumstances, namely, errors of fact or law allegedly made by a lower court should not be addressed unless these infringe fundamental principles (...).

59. The Constitutional Court supports as a whole the cited conclusions of the Venice Commission and holds that their aim is to remove the violations of human rights. The arguments related to the broadest protection of human rights form part of the case-law of the Constitutional Court. Even in Decision no. *U 4/05* of 22 April 2005 (*Official Gazette of BiH*, no. 32/05 of 24 May 2005), the Constitutional Court emphasized as follows: „(…) In line with the arguments concerning human rights, the Constitutional Court holds that it must, whenever this is feasible, interpret its jurisdiction in such a way as to allow the broadest possibility of removing the consequences of violation of human rights (…) (see, *mutatis mutandis*, cited Decision para 16).

60. Furthermore, the Constitutional Court notes that the prohibition under Article 31 of the Rules of the Constitutional Court is not absolute, taking into account the wording of that Article stipulating that, *as a rule*, the Constitutional Court shall examine the existence of only those violations that are stated in the request/appeal. Thus, the wording *as a rule* leaves nonetheless the possibility for exceptions, *i.e.* the examination of those violations that are not alleged in the appeal. However, Constitutional Court is of the opinion that, given the views referred to in paragraph 63 of the conclusion of the Venice Commission, such exceptions should be applied rarely and in very specific circumstances when errors of lower courts „infringe fundamental principles". In the present case, as already mentioned, the Constitutional Court is of the opinion that the views of the Court of BiH in the impugned verdicts are contrary to the principle of mandatory application of more lenient law and are in violation of the „fundamental principles", *i.e.* call into question the fairness of the relevant proceedings as a whole. Therefore, taking into account the fact that the appellant alleged, within the framework of his complaints about the violation of Article 6 of the European Convention, that this right had been violated due to the misapplication of the

relevant law and taking into account the fact that rights and freedoms provided for in the European Convention, pursuant to the provision of Article II(2) of the Constitution, apply directly and have priority over all other law, the Constitutional Court, in accordance with its hitherto case-law and the case-law of the European Court, will examine the appeal in the present case in relation to the mandatory application of more lenient law and principles of the right to a fair trial, *i.e.* it will examine whether the proceeding in question were fair as a whole for the purposes of Article 6(1) of the European Convention.

As to the mandatory application of more lenient law within the meaning of the principle under Article 6(1) of the European Convention

61. In the present case, the appellant was found guilty of the criminal offence of war crimes against civilians referred to in Article 173(1)(c) of the CC BIH in conjunction with Article 180(1) of the CC BiH, in conjunction with Article 31 of the CC BiH, as he had taken actions as described in the enacting clause of the verdict. In the verdict of the second-instance panel, the appellant was finally sentenced to eight (8) years in prison. According to the reasons for the aforementioned impugned verdicts, the appellant was found guilty of the actions taken in Bosnia and Herzegovina in July 1992. It was not disputed that the CC SFRY had been in force in BiH in the relevant period and that Article 142 thereof incriminated the actions which the appellant was found guilty of. However, he was convicted pursuant to the aforementioned provisions of the CC BiH which indisputably entered into force after the commission of the actions the appellant was declared guilty of.

62. The court gave reasons for considering why the law in force at the time of commission of the criminal offence in question was applied. It may be summarized as follows. The Court of BiH noted that Article 7(2) of the European Convention allows derogation from the principle under Articles 3 and 4 of the CC BiH, *i.e.* from the application of the criminal code which was in force at the time of perpetration of the criminal offence. The court noted that the criminal offence, which the appellant was found guilty of, constituted a criminal offence under customary international law and that, therefore, it fell under the general principles of international law stipulated under Article 4a of the Law on Amendments to the CC BiH, and that therefore the CC BiH could be applied in this case based on the mentioned provision. The court further explained that the application of the CC BiH was justified, since the prescribed punishment was at any rate more lenient than the death penalty, which was in force at the time of the criminal offence, thus meeting the principle related to temporal constraints of the criminal code, *i.e.* the application of the more lenient code to the perpetrator.

With regards to the aforementioned, the Constitutional Court notes that in case of *Z. Damjanović* (see Decision on Admissibility and Merits no. *AP 325/08* of 27 September 2013, available at: www.ccbh.ba, paras 46 and 51), while considering a similar factual and legal issue in the context of application of the CC BiH with regards to the criminal offence of war crimes against civilians, it found a violation of Article 7(1) of the European Convention, as there was a realistic possibility in that case that the retroactive application of the CC BiH was to the detriment of the appellant in respect of the sentence, which was contrary to Article 7(1) of the European Convention.

63. The Constitutional Court recalls that such a view was based on the case-law of the European Court in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina* (see judgment of the ECtHR of 18 July 2013). In particular, the European Court, in the cited judgment, having considered the issue of application of more lenient law in the context of Article 7 of the European Convention, examined the severity of prescribed punishments from the aspect of the minimum sentence prescribed by the CC BiH, which was applied to that case, and the CC SFRY which had been applicable at the relevant time to the criminal offence of war crimes against civilians.

64. Bringing into connection the aforementioned principles with the present case, the Constitutional Court notes that the issue of application of substantive law depends on the circumstances of each individual case. The Constitutional Court notes that those circumstances depend on the severity of the pronounced sentence and prescribed sentence, i.e. the range of penalties prescribed by the law which was in force at the time of perpetration of criminal offence and the law based on which the sentence was pronounced (CC SFRY or CC BiH). In this connection, the Constitutional Court notes that the criminal offence of war crimes against civilians was defined in both codes (CC SFRY and CC BiH) in the same manner, but the range of prescribed penalty is different (see *mutatis mutandis* Decision of the Constitutional Court in case *AP 3280/13* of 7 October 2013, paragraph 58).

65. Taking into account the fact that the appellant in the present case was sentenced to eight years in prison for the criminal offence of war crimes against civilians, which, according to the provisions of Article 173(1)(c) of the CC BiH constitutes the penalty below the minimum penalty prescribed by the law for that criminal offence, the Constitutional Court holds that it would be of particular importance to establish in this case which code is more lenient (the CC SFRY or CC BiH) or more favourable in respect of the minimum penalty. The aforementioned view of the Constitutional Court is based on the fact that the prison sentence below the minimum prescribed by the CC BiH was imposed on the appellant, which indicates more lenient punishment imposed on the appellant. Therefore, as already

said, it is necessary to establish which code (the CC SFRY or CC BiH) prescribes more lenient penalty for the criminal offence of war crimes against civilians.

66. As already said, the first-instance panel of the Court of BiH gave the reasons for its decision, which were not modified in the final decision of the Appellate Panel in respect of the application of the provisions of the CC BiH to the present case. However, the aforementioned reasons, as to the obligation to apply more lenient law, come down to the comparison between CC BiH and CC SFRY solely in the part related to the issue as to which code prescribes severer penalty for the perpetrator (the appellant), since the main argument was that the CC SFRY prescribed also death penalty for the criminal offence in question. None of two panels of the Court of BiH that dealt with this case gave reasons in respect of the issue which of the two codes prescribes more lenient penalty for the criminal offence of war crimes against civilians. This was compulsory according to the Constitutional Court given the fact that the tendency of the Court of BiH was to impose more lenient punishment on the appellant (as the imposed sentence was below the minimum prescribed by the law), so that it was necessary to make a comparison between Article 173 of the CC BiH and Article 142 of the CC SFRY, *i.e.* to give reasons as to which of the two codes prescribes (also) more lenient penalty on the appellant and to decide which law is more lenient from the aspect of the minimum penalty prescribed by the law and, accordingly, to apply more lenient law.

67. Taking into account the fact that there were no such reasons, the Constitutional Court holds that in the present case, Article 173 of the CC BiH was misapplied and that, therefore, 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 has been violated.

68. Finally, the Constitutional Court refers to its view expressed in case *AP 556/12* (see, *op. cit, AP 556/12*, para 60), which could be applied as a whole to the present case and in which the Constitutional Court noted that in that case or in a number of recent cases wherein it had found a violation of Article II(2) of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention and quashed the verdicts of the Court of BiH and ordered adoption of a new decision removing the established violation, it had not decided on the interruption of serving the prison term and the appellant's possible release nor on the procedure according to which the Court of BiH would take a new decision. Given the aforesaid, the Constitutional Court also noted that the appellant had been deprived of liberty in that case and sent to serve the prison sentence on the basis of the challenged verdict, which was quashed by the aforementioned decision of the Constitutional Court solely in respect of the application of Article 7 of the European Convention, and that the Court of BiH would decide on the appellant's deprivation of liberty, his remand or

detention in accordance with its jurisdiction. In the present case, the Constitutional Court does not have available evidence as to whether the appellant was sent to serve the term, but finds it necessary to remind the Court of BiH of this aspect of its jurisdiction.

Other aspects of the right to a fair trial

69. The Constitutional Court first notes that according to the consistent case-law of the European Court and the case-law of the Constitutional Court, it is not the task of these Courts to review the ordinary courts' findings relating to facts and application of the substantive law (see European Court, *Pronina v. Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01). Namely, the Constitutional Court is not called upon to substitute ordinary courts in the assessment of facts and evidence, but, in general, it is the task of ordinary courts to assess the presented facts and evidence (see European Court, *Thomas v. The United Kingdom*, judgment of 10 May 2005, Application no. 19354/02). It is the Constitutional Court's task to examine whether the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective legal remedy, *etc*.) have been violated or disregarded, and whether the application of law was, possibly, arbitrary or discriminatory. Thus, within its appellate jurisdiction, the Constitutional Court deals exclusively with the issue of a possible violation of the constitutional rights or the rights under the European Convention in the proceedings before the ordinary courts. 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, that is whether the right to property was violated (see Constitutional Court, Decision no. *AP 20/05* of 18 May 2005, the *Official Gazette of BiH*, 58/05).

70. Furthermore, the Constitutional Court recalls that it is outside its jurisdiction to appraise the quality of the courts' conclusions with respect to the assessment of evidence if this assessment does not appear to be manifestly arbitrary. Likewise, the Constitutional Court will not interfere with the manner in which the ordinary courts had accepted evidence as evidentiary material. The Constitutional Court will neither interfere with the situation where the ordinary courts give credence to evidence of one party to the proceeding on the basis of the court's assessment. It is solely the role of ordinary courts, even when the statements given by witnesses in open court and on oath are in conflict (see, European Court of Human Rights, *Doorson v. The Netherlands*, judgment of 6 March 1996, published in Reports no. 1996-II, paragraph 78).

71. Having considered the allegations of the appellant, the Constitutional Court holds that a comprehensive assessment of the presented evidence was not lacking. In particular, the Constitutional Court notes that in the present case, the first-instance court conducted

evidentiary proceedings during which the witnesses for prosecution and defence were heard, and material evidence was analysed and assessed. Furthermore, the Constitutional Court notes that the first-instance court, in its verdict, described fully the process of assessment of individual evidence, their mutual connection and findings that the appellant committed the criminal offence in question. The first-instance court gave detailed reasons for accepting the testimonies given by the witnesses for prosecution and for not accepting the allegations of the appellant's defence counsel. In particular, the first-instance court established that the actions taken by the appellant made it possible for the criminal offence to be perpetrated by G.M. and were significant to the perpetration thereof. It was established that, at the moment of perpetration of the criminal offence, the appellant had been a member of the armed forces, as had been G.M. who had shot at three brothers (I.G., Z.G. and V.G.). It was further established that the three brothers, I.G. Z.G. and V.G., during the critical event had not resisted nor had they had any means for attack at their disposal. Namely, they were civilians placed under house arrest for which reason they had followed the orders to leave the house of N.T. and to get into the „*Ford* escort" vehicle, driven by the appellant, to leave the vehicle in the certain spot and to move in the direction of the monument and the bazaar with no resistance up to the moment when G.M. started shooting, with the aim of killing, in the gunfire towards the three brothers, two of which were killed and the third was inflicted serious bodily injury. The first instance court, therefore, concluded that the appellant had participated in someone else's offence, *i.e.* the offence that someone else had committed, and in that manner, by his acts, had facilitated the other to commit the criminal offence of war crimes against civilians. At the same time, it was established that the appellant had offered assistance with a direct intent given that he had been aware that by the relevant acts he had given support to the perpetrator of the criminal offence in the perpetration thereof. The Constitutional Court notes that the first instance court based its conclusion on the existence of the appellant's criminal liability and criminal offence on the entire procedure of the presentation of evidence.

72. Moreover, the Constitutional Court notes that the conclusions of the first instance court on the criminal liability of the appellant were upheld by the second instance court in their entirety. However, the second instance court modified the first instance judgement in the legal assessment of the offence and decision on the penalty and gave sufficient reasoning for that. Furthermore, the second instance court underlined that while deciding on the appeal that court had to deal within the scope of the statement of claims in terms of Article 306 of the CPC BiH. It is, thus, evident that the second instance court considered the appellant's appellate claims and gave reasoning regarding its finding of those being unfounded and as to why those could not result in the different outcome of the particular criminal proceedings. In the opinion of the Constitutional Court, therefore, in the

challenged decisions the ordinary courts gave sufficient reasons for the conclusion that the appellant had committed the criminal offence of war crimes against civilians in violation of Article 173(1)(c) of the CC BiH in conjunction with Article 180(1) of the CC BiH and Article 31 of the CC BiH. Accordingly, the Constitutional Court holds that there is nothing in the challenged judgements that would indicate the arbitrariness in the establishment and evaluation of facts in terms of the appellant's criminal liability and that, as regards the aforementioned, the given reasons meet, in their entirety, the requirements of the right to a fair trial under Article 6(1) of the European Convention.

73. Besides the abovementioned, the Constitutional Court recalls that Article 6(1) of the European Convention obliges the courts to give reasons for their judgements, but that cannot be understood as requiring a detailed answer to every argument (see the European Court of Human Rights, *Harutyunyan v. Armenia*, Partial Decision on Admissibility of 5 July 2005, Application no. 36549/03). 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 second instance court gave the reasons for its conclusions in relation to the relevant appellant's statement of claims, within the scope of his appeal.

74. Furthermore, the Constitutional Court notes that during the entire course of proceedings the appellant had the defence counsel and in the second instance proceedings he had three defence counsels, therefore, he had the professional legal aid, and he also had and used all available remedies. Moreover, in the course of the entire proceedings, the appellant had a possibility to confront his arguments with the arguments of the prosecution. The Constitutional Court cannot conclude that in any part of the proceedings the appellant has been brought to an unequal position in relation to the prosecution. In the present case, therefore, the appellant has not been deprived of any procedural guarantees which would lead to the violation of the right to a fair trial. At the same time, the Constitutional Court reminds that the appellant's defence counsel failed to specify in the appeal what constituted a violation of the criminal code and, therefore, through the analysis of the appeal contents it was concluded by the second instance court that the appellant's defence council indicated that the appellant's actions could not be classified as the offense of assisting in the perpetration of the criminal offence that he was charged with. On the basis of the relevant proceedings in which the appellant in the end had three defence counsels, therefore, cannot be concluded that his defence counsels or the appellant himself raised the issue of arbitrariness in the application of substantive law from the aspect of a more lenient

punishment for the appellant. This is also confirmed by the appellant in his supplement to the appeal where he states that his defence counsels had not indicated the issue in the relevant proceedings for which reason he presented it in his supplement to the appeal.

75. As to the appellant's allegations about a violation of his right under Article 6(2) of the European Convention, the Constitutional Court recalls that the relevant provision stipulates that everyone charged with a criminal offence will be presumed innocent until proven guilty according to law, *i.e.*, by an enforceable and binding judgement. Moreover, any doubt as regards the facts that constitute the characteristics of a criminal offence the court solves by its judgement, in a manner more favourable for the accused. Under the case-law of the European Court of Human Rights, a presumption of innocence purports that the accused has no obligation of defending himself, although he has the right to defence, that the accused is not obliged to prove his/her innocence and the burden of proof lies with the prosecutor. In accordance with the above, the court must issue the acquitting judgement not only when convinced of the innocence of accused but also when not either convinced of his/her guilt or innocence. Therefore, the *in dubio pro reo* principle, in addition to the principle of presumption of innocence, is one of the fundamental principles of the procedural criminal law. That means, any doubt must be resolved in favour of the accused. When the court is in doubt as to whether a certain fact is detrimental to the accused or has doubts in this respect, it must consider it unproven and, additionally, in the case of doubt regarding the facts that are in favour of the accused but could not be established with sufficient certainty, it must consider them as established. According to this rule, what is not proven is deemed proven. If doubts remain as to the criminal liability of the accused after the criminal procedure is conducted, the court must issue the acquitting judgement.

76. In the establishment of criminal liability of the accused, the court, therefore, must apply the principle *in dubio pro reo*, which is an important element of the right to a fair trial under Article 6 of the European Convention (see ECtHR, *Barbera, Messegue and Jabardo v. Spain,* Judgement of 6 December 1988, Series A, no. 146, para. 77). These basic principles are established and elaborated in the provisions of the CPC BiH, which had been applied in the present case, and purports the obligation of the court to evaluate all pieces of evidence, individually and comparatively, and on the grounds of such an evaluation to derive a conclusion whether or not a certain fact is proved. Bringing the aforesaid in relation with the facts of the particular case, the Constitutional Court holds that the first instance court, as upheld by the second instance court, offered a clear and exhaustive reasoning for each piece of evidence presented as well as taken together, for which reason the Constitutional Court considers that the evaluation of evidence in the present case does not give the impression of arbitrariness or irrationality in any way, nor does it indicate that

the court had any doubt whatsoever regarding any piece of evidence in favour or to the detriment of the appellant. That is why a judgement in favour of the appellant could not be issued and, consequently, there was no violation of the *in dubio pro reo* principle. The Constitutional Court, therefore, holds that the appellant's allegations on the violation of his rights under Article 6(2) of the European Convention are ill-founded, too.

77. In view of the abovementioned, the Constitutional Court concludes that the challenged decisions of the ordinary courts are not in violation of the appellant's constitutional right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) and (2) of the European Convention.

Right to private and family life

78. The appellant points out that the challenged verdicts are also in violation of his right to private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. In this respect, the Constitutional Court observes that the appellant, apart from the arbitrary allegations about the violation of the relevant right, does not state or specify where he sees the violation of the cited right. Therefore, the Constitutional Court holds that the allegations of the appellant on the violation of the right to private and family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention are ill-founded.

VIII. Conclusion

79. 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, as the reasoning of the challenged judgements, as regards the mandatory application of more lenient law, is reduced to the application of the CC BiH and CC SFRY exclusively with regard to the consideration of which of the two abovementioned laws stipulates the more severe sanction for the perpetrator (the appellant), given that the main argument was that the CC SFRY stipulates (also) the death penalty for the said criminal offence. Neither of the two Panels of the Court of BiH, which decided on this case, has offered the reasoning as to which of the two of the above laws stipulates the more lenient sanction for the criminal offence of war crimes against civilians. In the opinion of the Constitutional Court, that was mandatory in the view of tendency of the Court of BiH to decide on the more lenient punishment for the appellant (since the pronounced sentence was below the legally prescribed minimum) and, exactly for this reason, it was necessary to compare Article 173 of the CC BiH and Article 142 of the CC SFRY, *i.e.*, to present the reasoning as to which of the two laws stipulates (also) the more lenient sanction for

the appellant, and then to decide which law is more lenient from the aspect of the legally prescribed minimum of the sanction provided for and, accordingly, to apply the more lenient law.

80. The Constitutional Court concludes that 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) and (2) of the European Convention has not occurred, given that there is nothing in the challenged judgements that would indicate the arbitrariness in the establishment and evaluation of facts in terms of the appellant's criminal liability as well as the violation of *in dubio pro reo* principle. During the entire course of proceedings the appellant had the professional legal aid and, therefore, he was not put in an unequal position in relation to the other party by any means whatsoever.

81. Having regard to Article 59(1), (2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of the Decision.

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

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 4218/12

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Ahmet Berbić against the judgment of the County Court of Doboj, no. 13 0 U 002163 12 U of 14 September 2012

Decision of 6 April 2016

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 94/14), in the Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić

Having deliberated on the appeal of **Mr. Ahmet Berbić**, in case no. **AP 4218/12**, at its session held on 6 April 2016, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Ahmet Berbić is hereby granted.

A violation of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No.1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The judgment of the County Court of Doboj, no. 13 0 U 002163 12 U of 14 September 2012, is hereby quashed.

The case shall be referred back to the County Court of Doboj, 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 County Court of Doboj is hereby ordered pursuant to Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina to inform the Constitutional Court within a time limit of 90 days from the date of delivery of this decision about 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 1 December 2012, Mr. Ahmet Berbić („the appellant") from Derventa, represented by Mr. Jozo Barišić, a lawyer practicing in Derventa, filed an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the County Court of Doboj („the County Court"), no. 13 0 U 002163 12 U of 14 September 2012.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, on 22 September 2015 the County Court and the Pension and Disability Insurance Fund of the Republika Srpska („the PIO Fund") were requested to submit their replies to the appeal. Also, on 19 and 26 October 2015 the PIO Fund was requested to submit decisions whereby the appellant's right to pension was recognized and other information concerning his status with the PIO Fund. On 29 October 2015 the Pension and Disability Insurance of the Federation of BiH („the FBIH PIO Fund") was requested to submit additional information about the appellant's status with the mentioned Fund.

3. On 10 July 2015 the County Court submitted its reply to the appeal. On 2 and 13 November 2015 the PIO Fund submitted additional information about the appellant's status with the PIO Fund. The FBiH PIO Fund submitted its reply to the appeal on 8 December 2012.

III. Facts of the Case

4. The facts of the case as they appear from the appellants' allegations and the documents submitted to the Constitutional Court may be summarized as follows.

5. In a ruling of the PIO Fund – Branch Office in Doboj („the Branch Office"), no. 112488282836 of 22 March 2005, the appellant's right to an old-age pension in the monthly amount of 152.27 KM was recognized starting from 26 July 2004.

6. In ruling no. 112488282836 of 8 April 2011, the Branch Office found that the appellant's right to an old-age pension ceased. According to the same ruling, pursuant to the provisions of Article 219 of the Law on the Pension and Disability Insurance (*Official Gazette of the Republika Srpska*, 106/05 – Consolidated Text, and nos. 20/07, 33/08, 1/09, 71/09, 106/09 and 118/09; „the Law on the PIO"), the appellant was obliged to return the amounts which the PIO Fund paid to the appellant on the basis of pension in the period from 26 July 2004 to 30 April 2011.

7. In the reasons for the ruling, the Branch Office noted that the procedure for cessation of the right to an old-age pension had been initiated *ex officio* on 8 November 2011 when the following was established: according to the ruling of the Branch Office, no. 112488282836 of 22 March 2005, the appellant's right to an old-age pension starting from 26 July 2005 was recognized; on 26 July 2004, the appellant filed a request but he failed to attach to the request a piece of evidence proving that he had been the member of the Armed Forces „Croatian Defence Council" (*Hrvatsko vijeće odbrane*, hereinafter referred to as „the HVO") in the period from 1992 to 1995; on 4 April 2011, the appellant, through the Branch Office in Derventa, filed a request for recalculation of an old-age pension on the basis of new facts related to his participation in the HVO; he attached a Certificate of Ministry for Issues of Veterans and Disables Veterans of the Defensive-Liberation War of the Federation of BiH („the Federation Ministry"), no. 0760-03-3-123/08 of 28 March 2008, wherein it was stated that the appellant had been a member of the Army of Bosnia and Herzegovina - the HVO in the period from 4 April 1992 to 23 December 1995, that the appellant, while filing his request to exercise the right to a pension with the PIO Fund, had concealed the fact that he had been the member of the HVO, which was significant to the resolution of the issue of competence between the PIO Fund and the PIO/MIO Federation Institute pursuant to Article 12(2) of the the Agreement on Mutual Rights and Obligations in the Implementation of Pension and Disability Insurance („the Agreement"), that the PIO Fund, given the aforesaid, was not competent to act upon the appellant's request and that, finally, the appellant was obliged to return the amounts paid at the expense of the PIO Fund in the period from the date of exercise of the right to the date of cessation of the right.

8. The appellant filed a complaint against the mentioned ruling with the Branch Office, which, in Conclusion no. 05-8875/11 of 9 September 2011, rejected the complaint as untimely.

9. Having dealt with a complaint which the appellant filed against the Conclusion of the Branch Office, the PIO Fund issued ruling no. 112488282836 on 7 March 2012, wherein it granted the appellant's complaint, quashed the Branch Office's Conclusion of 9 September 2011 and established that the complaint filed against the ruling of the Branch Office of 8 April 2011 (concerning the cessation of the right to an old-age pension) was considered as timely (para I of the operative part of the ruling). According to para II of the operative part of the ruling, the complaint filed against the ruling of the Branch Office of 8 April 2011 was dismissed as ill-founded.

10. Furthermore, according to the same ruling, the appellant was obliged to return the amounts which had been paid on the basis of the pension by the PIO Fund in the period from 26 July 2004 to 30 April 2011 in accordance with the provisions of Article 219 of the Law on the PIO. It found that the mentioned ruling had been served on the appellant on 21 August 2011 and that the complaint against that ruling had been filed on 1 September 2011. It was stated in the same ruling that the complaint was rejected as untimely by the Branch Office's Conclusion no. 112882836 of 9 September 2011 and that the ruling on complaint had been delivered on the party on 16 April 2011 but it could not been served on the appellant in person, as he had change his residence address, so that it had been done through the notice board.

11. The appellant initiated an administrative dispute against the PIO Fund's ruling no. 112488282836 of 7 March 2012. In judgment no. 13 0 U 002163 12 U of 14 September 2012, the County Court dismissed the appellant's lawsuit.

12. The County Court noted that the defendant, in ruling no. 1124882836 of 22 March 2004, had recognized the appellant's right to an old-age pension in the monthly amount of 157.27 KM starting from 26 July 2004, that upon a request for recalculation of an old-age pension, which the appellant had filed with the PIO Branch Office in Derventa on 4 April 2011 based on new facts related to his participation in the HVO, a procedure for cessation of the appellant's right to an old-age pension had been initiated *ex officio* on 8 April 2011. Furthermore, as stated by the County Court, it was established in the proceedings that the appellant had failed to attach to the request for old-age pension a piece of evidence proving that he had been a member of the HVO in the period from 1992 to1995 and that it indisputably followed from the ruling of the Federation Ministry, no. 07/60-03-3-123/08 of 28 March 2008, that the appellant had been the member of the Armed Forces of BiH – the HVO in the period from 4 April 1992 to 23 December 1995.

13. The County Court further noted that the appellant, when filing the request to exercise the right to a pension, had concealed the fact that he had been the member of the HVO, which was significant to the resolution of the issue of competence between the defendant and the Federation PIO Institute within the meaning of Article 12(2) of the Agreement. It is stated that the mentioned provision stipulated that the insuree who had not been insured after 30 April 1992 by any of the insurance authorities and who had additional years of service, as in the appellant's case, would file a request with the insurance authority that recognized additional years of service, from which it followed that the defendant was not competent to act upon the appellant's request. The County Court further noted that the first-instance authority of the defendant had correctly acted when it had established in its ruling no. 1124882836 of 8 April 2011 that the appellant's right to an old-age pension ceased on 1 May 2011. It further noted that the appellant was obliged to return the amounts paid on the basis of the pension in the period from the date when the right had been exercised to the date of cessation of the right and that the appellant had had filed a complaint against the mentioned ruling, which had been dismissed in an act of the defendant, on the basis of the reasons stating that the Agreement represented the prescribed manner and the procedure for exercising the insuree's right arising from the pension and disability insurance, who was insured by several insurance authorities after 30 April 1992 (parties to the Agreement). It was noted that competence to decide on the right to pension in the case when the insuree had not been insured by any of the insurance authorities after 30 April 1992 and who had additional years of service earned in armed forces was established and that the request for pension was to be filed with the insurance authority which recognized his/her years of service. As noted by the County Court, when filing the request for recognition of the right to an old-age pension, the appellant concealed the fact that he had been the member of the armed forces, although that fact was decisive for the establishment of competence to decide on the right to pension.

14. Given such a state of facts, the County Court noted that the first-instance authority had correctly acted when it had established that the appellant's right to an old-age pension ceased on 1 May 2011, as well as the defendant-authority when it had dismissed the appellant's complaint as ill-founded. The County Court found as unfounded the allegations set forth in the lawsuit that the impugned ruling was incorrect and unlawful, that it was not possible to deprive the appellant of his right, who had been employed all working life in Republika Srpska, that the appellant had had the required length of service before the war and that a violation of the right to property under European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention") had occurred and that the mentioned allegations could not be based on Article 12(2) of

the Agreement, regulating the competence to deal with the rights arising from pension and disability insurance. In the instant case, the County Court noted that there were no reasons for which the administrative act in question could be challenged under Article 10 of the Law on Administrative Disputes and it dismissed the lawsuit as ill-founded, pursuant to Article 31(1) and (2) of the Law on Administrative Disputes, *i.e.* the County Court decided as stated in the operative part.

IV. Appeal

a) Allegations from the appeal

15. The appellant claims that the challenged judgment is 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 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.

16. Taking into account the fact that his right to a pension was recognized from 26 June 2004 by the ruling of the PIO Fund of the Republika Srpska, no. 1124882836 of 22 March 2004, the appellant holds that the same ruling could not have been quashed on 1 May 2011 and that he could not have been obliged to return all the pensions received until that moment for the sole reason that he had requested at the beginning of 2011 that his pension be recalculated so as to include additional years of service earned during the war. The appellant is of the opinion that due to the fact that he has some additional years of service, which he did not conceal when he filed his request in 2004, since such information was not requested from him, and given his previously acquired right to a pension and years spent in service in RS, his pension right, which had already been established, could not have been denied. The competent authority could possibly reject his request for recalculation of his pension as untimely or dismiss it as ill-founded, or refer it to the competent authority in charge of pension affairs in the Federation of Bosnia and Herzegovina. The appellant remained in that manner without any income, as the Federation PIO Fund did not recognize his right to a pension either.

17. The appellant alleges that he has fulfilled the requirements to acquire the right to an old-age pension in RS on the basis of the length of service and that he could not have been deprived of that right retroactively, since he has been receiving the pension for seven years based on the existing law related to the PIO and by reference to the provisions of the Agreement, which are contrary to the Law on the PIO.

b) Response to the appeal

18. The County Court alleged that the reasons for rendering the impugned judgment were indicated in the reasons for its judgment and it proposed that the appeal be dismissed as ill-founded.

19. In the letters delivered to the Constitutional Court, the PIO Fund alleged that „on 15 May 2014 a natural disaster happened in the Town of Doboj and the entire documentation of the RS PIO Fund– Branch Office in Doboj - was destroyed, including the case-file related to the appellant". The PIO Fund also alleged that the appellant was not an insuree of the pension and disability insurance of the Republika Srpska after 30 April 1992 and that the appellant has been the beneficiary of old-age pension of the RS PIO Fund since 26 July 2004.

V. Relevant regulations

20. **Law on Pension and Disability Insurance of the Republika Srpska - Revised Text** (*Official Gazette of the Republika Srpska*, 106/05 – Revised Text, no. 20/07, 33/08, 1/09, 71/09, 106/09 and 118/09), so far as relevant, reads:

Article 3

The rights deriving from the pension and disability insurance shall be acquired and exercised under conditions as specified by this law, and the scope of the rights shall depend, as a rule, on the length of service for retirement and the professional qualifications of the insurance authority.

Article 147

The rights deriving from the pension and disability insurance shall cease if it is established subsequently that the requirements to exercise that right have not been fulfilled.

5. Cessation of right

Article 184

...The rights deriving from the pension and disability insurance shall cease if it is established subsequently that the requirements to exercise that right have not been fulfilled.

The procedure for cessation of the right within the meaning of para 2 of this Article shall be instituted ex officio regardless of the time limit which expired from the date when the ruling recognizing the right has been issued.

The rights referred to in para 2 of this Article shall cease on the first day of the month following the month in which the ruling on the cessation of the right is issued. ...

21. **Agreement on Mutual Rights and Obligations in the Implementation of Pension and Disability Insurance** *(Official Gazette of the Republika Srpska*, 15/00), so far as relevant, reads:

COMPETENCE TO DEAL WITH RIGHTS

Article 12

The insured person who completed pension-related years of services at one or several insurance authorities after 30 April 1992 shall file a request to exercise his/her rights with the insurance authority by which he/she was insured the last time.

The insured person who was not insured by any of the insurance authorities after 30 April 1992 but has additional years of service shall file a request with the insurance authority which recognized his/her additional years of service.

The insurance authority who received the request within the meaning of para 1 of this Article shall decide on the right and shall forward the request, together with other relevant documents, to the insurance authority at which the insured person completed years of service, for relevant procedure.

The insured person who does not have insured years of service by any of the insurance authorities after 30 April 1992, but he/she was insured by the former Fund until 30 April 1992 shall file a request to exercise his/her right with the insurance authority on whose territory he/she was insured the last time.

The person who does not have any year of service insured by any of the insurance authorities after 30 April 1992, nor did it have by the Fund before 30 April 1992, but has the recognized years of service under Article 5(1) of this Agreement, shall file a request to exercise his/her right with the insurance authority which has jurisdiction according to his/her place of residence or, in case of displaced person, according to the place of temporary residence, on the date of fulfilment of requirements for recognition of the right to old-age or family pension, or on the date of filing the request to exercise the right to disability pension.

VI. Admissibility

22. 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.

23. In accordance with Article 18(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.

24. In the present case, the subject challenged by the appeal is the judgment of the County Court, no. 13 0 U 002163 of 14 September 2012, against which there are no other effective remedies available under the law. The appellant received the challenged judgment on 2 October 2012 and the appeal was filed on 1 December 2012, that is, within the 60 days time-limit as provided for under Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court as it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

25. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18(1),(3) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that this part of the appeal meets the admissibility requirements.

VII. Merits

26. The appellant challenges the mentioned judgment claiming that his rights under Article II(3)(e) and (k) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention and Article 1 of Protocol No.1 to the European Convention have been violated.

Right to property

27. Article II(3) 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:

[...]

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.

28. Article 1 of Protocol No. 1 to the European Convention comprises three distinct rules. The first rule, set out in the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property. The second rule contained in the second sentence of the same paragraph, covers deprivation of possession and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not „distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, *inter alia*, ECtHR, *James and Others v. the United Kingdom*, judgment 21 February 1986, Series A, no. 98, pp. 29-30, para 37).

29. Any interference with the right pursuant to either the second or third rule must be provided for by law, it must pursue a legitimate aim and it must strike a fair balance between the right of the right holder and the public or general interest. In other words, to be justified, interference must not only be imposed by a legal provision which meets the requirements of the rule of law and serves a legitimate aim in the public interest but must also maintain a reasonable relationship of proportionality between the means employed and the aim sought to be realized. In particular, the interference with the right must not go beyond than necessary to achieve the legitimate aim, and occupancy right holders must not be subject to arbitrary treatment, or required to bear an excessive burden in pursuit of the legitimate aim (see Decision of the Constitutional Court, no. *U 83/03* of 22 September 2004, *Official Gazette of Bosnia and Herzegovina*, 60/04, para 49).

30. According to the case-law of the European Court, the notion „possessions" in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as „property rights", and thus as „possessions" for the purposes of this provision (see, ECtHR, *Gasus Dosier – und Fordertechnik GmbH v. Netherlands*, judgment of 23 February 1995, Series A, no. 306-B, p. 46, para 53). According to the view which the Constitutional Court took at an earlier point, the right to pension for a certain period represents property within the meaning of Article 1 of Protocol No.1 to the European Convention (see, Constitutional Court, Decision on Merits, no. *AP 639/04* of 23 September 205, para 20).

31. The appellant alleges that the ruling wherein his right to a pension was determined could not have been quashed on 1 May 2011 and that he could not have been obliged to return the received amounts paid to him on the basis of pension for the sole reason that at the beginning of 2011 he requested recalculation of his pension so as to include additional years of service acquired during the war. The appellant is of the opinion that due to the fact that he had some additional years of service, which he did not conceal when he filed his request in 2004, since such information was not requested from him, and given the previously acquired right to pension and years spent in service in RS, his right to pension, which had already been established, could not have been denied. The competent authority could possibly reject his request for recalculation of a pension as untimely or dismiss it as ill-founded, or refer it to the competent authority in charge of pension affairs in the Federation of Bosnia and Herzegovina. The appellant remained in that manner without any income as the Federation PIO Fund did not recognize his right to a pension either.

32. The appellant has possessions safeguarded by Article 1 of Protocol No. 1 to the European Convention, as the appellant's right to an old-age pension was recognized from 26 July 2004 by the ruling which the Branch Office issued on 22 March 2004. Thus, the Constitutional Court holds that it is indisputable that the acquired right to pension according to the relevant case-law of the European Court (*mutatis mutandis*, *Grudić v. Serbia*, judgment of 17 April 2912, para 77) constitutes the appellant's property within the meaning of Article 1 of Protocol No. 1 to the European Convention. Furthermore, it is obvious that the impugned decision, determining that the appellant's right to an old-age pension ceased and obliging the appellant to return the amounts paid to the appellant on the basis of pension to the Fund (covering the period from 26 July 2004 to 30 April 2011), constitutes an interference with the appellant's right to property under Article 1 of Protocol No. 1 to the European Convention. Therefore, the Constitutional Court will further establish whether the interference with the appellant's right to property was in accordance with the law.

33. The Constitutional Court reiterates that according to the case-law of the European Court of Human Rights the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only „subject to the conditions provided for by law" and the second paragraph recognises that the States have the right to control the use of property by enforcing „laws". Moreover, the principle of legal certainty is inherent in all the Articles of the Convention and must be complied with regardless of which of the three rules under Article 1 of Protocol 1 is applicable. This principle implies existence and compliance

with the national laws which are adequately available and sufficiently precise and which meet the basic requirements related to the notion of „law" (see ECtHR, *Iatridis v. Greece,* judgment of 25 March 1999, *Reports of Judgments and Decisions* 1999-II, para 58). It follows that the issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights becomes relevant only once it has been established that this requirement was satisfied.

34. In the reasons for the impugned judgment the County Court referred to the provisions of para 2 of Article 12 of the Agreement, which constituted the basis for interference with the appellant's right to property so that the Constitutional Court will consider the mentioned provisions to examine whether the court applied them correctly in the present case. In this connection, the Constitutional Court notes that the *ratio* of the Agreement was the regulation of certain disputable issues with regards to the exercise of the rights deriving from pension and disability insurance, since three pension Funds in Bosnia and Herzegovina have existed since 1992 each one independent from the others. The Agreement clearly defines the requirements to exercise the right to pension of the persons who were in the situation that several funds in Bosnia and Herzegovina decided on their rights, and the manner of distribution of duties of the existing funds in paying the acquired pensions. The Constitutional Court holds that it is relevant for it to refer to its previous view, namely that it is not sufficient for a law provision to fulfil the requirements of lawfulness in order to conclude that interference with the right to property is justified, but it also must pursue a legitimate aim in the public interest and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In the situation in which there are three funds for pension and disability insurance, whose mutual relationships were not defined, which had an impact on the exercise of the rights deriving from the pension and disability insurance on a number of citizens, it was necessary to regulate that issue so as to make it possible for every person who has fulfilled the law requirements to exercise these rights. This amounted to the conclusion of the Agreement and this, according to the Constitutional Court, constitutes a legitimate aim in the public interest (see, Constitutional Court, Decision no. *AP 2213/06* of 10 January 2008, para 25, available at www.ustavnisud.ba).

35. Given the aforesaid, the Constitutional Court holds that in the present case the County Court, as the competent court, interfered lawfully with the appellant's right to property within the meaning of the standards of the European Court when it issued ruling no. 112488282836 of 8 April 2011, wherein it established that the appellant's right to an old-age pension ceased. Given the aforesaid, the next question arises whether the deprivation

of the appellant's right to property is proportional to the legitimate aim sought to be achieved, *i.e.* whether a fair balance between the appellant' right and general interest is struck, since the case relates to the acquired right of the appellant. In this connection, the Constitutional Court, by referring to its own case-law and the case-law of the European Court, notes that a fair balance between the demands of the general interest and the requirements of the protection of the individual's fundamental rights must be struck in each individual case, which is not possible to achieve if the person concerned has had to bear an individual and excessive burden (see, ECtHR, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, paras 46 and 50). Furthermore, as to the issue whether the interference with the appellant's right to property pursued a legitimate aim in the public interest, the Constitutional Court notes that the European Court has established that national authorities enjoy a wide margin of appreciation when taking decisions interfering with the property rights of individuals because of their direct knowledge of their society and its needs. The decision to interfere with the property of an individual will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. Thus, a decision of the national authorities will be respected unless that judgment is manifestly without reasonable foundation (see, ECtHR, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, para 46). In this connection, the Constitutional Court notes that the aim of the Law on Pension and Disability Insurance is to achieve social and property security of those individuals who have exercised such rights in the procedure prescribed by the law and those who have such rights recognized in case of retirement (old-age pension). Given the aforesaid, the Constitutional Court notes that the right of individuals, namely the holders of the right to an old-age pension, and the protection of the rights of such individuals and consistent application of the relevant provisions of the Law on Pension Insurance, indubitably constitutes a legitimate aim in the public interest.

36. However, the question arises whether deprivation of the appellant's property is proportionate to the legitimate aim sought to be achieved and whether a fair balance is struck between the appellant's right and general interest. In this connection, the Constitutional Court, by referring to its own case-law and case-law of the European Court, notes that there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The requisite balance will not be found if the person concerned has had to bear an individual and excessive burden (see, ECtHR, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, paras 46 and 50). It follows that the issue of whether a fair balance has been struck becomes relevant only once it has been established that the interference in

question satisfied the requirement of lawfulness and that it was not arbitrary (see, ECtHR, *Iatridis v. Greece* [GC] no. 31107/96, para 58, ECHR 1999-II). Given the aforesaid, the Constitutional Court ought to further establish whether a fair balance has been struck between the appellant's right and general interest.

37. The Constitutional Court holds that it is relevant for its examination to refer to its previous view, according to which it is not sufficient for a law provision to meet the criterion of lawfulness in order to conclude that the interference with the right to property is justified, but it must also pursue the legitimate aim in the public interest and must reflect a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Furthermore, in the situation in which there are three funds for pension and disability insurance, whose mutual relationships were undefined, which directly affected the exercise of the rights deriving from the pension and disability insurance of a number of citizens, it was necessary to regulate this issue so as to make it possible for every person who has fulfilled the law requirements to exercise unconditionally these rights.

38. In this connection, the Constitutional Court notes that the Law on the PIO does not provide for the provisions regulating the issue concerning the pension amounts which indubitably belong to the beneficiaries and which are contested upon the request for recalculation of the pension. Furthermore, the Constitutional Court holds that the achievement of the legitimate aim – that is the assurance of legal certainty and the maintenance of liquidity of the pension fund – cannot be a justification for complete loss of the right acquired in a certain period. Thus, according to the Constitutional Court, such a law arrangement is not capable of striking a fair balance between the demands of the general interest and the requirements of the protection of the individual's fundamental rights, but it constitutes an excessive burden placed on the beneficiary, which is the reason why the principle of proportionality under Article 1 of Protocol No. 1 to the European Convention has not been satisfied. Taking into account the foregoing, the Constitutional Court concludes that in the present case there has been a disproportionate interference with the appellant's property, since the appellant must bear an excessive burden that disrupts a fair balance between the public interest and the appellant's interest, since his right to pension has been cancelled and he has been obliged to return the amounts paid on the basis of pension, which is contrary to the standards of protection under Article 1 of Protocol No. 1 to the European Convention.

39. Therefore, the Constitutional Court concludes that in the present case 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.

40. The Constitutional Court holds that it is necessary, in order to protect the appellant's constitutional rights, to quash the decision of the County Court as final decision in this case and to refer the case back to the County Court, in order for it to take a new decision in accordance with the safeguards 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

41. In view of the conclusion on the violation of Article II(3)(k) of the Constitution of Bosna and Herzegovina and Article 1 of Protocol No.1 to the European Convention, the Constitutional Court does not need to consider separately the alleged violations of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

VIII. Conclusion

42. The Constitutional Court concludes that there has been 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, as a disproportionate interference with the appellant's property occurred when the appellant's right to pension was revoked and he was obliged to return the amounts paid on the basis of pension, which placed an excessive burden on the appellant that disrupted a fair balance between the public interest and the appellant's interest.

43. Having regard to Article 59(1) and (2) and Article 62(1) of the Rules, the Constitutional Court decided as set out in the enacting clause.

44. Pursuant to Article 43 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of Vice-President Miodrag Simović makes an annex to this decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

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Separate Dissenting Opinion of Judge Miodrag Simović

I regret that I am unable to agree with the opinion of the majority of the Judges that the appeal in question is well-founded and that there is a violation of the appellant's right to property in the present case. I am of the opinion that the County Court in Doboj passed a correct and lawful decision.

(1) In the present case a key issue relates to the application of the Agreement on Mutual Rights and Obligations in the Implementation of Pension and Disability Insurance *(Official Gazette of the Republika Srpska*, 15/00; „the Agreement") and of the Law on Pension and Disability Insurance of the Republika Srpska *(Official Gazette of the Republika Srpska*, 134/11 and 82/13). According to the facts presented to the Constitutional Court, the appellant's right to an old-age pension in the monthly amount of 152.27 KM, starting from 26 July 2004, was recognized based on the Ruling of the defendant (the Pension and Disability Insurance Fund of the Republika Srpska) and, at the appellant's request for recalculation of the old-age pension (filed with the PIO Branch Office in Derventa on 4 April 2011), based on new facts related to the appellant's participation in the HVO, the procedure for cessation of the appellant's right to an old-age pension had been initiated *ex officio* on 8 April 2011. Furthermore, in the same procedure it was established that the appellant had failed to attach to his request for old-age pension a piece of evidence proving that he had been a member of the HVO and that it indisputably followed from the ruling of the Federation Ministry, no. 07/60-03-3-123/08 of 28 March 2008, that the appellant had been the member of the HVO in the period from 4 April 1992 to 23 December 1995.

(2) Therefore, the appellant, while filing his request to exercise the right to a pension with the defendant, had concealed the fact that he had been the member of the HVO, which was significant to the resolution of the issue of competence between the defendant and the PIO/MIO Federation Institute within the meaning of the provision of Article 12(2) of the the Agreement. The mentioned provision stipulates that the insured person who was not insured by any of the insurance authorities after 30 April 1992 but has additional years of service will file a request with the insurance authority which recognized his/her additional years of service, as is the case with the appellant. It follows that the respondent authority was not competent to act upon the appellant's request.

(3) The County Court noted that the first-instance authority had correctly acted when it had established that the appellant's right to an old-age pension ceased on 1 May 2011, as well as the respondent authority when it had dismissed the appellant's complaint as ill-founded. The County Court assessed that the allegations set forth in the lawsuit that the

impugned ruling was incorrect and unlawful were ill-founded. For that reason, the County Court dismissed the lawsuit as ill-founded pursuant to Article 31(1) and (2) of the Law on Administrative Disputes.

(4) Having regard to the provision of Article 12(2) of the the Agreement, there is no arbitrariness in the judgment of the County Court, which stated that the appellant should have exercised his right with the Federation PIO Fund. In the reasoning of the challenged decision, the County Court offered clear and substantiated reasons in respect of the application of the substantive law, more precisely, the application of the provisions of the the Law on Pension and Disability Insurance of the Republika Srpska and of the Agreement and, thus, complied with the guarantees of the right to a fair trial under Article 6(1) of the European Convention (see, Constitutional Court, Decision no. *AP 759/08* of 9 February 2011, para 53, available at www.ccbh.ba).

(5) In the present case Article 6(1) of the European Convention is applicable, as the court decided on the appellant's right to an old-age pension, which is a civil right. Therefore, before a decision on a possible violation of the property right, the Constitutional Court, instead of resolving the issue of pension as property, should have first examined whether the proceedings had been fair.

(6) Finally, as to the appellant's allegations about a violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, the appellant's allegations are essentially based on the alleged violations of the rules of civil procedure and misapplication of the substantive law, which has already been explained in the preceding paragraphs of the present opinion. In view of that, I consider that the appellant's allegations about a violation of the right to property are ill-founded, too.

CONTENTS

Case No. AP 4749/15

DECISION ON ADMISSIBILITY AND MERITS

Appeal of the Faculty of Political Science of the University of Sarajevo against the Judgment of the Cantonal Court in Sarajevo no. 09 0 U 011329 15 Uvp of 6 October 2015

Decision of 6 April 2016

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The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2), Article 62(1) and Article 64(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić

Having deliberated on the appeal of **the Public Institution of the Faculty of Political Science of the University of Sarajevo**, in the case no. **AP 4749/15**, at its session held on 6 April 2016, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by the Public Institution of the Faculty of Political Science of the University of Sarajevo is hereby granted.

The violation of Article II(3)(k) of the Constitution of Bosnia and Herzegovina is hereby established.

The Judgment of the Cantonal Court in Sarajevo no. 09 0 U 011329 15 Uvp of 6 October 2015 is hereby quashed.

The case shall be referred back to the Cantonal Court in Sarajevo, 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.

The Cantonal Court in Sarajevo is ordered, in accordance with Article 72(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 delivery of this Decision, of the measures taken to execute this Decision.

Pursuant to Article 64(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the legal effect of the Decision on an interim measure no. AP 4749/15 of 10 November 2015 shall cease.

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 October 2015, the Faculty of Political Science of the University of Sarajevo („the appellant") with a head office in Sarajevo, represented by Mr. Nedim Ademović, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Judgment of the Cantonal Court in Sarajevo („the Cantonal Court") no. 09 0 U 011329 15 Uvp of 6 October 2015.

2. By way of the submission of 28 October 2015, the appellant filed a request for an interim measure by which the Constitutional Court would postpone the enforcement of the Ruling of Inspectorate of Labour, Protection at Work, Social Protection and Education of the Cantonal Administration for Inspection Affairs of the Sarajevo Canton („the Inspectorate of Labour") no. 14-09/10-38-11999-4/10 of 7 October 2010 pending a final decision of the Constitutional Court.

II. Procedure before the Constitutional Court

3. While deciding the appellant's request, the Constitutional Court adopted a decision on interim measure postponing the enforcement of the challenged ruling pending the final decision of the Constitutional Court (see, the Constitutional Court, Decision on interim measure no. *AP 4749/15* of 10 November 2015, available on the website of the Constitutional Court www.ustavnisud.ba).

4. Pursuant to Article 23 of the Rules of the Constitutional Court, on 4 November 2015 the Cantonal Court, the Ministry of Education and Science of the Sarajevo Canton („the Ministry of Education"), and the Inspectorate of Labour were requested to submit their respective replies to the appeal.

5. The Cantonal Court and the Ministry of Education submitted their replies to the appeal on 13 and 16 November 2015 respectively.

6. The Inspectorate of Labour failed to submit its reply within the given deadline.

7. The attorney for five students of the appellant, of his own initiative, on 28 December 2015 submitted to the Constitutional Court the statement in relation to the adopted interim measure.

III. Facts of the Case

8. 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.

9. The Ruling of the Inspectorate of Labour no. 14-09/10-38-11999-4/10 of 7 October 2010 ordered administrative measures against the appellant, namely paragraph 1 of the enacting clause of the ruling ordered the following „to carry out the conferment of titles to students upon the completion of the master study 4+1, which was organized on the basis of the Competition of 12 November 2009 and the Competition of 4 December 2009, in accordance with the Law on Higher Education and the Rulebook on the Use of Academic Titles and the Acquisition of Academic and Professional Titles at higher education institutions in the Sarajevo Canton, no. 11-02-28928/08 of 14 October 2008" („the Rulebook"). The same ruling, namely paragraph 2 of the enacting clause ordered the appellant to do the following, „to carry out the charging of the price for the master study 4+1, which is organized within departments designated in the text of the mentioned competitions, in accordance with the Decision of the Sarajevo Canton Government on the approval of the amount of the price of services, enrolment fees and other costs of the study at the University of Sarajevo, and the faculties and academies in the composition thereof, no. 02-05-19288-9/09 of 11 June 2009" („the Decision"), whereby paragraph 3 ordered the appellant to inform the enrolled students, in a public and transparent fashion, of the payment of the price for the master study, while paragraphs 4 and 5 of the enacting clause of the ruling specified deadlines for the enforcement of administrative measures referred to in paragraphs 2 and 3 of the ruling, and paragraph 6 indicated that the appeal shall not stay the enforcement of the ruling (everything articulated in more detail in paragraphs 1 through to 6 of the enacting clause of the ruling).

10. While carrying out a targeted inspection control of the appellant on 29 September 2010, on the basis of a previously submitted written application by a student of the master study program 4+1 „International Relations and Economic Diplomacy", which the appellant administered within the Department of Politology in cooperation with the Faculty of Economy in Sarajevo, it was established that the appellant had published the Competition for admission of candidates to a master study at a total of nine courses, on 17 November 2009 (not on 12 November as stated in the enacting clause of the ruling) and 4 December 2009 (Corrigendum to the Notice of Competition) respectively. The text read, among other things, that the study would last for one academic year with two semesters, as well as that the title of a Master of Science in the respective area of study would be acquired upon the completion of study.

11. The Inspectorate of Labour referred in the reasons for the ruling to the Law on Higher Education – Revised text (*Official Gazette of the Sarajevo Canton*, 9/07) (which was rendered ineffective by the provision of Article 169 of the new Law on Higher Education), citing the provision of Article 43 paragraph 1, which prescribes as follows: „A postgraduate study for the acquisition of a degree in Master of Science, or Arts, and the acquisition of a professional degree of a specialist, is organized by a higher education institution", while paragraph 3 of the same article prescribes the following: „A postgraduate study for the acquisition of a degree in Master of Science, or Arts, shall last for a minimum of four semesters, and for the acquisition of a professional degree of a specialist shall last for a minimum of two semesters". Based on the afore-cited legal provisions, as stated in the reasons for the ruling, it follows that the study for the acquisition of a degree in Master of Science or Arts cannot last for less than four semesters, or two academic years for that matter. During decision-making the Inspectorate of Labour bore in mind also the provision of Article 57 „of the mentioned Law on Higher Education", which prescribes that the higher education institution enrolling students in accordance with the Bologna process shall organize three cycles of study, where the first cycle of study lasts for three or four years, the second cycle of study (master) lasts for two or one year, and the third cycle of study for a minimum of three years.

12. Bearing in mind the cited legal framework the Inspectorate of Labour concluded that the appellant, which had adopted since the academic year of 2005/2006 and applied the Bologna system of study according to the model of 3+2+3, with undergraduate study lasting for three academic years, master study lasting for two academic years and the doctoral study for three academic years, had no legal basis to organize a master study in duration of one year, neither was there a legal basis to confer on students, upon successful completion of one year of study, a title of „a master".

13. As to the price of study in the amount of BAM 5,500.00, it was established during the procedure that the said price was determined in a manner that is contrary to the provisions of the Law on Higher Education (*Official Gazette of the Sarajevo Canton*, 43/08 and 18/10), which prescribes in Article 137 paragraph 1 as follows: „Upon the proposal of the Senate of the higher education institution as a public institution, the Government establishes the school fees as a type of participation in the costs of the study, which students are obliged to pay at higher education institutions as public institutions". Based on the reasoning it follows that the Inspectorate of Labour bore in mind, during decision-making, also the provisions of Article 138 paragraphs 1 and 2 of the cited Law on Higher Education, which prescribe as follows: „The decision on the type of services offered to students by the higher education institution shall be established by the Government upon the proposal of a higher education institution. The Decision on the prices for services referred to in paragraph 1 of this article for the higher education institution as a public institution shall be adopted by the Government, and for a higher education institution as an institution by the founder".

14. In accordance with the cited provisions the Inspectorate of Labour indicated that the Government of the Sarajevo Canton („the Government"), by its decision, established the type of services offered to students by the higher education institution, as well as the price of study as per the cycles of study, namely „per one academic year", therefore it is undisputed that the Administrative Board of the appellant adopted the Decision of 29 January 2010 without the approval of the Sarajevo Canton Government, *i.e.* contrary to its Decision.

15. Finally, it follows from the ruling that in the disputed competition procedure the appellant acted contrary to the provisions of the Law on Higher Education, because it did not request and obtain the approval of the Government for the number and structure of students getting enrolled, which constitutes exclusively the right of the Government, and for failing to establish, in a lawful manner and in a prescribed procedure, the elements referred to in Article 81 paragraph 1 items a, b and c and Article 83 of the Law on Higher Education (*Official Gazette of the Sarajevo Canton*, 43/08).

16. The Inspectorate of Labour characterized the described conduct of the appellant as a misdemeanour, pursuant to the provisions of the Law on Higher Education. Thus, in that sense it emphasized that the educational inspector, in accordance with his/her authorization, would undertake adequate measures against the appellant.

17. In view of the aforementioned, by applying the provisions of the Law on Higher Education (*Official Gazette of the Sarajevo Canton*, 43/08 and 18/10), and taking into

account the Decision as well as the relevant provisions of the Law on Inspections in the Federation of BiH (*Official Gazette of the Federation of BiH*, 69/05), and the Law on Educational Inspection of the Sarajevo Canton (*Official Gazette of the Sarajevo Canton*, 9/00) the Inspectorate of Labour decided as stated in the enacting clause.

18. The Ruling of the Ministry of Education no. 11-05-38-4981/10 of 17 November 2010 dismissed as ill-founded the appeal lodged by the appellant against the ruling of the Inspectorate of Labour. While deciding on numerous objections of the appellant that were elaborated on in detail in the reasoning of the ruling, the Ministry of Education assessed all objection as ill-founded including the objection that the first-instance body had applied the law that ceased to be in force, because it was possible to observe from the very ruling that the applicable Law on Higher Education had been applied.

19. While deciding on the lawsuit filed by the appellant for the annulment of the ruling of the Ministry of Education, the Cantonal Court adopted the Judgment no. 09 0 U 011329 11 U of 13 May 2014 dismissing the lawsuit. The Cantonal Court, following the examination of the challenged rulings in the light of extensive objections of the appellant directed, among other things, at procedural omissions during the inspection control, which resulted in erroneously and incompletely established facts of the case, which consequentially led to arbitrary and erroneous application of the substantive law, including the application of the law that ceased to be in effect (the Law on Higher Education – Revised text, which was published in the *Official Gazette of the Sarajevo Canton*, 9/07), the Cantonal Court found all the objections to be ill-founded, regarding which the said court gave its opinion in detail on pages 4 through to 11 of the reasoning of the challenged judgment.

20. In relation to the established price of the study in the amount of BAM 5 500 for the master study in duration of one year, based on the established facts and presented evidence in a procedure that preceded the adoption of the first-instance and the challenged act, by bearing in mind the provisions of Article 137 paragraph 1 and Article 138 paragraphs 1 and 2 of the Law on Higher Education, which it cited, the Cantonal Court took a stance that the defendants-bodies had correctly concluded that the appellant had established the price of the study contrary to the Law on Higher Education. To that end the Cantonal Court stated that the Administrative Board of the appellant adopted the Decision no. 01-02-148-1/10 of 29 January 2010 without the approval of the Government, and contrary to the Decision, which established the amount of BAM 1 000 for one academic year of the second cycle of study for students who are self-funding their study within the group of social sciences.

21. In relation to the objections of the appellant that it had informed the Ministry of Education of the price of the study attaching its act to the lawsuit, the Cantonal Court

stated that the mentioned act had no character of a request for obtaining the approval. Furthermore, the Cantonal Court stated that the legal possibility for establishing a different price for the study for individual study programs at higher education institutions is not disputed, but it is undisputed that it is a legal possibility that provides at the same time that it is necessary to establish the specific nature of certain study programs, and then to obtain the decision of the Government for such study programs, which was not done in the respective case in a prescribed manner.

22. As the remainder of the appellant's objections were assessed as ill-founded, the Cantonal Court concluded that the challenged rulings were adopted in a legally conducted procedure, through the correct application of the substantive law, that it was in conformity with the facts of the case established during the control conducted on the appellant's premises and the observed unlawful conduct, the first-instance body imposed adequate administrative measures by its act, thereby obliging the appellant to comply with them within the corresponding deadlines, whereby it was indicated that the appellant's objections could not have a bearing on a different resolution of the respective administrative matter, because they did not cast a doubt on the lawfulness of the challenged acts, especially the objection that invalid regulation had been applied during the procedure.

23. In the end the Cantonal Court put a particular emphasis on the measure, which was ordered in the first-instance ruling, paragraph one of the enacting clause thereof, being already enforced by the appellant through the adoption of the Decision on the adoption of the curriculum by the Teaching and Scientific Council of the appellant and by the Senate of the University, which defines the titles acquired upon the completion of the study and that the titles for all studies 4+1 were published in the *Official Gazette of the Sarajevo Canton*, 26/12, in a procedure prescribed by the Law on Higher Education.

24. Upon the inspection of the *Official Gazette of the Sarajevo Canton*, 26/12, which the Cantonal Court referred to, it follows that the Ministry of Education published a list of academic titles, scientific and professional titles that may be acquired at the higher education institutions in the Sarajevo Canton. According to the published list, it was anticipated for the appellant to be allowed to organize the study cycles according to the system of 3+2+3 and 4+1+3, whereafter students earn corresponding titles, namely after the completion of the first cycle of study the title of a bachelor (of corresponding science), after the completion of the second cycle of study in duration of one or two years the title of a master is acquired (of corresponding science), and after the completion of the third cycle in duration of three years the tile of a doctor is acquired (of corresponding science).

25. While deciding on the appellant's request for extraordinary review of the judgment of 13 May 2014, the Cantonal Court adopted a judgment no. 09 0 U 011329 15 Uvp of 6 October 2015 dismissing the request.

26. Following the exhaustive elaboration of the appellant's allegations stated in the request, and the allegations of the defendant body, through the application of the relevant provisions of the Law on Higher Education, the Decision and the Rulebook, the Cantonal Court drew a conclusion that the request was ill-founded. To that end, among other things, it was mentioned that the appellant acted contrary to the relevant provisions of the Law on Higher Education, the Rulebook and the Decision, because the appellant's conduct was contrary to the provisions of Article 9 item I and Article 81 paragraph 1 of the Law on Higher Education, since the appellant published the Competition for the admission of candidates to the master study 4+1 (the second cycle in duration of one year), although it is undisputable that the appellant had established the model of 3+2+3 in the academic year 2005/2006, whereby the assertions of the appellant that it concerned a joint study in terms of Article 44 of the Law on Higher Education were assessed as ill-founded, as in that case it was necessary to obtain the approval of the competent ministry that was not obtained. The Cantonal Court further clarified that the appellant failed to conduct an individual procedure of equivalence of the previously acquired academic titles, in accordance with the provision of Article 167 paragraphs 1 and 2 of the Law on Higher Education, in order to establish whether the students who applied met individually the condition for the enrolment to the second cycle of study, in accordance with the Law on Higher Education and the Rulebook, thus in that way it was made possible to confer unlawfully the academic title of „a master", contrary to the relevant legal framework. Also it was indicated during the procedure that the appellant unlawfully established the price of study in the amount of BAM 5,500.00, because that price was established in contravention of the Decision and without the approval obtained beforehand from the competent Ministry of Education.

27. In view of all the aforementioned, the Cantonal Court indicated that the first-instance court neither violated the cantonal law by the adoption of the challenged judgment, nor the rules of the federal law on procedure that may have had a bearing on the resolution of the respective administrative matter, which is the reason why the appellant's request is ill-founded according to that court, whereby it was emphasized that that court was not authorized to examine the facts of the case during decision-making on the request, thus the appellant's objections made in that direction were assessed as ill-founded.

IV. Appeal

a) Allegations stated in the Appeal

28. In exhaustive allegations the appellant indicated that the acts adopted in a procedure of inspection control violated its right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), as well as the right not to be discriminated against under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in connection with the right to property. The allegations, among other things, indicate that the respective case concerns the legal right of the appellant to organize on its own the teaching for the second cycle of education, by availing itself of the right to determine the real price of the costs of such a study. The appellant also pointed to the problem of unlawful interference of the inspection bodies with the discretionary authority of educational institutions, as well as to the abuse of their right to inspection control in terms of taking over the authorization for decision-making, which formally belong to other bodies. The appellant pointed out that, pursuant to the relevant Law on Higher Education, which was enacted in 2008, it has the right to organize a one-year interdisciplinary study for students of postgraduate cycle of study, whereby that right includes also the right to participate in the creation of the price for such a study, which arises from the Law on Higher Education and university autonomy proclaimed by the mentioned law. The appeal describes in detail the conduct of the appellant prior to the publication of the disputed competition, among other things, that in the autumn 2009 the appellant adopted a series of different acts with the aim of organizing nine different interdisciplinary master studies, which were confirmed by the Senate of the University. It was indicated that the appellant informed the Government on two occasions of the price for the master study, whereby it requested explicitly the adoption of a decision on the price of the study, but the Government had no reaction whatsoever. The appellant corroborated the allegations with relevant evidence. In addition, it was pointed out that students had signed individual contracts on the master study program, where, among other things, the prices for the study program were established in the amount of BAM 5 500. Not a single student raised an objection of any sort whatsoever regarding the amount of the costs of the master study program. Further, it was indicated that the Inspectorate of Labour in its ruling referred to the Law on Higher Education, which ceased to be in force. Besides, it was pointed to the contradiction of an administrative measure referred to in item 1 requiring the harmonization of the title of the master study with positive regulations, although the inspection body established that this study program had no legal basis. In doing so the appellant indicated that the Cantonal Court noted in its reasoning

that the appellant acted in compliance with the order referred to in item 1 of the challenged ruling of the Inspectorate of Labour, thus it is obvious that the lawfulness of study including the lawfulness of the acquired academic titles, are no longer disputable, but only the price for the study. Unfortunately, the Cantonal Court, while deciding the request for the extraordinary review of a court decision, failed to observe it, thereby entering a discussion on the lawfulness of the study, although the request was made in that direction, thus violating the provision of Article 46 of the Law on Administrative Disputes. The aforementioned precisely shows the extent to which no regard was paid to the subject-matter of the administrative dispute.

29. In relation to discrimination the appellant, among other things, indicated that the comparative analysis of the appellant's work and the work of other faculties in the same or different period, shows that the appellant was the only one to be unlawfully sanctioned in the academic year 2009/2010, for no faculty had been the subject of inspection control before or after, although it is well-known that the same or similar interdisciplinary studies were organized for years, even at present. The appellant corroborated the aforementioned by the relevant documentation, emphasizing that the work of inspection bodies must not be selective. Finally, the appellant emphasized in particular that arguments on the lawfulness of the appellant's studies from 2009 were fully supported by the University of Sarajevo, and the conclusion of the University of Sarajevo no. 0101-38-2859/14 of 16 July 2014 was submitted in support thereof.

b) Reply to the Appeal

30. In the reply to the appeal the Cantonal Court alleged that the challenged decision was adopted in accordance with procedural and substantive laws, and that it was based on correctly and completely established facts of the case and that it was the base for dismissing the appellant's request by the mentioned judgment. It was particularly emphasized that the challenged judgment did not result in the violation of the provisions of the European Convention, the Constitution of Bosnia and Herzegovina, or of other provisions of the international law.

31. In an exhaustive reply to the appeal the Ministry of Education assessed all objections as ill-founded, whereby it was emphasized that the mentioned body remains entirely supportive of the argumentation mentioned in the challenged ruling adopted in an appellate procedure. In the attachment to the reply the Ministry of Education submitted numerous evidence, among other things, non-legally binding judgment of the Municipal Court in Sarajevo establishing the nullity of the contract on the master study 4+1 entered into between the appellant and two students who attended the disputed master study.

32. The appellant's students, who appear in the respective procedure as the interested persons, informed the Constitutional Court, through their attorney, of other misdemeanour and civil procedures against the appellant in relation to the organization of the disputed study, and proposed that the Constitutional Court reviews the reasons for the adoption of an interim measure and requested „to repeal it thereafter and to render it ineffective". In support of their statements they submitted numerous evidence. To that end, among other things, they submitted the non-legally binding judgment of the Municipal Court in Sarajevo of 22 April 2013, which granted in entirety the claim of two students requesting the annulment of individual contracts on the master study entered into with the appellant in 2010, and the refund of the paid funds (BAM 1 000 and BAM 2 000). In support of the statement non-legally binding ruling of the Municipal Court in Sarajevo of 20 March 2013 was submitted establishing the responsibility of the responsible person of the appellant, Mr. Mirko Pejanović, for the misdemeanour under Article 83 paragraph 4 of the Law on Higher Education, which he was fined for in the amount of BAM 1 000. The interested party to the proceedings also informed the Constitutional Court that the Sarajevo Canton Prosecutor's Office is conducting an investigation regarding the disputed study and its „unlawful organization", during which certain investigative actions had already been conducted.

V. Relevant Law

33. The **Law on Higher Education** (*the Official Gazette of the Sarajevo Canton*, 43/08), in the relevant part, reads:

Article 5, paragraph 1, items a), b), e) and g)
(Academic Autonomy and Academic Liberties)

(1) Institutions of higher education performs activities according to principles of academic autonomy and academic liberties in accordance with the Constitution and law.

(2) Academic autonomy of an institution of higher education is reflected especially in the following:

a) educational, scientific-teaching, artistic, art-teaching, scientific-research and creative freedom;

b) setting, independent approach to, and development of educational, scientific, artistic and professional programs and research projects;

e) setting study regulations;

g) establishing and development of co-operation with other institutions of higher education and other institutions in the country and abroad, within their registered activities;

Article 44, paragraphs 1, 3 and 6
(Organization of joint, interdisciplinary and multidisciplinary studies)

(1) University can organize studies for all three study cycles in co-operation with a national or a foreign institution of higher education.

(3) Upon request by an organizational unit, the University can consent that one or more organizational units organize a multidisciplinary and/or an interdisciplinary study.

(6) For realization of the studies referred to in this Article, the institution of higher education is required, upon the previously obtained consent of the Senate, to obtain the consent by the Ministry as well. The cost for this kind of study which is organized by the institution of higher education with another domestic or foreign institution of higher education is determined by the institution of higher education and the Ministry is informed thereof.

Article 54, paragraph 1, item b)
(Study Cycles)

(1) Higher education is organized in three study cycles:

b) The second cycle of study leads to the academic title of Master's Degree or its equivalent, acquired after completing undergraduate studies, which lasts for one or two years, and is valued at 60 or 120 ECTS credits, and so that the sum of the first and the second cycle of study accumulates to 300 ECTS credits.

Article 57, paragraphs 1, 2 and 5
(Study Programs)

(1) Study programs are divided on study years and semesters.

(2) In accordance with ECTS, the content of curricula amounts to 60 ECTS study credits in one study year, or 30 ECTS study credits in one semester.

(5) Study cycles and programs which lead to the academic titles, professional and scientific titles which are offered by the institution of higher education are flexible, so that they provide mobility to the student in the relevant stages, with accrual of the ECTS credits and /or qualifications, depending on the student's achievements.

Article 137, paragraph 1, item i)
(Sources of Revenue)

In addition to the income referred to in Article 136, the institution of higher education can also raise revenues by:

i) tuition fees in all study cycles;

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Article 138
(Tuition Fees)

(1) On proposal by the Senate of the institution of higher education as a public institution, the Government determines tuition fees as a type of participation towards the cost of studies that students are required to pay to the institution of higher education.

(2) Tuition fees referred to in paragraph (1) of this Article may be determined in different amounts for different organizational units of institutions of higher education as public institutions, and also within the units for different study programs, depending on the cost of their realization.

Article 139
(Decision on participation)

(1) Decision on the type of services that are offered to students by an institution of higher education is determined by the Government on the proposal of the institution of higher education.

(2) Decision on the cost for the services referred to in paragraph (1) of this Article for institutions of higher education as public institutions is made by the Government, and the decision for the institution of higher education as an institution is made by the founder.

(3) The institution of higher education as an institution is obliged to deliver the decision referred to in paragraph (2) of this Article to the Ministry.

Article 149
(Supervision over the implementation of the Law)

Supervision over the implementation of the Law and regulations adopted for the purpose of its implementation at institutions of higher education is carried out by the Ministry in the manner stipulated by the law.

Article 150
(Supervision over regularity of work)

(1) Supervision over regularity of work at institutions of higher education is carried out by the Ministry, in accordance with the law.

Article 151
(Inspection Control)

(1) Inspection control over the implementation of the Law shall be carried out by a competent authority, in accordance with the law.

Article 152, paragraph 1, item 10
(Penal provisions for offences caused by an institution of higher education)

(1) An institution of higher education shall be fined between BAM 1 000 and BAM 5 000 for any of the following offences:

10. Organizing studies in cooperation with a domestic or foreign institution of higher education contrary to Article 44;

Article 169

The Law on Higher Education shall be rendered ineffective on the date when this Law comes into force (the Official Gazette of Sarajevo Canton, 9/07) – Consolidated Text).

34. The **Sarajevo Canton Decision on the approval of the amount of the price of services, enrolment fees and other costs of studying at the faculties and academies of the University in Sarajevo, No. 02-05-19288-9/09 of 11 June 2009** (*the Official Gazette of the Sarajevo Canton*, 9/09), in the relevant part, reads:

Article III

The approval is hereby granted to the amount of the price of services, enrolment fees and other costs of studying at the faculties and academies of the University in Sarajevo as follows:

The amount of the costs of studying plus VAT (the group of social sciences) shall be:

12. BAM 1 000 per academic year, second cycle – full-time study for BiH students who are self-funding their study.

35. The **Law on Inspections in the Federation of BiH** (*the Official Gazette of the Federation of BiH,* 69/05), in the relevant part, reads:

Article 9

An inspection control shall be carried out based on and within the scope of authority stipulated by this Law and the regulations related to the inspection control.

In ordering administrative measures to the subject of control, if permitted by the regulation related to the inspection control, the inspector shall order a more lenient administrative measure to the subject of control, if the purpose of ordering the measure is achieved.

36. The **Law on Administrative Disputes** (*the Official Gazette of the Federation of BiH,* 11/05), in the relevant part, reads:

Article 41, paragraphs 1, 3 and 4
(Request for extraordinary review of judgments)

The request for extraordinary review of a final decision (the request for extraordinary review), taken in an administrative dispute by the Cantonal Court, may be filed with the Supreme Court of the Federation of BiH or the Cantonal Court.

The request for extraordinary review may be filed with the Cantonal Court for a violation of the cantonal law or other regulations of the Canton, or for a violation of the rules of the FBiH Law on the Procedure, which could affect the outcome of the dispute.

The request for extraordinary review may not be filed for a violation of the procedure relating to an erroneous or incomplete establishment of facts.

Article 43, paragraph 1
(Procedure upon the request for extraordinary review)

The request referred to in Article 41 of this Law shall contain the reference to the decision the review of which is proposed, as well as the reasons for and the extent to which the review of the decision is proposed.

Article 45

The relevant court shall decide the request referred to in Article 41 of this Law, as a rule, in closed session, and shall review the impugned decision only within the limits of the request and violations of the regulations under Article 41 of this Law that are mentioned in the request.

VI. Admissibility

37. 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.

38. In accordance with Article 18(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

39. In the present case, the subject matter of the appeal is the judgment of the Cantonal Court No. 09 0 U 011329 15 Uvp of 6 October 2015, against which there are no other effective remedies available under the law. The appellant received the impugned ruling on 7 October 2015, and the appeal was filed on 23 October 2015, *i.e.* within a time limit

of 60 days as prescribed by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court, for it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

40. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 18(1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal meets the admissibility requirements.

VII. Merits

41. The appellant challenges the aforementioned decisions, claiming that they are in violation of the right referred to in Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention and the right referred to in Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention, taken together with the mentioned right.

42. Given that the appellant, as a public institution, has been vested with public authority, the Constitutional Court recalls that the appellant does not enjoy the protection of rights safeguarded by the provisions of the European Convention and Protocols thereto, which regulate the relationship between public authorities and individuals and render to the individuals the protection of human rights and fundamental freedoms in their dealings with public authorities. However, in its case-law the Constitutional Court has pointed out that the European Convention offers less human rights and fundamental freedoms protections than the Constitution of Bosnia and Herzegovina, which provides a wider protection, so that the Constitutional Court has taken the position that, pursuant to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, anyone who has been a party to certain proceedings and obtained a judgment of any other court which he or she considers to have violated his or her rights, may lodge an appeal with the Constitutional Court. Consequently, given the objections stated in the appeal, the appellant, as a public institution, does enjoy the guarantees of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina (see, Constitutional Court, Decision No. *AP 39/03* of 27 February 2004, published at www.ustavnisud.ba).

Right to property

43. 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

44. The Constitutional Court notes that the appeal in question raises an issue of autonomy of the appellant, as an institution of higher education, and its right under the law to organise a master interdisciplinary study, by availing itself of the right to determine a realistic cost of such a study, and its right to property by means of charging for the services it offers pursuant to the applicable Law on Higher Education. In the opinion of the appellant, the impugned decisions are the result of gross violation of positive regulations governing the issue of organization of master studies. The appellant also points out numerous failures in decision-making by the administrative bodies and Cantonal Court, which amount to an unlawful interference with the appellant's right to property.

45. As to the appellant's complaints, the Constitutional Court must first examine whether the appellant has „possessions" which would enjoy the protection of Article II(3)(k) of the Constitution of Bosnia and Herzegovina. In deliberating on the issue whether the present case entails „possessions", the Constitutional Court recalls that the notion „possession" has an autonomous meaning which is certainly not limited to ownership of physical goods, but it encompasses also other rights and interests. In addition, the Constitutional Court recalls that the notion „possessions" can be very broadly interpreted because it includes a wide range of rights and interests constituting assets which represent economic value. Furthermore, the Constitutional Court recalls that the economic interests, which can be regarded as money in respect of which a person may have „a legitimate expectation" for recognition of effective enjoyment of certain economic interests, may be subsumed under the notion „possessions".

46. In this regard, the Constitutional Court notes that the appellant, in accordance with its public authority under the Law on Higher Education (Article 44(3)), including the preliminary approval of the University Senate, had organised and realised interdisciplinary/multidisciplinary master studies within the second cycle of study in the academic year 2009/2010 and, based on the costs previously determined, the appellant had established the price for the study program in the amount of BAM 5 500; subsequently, the appellant signed individual contracts on the master study programs with the students who satisfied the requirements, in accordance with the Law on Higher Education. In addition, the Constitutional Court recalls that Article 138(2) of the Law on Higher Education clearly gives the legal right to the appellant, as a public institution, to propose the price for different study programs, depending on the costs of the realization thereof. Furthermore, pursuant to the provision of Article 137(1)(i) of the Law on Higher Education, the appellant's sources of revenues include, *inter alia*, tuition fees in all study cycles. Also, the Constitutional Court notes that the provision of Article 44(6) of the Law on Higher Education stipulates that the price of interdisciplinary study, within the meaning of Article 44(3) of the said

Law, upon a proposal by the institution of higher education, will be determined through the Ministry based on a specific decision by the Government. Moreover, the Constitutional Court notes that on 9 November 2009 the appellant notified the relevant Ministry on the organisation of the interdisciplinary study and its price. The Constitutional Court notes that in its act the appellant did not explicitly seek the approval for organising the study, nor did it explicitly seek the adoption of a decision on the price of the study. In addition, it is undisputed that the relevant Ministry failed to react either positively or negatively on the act of 9 November 2009. According to the evidence attached to the appellant's appeal, it follows that in the case at hand there was no reaction by the Government on the request of 20 October 2010, whereby the appellant explicitly sought the approval to administer the interdisciplinary study and requested that a decision be adopted on the price of the study, as proposed. Taking into account the appellant's authority under the law to specify and to determine the rules of study and to establish and to develop cooperation with other institutions of higher education, and given the authority of the institution of higher education to determine tuition fees for different study programs, depending on the cost of their realisation (Article 138(2) of the Law on Higher Education), as well as the fact that the appellant signed individual contracts on master study programs with the students who satisfied the requirements, all taken in the context of the relevant bodies' failure to react either positively or negatively on the appellant's written acts, the Constitutional Court holds that the appellant, in such circumstances, could have „a legitimate expectation" of obtaining effective enjoyment of certain economic interests through the realisation of the master studies. All the more so because of the circumstance that certain students (who, following the decision on interim measures, filed their submissions related to the proceedings pending before the Constitutional Court), initiated civil proceedings before the relevant court in Sarajevo to annul the individual contracts entered into with the appellant and to be refunded for the price of their master study. Therefore, in the view of the Constitutional Court, the amounts paid for the master study programs may be subsumed under the notion „possessions" and, in the present case, it may be regarded as property protected under Article II(3)(k) of the Constitution of Bosnia and Herzegovina.

47. In view of the above, the Constitutional Court must further examine whether there was an interference with the appellant's property and whether the interference was in accordance with the law.

48. Any interference with the right to property must be in accordance with the law, it must pursue a legitimate aim and it must strike a fair balance between the demands of the general and public interest and the individual's fundamental rights. In other words, to be justified, interference must not only be imposed by a legal provision which meets the requirements of the rule of law and serves a legitimate aim in the public interest but must

also maintain a reasonable relationship of proportionality between the means employed and the aim sought to be realized. In particular, the interference with the right must not go beyond than necessary to achieve the legitimate aim, and property right holders must not be subject to arbitrary treatment, or required to bear an excessive burden in pursuit of the legitimate aim (see, Constitutional Court, Decision No. *U 83/03* of 22 September 2004, the *Official Gazette of Bosnia and Herzegovina*, 60/04, paragraph 49).

49. In deliberating the issue whether the impugned ruling by the Inspectorate of Labour amounts to an interference with the appellant's property, the Constitutional Court considers that it does amount to the interference with the appellant's property, as the appellant was ordered by the impugned ruling, *inter alia*, to harmonise the price of the study, which it had individually established in accordance with its authority under the Law on Higher Education (Article 138(2) of the said Law), with the Decision of the Government, establishing the price of full-time second cycle study program at the faculties and academies of the University in Sarajevo, which amounts to the interference with the appellant's right to property.

50. The Constitutional Court also notes that the issue related to the validation of study programs and diplomas acquired by the students who attended and successfully completed a one-year master program is undisputed. Although it follows from the impugned rulings of the administrative bodies that the appellant organized and administered an unlawful master study, the Constitutional Court notes that the Cantonal Court, in its judgment passed upon the appellant's action, clearly stated that the appellant fulfilled its obligation referred to in paragraph 1 of the first instance ruling (see paragraphs 23 and 24 of the present Decision). Namely, the Constitutional Court notes that according to a list published by the Ministry of Education, the appellant, as an institution of higher education, is entitled to organise study cycles according to the models 3+2+3 and 4+1+3, whereafter the students, in addition to other titles, are conferred a title of „a master", which was actually one of the issues raised during the proceedings and which was resolved by the Cantonal Court's judgment of 13 May 2014. However, in addition to the aforementioned, the Constitutional Court notes that the Cantonal Court's Panel, which made the decision in the present case upon the appellant's request for extraordinary review of the mentioned judgment, assessed the lawfulness of study and of acquired academic titles, although the appellant raised no such objection and acted contrary to the position taken by the lower court which clearly stated in its judgment that the order no. 1 of the first instance ruling by the Inspectorate of Labour no longer posed a legal problem, as the appellant complied with the mentioned order. Thus, in the opinion of the Constitutional Court, the Cantonal Court's Panel exceeded the bounds of its authority and violated the provisions of the Law on Administrative Disputes, which stipulate the limits and scope of review of the impugned decision upon the request

for extraordinary review thereof (Article 45 of the Law on Administrative Disputes). All the more so because of the fact that the Cantonal Court rendered a final decision in the relevant case, so that the appellant was put in a position less favourable than the one before filing the request for extraordinary review, which is totally unacceptable.

51. In addition to the said failure by the Cantonal Court, as the appellant rightly indicated in its appeal, the appellant indicated other failures by the administrative bodies and Cantonal Court, which will be further examined by the Constitutional Court. The Constitutional Court notes that the main objection concerns the price of study programs and the appellant's right under the law independently to set the price of study programs, depending on the costs of the realisation thereof, so that, in the view of the appellant, the relevant administrative bodies and Cantonal Court, exceeding the bounds of their authority and in contravention of the Law on Higher Education, interfered with the appellant's property in an unlawful manner.

52. The Constitutional Court will examine the mentioned complaint in light of the fact that the lawfulness of the master studies, in essence, was not called into question by the administrative measures ordered, and the fact that the students who successfully completed the master programs earned corresponding academic degrees and titles. In view of the above, the Constitutional Court notes that the appellant, by the administrative measure referred to in paragraph 2 of the enacting clause of the first instance ruling, was ordered to harmonise the price of study in the amount of BAM 5 500 with the Decision, which established the amount of BAM 1 000 for one academic year of the second cycle of study. The Constitutional Court recalls that the provisions of Article 138(2) of the Law on Higher Education (*the Official Gazette of the Sarajevo Canton*, 43/08), which came into force on 31 December 2008 and which is relevant in the present case because it was applicable at the time when the impugned decisions were issued and when the inspection control was carried out, stipulates that the tuition fees referred to in paragraph 1 of that Article may be determined in different amounts for different organizational units of institutions of higher education as public institutions, and also within the units for different study programs, depending on the cost of their realization. The Constitutional Court notes that the cited provision of the Law on Higher Education envisages the possibility that the institutions of higher education may independently determine the price of study programs, depending on the costs of their realisation. In addition, the Constitutional Court recalls the provision of Article 5 of the Law on Higher Education, which stipulates that the institutions of higher education are autonomous, *inter alia*, in setting independent approach to and development of educational, scientific, artistic and professional programs and research projects as well as in setting study regulations.

53. Furthermore, the Constitutional Court recalls that Article 44, paragraph 3 of the Law on Higher Education allows the institutions of higher education to organise multidisciplinary or interdisciplinary master studies, while paragraph 6 of the said Article prescribes that the price of interdisciplinary studies, upon a proposal by the institution of higher education, will be determined through the Ministry based on a specific decision by the Government. A number of the specific decisions were attached to the appeal by the appellant and it is clear that those are the specific decisions issued by the Government upon the proposal by the institution of higher education, pursuant to Article 44(6) of the Law on Higher Education. In addition, the decisions show that the Government, by its formal decision, actually determines the price of study programs proposed by the institution of higher education. Furthermore, the Constitutional Court notes that the appellant, by its act of 20 October 2010, explicitly requested that the Government adopt such a decision, but the Government failed to respond to the request.

54. Therefore, in view of the above, the Constitutional Court considers that the Decision of the Sarajevo Canton Government No. 02-05-19288-9/09 of 11 June 2009, which the Inspectorate of Labour took into account in decision-making and referred to in the administrative measure under paragraph 2 of the enacting clause of the impugned ruling, constitutes a general act of the Government, approving the amount of the price of services, enrolment fees and other costs of studying at the faculties and academies of the University in Sarajevo. The Constitutional Court also notes that, in adopting the general Decision, the Government invoked Articles 138 and 139 of the Law on Higher Education. Hence, it appears that the said Decision cannot be considered to be a decision adopted by the Government upon a proposal by the institution of higher education, pursuant to Article 44(6) of the Law on Higher Education, the issuance of which was requested by the appellant. Therefore, the question is whether the Decision referred to in the administrative measure by the Inspectorate of Labour relates to the interdisciplinary study organised by the appellant in cooperation with the Faculty of Economy in Sarajevo, pursuant to Article 44(3) of the Law on Higher Education and the price of which, upon a proposal by the institution of higher education, should be determined by a specific decision by the Government. All the more so given that the appellant organised and administered the master studies and that the lawfulness thereof was not contested by the administrative measures issued in the administrative dispute and that the students who successfully completed the master programs earned corresponding academic degrees and titles, including the fact that the appellant had Sarajevo University's full support as well as the approval to organise the master studies.

55. Finally, the Constitutional Court points out that the impugned decisions jeopardise the autonomy of the appellant, as an institution of higher education, and its right to organise, administer and determine the price of studies in accordance with the Law on Higher Education. All the more so given the fact that the Ministry of Education was notified about the organisation and price of the study but made no objection to that end, whereas the lack of formal approval and the lack of Government's decision, in accordance with the Law on Higher Education as *lex specialis*, are characterised as a misdemeanour. Namely, the Constitutional Court recalls that Article 152(1)(10) of the Law on Higher Education stipulates that an institution of higher education will be fined between BAM 1 000 and BAM 5 000 for organizing studies in cooperation with a domestic or foreign institution of higher education contrary to Article 44 of the Law. In this regard, the Constitutional Court points out the provision of Article 9 of the Law on Inspections in the Federation of BiH, which stipulates that the inspector, in ordering administrative measures to the subject of control, will order a more lenient administrative measure to the subject of control, if the purpose of ordering the measure is achieved, which, as evident in the present case, the inspector did not take into account. The aforementioned actually corroborates the position taken by the Constitutional Court that there was an unlawful interference with the appellant's right to property, since the relevant Inspectorate of Labour, through its actions and the measure ordered in paragraph 2 of the enacting clause of the first instance ruling, exceeded the framework of the Law on Higher Education as *lex specialis* in the specific case, by ordering the administrative measure that was not commensurate with the cited Law, which, taking into account the right to property under the European Convention, amounts to an unlawful interference with the appellant's right to property.

56. In addition to the aforementioned, the Constitutional Court highlights that the conduct, as described, of the Ministry and of the Sarajevo Canton Government, which did not even see fit to respond to the appellant, let alone to decide on its official request, and the exercise of their authority under law related to the decision to determine the price of the studies in question, either by approving the price as proposed or by changing it, does not correspond to the role of public authorities in educational reform. Namely, the public authorities have bound themselves to do everything required to apply and to implement the Bologna Process as a whole in Bosnia and Herzegovina. Instead, at the time when Bosnia and Herzegovina is ranked 42nd out of 48 countries by the European bodies monitoring the implementation of the Bologna Process, the public authorities, the Ministry and the Sarajevo Canton Government, do not exercise their jurisdiction prescribed by the Law on Higher Education. Thus, not only have they failed to facilitate Bosnia and Herzegovina in fulfilling the obligation undertaken by the country, but they have made it more difficult, as

it has been done by Cantonal Court, which passed the challenged decision. The appellant's alternative was not to do anything in respect of the implementation of the Bologna Process and not to organise the studies at issue and to wait for those two public authorities to act in response to the appellant's notification, *i.e.* the appellant's explicit request for approval of the price of the study at issue. Finally, as to university autonomy, *i.e.* the autonomy of the appellant, as an institution of higher education, the Constitutional Court will not examine whether the Law on Higher Education, stipulating such a strong role of the public authorities in approving the price of study, undermines or jeopardise the mentioned autonomy; however, the Constitutional Court deems necessary to underline that the public authorities failed to exercise their jurisdiction under the Law on Higher Education.

57. In view of the above, the Constitutional Court holds that it is unnecessary separately to examine whether the interference with the appellant's right to property was in the public interest and whether it maintained a reasonable relationship of proportionality between the means employed and the aim sought to be realized.

58. Therefore, the Constitutional Court concludes that the challenged decisions amount to an unlawful interference with the appellant's right to property, *i.e.* that the challenged decisions are in violation of the appellant's right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina.

Non-discrimination

59. As to the appellant's allegations about a violation of the right not to be discriminated against in conjunction with the right to property, the Constitutional Court points out that these allegations are ill-founded taking into account, primarily, the protection offered by Article II(4) of the Constitution of Bosnia and Herzegovina and the fact that the appellant is a public institution and, consequently, the Constitutional Court sees no possibility that the ordinary courts, in respect of the appellant, have acted in violation of Article II(4) of the Constitution of Bosnia and Herzegovina.

VIII. Conclusion

60. 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 Cantonal Court, in deciding on the extraordinary legal remedy, exceeded the bounds of its authority and the Inspectorate of Labour, in its administrative measure, ordered the harmonisation of the price of the study with the Decision which cannot be associated with the master study organised according

to special studies programs by the appellant, pursuant to Article 44 of the Law on Higher Education, thereby exceeding the bounds of their authority, given that the lawfulness of the studies and acquired academic titles is not called into question.

61. The Decision on interim measure no. *AP 4749/15* of 10 November 2015, ordered by the Constitutional Court, shall cease to have effect on the date on which the present Decision is adopted.

62. Having regard to Article 59(1) and (2), Article 62(1) and Article 64(4) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this Decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 4207/13

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Muharem Softić against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. 33 0 P 000492 12 Rev of 23 July 2013, the Judgment of the Cantonal Court in Tuzla no. 33 0 P 000492 09 Gž of 16 April 2012 and the Judgment of the Municipal Court in Živinice no. 33 0 P 000492 07 P of 19 August 2009

Decision of 30 September 2016

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

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru

Ms. Valerija Galić

Mr. Miodrag Simović

Ms. Constance Grewe

Ms. Seada Palavrić

Having deliberated on the appeal lodged by **Mr. Muharem Softić** in case no. **AP 4207/13**, at its session held on 30 September 2016 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Muharem Softić is hereby granted.

A violation of the prohibition of discrimination under Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina is hereby established.

A Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. 33 0 P 000492 12 Rev of 23 July 2013 is hereby quashed.

The case shall be referred back to the Supreme Court of the Federation of Bosnia and Herzegovina, which is obligated to render a new decision, in an expedited procedure, in accordance with Article 14 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Supreme Court of the Federation of Bosnia and Herzegovina is hereby ordered, in accordance with Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to inform the Constitutional Court 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 10 October 2013 Mr. Muharem Softić („the appellant") from Banovići, represented by Mr. Zlatan Dž. Bektić, a lawyer practicing in Živinice, 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. 33 0 P 000492 12 Rev of 23 July 2013, the Judgment of the Cantonal Court in Tuzla („the Cantonal Court") no. 33 0 P 000492 09 Gž of 16 April 2012 and the Judgment of the Municipal Court in Živinice („the Municipal Court") no. 33 0 P 000492 07 P of 19 August 2009.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) and (3) of the Rules of the Constitutional Court, on 10 May 2016, the Supreme Court, the Cantonal Court and the Municipal Court as well as Ms. Hata Mujanović and Mr. Nezir Kovač („the defendants"), as the parties to the proceedings, were requested to submit their replies to the appeal.

3. The Supreme Court submitted its reply on 13 May 2016, the Cantonal Court did so on 19 May 2016, and the defendants submitted their reply through their authorised representative on 16 May 2016. The Municipal Court failed to submit its reply to the appeal.

III. Facts of the Case

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

5. The Municipal Court, in its judgment no. 33 0 P 000492 07 P of 19 August 2009, dismissed the appellant's claim, whereby the appellant requested that it be established that the appellant, based on a common law marriage, is „an heir at law and second in the line of succession after deceased Fatima Kulović" („the testator"), a sister of the defendants, and that the defendants are obligated to accept and to bear that in the probate proceedings the testator's property will be distributed to the appellant, who will receive ½ of the inheritance and to the defendants, so that each of them will receive ¼ of the inheritance. In the second paragraph of the judgment, the appellant's alternative claim was granted and the defendants were obligated jointly and severally to pay a sum of BAM 970.00 for increase and maintenance of the property constituting the testator's specific property (apartment). In the third paragraph of the judgment, the Court granted the counter-claim of the defendants and obliged the appellant to hand over possession of the apartment referred to in the first paragraph of the first instance judgment to the defendants, as the legal heirs of the testator, and to compensate the defendants for the costs of the proceedings.

6. In the reasoning of the judgment, the Municipal Court states that the parties to the proceedings do not dispute that the appellant and the testator lived in a common-law marriage in the period between the end of 2003 and the end of November 2007 in the apartment owned by the testator. It is also stated that the parties to the proceedings do not dispute that the apartment in question constitutes the testator's specific property, as she acquired the ownership right over the apartment before entering into the common-law marriage with the appellant. It is also undisputed, according to the reasoning of the Municipal Court, that the appellant and the testator do not have a child together as well as that the testator had no child from a previous marriage, meaning that „at the time of her death the testator had neither a child nor spouse". The question then arose whether the appellant could be included in the circle of testator's heirs at law.

7. In answering the question, the Municipal Court states that the appellant's statement of claim was based on the provision of Article 3 of the Family Law of the Federation of

Bosnia and Herzegovina („the Family Law of FBiH"), stipulating that a common-law marriage is a union of two people living together for at least three years or less if the couple are parents of a child. However, according to the opinion of the Municipal Court, „by a proper interpretation of the said provision no conclusion can be made that this union can be considered as equal to marriage", but only „in respect of certain rights". According to the Municipal Court, this concretely means that „common-law partners have certain rights as if they were married, including a right to mutual maintenance, a right related to the property acquired in the common-law marriage"; nevertheless, „they are not entitled to equal rights and, particularly, as regards inheritance rights". Consequently, the Municipal Court concludes that although the appellant lived with the testator in the common-law marriage for more than three years he cannot be deemed to be her hear at law but „the Family Law of FBiH entitles him to claim certain rights".

8. In addition, the Municipal Court states that Article 9 of the Inheritance Law, applicable to the present case, specifies the circle of persons deemed to be heirs at law and a common-law partner is not among them. Furthermore, the Municipal Court states that „the hitherto case-law clearly states that a common-law partner is not included in the circle of heirs at law and that the effects of the common-law marriage referred to in the Family Law of FBiH do not relate to the inheritance right of persons who lived with the testator" as well as that „the person who lived in a union with the testator is not a party to the probate proceedings unless he/she is an heir, legatee or a person exercising a right in respect of the legacy". As the Municipal Court concludes that the Inheritance Law is *lex specialis* with respect to the Family Law of FBiH and does not stipulate the possibility that the persons who lived together in a common-law marriage may inherit from each other, meaning that „marriage and common law relationships are not treated equally under the inheritance law", the appellant's request that he be recognised as an heir at law after the death of the testator is dismissed.

9. On the other hand, the Municipal Court, based on the evidence presented, establishes that the appellant and the testator jointly funded the restoration of the apartment wherein they lived and, according to an expert witness in the field of civil engineering, a sum of BAM 1,940.00 was invested in repair works. However, the Municipal Court assesses that the appellant's claim up to BAM 970.00 is well-founded, as the appellant failed to prove that he alone funded the repair works, *i.e.* „the appellant failed to prove that the repair works were not jointly funded by the appellant and the testator". In addition, in part of the reasoning of the decision obliging the appellant to hand over possession of the apartment to the defendants, the Municipal Court states that the apartment in question constitutes the testator's specific property and that the appellant is in possession of the apartment in

question but that he does not have the right to inherit the apartment or any other legal basis for that and, consequently, the defendants are entitled to request entry into possession of the apartment in question.

10. In the judgment of the Cantonal Court no. 33 0 P 000492 09 Gž of 16 April 2012, the appellant's appeal is partly granted and the first instance judgment is modified in respect of the amount awarded to the appellant for the funds invested in renovation of the apartment. Thus, the appellant is awarded the sum of BAM 1 940 and the amount payable for the costs of the proceedings is reduced. The remainder of the appellant's appeal is dismissed. The Cantonal Court states that the appellant's assertions are correct that he requested in his modified statement of claim that it be established that the appellant is an heir at law and the first, and not the second, in the line of succession, as incorrectly stated in the first instance judgment. According to the reasons of the Cantonal Court, in the situation where the first instance court „provided the clear and detailed reasons for its decision that the appellant's claim is ill-founded, as stated in the first paragraph of the enacting clause of the challenged judgment, and the reasons are accepted as correct by this Court", such „a writing mistake" can always be corrected. Besides, the Cantonal Court states that the Municipal Court's conclusion is correct that a common-law marriage has no effect on inheritance rights, *i.e.* that it, in itself, is not a basis of inheritance" within the meaning of Article 9 of the Inheritance Law. Furthermore, the Cantonal Court infers that making reference to the „right to home and the relevant provisions of the Constitution of BiH and the European Convention for the Protection of Human Rights and Fundamental Freedoms cannot lead to a different decision of the court, as it concerns a common-law marriage and the testator concluded no gift agreement or lifelong maintenance agreement with the appellant, nor is the appellant a legal heir at law, legatee or a person exercising a right in respect of the legacy". Therefore, the Cantonal Court concludes that the Municipal Court's conclusion that the appellant is not a party to the relevant probate proceedings is correct.

11. In its judgment no. 33 0 P 000492 12 Rev of 23 July 2013, the Supreme Court rejected, as inadmissible, the appellant's request for review filed against the second instance decision in part relating to the monetary claim, and dismissed the appellant's request that it be established that the appellant is a legal heir and the first in the line of succession. According to the conclusion by the Supreme Court, the lower courts correctly applied the substantive law and, therefore, the appellant's claim appears „unclear and imprecise as well as unfounded, since the plaintiff, as the common-law partner of the deceased person, is not entitled, according to the applicable regulations, to inherit from the testator because he is not included in the circle of heirs at law in any legal line of succession under the Law on Inheritance".

12. As to the part of the appellant's request for review relating to a violation of the right under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms („the European Convention"), the Supreme Court reasons that the apartment in question was the appellant's „home" within the meaning of the aforementioned provision, but the interference with that right was in accordance with the law, „for it was founded on the domestic legal basis which is sufficiently accessible, precise and foreseeable", and the legitimate aim „in the public interest was pursued (the measures to regulate inheritance rights)", and „a fair balance" was struck „between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental right". The Supreme Court concludes that the appellant, as „a common-law spouse", moved into the apartment in question and „used it for three years" together with the testator and that the mentioned period „cannot be deemed to be a longer period of time" and that „'an excessive and particular burden' would be imposed on the defendants in case that 'the appellant's right to home' were recognised".

IV. Appeal

a) Allegations of the appeal

13. The appellant claims 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) of the European Convention and his right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. In his complaints relating to a violation of his right to a fair trial, the appellant states that „the provisions of the substantive law were interpreted in an arbitrary manner by the courts and they failed to subsume the concrete situation under the provisions of the Family Law and Inheritance Law". In the reasons for the aforementioned complaints, the appellant points out that the Family Law of FBiH stipulates that a common-law marriage is the union between a man and a woman, who are not married to another person or living in another common-law marriage, and who are living together for at least three years or less if the couple are parents of a child. In addition, the appellant points out that a common-law marriage, under the Family Law of FBiH, can be considered as equal to a marriage, as prescribed by Article 2(1) of the Family Law of FBiH. Furthermore, the appellant underlines that he proved in the proceedings before the court that his common-law partnership with the testator lasted for more than three years and that during that time none of them was married to another person or was in a common-law marriage with another person and that those facts were not called into question by the courts. Moreover, the appellant states that the Inheritance Law entered into force 25 years prior to the applicable Family Law of FBiH, „when social, political and other conditions and

circumstances were completely different". For that reason, according to the appellant's complaints, the Inheritance Law does not mention common-law partners as heirs in the first line of succession and, although a common-law marriage, under the Family Law of FBiH, can be considered as equal to a marriage. In view of the above, the appellant holds that „common-law partners must be treated as heirs at law in the first line of succession after the death of one of the common-law partners". Besides, the appellant highlights that the Law on Inheritance does neither regulate nor could regulate „who can be deemed to be a partner of the deceased within the meaning of a life union, but it determines those who are heirs at law of the deceased". According to the appellant, the Family Law of FBiH is *lex specialis* and „it gives common-law marriage a status legally equal to marriage and, thereby, the partners in such a life union are given that status, too". For that reason, as stated by the appellant, common-law partners must be included in probate proceedings as heirs and the relevant rights must be recognised to them".

14. As to the right to property, the appellant holds that the courts incorrectly applied the provisions of the substantive law, as already reasoned by the appellant, thereby preventing the appellant, as an heir at law in the first line of succession, to inherit the testator. Accordingly, the appellant holds that in this way he, as the common-law partner of the testator, is deprived of the property in contravention of Article 1 of Protocol No. 1 to the European Convention.

b) Reply to the appeal

15. In the reply to the appellant's complaints, the Supreme Court and the Cantonal Court state that the appellant's complaints relating to a violation of his right to a fair trial and his right to property are ill-founded and that the courts gave the detailed and clear reasons in the challenged decisions about it. The defendants, in the reply to the appeal, also dispute the appellant's complaints and point out that, contrary to the appellant's assertions, the Inheritance Law is *lex specialis*, as the circle of heirs at law is determined only by that Law.

V. Relevant Law

16. The **Family Law of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 35/05, 41/05 and 31/14), as relevant, reads:

Article 2

In terms of this Law, family is a life union between parents and children and other persons related by blood, marriage, or adoption and persons living together in a common-law marriage in the same household.

Article 3

In terms of this Law, a common-law marriage is a life union between a woman and a man who are not married to another person or living in another common-law marriage, and who are living together for at least 3 years or less if the couple are parents of a child.

Article 213

(1) Mutual maintenance of married couples, common-law partners, parents and children and other relatives is their right and responsibility when foreseen by this Law.

Article 224

A spouse who has insufficient means to live on or is unable to obtain such means out of his/her assets, and who is also unable to work or cannot find a job, is entitled to spousal maintenance in proportion to his/her partner's capacities.

Article 230

A common-law partner who meets the requirements set out in Articles 3 and 224 of this Law shall be entitled to maintenance from their common-law partner when their common-law relationship ends.

Article 263

(1) The property acquired from work by common-law partners during their common-law partnership in accordance with Article 3 of this Law shall be deemed their marital property.

(2) The provisions of the Marital Property Law shall apply to the property referred to in paragraph 1 of this Article.

17. The **Inheritance Law – revised text** (*Official Gazette of SR BiH,* 7/80 and 15/80), as relevant, reads:

Article 9

Unless otherwise provided by this Law, a deceased person shall be inherited based on the law by the following: all his/her descendants, his/her spouse, his/her parents, his/her brothers and sisters and their descendants, his/her grandfathers and grandmothers and their descendants. […]

18. The **Inheritance Law of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, 8/140), as relevant, reads:

Article 9

(1) A testator shall be inherited based on the law by his/her common-law partner who has the same right to inheritance as married partners.

(2) In terms of this Law, a common-law marriage is a life union between a woman and a man in accordance with the provisions of the law governing family relationships, which ceases to exist by the death of the testator.

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 18(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

21. In the present case, the subject-matter of the appeal is the Judgment of the Supreme Court no. 33 0 P 000492 12 Rev of 23 July 2013, against which there are no other effective remedies available under the law. Furthermore, the appellants received the challenged judgment on 2 September 2013 and the appeal was filed on 10 October 2013, *i.e.* within 60-day time-limit as provided for by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court because there is no formal reason rendering the appeal inadmissible, nor is it manifestly (*prima facie*) ill-founded.

22. Having regard to the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18 (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the respective appeal meets the admissibility requirements.

VII. Merits

23. The appellant complains about a violation of his right to a fair trial and his right to property, as he could not acquire the status of an heir at law in the first line of succession under the Inheritance Law, although a common-law marriage has a status legally equal to marriage under the Family Law of FBiH.

24. In this respect, the Constitutional Court first points out that the appellant makes no reference in his appeal to a violation of Article 14 of the European Convention (prohibition of discrimination) in conjunction with the right to property under Article 1 of Protocol No. 1 to the European Convention, nor did he assert it in the proceedings before the ordinary court. However, the appellant's complaints explicitly refer to differential treatment, *i.e.* that he, as a common-law partner of the testator, was subjected to differential treatment compared to married partners under the Inheritance Law, which was applied in the present case, although the Family Law of FBiH gives common-law marriage a status legally equal to marriage. The appellant made the same complaints in the proceedings before the ordinary courts, meaning that the appellant's request, in the proceedings before the ordinary courts was essentially the same regardless of its legal characterisation given by the appellant. In addition, the Constitutional Court notes that the courts, in the challenged decisions, examined the appellant's request within the scope of the relevant legal provisions but from the standpoint of the right to home under Article 8 of the European Convention.

25. The Constitutional Court points out that the European Court of Human Rights established in its case-law that that Court is master of the characterisation to be given in law to the facts of the case, it is not bound by the legal characterisation given by the applicant or the Government. By virtue of the *iura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by the parties and even under a provision in respect of which the Court had declared the complaint to be inadmissible while declaring it admissible under a different one. The reason being that the European Court holds that a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see the European Court of Human Rights, *Şerife Yiğit v. Turkey*, Judgment of 2 November 2010, paragraphs 51-52 with further references). The Constitutional Court's case-law is similar in the situations where an appellant makes reference to one right and the facts or arguments presented by the appellant disclose a possible violation of some other constitutional right (see, the Constitutional Court, Decision on Admissibility and Merits no. *AP 2043/12* of 12 December 2012, paragraph 22, published in the *Official Gazette of Bosnia and Herzegovina* no. 10/16 and available at www.ccbh.ba).

26. In view of the above, the Constitutional Court will examine the appellant's complaints in the light of Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with the right to property.

Applicability of Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with the right to property

27. The Constitutional Court reiterates that Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols (*loc. cit.* Judgment in the case of *Şerife Yiğit v. Turkey*, paragraph 55). In this respect, the Constitutional Court notes that the present case entails an issue as to whether the status of an heir at law in the first line of succession can be recognised to the appellant, as a common-law partner of the testator. Namely, according to the Inheritance Law applicable at the time when the decisions were passed, common-law partners were not legally recognised as heirs in any line of succession. According to the consistent case-law of both the European Court and the Constitutional Court, the right to property does not entail the right to acquire property. However, in the specific case the appellant requested, in the proceedings completed by the challenged judgments, that it be established that he has the status of an heir at law, given that the Family Law of FBiH, passed in 2005, gave common-law marriage a status legally equal to marriage as regards rights and responsibilities, including property rights. In case that such a request were granted, the appellant *ex lege* would have „property" within the meaning of Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention. In such a situation, the Constitutional Court holds that the decisions on the request specified in this way are decisive for the appellant's right to property and, consequently, the appellant's complaints fall within the scope of Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention.

28. Furthermore, in the situation where one law gives common-law marriage a status legally equal to marriage as regards rights and responsibilities and the other law completely excludes the possibility that common-law partners inherit from each other, it certainly constitutes a differential treatment that has to be examined. Therefore, the Constitutional Court holds that Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention are applicable to the present case.

Compliance with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with the right to property

29. According to the case-law of the European Court of Human Rights and the Constitutional Court, a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *e.g.* the Judgement of the European Court of Human Rights, *Burden v. the United Kingdom* of 29 April 2008, paragraph 60). Furthermore, the right not to be discriminated against may occur in situations in which it as a consequence of equal treatment of persons whose situations are different, *i.e.* „when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different" (see, European Court of Human Rights, *Thlimmenos v. Greece*, Judgement of 6 April 2000). Moreover, the Constitutional Court recalls that the right to non-discrimination is a qualitative rather than an absolute right, and States can have a considerable margin of appreciation in that regard. Whether that margin of appreciation is wide or narrow depends upon: a) the nature of the right involved (the margin of appreciation is wide where relating to social and economic rights, *e.g.* see, European Court of Human Rights, *Stec v. the United Kingdom*, Judgement of 12 April 2006, and it is very narrow where it relates to fundamental rights); b) the level of interference (whether certain measure, partly or completely, has deprived an individual of his/her right, see, European Court of Human Rights, *Aziz v. Cyprus,* Judgement of 22 April 2004); and c) the public interest (*e.g.* the strong public interest in combating gender and racial distinctions requires a higher level of justification for discrimination on those bases).

30. On the other hand, it is important to point out that the European Court has already ruled that marriage is widely accepted as conferring a particular status and particular rights on those who enter it. The protection of marriage constitutes, in principle, an important and legitimate reason which may justify a difference in treatment between married and unmarried couples (*op.cit*. *Şerife Yiğit v. Turkey*, paragraph 72 with further references). However, the European Court has also specified that the concept of family and family life is broader than the concept of marriage, as it evolved over time, and it concluded that „respect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues". In this regard, the European Court has construed the expression „*de facto* marital cohabitation" and concluded that the exclusion of same sex partners from succession to a tenancy constitutes the difference in treatment that cannot be justified by the protection of family (see, European Court of Human Rights, *Kozak v. Poland*, Judgment of 2 March 2008, paragraph 98).

31. In the present case, the Constitutional Court points out that the challenged decisions have undisputedly established that the union between the appellant and the testator lasted for more than three years and that it, therefore, could be considered the common-law marriage within the meaning of the Family Law of FBiH. In their decisions, the courts consistently point out that according to the Family Law of FBiH, common-law marriage is legally equal to marriage, but the courts have concluded that „by a proper interpretation of the said provision no conclusion can be made that this union can be considered equal to marriage", but only „in respect of certain rights". In addition, the courts make reference to the Inheritance Law and conclude that the mentioned Law is *lex specialis* and, as such, does not include common-law partners as heirs in law in any line of succession.

32. In this regard, the Constitutional Court notes that the Family Law of FBiH was passed in 2005 and that the legislator, having accepted the fact that common-law marriage, under the former Family Law, was legally recognised equal to marriage and given the developments in society and families and family ties, consistently regulated this equality in respect of all rights and responsibilities, including property rights, too. On the other hand, the Inheritance Law applicable at the time when the decisions were adopted had been passed in 1980 and had not been amended to recognise common-law marriage a status equal to marriage, even after the new Family Law of FBiH, *i.e.* until 2014 when the new Inheritance Law of FBiH was passed. Under the mentioned Law, Article 9 explicitly prescribes that a testator will be inherited based on the law by his/her common-law partner who has the same right to inheritance as married partners, provided that the common-law marriage meets the conditions under the Family Law of FBiH and lasted until the death of the testator. Particularly, the Constitutional Court points out that the proponent of the draft Inheritance Law of the Federation of BiH, in the reasons of this arrangement, stated the following:

> *[...] during the last 50 years, in addition to social and economic changes, social circumstances have also changed and, as a result, legislation has been amended or new laws have been passed. First of all, there has been a reform of property law and land registration law, and a new Family Law of FBiH has been passed. As in the former Family Law of the SR BiH from 1979, this Law includes the principle of equality and gives common-law marriage a status legally equal to marriage, which has not been consistently included in inheritance law. Namely, unlike the former SR of Slovenia and SAP Kosovo, which, while within the former SFRY, recognised the common-law partners' right to inherit from each other as heirs at law, whereas this determination in family legislation remained without positive response in the inheritance law of the SR of BiH, i.e. the Federation of BiH. The present draft includes common-law partners as heirs at law and thus follows trends in comparative law. [...]*

Article 9(2) introduces an important novelty, as it provides the possibility that common-law partners are heirs at law. In this way, the determination in family law that common-law partners are treated legally the same way that married couples are has been fully included, which is an absolute trend in European Comparative Law. In order for common-law partners to be heirs at law, the common-law marriage has to meet the conditions under the Family Law of FBiH and it is required that the common-law marriage has lasted until the death of the testator. […] By this Law, persons living together in a common-law marriage will not be discriminated against compared to a married couple, as the case was until now" (emphases added).

33. Therefore, the proponent of the new Inheritance Law of the Federation of BiH and then the legislator adopting the new Law recognised a discrepancy between the two laws and concluded that such a discrepancy constituted discriminatory treatment of common-law partners and removed it by the new regulation. Such conduct, in the view of the Constitutional Court of Bosnia and Herzegovina, falls within a margin of appreciation that State have in regulating such relationships. In addition, the Constitutional Court underlines that it is irrelevant to assess whether or not one or the other law is *lex specialis*. Namely, the Family Law of FBiH regulates, *inter alia*, family matters and family relationships and gives common-law marriage, lasting more than three years, a status legally equal to marriage in respect of rights and obligations, while the inheritance law regulates the issue relating to family members entitled to inherit from a testator. In such a situation, it was reasonable to expect, as already confirmed in the legislator's new inheritance law, that common-law couples were put on an equal footing with married couples also in respect of inheritance.

34. Certainly, the Constitutional Court notes that the 1980 Inheritance Law was in effect at the time when the challenged decisions were passed and that that Law did not recognise the inheritance rights of common-law couples. However, pursuant to Article II(4) of the Constitution of Bosnia and Herzegovina, the European Convention applies directly in Bosnia and Herzegovina and has priority over all other law. The aforementioned, *inter alia*, means that the laws that are inconsistent with the European Convention must be applied in a manner which is compatible with the Convention rights. Therefore, in the situation where it is undisputed that the common-law marriage between the appellant and the testator started at the time when the 2005 Family Law of FBiH was applicable, which not only included the principle of equality from the former Family Law giving common-law marriage a status legally equal to marriage, but also consistently put common law partners on an equal footing with married couples in respect of rights and obligations, and given that the common-law marriage between the appellant and the testator lasted until the testator's death and that the legislator itself, when passing the new Inheritance

Law, pointed out that a difference in treatment between married and unmarried couples regarding inheritance was discriminatory, the Constitutional Court holds that the 1980 Inheritance Law was not applied consistent with respect for „the determination in family law that common-law partners are treated legally the same way that married couples are". Besides, in the situation where the new Inheritance Law of the Federation of BiH, having the same aim, was passed only 10 years after, the Constitutional Court holds that the appellant cannot bear detrimental consequences for the relevant laws were not harmonised earlier to apply the legislator's consistent determination to eliminate discrimination stemming from the difference in treatment between married and unmarried couples also in an inheritance relationship.

35. In view of the above, the Constitutional Court holds that the application of the 1980 Inheritance Law, in the manner in which the ordinary courts did so in the challenged decisions, had no objective and reasonable justification. For that reason, the appellant was deprived in a discriminatory manner of the possibility to acquire the status of an heir at law in the first line of succession and to take part in the probate proceedings relating to the testator.

36. Therefore, the Constitutional Court holds that in the present case there is a violation of the prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with the right to property under Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention.

VIII. Conclusion

37. The Constitutional Court concludes that the courts violated the prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in conjunction with the right to property under Article II(3)(k) of the Constitution of BiH and Article 1 of Protocol No. 1 to the European Convention, as they applied the 1980 Inheritance Law without respect for the determination in the 2005 Family Law of FBiH that common-law partners living together for more than three years are treated legally the same way that married couples are as regards rights and responsibilities, including property rights, and the courts dismissed the appellant's request that he be recognised the right to take part in the probate proceedings as an heir at law in the first line of succession after the death of the testator.

38. Pursuant to Article 59(1) and (2) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of the present 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.

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 4183/13

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Svetozar Janković against the judgment of the County Court in Bijeljina, no. 83 0 P 010679 13 Gž of 4 September 2013, and the judgment of the Basic Court in Zvornik, no. 83 0 P 010679 11 P of 19 February 2013

Decision of 1 December 2016

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President,

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić

Having deliberated on the appeal of **Mr. Svetozar Janković** in case no. **AP 4183/13**, at its session held on 1 December 2016, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Svetozar Janković 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 and the right to property under 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 Bijeljina, no. 83 0 P 010679 13 Gž of 4 September 2013 and the judgment of the Basic Court in Zvornik, no. 83 0 P 010679 11 P of 19 February 2013, are hereby quashed.

The case shall be referred back to the Basic Court in Zvornik, which is obligated to employ an expedited procedure and to take a new decision in line with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Basic Court in Zvornik is hereby ordered in accordance with Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of delivery of this Decision, of the measures taken to execute 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 9 October 2013 Mr. Svetozar Janković („the appellant") from Zvornik, represented by Predrag Đuric, a lawyer practicing in Loznica, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the judgment of the County Court („the County Court") in Bijeljina, no. 83 0 P 010679 13 Gž of 4 September 2013, and the judgment of the Basic Court („the Basic Court") in Zvornik, no. 83 0 P 010679 11 P of 19 February 2013.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) and (3) of the Rules of the Constitutional Court, on 11 November 2015 the County Court, the Basic Court and the Ministry of Internal Affairs of the Republika Srpska – Public Security Centre in Zvornik („the defendant") were requested to submit their responses to the appeal.

3. The County Court, the Basic Court and the defendant submitted their responses to the appeal on 17 November 2015, 9 December 2015 and 16 November 2015, respectively.

III. Facts of the Case

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

a) Facts related to the criminal proceedings and previous civil proceedings

5. Based on a Receipt on Temporary Seizure of Objects („the receipt"), dated 28 June 1996, pursuant to Articles 154 and 211 of the Criminal Procedure Code, a van („the vehicle in question") was seized from the appellant. On 18 September 2000, the appellant was indicted on a theft charge by the Public Attorney's Office in Zvornik. The Basic Court, in its judgment of 29 October 2001, found the appellant guilty and sentenced him to a suspended sentence (the law, duration and elements of the suspended sentence imposed on the appellant are specified in the mentioned judgment). According to the facts mentioned in the judgment, the appellant used the vehicle in question to transport the co-accused persons to the crime scene. Deciding on the appellant's appeal, the County Court, in its Judgment of 21 May 2003, modified the first instance judgment and dismissed the charge against the appellant (a criminal prosecution was statute-barred).

6. After the completion of the criminal proceedings, the civil proceedings, initiated upon the appellant's action filed on 2 June 1999 against the defendant, were continued. In the civil proceedings, the appellant requested, *inter alia*, to recover possession of the vehicle in question. By its judgment of 1 November 2010, the Basic Court in Banja Luka dismissed, *inter alia*, the appellant's statement of claim in the part in which the appellant requested that the plaintiff pay him a sum of money specified in the aforementioned judgment, as compensation for the vehicle in question. In the reasoning of the judgment it was stated that on 2 June 1999 the appellant had filed the action and requested to recover possession of the vehicle in question but, at the preliminary hearing of 28 April 2010, the plaintiff had specified his claim relating to the payment of the value of the vehicle in question. The Court pointed out that the subject-matter of the dispute was compensation for damages arising out of the seizure of the vehicle in question and, given that the damage occurred on 28 June 1996, the claim for damages became statute-barred pursuant to Article 376 of the Law on Contractual Obligations.

7. By its judgment of 28 February 2011, the County Court in Banja Luka upheld the first instance judgment in the part dismissing the appellant's statement of claim for payment of a sum of money as compensation for the vehicle in question. In the reasoning of the judgment, the County Court noted, *inter alia*, that the Court had attempted to deliver the judgment passed in the criminal proceedings to the appellant's address but the delivery

had been impossible, so that on 3 October 2003 the judgment was displayed on the bulletin board of the Court.

b) Facts related to the civil proceedings concerned

8. On 28 April 2011, the appellant filed an action against the defendant for the handover of possession of the vehicle in question and for the monetary value of the vehicle in question (the amount is specified in the judgment).

9. In its judgment No. 83 0 P 010679 11 P of 19 February 2013, the Basic Court dismissed the appellant's claim to recover possession of the vehicle in question and rejected the appellant's claim to get paid a counter value of the vehicle in question. According to the reasons for the judgment, the defendant, in its response to the action, stated that the County Court had not passed a judgment of conviction because criminal prosecution had become statute-barred and not because the appellant had not been guilty, and that it was impossible to return the vehicle in question, as „it had been sold by tender on 19 November 1997 for 2,000 Dinars", and that the defendant raised *a res judicata* objection. The Basic Court pointed out that in the evidentiary proceedings it had examined the case-file and the judgment related to the criminal proceedings against the appellant, the judgments passed in the previous civil proceedings, the findings and opinion of the expert witnesses, the decision passed by the Municipality, the receipt and that it had heard the appellant.

10. In addition, the Basic Court noted that the provision of Article 127(1) of the Law on Real Rights of the Republika Srpska („the Law on Real Rights") stipulates that an owner, who claims the right to an object that is temporarily seized, must prove that he/she is the owner of the object and that the object is in possession of the defendant. Therefore, it concerns two cumulative conditions that must be met for the claim to be granted. The appellant proved that he was the owner of the vehicle in question, which had been seized by the defendant. The Basic Court also noted that, given that the vehicle in question had been used in the commission of the criminal offence, it was lawfully seized from the appellant. The appellant could not request the return of the seized vehicle in question, as he was not acquitted of the charge in the criminal proceedings and the County Court in Bijeljina, in its judgment, dismissed the indictment as criminal prosecution was statute-barred. In view of the above, the appellant had no standing to request the return of the seized object.

11. As to the appellant's request for the monetary value of the vehicle in question, the Basic Court noted that, „as to the alternative claim", that claim had already been decided and, therefore, this part of the appellant's claim was dismissed in accordance with Article 67(1)(4) of the Civil Procedure Code.

12. The County Court, in its judgment No. 83 0 P 010679 13 Gž of 4 September 2013, dismissed the appellant's appeal as ill-founded. The County Court noted that the appellant's allegations in the appeal were accurate concerning a violation of Article 4 of the Civil Procedure Code, as the first instance proceedings were conducted by Judge Mileva Balotić, while the first instance judgment was passed by Judge Muhamed Halilović. However, the violation of the mentioned provision had no essential effect on the correctness and lawfulness of the first instance judgment, which was based on the assessment of the written evidence presented indirectly.

13. The County Court also stated that the appellant's allegations were accurate that the right to have the object returned in terms of Article 126(2) of the Law on Real Rights is not subject to the statute of limitations and that the appellant proved that he was the owner of the vehicle in question. However, the appellant's claim was ungrounded that the receipt proved the fact that the vehicle in question was in possession of the defendant, as the defendant, in its response to the action, pointed out that the vehicle in question was not in possession of the defendant, and the appellant only arbitrarily challenged the said allegation.

14. As to the allegation in the appeal that the appellant had not been sentenced for the criminal offence as the charge against him had been dismissed and, therefore, the reason for the seizure of the vehicle in question „had fallen off" and the seized vehicle should have been returned to the appellant, the County Court pointed out that the aforementioned did not have a decisive effect, as the appellant failed to prove that he had cumulatively met the requirements under Article 127(1) of the Law on Real Rights.

15. According to the County Court, the first instance court correctly dismissed the claim for the monetary value of the vehicle in question, since that part of the claim was decided by a final and binding decision. Namely, it concerned the identical parties to the relevant civil proceedings and the identical facts and the proceedings conducted before the courts in Banja Luka.

IV. Appel

a) Allegations in the appeal

16. The appellant holds that the contested judgments are in violation of the 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 („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 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.

17. The appellant complains about a violation of the provisions of civil procedure as the civil proceedings were conducted by Judge Mileva Balotić and the judgment was passed by Judge Muhamed Halilović who „did not take part in the proceedings, did not know the parties and did not hear them". In the appellant's view, the court had an obligation to reopen the main trial and once again to present the evidence proposed.

18. The appellant also alleges that the judgment dismissing the charge against him was never delivered to him and that he learnt about it in 2009.

19. The appellant asserts that the present case is about a *rei vindicatio* action and that the right to recover possession of an object can never be statute-barred and that a claimant should always first request to recover possession of an object and, only if the defendant has no possibility to return the object, the claimant should request the monetary value thereof. According to the appellant, he proved that he was the owner of the vehicle in question, which had been seized from him, whereas the defendant failed to provide a piece of evidence that the vehicle in question was destroyed, misappropriated, lost, *etc*. Given that it was not possible to recover possession of the vehicle in question, the appellant sought the counter value of the seized vehicle. According to the appellant's allegations, the courts erroneously concluded that the matter was *res judicata*, meaning that the first instance court made no difference between the claim for damages and the *rei vindicatio* action, which consists of two parts: the claim for repossession of the object and the claim for the counter value thereof.

20. In addition, the appellant states that he was not convicted in the criminal proceedings and, therefore, the reason for the seizure of the vehicle in question „fell off" and the seized vehicle should have been returned to him.

b) Reply to the appeal

21. In response to the appeal, the County Court alleged that there was no violation of the rights referred to in the appellant's appeal.

22. The Basic Court alleged that it was an undisputed fact that the first instance proceedings had been conducted by Judge Mileva Balotić and that evidence had been presented at the public hearing held on 30 August 2012 and that the public hearing was concluded so that it was stated that the judgment would be passed within the relevant time limit and that it

would be delivered to the parties to the proceedings. In the meantime, the Judge Mileva Balotić became seriously ill and, for that reason, the President of the Court decided that all the cases assigned to the aforementioned Judge would be assigned to other Judges. The cases in which the main hearings were concluded and the decisions were not passed were also assigned to other Judges, so that the case at hand, in which the main hearing had been concluded on 30 August 2012, was assigned to Judge Muhamed Halilović to make a decision.

23. In addition, the Basic Court alleged that the appellant's allegations were correct that the claim to recover possession of an object can never be statute-barred. However, his claim was not dismissed as statute-barred but it was dismissed because of the fact that the appellant had no legal basis to seek the repossession of the vehicle in question, given that the vehicle in question had been seized from the appellant based on a reasonable suspicion that he had used it to commit criminal offences, while the charge against the appellant was dismissed as statute-barred, so that there existed no grounds for returning the vehicle in question.

24. The defendant alleged that the appellant failed to provide evidence as to a violation of the rights referred to by the appellant. The appellant, as the plaintiff, was obliged to prove that the vehicle in question was in possession of the defendant and that was why the appellant had failed to appear and to provide evidence in the relevant proceedings.

V. Relevant Law

25. The **Civil Procedure Code of the Republika Srpska** (*Official Gazette of the Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13), as relevant, reads:

Article 4

As a rule, the court shall decide on claims on the basis of an oral, direct and public hearing.

Article 67, paragraph 1(4)

After the preliminary examination of the complaint, the court shall render a decision rejecting the complaint if it finds that:

4) a final judgment has already been rendered on the subject matter;

26. The **Criminal Code of the Republika Srpska** (*Official Gazette of the SFRY*, 44/76, 34/84, 74/87, 57/89, 3/90 and 38/90; and *the Official Gazette of the Republika Srpska*, 12/93, 19/93, 26/93, 14/94 and 3/96), as relevant, reads:

Article 69, paragraph 1

(1) Objects used or destined for use in the commission of a criminal act as well as those which resulted from the commission of a criminal act may be confiscated if they are owned by the offender.

27. The **Criminal Procedure Code of the Republika Srpska** (*Official Gazette of the SFRY*, 4/77, 14/85, 74/87, 57/89, 3/90; and *the Official Gazette of the Republika Srpska*, 4/93, 26/93, 14/94, 6/*97* and 61/01), as relevant, reads:

Article 154, paragraph 1

Before the institution of an investigation, the internal affairs authorities may also seize objects pursuant to the provisions of Article 211 of this Code.

Article 211, paragraph 1

1) Objects which must be seized under the Criminal Code, or which may serve as evidence in criminal proceedings, shall be temporarily seized and placed with the court for safekeeping, or their safekeeping will be secured in another way.

Article 215

Objects temporarily seized during criminal proceedings shall be returned to their owners, or holders, if the proceedings are suspended and there exist no ground for their confiscation (Article 500).

Article 500

Objects which must be seized under the Criminal Code shall be seized even when the criminal proceedings are not concluded with a judgement convicting the defendant, if it is in the interest of general security or reasons of morality.

28. The **Law on Real Rights of the Republika Srpska** (*Official Gazette of the Republika Srpska*, 124/08, 3/09, 58/09 and 95/11), as relevant, reads:

Article 126

1) The owner is entitled to demand repossession of an object from anyone in possession of that object and to demand the person, who unlawfully disturbs him/her, to stop a disturbance.

2) The right to have an object returned and cessation of disturbance are not subject to the statute of limitations.

Article 127, paragraph 1
Rei vindicatio for return of objects

1) To enforce the right to have an object returned, the owner must prove that he/she owns the object demanded and that the object is in possession of the defendant.

VI. Admissibility

29. 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.

30. Pursuant to Article 18(1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective legal remedies available under the law against a judgment/decision challenged by the appeal are exhausted and if the appeal 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.

31. The Constitutional Court notes that the subject-matter challenged in this part of the appeal is the judgment of the County Court, no. 83 0 P 010679 13 Gž of 4 September 2013, against which there is no effective legal remedy available under the law. Therefore, the judgment was rendered on 4 September 2013 and the appeal was filed on 9 October 2013, *i.e.* within a time limit of 60 days as prescribed by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court, for it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

32. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 18(1), (3) and (4) of the Constitutional Court's Rules, the Constitutional Court has established that the present appeal meets the admissibility requirements.

VII. Merits

33. 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(1) of the European Convention, 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 and 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 are violated in the relevant proceedings.

Right to a fair trial

34. Article II(3)(e) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

[...]

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

35. Article 6, paragraph 1 of the European Convention, as relevant, reads:

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

36. In the present case, the Constitutional Court notes that in the relevant civil proceedings the appellant requested the return of the vehicle in question and the monetary value thereof. Therefore, the case in question is of civil nature and, consequently, the appellant enjoys the guarantees under 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.

37. The appellant holds that his right to a fair trial has been violated as a result of the violation of the rules of civil procedure. According to the appellant's allegations, the civil proceedings were conducted by one judge, whereas the judgment was passed by another judge, who „did not take part in the proceedings and did not know the parties and did not hear them". For that reason, in the appellant's opinion, the court was obligated to reopen the main hearing and to re-examine the evidence presented. Therefore, the appellant's allegations indicate a violation of the principle of immediacy in the procedure and for that reason the appellant holds that his right to a fair trial has been violated.

38. Deciding on the appellant's complaints mentioned above, the County Court noted that it was correct that the provision of Article 4 of the Civil Procedure Code was violated but that it did not have an essential effect on the correctness and lawfulness of the first instance judgment, which was based on the assessment of written evidence presented indirectly. In response to the appeal, the Basic Court stated that the public hearing had been held and that the evidence had been examined at the public hearing, which had been concluded so that it had been stated that the judgment would be passed within the relevant time limit and delivered to the parties to the proceedings. In the meantime, the presiding

judge became seriously ill and, for that reason, the case was assigned to another judge to make a decision.

39. The Constitutional Court points out that one of the fundamental principles of the civil procedure is the principle of immediacy that is, *inter alia*, prescribed by the provision of Article 4 of the Civil Procedure Code. As a rule, the mentioned principle reflects the requirement that a judgment has to be based on evidence presented at the main hearing and that the judgment is passed by the judge who was present at the hearing, meaning that the court examining the evidence should be the same court which presented them at the hearing, that is to say that the court, through direct observation, acquires all knowledge on which it basis its decision.

40. The Constitutional Court finds that it follows from the minutes taken at the hearing that the proceedings were conducted by a single judge who failed to pass a decision, namely that the plaintiff was heard before the judge who failed to pass a decision and that the attorney for the plaintiff presented evidence before the judge who failed to pass a decision (inspection of the case file and the judgment passed in the criminal proceedings against the appellant, the judgments passed in the previous civil proceedings, the findings and opinion of an expert, the decision of the Municipality, and the receipt). Therefore, the judgment was passed by the judge who had not had a single piece of evidence presented before him. The Constitutional Court finds that the judge was replaced due to her illness, *i.e.* her continuous work on the case was not possible. However, in view of the above, the Constitutional Court cannot see that measures were taken to ensure that the judge who passed the decision had the appropriate understanding of the evidence and arguments, for example, by providing for a rehearing of the relevant arguments before the judge. In view of the above, the Constitutional Court holds that in the present case the principle of immediacy, as an important guarantee of the fairness of the proceedings, was not respected, meaning that the proceedings as a whole were not fair.

41. Therefore, the Constitutional Court finds 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 and Article 6(1) of the European Convention.

42. Furthermore, the Constitutional Court notes that, according to the documentation submitted to it, it follows that the appellant, in the previous proceedings, brought a *rei vindicatio* action against the same defendant (in 1999), seeking to recover possession of the vehicle in question since the defendant seized it without legal basis. In 2010 the appellant specified his claim for payment of the value of the vehicle in question. The appellant's claim was dismissed by a final and binding judgment.

43. The appellant asserts that there existed no legal ground to dismiss his claim in the proceedings, given that he proved that he was the owner of the vehicle in question, which had been seized from him, whereas the defendant failed to provide a piece of evidence that the vehicle in question had been destroyed, misappropriated, lost, *etc*. In addition, the appellant points out that the courts erroneously concluded that the matter was *res judicata*. According to the appellant's assertions, there is a violation of his right to a fair trial and of his right to property.

44. In connection with these allegations, the Constitutional Court recalls the case-law of the European Court of Human Rights and the Constitutional Court, according to which 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 v. the United Kingdom*, judgment of 10 May 2005, Application no. 19354/02). It is the Constitutional Court's task to ascertain whether the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective remedies, *etc*.) have been violated or disregarded and whether the application of a law was obviously arbitrary or discriminatory. Therefore, within its appellate jurisdiction, the Constitutional Court shall exclusively deal with the issue of possible violations of the rights under the Constitution of Bosnia and Herzegovina or the European Convention in the proceedings before ordinary courts.

45. Therefore, the appellant instituted the relevant proceedings and sought to recover possession of the vehicle in question and the payment of the counter value of the vehicle in question. By the judgment of the Basic Court, which was upheld by the County Court, the first part of the appellant's claim was dismissed and the second part of his claim was rejected. In the reasoning of the mentioned judgments it was noted that the appellant's allegations were correct that the right to recover possession of an object could never be statute-barred and that the appellant proved that he was the owner of the vehicle in question. However, the appellant's assertion was ungrounded that the receipt proved the fact that the vehicle in question was in possession of the defendant, as the defendant, in its response to the action, pointed out that the vehicle in question was not in possession of the defendant, and the appellant only arbitrarily challenged the said allegation. In addition, the appellant's objection was ill-founded that, because the charges against him had been dismissed, the reason for the seizure of the vehicle in question „fell off" and the seized vehicle should have been returned to him, as it had no decisive effect given that

the appellant failed to prove that he had cumulatively met the requirements under Article 127(1) of the Law on Real Rights. According to the reasoning offered by the ordinary courts, it followed that the second part of the appellant's claim was rejected, as the claim had already been decided (Article 67(1)(4) of the Civil Procedure Code).

46. The Constitutional Court reiterates that the present case relates to a civil dispute, wherein the appellant, as the holder of the real right, sought the judicial protection of his right of ownership. The Constitutional Court also recalls that real rights are absolute rights, which avail against all persons, so that they are protected against all persons in violation of such rights. Therefore, an owner has a subjective right to protection and a legal order provides for the possibility of protecting their ownership right before competent public authorities. In this connection, the Constitutional Court recalls Article 126 of the Law on Real Rights, which stipulates that an owner has a right to demand repossession of an object from anyone in possession of that object and that the mentioned right is not subject to the statute of limitations.

47. The Constitutional Court notes that the defendant seized the vehicle in question from the appellant as the appellant was charged that he had used it to transport the co-accused persons to the crime scene. It is indisputable that the action taken by the defendant was prescribed by the provisions of the criminal law applicable at the relevant time (Article 69 of the Criminal Code). In addition, it is also indisputable that the provisions of the criminal law prescribed that temporarily seized objects were stored, *i.e.* returned to their owners if the criminal proceedings were suspended, including the possibility of returning the seized objects even when the criminal proceedings were not concluded by a judgement convicting the defendant, if it was in the interest of general security or reasons of morality (Articles 211, 215 and 500 of the Criminal Procedure Code). The charges against the appellant had been dismissed but the vehicle in question was not returned to him and it does not follow that there existed any circumstance indicating that the requirements for retaining the vehicle in question were satisfied. However, the seized vehicle was at the defendant's disposal and the defendant sold it through tender on 19 November 1997.

48. In view of the above, the Constitutional Court finds that the courts in the present case acted in an arbitrary manner. Namely, the courts failed to assess the relevant fact that the appellant's property was permanently seized by the defendant, that is that the appellant's property was at disposal of the defendant without court decision (the charges against the appellant were dismissed and there existed no circumstance indicating that the requirements for retaining the vehicle in question were satisfied). The appellant pointed to the aforementioned but the ordinary courts assessed that it had no decisive effect, as the

appellant failed to prove that he had cumulatively met the requirements under the Law on Real Rights. The ordinary courts arbitrarily placed on the appellant the burden of proving that the vehicle in question was in possession of the defendant, while it was indisputably proved that the vehicle in question had been seized, that the defendant, in terms of the aforementioned Law, was responsible for the safekeeping of the vehicle in question and that the vehicle in question was unlawfully at disposal of the defendant and that the defendant sold the vehicle in question by tender. In addition, the ordinary courts rejected the second part of the appellant's claim (the payment of the counter value of the vehicle in question) and assessed that the claim had already been decided. The Constitutional Court notes that the ordinary courts arbitrarily applied the Civil Procedure Code by dividing the appellant's claim into two parts: the claim for repossession of the property and the claim for the counter value of the vehicle in question.

49. In view of the above, 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 and Article 6(1) of the European Convention, 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.

50. The Constitutional Court recalls that in its hitherto case-law related to similar situations where the Constitutional Court established a procedural violation, it stated that, given that the proceedings must be renewed, it was unacceptable to consider objections raised in respect of other aspects of the right to a fair trial or a violation of other rights before those objections have been considered by the ordinary courts. However, taking into account all the aforementioned specific circumstances of the present case, particularly the fact that the finding of a procedural violation of the principle of immediacy, as an important guarantee of fairness of the proceedings, will not be in itself sufficient just satisfaction to the appellant, the Constitutional Court finds it necessary to quash the judgments of the ordinary courts and to refer the case back to the Basic Court for retrial, so that the proceedings should be conducted in accordance with the provisions of the Law on Real Rights and the provisions of the Civil Procedure Code.

51. As to 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 of the European Convention, the Constitutional Court holds that the relevant proceedings do not raise an issue in respect of the aforementioned right of the appellant.

VIII. Conclusion

52. 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 as the judgment was rendered by the judge before whom not a single piece of evidence was presented, and it is not possible to see that measures were taken to ensure that the judge who passed the decision had the appropriate understanding of the evidence and arguments, for example, by providing for a rehearing of the relevant arguments, *i.e.* because the principle of immediacy, as an important guarantee of fairness of the proceedings, was not complied with. In addition, 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 and Article 6(1) of the European Convention and of his right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention as the courts failed to assess the fact, which is relevant, that the appellant's property had been permanently seized by the defendant, i.e. the vehicle in question was at disposal of the defendant without court decision (the charges against the appellant had been dismissed and there existed no circumstance indicating that the requirements for retaining the vehicle in question were satisfied).

53. Having regard to Article 59(1) and (2) and Article 62(1) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of the present Decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP 1634/16

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Drago Lukenda from Široki Brijeg claiming that he was unlawfully deprived of liberty on 19 February 2016 by the members of the Ministry of the Interior of the West Herzegovina Canton, Široki Brijeg Police Administration

Decision of 1 December 2016

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18(2), Article 57(2)(b) and Article 59(1) and (2) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President,

Mr. Mato Tadić, Vice-President,

Mr. Zlatko M. Knežević, Vice-President,

Ms. Margarita Tsatsa-Nikolovska, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Having deliberated on the appeal of **Mr. Drago Lukenda**, in case no. **AP 1634/16**, at its session held on 1 December 2016 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Drago Lukenda is hereby granted.

A violation of the right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the process of depriving Mr. Drago Lukenda of liberty, undertaken on 19 February 2016 by the members of the Ministry of the Interior of the West Herzegovina Canton – Široki Brijeg Police Administration, is hereby established.

Reasoning

I. Introduction

1. On 8 April 2016, Mr. Drago Lukenda from Široki Brijeg („the appellant") lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") claiming that he was unlawfully deprived of liberty on 19 February 2016 by the members of the Ministry of the Interior of the West Herzegovina Canton, Široki Brijeg Police Administration („the PA").

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the PA was requested on 22 and 28 April 2016 to submit its respective reply to the appeal.

3. The PA submitted its reply on 29 April and 4 May 2016 respectively.

III. Facts of the Case

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

5. On 19 February 2016 the PA made an official record no. 02-2-8/1-4-72/16 regarding the circumstances of the disturbance of public order and peace at the closely specified location. It follows from the record that the authorized official persons, while acting on the report on the disturbance of public order and peace arrived to the designated location, but that, due to a physical obstacle, they were unable to reach the designated location where the appellant, the named employees of the Service for Urban Town Planning of the Municipality of Široki Brijeg, and B.M. and R.M. were. Since the authorized official persons were unable to hear, due to noise, the instructions of the aforementioned persons on how to cross over to the other side, they informed them in a loud voice in order to be heard that they should come to the PA official premises, in order to be able to take statements from them in relation to the report of disturbance of public order and peace. Since none of the mentioned persons responded to the call, the authorized official persons tried to find the crossing over to the other side and that is when they met the employees of the Service for Urban Town Planning, who informed them that the rest of the persons involved in the event had left. Thinking that the others might have left for the PA, they too went in that direction and thus saw the appellant in front of the family house of B.M. who, when asked why he did not go to the PA, answered „police what do you want" and headed towards the parked vehicle. Since they concluded that the appellant had the

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intention to leave the location where they were, the authorized official person issued a clear order to him to get in the official car, to which the appellant replied that he would not come with them and would not get in the car. After the order had been repeated several times for the appellant to get in the official car and after the appellant refused to do so, by using physical force and by handcuffing the appellant, the appellant was brought to the PA premises. Furthermore, the record noted that after being brought to the PA to the designated office, it was not possible to establish a normal contact with the appellant, because he was impudently making noise and shouting, despite the warnings by the present authorized official persons. Furthermore, it follows from the record that the appellant was then brought to the detention premises. Finally, the record noted that during the appellant's deprivation of liberty a person with the initials R.M., employed with the Municipal Court in Široki Brijeg showed up, and she shouted and said „take the thief away".

6. According to the records of PA no. 02-2-8/1-5-08/16 of 19 February 2016, at 13.55 hrs on the mentioned day the appellant was detained in the PA official premises by the authorized official persons, pursuant to Article 153(1) of the Criminal Procedure Code of FBiH („the FBiH CPC"), on the grounds for suspicion that he had committed a minor offense under Article 11 of the Law on Public Order and Peace. It follows form the record that the appellant, in terms of Article 5 of the FBiH CPC, *inter alia*, was informed of the reasons for his deprivation of liberty. The records carry the appellant's signature and the seal and signature of the authorized official person.

7. According to the PA records on the release of the detained person no. 02-2-8/1-5-08/16 of 19 February 2016, the appellant was released on the very same day at 21.50 hrs, pursuant to Article 153(3) of the FBiH CPC, as mentioned, due to the cessation of the reason for detention. The minuets carry the appellant's signature, as well as the signature of the authorized official person.

IV. Appeal

a) Allegations stated in the Appeal

8. The appellant asserts that his right 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") has been violated. The appellant indicates that he lodged the appeal „over continuous repetition of unlawful deprivation of liberty", stating that „persons holding positions in judicial authority use such positions to achieve unlawful objectives, thereby stopping at nothing to use the authorized official authorities to violate human rights and freedoms guaranteed under the

Constitution". The appellant asserts that his fundamental rights have been violated by the PA, which his neighbors have used to realize unlawful construction on the land over which his family has rights.

9. Furthermore, the appellant alleges that on 19 February 2016 he was deprived of liberty on the grounds for suspicion that he had committed a minor offense referred to in Article 11 of the Law on Public Order and Peace. In his opinion „the alleged minor offense" had not occurred at a public spot, but during the inspection of a private construction site, where, as a person authorized by the investor, he was attacked by neighbors, and that, although the mentioned minor offense did not occur, he was unlawfully deprived of liberty. Furthermore, the appellant alleges that R.M. is a judge of the Municipal Court in Široki Brijeg, and that she participated in his detention indicating that it was noted in the official record of the PA dated 19 February 2016. The appellant claims that during any unlawful construction and action the police would order appearance in person in the PA premises for „questioning" that would last until the completion of unlawful action. In support of these claims he presented the conclusion of the Administration for Inspection Work of 5 February 2016 wherefrom it follows that B.M. was ordered to remove objects built without building permit, the official record of the PA dated 12 April 2011 made upon the appellant's report related to the property and legal dispute with R.M. wherefrom it follows that the appellant was ordered to come to the PA in order to calm down the situation and to take a statement, which he did, that regarding the same circumstances an interview with R.M. was conducted, and the official record of the PA dated 7 November 2013 made upon the report by R.M. over the appellant's taking photos of her house, wherefrom, among other things, it follows that the appellant was called to report to the PA, which he did.

10. Finally, the appellant claims that also on 18 September 2015 he was deprived of liberty, taken in the PA official vehicle, detained at the PA for some time and released without questioning or any records whatsoever.

b) Reply to the appeal

11. In its reply to the appeal the PA alleges that it acted on 19 February 2016 upon the report by the Head of the Service for Urban Town Planning and Environment Protection of the Municipality of Široki Brijeg on the disturbance of public order and peace through a fight at the designated location. Furthermore, it was indicated that the authorized official persons, after reaching the scene, following a brief talk, invited the persons they found there on that occasion to come to the PA premises in order to establish facts in relation to the committed minor offense. The appellant failed to respond to the call or to comply with the duly issued order by police officers, in support of which references were made to the

official record of the PA of 19 February 2016. As a result he was arrested and brought to the official premises of the PA where he continued disturbing public order and peace by shouting and making noise. Also, it was indicated that the record on the deprivation of liberty over the committed minor offense under Article 11 of the Law on Public Order and Peace was served on the appellant, and the record on the release of the person deprived of liberty after the completion of the minor offense processing at 21.50 hrs.

12. Furthermore, it is indicated in the reply that on 3 March 2016 the PA filed a request with the Municipal Court in Široki Brijeg for the initiation of minor offense proceedings against B.M. over the committed minor offense referred to in Article 11(1)(a) of the Law on Public Order and Peace, and against the appellant over the committed minor offense referred to in Article 11(1)(a) and Article 12(1)(a) of the Law on Public Order and Peace.

13. Furthermore, it is indicated in the reply that on 12 April 2011 the PA acted upon the appellant's telephone report in relation to the property and legal dispute, on which occasion the appellant was summoned to the premises of the PA where an interview was conducted regarding the circumstances of the report and official record was made. Next, it is indicated that on 7 November 2013 the appellant was summoned to the premises of the PA for an interview regarding the circumstances of the report by R.M. Finally, it is indicated in the reply that based on the inspection of the available PA records no action was taken on 18 September 2015 concerning the appellant.

14. The PA submitted, along with the reply, the record on the deprivation of liberty and the record on the release of the person deprived of liberty drafted on 19 February 2016, the request for the institution of minor offense proceeding dated 3 March 2016, and the official record of 12 April 2011 and 7 November 2013.

15. It follows from the request for the institution of minor offense proceedings, which was submitted along with the reply to the appeal, that public order and peace were disturbed on 19 February 2016 at the designated location, in a way that firstly the first-reported B.M. approached the second-reported appellant who was with the employees of the Service for Urban Town Planning at the location where he planned to build a facility, which was located in the vicinity of the family house of the first-reported B.M., and started arguing with him regarding the circumstances of the construction of the facility, whereafter B.M. and the appellant started pushing and grabbing one another, fell to the floor, until they got separated by I.C. Furthermore, the request reads that during the activities of police officers the appellant disobeyed clear orders by police officers on several occasions to come to the PA official premises, and after police officers realized that the appellant intended to get into his personal vehicle and leave the scene, the police officers arrested the appellant by

using force and transported him in an official vehicle to the PA official premises. Finally, the request reads that, as described, B.M. and the appellant had committed the minor offense referred to in Article 11(1)(a) of the Law on Public Order and Peace, and the appellant had committed the minor offense referred to in Article 12(1)(a) of the Law on Public Order and Peace.

V. Relevant Law

16. The **Law on Public Order and Peace** (the basic text and amendments were taken over from http://www.skupstina-zzh.ba/opsirnije.asp?id=111) reads in the relevant part as follows:

Article 11

A fine in the amount ranging from BAM 400.00 to 800.00 will be imposed for a minor offense on:

a) a person who disturbs public peace and order in a public place by provoking, participating or aiding in a fight, abuse or a physical assault against another person,

(...)

Article 25
(Competence)

The Ministry of the Interior of the West Herzegovina Canton shall have competence for the implementation of the provisions of this Law.

17. The **Law on Minor Offenses** (*Official Gazette of FBiH*, 63/14) reads in the relevant part as follows:

Article 17
Deprivation of Liberty and Guarantees Ensuring Appearance and Payment of Fine

(1) Police officers or other authorized officials may deprive of liberty a person suspected of committing a minor offence, but must immediately, no later than within 12 hours, bring such a person before the court, in order to ensure his/her presence in court under the following circumstances:

1) *where a person refuses or is unable to disclose his/her identity; or*
2) *where a person is not domiciled in Bosnia and Herzegovina or is temporarily living outside the country and there is suspicion that he/she shall flee in order to evade responsibility for the minor offense; or*

3) where there is a danger that the person will either continue committing the minor offense or commit the same type of minor offense again.

(2) The Court is obligated to question the defendant without delay and no later than within 12 hours of the person being deprived of their liberty.

(3) Any such deprivation of liberty may be ordered only if the same purpose cannot be achieved by another measure and must be reasonable in view of the nature of the alleged offense and must take into account the age and other personal features of the person, so that the duration of detention is proportionate to the circumstances. Any person deprived of liberty in accordance with the provisions of this Article shall be informed as soon as possible, in a language which he understands, and in detail of the reasons for such deprivation of liberty and of the minor offense of which he/she is accused.

(4) In order to secure the appearance before the Court, the police or any other authorized body may require a person accused of committing a minor offense who is not domiciled in Bosnia and Herzegovina or who is temporarily living outside the country and who wants to leave Bosnia and Herzegovina before the conclusion of the procedure, or for whom there is suspicion that he/she might flee in order to avoid responsibility for the minor offense, to hand in his/her passport or other identity document until his/her appearance before the Court, though for a period not longer than 24 hours. The passport and other identity document shall be handed to the Court together with the minor offense order or request to initiate a minor offense procedure.

(5) In order to secure the payment of a fine, a person accused of a minor offense who is not domiciled in Bosnia and Herzegovina, or who is temporarily living outside the country and who wants to leave Bosnia and Herzegovina before the conclusion of the procedure, or for whom there is suspicion that he/she might flee in order to avoid responsibility for the minor offense, may be required by a judge to deposit a monetary guarantee equal to the maximum fine which can be imposed for such minor offense.

Article 18
Application of Provisions of the Criminal Code and Criminal Procedure Code of the Federation of Bosnia and Herzegovina

(...)

(2) If not otherwise prescribed by provisions of this Law, the following provisions of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09 and 12/10 - hereinafter the Criminal Procedure Code) shall be applied mutatis mutandis in the minor offense procedure: Chapter I entitled „Basic Provisions"; [...] Chapter VIII Section 1 entitled „Search of Dwellings, other Premises and Persons"; Chapter VIII Section 2 entitled „Temporary Seizure of Objects and Property"; Chapter

VIII Section 4 entitled „Questioning the Suspect"; Chapter VIII Section 5 entitled „Examination of Witnesses"; Chapter VIII Section 6 entitled „Crime Scene Investigation and Reconstruction of Events"; Chapter VIII Section 7 entitled „Expert Evaluation"; Chapter XI entitled „Submissions and Minutes"; […].

[…]

Article 108
Other cases of entitlement to compensation for damage

A person shall be entitled to compensation for damage in the event that:

1) he/she was detained in a minor offense procedure, and a procedure was suspended;

2) he/she was detained longer than stipulated by law due to an error or unlawful work on the part of a judge.

Article 111
Process of exercising one's right

(1) An authorized person has the obligation to address his/hers claim for the compensation for damage to the competent body, ministry or administration in charge of dealing with minor offenses in order to reach an agreement on the existence of damage and the amount of compensation.

(2) If an agreement is not reached within three months from the day of receiving the request, an authorized person may file a lawsuit with a competent court for the compensation for damage against the Federation of Bosnia and Herzegovina, canton, city or municipality, depending on which budget the fine was paid to, material gain seized, registered seized object or monetary value of the seized object.

(3) A claim for the refund is lodged with an administration body in charge of finances in accordance with paragraph (2) of this Article.

18. The **Law on Police Officers of the West Herzegovina Canton** (the basic text and amendments taken from: http://www.skupstina-zzh.ba/opsirnije.asp?id=111) reads in the relevant part as follows:

Article 9
Decisions and Orders for the Exercise of Police Powers

A police officer shall apply police powers based on one's own decision, in keeping with law, as well as based on a legitimate order by a superior officer or a competent body.

(...)

Article 10
Police Powers Prescribed by this Law

In addition to duties and powers prescribed by the CPC and other laws, this Law confers on police officers, namely police body, in order to prevent criminal offenses, minor offenses and maintaining public order and peace, the following powers:

(...)

2. of summonsing and conducting interviews;

3. of apprehension,

(...)

Article 15
Summonsing and Conducting an Interview

Whenever there is a legitimate reason a police officer may summons a person to come to the official premises of a police body for an interview.

Interviews shall be conducted between 6.00 hrs and 21.00 hrs and may not last more than six hours.

A summons for an interview must contain the following: name and surname of the person being summonsed, the name of organizational unit of a police body sending a summons for an interview, place, date, time and reason for summons, and a warning that a person being summonsed will be brought in under coercion if he/she fails to respond to the summons.

In exceptional cases, a police officer shall be authorized to summons a person verbally or by using a suitable telecommunication instrument, whereby he/she shall have the obligation to inform the person of the reason for summons, as well as to warn the person of a possibility to be brought in under coercion. With the consent of the person concerned, a police officer may bring him/her to the official premises.

Article 16
Apprehension without a Warrant

Without written warrant by a competent body, a police officer may bring to the official premises of a police body a person:

1. whose identity needs to be established, where there is no other way to do it;

2. concerning whom an investigation has been initiated officially;

3. who fails to respond to the summons for an interview referred to in Article 15 of this Law;

Detention referred to in paragraph 1 of this Article may last for as long as necessary to carry out a police action, and no longer than six hours.

Article 27
Conditions for the Use of Force

A police officer may use force solely when necessary and exclusively to the extent needed to pursue a legitimate goal. Unless otherwise provided by this Law, coercion means such as physical force including (...) tying means may be used when necessary to protect human life, to repel an assault, to overcome resistance, and to prevent flight.

(...)

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 18(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

21. In accordance with Article 18(2) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal even when no decision by a competent court exists, if the appeal points to serious violations of rights and fundamental freedoms safeguarded under the Constitution or international documents applicable in Bosnia and Herzegovina.

22. In the present case, the appellant essentially claims that his right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention has been violated. In support of these allegations the appellant particularly points to the event of 19 February 2016 when, police officers, by using force, brought him to the police station and, according to the records prepared on the same day, he was deprived of liberty on the grounds for suspicion that he had committed a minor offense referred to in Article 11 of the Law on Public Order and Peace, and was released on the same day, after being held for eight hours.

23. Given that the respective appeal points to serious violations of the rights under the Constitution of Bosnia and Herzegovina and the European Convention, and that

requesting the appellant to seek out the most effective way in specific circumstances of the present case to protect his right would result in excessive burden placed on the appellant, the Constitutional Court concludes that the respective appeal is admissible in terms of Article 18(2) of the Rules of the Constitutional Court (see, Constitutional Court, *mutatis mutandis*, *inter alia*, Decision on Admissibility and Merits no. *AP 3376/07* of 28 April 2010, Decision on Admissibility and Merits no. *AP 3080/13* of 16 March 2016, available on www.ustavnisud.ba). Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court, for there is neither formal reason rendering the appeal inadmissible, nor is it manifestly (*prima facie*) ill-founded.

24. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 18(1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that the relevant appeal meets the admissibility requirements.

VII. Merits

25. The appellant claims that his right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention has been violated.

The right to liberty and security of person

26. 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:

d) The right to liberty and security of person;

27. Article 5 of the European Convention, in the relevant part, 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;

b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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;

[...]

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

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.

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.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

28. In the present case the appellant alleges that on 19 February 2016 he was unlawfully deprived of liberty by police bodies, which resulted in the violation of his right under Article 5 of the European Convention.

29. It follows from the documents submitted to the Constitutional Court that on 19 February 2016 around 13.30 hrs, police officers, by using force (physical force and handcuffs) brought the appellant to the police station, for disobeying their verbal summons for him to come to the PA official premises to give a statement regarding the circumstances on a report on disturbance of public order and peace, that after he had been brought to the PA official premises, he was placed in the room designated for detained persons, and, finally, on the same day at 21.50 hrs, he was released.

30. The Constitutional Court recalls that according to the position of the bodies of the European Convention, bringing a person to a police station against the will of the person concerned and detention in a cell results in the deprivation of liberty, even when the deprivation of liberty lasted for a relatively short time (see, for example, *Murray v. The United Kingdom*, [GC], 28 October 1994, paragraph 49 ss., Series A no. 300A, in connection with detention in a military center for less than three hours of questioning; *Novotka v. Slovakia* (dec.), Application no. 47244/99, 4 November 2003 with further references, in connection with one hour spent in police detention; *Shimovolos v. Russia*, Application no. 30194/09, paras 49-50, 21 June 2011, in connection with police detention in duration of 45 minutes for questioning; *Witold Litwa v. Poland*, Application no.

26629/95, paragraph 46, ECHR 2000III, in connection with detention in duration of six hours and 30 minutes in the Sobering Up Center).

31. Bearing in mind the circumstances of the present case i.e. that the appellant was first and foremost brought in and then detained in the PA official premises designated for persons deprived of liberty against their will, and the mentioned positions of the bodies of the European Convention, it follows that, despite the detention lasting for eight hours, the appellant's deprivation of liberty falls under Article 5(1) of the European Convention.

32. The Constitutional Court recalls that Article 5(1) of the European Convention, first and foremost, requires for the deprivation of liberty to be „lawful". When it comes to lawfulness, including the question as to whether a procedure prescribed by the law is complied with, the European Convention, in essence, refers to national law and establishes the obligation to comply with substantive and procedural rules of national law. However, the compliance with the domestic law does not suffice, because Article 5(1) additionally requires that each deprivation of liberty be in compliance with the purpose of Article 5, i.e. the protection of an individual against arbitrariness. This does not concern solely „the right to liberty" but also „the right to security" (see, ECHR, *inter alia*, *Bozano v. France*, 18 December 1986, paragraph 54, Series A no. 111, *Wassink v. The Netherlands,* 27 September 1990, paragraph 24, Series A no. 185-A). The fundamental principle is that an arbitrary detention cannot be consistent with Article 5(1), and that the notion of „arbitrariness" in terms of Article 5(1) of the European Convention extends beyond the lack of conformity with the national law, so that a deprivation of liberty may be lawful in terms of domestic law, but still arbitrary and thus contrary to the European Convention (see ECHR, *Saadi v. the United Kingdom* (GC), no. 13229/03, paragraph 67, 29 January 2008).

33. Accordingly, the first question to be answered is whether the appellant's deprivation of liberty was in conformity with the substantive and procedural rules of domestic law.

34. The Constitutional Court observes that Article 9 of the Law on Police Officers of the West Herzegovina Canton stipulates that, among other things, a police officer shall exercise police powers based on one's own decision, in keeping with law. Article 10 of the same Law stipulates that police powers are, *inter alia*, summonsing and conducting interviews, and apprehension. In accordance with Article 15 of the same Law, whenever there is a legitimate reason a police officer may summons a person to come to the official premises of a police body for an interview. The same article stipulates the content of the summons for an interview. Also, the mentioned article prescribes a possibility for a police officer to verbally summons a person in exceptional cases, whereby he/she has the obligation to inform the person of the reasons for summons, as well as to warn the person of a possibility

to be brought in under coercion. According to Article 16 of the same Law, a police officer may, without written warrant by a competent body, bring to the official premises of a police body a person who, among other things, fails to respond to the summons (verbal or written alike) referred to in the cited Article 15 of the Law on Police Officers of the West Herzegovina Canton. Furthermore, in accordance with Article 27 of the same Law, a police officer may use force solely when necessary in order to pursue a legitimate goal. Namely, coercion, such as physical force and tying means may be used when necessary to protect human life, to repel an assault, to overcome resistance, and to prevent flight. Finally, whether it concerns summonsing and conducting interviews within the meaning of Article 15 or apprehension without warrant within the meaning of Article 16 of the Law on Police Officers, an interview or detention may last no longer than six hours.

35. The Constitutional Court observes that the appellant, as well as other participants in the disputed event, were verbally summonsed to come to the PA in order to make a statement. It is not clear how police officers established that the participants in the disputed event, including the appellant, understood the summons. Namely, as stated in the official record, the authorized official persons „were unable, due to noise, to hear the instructions" on how to reach the place where the disputed event occurred and where the participants in the disputed event were at the time when police officers summonsed them to come to the PA in order to deposit statements.

36. Furthermore, as it follows from the official record, on their way back to the PA authorized official persons met the employees of the Service for Urban Town Planning, who informed them that the rest of the participants in the event had left. Based on the official record it is not possible to conclude that the authorized official persons had repeated the summons to the employees of the Service for Urban Town Planning to come to the PA, or that the employees informed the police that they were on their way to the PA in order to make statements. Furthermore, after this encounter, authorized official persons also met the appellant who, according to the official record, when asked by them as to why he did not go to the PA, answered the authorized official persons „police, what do you want, and other words they did not hear", he then turned his back to them and walked towards a car parked in the near vicinity. According to the official record, the authorized official persons, upon seeing that the appellant had the intention to leave the place where they were, „issued a clear order to the appellant to get into the official vehicle and not to create problems, to which the appellant answered that he would not get into the vehicle and that he would not come with them". After repeating the order a number of times for the appellant to sit in the official vehicle, which the appellant disobeyed, they used coercion against the appellant, physical force and they handcuffed him, and then he was brought in the official premises.

37. The Constitutional Court observes that it is not possible to conclude based on the official record as well as the answers to the allegations stated in the appeal what the exceptional situation was so as to indicate a need to verbally summons the appellant to come to the police station, instead of doing it by sending a summons in writing stating the place, date and time of summons, the reasons for summons, and a warning that in the event of failing to comply with the summons he may be forcibly brought in, which the Law on Police Officers of the West Herzegovina Canton prescribes as a rule. Namely, at the time when the verbal summons to the appellant to come to the PA was repeated, the disputed event had already been over, police officers did not have to establish the appellant's identity, and no investigation was initiated officially against the appellant. Furthermore, the official record reads that the appellant, upon being summonsed to come with them to the PA, answered „police, what do you want, and other words they did not hear", that is to say that „he did not want to enter the vehicle and that he did not want to come with them" but that the official record did not read that the appellant refused to come on his own to the PA as requested from him in the verbal summons addressed by authorized official persons. All the more so because the disputed event had already been over and the parties thereto „having had left", as stated in the official record, thus it cannot be concluded that the present case was about preventing the flight. Also, it is not possible to conclude why the authorized official persons did not take the statement from the appellant at the spot where they met him, or conducted an interview. Finally, irrespective of whether the specific situation falls under summonsing and interview conducting or apprehension without a warrant within the meaning of the powers of police officers referred to in the Law on Police Officers, it could not last over six hours. According to the presented records, the appellant was arrested on 19 February 2016 at 13.55 hrs and was released on the same day at 21.50 hrs, i.e. the detention lasted for eight hours, namely two hours longer than allowed for an interview or apprehension without a warrant to last.

38. Accordingly, the Constitutional Court cannot conclude that in the circumstances of the present case exceptional circumstances existed indicative of the need to verbally summons the appellant for an interview at the PA, i.e. to apprehend the appellant without a warrant. Also, based on the circumstances of the present case it is not possible to conclude and no reasons were offered in that regard that show why the appellant's detention in the PA lasted for over six hours.

39. Furthermore, it follows from the official record that the appellant, having been brought to the PA official premises under coercion, „shouted and made noise and that it was not possible to establish contact with him as he was impudent and brazen despite warnings by the present police officers, whereafter he was taken to the premises designated

for detention". In the reply to the appeal the PA characterized the appellant's behavior as a continuation of the disturbance of public order and peace. Based on the record on the deprivation of liberty it follows that the appellant was deprived of liberty on the grounds of suspicion that he had committed a minor offense under Article 11 of the Law on Public Order and Peace.

40. The Constitutional Court observes that Article 17 of the Law on Minor Offenses stipulates that a police officer may, upon request of an authorized official person, deprive of liberty a person suspected of committing a minor offense, but must immediately, no later than within 12 hours, bring such a person before the court, in order to ensure his/her presence in court under the following circumstances: where a person refuses or is unable to disclose his/her identity, or where a person is not domiciled in BiH or is temporarily living outside the country and there is a suspicion that he/she shall flee in order to evade responsibility for the minor offense, or where there is a danger that the person will either continue committing the minor offense or committing the same type of minor offense again. The same article stipulates that such deprivation of liberty may be ordered only if the same purpose cannot be achieved by another measure and must be reasonable and in compliance with the nature of the alleged offense and must take into account the age and other personal features of the person, so that the duration of detention is proportionate to the circumstances. Finally, any person deprived of liberty must be informed as soon as possible, in a language which he/she understands, and in detail, of the reasons for such deprivation of liberty and of the minor offense of which he/she is accused.

41. According to the mentioned provision it follows that in order for the deprivation of liberty to be legitimate it is necessary for the general requirement to be met i.e. that there are grounds for suspicion that a minor offense had been committed, along with the cumulative existence of one of the special conditions enumerated in the mentioned article.

42. In the present case, as it follows from the record on the deprivation of liberty of the appellant, the appellant was deprived of liberty on the grounds of suspicion that he had committed a minor offense referred to in Article 11 of the Law on Public Order and Peace. It is indisputable in the present case that the appellant had been at the scene where the public order had been disturbed, i.e. that he had been one of the participants in the disputed event, which was characterized as the disturbance of public order and peace, regarding which police officers took action, which can be considered as sufficient for a conclusion to be made on the existence of grounds of suspicion. However, the records on the deprivation of liberty, as well as the reply to the allegations stated in the appeal, mention not a single special condition as prescribed by Article 17(1) of the Law on Minor Offenses, which

were met in the present case. Also, it is not possible to conclude from the documents presented to the Constitutional Court that the appellant was in any way familiar with them, as stated in Article 17(3) of the Law on Minor Offenses (which prescribes that *any person deprived of liberty in accordance with the provisions of this Article shall be informed as soon as possible, in a language which he understands, and in detail of the reasons for such deprivation of liberty and of the minor offense of which he/she is accused)*. In that sense, the allegation stated in the official record that „it was not possible to establish contact with the appellant because he was impudent and brazen, where he shouted and made noise" cannot be subsumed under any of the special conditions under Article 17 of the Law on Minor Offenses (three conditions: *where a person refuses or is unable to disclose his/her identity; where a person is not domiciled in Bosnia and Herzegovina or is temporarily living outside the country and there is a suspicion that he/she shall flee in order to evade responsibility for the minor offense, or where there is a danger that the person will either continue committing the minor offense or committing the same type of minor offense again*).

43. Furthermore, in order for the deprivation of liberty to be lawful in accordance with Article 17 of the Law on Minor Offenses, it must be carried out for the purpose of bringing a person before a court immediately and within 12 hours at the latest. In the present case, the appellant was not brought before a court immediately and was released eight hours later, which is how long the deprivation of liberty lasted so that the time limit of 12 hours was not exceeded, within which a person deprived of liberty must be brought before a court at the latest. However, based on documents presented before the Constitutional Court, it is not possible to conclude that the appellant's deprivation of liberty was necessary in order to secure his bringing before a court, i.e. that this purpose could not be achieved by any other measure. Namely, the PA lodged the request for the institution of a minor offense procedure against the appellant with the Municipal Court in Široki Brijeg on 3 March 2016, and the appellant's deprivation of liberty took place on 19 February 2016. Also, as already indicated in this decision, despite the fact that the 12-hour period was no exceeded, based on documents presented to the Constitutional Court, it is not possible to conclude, despite the existence of grounds for suspicion, which of the special conditions prescribed by Article 17 of the Law on Minor Offenses went into effect, or that the appellant was made aware of them.

44. In view of the aforementioned, the Constitutional Court holds that, in the circumstances of the present case, the procedure prescribed by law was not complied with due to the omission on the part of police organs to establish, and to inform the appellant, at the time of the deprivation of liberty, of the existence of any of the special conditions prescribed

by Article 17 of the Law on Minor Offenses, in addition to the existence of the grounds for suspicion that he had committed the specific minor offense, which conditions must be met cumulatively, and that the appellant's deprivation of liberty was a necessary measure in order to achieve the purpose of the deprivation of liberty as established under the cited legal provision, i.e. the appearance before a court.

45. The Constitutional Court concludes that there has been a violation of the appellant's right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention.

Other allegations

46. The appellant claims that on 18 September 2015 too he was deprived of liberty, taken away in the PA official vehicle, detained for some time at the PA and released without questioning and any sort of records. In the reply to this part of the appellant's allegations the PA indicated that upon the inspection of the available records of the PA it was established that there was no activity on 18 September 2015 concerning the appellant. Accordingly, and bearing in mind that both the appellant and the PA submitted identical official records on dealing with the appellant from 2011 and 2013, the Constitutional Court, given the lack of any evidence whatsoever suggesting a different conclusion, could not accept as well-founded the appellant's allegations in this part.

VIII. Conclusion

47. The Constitutional Court concludes that there has been a violation of the right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention as the deprivation of liberty in the circumstances of the present case was not „lawful", since it was not undertaken in compliance with the substantive and procedural rules of the national law.

48. Pursuant to Article 18(2), Article 59(1) and (2) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of the present decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Case No. AP 548/17

DECISION ON ADMISSIBILITY AND MERITS

Appeal of the Republika Srpska against the verdicts of the Court of Bosnia and Herzegovina nos. S1 3 P 016159 16 Rev of 24 November 2016, S1 3 P 016159 Gž 15 of 27 July 2016 and S1 3 P 016159 14 P of 3 July 2015

Decision of 6 July 2017

CONTENTS

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

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru

Ms. Valerija Galić

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Mr. Giovanni Grasso

Having deliberated on the appeal of the **Republika Srpska** in the Case no. **AP 548/17**, at its session held on 6 July 2017 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of the Republika Srpska lodged against the verdicts of the Court of Bosnia and Herzegovina nos. S1 3 P 016159 16 Rev of 24 November 2016, S1 3 P 016159 15 Gž of 27 July 2016 and S1 3 P 016159 14 P of 24 May 2016 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 8 February 2017, the Republika Srpska („the appellant"), represented by the Public Attorney's Office of the Republika Srpska – the seat of the Deputy in Istočno

Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court"), against the verdicts of the Court of Bosnia and Herzegovina(„the Court of BiH") nos. S1 3 P 016159 16 Rev of 24 November 2016, S1 3 P 016159 Gž 15 of 27 July 2016 and S1 3 P 016159 14 P of 3 July 2015. The appellant also filed the request for an interim measure, whereby the Constitutional Court would suspend the execution of the mentioned verdict of the Court of BiH of 3 July 2015 in the part of the verdict in which the right of ownership of Bosnia and Herzegovina was established with regards to the real properties registered in the temporary land registry sheet and specified in the verdict, and in the part of the verdict of the Court of BiH of 27 July 2016, whereby the Republic Administration for Geodetic and Property Legal Affairs („the Republic Administration") is ordered to register the right of ownership of Bosnia and Herzegovina („the plaintiff") over the mentioned real properties and to erase the registration of all rights of the appellant over the mentioned real properties pending the adoption of the decision on the appeal.

II. Procedure before the Constitutional Court

2. The Constitutional Court adopted the Decision no. *AP 4106/16* of 23 November 2016 whereby the appellant's appeal filed against the Verdict of the Court of BiH no. S1 3 P 016159 Gž 15 of 27 July 2016 was rejected as premature for the reason that the proceeding upon the appellant's petition for review was not concluded.

3. The Constitutional Court adopted the Decision no. *AP 548/17* of 28 February 2017, whereby it dismissed the appellant's request for an interim measure as ill-founded.

4. Pursuant to Article 23 of the Rules of the Constitutional Court, the Court of BiH and the Ministry of Defense of BiH („the plaintiff") were requested on 20 February 2017 to submit their respective replies to the appeal.

5. The Court of BiH submitted its reply on 24 February 2017 and the plaintiff did so on 3 March 2017.

III. Facts of the Case

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

7. The Verdict of the Court of BiH no. S1 3 P 016159 14 P of 3 July 2015 granted the claim of the plaintiff and established the right to property of Bosnia and Herzegovina over the real properties registered in the temporary land registry sheet precisely specified in the verdict („the real properties"), which, in nature, consist of the building of the Ministry of Defence and a pasture of the 4th class of 11, 474.00 m2 of total surface area (paragraph

1). The Verdict ordered the Republic Administration to register the ownership rights over the real properties in the name of Bosnia and Herzegovina and to erase the registration of all rights of the appellant - the Public Company „Šume Republike Srpske" a.d. Sokolac („the second defendant") and „M:tel" a.d. Banja Luka („the third defendant") over the mentioned real properties from the land registry sheets specified in the verdict (paragraph 2). The verdict obligated the appellant, the second defendant and the third defendant to bear the registration of the plaintiff in the cadastre of real properties of the Republic Administration as a holder of the ownership right over the real properties specified in the verdict and to erase all registered rights of the defendants over the real properties in question (paragraph 3). The verdict also obligated the appellant, the second defendant and third defendant to reimburse to the plaintiff the costs of the proceeding in the amount specified in the verdict.

8. It was stated in the reasons for the decision that the real property in question belonged to the State Secretariat of National Defence of SFRY, and that based on the provisions of Article 1 of the Law on Temporary Prohibition of Disposal of the State Property of BiH („the Law"), the definition of the state property was given, so that such property implies the state property of BiH that is the subject of the distribution of the property of the former SFRY; that based on the Agreement on Succession Issues relating to the former SFRY („the Agreement"), Annex A, Articles 2 and 7, the respective real property, as state property of the former SFRY located in the territory of BiH, was transferred to the ownership of BiH on 1 March 1992, when BiH proclaimed its independence and, accordingly, the right of ownership at the given location is enjoyed by the State of BiH. Therefore, any opposite disposal or change of registration, based on the previously mentioned regulations is unlawful. It is stated that based on the relevant provisions of the Law on Defense of BiH and the decision of the Presidency of BiH on the size, structure and locations of the Armed Forces of BiH, the real property in question was defined as „promising military location, which cannot be given into possession and for use to any subject that is not in charge of defence issues", and which can be handed over only to the Ministry of Defence of BiH. According to the reasons given by the Court of BiH, on 26 September 2006, the High Representative for BiH issued a Decision on Amendments to the Law. It was reasoned that the relevant part of the mentioned decision reads as follows: „Part of the State property which shall continue to be used for the needs of defence on the basis of and in accordance with Articles 71-74 of the Law on Defence of BiH shall also be exempted from the temporary Prohibition proclaimed by this Law." It was also stated that the Decision of the Constitutional Court of BiH no. *U 1/11* noted that the State of BiH is competent to resolve the issues of state property, which also arises from Article IV(4) (e) of the Constitution of BiH, and that it is primarily the State of BiH which is entitled to continue regulating the State property, i.e. that it is the title holder of the ownership

over the State property. The Court of BiH stated that the appellant's objections that that court lacks jurisdiction to deal with the case at hand are ill-founded as the jurisdiction of the Court of BiH to deal with this and similar cases is stipulated by Article 1 of the Civil Procedure Code before the Court of BiH, which, *inter alia*, stipulates that the Court of BiH shall deal with the property related disputes between the State of BiH and Entities.

9. The appellant, the second defendant and the third defendant lodged the complaints against the mentioned verdict with the Court of BiH (the second instance panel), which rendered a Verdict no. S1 3 P 016159 15 Gž of 27 July 2016, dismissing the complaint of the appellant and upholding the first instance verdict in the part in which the right of ownership of BiH over the real properties in question was established and the Republic Administration was ordered to register the ownership rights in the name of BiH regarding the real properties in question and to erase the registration of all rights of the appellant regarding the real properties in question and the appellant is obligated to accept that fact. This verdict granted the complaints of the second defendant and third defendant and quashed the part of the first instance verdict related to erasing all registered rights of these defendants over the real properties in question from the title deeds specified in the verdict. Therefore, the Court of BiH declared itself as not having the jurisdiction and all previously conducted actions were quashed and that part of the claim was rejected. Moreover, the complaints of the second defendant and third defendant were granted by the verdict and the part of the first instance verdict was modified, wherein the defendants were requested to bear the registration of the plaintiff in the cadastre of the real properties of the Republic Administration as a holder of the ownership right over the real properties in question by way of dismissing this part of the claim. By the said verdict the decision on the costs was modified as precisely stated in the verdict and the appellant was ordered to fulfil all obligations arising from this verdict within the time-limit of 30 days from the day of delivery of the second instance verdict. As regards the complaint of the appellant, it was stated in the reasons for the decision that the court accepts all reasons given by the court of first instance in the challenged verdict, as a result of which the complaint of the appellant is considered ill-founded. As regards the complaints of the second defendant and third defendant, it was stated that they are justified since these defendants lack the standing to be sued as they were not registered as title holders over the real properties in question.

10. The appellant filed the petition for review against the mentioned verdict with the Court of BiH (the Review Panel), which rendered the Verdict no. S1 3 P 016159 16 Rev of 24 November 2016 and dismissed the petition for review as ill-founded while accepting the legal position of the lower instance courts. It was stated in the reasons, *inter alia*, that there is no ground for the motion for review by the appellant with regards to the issue of standing to sue because, as stated by the appellant, the real properties in question fall within

the scope of properties under the prohibition of disposal. The Court of BiH stated that it is true that Article 1 of the Law stipulates the prohibition of disposal of the state property. However, Article 3(3) of the Law Amending the Law excluded from the temporary prohibition imposed by this Law the portion of the state property which will continue to be used for the purposes of defence. The reasons given by the second-instance court with regards to the military property are granted in entirety by the reviewing panel, as clear and specified reasons were produced. In the opinion of the court, the present case concerns the military property having the character of promising property in military terms of the Ministry of Defence of BiH, and is related to the Stationary and Communication Nods, Veliki Žep, Municipality of Han Pijesak, in accordance with the BiH Presidency's Decision on the size, structure and locations of the Armed Forces of BiH, dated 18 April 2012, which, based on the decision of the Council of Ministers dated 23 October 2014, by means of a Rulebook, regulated the conditions and the procedure for renting out the resources of the Stationary and Communication Nods referred to in the BiH Presidency's decision to other users, and the manner of access to them. Unlike the appellant's opinion, the Court of BiH pointed out that there are no grounds for claiming that the Commission for the State Property is the only competent authority to establish whether that property is subject to the prohibition of disposal, the reason being that the amendments to the Law regulate the property excluded from disposal, the aim of which was obviously the enforcement of the Law on Defence of BiH with regards to the transfer of property rights and obligations on the so-called promising military property determined in the BiH Presidency's Decision.

11. Furthermore, the Court of BiH reasoned that the appellant wrongly interprets Annex A to the Agreement, which was ratified on 2 June 2004 and which has the character of an international treaty, wherein the movable and immovable property was transferred to the successor states in the manner that the immovable property referred to in Article 2 which was on the territory of the SFRY was transferred to the successor states, on the territory of which the property was located and that is the plaintiff in this case, and not to the subject on the territory of which the immovable property is located and that is the appellant in this case. The fact that the mentioned provision cannot be interpreted differently, in the opinion of the Court of BiH, derives from Article 7 of the Agreement, wherein the ownership right is transferred to one of the successor states as of the day of the declaration of independence, i.e. 1 March 1992 in the present case, when BiH declared the independence, so that the legal ground and other rights related to that property of any of the successor states will be considered null as from that date. It was reasoned that the Law on Defence entered into force after the Agreement, which has been applicable as of 1 January 2006. The provisions of Articles 71-73 of that Law prescribe that a list of immovable property used for the purpose of defence at all levels will be made. Article 73(2) of the mentioned Law prescribes a time limit for signing the agreement not later

than 31 December 2005, for the termination of disposal of all rights and obligations with regards to the movable and immovable property. Given that the Agreement on the transfer of property rights was not signed and that the real properties which belonged to the State Secretariat of Peoples' Defence of SFRY were registered as ownership of the Ministry of Defence – the appellant, for which obligations the RS Government is still responsible, the Court of BiH is of the opinion that the plaintiff's claim to determine the ownership right of the plaintiff is justified, for the purpose of the registration of the ownership right acquired by ratification of the Agreement.

12. The Court of BiH stated that Article I(3) of the Constitution of BiH defines the structure of Bosnia and Herzegovina as a State composed of two Entities and, in addition, of the Brčko District of BiH which exists as a separate local self-government unit; that the Constitutional Court, in its Decision no. *U 1/11*, pointed out that although Article III, paragraph 3 of the Constitution of BiH prescribes that all governmental functions and powers not expressly assigned in this Constitution to the Institutions of BiH will be those of the Entities, the same Article establishes a clear normative hierarchy between the State Constitution and the Entity legal system; that each level of the government has its own competences; that 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; that the term „Bosnia and Herzegovina", under the Constitution, implies the entire state as a subject of international law and the aforesaid follows from the line 6 of the Preamble of the Constitution of BiH, and Articles I(1), II(7) and VIII(1) of the Constitution of BiH, from which it clearly follows that the term „Bosnia and Herzegovina" under the Constitution of BiH includes several meanings: the highest level of the government in BiH called the government at the level of Bosnia and Herzegovina; Bosnia and Herzegovina as a subject of international law, *i.e.* as a legal state, and as the legal successor of the Republic of Bosnia and Herzegovina and Bosnia and Herzegovina. It is furthermore stated that that the Constitutional Court of BiH in its Decision no. *U 1/11*, in paragraph 72, *inter alia*, stated that „it can be useful 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, under the Agreement, the State of Bosnia and Herzegovina was conferred with the state property mentioned in that agreement, *i.e.* that Bosnia and Herzegovina is the title holder of that property. Accordingly, the State property reflects the statehood, sovereignty and territorial integrity of Bosnia and Herzegovina".

13. The Court of BiH stated that, because of the aforementioned, there is no ground to claim that the challenged decision resulted in the violation of Article I(3) of the Constitution of BiH, or that the granting of the plaintiff's claim resulted in the reduction

of the territory of the appellant by the surface area determined in the enacting clause of the verdict. Namely, as it was reasoned, the claim sought to determine the right of ownership of the plaintiff over the real property in question. In the opinion of the Review Panel, that does not in any way mean the reduction of the territory of the Entity - the appellant, but only the establishment of the fact as to who the title holder of the mentioned property is. The respective real property, as a state property of the former SFRY located in the territory of Bosnia and Herzegovina, according to the reasons adduced by the Court of BiH, was transferred and became the ownership of the appellant on 1 March 1992, i.e. on the day when BiH declared its independence. Therefore, according to the reasons of that court, the right of ownership on the given location is enjoyed by the plaintiff. Bearing in mind the aforesaid, the Court of BiH rendered the verdict as stated in the enacting clause.

IV. Appeal

a) Allegations stated in the appeal

14. The appellant considers that the challenged judgements 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"), and the right under Article II(1), (3) and (5) of the Constitution of Bosnia and Herzegovina. The appellant sees the violation in the erroneously established facts and arbitrary application of the substantive law. The appellant is of the opinion that the courts should not have allocated the real properties in question to the plaintiff, since only the commission made up of the representatives of all levels of the government, on the basis on the agreement on distribution of the state property in the territory of BiH, could have decided the issue of the distribution of the property such as the mentioned property. That has never been done as the agreement has never been made. Moreover, the appellant states that in the case at hand there was no ground for the application of the Agreement as that is the international agreement, which does not regulate the issue of the distribution of property within the levels of the government of the newly established states. The appellant states that there are the letters, which content is interpreted in the appeal and in which the High Representative addresses the Public Attorney's Office of BiH warning them to stop registering the property of the former SFRY in the name of BiH, as that violates the provisions of the Law on Prohibition of Disposal of Property. The appellant also holds that only in this case it was possible to apply the provisions of Article 71 of the Law on Defence of BiH, which clearly specifies that the legal basis for the distribution of property within BiH will be the agreement which, as already stated, has never been signed. Moreover, the appellant stated that it was unsuccessfully pointing out in the course of the proceeding that the position of the

Constitutional Court presented its Decision in the case no. *U 1/11* cannot be applied to this case, as the case no. *U 1/11* dealt with the issue of the registration of property in the appellant's name, as, in that way, its property received under the Dayton Agreement is being taken away and that is in contravention of the Decision of the Constitutional Court no. *U 5/98*. The appellant also considers that the Court of BiH lacks jurisdiction. The appellant also considers that the Court of BiH lacks jurisdiction in the case at hand, since the Basic Court in Vlasenica has exclusive jurisdiction given that the real properties in question are located in the territory covered by the jurisdiction of that court.

b) Reply to the appeal

15. The Court of BiH stated that there was no violation of the rights in the relevant proceeding that the appellant refers to and that the appeal should be dismissed as ill-founded.

16. The plaintiff stated that there was no violation of the rights the appellant referred to and that, for the said reason, the appeal is considered ill-founded. She also said that it is indisputable that in its Decision no. *U 1/11* the Constitutional Court established the exclusive jurisdiction of BiH to decide the status of property under Article 2 of the Law, and that the appellant, in the present appeal, reiterates in entirety the allegations presented in the proceeding in the case no. *U 1/11*. The plaintiff stated that the allegation of the appellant is unfounded in that it read that concerning the resolution of property issues the Commission for State Property has competence, since the competence of the Court of BiH concerning the property-related disputes between the State and the Entities unambiguously follows from the Civil Procedure Code before the Court of BiH given that the case at hand concerns the issue of a property dispute between the State of BiH and the Entity of the Republika Srpska.

V. Relevant Law

17. The **Agreement on Succession Issues of Former SFRY**, as relevant reads:

Annex A

MOVABLE AND IMMOVABLE PROPERTY

Article 1

(1) In order to achieve an equitable solution, 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 fol1owing Articles of this Annex.

(2) Other proprietary rights and interests of the SFRY are covered by Annex F to this Agreement.

(3) Private property and acquired rights of citizens and other legal persons of the SFRY are covered by Annex G to this Agreement.

Article 2

(1) 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.

(2) The successor States shall use their best endeavours to assist each other with the exercise of their diplomatic and consular activities by the provision of suitable properties in their respective territories.

Article 7

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.

18. The **Law on Defence** (*Official Gazette of BiH*, 88/05 and 95/05), as relevant reads:

Article 71
(Transfer of Immovable Property)

(1) On the day of the entry into force of this Law, the Ministry of Defence and the entity ministries of defence shall begin compiling all data on immovable property into an inventory list of immovable property used for defence purposes, for which the rights of management, disposal, use, or ownership are held by the Bosnia and Herzegovina Federation, the Government of the Republika Srpska, the Government of the Bosnia and Herzegovina Federation, defence ministries, the Army of the Republika Srpska, the Army of the Bosnia and Herzegovina Federation or another body of Bosnia and Herzegovina, or any administrative subdivision thereof (hereinafter referred to as: Immovable Property). The competent institutions shall deliver the comprehensive inventory lists of Immovable Property to the Ministry of Defence within sixty (60) days of the entry into force of this Law, but no later than 31 December 2005.

(2) Within thirty (30) days from the delivery of the comprehensive inventory list of Immovable Property, the Expert Team shall propose to the Minister of Defence a plan for the final status of all Immovable Property that will continue to serve defence purposes in accordance with valid regulations.

(3) On 1 January 2006, the Ministry of Defence shall begin to use and enter in possession of all Immovable Property from paragraph (2) of this Article.

Article 72
(Transfer of Other Rights and Obligations)

(1) Within 30 days of this Law's entry into force, the Ministry of Defence and the entity ministries of defence shall make a comprehensive inventory list of other rights and obligations of the former entity ministries of defence, as of 1 January 2006, and propose a plan for the transfer of other rights and obligations to the Ministry of Defence.

(2) Unless otherwise determined by the plan for the transfer of other rights and obligations from paragraph (1) of this Article, approved pursuant to Article 73 of this Law, the entity governments shall remain accountable for all debts, encumbrances and other liabilities of entity ministries of defence incurred by 1 January 2006.

(3) The governments of the entities shall not be entitled to compensation, contribution or indemnification from Bosnia and Herzegovina in relation to the transfer of other rights and obligations, except as authorized by the Council of Ministers of Bosnia and Herzegovina or Parliamentary Assembly.

Article 73
(Agreement on Transfer of Property Rights)

(1) The Ministry of Defence shall present the plan for the final takeover of the property from Article 70, paragraph (3); Article71, paragraph (3); and Article 72 to the Council of Ministers of Bosnia and Herzegovina for approval.

(2) Upon the approval by the Council of Ministers of Bosnia and Herzegovina and within a period of sixty (60) days, but no later than 31 December 2005, the Ministry of Defence shall submit agreements, decisions, resolutions or other relevant instruments required for the final takeover of all rights and liabilities related to the movable and immovable property to the Council of Ministers of Bosnia and Herzegovina, and Republika Srpska and Bosnia and Herzegovina Federation governments for signature.

Article 74
(Prohibition on Free Use of Property)

1) Any free use of the property from Articles 70, paragraph (3), 71, paragraph (3) and 72 of this Law, shall be prohibited from the day of this Law's entry into force until the effective day of an agreement, decision, resolution or another relevant instrument from Article 73 of this Law, finalizing the transfer of property rights from the former entity defence ministries to the Ministry of Defence.

19. The **Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina** (*Official Gazette of BiH*, 29/06), as relevant reads:

Article 1

This Law prohibits the disposal of State Property.

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

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

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

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

Article 2

Notwithstanding the provisions of any other law or regulation, State Property may be disposed of only in accordance with the provisions of this Law.

Any decision, act, contract, or other legal instrument, disposing of property referred to in Article 1 of this Law concluded contrary to provisions of this Law, after its entry into force, shall be null and void.

Article 3, paragraph 2

Assets and rights of enterprises, registered as such, which are subject to privatization pursuant to the Framework Law on Privatization of Enterprises and Prohibitions in Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina no. 14/98 and 14/00), and applicable regulations thereunder, shall be exempt from the prohibition under this Law.

Additionally, the State Property Commission established by the Decision of the Council of Ministers of Bosnia and Herzegovina („Official Gazette of Bosnia and Herzegovina", No. 10/05, hereinafter: „the Commission") may, upon the proposal of an interested party, decide to exempt certain State Property from the prohibition imposed by this Law.

Article 4

The temporary prohibition on the disposal of State Property in accordance with this Law shall be in force until entry into force of the law regulating implementation of criteria to be used for identification of property owned by Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District of Bosnia and Herzegovina, and specifying the rights of ownership and management of State Property, which shall be enacted upon the recommendations of the Commission but not later than one year from the day of the entry into force of this Law.

20. The **Law Amending** the **Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina** (*Official Gazette of BiH*, 85/06), as relevant reads:

Article 1

In Article 3, following paragraph 2 a new paragraph is inserted, which reads:

The portion of State Property that will continue to serve defence purposes, pursuant to and in accordance with Articles 71-74 of the Law on Defence of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, no. 88/05) shall also be exempt from the temporary prohibition imposed by this Law.

21. The **Civil Procedure Code before the Court of BiH** (*Official Gazette of BiH*, 36/04, 84/07, 58/13), as relevant reads:

(1) This Law determines the rules of procedure before the Court of Bosnia and Herzegovina („the Court") in resolution of property disputes (civil procedure) between the State of Bosnia and Herzegovina („the State") and the Entities, between the State and the Brčko District of Bosnia and Herzegovina („the District"), between the Entities, between the Entities and the District and between the institutions of Bosnia and Herzegovina, which are interrelated with the exercise of public functions.

(2) The provisions of this Law shall apply to property disputes arising from the damage caused in the course of performance of the tasks by the administration of Bosnia and Herzegovina, including other institutions of Bosnia and Herzegovina and official persons of those bodies and institutions.

(3) The provisions of this Law shall apply to other property related disputes where the jurisdiction of the Court is determined by the laws of Bosnia and Herzegovina or international agreement.

22. The **Civil Procedure Code** (*Official Gazette of RS*, 58/03, 85/03, 74/05, 63/07, 49/09, and 61/13), as relevant reads:

Jurisdiction in Real Estate Disputes

Article 42

The court on whose territory the real property is located shall have the exclusive jurisdiction for adjudicating disputes involving ownership rights and other substantive rights in or over real estate, disputes involving trespass to real estate and disputes involving rent or lease of real estate, as well as disputes arising from contracts on the use of apartment or business premises.

Where real estate is located on the territory of several courts each court on whose territory such real estate is located shall be competent.

VI. Admissibility

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

24. Pursuant to Article 18(1) of the Rules of the Constitutional Court, the Court shall examine an appeal only if all effective remedies available under the law against a judgment or a decision challenged by the appeal have been exhausted and if the appeal is filed within a time limit of 60 days as from the date on which the appellant received the decision on the last effective remedy she used.

25. In the present case, the subject-matter of the appeal is the Verdict of the Court of BiH no. S1 3 P 016159 16 Rev of 24 November 2016, against which there are no other effective remedies available under the law. Furthermore, the appellant received the challenged verdict on 27 December 2016 and the appeal was lodged on 8 February 2017, *i.e.* within the 60-day time limit provided for by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements set out in Article 18(3) and (4) of the Rules of the Constitutional Court, because there is neither a formal reason rendering the appeal inadmissible, nor is it manifestly (*prima facie*) ill-founded.

26. Having regard to the provision of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18(1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal in question meets the admissibility requirements.

VII. Merits

27. The appellant challenges the mentioned verdicts claiming that those verdicts violated its rights under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article

6(1) of the European Convention, including the rights under Article III (1), (3) and (5) of the Constitution of Bosnia.

28. Given the fact that the appellant is the holder of public office, the Constitutional Court recalls that it does not enjoy the protection of rights guaranteed under the provisions of the European Convention and its Protocols, which regulate the relationship of public authorities and individuals and provide individuals the protection of human rights and fundamental freedoms in their relationship with public authority. However, in its case-law the Constitutional Court indicated that the European Convention offers a minimum of protection with regards to human rights and fundamental freedoms, and the Constitution of Bosnia and Herzegovina provides wider protection and, therefore, it took a position that according to under Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, every person who was the party to a proceeding and has any court's judgment, for which he/she considers to be in violation of his/her rights, may file an appeal with the Constitutional Court. Accordingly, the State bodies and public authority, as participants in court proceedings, enjoy the guarantees of the right to a fair trial and of the right to property under Article II(3)(e) and (k) of the Constitution of Bosnia and Herzegovina (see, the Constitutional Court, Decision no. *AP 39/03* of 27 February 2004, published on the website: www.ustavnisud.ba). Having regard to the aforesaid, the Constitutional Court will examine the allegations of the appellant with regards to the right under Article II(3) (e) of the Constitution of Bosnia and Herzegovina.

Right to a fair trial

29. 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.

30. The appellant considers that in the process of rendering its decisions the Court of BiH applied the substantive law arbitrarily by concluding that the registration of ownership right over the real properties in question in the name of the plaintiff was based on positive regulations and that the court erroneously established the facts in that regard. The Constitutional Court indicates that, according to its consistent case-law, its task is not to examine the findings of ordinary courts concerning the facts of the case and the application

of the substantive law. Namely, the Constitutional Court is not called upon to substitute ordinary courts in the assessment of facts and evidence, but, in general, it is the task of ordinary courts to assess the presented facts and evidence. It is the Constitutional Court's task to examine whether the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective legal remedy, *etc*.) have been violated or disregarded, and whether the application of the law was, possibly, arbitrary or discriminatory.

31. First and foremost, the Constitutional Court observes that the subject-matter of the proceeding in the case at hand is the issue of ownership right over the real properties in question Moreover, the Constitutional Court observes that that the appellant is the Entity in BiH, while the plaintiff is the State of BiH, i.e. that this is the property related dispute between the State and an Entity. In that respect, the Constitutional Court recalls the provisions of Article 1 of the Civil Procedure Code before the Court of BiH, which prescribed that this law determines the rules of procedure before the Court of BiH in resolving the property related disputes (civil procedure), *inter alia*, between the State of Bosnia and Herzegovina and the Entities. Thus, the aforementioned law stipulates the exclusive jurisdiction of the Court of BiH in disputes of this kind from which it follows that in property-related disputes relating to the mentioned real properties this law is *lex specialis* with regards to the laws, which prescribe jurisdiction of courts according to the place in which the real property is located. For the mentioned reason, the Constitutional Court is of the opinion that the allegations of the appellant that the Court of BiH does not have jurisdiction in the case at hand are ill-founded.

32. Furthermore, the Constitutional Court observes that the real property in question constitutes prospective military property, which was owned by the State of SFRY-YPA (Yugoslav People's Army) before 1992. In this connection, the Constitutional Court recalls that the aforementioned cited Agreement, Annex A, Article 1, paragraph 1 and Article 2, paragraph 1, stipulates that in order to achieve an equitable solution, the movable and immovable State property of the federation constituted as the SFRY („State property") shall be transferred, under the said Annex, to the successor states in accordance with the provisions of the fol1owing Articles of this Annex (Article 1, paragraph 1), i.e. that the immovable State property located on the territory of the SFRY shall be transferred to the successor state on which territory that property was located (Article 2, paragraph 1). Therefore, contrary to the appellant's claims, it unambiguously follows from the mentioned agreement, as argued by the ordinary court as well, that the real property in question, as state property, which was owned by SFRY-YPA at the time, was transferred to the ownership of the SFRY successor states, namely the successor state in this case is the plaintiff - BiH.

33. Furthermore, the provisions of Article 1, paragraph 1 of the Law prescribes that the state property implies, *inter alia*, immovable property, which belongs to the State of Bosnia and Herzegovina (as an internationally recognised state) pursuant to the international Agreement signed on 29 June 2001 by the states of Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Slovenia and the Federal Republic of Yugoslavia which, on the day of the adoption of this Law, is considered the ownership or possession of Bosnia and Herzegovina, or of other public organisation of Bosnia and Herzegovina. Next, Article 3, paragraph 2 provides that the State Property Commission established by the Decision of the Council of Ministers of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, 10/05; hereinafter: „the Commission") may, upon the proposal of the interested party, decide to exempt certain state property from the prohibition imposed by this Law, and Article 4 provides that the temporary prohibition on the disposal of state Property in accordance with this Law shall remain in force until entry into force of the law regulating the implementation of criteria to be applied for identification of property owned by Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District of Bosnia and Herzegovina, and specify the rights of ownership and of the management of state property, which criteria shall be adopted upon the recommendations of the Commission, not later though than one year from the day of the entry into force of this Law. The prohibition of disposal of the property is also prescribed by the provisions of Article 74 of the Law on Defence. However, the Law on Amendments to the Law provides, as cited above, that the portion of state property that will continue to serve defence purposes, shall be exempt from the prohibition on disposal imposed by this Law (Article 1).

34. In this respect, it follows from the facts of the case at hand that there is no absolute prohibition on disposal of the property inherited from the former SFRY, which is contrary to the appellant's allegations, given the fact that the Commission may, at the proposal of the interested party, decide to exempt certain state property from the temporary prohibition of disposal and that the Law on Amendments to the Law „removed" the prohibition from the disposal of the property that continues to serve defence purposes. Besides, with the aim of implementing the Law on Defence, in accordance with the provisions of the Law on Amendments to the Law, the Presidency of BiH, as it stems from the challenged decisions, rendered the Decision on the size, structure and locations of the Armed Forces of BiH, which includes the real property in question. Thus, it indisputably follows from the aforementioned that there is nothing to indicate that the Court of BiH acted arbitrarily when it established the right of ownership in favour of the plaintiff and ordered the registration of that right in the land registry. In addition, bearing in mind all the mentioned relevant regulations, the Constitutional Court holds that the mere fact that the real property is registered does not

imply that it will remain registered in the future in the name of the plaintiff. The reason being that the aforementioned provisions of Article 73 of the Law on Defence, as stated in the reasons for the challenged verdicts, prescribe the obligation to conclude an agreement between the Council of Ministers and the RS and FBiH Governments on the distribution of property acquired through succession, which property, pursuant to the provisions of the Agreement, is currently owned by the plaintiff (State of BiH). The mentioned Agreement, as the Constitutional Court observes, has not been concluded yet (although it should have been concluded by 31 December 2005), the conclusion thereof however still remains the obligation for all levels of the government in BiH, and it does not preclude a possibility that, by agreement, following the conclusion of the said agreement, the real properties in question will change the title holder – the owner (which may or may not happen). The Constitutional Court is mindful that it follows clearly from the facts of the case at hand that the appellant had previously acted contrary to the regulations it referred to, given that it registered the real properties in question in its name.

35. Finally, the Constitutional Court considers as unfounded the allegations of the appellant that the registration of the right of ownership over the real properties in the name of the plaintiff is in violation of the Dayton Agreement and seizes the portion of the territory from the appellant. Namely, as argued by the ordinary court, the registration of the respective real properties, which are located in the territory that was allocated to the appellant under the Dayton Agreement, cannot constitute the seizure of the territory from the appellant, as in that case any registration of the real property in the name of a title holder other than the appellant would constitute the seizure of the territory from the appellant. Moreover, the appellant is the Entity, an integral part of the plaintiff as an internationally recognised state composed of two Entities – the appellant and FBiH (and the Brčko District as a local self-government within the territory) – they both share the plaintiff's territory in proportion agreed upon under the Dayton Agreement and that territory is located within the internationally recognised borders of the plaintiff, which is the title holder of, *inter alia*, the property acquired through the succession from the former SFRY in is entire territory, including the property located in the territory of the appellant and FBiH. In view of the aforementioned, the Constitutional Court considers that there is nothing to indicate that the Court of BiH arbitrarily applied the law or erroneously established the facts when it rendered the challenged decisions, and that all the elaborated allegations made by the appellant are ill-founded.

36. Having regard to the aforementioned, the Constitutional Court considers that there is no violation of the appellant's rights under Article II(3)(e) of the Constitution of Bosnia and Herzegovina in the case at hand.

Other allegations

37. The appellant states that, due to the arbitrary application of law and erroneously established facts, i.e. due to the violation of the right to a fair trial, the right referred to in Article III (1), (3) and (5) of the Constitution of Bosnia and Herzegovina was violated too. The Constitutional Court already concluded in the foregoing paragraphs of this decision that the substantive law was not applied arbitrarily, i.e. that there was no violation of the right to a fair trial. The ordinary court dealt with the issue of jurisdiction and relations between the institutions of Bosnia and Herzegovina and the Entities, as stipulated in Article III of the Constitution of Bosnia and Herzegovina, in the proceeding of rendering the decision and in the reasoning for the challenged decisions, which carry clear reasons as to why the challenged verdicts are not in contravention of the mentioned constitutional provisions. In view of the aforesaid, the Constitutional Court also considers that the challenged verdicts are not in contravention of Article III(1), (3) and (5) of the Constitution of Bosnia and Herzegovina.

VIII. Conclusion

38. 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 III(1), (3) and (5) of the Constitution of Bosnia and Herzegovina where there is nothing to indicate that the Court of BiH arbitrarily applied the substantive law upon establishing established that the plaintiff is the title holder of the right of ownership over the real properties in question, as it acquired them on the basis of the Agreement as a successor state, while, in the meantime, no agreement has been reached on the distribution of the property obtained through succession between different levels of the government in BiH.

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

40. Within the meaning of Article 43 of the Rules of the Constitutional Court, Vice-President Zlatko M. Knežević and Judge Miodrag Simović gave their statement of dissent.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

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Case No. AP 1590/14

DECISION ON ADMISSIBILITY AND MERITS

Appeal of „Agrocoop Export-Import" d.o.o. Banja Luka against the Judgment of the Supreme Court of the Republika Srpska, no. 11 0 K 006949 13 Kžk of 24 January 2014.

Decision of 28 September 2017

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

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Mr. Giovanni Grasso,

Having deliberated on the appeal of **„Agrocoop Export-Import" d.o.o. Banja Luka** in the Case no. **AP 1590/14**, at its session held on 28 September 2017 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by „Agrocoop Export-Import" d.o.o. Banja Luka against the Judgment of the Supreme Court of the Republika Srpska, no. 11 0 K 006949 13 Kžk of 24 January 2014, is dismissed as ill-founded.

Reasoning

I. Introduction

1. On 7 April 2014, „Agrocoop Export-Import" d.o.o. Banja Luka („the appellant"), represented by the Law Office „Muhić and Others" d.o.o. Tuzla, filed an appeal with the Constitutional Court of Bosnia and Herzegovina („the Constitutional Court") against the Judgment of the Supreme Court of the Republika Srpska („the Supreme Court"),

no. 11 0 K 006949 13 Kžk of 24 January 2014. The appellant also sought an interim measure „banning the prohibition of alienation of and encumbrance on 10,880,395 shares of Fabrika šećera Bijeljina („Sugar Factory Bijeljina") pending a final decision by the Constitutional Court".

2. On 30 June 2014, the appellant addressed a submission to the Constitutional Court, to which it attached the Ruling rendered by the County Court of Banja Luka, Special Department for Organized Crime and Most Serious Types of Economic Crime („the County Court"), no. 11 0 K 006949 12 K 2 of 7 April 2014.

II. Procedure before the Constitutional Court

3. In its Decision on Interim Measure no. 1590/14 of 10 June 2014, the Constitutional Court dismissed as ill-founded the appellant's request for interim measure.

4. Pursuant to Article 23 of the Rules of the Constitutional Court, the Constitutional Court requested on 8 December 2016 the Supreme Court, the County Court and the County Prosecutor's Office of Banja Luka, Special Prosecutor's Office for Organized Crime and Most Serious Types of Economic Crime („the County Prosecutor's Office") to submit their replies to the appeal.

5. The Supreme Court and the County Court submitted their replies on 15 December 2016 and the County Prosecutor's Office did so on 19 December 2016.

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. In the Judgment no. 11 0 K 006949 12 K 2 of 18 July 2013 the County Court found the accused Z.Ć. and D.N. guilty of having committed, through the actions described in detail in the enacting part of the judgment, the criminal offence: the accused Z.Ć. was convicted of having committed a continuing criminal offence of money laundering referred to in Article 280(4), in conjunction with paras (1) and (3), of the Criminal Code of the Republika Srpska („the RS Criminal Code"), and the accused D.N. was convicted of having committed a criminal offence of money laundering referred to in Article 280(5), in conjunction with paras (1) and (3), of the RS Criminal Code, and sentenced them to imprisonment.

8. In accordance with the mentioned judgment, pursuant to Article 280(6) of the RS Criminal Code, the property and money were forfeited from the appellant as a third person,

as follows: 10,880.395 shares, i.e. 51% of the capital share in Joint-Stock Company „Sugar Factory Bijeljina" („the Sugar Factory"), which were registered under the name of the Sugar Factory in the owner account maintained by the Central Register of Securities of the RS a.d. Banja Luka („the Central Register"), which were entered as ownership of the appellant in accordance with the rulings described in detail in the enacting part of the judgment, and the amount of BAM 2 672 590.58. Finally, in accordance with Article 35 of the Law on the Forfeiture of the Property Acquired by the Perpetration of Criminal Offence („the Law on Forfeiture of Property"), the forfeited money and assets were handed over to the Agency for the Management of Forfeited Property of the RS pending the conclusion of the proceedings by a legally binding decision, and, in accordance with Article 46(1) of the same Law, when a decision on the permanent forfeiture of money and assets becomes legally binding, the forfeited money and assets will become the ownership of the Republika Srpska.

9. In the reasons for the judgment, the court interpreted in detail extensive evidentiary material, first of all the substantive evidence – financial documents forfeited from the appellant, statements of accounts opened with commercial banks, testimonies of the heard witnesses, including those given by the appellant's director and head of the accounting department, testimony given by the accused Z.Ć., findings and opinion of M.V. as the expert in finance. Having assessed the presented pieces of evidence individually and together, the County Court established that during the relevant time period 14 offshore companies had made payments of money originating from criminal offences, that is to say from criminal offences of unauthorized production and sale of narcotics, into the appellant's designated accounts, that the payments had been made without legal grounds and that the no business had been done in that respect. Based on the findings and opinion of the expert M.V., the County Court established that the cash inflow from the disputable advance payments amounted to BAM 8 024 423.33, as booked by the appellant, whereas this had not come about as a result of the delivery of goods or any other business cooperation. Of the money received in this way, there was the outflow in the amount of BAM 4 960 666.75 through the payment made to the Pavlović International Bank, whereby according to the Bankruptcy Debtor Reorganization Plan („the Sugar Factory") the claims were purchased from the mentioned bank, and the outflow in the amount of BAM 2 177 610.00 to the account of the Law Office Mujić for the purpose of the purchase of claims by 201 employees of the Sugar Factory, which amounted to BAM 4 960 666.75. Based on the inspection of the ruling of the County Commercial Court of Bijeljina, dated 24 November 2010, it was established that based on the appellant's investments in the Sugar Factory by way of the repayment of loans and purchase of claims by the employees, 51% of the capital share or 10,880,395 shares of the company were recognized as the

appellant's shareholding. In view of the aforementioned, the County Court concluded that the appellant had invested the mentioned total amount of money, as „dirty money", into the Sugar Factory. Furthermore, the ruling o the County Commercial Court, dated 24 November 2010, recognized the appellant's investments based on the plant overhaul and costs of revitalization in the amount of BAM 3 457 013.31 which, together with the mentioned amount, made a total of BAM 9 456 240.74. Furthermore, the amount of BAM 3 003 943.24 was recognized on the basis of the bankruptcy debtor's liabilities (the Sugar Factory) committed to by the appellant, which amounted to BAM 12 460 183.98. Based on the mentioned amount and enumerated investments, the appellant acquired 18 379 913 voting shares, that is to say 63.75% of capital share in the Sugar Factory (51% or 10,880,395 shares on account of the investments in the overhaul and revitalization and 12.75% or 7,499,518 shares on the basis of the bankruptcy debtor's liabilities taken over by the appellant). The ruling of the RS Tax Administration, dated 30 June 2010 was used in support of the conclusion that the appellant had used the „dirty money" from offshore companies payments to invest in the Sugar Factory, including the gross balance sheet of the appellant, on the basis of which it was concluded that the appellant was not able to meet the obligations regarding the payment of claims by the creditors of the bankruptcy debtor „Sugar Factory" through its ordinary business activities, and that the accused Z.Ć. had provided additional funds originating from the payments made by the offshore companies and other associated legal persons that he had managed alone or through his closest collaborators.

10. Taking into account the total amount of „dirty money" of BAM 8 024 423.33, and the amount the appellant had paid to acquire 51% of the capital share in the Sugar Factory (BAM 4 960 666.75) and the amount paid for the purchase of an aircraft (BAM 391,166.00), the County Court concluded that of the total amount of „dirty money" the appellant was left with BAM 2 672 590.58, which was forfeited from the appellant in accordance with Article 280(6) of the RS Criminal Code.

11. Based on the reports of the bankruptcy administrator and minutes taken at the reporting hearings, the County Court established that the negotiations and fulfilment of undertaken obligations had been effectuated by the accused Z.Ć. who had appeared on behalf of the appellant in the capacity of the appellant's director, or the founder or owner at the hearings held by the relevant courts. The County Court concluded that the accused Z.Ć. had entered into the strategic partnership in accordance with the Reorganization Plan of the Bankruptcy Debtor (the Sugar Factory), according to which the appellant, as a strategic partner, had taken over all the liabilities under the bankruptcy plan, but not with the aim of launching production and managing permanently the property and capital

share, but with the aim of concealing the real origin of the money deriving from criminal offences and legalising it by investing into the Sugar Factory. The County Court also assessed the ruling of the Taxation Administration.

12. Furthermore, it follows from the reasons for the judgment that based on the adduced evidence the County Court found that the accused Z.Ć., in association with D.Š. and other persons from his criminal milieu (according to the judgments of the Higher Commercial Court of Belgrade), through several offshore companies, had injected substantial amounts of „dirty money" into the Republika Srpska and the Republic of Serbia (BAM 8 024 423.33), giving instructions to LJ.M. (the appellant's manager at the relevant time) and to the accused D.N. so that after the money had been paid into the appellant's account, the appellant's manager LJ.M., on the same day or the next day, having „laundered" the money or having mixed it with other „clean" money, that is to say the money originated from the appellant's legal business, further integrated, invested or purchased the shares of other companies on the territory of the Republika Srpska and the Republic of Serbia with the aim of acquiring as higher property gain as possible. Taking into account the clarified circumstances and a number of preparatory specific activities taken by the accused Z.Ć., the County Court found that the accused Z.Ć. had been aware that the money originated from a criminal offence. Finally, it was noted that the crucial circumstance for the criminal offence of money laundering to exist was the awareness and knowledge of the accused that the money originated from and was obtained through the perpetration of a criminal offence, and that it was not necessary to establish in a court judgment that the money had been obtained by the perpetration of the criminal offence, not even to initiate criminal proceedings in respect of the main criminal offence.

13. In its judgment no. 11 0 K 006949 13 Kžk of 24 January 2014, the Supreme Court dismissed as ill-founded the appellant's appeal and the appeal of the Prosecutor's Office against the judgment of the County Court. The appeals of the accused Z.Ć. and D.N. and the third person „Avio-rent" d.o.o. Banja Luka were partially granted, and the judgment of the County Court was modified so that the accused Z.Ć. was found guilty of having committed a continuous criminal offence of money laundering referred to in Article 280(4), in conjunction with paras 1 and 3 of the RS Criminal Code, and he was sentenced to four years in prison.

14. Taking into account the reasons for which the appeals of the accused persons and third persons were filed as well as the content of the complaints relating to a number of serious violations of the provisions of the criminal procedure and erroneously and incompletely established facts, the Supreme Court decided to schedule a hearing before the Supreme Court.

15. As it follows from the reasons for the judgment, the Supreme Court concluded that the established facts were based on a number of substantive evidence, findings and opinion of the court expert M.V. in respect of which the County Court gave valid reasons for admitting them and for considering that that evidence could not be called into question; that they were based on correct assessment of the testimonies made by the enumerated witnesses, along with the reasons for giving them credence, as well as the reasons for not admitting the testimonies deposited by the accused Z.Ć. and witness A.K. Therefore, the Supreme Court found as correct the findings that none of the monetary transactions described in the operative part of the first-instance judgment and in the judgment of that court were followed by the real business relationships, and that all those amounts had been paid through the indicated commercial banks into the appellant's account and had been booked as received advance payments, which had been transferred from one year to another up until 2011.

16. The Supreme Court found as correct the County Court's conclusion to base the association of the accused S.Ć. with D.Š., N.D. and S.P. on two specified judgments of the Higher Commercial Court of Belgrade, according to which N.D. and S.P. were found guilty of having committed a criminal offence of money laundering. In this connection, it noted that the mentioned judgments established the mutual connection between the accused Z.Ć. and D.Š., N.D. and the witness A.K., who had been heard during the said proceedings, and between D.Š., S.P. and the witness A.K.

17. The Supreme Court found as unfounded the appellant's claim that it was not established with certainty that the funds invested in the Sugar Factory had originated from the money paid by offshore companies and that, therefore, the requirements for the forfeiture of the shares and money were not fulfilled and that its share in the capital of the Sugar Factory was determined incorrectly as a result. In this connection, it was indicated that it followed from the findings and opinion of the court expert M.V. that the appellant, based on the repayment of loans and payment of claims of the employees of the Sugar Factory, had acquired a shareholding of 51% in the capital of the Sugar Factory or 10,880,395 shares having the nominal value of BAM 1.00 each, and based on the overhaul and revitalization of the factory, it had acquired the shareholding of 12.75% in the Sugar Factory or 7,499,518 shares, and that based on the regular business without received advanced payments it would be unable to settle the liabilities, which it had settled in the period from 2008 to 2011.

IV. Appeal

a) Allegations in the appeal

18. The appellant complains that the challenged judgments violated its rights under Article II(3)(e) and (k) 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 Article 1 of Protocol No. 1 to the European Convention.

19. In this context, the appellant claimed that the challenged judgments were based on the erroneously assessed evidence and erroneously established facts, which resulted in the erroneous application of the law. In the appellant's opinion, the challenged judgments and the decision on the forfeiture of material gain were based on presumptions and insinuations.

20. The appellant claims that the challenged judgments are mathematically unsustainable as the number of forfeited shares, i.e. 10,880,395 shares, do not make up 51% of the total share capital in the Sugar Factory, as erroneously calculated by the court expert M.V., but 37.7353% instead, as correctly calculated by the Central Register. Furthermore, the appellant claims that it was mentioned in the challenged judgments that the accused Z.Ć., together with LJ.M. and D.N., through different off-shore companies and enterprises, via commercial banks, had injected substantial amounts of money obtained through the perpetration of criminal offences into the legal economic flows of the Republika Srpska and the Republic of Serbia. However, regardless of the fact that the disputed money had been integrated in another state, in the opinion of the courts, the total amount was forfeited from the appellant, and not from other persons in which it was integrated according to the ordinary courts.

21. Furthermore, the appellant claims that the shares of the Sugar Factory could not have been forfeited but only the money which was, as the appellant claimed, allegedly obtained through the perpetration of the criminal offence. The appellant indicates that the accused Z.Ć. obtained money, not property (shares), through the perpetration of the criminal offence. Furthermore, the appellant indicates that the shares of the Sugar Factory were acquired lawfully in the bankruptcy proceedings. In support of its claims, the appellant referred to Article 280 of the RS Criminal Code and Article 407 of the RS Criminal Procedure Code.

22. Further, the appellant enumerated in detail the amounts, as alleged, of purportedly „dirty money", which the appellant and other legal persons from Serbia, according to the indictment of the Prosecutor's Office, had invested in the Sugar Factory under the influence of the accused Z.Ć. The appellant indicated that when the mentioned amounts are

added up they come to the amount of BAM 3,372,184 of the purportedly „dirty money". However, the court expert M.V., who was given full credence by the courts, determined that the amount of advance payment made to the Sugar Factory was BAM 2,576.253 in total. That amount was accepted by the Prosecutor's Office. However, despite that fact, it requested the forfeiture of 63.75% of shares of the Sugar Factory, although only 26% of shares could have been acquired for the mentioned amount of „dirty money". In this connection, it alleged that it was indisputably established in the procedure that based on the investments in the Sugar Factory, which amounted to BAM 12,460,183.98, it acquired 18,379,913 shares. Finally, in this part, the appellant indicated that the ordinary courts finally determined that not even that amount was correct, but that the total amount of BAM 4, 960,666.75, which had been used to purchase 51% of shares of the Sugar Factory, was as a matter of fact „dirty money", which, in fact, was not claimed by the prosecutor, and that the amount of BAM 2,672,590.58, which had been transferred from the appellant's account to other legal persons, was to be forfeited as well. The appellant particularly indicated that the indictment sought the forfeiture of only the acquired shares in the Sugar Factory (63%), and that the forfeiture of the additional money in the specified amount was not requested. The appellant claimed that the starting point for the first-instance court was the presumption that the appellant had received and kept the total amount of received advance payments, which had no coverage in business relationships, namely the amount of BAM 8,024,423.33, that it had used that money to purchase 51% of the shares in the Sugar Factory and to purchase the „Cesna" airplane, so that it was left with the amount of BAM 2,672,590.58 out of the total amount of „dirty money". According to the appellant, this statement has grounds neither in the presented substantive evidence nor on the findings of court experts A.P. and M.V., and it is contrary to the indictment.

23. The appellant also claimed that the ordinary courts did not accept the fact that a minimum 80% of the capital it had invested in the Sugar Factory during the bankruptcy procedure originated from its own accumulation of funds, i.e. from its strategic partner ZZ Jankovci from Croatia, which was not „dirty money", as it follows from all adduced evidence and findings of both court experts.

24. Furthermore, the appellant enumerated in detail in its appeal the specific payments, which had nothing to do whatsoever, as the ordinary courts concluded, with D.Š. and certain individuals D. and P., or with any association of the accused Z.Ć. with third persons.

25. The appellant indicated that the ordinary courts based their conclusion that the case concerned „dirty money" on the following considerations: a) that not all monetary transactions had been followed by the real business relationships, i.e. delivery of

goods - which, in its opinion, means nothing as the business relationships could take place consequently, particularly in case of loans, which do not have to be justified by relevant documents (it is not a criminal offence), the money was received and registered in a transparent manner and transferred through commercial banks; b) that all amounts paid by offshore companies which had been made through the specified banks into the appellant's account were booked as advance payments, which were transferred from one year to another – in the appellant's opinion, the payments made by the offshore companies were not in themselves the presumption of a criminal offence, the advance payments were properly registered, that is to say this was properly registered money, the advance payments indicated the commencement of a business relationship, which did not have to be executed immediately or within a given time limit; c) that the accused Z.Ć. associated with several persons, i.e. D.Š., N.D. and S.P. with for the purpose of perpetrating a criminal offence, where N.D. and S.P. were convicted in Serbia – the appellant indicated that, according to the judgments convicting them, there were no ties established between N.D. and S.P and payments made to the appellant by third companies, that they had nothing to do with the actions which the accused Z.Ć. was charged with, namely the investments in the Sugar Factory, that the case concerned the guilty plea agreements concluded in another state, whereby the judgment of conviction of Z.Ć. and the decision to forfeit property gain could not have been based on these pieces of evidence for the major part. According to the appellant, the Prosecutor's Office did not present a single piece of evidence during the proceedings before the ordinary courts, i.e. no serious international investigation was conducted that would confirm that the case concerned „dirty money". Finally, the appellant indicated that the payments made by „Laffino Trade" USA were explained by the accused Z.Ć. and the witness A.K. and that substantive evidence was presented in that regard.

26. The appellant claimed that it had alleged all the aforementioned in its appeal, but that the Supreme Court did not give any response to its allegations.

27. In its supplement to the appeal, dated 30 June 2014, the appellant indicated that the County Court had rejected its request for the protection of legality as inadmissible.

b) Reply to the appeal

28. In the reply to the appeal the Supreme Court indicated that the forfeiture of property and money acquired through the perpetration of the criminal offence of money laundering, which the accused Z.Ć. was convicted of, was based on Article 280(6) of the RS Criminal Procedure Code. Furthermore, it was indicated that 10,880,395 shares or 51% of the shareholding in the Sugar Factory's capital, which were registered under the name of the

Sugar Factory in the owner account maintained at the Central Register of Securities, were forfeited from the appellant.

29. In the reply to the appeal the County Court indicated that in the present case the Supreme Court rendered a judgment after it had held a hearing, so that only the Supreme Court may provide the opinion on the allegations stated in the appeal.

30. In the reply to the appeal, the County Prosecutor's Office indicated that the presented evidence had been assessed correctly and fully in the challenged judgment, on which basis the facts of the case had been established correctly and Article 280(6) of the RS Criminal Code had been applied correctly.

V. Relevant Law

31. The **Criminal Code of the Republika Srpska** (*Official Gazette of RS*, 49/03, 108/04, 37/06, 70/06, 73/10, 1/12 and 67/13), in its relevant part, reads as follows:

The Basis of the Forfeiture of the Property Gain

Article 94

(1) Nobody shall be allowed to retain property gain obtained by commission of criminal offense.

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

Money Laundering

Article 280

(1) Whoever receives, exchanges, keeps, disposes of or uses in corporate or other business or conceals or tries to conceal money or property he knows was obtained by commission of criminal offense, shall be punished by imprisonment for a term between six months and five years.

(...)

(3) If the money or property referred to in Paragraphs 1 and 2 of this Article is of high value, the perpetrator shall be punished by imprisonment for a term between one and ten years.

(...)

(6) The money and property referred to in preceding Paragraphs shall be forfeited.

32. The **Criminal Procedure Code of the Republika Srpska** (*Official Gazette of RS*, 53/12), in its relevant part, reads:

Free Assessment of Evidence

Article 15

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

Contents of verdict

Article 304

(...)

(7) The court shall specifically and completely state which facts and on what grounds the court finds to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence, the reasons why the court did not sustain the various motions of the parties, the reasons why the court decided not to directly examine the witness or expert whose testimony was read, and the reasons guiding the court in ruling on points of law and especially in establishing whether the criminal offense was committed and whether the accused was criminally responsible and in applying specific provisions of the Criminal Code to the accused and to his act.

(...)

VI. Admissibility

33. 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.

34. Pursuant to Article 18(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

35. In the present case, the subject matter of the appeal is the Judgment of the Supreme Court, no. 11 0 K 006949 13 Kžk of 24 January 2014, against which there are no other effective remedies available under the law. Next, the appellant received the challenged

judgment on 5 March 2014, and the appeal was filed on 7 April 2014, *i.e.* within 60-day time-limit, as provided for by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court, because there is neither a formal reason rendering the appeal inadmissible, nor is it manifestly (*prima facie*) ill-founded.

36. Having regard to the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18 (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the respective appeal meets the admissibility requirements.

VII. Merits

37. The appellant claims that the challenged judgment of the Supreme Court is in violation of its rights under Article II(3)(e) and (k) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention and Article 1 of Protocol No. 1 to the European Convention.

Right to a fair trial

38. Article II(3) of the Constitution of Bosnia and Herzegovina, so 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.

39. Article 6(1) of the European Convention, so far as relevant, reads as follows:

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

40. The Constitutional Court primarily notes that the proceedings in question was related to the determination of the well-foundedness of criminal charges against the accused Z.Ć. and D.N.. However, in the respective proceedings conducted against other persons, property was taken away from the appellant as a third person so that it follows that in the present case the appellant enjoys the guarantees of the right to a fair trial from the civil

aspect (see, Constitutional Court, Decision on Admissibility and Merits, no. *AP 1551/14* of 6 December 2016, paragraph 1, available at www.ustavnisud.ba).

41. The appellant's allegations, essentially, come down to the claim that the presented evidence were erroneously assessed, which is the reason why the facts were erroneously established, which resulted in the erroneous application of law. According to the appellant, the challenged judgments and decision on the forfeiture of property gain were based solely on presumptions and insinuations.

42. The Constitutional Court recalls that according to the case-law of the European Court of Human Rights („the European Court") and the Constitutional Court, it is not the task of these courts to review the ordinary courts' findings relating to the facts and application of the substantive law (see European Court, *Pronina v. Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01). Namely, the Constitutional Court is not called upon to substitute ordinary courts in the assessment of facts and evidence, but, in general, it is the task of ordinary courts to assess the presented facts and evidence (see ECtHR, *Thomas v. the United Kingdom*, judgment of 10 May 2005, Application no. 19354/02). It is the Constitutional Court's task to examine whether the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective legal remedy, *etc*.) have been violated or disregarded, and whether the application of law was, possibly, arbitrary or discriminatory. Thus, within the scope of its appellate jurisdiction, the Constitutional Court deals exclusively with the issue of possible violation of constitutional rights or the rights under the European Convention in the proceedings before the ordinary courts.

43. Furthermore, the Constitutional Court notes that it is outside the scope of the jurisdiction of the Constitutional Court to assess the quality of the conclusions of courts in respect of the assessment of evidence, unless such an assessment is deemed to be manifestly arbitrary. Namely, the Constitutional Court took the position in its case-law that free assessment of each piece of evidence individually and in connection with other pieces of evidence is an inherent element of the right to a fair trial, so that the obligation of the ordinary court is to describe in the reasoning for the judgment the process of individual assessment of evidence, and connecting every piece of assessed evidence with other evidence and reaching the conclusion on a certain fact being proved (see, *inter alia*, Constitutional Court, Decision on Admissibility and Merits, no. *AP 661/04* of 22 April 2005, paragraph 35).

44. The Constitutional Court observes that it follows from the reasons for the challenged judgment that the ordinary courts scrupulously and conscientiously assessed the extensive evidentiary material, substantive evidence, primarily the financial documents seized from

the appellant, testimonies deposited by the witnesses heard, thereby providing valid reasons regarding the admission thereof, or refusal thereof, and findings and opinion of court expert M.V. Based on the mentioned evidence, the Supreme Court concluded that the facts had been correctly established, that none of the monetary transactions specified in the operative part of the first-instance judgment and challenged judgment had been followed by the real business relationships, that the payments had been made by the specific commercial banks into the appellant account and were booked as advance payments and had been transferred from one year to another until 2011. Furthermore, the Supreme Court gave valid reasons, which the Constitutional Court did not consider arbitrary in respect of the fact that the County Court had accepted the judgments of the Higher Commercial Court of Belgrade against the specified persons as evidence being the basis for establishing the fact that the accused Z.Ć. associated with D.Š. and other indicated persons from his criminal milieu in order to, through offshore companies, inject considerable amounts of „dirty money" into the Republika Srpska and the Republic of Serbia.

45. Further, the Constitutional Court observes that after a scrupulous and conscientious assessment of evidence, the court established the amount of „dirty money", i.e. the money acquired through the perpetration of a criminal offence, which the appellant had obtained through the payments made by the offshore companies, and had used the amount of money so obtained to acquire the specified number of shares or 51% of the capital of the Sugar Factory, and determined the amount of the money, which the appellant was left with after the purchase of the airplane. Taking into account such findings and contrary to the appellant's allegations, through the application of Article 280(6) of the RS Criminal Procedure Code, which stipulates that the money and property gain obtained through the perpetration of a criminal offence of money laundry shall be forfeited, the money and shares were forfeited from the appellant. Not a single piece of evidence was submitted to the Constitutional Court in support of the claim that the indictment specified only the forfeiture of shares and not the money. As to the appellant's claim that the challenged judgment was mathematically unsustainable and that the court expert M.V. had erroneously calculated the shareholding in the owner's capital and the number of shares, the Constitutional Court observes that it follows from the judgment of the County Court that that fact was established not only on the basis of the findings and opinion of the court expert M.V., but also on the basis of the ruling of the County Commercial Court of Bijeljina, dated 24 November 2010, according to which the shareholding of 51% or 10,880,395 shares were recognized based on the appellant's investment in the Sugar Factory through the repayment of loans and claims from employees, and those were forfeited from the appellant in accordance with the challenged judgment. Furthermore, it follows from the challenged judgment that the accused Z.Ć. was found guilty not only of having provided the money, as alleged by the

appellant, but also of having injected „the dirty money", *inter alia*, through the appellant's accounts into economic flows, as in the case of the Sugar Factory.

46. Finally, the Constitutional Court observes that the ordinary courts established that the accused Z.Ć. was aware that the money received through the payments made by the offshore companies had originated from the perpetration of a criminal offence and that, as concluded by the ordinary courts, it was not necessary to establish in a court decision that the money had been obtained through the perpetration of a criminal offence, or to initiate an investigation in order to establish the existence of the criminal offence of money laundering of which the accused Z.Ć. was found guilty. Therefore, the appellant's claims that the Supreme Court concluded that the payments made by the offshore companies constituted in themselves a criminal offence and that it was not established that the money had been obtained through the perpetration of a criminal offence, i.e. that international investigation had not been conducted, are unfounded. In view of the aforementioned, the court cannot accept as founded the appellant's claims that the money so obtained was booked as advance payments and that there was no time limit within which a business relationship had to be effectuated, that it was transferred from one year to another, that it was properly recorded and shown, thus, consequently, that rules out the conclusion that „dirty money" was involved. Besides, the Constitutional Court observes that it follows from the reasons for the challenged judgment that the accused Z.Ć. had testified only about the payments made by two off-shore companies, whereas he had refused to give a statement about the payments made by the remaining twelve companies. Also, only two payments were followed by pro-forma invoices that were found to be fictitious, which the appellant did not dispute in the appeal, since goods had never been delivered according to the said invoices, whereas the remaining payments had been made without any legal ground whatsoever.

47. The Constitutional Court holds that scrupulous and conscientious assessment of evidence, which were assessed individually and in mutual correlation, was not lacking in the reasons for the challenged judgment, which assessment was corroborated by valid reasons in support of the conclusion on the existence of decisive facts to which the relevant law was applied correctly. Given the aforementioned, the Constitutional Court could not accept as well-founded the appellant's claim that the Supreme Court failed to reply to the allegations stated in the appeal, which, as it follows from the reasons for the challenged judgment of the Supreme Court, came down to the claim that the monetary funds the appellant had invested in the Sugar Factory did not originate from the payments made by the offshore companies and that his shareholding in the Sugar Factory was not determined correctly.

48. The Constitutional Court concludes that the appellant's allegations that the challenged judgment of the Supreme Court is in violation of its right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention are unfounded.

Right to property

49. As to the allegations relating to 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 observes that the appellant based the violation of the mentioned right on the same allegations as those indicated in relation to the right to a fair trial. In view of the foregoing conclusion 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, wherefrom it follows that the decision on the forfeiture of the indicated number of shares and amounts of money, which were established to have been obtained through the perpetration of a criminal offence based on the presented evidence, was based on the provision of Article 280(6) of the RS Criminal Code, the Constitutional Court holds that the allegations made in the appeal relating to the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention are also ill-founded for the same reasons.

VIII. Conclusion

50. 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 where the court, in the reasons for its judgment, did not fail to assess the evidence scrupulously and conscientiously, which was corroborated by the valid reasons in support of the findings on the existence of the crucial facts to which the relevant law was applied correctly, and as the ordinary court did not fail to decide on the appellant's allegations made in the appeal about the assessment of evidence, the established facts of the case and the application of the relevant law.

51. In addition, the Constitutional Court concludes that there is no violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, where the appellant based the claim about the violation of that right on the assessment of evidence, facts of the case and arbitrary application of the law, whereas the Constitutional Court concluded that there was no arbitrariness in that respect.

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

53. Within the meaning of Article 43 of the Rules of the Constitutional Court, Judge Miodrag Simović gave a statement of dissent to the decision of the majority.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

CONTENTS

Case No. AP 1660/14

DECISION ON ADMISSIBILITY AND MERITS

Appeal of Mr. Zoran Ćopić against the judgments of the Supreme Court of the Republika Srpska no. 11 0 K 006949 14 Kvlz of 14 August 2014 and no. 11 0 K 006949 13 Kžk of 24 January 2014 and the Judgment of the County Court of Banja Luka no. 11 0 K 006949 12 K 2 of 18 July 2013

Decision of 28 September 2017

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

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Mr. Giovanni Grasso,

Having deliberated on the appeal of **Mr. Zoran Ćopić**, in the Case no. **AP 1660/14**, at its session held on 28 September 2017, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. Zoran Ćopić against the judgments of the Supreme Court of the Republika Srpska no. 11 0 K 006949 14 Kvlz of 14 August 2014 and no. 11 0 K 006949 13 Kžk of 24 January 2014 and the Judgment of the County Court of Banja Luka no. 11 0 K 006949 12 K 2 of 18 July 2013 is hereby dismissed as ill-founded.

Reasoning

I. Introduction

1. On 9 April 2014, Mr. Zoran Ćopić („the appellant") from Banja Luka, represented by Mr. Mirko Dabić, 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. 11 0 K 006949 13 Kžk of 24 January 2014 and judgment of the County Court of Banja Luka – Special Department for Organized Crime and Most Serious Forms of Economic Crime („the County Court"), no. 11 0 K 006949 12 K 2 of 18 July 2013. The appellant also lodged a request for interim measure and demanded that the Constitutional Court postpone „the enforcement of the unserved portion of the sentence, being a term of one year and nine months, pending a decision on the appeal".

2. On 4 September 2014, the appellant supplemented the appeal by challenging the judgment of the Supreme Court no. 11 0 K 006949 14 Kvlz of 14 August 2014, which was rendered upon a request for the protection of lawfulness.

II. Procedure before the Constitutional Court

3. In its Decision on Interim Measure no. *AP 1660/14* of 6 November 2014, the Constitutional Court dismissed the appellant's request for interim measure as being ill-founded.

4. Pursuant to Article 23 of the Rules of the Constitutional Court, on 25 April 2014 the Constitutional Court requested the Supreme Court, County Court, County Prosecutor's Office in Banja Luka - Special Prosecutor's Office for Fighting Organized Crime and Most Serious Forms of Economic Crime (the Special Prosecutor's Office) to submit their replies to the appeal.

5. The Supreme Court, the County Court and the Special Prosecutor's Office submitted their replies between 5 and 8 May 2014.

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 judgment of the County Court, no. 11 0 K 0069049 12 K 2 of 18 July 2013, which was rendered in the renewed criminal proceedings against the appellant and D.N., found the appellant guilty of having committed the continuing criminal offence of money laundering referred to in Article 280(4) in conjunction with paragraphs (1) and (3) of the Criminal Code of the Republika Srpska („the Criminal Code of the RS") and was sentenced to four years and six months in prison. The County Court stated in the reasons for the judgment that, according to the indictment of the Special Prosecutor's Office, the appellant was accused of having committed criminal actions together with Lj.M. and D.Z. and that,

at the main trial held on 7 November 2011, the Special Prosecutor's Office submitted to the court a guilty plea agreement, which it entered into with the defendant Lj.M., which was the reason why the separation of the proceedings in respect of the defendant Lj.M. was proposed. Taking into account the guilty plea agreement entered into with the defendant Lj.M., a ruling was issued to separate the proceedings against Lj.M. from the proceedings against the appellant and D.N. In the reasons for the challenged judgment of the County Court, passed in the renewed proceedings after the previous decision of that Court had been quashed by the Supreme Court, it is stated that, following the presentation of evidence for the prosecution and the defence, an analysis of all the presented pieces of evidence, individually and taken together, was carried out. In the relevant part of the reasoning (the part relating to the appellant), it is indicated that the facts described in the indictment ensued from the evidence adduced (for the prosecution and for the defence), including, *inter alia*, a considerable number of material pieces of evidence (foreign currency account statements, analytical cards), witness statements made in court, testimony made by the appellant in the capacity of a witness, and expert evaluations by an expert in the field of economy. As to the evidentiary proceedings and established facts, the County Court states that, based on the evidence – by listening to the recorded telephone conversations between the appellant and D.S., N.J., M.P., N.S., S.P., G.S., D.S., and other persons, as a special investigative action, it has established grounds for suspicion that the appellant committed the criminal offence of money laundering and that the mentioned offence continued to be committed by the appellant, including the elements of organised crime. Namely, it is established that the appellant committed the criminal offence so that he, along with D.S. and D.S. from Belgrade, who had organised a smuggling channel of distribution of narcotic drugs, actively participated in the placement of money obtained from criminal activities into the legal economic flows through the Company „Agrocop export-import" from Novi Sad and its subsidiary in Banja Luka. In addition, as further reasoned, the evidence was adduced in the proceedings by listening to the recorded conversations between the appellant and the convicted Lj.M. and other persons and this special investigative action - surveillance and technical recording of telecommunications towards the appellant had been carried out based on an order for special investigative actions, issued by that Court. The facts established after a detailed analysis and assessment of the numerous evidence adduced leads to a conclusion, as pointed out by the County Court, that the appellant committed a continuing criminal offence of money laundering referred to in Article 280(4) in conjunction with paragraphs (1) and (3) of the Criminal Code of the Republika Srpska, in the period from 2008 to 2011 and so by associating with D.S., N.J., R.S. and other persons from the Republic of Serbia and by agreeing about the manner and joint action plan with those persons; more precisely, by paying substantial amounts of money obtained through the perpetration of criminal offence of unauthorised

production and sale of intoxicating drugs, *i.e.* substantial amounts of dirty money", through different off-shore companies, into the accounts of the companies in the Republika Srpska, in order to integrate that money into regular economic flows and to clean it in such a way. In reaching such a conclusion, the County Court considered the indictment of the Prosecutor's Office for Organized Crime of the Republic of Serbia, No. KT.S 17/09 of 6 August 2010, wherein the appellant, in addition to other persons from the Republic of Serbia, D.S., N.J. and R.S., was accused of having committed the criminal offence of the same type, namely money laundering referred to in the Criminal Code of the Republic of Serbia. The County Court also examined the legally binding judgment of the Higher Court in Belgrade, wherein the persons from the Republic of Serbia, with whom the appellant collaborated (among other things, the appellant and one of those persons entered into a contract of sale of one company), were sentenced to prison for the criminal offence of money laundering, *i.e.* associating with other person with the aim of perpetrating criminal offences. According to the reasoning, the mentioned judgments were obtained through a request for mutual assistance in criminal matters based on the provisions of Articles 14 and 15 of the European Convention on Mutual Assistance in Civil and Criminal Matters (*Official Gazette of BiH*, 11/2005) and the Agreement between BiH and the Republic of Serbia Amending the Agreement on Legal Assistance in Civil and Criminal Matters between BiH and Serbia and Montenegro (*Official Gazette of BiH*, 8/2010). In addition, it is stated in the reasoning that mutual assistance in criminal matters is stipulated by the Law on International Legal Assistance in Criminal Matters (*Official Gazette of BiH*, 53/2009), regulating the relevant matter (Articles 13 and 26), as well as by the provisions of the Criminal Procedure Code of the Republika Srpska (Article 401), which do not prohibit the use of such evidence nor do they prohibit that a judicial decision, among other pieces of evidence, is based on them. The provision of Article 401 of the Criminal Procedure Code of the Republika Srpska stipulates as follows: *International aid in criminal matters shall be rendered under the provisions of this Code, unless otherwise prescribed by the legislation of Bosnia and Herzegovina or an international agreement*. Article 402 of the mentioned Law stipulates the procedure for making mutual legal assistance requests and, in the present case, the Special Prosecutor's Office fully complied with the procedure and obtained the aforementioned evidence (the judgments of the Higher Court in Belgrade) in accordance with the provision concerned. Furthermore, as stated in the reasoning of the judgment, not only the provisions of the Criminal Procedure Code of the Republika Srpska point to a legal admissibility to use such evidence, but also international legal documents ratified by Bosnia and Herzegovina, which are therefore legally binding, such as: the European Convention on Mutual Assistance in Criminal Matters (*Official Gazette of BiH*, 4/05 – international treaties), the Law on International Legal Assistance in Criminal Matters (*Official Gazette of BiH*, 53/09), the United Nations

Convention against Transnational Organized Crime, signed on 12 December 2000 and ratified by Bosnia and Herzegovina on 24 April 2002, and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, signed by Bosnia and Herzegovina on 19 January 2006 and ratified on 11 January 2008. In connection with the aforementioned, the County Court indicated that the presentation and admission of evidence, obtained based on the aforementioned provisions of the Criminal Procedure Code of the Republika Srpska and international documents ratified by Bosnia and Herzegovina, unambiguously indicate that there existed the legal grounds for obtaining such evidence as well as the legal admissibility to use such evidence in the criminal proceedings against the appellant, including the analysis and evaluation of the evidence obtained in such a way, in conjunction with other evidence (for the defence and for the prosecution).

8. While reasoning the manner of commission of the criminal offence the appellant was charged with, the County Court emphasized that it was very simple to set up an off-shore company, and that any physical or legal person could set up such a company via internet by making the payment of the amount of 50 dollars and that they were usually set up in the countries of the so-called „tax haven" for the purpose of faster and more efficient transfer of money. Next, the Court examined a number of pro-forma invoices of companies, including „Agrocoop export-import" d.o.o. Banja Luka, „UniCredit Banka" a.d. Banja Luka, off-shore companies „Lafino trade" LLC, Delaware, USA, *etc*., based on which a joint conclusion was reached that taking into account the given and received advance payments there was no real business relationship, *i.e.* the goods indicated in pro-forma invoices were never delivered. Besides, it was established, based on, *inter alia*, the intercepted telephone conversations between the appellant and his closest business collaborators and other collaborators belonging to the criminal group, that the aforementioned money transactions had been preceded by an agreement and a particular importance was given to that the conversation between the appellant and Ljubo Mrđen (convicted following the guilty plea) and the statement of Ljubo Mrđen, as a witness. Further, based on foreign currency account statements and analytical cards seized from, *inter alia*, the company „Agrocoop export-import" and based on the statement made by the head of the accounting department of the aforementioned company, the conclusion followed that the financial transactions were not related to the borrowings and that the amounts were deposited as advance payments, which were registered from year to year as debt for undelivered goods. It was further mentioned in the reasoning that the appellant had agreed in advance the quantity and transfer of money with the persons known to him and that that fact stemmed from the appellant's testimony. Namely, it is pointed out that it was impossible without prior agreement for the companies from America, Virgin Islands, Cyprus and Nicosia to

make payments into the account of a small and unknown company, and that that action had been carried out by the appellant. The foregoing fact was confirmed by the statement made by the head of the accounting department of the company „Agrocoop export-import", Ms. Stoja Kasalović, who had described clearly and precisely the manner in which the companies „Agrocoop export-import" and „Avio-rent" ran business after the appellant had become the head of those two companies. The witnesses heard in court, including Savo Mrđen, Miodrag Dobrić and Damir Pejković, confirmed those allegations, the common point of their testimonies was the fact that the manner in which business was run upon the arrival of the appellant was specific as it was obvious that from 2008 to 2011 the company had a considerable flow of cash, which was transferred immediately or the next day into accounts of other companies. With regards to the financial transactions (enumerated on pages 54 through 58 of the judgment), an expert witness examination was carried out by a court witness expert in the field of economics, Ms. Maida Velić, who acted upon an order by the Special Prosecutor's Office. The expert examination was carried out, as further noted, following the examination of the documentation attached to the case-file, documentation of the companies „Agrocoop export-import", „Avio-rent" and a sugar factory for the period from 1 December 2008 to 20 October 2010. Based on the detailed findings and opinion of the expert witness, the County Court established that payments had been made into the accounts of the mentioned companies based on pro-forma invoices, but business had never been realized. Having analysed and assessed all the evidence adduced, the County Court concluded that the appellant and D. N. had taken actions as described in the operative part of the judgment, and having assessed them from the criminal-legal aspect, it concluded that the appellant had committed the continuing criminal offence of money laundering referred to in Article 280(4), in conjunction with paragraphs 1 and 3, of the Criminal Code of the Republika Srpska by taking the mentioned actions. The court concluded that the appellant had committed the mentioned continuing offence as he had committed several actions of the same type that featured the mentioned criminal offence, and given the manner in which he had taken those actions and their temporal continuity, it established that those actions made up a whole, *i.e.* that the duration of the committed offence was continuing. In addition, the crucial circumstance for the existence of the criminal offence of money laundering is the appellant's awareness and knowledge that the money originated from and was obtained through the perpetration of the criminal offence, but it is not necessary that it is determined in the course of court proceedings that money was obtained through the perpetration of the criminal offense. Namely, it is necessary for the actions of the perpetrator to have characteristics of at least one of the alternative perpetrated actions referred to in Article 280(1) of the Criminal Code of the RS (to receive money, exchange, keep, dispose of it, use it in corporate business, or to conceal or try to conceal it). According to the first instance panel, there

was no doubt that the appellant knew that money originated from the criminal offense and that the appellant had undertaken those actions with the aim of injecting „dirty" money into the regular financial flows, and he had consciously and willingly placed dirty money into healthy economic flows in order to erase the traces of the origin of such money. Deciding on the criminal sanction, the court indicated that it took into account all the relevant circumstances to mete out the criminal sanction prescribed by Article 37(1) of the Criminal Code of the Republika Srpska, notably the fact that the case related to a serious criminal offence falling within the group of the criminal offences against the economy and payment system, the prescribed sentence (ranging from 2 to 12 years in prison) for the mentioned criminal offence referred to in Article 280(4) of the Criminal Code of the Republika Srpska or three years in prison as referred to in paragraph 5 of the same Article, and the circumstances accompanying the perpetration of the criminal offence, thus, that the appellant had committed the continuing criminal offence. Thus, having assessed both the aggravating and mitigating circumstances, the health condition of the appellant, his conduct during the main trial, the fact that he did not have previous criminal record, the court concluded that the imposed prison sentence of four years and six months was commensurate with the gravity of the criminal offence, the extent to which the protected good was endangered and degree of accountability of the appellant.

9. Upon the appellant's appeal and the appeal filed by the co-defendant D.N. in the criminal proceedings in question, the Supreme Court issued ruling no. 11 0 K 006949 13 Kž 10 of 5 December 2013, wherein it scheduled a hearing before the Supreme Court. In this connection, the Supreme Court noted that taking into account the numerousness and nature of complaints, and the fact that the complaints related to the established facts and violations of the criminal procedure, it concluded that it could not take a decision on the merits without holding a hearing.

10. In judgment no. 11 0 K 006949 13 Kžk of 24 January 2014, which was rendered after the hearing, the Supreme Court partially granted the appellant's appeal and modified the judgment of the County Court in the part related to the decision on the criminal sanction by finding the appellant guilty of having committed the continuing criminal offence of money laundering referred to in Article 280(4), in conjunction with paragraphs 1 and 3 of the Criminal Code of the Republika Srpska for which the appellant was sentenced to four years in prison. The length of time he had spent in detention from 26 April 2011 to 18 July 2013 was credited against the sentence. In this connection, the Supreme Court noted in the part of the reasons related to the appellant that the appellant complained in his appeal about erroneously and incompletely established facts, violations of the criminal code, decision on the criminal sanction and that he proposed that he be acquitted of criminal charges. The

panel of the Supreme Court accepted all evidence adduced at the main trial held before the first-instance court, with the exception of the transcripts of the records of intercepted phone conversations, which had been gathered upon the chief prosecutor's request for international legal assistance, which had been, among other pieces of evidence, the basis for the previous judgment in that case and which had been quashed by the ruling of the Supreme Court on 11 December 2012. The Supreme Court then assessed the remaining pieces of evidence presented at the main trial and complaints, and it considered the replies to the appeal. In this connection, it noted that there were no serious violations of the provisions of the criminal procedure referred to in Article 311(1)(z) and (k) of the Criminal Procedure Code of the Republika Srpska, as the serious violation referred to in paragraph (z) of the same provision was the reason for quashing the previous first-instance judgment (quashed in the ruling of the Supreme Court, no. 11 0 K 0069494 of 11 December 2012). In this connection, the appellant was reminded of the reasons for the mentioned ruling and the reasoning according to which the piece of evidence - the transcripts of the records of intercepted phone conversations gathered through the special prosecutor's request for international legal assistance - was not admitted and therefore could not be the subject of consideration by the court. As to the paragraph (k) of that provision, the Supreme Court noted that the appeal was unfounded in that respect, as the operative part of judgment was clear and was not contrary to the reasoning of the judgment, nor was it in itself contrary to the reasoning of the judgment. The Supreme Court held that the factual findings in the challenged judgment were correct and complete, and it explained in that respect that the judgment was based on the numerous pieces of evidence adduced, both material and non-material evidence, and pointed notably to the significance of the findings and opinion of the court expert witness in finances and verbal explanation of the findings presented at the main hearing, while the contents and assessment of the mentioned evidence were presented in the first-instance judgment in accordance with Article 295(2) of the Criminal Procedure Code of the Republika Srpska. In addition, as to the unfoundedness of this complaint, it is underlined that the findings and opinion of the court expert witness are based on the financial documentation of the companies „Agrocoop" and „Aviorent" and that the court expert witness answered all the questions posed by the prosecution and defence in respect of the given findings and opinion and, therefore, this piece of evidence is in no way called into question. Furthermore, the contents of the statements of all the witnesses heard as well as the appellant's testimony were correctly assessed in the first-instance judgment, including the reasons for admitting those statements and the reasons for not admitting the appellant's testimony, and they were brought into connection with other pieces of evidence being the basis for the decision. What the Supreme Court considered as a realistic basis for the correct conclusion in the first-instance judgment was the finding that none of the monetary transactions described in the operative part of the

judgment was followed by the real business relationships, *i.e.* the delivery of goods, and that all those amounts which had been paid through off-shore companies (which names were mentioned in the operative part of the judgment) were booked as advance payments received and were transferred from one year to another up until 2011. According to the Supreme Court, the reasons given in the first-instance judgment in relation to the fact that the appellant had acted in association with other persons from the Republic of Serbia were clear and that fact was based, *inter alia*, on legally binding judgments of the Higher Court in Belgrade, which had been passed with regard to and legally binding on N.D. and S.P., convicted of having committed the criminal offence of money laundering, while the appellant's name had been mentioned with regard to the actions perpetrated, and on other evidence adduced, including the evidence presented before the first instance court, upon the proposal of the appellant's defence, by hearing the witness Andrija Krlović, but not on the transcripts obtained based on the request for mutual assistance in criminal matters, as already highlighted in the judgment. In this connection, as to the unfoundedness of the complaints about the findings referred to in paragraph 1 of the operative part of the first-instance judgment, according to which the appellant, together with Ljubo Mrđen (in relation to the proceedings being separated upon the conclusion of guilty plea agreement) and Drago Nižol, in the period from 2008 to the middle of 2011, in association with D. S., N.D. and S.P. from Belgrade and Novi Sad, through different off-shore companies and enterprises, via commercial banks, injected substantial amounts of money obtained through the perpetration of criminal offences with the aim of concealing the real origin thereof, by giving instructions to Ljubo Mrđen and Drago Nižol, integrated the money (…), the Supreme Court clarified and emphasised that the appellant's association with the mentioned persons followed from the legally binding judgments of the Higher Court in Belgrade, whereby N.D. and S.P. from Belgrade and Novi Sad were convicted of having committed the criminal offence of money laundering and their mutual connection and the agreement between the appellant and those persons, including the witness heard in those proceedings, namely Andrija Krlović, were established in the operative part of those judgments. As to the complaints related to the actions described in counts 1.2, 1.3, 1.4 and 1.5, which the appellant was charged with and which constituted the means used for the perpetration of the offence, in relation to the appellant's testimony regarding this circumstance wherefrom it followed that those were borrowings provided by friends and the claims that the appellant did not even know the owners of those off-shore companies, the Supreme Court held that the mentioned complaint was not founded. Namely, the Supreme Court pointed out that the appellant, in his testimony given before the first instance court, had testified only about the payments made by two off-shore companies („Lafino trade" and „Mattenico"), whereas he had not been willing to give a statement about the payments made by other 12 off-shore companies as well as to answer the question posed to him

by the Special Prosecutor, in respect of which the first instance-judgment offered clear and detailed reasons which were brought into connection with other pieces of evidence adduced, including, *inter alia*, the testimonies given by the witnesses, Ljubo Mrđen and Stoja Kasalović.

11. As to the unfoundedness of other complaints about the facts of the case, the Supreme Court pointed to the relevant parts of the reasoning given in the first-instance judgment wherein the manner in which the appellant had perpetrated the criminal offence upon prior agreement with other persons (some of whom had already been convicted) was clearly described, including the appellant's awareness and knowledge that he perpetrated a criminal offence in relation to the companies' business running, payments made by off-shore companies and monetary transactions through which „dirty" money was injected into regular economic flows that were clearly described in the operative part of the first-instance judgment. In examining, in the end, the decision on the punishment, the Supreme Court noted that the appellant's appeal was partially founded and that a too severe punishment was imposed on him by the first-instance judgment, since the mitigating circumstances prevailed over the established aggravating circumstance and that the purpose of punishment could be achieved by a more lenient punishment, which was the reason why it granted that part of the appeal by imposing a four-year prison sentence on the appellant.

12. Having dealt with a request for protection of legality, the Supreme Court rendered judgment no. 11 0 K 006949 14 Kvlz on 14 August 2014, dismissing the appellant's request as ill-founded. In deciding on the request, the Supreme Court, pursuant to Article 354 of the Criminal Procedure Code of the Republika Srpska, limited the examination of the legally binding judgment to the violations of the law that were alleged by the appellant. It noted that the provision of Article 350 of the Criminal Procedure Code of the Republika Srpska stipulated that an extraordinary legal remedy could be used against a legally binding judgment only in case of violation of the Criminal Code of the Republika Srpska and provisions of Article 311(1)(g) of the Criminal Procedure Code of the Republika Srpska, which related to the violation of the right of defence within the limitations referred to in paragraph 2 of the same Article. In this connection, the Supreme Court established as unfounded the appellant's allegations related to the violations of the criminal procedure referred to in Article 311(1)(g) of the Criminal Procedure Code of the Republika Srpska (the right of defence) as the challenged judgment, just like the first-instance judgment, and unlike the allegations in the request, was based neither exclusively nor to the greatest possible extent on the judgments of the Special Department of the Higher Court in Belgrade, which had been rendered against the persons convicted in those judgments (N.D. and S.P.)

on the basis of the guilty plea agreement and without hearing those persons as the parties to the proceedings conducted against the appellant. The challenged judgment, as noted in the reasons for the judgment, was also based on a number of other pieces of evidence which had been presented at the main trial before the first-instance court and which were admitted by the Supreme Court (with the exception of intercepted phone calls), including material evidence (financial statements, analytical cards, *etc*.) and non-material evidence (testimonies given by the witnesses, court expertise), the analysis and assessment thereof and the assessment of the complaints based on all grounds for challenging the first-instance judgment. Moreover, the Supreme Court pointed to the unfoundedness of the appellant's complaints about the necessity for the court to hear as witnesses the persons who had concluded the guilty plea agreements according to the judgments of the Special Department of the Higher Court in Belgrade (N.D. and S.P.), given the situation that the appellant's defence counsel had not even proposed such evidence, although such a possibility existed both in the first-instance proceedings and second-instance proceedings, and so in the same manner in which the witness for the defence, namely Andrija Krlović, had been heard in the capacity of witness before the first-instance court. Moreover, the complaint, *i.e.* the proposal for the necessity for the court to hear those witnesses had not been given by the defence in the first-instance proceedings, nor had it been requested in the appeal upon which the main trial was scheduled and the judgment was rendered, and against which the request for protection of legality was filed, which was the reason why the possibility to file such a proposal was excluded when it comes to an extraordinary legal remedy. In addition, the Supreme Court noted that unlike the allegations set forth in the request, the legal assessment of the criminal offence of which the appellant was convicted was not exclusively based on the judgments of the Higher Court in Belgrade, but the perpetration of the predicate offence (the offence, the perpetration of which makes it possible for the offender to provide the property being the subject of the criminal offence of money laundering) was established in those judgments, while the appellant's awareness and knowledge that the money originated from the criminal offence and that he had undertaken all actions precisely with the aim of injecting the „dirty" money into regular financial flows were established based on numerous pieces of evidence. As to the complaints relating to the erroneously and incompletely established facts of the case, the Supreme Court noted that such allegations could not constitute legal grounds for lodging a request for protection of legality, so that the claim on the violation of the Criminal Code of the Republika Srpska could not be developed either on the hypothesis on the insufficient factual background in the judgment. Finally, the Supreme Court found that the request for the protection of legality was ill-founded and it dismissed it as such within the meaning of the provision of Article 355 of the Criminal Procedure Code.

IV. Appeal

a) Allegations in the appeal

13. The appellant complains that the challenged judgments are in violation of his right to a fair trial and right to property under Article II(3)(e) and (k) 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 Article 1 of Protocol No. 1 to the European Convention. The appellant based his allegation on the violation of the mentioned rights on the claim that the proceedings against him were not conducted in compliance with the standards set forth in Article 6 of the European Convention, more specifically that the evaluation of evidence was not correct and that, therefore, the facts were not established completely and correctly. Furthermore, the appellant points to a lack of findings and reasons related to the crucial facts, considering that the challenged judgments did not answer with certainty the question related to the origin of the money which had been used as a means to perpetrate the alleged criminal offence. He also contests the evidence proving his association and cooperation with the persons from the Republic of Serbia by considering that the judgments which were rendered by the Higher Court in Belgrade on the basis of the plea agreement with the convicted persons N.D. and S.P. were not sufficient for finding his guilt, *i.e*. his association with those persons in the relevant criminal proceedings, without hearing those persons directly as witnesses and, in the appellant's opinion, it therefore follows that the evaluation of evidence was arbitrary. In this connection, the appellant holds that it was impossible in the specific situation to admit the evidence proving his association with other persons by giving reasons being based on the application of the principle of free margin of appreciation. In addition, the appellant is of the opinion that the evidence for the prosecution was admitted uncritically and that the conclusions were reached on the basis of presumptions or actual state of affairs, as the origin of money was not established with certainty in the challenged court judgments, *i.e.* the court did not find as relevant the fact whether the money in question had been provided through borrowings, advance payments or other businesses. In this connection, he alleges that the expert witness of the Special Prosecutor's Office, Ms. Maida Velić, who carried out a financial expertise, did not establish either in her findings that the money had been provided by the perpetration of criminal offence, and that the challenged judgments attempted to reinforce the hypothesis that the case related to fictitious turnover and fictitious borrowings and that in presenting the crucial facts such an opinion was based on the presumptions. Furthermore, in his supplement to the appeal, the appellant alleges that he filed a request for protection of legality against the legally binding judgment of the Supreme Court, which dismissed it as ill-founded by giving the

same reasons as those given in the legally binding judgment, wherein the findings were arbitrary and unsubstantiated and the reasons did not meet the standards of careful and scrupulous evaluation of evidence. Therefore, the appellant contests that judgment as well, since „he sees the same ground as that for the appeal against the judgment rendered upon the request for protection of legality", as „it encompasses the same violations as those alleged in the appeal", and he proposed that the challenged judgments be quashed and that the case be remitted for a new trial.

b) Reply to appeal

14. In its reply to the appeal, the Supreme Court alleged that it remained supportive of the reasons given in its judgment as there was no violation of the rights the appellant complained of in his appeal. Furthermore, it outlined that the appeal dealt only with the established facts and assessment of evidence and that the appellant lost sight of the fact that an appeal could not be grounded on the revision of factual findings in the judgments against which it was filed.

15. The County Court did not give a particular response to the appellant's allegations, as the hearing was scheduled before the Supreme Court after it had rendered a judgment in the appellate proceedings, which rendered a final judgment against which an appeal was filed.

16. According to the County Prosecutor's Office, the allegations in the appeal had already been the subject of an analysis and decision in the appellate proceedings, and that the appellant generally complained of the manner in which the evidence had been presented and the facts established, that the proceeding before the ordinary courts were fully fair, and the court had fully and correctly assessed all presented evidence, both individually and in their mutual connection, and that based the presented evidence they reached a conclusion on the perpetration of the offence. Taking into account the fact that there was no violation of the rights the appellant complained of in his appeal and that the Supreme Court gave clear and precise reasons for its decision, it proposed that the appeal be dismissed as ill-founded.

V. Relevant Law

17. The **Criminal Procedure Code** - Revised Text (*Official Gazette of the Republika Srpska*, 100/09 and 53/12), so far as relevant, reads:

Article 15
Free Assessment of Evidence

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

Article 295(2)
Evidence on which Verdict is grounded

(2) The court is obliged to conscientiously evaluate every piece of evidence and its correspondence with the rest of the evidence and, based on such an evaluation, to conclude whether the facts have been proved.

Article 311(1)(z) and (j)
Essential Violations of 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;

j) if the enacting clause of the verdict is incomprehensible, self-contradictory or contradictory to reasons of the verdict, or if the verdict does not contain reasons or if it does not contain reasons about relevant facts

Article 331
Hearing before the Appellate Court

(1) Provisions that apply to the main trial before the court of first instance shall be accordingly applied to a hearing before the appellate court.

(2) If the panel of the appellate court finds that it is necessary to repeat the examination of evidence presented in the first-instance proceedings, testimony of examined witnesses and experts, and written findings and opinions of experts shall be admitted as evidence only if those witnesses and experts were cross-examined by the opposing party or the defence attorney or they were not cross-examined by the opposing party or defence attorney although it was made possible, or if it is about the evidence referred to in item (d) paragraph 2 of Article 276 of this Code.

Article 354
Refusing Motion

The Supreme Court shall issue a verdict refusing the motion for protection of legality if it establishes that there are no violations of the law that the person submitting the motion alleges.

PROCEDURE TO RENDER INTERNATIONAL LEGAL ASSISTANCE AND TO ENFORCE INTERNATIONAL AGREEMENTS IN CRIMINAL MATTERS

General Provisions

Article 401

International assistance in criminal matters shall be rendered under the provisions of this Code, unless otherwise prescribed by the legislation of Bosnia and Herzegovina or an international agreement.

Communication of Request for Legal Assistance

Article 402

Requests of the court or the prosecutor for legal assistance in criminal matters shall be communicated to foreign authorities by diplomatic channels by the court or the prosecutor through the Ministry of Justice of Republika Srpska to send them to the Ministry of Justice of Bosnia and Herzegovina. Foreign authorities shall send the letters of request to courts of Republika Srpska in the same manner.

18. The **Agreement on Legal Assistance in Civil and Criminal Matters between Bosnia and Herzegovina and Serbia and Montenegro** (*Official Gazette of Bosnia and Herzegovina* - addendum, International Agreements no. 11/2005, ratified by the Presidency of Bosnia and Herzegovina 26 October 2005, and signed in Sarajevo on 24 February 2005), so far as relevant, reads:

Article 1(1), (3) and (4)
Providing Legal Assistance

(1) Upon a request, the Contracting Parties shall provide each other mutual assistance in civil and criminal matters under the conditions and in the manner laid down in this Agreement.

(2) ...

(3) For the purposes of this Agreement, „criminal matters" shall mean criminal offences and economic offences.

(4) Legal assistance shall be provided by courts and other authorities of the Contracting Parties, which, according to the regulations of their country, have jurisdiction to decide on the matters referred to in paragraphs 1 through 3 of this Article.

Article 3
Scope of Legal Assistance

For the purposes of this Agreement, legal assistance shall include the delivery of procedural documents and the undertaking of procedural actions (hearing of parties, witnesses and other persons, seizure of objects, temporary surrender, investigation, expert examination, etc.). […]

Article 4
Bodies of Cooperation

(1) In order to provide legal assistance under this Agreement, courts and other relevant authorities of the Contracting Parties communicate mutually through their relevant bodies, as follows:

1. *for Bosnia and Herzegovina – through the Ministry of Justice of Bosnia and Herzegovina;*
2. *for Serbia and Montenegro – through the Ministry of Human and Minority Rights;*

(2) The provision of paragraph 1 of this Article shall not exclude communication through diplomatic or consular channels.

(3) In case of urgency, courts and other relevant authorities of the Contracting Parties may communicate also through the International Criminal Police Organisation (INTERPOL).

19. The **European Convention on Mutual Assistance in Civil and Criminal Matters**, **Strasbourg, 20 April 1959,** (*Official Gazette of BiH*, 11/2005 - addendum, International Agreements no. 4/2005), so far as relevant, reads:

Article 1(1)

The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.

Article 3(1)

The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

Article 7(1), (2) and (3)

The requested Party shall effect service of writs and records of judicial verdicts which are transmitted to it for this purpose by the requesting Party.

Service may be effected by simple transmission of the writ or record to the person to be served. If the requesting Party expressly so requests, service shall be effected by the requested Party in the manner provided for the service of analogous documents under its own law or in a special manner consistent with such law.

Proof of service shall be given by means of a receipt dated and signed by the person served or by means of a declaration made by the requested Party that service has been effected and stating the form and date of such service. One or other of these documents shall be sent immediately to the requesting Party. The requested Party shall, if the requesting Party so requests, state whether service has been effected in accordance with the law of the requested Party. If service cannot be effected, the reasons shall be communicated immediately by the requested Party to the requesting Party.

Article 15(1), (2) and (5)

1. Letters rogatory referred to in Articles 3, 4 and 5 as well as the applications referred to in Article 11 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels.

2. In case of urgency, letters rogatory may be addressed directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party. They shall be returned together with the relevant documents through the channels stipulated in paragraph 1 of this article.

5. In cases where direct transmission is permitted under this Convention, it may take place through the International Criminal Police Organisation (Interpol).

20. The **Law on International Legal Assistance in Criminal Matters** (*Official Gazette of BiH*, 53/09), so far as relevant, reads:

Article 26
(Providing Information without Request)

(1) Without prejudice to their own investigations or proceedings and subject to reciprocity, national judicial authorities may, without a prior request, forward to the relevant foreign judicial authorities information obtained during their own investigations and related to criminal offences if they consider that the disclosure of such information might assist the receiving State in initiating investigations or criminal proceedings or might lead to a request for mutual assistance by that State.

21. The **Criminal Code of the Republika Srpska** (*Official Gazette of the RS*, 49/03, 108/04, 37/06, 70/06, 73/10, 1/12 and 67/13), so far as relevant reads:

Money Laundering

Article 280

(1) Whoever receives, exchanges, keeps, disposes of or uses in corporate or other business or conceals or tries to conceal money or property he knows was obtained by commission of criminal offense, shall be punished by imprisonment for a term between six months and five years.

[...]

(3) If the money or property referred to in Paragraphs 1 and 2 of this Article is of high value, the perpetrator shall be punished by imprisonment for a term between one and ten years.

(4) If the criminal offences referred to in preceding Paragraphs are committed by a group of people who joined with the intention of committing such criminal offences, the perpetrator shall be punished by imprisonment for a term between two and twelve years. [...]

(5) If, while committing the criminal offences referred to in Paragraphs 1, 2 and 3 of this Article, the perpetrator acted negligently concerning the fact that the money or property were obtained by commission of a criminal offence, he shall be punished by imprisonment for a term not exceeding three years.

(6) The money and property referred to in preceding Paragraphs shall be forfeited.

VI. Admissibility

22. 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.

23. In accordance with Article 18(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

24. In the present case, the subject matter challenged by the appeal is the judgment of the Supreme Court no. 11 0 K 006949 14 Kvlz of 14 August 2014 118 against which there are no other effective remedies available under the law. The appellant received the challenged judgment on 19 August 2014, and he filed a supplement to the appeal against the judgment of the Supreme Court, of 24 January 2014, against which he filed a timely appeal, on 4 September 2014, that is within the time limit of 60 days as prescribed by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court, for it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

25. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 18 paragraphs (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the relevant appeal meets the admissibility requirements.

VI. Merits

26. The appellant challenges the judgment of the Supreme Court, claiming that the said judgment is in violation of his right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) 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.

Right to a fair trial

27. Article II(3) of the Constitution of Bosnia and Herzegovina, so 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.

28. Article 6 of the European Convention, so far as relevant, reads as follows:

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

29. The Constitutional Court primarily notes that the proceedings in question relate to the determination of the well-foundedness of criminal charges against the appellant, thus the appellant enjoys in the respective proceedings the guarantees of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention. Therefore, the Constitutional Court will examine whether the proceedings were fair as required under Article 6 of the European Convention.

30. The Constitutional Court observes that the appellant's allegations about a violation of the right to a fair trial in the proceedings which resulted in the challenged judgments relate to the erroneous assessment of the evidence adduced and, in that regard, the arbitrarily established facts of the case and the arbitrary application of substantive law, and the lack of valid reasons, which amounted to the violation of the appellant's right to a fair trial. The appellant essentially considers that his right to a fair trial has been violated by the arbitrary application of the principle of free assessment of evidence in respect of the establishment of the key fact, based on which, on the basis of the judgments of the Higher Court in Belgrade, he was linked to the persons (N.D. and S.P.), who, by the same judgment, had been convicted of the criminal offence of the same type based on the guilty plea. The appellant indicates that the mentioned persons should have been heard in the capacity of witnesses in the proceedings conducted against him for the purpose of determining the key fact of association, *i.e.* „the mutual connection" between him and those persons, thereby indirectly pointing to the failure of applying the principle of *in dubio pro reo* in the circumstances of the present case.

31. As to the appellant's allegations related to the established facts and application of substantive law in relation to the evaluation of evidence, the Constitutional Court first notes that according to the case-law of the European Court of Human Rights („the European Court") and Constitutional Court, it is not the task of these courts to review the ordinary courts' findings relating to the facts and application of the substantive law (see European Court, *Pronina v. Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01). Namely, the Constitutional Court is not called upon to substitute ordinary courts in the assessment of facts and evidence, but, in general, it is the task of ordinary courts to assess the presented facts and evidence (see ECtHR, *Thomas v. the United Kingdom*, judgment of 10 May 2005, Application no. 19354/02). It is the Constitutional Court's task

to examine whether the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective legal remedy, *etc*.) have been violated or disregarded, and whether the application of law was, possibly, arbitrary or discriminatory. Thus, within the scope of its appellate jurisdiction, the Constitutional Court deals exclusively with the issue of possible violation of constitutional rights or the rights under the European Convention in the proceedings before the ordinary courts.

32. In this connection, in considering the appellant's allegations related to the erroneous and incompletely established facts and the erroneous application of substantive law in relation to the assessment of evidence, the Constitutional Court underlines that it is outside the scope of the jurisdiction of the Constitutional Court to assess the quality of the conclusions of ordinary courts in respect of the assessment of evidence, unless such an assessment is deemed to be obviously arbitrary. Furthermore, the Constitutional Court will not interfere with the manner in which the ordinary courts granted the evidentiary material, or with the issue as to which pieces of evidence the courts admitted as credible based on the judge's free margin of appreciation if they do not seem to be arbitrary. Therefore, the Constitutional Court's task, in the circumstances of the present case, is to establish whether the proceedings, including the manner in which evidence was admitted and assessed, taken as a whole, were fair as required by Article 6 of the European Convention. The Constitutional Court points out that one of the basic provisions in relation to the presentation and assessment of evidence, which exists in all applicable procedural laws in Bosnia and Herzegovina, including the Criminal Procedure Code of the Republika Srpska, is the provision of Article 295, reading as follows: „The court shall reach a verdict solely based on the facts and evidence presented at the main trial. The court is obliged to conscientiously evaluate every piece of evidence and its correspondence with the rest of evidence and, based on such an evaluation, to conclude whether the facts have been proved", thus it makes an inseparable element of the right to a fair trial. The free assessment of evidence is exempted from the legal rules which would *a priori* determine the value of individual evidence, but it requires the reasoning in terms of the content for each piece of evidence and all evidence together and mutual logical connection between evidence. According to the view of the European Court of Human Rights, it must be established whether the person concerned was given the opportunity to challenge the authenticity of the evidence and to oppose them. In addition, the quality of the evidence must be taken into consideration, including the fact whether they were obtained in the circumstances that cast doubt on their reliability and accuracy (see, European Court of Human Rights, among other authorities, *Sevinç and Others v. Turkey* (dec.), Application No. 8074/2 of 8 January 2008; *Bykov v. Russia* [GC], Application no. 4378/02, para 90, of 10 March 2009).

33. Bringing the aforementioned views into connection with the facts of the present case, the Constitutional Court notes that a comprehensive analysis of the adduced evidence was carried out in the criminal proceedings completed by the challenged judgments and that the second instance court, in its judgment, thoroughly described the process of evaluation of the evidence, both individually and in combination, and the conclusion arrived at with regard to the appellant's criminal liability for the criminal offense he was charged with. Namely, the Supreme Court, after the hearing before that court, admitted all the evidence presented at the main trial held before the first-instance court, with the exception of the transcripts of the records of intercepted phone conversations, which had been obtained upon the chief prosecutor's request for international legal assistance, which were, among other pieces of evidence, the basis for the previous judgment in that case and which had been quashed by the ruling which was issued by the Supreme Court on 11 December 2012. Taking into account that, in the appellate proceedings, the appellant brought this complaint into connection with an essential violation of the provisions of criminal procedure, the Supreme Court, in the reasoning of its judgment, referred to the reasons given in the previously made ruling, and it highlighted that the evidence indicated by the appellant (intercepted phone conversations) had not been the subject of analysis and evaluation by the court and that the first instance judgment had not been based on those pieces of evidence. As to the remaining pieces of evidence being the basis for the first instance judgment, which, in the appellant's opinion, were not sufficient for finding his guilt (the judgments of the Higher Court in Belgrade, rendered on the basis of the guilty plea agreement entered into with N.D. and S.P. and without hearing those persons as the parties to the proceedings conducted against the appellant, and the financial expertise), the Supreme Court, according to the reasoning of the judgment, clearly points to the relevant parts of the first instance judgment in which the evidence, being the basis for the first instance judgment, was clearly stated and evaluated in accordance with Article 295 of the Criminal Procedure Code of the Republika Srpska and based on which the facts were established with regard to the conclusion that the appellant, upon a prior agreement with other persons (some of whom had already been convicted, Ljubo Mrđen in respect of whom the proceedings had been separated upon the conclusion of the guilty plea agreement), had committed the continuing criminal offence of money laundering of which he was convicted. As to a legal basis, *i.e.* legal admissibility to use evidence obtained through international legal assistance (in accordance with the relevant national and international legal regulations), more precisely, the judgment of the Special Department of the Higher Court in Belgrade in connection with the appellant's complaint about the necessity for the court to hear as witnesses the persons who had concluded the guilty plea agreements (N.D. and S.P.) and, therefore, should have been directly heard, the Supreme Court clearly stated in the reasoning of its judgment the legal provisions (Articles 401 and 402 of the Criminal Procedure Code of the Republika Srpska, according to which

there is a possibility to use such evidence (the judgment of the Higher Court in Belgrade), as there is no provision prohibiting the use of such evidence as well as taking into account the existence of the international documents, including the European Convention on Mutual Assistance in Criminal Matters, which stipulate an obligation to provide mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the criminal offences under the mentioned Convention, as acted in this case. However, taking into account that the appellant complained about the presentation of this piece of evidence in the context of necessity for the court to hear N.D. and S.P. as witnesses (convicted by the mentioned judgment on the basis of their confession statements), the Supreme Court held that such a complaint was ungrounded and pointed to the failure of the appellant's defence counsel to propose that the aforementioned persons should be heard as witnesses, although such a possibility existed both in the first-instance proceedings and second-instance proceedings, and so in the same manner in which the witness for the defence, namely Andrija Krlović, had been heard in the capacity of witness before the first-instance court. In addition, as further explained, the legal assessment of the criminal offence the appellant was convicted of was not exclusively based on the judgments of the Higher Court in Belgrade, but based on a number of adduced pieces of evidence, both material and non-material. Taking into account that, pursuant to Article 6 of the European Convention, it is a task of ordinary courts, as a rule, to assess whether it is necessary to summon certain witnesses, *i.e.* whether the statements of proposed witnesses or the presentation of other pieces of proposed evidence would be relevant for decision-making in the relevant case (see, European Court of Human Rights, *Harutyunyan v. Armenia*, Partial Decision on Admissibility of 5 July 2005, Application no. 36549/03), the Constitutional Court points out that the court which conducts the proceedings must have a certain margin of discretion in these matters and that it follows from Article 6(1) of the European Convention that the party to the proceedings cannot not be treated less favourably than the other party to the proceedings with regard to the possibility to adduce evidence (see, *inter alia*, Decision on Admissibility and Merits of the Constitutional Court No. *AP 628/04* of 12 April 2005, paragraph 24). The Constitutional Court notes that the appellant, in the circumstances of the present case, offered nothing to prove that his proposal for hearing the witnesses (N.D. and S.P.) was dismissed in an arbitrary manner or that the result of the relevant proceedings would be significantly influenced by these pieces of evidence; in addition, there is nothing in the case-file indicating that the court acted in an arbitrary manner in conducting the relevant proceedings or that there existed a misuse of the evidentiary proceedings to the detriment of the appellant. On the contrary, according to the clear and detailed reasoning given by the courts, the appellant had not even proposed such evidence and, therefore, the court, without proposal to adduce such evidence, with regard to the circumstance that is in the appellant's view crucial and related to the appellant's „association" with those persons,

had no opportunity to dismiss such a proposal and, in particular, it could not dismiss it in an arbitrary manner, as claimed by the appellant. In view of the above, the Constitutional Court cannot find that the conduct of the courts on this issue, *i.e.* the issue of admissibility and evaluation of the evidentiary material, was in contravention of the standards of the right to a fair trial or the principle of free assessment of evidence. Furthermore, the Supreme Court gave detailed reasoning in respect of all the evidence admitted as well as those dismissed and that reasoning can in no way call into question the right to a fair trial.

34. In connection with the aforementioned, more precisely, as to the admission of evidentiary material, the Constitutional Court notes that a detailed analysis and assessment of the numerous evidence are presented in the challenged judgments, with a particular emphasis put on the evidence adduced through the testimony given by the head of the accounting department of the company „Agrocoop export-import", Ms. Stoja Kasalović, who had described clearly and precisely the manner in which the companies „Agrocoop export-import" and „Avio-rent" ran business after the appellant had become the head of those two companies, and the three heard witnesses confirmed those allegations, the common point of their testimonies was the fact that the manner in which the business was run upon the arrival of the appellant was specific, as it was obvious that from 2008 to 2011 the company had a considerable flow of cash, which was transferred immediately or the next day into accounts of other companies. Moreover, emphasis was placed on the financial expert witness evidence adduced through the expertise carried out by the court expert witness in the financial field based on the extensive written (business and accounting) documentation, showing that payments had been made into the accounts of the mentioned companies based on pro-forma invoices, but business had never been realized, and based on the statement made by the expert witness in respect of the findings and opinion given at the main hearing and the statements made by the witnesses heard in court as well as on the statement made by the appellant, as a witness, including the unambiguous and clear reasons for which the evidence was either admitted or dismissed. In this connection, contrary to the allegations referred to in the appeal that it was a task of the expert witness in the present case to establish whether or not the money originated from the criminal offence, the Constitutional Court indicates that the task of an expert witness (expert team), qualified as an expert by professional or scientific knowledge, skill or experience, is to assist a court in establishing facts in accordance with the rules of profession and the subject of expertise but never to assist a court in deciding on the application of a legal norm. A court has the exclusive power to establish the origin of money („dirty" or not), which is an essential element of the criminal offence of which the appellant has been convicted in the present case, and to apply a legal norm and the court, following an analysis and evaluation of all evidence adduced, including an expertise, arrives at its conclusion, which is not

and must not be the task of an expert witness, as incorrectly considered by the appellant. Besides, the Supreme Court pointed to the correctness of the reasoning in the first-instance judgment, thoroughly describing the process of evaluation of the evidence, individually and in combination, and based on, *inter alia*, the testimonies of the numerous witnesses heard in court, arrived at the conclusion related to the appellant's criminal liability. What the Supreme Court considered as a realistic basis for the correct conclusion in the first-instance judgment was the finding that none of the monetary transactions described in the operative part of the judgment had been followed by the real business relationships, *i.e.* the delivery of goods, and that all those amounts which had been paid through off-shore companies (which names were mentioned in the operative part of the judgment) had been booked as received advance payments and had been transferred from one year to another from 2008 until 2011. As to the appellant's complaint related to the actions connected with the means used for the perpetration of the offence and, in that connection, the lack of awareness that he perpetrated a criminal offence, as an essential element, and the appellant's assertion stemming from his testimony that the money had been borrowed from friends and that the appellant had not even known the owners of those off-shore companies, the Supreme Court gave the reasons for its conclusion that the mentioned complaint was ill-founded; namely, the Supreme Court pointed out that the appellant, in his testimony had testified only about the payments made by two off-shore companies („Lafino trade" and „Mattenico"), whereas he had not been willing to give a statement about the payments made by other 12 off-shore companies as well as to answer the question posed to him by the Special Prosecutor, in respect of which the first instance-judgment gave clear and detailed reasons which were brought into connection with the testimonies given by the witnesses heard in court. Thus, it was established, *inter alia*, based on all the other evidence, that the appellant had been aware and had known that he had been committing the criminal offence related to the companies' business running and monetary transactions through which „dirty" money had been injected into regular economic flows, as clearly described in the operative part of the first-instance judgment. Given the foregoing and taking into account general and special safeguards under Article 6 of the European Convention and, in that connection, the principle of free assessment of evidence in conjunction with the mandatory application of the principle *in dubio pro reo*, as a part of the principle of presumption of innocence, the Constitutional Court holds that the challenged judgments offer clear and satisfactory reasons that do not raise doubts about the conclusions that it was undoubtedly proved that the appellant committed the criminal offence of which he has been convicted.

35. The aforementioned can be brought into close connection with the allegations in the appeal relating to a lack of reasoning of the challenged judgment. In this connection, the

Constitutional Court reiterates, in accordance with its own case-law in the cases raising similar legal issues, that the courts are obligated 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). 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 versus 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). A further function of a reasoned decision is to demonstrate to the parties that they have been heard in a fair and equitable manner (see, ECtHR, *Kuznetsov and others v. Russia*, judgment of 11 January 2007, Application no. 184/02 and *AP 1039/06* of 16 July 2007). Taking into account that the appellant brings this allegation into connection with „no answer about the origin of money" and that the Supreme Court, in the reasons for its judgment after the completion of hearings before that Court, clearly pointed to the correctness of the reasoning given in the first-instance judgment, thoroughly describing the process of evaluation of the evidence, individually and in combination, and based on, *inter alia*, the testimonies of the numerous witnesses heard in court, arrived at the conclusion related to the appellant's criminal liability, the Constitutional Court holds that the appellant's allegations are ill-founded and that the standards under Article 6(1) of the European Convention have been satisfied.

36. In addition, the Constitutional Court notes that the appellant, in the supplement to the appeal, challenged the Supreme Court's judgment, which had been passed in relation to the appellant's request for protection of legality, for the same reasons as those given in the appeal, *i.e.* the erroneous and incompletely established facts, the misapplication of substantive law, the evaluation of evidence and lack of reasoning. In this connection, the Constitutional Court notes that the Supreme Court, deciding on this extraordinary legal remedy and taking into account the appellant's allegations in his request for protection of legality, established that the legally binding judgment, unlike the allegations set forth in the request, was not based exclusively on the judgments of the Special Department of the Higher Court in Belgrade, which had been rendered against the persons convicted in those judgments (N.D. and S.P) on the basis of the guilty plea agreement and which established the perpetration of the predicate offence (the offence, the perpetration of which makes it possible for the offender to provide the property being the subject of the criminal offence of money laundering), and that the challenged judgment, as noted in the reasons for the judgment, was also based on a number of other pieces of evidence presented at the main trial before the first-instance court and which were admitted by the Supreme Court

(with the exception of intercepted phone calls), including the material and non-material evidence, the analysis and assessment thereof and the assessment of the complaints based on all grounds for challenging the first-instance judgment. In its further reasons related to the appellant's complaints about the necessity for the court to hear as witnesses the persons who had concluded the guilty plea agreements, according to the judgments of the Special Department of the Higher Court in Belgrade, the convicts N.D. and S.P., who, according to the appellant, were insufficient to establish his guilt, the Supreme Court stated that, in the situation where the appellant's defence counsel had not even proposed such evidence, although such a possibility existed both in the first-instance proceedings and second-instance proceedings (in the same manner in which the witness for the defence, namely Andrija Krlović, had been heard in the capacity of witness in proceedings before the Higher Court in Belgrade), the conclusion followed that the appellant's complaint was ill-founded as well as the possibility of filing this proposal with regard to the specific legal remedy – request for protection of legality. As to the complaint about erroneously and incompletely established facts, the Supreme Court clearly stated that it did not constitute legal grounds for filing a request for protection of legality and, therefore, the claim that the Criminal Code of the Republika Srpska was violated could not be developed on the hypothesis on the insufficient factual background in the judgment. Taking into account the clear reasoning related to the extraordinary legal remedy – request for protection of legality and given that the appellant failed to prove that his proposal had been dismissed in an arbitrary manner or that there existed a misuse of the evidentiary proceedings to the detriment of the appellant, the Constitutional Court holds that the allegations in the appellant's supplement to the appeal are ill-founded, too, and that the reasoning in the judgment of the Supreme Court related to the request for protection of legality satisfies the standards under Article 6(1) of the European Convention.

37. In view of the aforementioned principles and the fact that the appellant in the present case does not call into question the legality of the evidence adduced, but the manner in which the Supreme Court evaluated the mentioned evidence and, on that basis, applied the substantive law, the Constitutional Court holds that the reasons stated in the legally binding judgment of the Supreme Court, which were decisive for passing the challenged decision, do not raise doubts about the court's decision on the appellant's criminal liability, nor is there anything leading to the conclusion that some facts remained unclarified and that the substantive law was consequently misapplied. In addition, although the appellant does not call into question the lawfulness of the manner of obtaining evidence but the manner of the evaluation thereof, the Constitutional Court points out that, according to the case-law of the European Court of Human Rights, the use of evidence at a trial is not in itself a breach of Article 6, even if the evidence was unlawfully obtained. Namely, in

the case of *Schenk v. Switzerland*, the European Court of Human Rights found that the use of unlawfully obtained evidence could lead to unfairness, depending on the facts of the relevant case (see, European Court of Human Rights, *Schenk v. Switzerland*, judgment of 12 July 1988, Application no. 1086/84, Series A-140, paragraph 49); however, in the mentioned decision, the European Court of Human Rights takes the position that Article 6 of the European Convention does not lay down any rules on the admissibility of evidence as such and that it is therefore primarily a matter for regulation under national law and that according to the aforementioned, the admission of unlawful evidence is not in itself a breach of Article 6 of the European Convention, and that the European Court of Human Rights considers the proceedings as a whole, *i.e.* whether the use of unlawful evidence by courts deprived the person concerned of a fair trial, and that it is particularly assessed whether that unlawful evidence is the only piece of evidence on which the courts based their decision. In view of the above and given the fact that the appellant was not deprived of the right to present his evidence and that he had a defence counsel during the proceedings and that the challenged judgment was not based solely on the judgments of the Higher Court in Belgrade, in respect of which the appellant called into question the manner in which the evidence was assessed (and not the lawfulness of the acquisition of the evidence), but that it was based on the extensive evidentiary material directly adduced at the main trial before the court that passed the challenged judgment, the Constitutional Court holds that the appellant's allegations are ill-founded in respect of this aspect of the right to a fair trial.

38. In addition, the Constitutional Court holds that the appellant's allegations in his supplement to the appeal, challenging the judgment of the Supreme Court passed on the extraordinary legal remedy, are ill-founded for the same reasons, as the Supreme Court gave the clear and substantiated reasons for dismissing the appellant's request.

39. Therefore, the Constitutional Court holds that the appellant's allegations on the erroneous assessment of evidence and, in that regard, the incorrectly established facts of the case and the arbitrary application of substantive law, and the lack of valid reasons, do not call into question compliance with the guarantees under Article 6(1) of the European Convention. In view of the above, the Constitutional Court concludes that the appellant's allegations in this regard are ill-founded.

Right to property

40. As to the allegations in the appeal related to the right to property under Article II(3) (k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, the Constitutional Court notes that the appellant claims a violation

of the mentioned right on the basis of same allegations as those related to the right to a fair trial. In view of the conclusion related to a violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, the Constitutional Court holds that the allegations in the appeal related to the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention are ill-founded, too.

VIII. Conclusion

41. The Constitutional Court concludes that there is no violation of the right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention where the court, in its judgment, thoroughly described the process of evaluation of the evidence, both individually and in combination, and arrived at the conclusion that the appellant had committed a continuing criminal offense he was charged with and sentenced for, including the clear and adequate reasons for which the pieces of evidence were considered either admissible or inadmissible as well as the clear reasoning that satisfies the standards of a fair trial. Furthermore, with regard to the extraordinary legal remedy, there is no violation of the aforementioned right where the court provided clear reasons for which the extraordinary legal remedy was ill-founded and, therefore, dismissed.

42. In addition, the Constitutional Court holds that there is no violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, where the appellant bases his claim about a violation of that right on the evaluation of evidence, statement of facts, arbitrary application of law and lack of reasons, while the Constitutional Court concluded that no arbitrariness in that respect occurred.

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

44. Pursuant to Article 43 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of Judge Miodrag Simović is annexed to the present Decision.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

Separate Dissenting Opinion of Judge Miodrag Simović

These are the reasons for my separate opinion that I announced at the plenary session of 28 September 2017:

I disagree with the findings

- that there is no violation of the 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") where the court, in its judgment, thoroughly described the process of evaluation of the evidence, both individually and in combination, and arrived at the conclusion that the appellant had committed a continuing criminal offense he was charged with and sentenced for, including the clear and adequate reasons for which the pieces of evidence were considered either admissible or inadmissible as well as the clear reasoning that satisfies the standards of a fair trial;

- that there is no violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, where the appellant bases his claim about a violation of that right on the evaluation of evidence, statement of facts, arbitrary application of law and lack of reasons, while the Constitutional Court concluded that no arbitrariness in that respect occurred.

My reasons are of procedural and substantive nature, closely linked and interwoven, so that I am not going to elaborate them separately. In addition, I have been governed by the clear stances of the European Court of Human Rights („the European Court") that are expressed in the recent decisions which I quote together with specific analysis.

(1) The appeal basically raises several key issues and the existence of the criminal offence concerned depends on answers to these questions:

- whether the appellant, in performing procedural actions, had previously associated with other person with the clear aim of injecting „dirty" money *i.e.* money obtained from criminal activities into regular economic flows through the mentioned monetary transactions;

- whether the payments into the accounts of the appellant's companies were made in money the origin of which was without a trace, *i.e.* the money obtained from criminal activities and whether it, therefore, related to fictitious turnover;

- whether the appellant, at the time, knew or could have known that it related to „dirty" money?

These issues (as well as the decisive facts on which the application of law depends) were not considered or established either by the Supreme Court of the Republika Srpska („the Supreme Court") or the County Court in Banja Luka. The aforementioned is corroborated by indisputable facts.

(2) Surveillance and technical recording of telecommunications, as a special investigative action, carried out towards the appellant by the authorised bodies in the Republika Srpska, do not indicate the conclusion that it related to money laundering. The evidence collected do not confirm the appellant's association with D.Š. and other persons, while the relationship between the appellant and accused Nižol, *i.e.* Mrđen, was a business relationship. In that context, the appellant sought a buyer for his company „Mitrosrem".

In addition, based on the case-file it can be concluded that the appellant was not involved in distribution of narcotic drugs, fire arms and other prohibited goods. If the competent authorities in the Republic of Serbia were not aware of D.Š.'s criminal activities until the end of 2009, when an investigation was instituted, how come that the appellant could have known about it in 2008, when he had met D.Š. for the first time and entered into a business relationship with him?

(3) In the proceedings conducted before the courts the judgments of which were challenged before the Constitutional Court it was undisputedly established that all impugned monetary transactions had been carried out via commercial banks in Banja Luka, specifically via the NLB and the Development Bank, the fact that was confirmed by the mentioned banks in their response upon a request by the defence counsel; in addition, they pointed out that the impugned funds were transferred, *via SWIFT non-cash payments,* to „Agrocop" Banja Luka and that the relevant documentation was kept by the instructing bank. It may be concluded that the effectuated monetary transactions were carried out lawfully and transparently and, if there had been irregularities, the mentioned commercial banks should have reported about them. That was their legal obligation to do so. According to the rules of logic, if „dirty money" had been placed into the financial flows of the Republika Srpska – it had been practically done by the commercial banks making payments to Company „Agrocop" and, only then, by other persons (if those persons knew or could have known that it related to suspicious deposits). It is outside legal logic that the commercial banks do not know that it related to „dirty money" (which was not proved in the present case) and that the appellant knows.

(4) At the session of the Supreme Court, during a hearing, the appellant and his defence counsel proposed that the Director of the Raiffeisen Bank in Vienna and the Director of the Hypo Bank in Podgorica be heard as witnesses in respect of the circumstance of the origin of the impugned money, which had been transferred through the mentioned banks to „Agrocop" Banja Luka. That proposition was not only rejected but also unregistered in the record of the hearing. Interestingly, the relevant Prosecutor of the Special Prosecutor's Office of the Republika Srpska also failed to summon them as witnesses in the proceedings before the County Court in Banja Luka and the Supreme Court.

Instead of that, the County Court and the Supreme Court based their judgments, **to a large extent**, on the guilty plea agreements entered into with Nikola Dimitrijević and Dr. Srđan Petrović (before the Special in Belgrade), who cannot be associated with any payment of monetary transaction towards „Agrocop". **Actually, other pieces of evidence, even indirect ones, do not exist**.

(5) According to the case-law of the European Court related to the hearing of witnesses according to the Convention, it clearly follows that an applicant must always have the possibility to challenge witnesses' credibility, *i.e.* the evidence on which the court relied in reaching its finding that the applicant was guilty. Otherwise, **an unfair advantage in favour of the prosecution would be created and, consequently, the applicant would be deprived of any practical opportunity to effectively challenge the charges against him**. The European Court took such a stance in its recent judgment in the case of *Poropat v. Slovenia* (number 21668/12) of 9 May 2017, finding a violation of Article 6(1) and (3)(d) of the European Convention. In the mentioned case, the European Court also pointed out that the subsequent examination of one of the witnesses in the proceedings concerning the application for reopening did not cure that defect. Specifically, the courts did not even make an attempt to cure that defect in the case of appellant Ćopić.

(6) The courts did not hear the witnesses who had entered into the guilty plea agreement in a foreign country, as the courts held that such evidence was irrelevant despite the fact that the evidence was deemed decisive to the appellant's conviction in the proceedings against him. **A limitation upon the right of the accused to examine prosecution witnesses in the specific case was unreasonable, too**. This position was also taken in the judgment of the European Court in the case of *Chap Ltd v. Armenia* (number 15485/09) of 4 May 2017, finding a violation of Article 6(1) in conjunction with Article 6(3)(d) of the European Convention and referring to the case-law in similar cases (see *Paykar Yev Haghtanak Ltd v. Armenia*, no. 21638/03 and *Jussila v. Finland* no. 73053/01, as regards the *Engel* criteria).

In addition it is not of special importance whether the defence counsel requested the presentation of that evidence in the appellant's case, given the nature of evidentiary proceedings in the Republika Srpska (mixed criminative –inquisitorial) and the obligation that a court itself may (and should, if deems it necessary,) order the presentation of evidence (for example, Article 276(2)(d) of the Criminal Procedure Code of the Republika Srpska – **evidence whose presentation was ordered by the judge or the panel.** Furthermore, the Supreme Court was obligated ***ex officio*** to establish whether the Criminal Code was violated to the detriment of the accused (Article 320 of the Criminal Procedure Code of the Republika Srpska), which was not done in the present case.

(7) It follows from the analysis of the whole case-file that D.Š. was not convicted of drug trafficking or money laundering by the Special Court in Belgrade. It is undisputed that, following the advance payments made by Companies „Lafino trade" and „Mattenico", those payments were transferred immediately into accounts of other companies in Serbia owned by the appellant. However, one cannot speak about the concealing of impugned payments, as in the case-file there is a report made by the Ministry of Internal Affairs of the Republic of Serbia (obtained by Special Prosecutor's Office of the Republika Srpska through international legal assistance), which clearly shows that the appellant was using those funds for paying salaries to employees as well as for taxes and contributions in Serbia and for settling his obligations towards Elktroprivreda, insurance companies and banks. To make it more absurd, by the judgment of the Appellate Court in Podgorica of 27 September 2017, Duško Šarić, brother of D.Š., and Jovica Lončar were acquitted of money laundering charges related to 19,3 million euros, as „it was not proven that the money originated from drug trafficking".

(8) The impugned judgments also refer to the finding and opinion of the expert witness of the Special Prosecutor's Office, V.M., who established that the impugned advance payments made to „Šećerana" Bijeljina between 1 December 2008 and 31 December 2008 by „Agrocop" Banja Luka consisted of BAM 1 500 000 and BAM 1 000 000 for 2009. However, the aforementioned expert witness, in the course of cross-examination and in the written findings and opinion, failed to explain the origin of the paid funds and did not have a proof that the money paid to „Šećerana" related to suspicious deposits, *i.e.* „dirty money". There are no valid reasons about it in the impugned judgments.

A fair administration of justice, seeking reasonable and logically balanced argumentation by the courts, is destroyed by the manner in which the essential allegations of the impugned judgments are reasoned. The reasons given by the courts in the Republika

Srpska in support of their decisions, in my view, are neither „authoritative nor sufficient". Therefore, it is certain that in that part 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 has been violated in respect of the right to reasoned decisions and the real and effective examination of the appellant's essential allegations.

Finally, I find a violation of the right to a fait trial in the fact that the interpretation and evaluation of the impugned facts (and the content of the judgment depended solely on that) are in contravention of the interpretation and evaluation of similar facts by the European Court.

For the above reasons, I consider that the impugned judgments should be quashed in order to reopen the proceedings in which the specific and legally decisive circumstances of the present case would be clearly established in a *lege artis* manner.

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